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# **DEATH PENALTY; PROCEDURES** **AND PRACTICES IN INDIA & A** **COMPARATIVE ANALYSIS WITH** **THE ABOLITIONISTS VIS-A-VIS** **ITS DETERRENT EFFECT**

*Authored By- Malavika Harikumar*

Capital Punishment involves the judicial killing or taking the life of the accused as a form of punishment and it has been imposed by all societies at some point in time owing to its deterrent effect. However, As the concept of human rights began to be discussed widely, and due to the provisions in various international documents such as the Universal Declaration of Human Rights, 1948, and The Second Optional Protocol to the International Covenant on Civil and Political Rights there came a divide between the world nations as 'Abolitionists' (nations that abolished death penalty) and 'Retentionist (nations that retain death penalty). As of 2020 144 countries have abolished the death penalty or capital punishment in law or in practice and 55 countries still retain the death penalty. India has a retentionist approach and continues to impose the death penalty. Article 21 of the Constitution of India guarantees the right to life and personal liberty of every person despite such a provision in the Constitution India imposes the death penalty for 'rarest of rare' crimes the determination of which is left to the discretion of judges depending upon the facts and circumstances of each case. Capital punishment in India is provided as a mode of punishment for crimes specified under sections 121, 132, 194, 195A, 302, 305, 307, 364A, 376A, 376E, and 396 of the Indian Penal Code, 1860, The Army Act, 1950, The Navy Act, 1957, and The Air Force Act, 1950. In the year 2021, the Indian Courts sentenced 488 prisoners to the death penalty which is the highest number of persons on death row when compared to the preceding 6 years. The main aim of this research paper is to first study the practice of the death penalty in India, to understand the criteria used by Indian courts

in deciding what amounts to ‘rarest of rarest cases’, and secondly to compare a retentionist India with that of countries that have abolished the death penalty vis-a-vis to understand if the imposition of the death penalty actually has the deterrent effect to prevent crimes as argued by the supporters. To fulfill the research objectives, the author aims to conduct doctrinal research by referring to various authoritative books, journals, articles, government statistics, and data on the topic. The major findings are that India as of now does not follow a strict *modus operandi* in imposing the death penalty, it is majorly subject to the predilection and discretion of the judges and while it is stated that the death penalty is imposed only the ‘rarest of rare cases, not in all such cases death penalty was imposed as in the case of *Des Raj v State of Punjab*, *Ram Anup Singh v State of Bihar*, *Vasant Vithu Jadhav v State of Maharashtra*, etc..., also, the mitigating factors are often overshadowed by the gravity of the crimes and the sentiments of the society. This paper seeks to understand the major faults and gaps in the system of imposing capital punishment in India and compare India with the abolitionists and understand whether the abolition of the death penalty has resulted in a rise in the crime rates.

**KEYWORDS:** Capital Punishment, Retentionist, Abolitionist, Rarest of rarest cases, Mitigating factors

## I. INTRODUCTION

Capital Punishment, also known as the Death Penalty, is a form of punishment in which the offender is punished with his life for the criminal offense committed. It involves the judicial killing or taking the life of the accused as a form of punishment.

Capital Punishment is one of the harshest forms of punishment imposed. Every country has used capital punishment as a punishment at some point in time. In India, the Indian Penal Code, of 1860 provides for capital punishment for the following offenses<sup>1</sup> under sections 121<sup>2</sup>, 132<sup>3</sup>,

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<sup>1</sup> K I Vibhute, “*P S A Pillai’s CRIMINAL LAW*” 314 (LexisNexis, 13<sup>th</sup> Edition 2017)

<sup>2</sup> Treason, as in waging, attempting, or abetting war against the Government of India.

<sup>3</sup> Abetment of mutiny actually committed.

194<sup>4</sup>, 195A<sup>5</sup>, 302<sup>6</sup>, 305<sup>7</sup>, 307<sup>8</sup>, 364A<sup>9</sup>, 376A<sup>10</sup>, 376E<sup>11</sup>, and 396<sup>12</sup>, According to the 35<sup>th</sup> Law Commission Report, 1967 titled Capital Punishment the objects of capital punishment were stated as (i) deterrence (ii) retribution (iii) Disabling (iv) Avoidance of lynching, and private revenge (v) Disapprobation by the public (vi) atonement by the offender<sup>13</sup>. In India, the execution of the death sentence is done through two methods: hanging by the neck till death<sup>14</sup> and being shot to death.

India has had diverse views regarding the death penalty. In the 35<sup>th</sup> Law Commission Report, the commission recommended that considering the variety of social upbringing of the inhabitants, the country, and the country's prime priority of maintaining law and order throughout the country, the death penalty cannot be abolished. However, the 262<sup>nd</sup> Law Commission Report, the report opined that if India retains the practice of the death penalty, then it will be a part of a group of nations that's ever decreasing and also that the 140 countries that have abolished the death penalty are showcasing evolving standards of human dignity and decency.

## **II. CONSTITUTIONALITY OF THE DEATH PENALTY & MAJOR GUIDELINES IN IMPOSING THE DEATH PENALTY IN INDIA**

The right to equality<sup>15</sup> and the right to life and personal liberty<sup>16</sup> has been guaranteed by the Constitution of India to all persons. The arguments against the death penalty have always been raised on the ground of violation of Articles 14 and 21 of the Constitution of India. On this

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<sup>4</sup> Perjury resulting in the conviction and death of an innocent person.

<sup>5</sup> Threatening or inducing any person to give false evidence, if an innocent person is convicted and sentenced in consequence of such false evidence, with death.

<sup>6</sup> Murder.

<sup>7</sup> Abetment of suicide by a minor or an insane person or an intoxicated person.

<sup>8</sup> Attempted murder by a life convict, if hurt is caused.

<sup>9</sup> Kidnapping for ransom.

<sup>10</sup> Causing death or resulting persistent vegetative state of a rape victim

<sup>11</sup> Repeat offenders of offenses punishable under

<sup>12</sup> Dacoity accompanied with murder.

<sup>13</sup> Law Commission of India, "35<sup>th</sup> Report: Capital Punishment" (September 1967)

<sup>14</sup> The Army Act, 1950 (Act 46 of 1950) ss. 34, 37, 166. The Navy Act, 1957 (Act 62 of 1957) s.147. The Air Force Act, 1950 (Act 45 of 1950) ss. 34, 37, 73, 163.

<sup>15</sup> The Constitution of India, art. 14.

<sup>16</sup> The Constitution of India, art.21.

argument, the Supreme Court of India has decided a number of cases raised before it questioning the constitutionality of the Death Penalty.

The Indian Supreme Court considered the validity of the death penalty in *Bachan Singh v State of Punjab*<sup>17</sup> This matter came up before the Constitutional Bench as they noticed that there was a conflict between 2 rulings of the Supreme Court related to the validity and Scope of provisions relating to the death penalty. These rulings were *Jagmohan v State of Uttar Pradesh*<sup>18</sup> which had upheld the constitutional validity and scope of the death penalty and *Rajendra Prasad v State of UP*<sup>19</sup> which held that special reasons provided by the state through the prosecutor to the Court for imposing the death penalty should focus on the criminal and not the crime. However, the constitutional bench in *Bachan Singh Case*<sup>20</sup> upheld the Constitutional validity of the death penalty differing from the ruling in the *Rajendra Prasad Case*<sup>21</sup> and also held that while determining “Special Reasons” the Courts must give due regard to both the crime and the criminal<sup>22</sup>.

i. In this case, the court coined the phrase “Rarest of rare” cases, stating that “A real and abiding concern for the dignity of human life postulates resistance to taking a life through law’s instrumentality. That ought to not be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed”<sup>23</sup>. The Bachan Singh case further discussed the pressing need to give importance to the mitigating factors that can be used in favor of the accused in a case.

The aspect of the “rarest of rare” cases was given further expansion in *Machi Singh v State of Punjab*<sup>24</sup> in which the Supreme Court put forth the following propositions regarding the death penalty. They are:

- The circumstances of the offender and the crime needs to be taken into consideration before imposing the death penalty

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<sup>17</sup> AIR 1980 SC 898 (1980) CrL LJ 636 (SC).

<sup>18</sup> AIR 1973 SC 947.

<sup>19</sup> AIR 1979SC 916.

<sup>20</sup> *Ibid.* note 18.

<sup>21</sup> *Ibid.* note 20.

<sup>22</sup> AIR 1980 SC 898 (1980) CrL LJ 636 (SC).

<sup>23</sup> *Ibid.*

<sup>24</sup> AIR 1983 SC 957.

- Death penalty need not be imposed except in the gravest cases of extreme culpability
- Death penalty should be imposed only in the event of imposing life imprisonment becomes an altogether inadequate punishment for the crime committed
- Before deciding upon the punishment, a just balance has to be struck between the “aggravating” and “mitigating” circumstances

And it is pertinent to ask 2 questions before imposing the death penalty in each case, firstly, Is there something uncommon about the crime which renders a sentence of imprisonment for life inadequate and calls for a death sentence?<sup>25</sup> And, secondly, Are the circumstances of the crime such that there is no alternative but to impose the death sentence even after according maximum weightage to the mitigating circumstances which speak in favor of the offender?<sup>26</sup>

The Landmark judgment of *Lehna v State of Haryana*<sup>27</sup> was yet another turning point in the jurisprudence of the death penalty in India, as it explained acts that can come under the purview of “rarest of rare” cases. They are (i) when the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation in the community<sup>28</sup>. (ii) when the murder is committed for a motive that evinces total depravity and meanness<sup>29</sup>. (iii) when the murder of a member of a Scheduled Caste of a minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of ‘bride Burning’ or ‘dowry deaths’ or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation<sup>30</sup>. (iv) when the crime is enormous in proportion<sup>31</sup>. (v) when the victim of murder is an innocent child or a helpless woman or an old or infirm person and the murderer is in a dominating position generally loved and respected by the community<sup>32</sup>.

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> (2002) 3 SCC 76.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

### III. AGGRAVATING FACTORS V MITIGATING FACTORS

In the case of the death penalty, the courts must always give importance to aggravating as well as mitigating factors. Aggravating factors are those factors that work against the accused and help in criminalizing the accused in a way that he gets punished the maximum. Some of the aggravating factors are:

1. If the accused is a repeat offender who has committed multiple heinous crimes.
2. Fiduciary relationship of the accused with the victim
3. Hate crimes.
4. The culpability of the offense
5. Nature of the crime etc.

However, mitigating factors are those factors that work in favor of the accused and help in reducing his liability. Some of these are<sup>33</sup>;

- ii. Mental condition of the accused i.e., if the accused was in an unsound mind or extremely disturbing condition during the commission of the crime
- iii. Tender age of the accused
- iv. The probability that the accused will not commit such a violent act of crime in the future and will not be a threat to the society
- v. The scope of reforming and rehabilitating the accused
- vi. Moral justification or circumstantial justification is given by the accused in relation to the given circumstances of the act.
- vii. If the accused was acting against his will or was rather forced to commit the particular crime.

The courts should always give equal importance to the aggravating as well as the mitigating factors. The courts cannot undermine the mitigating factors and their decisions should not be overburdened by the aggravating factors. And only if the aggravating factors outweigh the mitigating factors and when in such a situation imposition of life imprisonment seems

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<sup>33</sup> Ananya Tyagi, "Death Penalty: Legislative and Judicial Chronology from *Bachan Singh v State of Punjab* (1980) to *Manoj Singh v State of MP* (2022)", available at < <https://www.livelaw.in/columns/death-penalty-article-of-14-criminal-procedure-code-crime-and-the-criminality-test-bachan-singh-supreme-court-207070>> (16<sup>th</sup> September 2022).

inadequate can the death sentence be imposed. In the case of *Vinay Sharma v. Union of India*<sup>34</sup> the death sentence was imposed to the four accused in the case because life imprisonment seemed inadequate considering the relevant circumstances of the crime and the inhuman torture committed on the victim.

## IV. MAJOR PROBLEMS AND ISSUES IN IMPOSING CAPITAL PUNISHMENT IN INDIA

Guidelines regarding the imposition of the death penalty have been formulated by the Supreme Court through various landmark decisions such as the *Bachan Singh* case, *Machi Singh* case, and *Lehna* case however one can find many cases wherein these guidelines have been blatantly ignored by the courts in deciding cases that came under the ambit of “Rarest of rare” cases. In the case of *Des Raj v State of Punjab*,<sup>35</sup> the Supreme Court refused to treat it as a situation of “rarest of rare” case and converted the death sentence of the accused confirmed by the High Court and the Trial Court into life imprisonment stating that the Courts below got carried away by the brutality of the crime and it stated that the aggravating circumstances did not much over weigh the mitigating circumstances. *Ram Anup Singh v state of Bihar*<sup>36</sup> in this case the appellant had killed all the members of the family. The lower courts had treated it as a classic matter coming under the “rarest of rare” case criterion, However, the Supreme Court replaced the death sentence of the accused with life imprisonment. In yet another case of *Sahdeo v State of Uttar Pradesh*<sup>37</sup> the Apex Court converted the death sentence into life imprisonment, the convicts, in this case, were an unlawful assembly that killed 8 people. In a case where the convict was a doctor who had murdered his in-laws was sentenced to life imprisonment by the Apex Court<sup>38</sup>. In *Vasant Vithu Jadhav v State of Maharashtra*,<sup>39</sup> the police officer who opened fire in public and shot his colleagues was sentenced to mere 5-year imprisonment.

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<sup>34</sup> [2020 SCC OnLine SC 196](#).

<sup>35</sup> (2007) 12 SCC 494.

<sup>36</sup> (2002) 6 SCC 868.

<sup>37</sup> 2004 Cr LJ 2876 (SC)

<sup>38</sup> Reddy Sampath Kumar v State (2005) Cr LJ 4131 (SC).

<sup>39</sup> (2004) Cr LJ 1786 (SC).

All these cases show that there is no uniformity in the application of the death sentence in India. The application of death sentencing in India is now based on predilection and discretion of the respective benches<sup>40</sup>. In India, the application of the death penalty is subjective and arbitrary. What was supposed to be principle-centric sentencing is now 'judge-centric sentencing'<sup>41</sup>.

In the case of *Shankar Kisanrao Khade v the State of Maharashtra*,<sup>42</sup> the Supreme Court came up with a Triple Test formula for inflicting the death penalty which included the 'crime test' (aggravating circumstances), 'criminal test' (mitigating factors), and the 'R-R test' (rarest of the rare case). Thus, to impose the death penalty the aggravating circumstances must be fully satisfied, and there should not be any mitigating factors if these are satisfied the court has to look into whether the case falls under the 'rarest of rare cases' category. This triple test which evolved through the *Shanker Kisanrao* case was created to lend clarity to the application of the death penalty but "on the contrary, it seems, it has added further confusion to the hitherto existent ambiguity of the fundamental doctrinal framework of *Bachan Singh* and *Machi Singh* and the operational Facets of rarest of rare case formula"<sup>43</sup>.

## V. RELEVANCE & SIGNIFICANCE OF THE DEATH PENALTY IN THE CONTEMPORARY CONTEXT

India is a retentionist country in the sense that India has retained the death penalty as a form of punishment and the same is present in the various statute books. In fact, the number of prisoners on death row at the end of 2021 was 488 which is the highest comparing the preceding 6 years<sup>44</sup>.

### ➤ Recent Legislative Developments Regarding Death Penalty in India

The major legislative developments that took place in India in 2021 in the context of the death

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<sup>40</sup> See *Santhosh Kumar Sathishbhushan Bariyar v state of Maharashtra* (2009) 6 SCC 498, 2009 (7) SCALE 341; *Shankar Kisanrao Khade v State of Maharashtra* (2013) Cr LJ 2595 (SC), 2013 (6) SCALE 277, (2013) 5 SCC 546; *Sangeet v State of Haryana* (2013) 2 SCC 452, AIR 2013 SC 447, (2013) Cr LJ 452 (SC).

<sup>41</sup> See *Alok Nath Dutta v State of West Bengal* (2007) 12 SCC 230; *Swamy Shradananda @ Murli Manohar Mishra (2) v State of Karnataka* (2008) 12 SCC767, AIR 2008 SC 3040; *Faruq Abdul Gafur v State of Maharashtra* (2010) 14 SCC 641.

<sup>42</sup> (2013) Cr LJ 2595 (SC).

<sup>43</sup> K I Vibhute, "P S A Pillai's CRIMINAL LAW" 314 (LexisNexis, 13<sup>th</sup> Edition 2017).

<sup>44</sup> Apurva Vishwanath, "Number of Death Row Prisoners 488, Highest in 17 years, says report", 2022, available at < <https://indianexpress.com/article/india/number-of-death-row-prisoners-488-highest-in-17-years-says-report-7748972/>> (15<sup>th</sup> September 2022).

penalty are the Punjab and Madhya Pradesh legislatures introduced the death penalty for the offense of causing death by the sale or manufacture of spurious liquor. Also, the Maharashtra State Legislature introduced a bill named Shakti Criminal Laws (Maharashtra Amendment) Bill, 2020 imposing the death penalty for heinous crimes of rape and gangrape which was unanimously approved, further, the Ministry of Women & Child Development introduced a bill named Draft Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021 that imposed the death penalty on repeat offenders of aggravated trafficking crimes involving women and children<sup>45</sup>.

All these recent statistics, data, and developments show India's positive attitude toward the imposition of the death penalty and its interest in retaining the death penalty in the Criminal Justice System.

#### ➤ **Recent International Developments Regarding Death Penalty**

When the United Nations Human Rights Council called upon states to consider acceding or ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights for the abolition of the death penalty India was one among the other states to vote against it<sup>46</sup>. Another major development was that Kazakhstan and Sierra Leone abolished the death penalty and joined the group of 'Abolitionists' nations<sup>47</sup>. Also, the Malawi Supreme Court reversed its earlier decision of declaring the death penalty unconstitutional.<sup>48</sup>

## **VI. CAPITAL PUNISHMENT IN THE GLOBAL CONTEXT VIS-A-VIS 'ABOLITIONIST' VS 'RETENTIONIST DEBATE**

The debate between the abolitionists and the retentionist countries has been existing in for a very long time now. The most common argument of the countries that retain the death penalty is regarding the deterrent effect of the death penalty. However, there has been no strong

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<sup>45</sup> Project 39A National Law University of Delhi "Death Penalty in India" 8 (January 2022).

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Death Penalty Information Centre, "Malawi Supreme Court Retreats from Opinion that Declared the Death Penalty Unconstitutional" (2021) available at < <https://deathpenaltyinfo.org/news/malawi-supreme-court-retreats-from-opinion-that-declared-the-death-penalty-unconstitutional>> (15<sup>th</sup> August 2022).

evidence to prove that the death penalty has contributed in any way to reducing the crime rates in the countries that impose it. On the contrary as per the Death Penalty Information Centre, the states in the US that abolished the death penalty showed a reduction in the number of murders recorded whereas the number of deaths in the retentionist states showed a growing trend. A report by the Abdorrahman Boroumand Centre, in December 2018 conducted a study on 11 countries that had abolished the death penalty 10 years ago and had carried a minimum of 1 execution in the years preceding the abolition, found that 10 out of the 11 countries depicted a decline in the murder rates<sup>49</sup>. The countries studied were Serbia, Bulgaria, Poland, Azerbaijan, South Africa, Ukraine, Latvia, Estonia, Kyrgyzstan, Georgia, and Albania<sup>50</sup>. Murder rates below the baseline were found in 6 of these countries following the abolition of capital punishment<sup>51</sup>. Lower homicide rates were found in the states of the US without the death penalty than in the states with the death penalty as per a survey conducted by the New York Times<sup>52</sup>.

## VII. CONCLUSIONS & RECOMMENDATIONS

Capital Punishment is one of the harshest forms of punishment imposed. There has been a constant debate in India regarding the abolition or retention of the death penalty. And as of now India still retains the death penalty for the “rarest of the Rare” crime. Although there is the standard of “rarest of rare” cases to attract the imposition of the death penalty not in all “rarest of rare” cases have the death penalty been imposed. Also, as per the *Bachhan Singh Case*, there is an important need to give equal importance to the mitigating factors, however, the Indian Court’s decisions are always overshadowed by the weight of the circumstances of the crime. A view and examination of the recent trends in the application of the death penalty in India draw a clear picture depicting individualistic subjectivity, lack of requisite material, improper consideration of elements, and scaling of mitigating factors against other aggravating factors along with challenges to the constitutionality and propriety of the death sentence as an option

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<sup>49</sup> Death Penalty Information Centre, “Study: International Data Shows Declining Murder Rates after Abolition of Death Penalty”, <https://deathpenaltyinfo.org/news/study-international-data-shows-declining-murder-rates-after-abolition-of-death-penalty> (23rd October 2022).

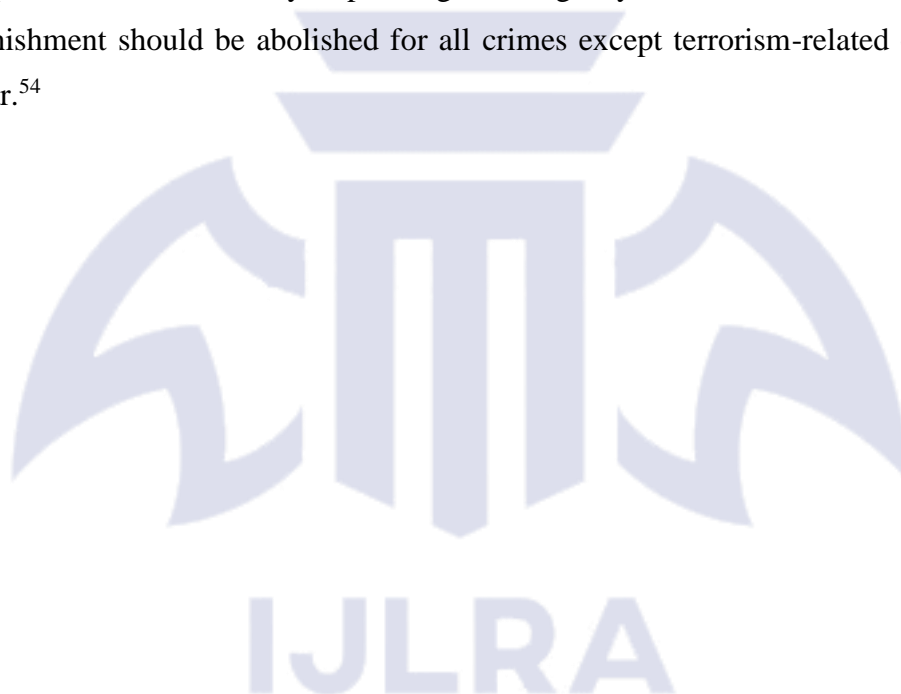
<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> Death Penalty Information Centre, “Murder Rates of Death Penalty States Compared to the Non-Death Penalty States”, < <https://deathpenaltyinfo.org/facts-and-research/murder-rates/murder-rate-of-death-penalty-states-compared-to-non-death-penalty-states> > (23<sup>rd</sup> October 2022).

of punishment<sup>53</sup>. There is a pressing need in India to bring uniformity in the imposition of death penalty and the approach in sentencing should be principle-centric.

The current world trend is favoring the total abolition of the death penalty. However, India is a retentionist. Most of the supporters of the death penalty in India claim that it acts as a deterrent. Although the various studies conducted show that the countries that have abolished the death penalty depict lower crime rates than the countries retaining the death penalty. Thus, the claim that the death penalty has a deterrent effect does not stand. And the international trend toward successful and sustained abolition further confirms that retaining the death penalty is not a requirement for effectively responding to insurgency, terror, or violent crimes and thus capital punishment should be abolished for all crimes except terrorism-related offenses and waging war.<sup>54</sup>



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<sup>53</sup> Supra, note 26 at 4.

<sup>54</sup> Law Commission of India, “262<sup>nd</sup> Report: The Death Penalty” (August 2015).