

An Overview of Capital Punishment in India with Recent Recommendation- A Study By

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Email: Piyush_maheshwari22@yahoo.com**ABSTRACT**

The Death penalty forms an integral part of the criminal justice system in the Indian State. It can be defined as the lawful infliction of death as a punishment for a wrongful act. In this paper the scope and validity of death penalty in the context of the Indian judiciary shall be discussed. It analyses the constitutional validity of death sentence and the circumstances under which it may be granted with the help of relevant cases and the 'rarest of the rare' test that was prescribed by Supreme Court in Bachan Singh case.

This paper also examines and elucidates strong reasons as to why the existence of death penalty is important to the peace and tranquility of the society at large, this shall be followed by a brief of some of the most famous and important cases relating to the subject matter decided by the Indian Courts. The aim of this paper is to give the readers a clear understanding of the position of the Indian courts in regard with awarding of capital punishment

Keywords: Crimes, death penalty, executive, judiciary, Rarest of rare case.

1. Introduction

In the words of Aristotle, a man is a 'social' animal then in Plato's words he is the most 'selfish' animal. But, for both the species, the centre of all their activities is the society which makes it possible for them to live an orderly and secured life. The crime and criminal behavior, both being omnipotent and omnipresent has been associated with the society and the individual since the history of human civilization and have created serious problems in the social order. To tackle with it, State devised and introduced sentencing policy. Section 53.of Indian Penal Code [1], defines the various punishments to which offenders are liable under the provisions of this Code are:

1. Death
2. Imprisonment for life
3. Repealed
4. Imprisonment, which is of two descriptions, namely
 - Rigorous, that is, with hard labour;
 - Simple
5. Forfeiture of property
6. Fine.

Out of the various forms of punishments inflicted by the State, 'capital punishment' or 'death penalty' stands distinct because of two main reasons, firstly, the punishment is irrevocable, and secondly, the punishment has a retributive nature due to which this punishment is a subject of intense debate all over the globe. If we talk about penological aspects, there

are several theories of punishment such as deterrent theory, preventive theory, retributive theory, reformatory theory, rehabilitative theory and so forth. Deterrent theory has been more focused as it emphasizes on protection of society from offenders. It sets an example for the society so that it deters the future criminals. In this way it creates a sense of fear among people and prevents them from breaking the law. Hence, it reduces the crime rate in the society. No other punishment deters men so effectually from committing crimes as the punishment of death.¹ True, it cannot be proved by evidence. It is a conclusion that must be drawn from the general impression one gains from experience, from looking around the world, from seeing how things are done and how people feel.

2. Meaning - Capital Punishment

Punishment is the sanction imposed on a person for the infringement of the rules of society. It is primarily used as a method of protecting society by reducing the occurrence of criminal behavior. [2] Capital punishment or the death penalty is a legal process whereby a person is put to death by the state as a punishment for a crime [3]. Capital punishment, death penalty or execution is government sanctioned punishment by death. The sentence is referred to as a death sentence. Crimes that can result in a death penalty are known as capital crimes or capital offences, such as treason or first degree murder.

The term capital is derived from the Latin capitalis ("of the head", referring to execution by beheading). Historically, executions were normally carried out in public, and they were often combined with the systematic application of torture. [4] the most common modern method of execution is hanging. [5] Thirty-six countries actively practice capital punishment, 103 countries have completely abolished it de jure for all crimes, six have abolished it for ordinary crimes (while maintaining it for special circumstances such as war crimes), and 50 have abolished it de facto (have not used it for at least ten years and/or are under moratorium). No western country still uses the death penalty except the United States [6].

3. Capital Punishment In India

Capital Punishment or the death penalty remains a controversial subject in India. Despite the global move toward abolition, India retains such punishment. As of now more than 100 countries in the world have abolished the capital punishment. India is still one such country where capital punishment is practiced even today. The Supreme Court of India has ruled that capital punishment may be awarded in following [7]- Execution of Capital Punishment is laid down as a penalty in several legislative Acts, such as: Indian Penal Code, 1860

- **121 of IPC**- Waging, or attempting to wage war, or abetting waging of war, against the Government of India
- **132 of IPC**- Abetting a mutiny in the armed forces (if a mutiny occurs as a result), engaging in mutiny
- **194 of IPC**- Giving or fabricating false evidence with intent to procure a conviction of a capital offence
- **195 A of IPC**- Threatening any person to give false evidence
- **302, 303 of IPC**- Murder
- **305 of IPC**- Abetting the suicide of a minor, mentally ill person, or intoxicated person
- **307 of IPC**- Attempt to murder by a life convict, if hurt is caused
- **364A of IPC**- Kidnapping, in the course of which the victim was held for ransom or other coercive purposes
- **376A of IPC and Criminal Law (Amendment) Act, 2013**- Rape if the perpetrator inflicts injuries that result in the victim's death or incapacitation in a persistent vegetative state, or is a repeat offender.

- **376E of IPC** and Criminal Law (Amendment) Act, 2013- Punishment for repeat offenders of rape
- **396 of IPC**- Dacoity with murder

Despite frequent demand from some sections of society, India has not so far, abolished capital punishment. But even in India there has been a decline in the frequency of such punishment, it is now awarded only in case of hardened criminals and only when it is established that the murder was not the result of momentary impulse, the result of serious provocation, but well planned and cold blooded. In such cases, it is felt that nothing less than capital punishment would meet the ends of justice, that it is just and proper that such beasts of society are eliminated.

4. Constitutionality of Death Sentence

The question of constitutional validity of death penalty has been raised before the Supreme Court of India more than once on the ground that it violates right to life and right to equality enshrined in the constitution in Article 14 and 21 respectively in various cases. Article 21 of the Indian Constitution ensures the Fundamental Right to life and liberty for all persons. It adds no person shall be deprived of his life or personal liberty except according to procedure established by law. This has been legally construed to mean if there is a procedure, which is fair and valid, then the state by framing a law can deprive a person of his life.

While the central government has consistently maintained it would keep the death penalty in the statute books to act as a deterrent, and for those who are a threat to society, the Supreme Court too has upheld the constitutional validity of capital punishment in “rarest of rare” cases. In *Jagmohan Singh vs State of UP* (1973), then in *Rajendra Prasad vs State of UP* (1979), and finally in *Bachan Singh vs State of Punjab* (1980), the Supreme Court affirmed the constitutional validity of the death penalty. It said that if capital punishment is provided in the law and the procedure is a fair, just and reasonable one, the death sentence can be awarded to a convict. This will, however, only be in the “rarest of rare” cases, and the courts should render “special reasons” while sending a person to the gallows [8]. In **Jag Mohan Singh V. State of U.P** [9] the validity of death sentence was challenged on the ground that it was violative of Articles 19 and 21 because it did not provide any procedure. It was contended that the procedure prescribed under Cr. P.C. was confined only to findings of guilt and not awarding death sentence. The Supreme Court held that the choice of death sentence is done in accordance with the procedure established by law. The judge makes the choice between capital sentence or imprisonment of life on the basis of circumstances and facts and nature of crime brought on record during trial. Accordingly a five member Bench of the court held that capital punishment was not violative of Articles 14, 19 and 21 and was therefore constitutionally valid. After the decision of *Jagmohan's* case the constitutional validity of death sentence was not open to doubt.

But in **Rajendra Prasad V. State of U.P** [10] Krishna Iyer, J., held that capital punishment would not be justified unless it was shown that the criminal was dangerous to the society. He further held that giving discretion to the judge to make choice between death sentence and life imprisonment on "special reasons" under section 354(3), Cr.P.C. would be violative of Art. 14 which condemns arbitrariness. He pleaded for the abolition of death sentence and retention of it only for punishing "white collar offences", Sen, J., in his dissenting judgment held that the question whether the death sentence should be abolished or the scope of section 302 I.P.C. and section 354(3) should be curtailed or not is a question to be decided by Parliament and not by the court. It is submitted that the minority judgment is correct because after the amendment in the I.P.C. and the decision in *Jag Mohan Singh's* case the death penalty is only an exception and the life,

imprisonment is the rule. The discretion to make choice between the two punishments is left to the judges and not to the executive.

In **Bachan Singh V. State of Punjab** [11] The SC by majority overruled Rajendra Prasad's decision and has held that the provisions of death penalty under section 302, I.P.C. as an alternative punishment for murder is not violative of Article 21. Article 21 of the constitution recognises the right of the state to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law. In view of the constitutional provision by no stretch of imagination it can be said that death penalty under section 302, I.P.C. either per se, or because of its execution by hanging constitutes an unreasonable cruel or unusual punishment. The death penalty for the offence of murder does not violate the basic feature of the constitution. And till today, this remains the unchanged judicial position in India. This judgment undoubtedly affirmed again that the death penalty was the exception, not the rule. Subsequently, the Supreme Court in another famous case, **Machhi Singh v. State of Punjab** [12] directs the trial court to draw up a balance sheet of the aggravating and mitigating circumstances and opt for the maximum punishment and considering all these factors, if the judge then finds no other alternative, then he can hand down the death penalty.

Then again in **Smt. Shashi Nayar v. Union of India**, [13] a very desperate and futile attempt was made to get capital punishment declared unconstitutional. The Supreme Court, however, rejected all the arguments and held that death penalty has a deterrent effect and it does serve a social purpose and is hence within the framework of the Constitution. The International covenant on civil and political Rights to which India has become party in 1979 do not abolish imposition of death penalty in all circumstances. All that it requires is, that

- death penalty should not be arbitrarily inflicted,
- it should be imposed only for most serious crimes.

Thus the requirements of International Covenant are the same as the guarantees or prohibitions contained in Articles 20 and 21 of our constitution. The Indian Penal Code prescribes death penalty as an alternative punishment only for heinous crimes. Indian Penal laws are thus entirely in accord with international commitment.

5. Constitutional Validity of Section 303 of IPC

The Supreme Court in **Mithu vs State of Punjab** [14] struck down Section 303 of the Indian Penal Code, which provided for a **mandatory** death sentence for offenders serving a life sentence, it is wholly unreasonable and arbitrary and that it violates article 21 because the procedure by which Sec 303 authorises the deprivation of life is unfair and unjust. Mandatory capital punishment is unconstitutional since it completely cuts out the judicial discretion which is not just, fair and reasonable within the meaning of Article 21 [15] of the Constitution. Further it deprives the accused of the opportunity under Section 235(2) [16] of the Criminal Procedure Code to show cause why he should not be sentenced to death and the Court is relieved from its obligation under Section 354(3) [17] of that Code to state the special reasons for imposing the sentence of death.

The deprivation of these rights and safeguards which is bound to result in injustice is harsh, arbitrary and unjust. The Supreme Court has always said that the death sentence should be given rarely. In **Mithu vs State of Punjab** (1983), the Supreme Court ruled that the mandatory death penalty is unconstitutional it said all murders would come under the ambit of Section 302, where a court would have the discretion to award life term or death sentence. Similarly, the Supreme

Court ruled in State of Punjab vs Dalbir Singh in 2012 that mandatory death penalty as punishment for crimes under Section 27 (3) of the Arms Act, 1959, was unconstitutional.

6. Rarest of Rare Case

The doctrine "rarest of the rare cases" is based on Gandhian theory, i.e., "hate the crime not the criminal". And thus, from this quotation, we can interpret the significance and extent of Death Penalty. And if we go through the deep study of it, we find that the court wants to say that the death-penalty should be awarded rarely and only in such cases which are heinous, affecting the humanity and are brutal. [18] Death penalty is being awarded in very few cases of murder and in most of the cases of murder the alternative penalty of life imprisonment is awarded. Keeping the above points in the view the Apex Court propounded the doctrine of "rarest of rare" [19]. The expression 'rarest of the rare case' was first used by the court in the case of **Bachan Singh v State of Punjab** [20] In this case, the Supreme Court analyzed in detail the question as to whether the capital punishment should be granted or not. The court laid down broad guidelines to determine what circumstances would constitute rarest of rare case. The court opined that the death sentence should only be awarded when the sentence of life imprisonment is "unquestionably foreclosed". The Court also asserted that a balance needs to be struck between the aggravating and mitigating factors in order to reach the conclusion regarding the punishment that should be awarded. If there is no option but to award capital punishment even after taking into consideration all the mitigating factors, only then it should be awarded.

It was, however, in **Macchi Singh vs. State of Punjab** [21] that a division bench of the Supreme Court on July 21, 1983 made an attempt to define the 'rarest of rare cases'. Justice Thakkar speaking for the Court held that five categories of cases may be regarded as rarest of rare cases deserving extreme penalty. They are:

- (1) *Manner of Commission of murder*: If the murder is committed in an extremely brutal, revolting, grotesque, diabolical or dastardly manner to intense indignation of the community.
- (2) If *Motive for the Commission of Murder* shows depravity and meanness.
- (3) *Anti-social or socially abhorrent nature of the Crime*.
- (4) *Magnitude of the Crime*.
- (5) *Personality of Victim of the murder that is, Child, helpless Woman, public figure and so forth*.

The principles laid down by the Apex Court were reiterated in its judgment in **Sushil Murmu v. State of Jharkhand** [22]: In rarest of rare cases, when the collective conscience of the community is so shocked that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded.

In **Prajeet Singh v State of Bihar** [23] the court opined the rarest cases were those in which the "collective conscience of the community is so shocked that it will expect the holders of the judicial power to inflict death penalty." **Dhananjay Chatterji v State of west Bengal** [24], This is the case of Rape and Murder from trial court of Supreme court was agree that this is rarest of rare case and court impose Death Penalty in this case

7. Mode of Execution of Death Sentence

Execution is carried out by two modes, namely hanging by the neck till death, and being executed by firing squad. The Code of Criminal Procedure calls for the method of execution to be hanging. It states: "When any person is sentenced to

death, the sentence shall direct that the person be hanged by the neck till the person is dead.” The issue regarding the constitutionality of hanging as a mode of execution came up before the Supreme Court in **Deena v. Union of India** [25], though the court asserted that it was a judicial function to probe into the reasonableness of a mode of punishment, it refused to hold the mode of Hanging as being violative of Article 21 of the constitution. This issue was once again raised in **Shashi Nayar** [26] the court held that since the issue had already been considered in Deena, there was no good reason to take a different view. Another issue which deserves attention is public hanging as a mode of execution. The issue of public hanging came to the Supreme Court through a writ petition **Attorney General v. Lachma Devi** [27] in this petition the order of Rajasthan High Court regarding the execution of the petitioner by public hanging under the relevant rules of Jail manual. The S.C. held that public hanging even if permitted under the rules would violate Article 21 of the Constitution.

8. Conclusion

Thus, we can conclude that in India, the law is not incorrect in granting death to the person guilty of rarest of rare crime. In India death for such person is a must to create an example for the society and to bring in a sense of fear in the minds of people who are involved in mala fide & ill practice. Leniency in dealing with offenders of such case is currently not a matter of appraisal in India. Even after grave steps taken by the human rights commission, the Indian court is of the opinion to keep the provision for death sentence intact but with a narrow purview. It is mandatory because of low literacy rate in the country & less value for moral ethics which drives ill intent people to end up committing such crime.

Therefore, in India, with recent amendments in the penal laws, purview of death sentence has been narrowed & it can thus be held justified & effective.

The just, fair effective & reasonable nature of the amended death sentence clause is evident from the recently decided dhananjay chatterjee case, wherein the crime committed by the accused was found to fall within the purview of the death sentence provision & was thus awarded death .even the president of India failed to acknowledge his appeal to lessen his punishment & the punishment was finally awarded. The death penalty is no doubt unconstitutional if imposed arbitrarily, capriciously, unreasonably, discriminatorily, freakishly or want only, but if is administered rationally, objectively and judiciously, It will enhance people’s confidence in criminal justice system.

9. References

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[12]. A.I.R. 1979, S.C-916.

[13]. A.I.R.1980 S.C-898.

[14]. A.I.R. (1983)3 SCC470.

[15]. AIR 1992 SC 395; 1992 SCC (Cri) 24.

[16]. AIR 1983 SC 473.

[17]. In Bachan Singh which upheld the constitutional validity of the death penalty, Sarkaria J., speaking for the majority, said that if Article 21 is understood in accordance with the interpretation put upon it in Maneka Gandhi, it will read to Say that: No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law, at page 730.

[18]. If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360 hear the accused on the question of sentence, and then pass sentence on him according to law.

[19]. When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

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