



EXISTENCE AND DEVELOPMENT OF CAPITAL PUNISHMENT IN INDIA

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ABSTRACT

The death penalty controversy continues to be one of the most relevant ones in modern times, especially given the conditions that the twenty-first century has created. One important part of the criminal justice system in the Indian State is the death penalty. Still doubts about the morality of the human rights movement are becoming more prevalent as it gains traction. Some contend that it is morally wrong and untenable to preserve one person's life at the expense of other potential victims in society. Countries around the world continue to have differing views on this matter dividing the international community. The death penalty is prohibited in some countries but it is seen as a deterrent to enduring social threats in others. Since the death penalty is cruel and barbaric the United Nations has taken a strong stand against it. Even though it has ratified several UN conventions India has continuously voted against a worldwide ban on the death penalty.

Though its domestic legislation contains multiple provisions permitting the death penalty in cases of serious offences India abides by the provisions of UN resolutions regarding the death penalty. The Indian Supreme Court sought to restrict the use of the death penalty in the 1980s by designating it as a punishment for the rarest of the rare circumstances. Nevertheless neither the Constitution nor any lawful provision clearly defines this category. Rather it depends on judicial interpretation that is shaped by the ingenuity and mindset of judges and is based on the particular facts and circumstances of each case.

We have examined several legal cases to understand the rationale behind the "rarest of the rare" classification for the death penalty. However, there are instances where its application seems unclear and inconsistent. For instance, in one case, a person is convicted of a crime and sentenced to death, while in another similar case, the accused receives a life sentence. This inconsistency in applying the "rarest of the

rare" concept can introduce corruption into the system. Furthermore, there appears to be a conflict between the guidelines for granting the death penalty and the provisions concerning mercy petitions from Governors and Presidents. These challenges are compounded by the diverse customs, beliefs, and superstitious traditions in India. This essay aims to delve into these complexities and present compelling arguments.

It is crucial to maintain the death penalty to uphold harmony and peace in society. This paper seeks to clarify the various checks and balances in place, countering the common belief that an innocent person might be wrongfully convicted and executed. These safeguards ensure that no innocent individual is condemned, while also ensuring that those responsible for the most heinous crimes do not escape justice. The paper concludes by advocating for the continued application of the death penalty, citing both its deterrent value and its contribution to lower crime rates.

CHAPTER 1- INTRODUCTION

Societies have employed penalties to terrorize wrongdoers throughout history the death penalty is a special kind of punishment reserved for the most horrific offences. Capital punishment can be imposed for crimes like waging or attempting to wage war against the Government of India murder committed by a life sentence prisoner aiding and abetting a mutiny aiding a child or an insane person to commit suicide and providing false evidence that kills an innocent person. Based on the idea that one should take a life for another and an eye for an eye the death penalty is established. The Supreme Court has wrestled with issues pertaining to the execution of capital punishment laws and their constitutional ramifications in recent times.

The death penalty has long been a source of controversy and ethical discussion. The emphasis on human rights around the world has sparked movements to outlaw the death penalty or at the very least bring it into compliance with international legal norms that prioritize the rights of those who are sentenced to death. The protracted execution of people such as Ajmal Kasab Afzal Guru and Yakub Memon has provoked discussions about whether India should reconsider the utility and advantages of keeping this death penalty in place. This has sparked a great deal of discussion in the media about the potential repercussions of maintaining such a penalty in the legal system. At least two important goals are served by the death penalty. Primarily its purpose is to penalize individuals who have perpetrated severe offenses like killing or extermination against other people or the community.

The death penalty differs from other types of punishment due to its severity which is especially applied to such severe crimes. Because of this nothing about it is intrinsically unethical. The notion that one who takes another's life must pay with their own is still widely recognized in many cultures. The death penalty's deterrent effect on potential offenders is its second—and possibly more important—purpose. Because life

is so valuable the death penalty makes it more likely that potential offenders will be discouraged from committing such crimes.

The state may legitimately execute someone as retribution for their horrible crimes against other people a practice known as the death penalty. It is a type of penalty meant to deter possible offenders in the future. Every legal system has always been based on the principle of punishing wrongdoers. The death penalty which involves taking an offenders life in exchange for their crimes is the harshest punishment that can be applied to them. This type of penalty has long been thought to be the harshest and most severe.

When it comes to interpreting and applying the law and settling conflicts between people and the government, the judiciary is essential. Maintaining the nation's rule of law and making sure the government operates legally are the court's duties. Courts also have the responsibility of upholding constitutions in countries where they are written.

On the crucial subject of the death penalty, the judiciary is nevertheless sharply split. The death penalty opponents contend that it is cruel but in contemporary penology, their claims are not as persuasive. However, proponents of retention argue that the death penalty is a social necessity that has a strong deterrent effect. The evolution of criminal law over time demonstrates the trend toward the death penalty being applied to murderous crimes. Before 1955 the judge had to give a justification for his or her decision to impose a lesser sentence rather than the death penalty. Even if the judge was ultimately right in his decision it was eventually acknowledged that restricting the court's authority was needless and that it compromised the judge's ability to make a sound decision if his justification for selecting life in prison rather than the death penalty was suspect.

Every individual's right to life and personal liberty is expressly protected by Article 21 of the Indian Constitution which also stipulates that a person can only be deprived of these rights through a legal process. Denying someone their right to life is against the Constitution. There have been numerous successful attempts by several nations to outlaw the death penalty. The death penalty is viewed differently in India where some people favor its retentionist application while others call for its abolition. In line with the opinions of those who are against it, Justice Ganguly has described the death penalty as a barbaric and

anti-life law. Nonetheless given the constitutionality of the situation the state is permitted by Article 21 to take a person's life as long as it stays inside the bounds of the established legal process. Since there is no legal procedure that specifically specifies how to carry out such an act taking someone's life is always a matter of inquiry. In *Jagmohan Singh v. State of U. S. A. P.*, a five-judge panel affirmed that the death penalty is constitutional. In the matter of *Rajendra Prasad v.* this ruling was upheld. Condition of the U.

S. H. P. where it was once again decided that the death penalty is constitutional. Despite continuous discussions regarding the death penalty's moral and ethical ramifications these cases highlight the legal basis for India's constitutional view of the death penalty.

Capital punishment in India has a long and complex history, dating back to the colonial era when the British ruled the country. The Indian Penal Code (IPC) of 1860 and the Code of Criminal Procedure (CrPC) of 1898, both inherited from the British, provided for the death penalty as a punishment for certain crimes. These laws were retained after India gained independence in 1947.

Early Developments and Reforms

Initially, the death penalty was the norm in India, with courts required to record reasons for not imposing it if the accused was convicted of a crime punishable by death but received a different sentence. This changed in 1955 when the Parliament repealed Section 367(5) of the CrPC 1898, which had mandated recording reasons for not imposing the death penalty. This shift marked a significant change in the approach to capital punishment, as it was no longer the automatic default sentence for crimes punishable by death.

CHAPTER 2-LAW COMMISSION REPORTS AND CONSTITUTIONAL VALIDITY

The Law Commission of India has issued several reports on capital punishment, including the 1967 report that recommended retaining the death penalty. The commission's 187th report, published in 2003, focused on the mode of execution and incidental matters related to capital punishment. The constitutional validity of the death penalty has been challenged in various cases before the Supreme Court of India, with the court upholding its constitutionality in several instances.

35th report of the Law Commission on Capital Punishment

In 1967, the 35th report of the Law Commission on Capital Punishment was published. After carefully

considering the arguments presented by both abolitionists and retentionists, the commission recommended the retention of the death penalty in India. However, it suggested that judges should provide reasons for their decision to impose this sentence.

“Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment¹”.

The Law Commission justified the retention of capital punishment in its 35th Report primarily on the grounds of its deterrent purpose, deeming it the most essential objective.

Although the 35th Report acknowledged the discretion of judges in awarding the death penalty, the Supreme Court articulated concerns regarding the problematic nature of such discretion. Additionally, the report recommended the retention of section 303 of the Indian Penal Code, which mandates the death penalty. However, the Supreme Court took a divergent stance on this issue and declared the provision unconstitutional in the case of *Mithu v. State*

¹ Law Commission of India, 35th Report, 1967, at para 293, available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 16.03.2016).

The 187th Report of the Law Commission

In 2003, the Law Commission released its 187th Report on the "Mode of Execution of Death and Incidental Matters," prompted by the technological advancements in science, medicine, technology, and anesthetics. While this report did not directly address the desirability of the death penalty, it focused on three major issues:

- a) The method of executing death sentences,
- b) Eliminating discrepancies among judges when imposing such punishment, and
- c) Ensuring the right of appeal to the accused to the Supreme Court in matters of death sentences.

After soliciting public opinion and conducting a comparative study of precedents in India and other countries,

the Law Commission recommended several measures. Firstly, it suggested amending Section 354(5) of the CrPC to allow for the use of lethal injection as an alternative method of execution alongside hanging. Secondly, it proposed that the right of appeal to the Supreme Court should be a statutory right when the High Court confirms or enhances the sentence to death. Finally, it recommended that cases involving death sentences should be heard by at least a five-judge Bench of the Supreme Court to ensure thorough consideration and deliberation.

Law Commission of India 262nd report, 2015

The Law Commission of India, under the leadership of Justice A.P. Shah, presented its 262nd report on August 31, 2015, addressing the issue of capital punishment in the country. This issue was referred to the Law Commission by the Supreme Court in cases such as *Santosh Kumar Satishbhushan Bariyar v. Maharashtra* (2009) 6 SCC 498 and *Shankar Kisanrao Khade v. Maharashtra* (2013) 5 SCC 546. Despite previously recommending the retention of capital punishment in India in its 35th report (1967), the Law Commission undertook a comprehensive study on the matter due to significant changes in the country's socioeconomic landscape since then.

The Supreme Court, in *Bachan Singh v. Union of India* (1982) 3 SCC 24, upheld the legality of capital punishment but limited its application to the 'rarest of rare cases' to mitigate arbitrariness. However, concerns regarding arbitrariness persisted over the years, with the Law Commission concluding that capital punishment fails to serve the penological objective of deterrence any more than life imprisonment. Moreover, it neglects to achieve other significant penological goals and overlooks the rehabilitative aspects of justice.

The Commission highlighted the uneven application of the *Bachan Singh* precedent, leading to uncertainty in capital sentencing law and violating constitutional due process and justice standards. Additionally, outdated investigative methods, excessive police powers, inadequate prosecution, and poor legal assistance contribute to systemic flaws within the criminal justice system, further weakening the administration of the death penalty.

The Commission emphasized that the exercise of clemency powers under Articles 72 and 161 has often been marred by procedural violations and lack of due consideration, rendering the death penalty an unreliable form of punishment. The prevalence of the death row phenomenon, characterized by deplorable prison conditions, violates Article 21 protections against cruel and unusual punishment.

Therefore, the Commission recommended a shift towards the abolition of capital punishment in India. It noted the evolution of legislation and judicial precedents, highlighting the gradual movement towards restricting the use of the death penalty to the rarest of rare cases. Additionally, it suggested that while there is no legitimate

penological justification for treating terrorism differently, concerns about national security should not delay the abolition of capital punishment for all offenses except terrorism-related ones.

CHAPTER 3- CASES CHALLENGING THE CONSTITUTIONALITY OF DEATH PENALTY

*In Jagmohan Singh v. State of U.P.*² the validity of the death sentences was contested, arguing that it contravened the fundamental rights guaranteed under Article 14 and 21 of the Constitution. Additionally, the procedure for sentencing to death was challenged. The court ruled that the option of imposing the death sentence is considered in accordance with the procedure established by law. The decision between the death sentence and life imprisonment is made by judges based on the specific facts and circumstances of each case. A five-judge bench of the Supreme Court concluded that capital punishment does not violate Articles 14, 19, and 21 of the Constitution.

*In Rajendra Prasad v. State of U.P.*³ V. R. Krishna Ayer, J. observed:

“The humanistic imperative of the Indian Constitution, as paramount to the punitive strategy of the Penal Code, has hardly been explored by the courts in this field of ‘life or death’ at the hands of the Law. The main focus of our Judgment is on this poignant gap in human rights Jurisprudence within the limits of the Penal Code, impregnated by the Constitution.....in the Post-Constitutional period section 302, IPC and section 354(3) of the Code of Criminal Procedure have to be read in the human rights of Parts III and IV, further illuminated by the Preamble to the Constitution.”

In this case, it was determined that taking the life of a criminal should only occur when they pose a threat to national security, public order, or the interests of the general public. The concept of social justice within society must be both reasonable, as per Article 19, and non-arbitrary, as per Article 14. Justice V. R. Krishna Ayer expressed his opposition to the death penalty except in cases of white-collar crimes. However, he also noted that if the accused's crime is of such a serious nature that it poses a significant threat to society and the nation's progress, then the sentence of hanging until death may be warranted..

*In Bachan Singh v. State of Punjab*⁴, the Supreme Court found that in India, as well as in some other countries worldwide, the death penalty is perceived as a more deterrent punishment than life imprisonment. This belief is shared by eminent jurists, judges, legislators, and others. The court noted numerous instances where the death penalty is regarded as the most effective deterrent punishment. Additionally, the case held that imposing the death sentence under Section 302 of the Indian Penal Code does not violate Article 21 of the Constitution as long as the court follows the procedure established by law.

In *Bachan Singh v. State of Punjab*, the Court emphasized that judges should not possess a thirst for blood. It

stressed the importance of upholding the dignity of human life and cautioned against resorting to taking a life through legal means except in the rarest of rare cases where no alternative option exists.

In *T.V Vatheeswaran v. State of Tamil Nadu*, the case addressed whether prolonged delays in executing capital punishment violate Article 21 of the Constitution and whether such delays warrant commutation to life imprisonment. The division bench, comprising R.B. Misra and J. Chinnappa Reddy, held that extended delays in execution are unjust, unfair, and against humanity, thus depriving the accused of their right to life and personal liberty under Article 21. They suggested that a delay exceeding two years in executing a death sentence should entitle the convict to invoke Article 21 and seek to quash the death sentence.

The due process of law not only entails fairness and reasonableness but also involves eliminating unnecessary delays in the execution process. The right to a speedy trial, a part of Part III of the Constitution under Article 21, encompasses the timely execution of sentences. Prolonged delays in execution violate the fundamental right enshrined in Article 21 and instill terror in the convict until the moment of execution.

In *Noel Riley v. A.G. o Jamaica*, it was held that there is no fixed timeframe for the execution of a convict; however, the duration should be reasonable to avoid threatening the accused until execution while also respecting their fundamental rights. In *Sher Singh v. State of Punjab*, the Chief Justice, along with Justices V.D. Tulzapurkar and A. Varadrajan, emphasized that converting a death sentence to life imprisonment solely due to a delay of two years was unjustified. The court stressed the importance of investigating the reasons for any delays in execution.

5.3. “Rarest of Rare case” doctrine

The "rarest of the rare" doctrine originated from the landmark case of *Bachan Singh v. State of Punjab*⁵. In this case, the Supreme Court of India affirmed the constitutionality of death sentences but emphasized that they should only be imposed in the "rarest of the rare" cases. The Court highlighted certain instances that exemplify the application of this doctrine:

- ❖ Murders committed with meticulous planning and extreme brutality.
- ❖ Killings of individuals while they are in the lawful discharge of their duties under sections 43, 37, and 129 of the Criminal Procedure Code (CrPC).
- ❖ Murders involving exceptional depravity or the use of armed force, especially when committed while the

perpetrator is on duty.

In *Macchi Singh v. State of Punjab*, the Supreme Court invoked the doctrine of the "rarest of the rare" cases. It held that in instances where the murder is committed with meticulous planning and extreme brutality, or when it occurs during the discharge of lawful duties under specific sections of the CrPC, or if it involves exceptional depravity or armed force, the death penalty may be warranted. The Court emphasized that if the criminal act is of such a serious nature that it shocks the conscience of society and the nation looks to the judiciary for justice and deterrence, then the imposition of the death sentence should not be shied away from. Such crimes would indeed fall under the category of the "rarest of the rare," as their nature is intolerable to society.

In accordance with the guidelines laid down by the Supreme Court in *Bachan Singh v. State of Punjab*, courts should consider various factors when determining whether a case falls within the "rarest of the rare" category for awarding a death sentence. These factors include:

1. **Modus of the Commission:** If the murder is committed in an extremely brutal, revolting, grotesque, diabolical, or dastardly manner, causing intense indignation within the community.
2. **Motive:** If the motive behind the murder is complete depravity and meanness.
3. **Socially unacceptable characteristic of the crime:** If the crime exhibits characteristics that are socially unacceptable or against the norms of society.
4. **Gravity of the crime:** The severity and magnitude of the crime committed.
5. **Personality of the Victim:** If the victim of the murder is a child, an insane person, a helpless woman, or an elderly individual.

In *Kehar Singh v. Delhi administration*⁶ the Supreme Court adjudicated on the assassination of then Prime Minister Smt. Indira Gandhi by her security guard. Recognizing the extreme gravity of the crime, the Court deemed the murder of a head of state as utterly unacceptable to society, thus categorizing it under the "rarest of the rare" doctrine.

Similarly, in *State of Maharashtra v. Sukhdeo Singh*⁷ the murder of the army chief was considered a crime of exceptional severity. The Court reasoned that such an act posed a threat not only to the individual but also to the nation's democracy. Hence, the Supreme Court upheld the death penalty for the accused, as the case fell within the ambit of the "rarest of the rare" doctrine.

In *Laxman naik v. state of Orissa*⁸, the Supreme Court addressed the rape and murder of a 7-year-old girl. Given the heinous nature of the crime, particularly the victim's vulnerable age and the brutality involved, the Court deemed it a rarest of the rare case. Consequently, the death penalty was deemed the most appropriate punishment for such an egregious offense.

In *Madhu Mehta v. Union of India*⁹ the clemency petition of the convict was pending before the president of India for 9 years. The court commuted the sentence to life imprisonment as there was no ground of justification for further reconsideration of the case. The speedy trial such matters was asked to include under Article 21 of the constitution. In another case naming, Sabyosachi Mukharji J. and B.C. Roy J. approved and relied on *Triveniben*⁷³ there was delay of 9 years in the execution of the accused. Therefore the court held: -

“ undue long delay in execution of the sentence of death would entitle the condemned person to approach this court or to approach under article 32 of the constitution, but this court would only examine the nature of delay caused and circumstances.... No fixed period of delay can be considered to be decisive. It has been emphasised that article 21 is relevant here. Speedy trial in criminal cases though may not be fundamental right is implicit in the broad sweep and context of article 21. Speedy trial is part of one's basic fundamental right i.e., right to life and liberty. This principle is no less important for disposal of mercy petitions. It has been universally recognised that a condemned person has to suffer a degree of mental torture even though there is no physical mistreatment and no primitive torture.”

CONCLUSION AND RECOMMENDATION

After a comprehensive review of various cases and scholarly articles, the author strongly advocates for the retention of the death penalty in India. Central to this argument is the "rarest of the rare" doctrine, established in the landmark *Bachan Singh* case. This doctrine, while offering a wide scope, leaves it to the judges to determine which cases qualify. However, the lack of a precise formula for this determination opens the door to potential arbitrariness in sentencing. Thankfully, Article 72 and 161 of the Indian Constitution serve as safeguards against such arbitrariness, allowing for the review of death penalty cases.

Delving deeper into the Law Commission's 262nd report, which suggests retaining the death penalty solely for terrorism and war-related cases, the author disagrees with this limited approach. Instead, they argue for the continuation of the *Bachan Singh* precedent. The reasoning is straightforward: following the "rarest of the

rare" doctrine inherently encompasses cases of terrorism and war, ensuring a nuanced approach to capital punishment.

India's high crime rate, standing at 581.1 crimes per 100,000 of the population, further underscores the author's stance on retaining the death penalty. The fear of facing the ultimate consequence of one's actions is crucial in maintaining law and order. Abolishing the death penalty in a country grappling with rising crime rates could potentially lead to a loss of respect for the law, resulting in a society devoid of basic humanity.

However, the author does not wholeheartedly support the death penalty as an absolute principle. They also believe in the possibility of reformation for certain offenders. If there is genuine evidence that an accused can be reformed and reintegrated into society as a law-abiding citizen, this option should be explored. But in cases where reformation seems unattainable and the accused poses a significant and irreparable threat to society, the death penalty is deemed necessary.

Drawing an analogy to medical treatment, the author likens the removal of an irreparably damaged organ to the removal of an incorrigible criminal from society. In cases where an individual's actions have demonstrated an irreparable and grave danger to society, their removal through the death penalty is viewed as a form of societal self-preservation.

The "might rules the weaker" concept is invoked to highlight the potential consequences of allowing brutal criminals to go unpunished. Such leniency, the author argues, can lead to a degradation of society's moral fabric, potentially inciting individuals to take justice into their own hands.

While some argue against the deterrent effect of the death penalty, the author contends that the fear of severe consequences has a significant impact on deterring potential criminals. They point to the amendments made in criminal law in 2013 as evidence of the legislature's acknowledgment of this deterrent effect.

Regarding terrorists, the author acknowledges their potential mindset to die, but emphasizes that their actions are often driven by the promise of paradise and misled by those who manipulate their beliefs. The execution of terrorists, especially those responsible for large-scale violence against innocent civilians, is viewed as a necessary measure for justice and deterrence.

In conclusion, the author strongly asserts that the death penalty should be retained in India under the "rarest of the rare" doctrine. The fear of consequences remains a vital aspect in deterring crime, and the option of rigorous life imprisonment may not adequately serve justice for those who pose an extreme threat to society. By removing such irredeemable individuals from society, the public interest is preserved, societal integrity is maintained, and potential future crimes are deterred.

