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Capital Punishment as a Paradox to the Indian Constitution and the Fundamental Rights

Aryan Malik[a] Sai Svarjit[b]

[a]OP Jindal Global University, Sonipat, India [b]OP Jindal Global University, Sonipat, India

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Death Penalty/ Capital Punishment is a highly debated topic across the world. In India too, the question of whether or not capital punishment must be abolished is a highly disputed one. However, through recent and past judgements, one can also see that the Indian judiciary still sees the death penalty as a vital punishment that could lead to the abolishment of crime in society. This paper aims to analyse the history of the death penalty post-independence in India and attempt to bring to light the inadequacies of the judiciary in deciding cases where the death penalty was meted out as the punishment. Lastly, this paper aims to reach a conclusion about the constitutionality of the death penalty, while relying on and drawing primarily from other scholarly articles surrounding the judgement laid down in Bachan Singh v State of Punjab and other case laws.[1]

Keywords: *capital punishment, constitution, fundamental rights.*

INTRODUCTION

Capital Punishment or the death penalty is a form of punishment that is imposed by the judiciary as opposed to life imprisonment in cases where the offence or the crime committed is

[1] *Bachan Singh v State of Punjab* (1980) 2 SCC 684

so extreme that the judiciary decides that the only way to deliver justice is through the statutory death of the offender. Death Penalty's constitutional validity is a highly debated topic across the world. In India, after the Nirbhaya case,[2] the debate surrounding constitutional validity came to the forefront and remains unresolved owing to the inconsistent nature of the Indian judiciary in imposing the death penalty. According to various international and national human rights organisations, the biggest form of violation of fundamental rights would be taking someone's life through the procedure or without procedure.[3] India is a signee of various treaties that ban the exercise of giving capital punishment to the accused of any heinous crime. The doctrine of rarest of rare as laid down in the case *Bachan Singh v State of Punjab* has often been used by the Supreme Court of India in passing its judgements which will be further discussed in the paper.[4] According to various jurists and retired judges, the doctrine has been used disproportionately. The concept of capital punishment existed much before the actual judicial meaning came into existence. More than 70% of the world's countries have abolished capital punishment in law or practice.[5] However, the death penalty continues to exist in many parts of the world, including India.

This paper will first look at the meaning of capital punishment and analyse its trends. Secondly, using landmark judgements such as *Bachan Singh v State of Punjab*, it will attempt to analyse the process by which the punishment of the death penalty is meted out to the accused. Further, it will attempt to bring to light the inadequacies of the judiciary in deciding such cases by drawing from other scholarly articles and research papers. Finally, by analysing the international community's views on the death penalty and how the continued use of the death penalty would prove detrimental to the fundamental principles enshrined under the Constitution of India and should therefore be abolished.

[2] *Mukesh v State (NCT of Delhi)* (2017) 6 SCC 1
[3] 'Human Rights' (*Death Penalty Information Center*) <https://deathpenaltyinfo.org/policy-issues/human-rights> accessed 12 January 2024
[4] *Bachan Singh v State of Punjab* (1980) 2 SCC 684
[5] 'Human Rights' (*Death Penalty Information Center*) <https://deathpenaltyinfo.org/policy-issues/human-rights> accessed 12 January 2024

WHAT IS CAPITAL PUNISHMENT AND HOW DID IT EVOLVE?

Capital Punishment is also known as the death penalty, the execution of an offender sentenced to death after conviction of a criminal offence by a court of law.[6] Indian Criminal justice system is one of the important parts of capital punishment. India retained the 1860 Penal Code at independence in 1947, which provided for the death penalty for murder.[7] Several members of the Constituent Assembly expressed a desire to abolish the death penalty while the Indian Constitution was being written between 1947 and 1949, but no such provision was included. In the next two decades, to abolish the death penalty, private members' bills were introduced in both Lok Sabha and Rajya Sabha, but none of them were adopted. It was estimated that between 1950 and 1980, there were 3000 to 4000 executions.[8] It is more difficult to measure the number of people sentenced to death and executed between 1980 and the mid-1990s. It is estimated that two or three people were hanged annually. In *Bachan Singh v State of Punjab* judgement, the Supreme Court ruled that the death penalty should only be used in the 'rarest of rare' cases, but it is not clear what defines the rarest of the rare. It is even more difficult now to understand which crimes should be under the ambit of heinous crimes that might shake the public at large.

Furthermore, the constitutionality of capital punishment is constantly changing through various landmark judgements of the Supreme Court. The following section of the paper will analyse the various landmark judgments of the Supreme Court and through its analysis, bring out the inconsistencies of the judiciary in its judgments in imposing the death penalty in the following cases. The facts of the case have been disclosed with the help of the basic needs that have been classified by Article 21 of the Indian Constitution.[9]

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[6] Sushil Kumar Singh and Arun Verma, 'A Study of Capital Punishment in India' (2022) Research Gate <https://www.researchgate.net/publication/361025100_A_Study_of_Capital_Punishment_in_India> accessed 12 January 2024

[7] Sushant Kadam and Jyoti Shrirang Dharm, 'Capital Punishment in India: A Critical Study' (2020) 9(6) Alochana Chakra Journal <https://www.researchgate.net/publication/362546483_CAPITAL_PUNISHMENT_IN_INDIA_A_CRITICAL_STUDY> accessed 12 January 2024

[8] *Ibid*

[9] Constitution of India 1950, art 21

JUDGEMENTS RELATING TO CAPITAL PUNISHMENT

In *Bachan Singh v State of Punjab*, the Supreme Court upheld the constitutional validity of the death penalty in a 4:1 judgement. It held the provision of the death penalty as an alternative punishment for murder under section 302 of the IPC is neither unreasonable nor is it against the public interest.[10] In its judgement, the Court took on a traditionalist approach and relied on the rarest of the rare doctrine, which means that the death penalty can only be given in the rarest of rare cases. Before imposing the death penalty, the court must weigh the aggravating and mitigating circumstances and determine whether the option of life imprisonment is 'unquestionably foreclosed' and does not violate the ethos of Article 19 of the Constitution of India. However, the Court did not elaborate on the criteria for identifying the 'rarest of rare' cases and what falls under the purview of the 'rarest of rare' cases.[11]

In *Machhi Singh & Others v State of Punjab*, a total of 17 people were murdered because of a feud between families, and the issue, in this case, was whether the death penalty could be given to the accused using the 'rarest of the rare' doctrine as laid down in *Bachan Singh*. In this case, the Court held that the following factors must be considered when using the above-mentioned doctrine: (i) Manner of commission of murder; (ii) Motive for commission of murder; (iii) Anti-social or socially abhorrent nature of the crime; (iv) Magnitude of the crime; (v) Personality of the victim of murder. The Supreme Court claims that the decision to impose the death penalty depends on society's reaction to the nature of the crime. However, it is the Supreme Court in the end by passing a decision on whether the death penalty is to be imposed or not, that inadvertently decides the society's reaction. An argument can also be made that the legislature, a body consisting of society's elected representatives is in a better position to judge the society's reaction to a particular crime than the Courts.[12]

In *Dhananjoy Chaterjee v State of West Bengal*, a young school-going girl was brutally raped and murdered by one of the security guards (the accused) in her building. One of the issues that

[10] Indian Penal Code 1872, s 302
[11] *Bachan Singh v State of Punjab* (1980) 2 SCC 684
[12] *Machhi Singh v State of Punjab* (1983) 3 SCC 470

were taken into consideration by the Court was whether this case came within the ambit of the 'rarest of the rare' cases. The Court finally held that the imposition of appropriate punishment is how the Court responds to society's cry for justice against the criminals. This means that the Court's decision more often than not is influenced by how society reacts to the crime committed by the accused.[13]

In *Mukesh and Another v State of NCT of Delhi*, which is infamously known as the Nirbhaya case, where a paramedical student was brutally murdered and raped. The Court stated that in determining whether life imprisonment or capital punishment is to be imposed, it has to look at both the intensifying and diminishing factors and try to strike a balance between the two. In this case, even though there were diminishing factors such as the young age of the offender, helpless and sick parents, post-crime regret and good conduct in jail, the Court held that the intensifying factors, i.e., the brutal nature of the crime and the public outcry for the hanging of the accused persons, outweighed the diminishing factors.[14]

In contrast to the principle employed in the cases, the Court, in *MA Antony v State of Kerala*[15] was of a conflicting opinion to the judgement passed down and the principle used in *Machhi Singh*.[16] In this case, the Court commuted the death sentence into life imprisonment and noted that the Trial Court erred by considering the disturbance caused by the crime to the collective conscience of the society. The Court held that reference to public opinion and what is perceived by the judges to be the collective conscience of the society must be avoided.[17]

Therefore, from the analysis of the aforementioned case laws, it can be reasonably ascertained that although the 'rarest of the rare' doctrine was formulated in Bachan Singh and was further elaborated on in Machi Singh and a large part of the decision-making process concerning the imposition of the death penalty lies on the discretion of the judiciary and the sitting judge's notion of the crime and the corresponding meaning of justice. There is a fine line between cases

[13] *Dhananjoy Chatterjee v State of W.B.* (1994) 2 SCC 220
[14] *Mukesh v State (NCT of Delhi)* (2017) 6 SCC 1
[15] *M.A. Antony v State of Kerala* (2009) 6 SCC 220
[16] *Ibid*
[17] *Ibid*

that fall under the 'rarest of the rare' doctrine and an ordinary case, and the category into which a case falls is decided solely through judicial discretion rather than using a pre-decided legal principle. For example, in the Nirbhaya case, the accused was convicted of rape and murder and the punishment of death penalty was imposed on him. However, in *Kumudi Lal v State of Uttar Pradesh*,[18] where the victim, a 14-year-old girl was raped and murdered by the appellant, the appellant was charged only with life imprisonment and the Court held that this does not come under the 'rarest of the rare cases' as the victim did not raise cries for help.

Thus, it can be concluded that although there exists a doctrine such as the 'rarest of the rare cases' the imposition of the death penalty is dependent on the discretion of the judiciary and the judiciary's views are often contradictory and change on a case-to-case basis as displayed with the *M.A. Antony* case. It can further be argued that, as it stands, there is no uniform system that is employed by the judiciary in deciding whether to impose the death penalty or life imprisonment, and it often contradicts itself even in cases with similar facts and circumstances. Subsequently, it can be concluded that the 'rarest of the rare' doctrine is inadequate owing to its lack of uniformity and the reliance on the discretion of the judiciary. Therefore, there is a need for a uniform system that can be employed by the judiciary while deciding on cases involving the death penalty to ensure equity for all in delivering justice.

PUBLIC OPINION ON THE DEATH PENALTY

As established in the previous sections of the paper, the judiciary relies on public opinion, i.e. the societal impact of the crime committed, when deciding on whether the death penalty should be imposed on the accused or not. Therefore, this judiciary also has some bias whether they would like to admit it or not when deciding on death penalty cases. For justice to be equitably delivered, the judgements must be completely free of bias, which is a utopian concept.[19] Bias can never be completely rid of. Sanjeev Sahni, in his paper on the death penalty, says that the problem of bias is what makes public opinion unreliable.[20] He also raised the question that in a

[18] *Kumudi Lal v State of U.P.* (1999) 4 SCC 108
[19] Sanjeev P. Sahni and Mohita Junnarkar, *The Death Penalty Perspectives from India and Beyond* (Springer 2020)
[20] *Ibid*

society where bias can never be eliminated, should public opinion be used when deciding the fate of a man, and how much weight must be attached to this public opinion or whether the issue should be decided based on a fundamental principle of human rights, and not opinion.[21]

Through this and the analysis of the various Supreme Court judgements, it can be inferred that when the judiciary passes decisions on cases regarding the death penalty, its decision relies on society's reaction to the crime committed by the accused, i.e., it gives weightage to public opinion when passing a judgement. Drawing from Sanjeev Sahni's arguments in his paper and the fact that the judiciary has not adopted a uniform system in deciding death penalty cases and relies heavily on the opinions of the public as well as that of the sitting judge, it can be argued that the current system of deciding on whether the death penalty should be imposed or not is flawed, to say the least. Further, it can also be argued that to ensure justice, the decision of the judiciary should be free of bias, or else it will lead to inconsistent judgements being meted out as displayed in the cases of *Bachan Singh* and *M.A. Antony*. However, the judiciary, consisting of human beings, cannot completely get rid of personal biases. Therefore, in the absence of an alternative, to ensure that the fundamental rights enshrined under Articles 14 and 19 of the Constitution of India are protected,[22] and for the sake of the democratic system of India, it would be beneficial to abolish the imposition of the death penalty as a punishment.

WHY CAPITAL PUNISHMENT IS CONSIDERED UNCONSTITUTIONAL IN A DEMOCRACY?

Every person has the right to life under Article 21 of the Indian Constitution until and unless the life of the individual is taken through judicial procedure through the imposition of the death penalty.[23] Death penalty is the last resort, which the judiciary resorts to, and the focus in this case is shifted from reforming the individual to surrendering to the demands of society instead. Still, Capital punishment is unconstitutional as it takes away the bodily autonomy of an individual, his/her freedom to speech and expression and in some cases the right to be treated

[21] *Ibid*
[22] Constitution of India 1950, art 14
[23] Constitution of India 1950, art 21

equally where the judgement given is arbitrary and unjust to the individual. As per the 35th report of the Law Commission of India,[24] it led to the amendment in the Criminal Procedure Code 1973. The amended section 354(3) dealt with 'extraordinary reasons' to be given to convict someone and punish with capital punishment or life imprisonment.[25] *Bachan Singh* also specifically dealt with extraordinary circumstances, but these 'extraordinary circumstances' did not remain extraordinary when used frequently. The Commission also states that in the normal course of nature, the punishment for murder is imprisonment forever but in aggravating circumstances, the death penalty could be considered as an option.[26]

The following section of the paper is going to attempt to analyse how the death penalty infringes on the fundamental rights that are enshrined in the Constitution of India.

Article 14: Article 14 of the Constitution of India reads, 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'[27] However, from the analysis of the various case laws on the death penalty, it can be observed that different people who are convicted for the same offence are given different punishments depending on the impact the act has created on society. Therefore, there is clearly no equality before the law that is granted to the person who is punished with the death penalty when another person convicted of the same offence is awarded life imprisonment. This distinction in punishment, as concluded before is decided based on the society's reaction to the crime committed. This goes against the very notion of equality as mentioned under Article 14 of the Constitution. Furthermore, the Law Commission of India in the Shankar Kisanrao Khade v State of Maharashtra case, that the two paramount organs of the state - executive and judiciary consider different standards when deciding different cases, leading to a lack of uniformity, recommended it.[28]

[24] Law Commission, *Capital Punishment* (Law Com No 35, 1967) para 265
[25] *Ibid*
[26] *Ibid*
[27] Constitution of India 1950, art 14
[28] *Shankar Kisanrao Khade v State of Maharashtra* (2013) 5 SCC 546

Article 19: Article 19 of the Indian Constitution grants freedom of speech and expression, including the right to exhaust all legal remedies before capital punishment.[29] However, the execution process is often not followed as per the law, with either a slow judicial process or too hasty a verdict. The case of *Afzal Guru* is an example of such speedy justice,[30] leading to his death penalty without valid proof and evidence. This judgement was criticised by legal experts, including judges and advocates, for breaching Article 19 by curbing the individual's right to express themselves freely in front of the judiciary and denying them remedies available in capital punishment procedures.[31]

Article 21: The right to privacy has been recognized by the Indian Supreme Court as an essential component of the right to life and personal liberty under Article 21 of the Constitution.[32] This right to privacy is an extension of the right to bodily autonomy, which means that individuals have the right to make decisions about their bodies without interference from the state or other actors. The use of the death penalty in India encroaches on this right to privacy and bodily autonomy. When a person is sentenced to death, they are stripped of their right to make decisions about their own body and are subjected to invasive and degrading procedures, such as the forced taking of blood samples and the mandatory physical examination. The act of execution itself is also a violation of bodily autonomy and the right to privacy, as it involves the state taking control of the person's body and subjecting them to physical harm. Furthermore, the lack of transparency in the process leading up to the execution and the secrecy around the method of execution further undermines the individual's right to privacy and bodily autonomy. The use of the death penalty in India, therefore, not only violates the right to life but also the right to privacy and bodily autonomy, which have been recognized as integral components of the right to life under Article 21[33] following the landmark *Puttaswamy* judgement.[34]

[29] Constitution of India 1950, art 19
[30] *State v Mohd. Afzal* (2003) SCC OnLine Del 935
[31] Constitution of India 1950, art 19
[32] Constitution of India 1950, art 21
[33] *Ibid*
[34] *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1

INTERNATIONAL TRENDS ON CAPITAL PUNISHMENT

India is a signatory to various international human rights treaties that prohibit the use of capital punishment, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[35] Despite these commitments, as mentioned before, capital punishment is still practised in India.

The practice of the death penalty in India differs significantly from that in other developed countries. While many countries, including the United States and Japan, continue to use the death penalty, most European countries have abolished it. The European Union prohibits the use of the death penalty, and many European countries have abolished it in law and practice.[36] In contrast, India is one of the few countries that have not yet abolished the death penalty, and it continues to be used in cases of murder, terrorism, and treason. The use of the death penalty in India has been criticized by human rights organizations, who argue that it is arbitrary and disproportionately affects marginalized groups. Moreover, the use of the death penalty in India has been questioned based on its effectiveness as a deterrent. In comparison, many developed countries that have abolished the death penalty have seen a decrease in violent crime rates.[37] The international community must continue to pressure India to abolish the death penalty and work towards a justice system that is fair and just for all individuals.

CONCLUSION

In conclusion, this paper has analysed the process through which the death penalty is meted out to the accused by the judiciary through the use of the rarest of the rare doctrine. Through this analysis, it can be inferred that there is a lack of uniformity in the way the judiciary applies the aforementioned doctrine. Consequently, it has also established that there exists bias on the part

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[35] International Covenant on Civil and Political Rights 1966, art 6

[36] 'Abolition of death penalty and fight against torture' (*European Union*) <https://www.eeas.europa.eu/eeas/abolition-death-penalty-and-fight-against-torture_en> accessed 12 January 2024

[37] 'Death Penalty' (*Amnesty International*) <https://www.amnesty.org/en/what-we-do/death-penalty/> accessed 12 January 2024

of the judiciary when deciding on the punishment that is to be meted out to the accused, as it relies heavily on the societal impact, i.e., public opinion. Because of this reliance on public opinion, the decision of whether the death penalty should be given to the accused or life imprisonment can never be free of bias even on the part of the judiciary. This biased decision-making process takes away any scope of reformation of the accused, which should ideally be the primary aim of a democracy.

The paper also analyses the various fundamental rights that are encroached on through the continued use of the death penalty, namely, Articles 14, 19 and 21 of the Constitution of India. Because of the aforementioned bias, the accused is not given the right to a fair trial, i.e., one that is free of any pre-existing biases. Lastly, it can be concluded that the current death penalty system is limited by the lack of a uniform judicial system, the bias of judges, and the absence of an objective alternative for determining when the death penalty is warranted over life imprisonment. At present, as discussed above there is no alternative system that can objectively and consistently decide whether the facts and circumstances of a case require the accused to be punished with the death penalty rather than life imprisonment. Despite efforts to explore sentencing alternatives, such as restorative justice, the lack of a comprehensive and universally accepted framework for making this determination remains a significant challenge in the criminal justice system. This issue has continuously been the subject of academic research and public debate for a long time.

Therefore, as a result of there being no effective alternative, the system of imposing the death penalty as a whole should be abolished to ensure that the accused's and thereby, every citizen's fundamental rights are protected, and remain protected in perpetuity.