

## DEATH PENALTY: CONSTITUTIONAL POSITION

*Ravi Boolchandani<sup>1</sup>*

### ABSTRACT:

The Supreme Court of India as the highest Judicial Tribunal of the country has given its authoritative decisions on various points of law from time to time. The apex court has examined the constitutional validity, procedure and many other issues related to death sentence and delivered its valuable verdict on numerous occasions in last 50-60 years. The constitutionality of death penalty has been questioned before the Supreme Court several times on the ground that it contravenes provisions incorporated in Indian Constitution. However, the Court has made it clear many times that the imposition of death penalty is not opposed to the supreme law of the land, Bhagwati, J., is of opinion that Sec. 302 of the I.P.C. in so far as it provides for imposition of death penalty as an alternative to life sentence is ultra vires and void because it is violating Art. 14 and 21 of the constitution since it does not provide any legislative guidelines as to when life should be permitted to be extinguished by imposition of death sentence. The rarest of the rare doctrine is being misused. This paper suggests the abolition of death penalty as it has failed to prove its deterrence effect.

**KEYWORDS:** Death Penalty, constitutionality, Rarest of the rare, Deterrence, Abolishment

### INTRODUCTION

Death penalty is a highly debated issue worldwide. Every modern society has its paragons and protagonists. However, what distinguishes a truly enlightened society is not the way it treats its heroes. What makes it exceptional is the way it mainstreams the marginalised. The methods

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<sup>1</sup> Amity Law School, Delhi (IP University)

using which it assimilates its minorities. And the modus vivendi through which it reforms and re-educates its misdemeanants, corrects its incorrigibles and integrates its deviants. The death penalty has been a staple in the justice system of India since its inception. Though very controversial, it has stood the test of time as the ultimate punishment. Many countries are currently abolishing their death penalty practice. India, on the other hand, awards death penalty to victims in rarest of the rare cases.

The system of tangled appeals, court orders, and last minute pardons has rendered the entire system ineffective. It seems the India requires the death penalty more than ever due to the increased rate of violent crime. Since 1990 more than 350 people have been put to death with another three thousand three hundred in the waiting on death row. Also studies show that the application of the death penalty is racial biased. The death penalty is cruel and inhumane. No matter how the death penalty is carried out, no man has the power to judge and sentence another to death.

**EVOLUTION AND ORIGIN:**

All religious thought that has evolved in India (over more than 5000 years) are based on expositions of the theory of karma and dharma. This allows for a far more comprehensive and sophisticated view of life, suffering and death in India (and many parts of Asia deeply influenced by Indic religions). In the Indic view, the terrorist (or any other criminal) should face the punishment awarded by the legal institutions of society as this would substantially reduce the karmic burden that he (or she) carries for the crime/s committed. Trying to escape this punishment (in this world) only prolongs the repayment of the karmic debt, and is not in the interest of either the criminal/terrorist or his/her victims.

Death sentences in our country largely came into effect by the kings who were thinking their enemies should be killed and also it should be lawful. These became profusely large with the Moghuls when they came to power. The British also went to the extent of giving this punishment to conserve their position.

## **EFFECTS AND IMPACTS OF CAPITAL PUNISHMENT ON NATION'S SOCIO ECONOMIC STRATA:**

Hon'ble Justice PN Bhagwati in his vigorous dissent over the Death Sentence, declared Section 302 (IPC) when read with Section 354 (3) (Cr.P.C) as unconstitutional and void because these sections were clearly violating Articles 14 and 21 of the Indian Constitution. He made the following observation: "I may make it clear that the question to which I am addressing myself is only in regard to the proportionality of death sentence to the offence of murder and nothing that I say here may be taken as an expression of opinion on the question whether a sentence of death can be said to be proportionate to the offence of treason or any other offence involving the security of the State"<sup>2</sup>.

These words, from the strongest votary against the death penalty, are revealing. Justice Bhagwati clearly indicated that his observations do not apply to punishment of death in relation to terrorist acts or to treason — implicitly endorsing the death penalty for terrorist acts.

While abolition of the death penalty for crimes other than terrorist acts or treason may be justified, its retention in the case of punishment for having carried out terrorist acts or treason seems equally justifiable.

### **Effects of death penalty given to terrorists**

There is increasing support for the view that the death penalty for terrorists may not only be ineffective but also be counterproductive. As the terrorists, when awarded the death penalty, become martyrs influencing many other misguided youngsters to espouse a similar cause. Many religious fanatics believe in reward in the after-life and endless pleasures in heaven. Not awarding them the death penalty would mean depriving them of the anticipated rewards in heaven. Again, imprisonment and incarceration of a terrorist may result in yields obtaining information relating to other terrorist organizations.

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<sup>2</sup>Bachan Singh vs. State of Punjab,(1982) 3 SCC 24 at Pg. 76

**Effects Of other Offences Punishable with Death penalty:**

In its present form the death penalty fails to act as a deterrent. Hard core criminals will never repent their acts whatever be the punishment. Death is a release, a freeing, not a punishment whereas Life is the punishment and the reward. For the persons who commit evil by evil design and action and is mentally conditioned to accept death or any other punishment no punishment is deterrent. Deterrence in such cases comes from defeating the faulty indoctrination by knowledge infusion with the right doctrine and taking care of mundane life.

**Economic Aspects:**

To bear Expenditure incurred in life sentence, our liberals suggest collecting money from surviving victims or their families”. But these dodgy facts are debunked by using correct economics. Fact is that the very irreversible nature of the death penalty makes the few democratic countries which retain it to take steps to ensure that no errors are made. This results in lengthy and costly appeals processes. Several independent studies have corroborated the fact that the death penalty is costlier than life imprisonment. Amnesty International says: “The greatest costs associated with the death penalty occur prior to and during trial, not in post-conviction proceedings. Even if all post-conviction proceedings (appeals) were abolished, the death penalty would still be more expensive than alternative sentences.”

## LEGAL AND CONSTITUTIONAL ASPECTS:

### Acts and laws on death penalty:

As of now there are 22 legislations and acts which mention death penalty in their penal clause. The Indian Penal Code 1860, having 11 offences defined in various sections in which death penalty can be awarded. *In Toto*, at present there are 61 offences for which death penalty can be awarded.

### Several Acts and legislation in which Capital punishment is been awarded are:

Indian Penal Code, 1860, Anti-Terror Legislations, Armed forces and Para Military legislations, Social Reforms and protection legislations, Narcotic Drugs and Psychotropic Substances Act, 1985, Economic Legislations, Miscellaneous legislations.

### ***(i) The 35th Report of Law Commission on Capital Punishment (1967)***<sup>3</sup>

In its 35th Report on “Capital Punishment” in December 1962, which was presented in December 1967. The Commission undertook an extensive exercise to consider the issue of abolition of capital punishment from the statute books. Based on its analysis of the existing socio-economic, cultural structures (including education levels and crime rates) and the absence of any Indian empirical research to the contrary, it concluded that the death penalty should be retained.

### **After observing the socio-economic and cultural factors in India, The Commission recommended**

The commission said that, it's being strenuous to rule out the validity of, or the strength behind, many of the arguments for abolition. Nor does the Commission treated lightly the argument of irrevocability of the sentence of death, the need for a modern approach, the severity of capital

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<sup>3</sup>Law Commission of India, 35th Report, 1967, at para 7 (Summary of Main Conclusions and Recommendations), <http://lawcommissionofindia.nic.in/150/Report35Vol1and3.pdf>

punishment, and the strong feeling shown by certain sections of public opinion, in stressing deeper questions of human values.

With respect to scenario, 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 punishment.

Considering issues involved, the Commission is of the opinion that capital punishment should be retained in the present state of the country.

### **(ii) The 187th Report on the Mode of Execution (2003)**

The Commission dealt with the issue of death penalty once more – in its 187th Report on the “*Mode of Execution of Death Sentence and Incidental Matters*” in 2003<sup>4</sup>. It only concentrate with a limited question on the modus operandi of execution and did not engage with the substantial question of the constitutionality and desirability of death penalty as a punishment.

### **(iii) Need for re-examining the 35th Report**

Commission in its 35<sup>th</sup> report recommended that “*capital punishment should be retained in the present state of the country,*”<sup>5</sup>. Significant changes in India, and indeed around the world, since 1967, so much so that a fresh look at the issue in the contemporary context has become desirable.

Some factors require special mention-

#### **(a) Development in India**

In the past Commission’s conclusions in the 35th Report rejecting the abolition of capital punishment were linked 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.”

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<sup>4</sup>Law Commission of India, 187th Report, 2003, [lawcommissionofindia.nic.in/reports/187th report.pdf](http://lawcommissionofindia.nic.in/reports/187th%20report.pdf)

<sup>5</sup> Law Commission of India, 35th Report, 1967, at para 1 (Summary of Main Conclusions and Recommendations), <http://lawcommissionofindia.nic.in/150/Report35Vol1and3.pdf>

**Changes in statistics:**

Nevertheless, education, general well-being, and social and economic conditions are vastly different today from those prevailing at the time of writing the 35th Report. For example,

Per capita Net National Income at constant prices, based on the 2004-2005 series was Rs.1838.5 in 2011 - 2012, while it was Rs.191.9 in 1967-1968<sup>6</sup>

Similarly, adult literacy was 24.02% in 1961<sup>7</sup> and 74.0% in 2011<sup>8</sup>, and life expectancy (a product of nutrition, health care, etc.) was 47.1 years in 1965-1970<sup>9</sup> and 64.9 years in 2010-2015.<sup>10</sup> The state of the country and its inhabitants has thus changed significantly.

Further, the figures of homicide in India during the several years have not shown any marked decline. *The rate of homicide per million of the population is considerably higher in India than in many of the countries where capital punishment has been abolished.*<sup>11</sup>

**Recent decline in the homicide rates:**

But contrary to it, *Crime in India*<sup>12</sup> reports, published by the **National Crime Records Bureau** ('NCRB') under the aegis of the Ministry of Home Affairs, the homicide rate has been in continuous and uninterrupted declining

<sup>6</sup>The Statistical Appendix to the Economic Survey 2014-2015, Table 1.1, <http://indiabudget.nic.in/es2014-15/estat1.pdf>

<sup>7</sup>Census of India, State of Literacy, Census of India 1961, [http://censusindia.gov.in/Data\\_Products/Library/Provisional\\_Population\\_Total\\_link/PDF\\_Links/chapter7.pdf](http://censusindia.gov.in/Data_Products/Library/Provisional_Population_Total_link/PDF_Links/chapter7.pdf)

<sup>8</sup>Census of India 2011, Status of Literacy, [http://censusindia.gov.in/2011-prov-results/data\\_files/mp/07Literacy.pdf](http://censusindia.gov.in/2011-prov-results/data_files/mp/07Literacy.pdf)

<sup>9</sup> UN Data, Life Expectancy at Birth- Both Sexes Combined, 1965-70, <http://data.un.org/Data.aspx?q=india+life+expectancy+1965&d=PopDiv&f=variableID%3a68%3bcrID%3a356%3btimeID%3a103%2c104>

<sup>10</sup> UN Data, Life Expectancy at Birth- Both Sexes Combined, 2010-2015, <http://data.un.org/Data.aspx?q=india+life+expectancy+2010&d=PopDiv&f=variableID%3a68%3bcrID%3a356%3btimeID%3a112%2c113>

<sup>11</sup> Law Commission of India, 35th Report, 1967, at paras 262, 263, <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf>



1. In 1992 it was 4.6 per lakh of population.<sup>13</sup>
2. As per the latest figures for 2013, the murder rate is 2.7 per lakh of population. After having fallen further from 2012, when it was 2.8.<sup>14</sup>

This reduction in the homicides rate has coincided with a corresponding decline in the rate of executions, thus raising questions about whether the *death penalty has any greater deterrent effect than life imprisonment*.<sup>15</sup>

#### (b) The new Code of Criminal Procedure in 1973:

The Commission's recommendations in the 35th Report predate the current Code of Criminal Procedure ('CrPC'), which was enacted in 1973. This resulted in an amendment to Section 354(3), requiring "special reasons" to be given when the death sentence was imposed for an offence where the punishment could be life imprisonment or death. The Supreme Court, in *Bachan Singh v. State of Punjab*<sup>16</sup> has interpreted this to mean that the normal sentence for murder should be imprisonment for life, and that only in the rarest of rare cases should the death penalty be imposed.

Section 354(3) went contrary to the Recommendations of the 35th Report, which stated that, "*The Commission does not recommend any provision (a) that the normal sentence for murder should be imprisonment for life but in aggravating circumstances the court may award the sentence of death.*"<sup>17</sup>

Pertinently, *the Report also recommended that Section 303 of the Indian Penal Code, remain unchanged*<sup>18</sup>. Section 303 states that if a person who serving his term for life imprisonment commits murder then he shall be punished with death penalty (*subsequently held*

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<sup>12</sup> National Crime Records Bureau, See *Crime in India*, <http://ncrb.gov.in/CD-CII2013/Home.asp>

<sup>13</sup> National Crime Records Bureau, *Crime in India, 2013*, available at <http://ncrb.nic.in/ciiprevious/Data/CII1992/CII-1992/table-2.pdf>

<sup>14</sup> National Crime Records Bureau, *Crime in India, 2013*, <http://ncrb.gov.in/CD-CII2013/figure%20at%20a%20glance.pdf>

<sup>15</sup> See Yug Mohit Chaudhry, *Hanging on Theories*, *Frontline*, 7 September 2012, 2932.

<sup>16</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684

<sup>17</sup> Law Commission of India, 35th Report, 1967, at para 7 (*Summary of Main Conclusions and Recommendations*), <http://lawcommissionofindia.nic.in/150/Report35Vol1and3.pdf>

<sup>18</sup> Law Commission of India, 35th Report, 1967, at para 4 (*Summary of Main Conclusions and Recommendations*), <http://lawcommissionofindia.nic.in/150/Report35Vol1and3.pdf>

*unconstitutional in Mithu v. State of Punjab*)<sup>19</sup> and that there was no requirement for a minimum interval between the death sentence and the actual execution (*subsequently made 14 days in Shatrughan Chauhan v. Union of India*)<sup>20</sup>). Such developments emphasise the importance of relooking at the Report.

**(c) The emergence of constitutional due-process standards:**

Post-1967, India has witnessed an expansion of the interpretation of Article 21 of the Constitution of India, reading into the right to dignity and substantive and due process. Most famously, *Maneka Gandhi v Union of India*<sup>21</sup>, held that the procedure prescribed by law has to be “*fair, just and reasonable, not fanciful, oppressive or arbitrary.*”<sup>22</sup>

Subsequently, in *Bachan Singh*, the Court observed that Section 354(3) of the CrPC, 1973, is part of the due process framework on the death penalty.

The ‘rarest of rare’ standard has at its core the conception of the death penalty as a sentence that is unique in its absolute denunciation of life. As part of its concerns for human life and human dignity, and its recognition of the complete irrevocability of this punishment, the Court devised one of the most demanding and compelling standards in the law of crimes. The emergence of the ‘rarest of rare’ dictum when the “alternative option [is] unquestionably foreclosed” was very much the beginning of constitutional regulation of death penalty in India.

In *Shankar Kisanrao Khade v. State of Maharashtra*<sup>23</sup> the Supreme Court of India, while dealing with an appeal on the issue of death sentence, expressed its concern with the lack of a coherent and consistent purpose and basis for awarding death and granting clemency. The Court specifically called for the intervention of the Law Commission of India on these two issues:

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<sup>19</sup>*Mithu v. State of Punjab*, (1983) 2 SCC 27

<sup>20</sup>*Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1

<sup>21</sup>*Maneka Gandhi v. UOI*, (1978) 1 SCC 248

<sup>22</sup>*Maneka Gandhi v. UOI*, (1978) 1 SCC 248 at para 48

<sup>23</sup>*Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546

- “Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance.”<sup>24</sup>
- “It does prima facie appear that two important organs of the State, that is, the judiciary and the executive are treating the life of convicts convicted of an offence punishable with death with different standards.”<sup>25</sup>

In *Santosh Kumar SatishbhushanBariyar v. State of Maharashtra* the court lamented on the lack of empirical research on this issue.<sup>26</sup>

However, it is important to consider the NCRB data on the number of death sentences awarded annually. On average, NCRB records that 129 persons are sentenced to death row every year, or roughly one person every third day. In *Khade*, the Supreme Court, took note of these figures and stated that this number was “rather high”<sup>27</sup> and appeared to suggest that the death penalty is being applied much more widely than was envisaged by *Bachan Singh*. In fact, as subsequent pages suggest, the Supreme Court itself has come to doubt the possibility of a principled and consistent implementation of the ‘rarest of rare’ doctrine.

#### **(d) Judicial developments on the arbitrary and subjective application of the death penalty:**

Despite the Court’s optimism in *Bachan Singh* that its guidelines will minimise the risk of arbitrary imposition of the death penalty, there remain concerns that capital punishment is “arbitrarily or freakishly imposed”.<sup>28</sup> In *Bariyar*, the Court held that “there is no uniformity of

<sup>24</sup>*Shankar KisanraoKhade v. State of Maharashtra*, (2013) 5 SCC 546, at para 148

<sup>25</sup>*Shankar KisanraoKhade v. State of Maharashtra*, (2013) 5 SCC 546, at para 149

<sup>26</sup> *Santosh Kumar SatishbhushanBariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 112

<sup>27</sup> *Shankar KisanraoKhade v. State of Maharashtra*, (2013) 5 SCC 546, at para 145 - “[T]he number of death sentences awarded ... is rather high, making it unclear whether death penalty is really being awarded only in the rarest of rare cases”

<sup>28</sup>*Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 15

*precedents, to say the least. In most cases, the death penalty has been affirmed or refused to be affirmed by us, without laying down any legal principle*".<sup>29</sup>

Such concerns have been reiterated on multiple occasions, where the Court has pointed that the rarest of rare dictum propounded in *Bachan Singh* has been inconsistently applied. In this context, it is instructive to examine the observations of the Supreme Court in *AlokeNathDutta v. State of West Bengal*<sup>30</sup>, *SwamyShraddhananda v. State of Karnataka*<sup>31</sup>, *Farooq Abdul Gafur v. State of Maharashtra*<sup>32</sup>, *Sangeet v. State of Haryana*<sup>33</sup>, and *Khade*<sup>34</sup>. In these cases, the Court has acknowledged that the subjective and arbitrary application of the death penalty has led "principled sentencing" to become "judge-centric sentencing"<sup>35</sup>, based on the "personal predilection of the judges constituting the Bench."<sup>36</sup>

#### **(e) Recent Political Developments:**

Some recent developments indicate an increase in political opinion in favour of abolition. Most recently, in August 2015, the *Tripura Assembly* voted in favour of a resolution seeking the abolition of the death penalty.<sup>37</sup>

Demands for the abolition of the death penalty have been made by the parties like CPI, [CPI (M)], [CPI (M-L)] VCK,MMK, GMI, MDMK, DMK.<sup>38</sup>

*D. Raja* of the CPI introduced a Private Member's Bill asking the Government to declare a moratorium on death sentences pending the abolition of the death penalty.<sup>39</sup> On August 2015,

<sup>29</sup> *Santosh Kumar SatishbhushanBariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 104

<sup>30</sup> *AlokeNath Dutta v. State of West Bengal*, (2007) 12 SCC 230

<sup>31</sup> *SwamyShraddhananda v. State of Karnataka*, (2008) 13 SCC 767

<sup>32</sup> *Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641

<sup>33</sup> *Sangeet v. State of Haryana*, (2013) 2 SCC 452

<sup>34</sup> *Shankar KisanraoKhade v. State of Maharashtra*, (2013) 5 SCC 546

<sup>35</sup> *Sangeet v. State of Haryana*, (2013) 2 SCC 452

<sup>36</sup> *SwamyShraddhananda v. State of Karnataka*, (2008) 13 SCC 76

<sup>37</sup> *Syed Sajjad Ali, Tripura passes Resolution against Death Penalty, The Hindu*, 7 August 2015

<sup>38</sup> See *PTI, Left joint movement asks Centre to not hang YakubMemon, Economic Times*, 27 July, 2015; *IANS, Death penalty: CPI leader D Raja moves private member's resolution, Economic Times*, 31 July, 2015.; *ET Bureau, Seeking end to death penalty, DMK's Kanimozhi set to move private member's bill, Economic Times*, 7 August, 2015; See also: *Repeal Death Penalty, CPI M-L*, 30 June, 2015, available at <http://cpiml.in/cms/editorials/item/150-repeal-death-penalty>

<sup>39</sup> *IANS, Death penalty: CPI leader D Raja moves private member's resolution, Economic Times*, 31 July, 2015.

DMK Member of Parliament Kanimozhi introduced a private member's bill in the Rajya Sabha seeking abolition of capital punishment.

#### **(f) International Developments:**

In 1967, when the 35th Report was presented, only *12 countries had abolished capital punishment for all crimes in all circumstances*.<sup>40</sup> Today, 140 countries have abolished the death penalty in law or in practice. Further, the number of countries that have remained “active retentionists”, namely they have executed at least one person in the last ten years, has fallen from 51 in 2007 to 39 (as of April 2014). A category of countries have also abolished death penalty for ordinary crimes such as murder and retained it for exceptional crimes such as crimes under military law or under exceptional circumstances. The death penalty is most prominently used in Iran, China, Pakistan, Saudi Arabia and the United States of America.

The issues relating to capital sentencing and the move towards the abolition of the death penalty internationally subsequent to the publication of the 35th Report deserve detailed consideration

#### **(iv) 262<sup>nd</sup> Report of Law Commission:**

The 20th Law Commission chaired by Justice Ajit Prakash Shah, recommended in its 262nd report<sup>41</sup> that “Principle of 'rarest of rare' cannot be operated free of arbitrariness.” It recommended a “swift” abolition of death penalty except in terror-related cases, noting it does not serve the penological goal of deterrence any more than life imprisonment.

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<sup>40</sup>Law Commission of India, 35th Report, 1967, 12 countries are Columbia (1910), Costa Rica (1877), Dominican Republic (1966), Ecuador (1906), Federal Republic of Germany (1949), Honduras (1956), Iceland (1928), Monaco (1962), Panama (1922), San Marino (1865), Uruguay (1907), Venezuela (1863), <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf>

<sup>41</sup> *The Law Commission of India 262<sup>nd</sup> Report*, [www.lawcommissionofindia.nic.in](http://www.lawcommissionofindia.nic.in)

## CONSTITUTIONAL VALIDITY (JUDICIAL ASPECTS)

In *Jagmohan Singh v. Uttar Pradesh*<sup>42</sup>, the validity of death sentence was first time challenged on ground that it was violative of Arts. 19 and 21 because it did not provide any procedure established by law. It was contended that the procedure prescribed under Criminal Procedure Code was confined only to findings of guilt and not awarding death sentence. The Supreme Court held that choice of awarding 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, Constitutional Bench of the Court held that capital punishment was not violating Articles. 14, 19 and 21 and was therefore constitutionally valid.

After this decision the constitutional validity of death sentence was not open to doubt. But in the case of *Rajendra Prasad v. State of U.P.*<sup>43</sup>, Krishna Iyer, J., held that capital punishment would not be justified unless it was shown that the criminal was dangerous to the society. He held that giving discretion to the Judge to make choice between death sentence and life imprisonment on "special reason" under Section 354 (3) of Cr.P.C., would be violating Art. 14 which we know, condemns arbitrariness. He pleaded for the abolition 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 the Parliament and not by the Court. It is submitted that minority judgment is correct because after the amendment in the Cr.P.C. and the decision in *Jagmohan 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*<sup>44</sup>, the Supreme Court by 4 : 1 majority has overruled *Rajendra Prasad's* decision and has held that the provision of death penalty under Section 302 of I.P.C. as an alternative punishment for murder is not violating Art. 21. Article 21 of the Constitution recognizes 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

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<sup>42</sup>*Jagmohan Singh v. Uttar Pradesh*, AIR (1973) SC 947

<sup>43</sup>*Rajendra Prasad v. State of U.P.*, AIR (1979) SC 916

<sup>44</sup>*Bachan Singh v. State of Punjab*, AIR (1980) SC 898

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. The International Covenant on Civil and Political Rights to which India has become party in 1979 do not abolition of death penalty in all circumstances. All that it requires is, that

- (1) Death penalty should not be arbitrarily inflicted,
- (2) It should be imposed for the most serious crimes.

Thus the requirements of International Covenant is the same as the guarantees and prohibitions contained in Articles 20 and 21 of our Constitution. 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.

Subsequently, the Supreme Court in another famous case, *Machhi Singh v. State of Punjab*<sup>45</sup>, 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.

In *State vs Jasbir Singh &Kuljeet Singh*<sup>46</sup>, popularly known as The Chopra Children Murder Case, Jasbirsingh and Kuljeet Singh were convicted and sentenced to death for the murder of two children since they were cold-blooded murderers and also the murder was a very brutal, barbaric and dastardly act. The murder depicted aggravating circumstances.

In *Deena v. Union of India*<sup>47</sup>, the constitutional validity of Section 354 (5), Cr.P.C., 1973 was challenged on the ground that hanging by rope as prescribed by this section was barbarous, inhuman and degrading and, therefore, violating Art. 21. It was urged that State must provide a human a dignified method for executing death sentence. The Court unanimously held that the method prescribed by Section 354 (5) for executing the death sentence by hanging by rope

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<sup>45</sup>*Machhi Singh v. State of Punjab*, (1983)3 SCC470

<sup>46</sup>*State vs Jasbir Singh &Kuljeet Singh*,17 (1980) DLT 404

<sup>47</sup>*Deena v. Union of India*, (1983) 4 SCC 645



does not violate Art. 21. The Court held that Section 354 (5) of the Cr.P.C., which prescribes hanging as mode of execution lays down fair, just and reasonable procedure within the meaning of Art. 21 and hence is constitutional. Relying on the report of U.K. Royal Commission, 1949, the opinion of the Director General of Health Service of India and the 35th report of the Law Commission, the Court held that hanging by rope is the best and least painful method of carrying out the death sentence than any other methods. The Judges declared that neither electrocution, nor lethal gas, or shooting, nor even the lethal injection has 'any distinct or advantage' over the system of hanging by rope. In *Attorney General of India v. Lachma Devi*<sup>48</sup>, it has been held that the execution of death sentence by public hanging is barbaric and violating Article 21 of the Constitution. It is true that the crime of which the accused have been found to be guilty is barbaric, but a barbaric crime does not have to be visited with a barbaric penalty such as public hanging.

In 1991, a Supreme Court bench again upheld the constitutionality of the death penalty in *Smt. Shashi Nayar v. Union of India and others*<sup>49</sup>, where the Court did not go into the merits of the argument against constitutionality, arguing that the law and order situation in the country has worsened and now is therefore not an opportune time to abolish the death penalty. An argument which assumes executions address such situations.

In recent years, the Supreme Court has reversed two practices that had been observed for several decades in capital cases. The first practice was not to impose a death sentence where the judges hearing the case had not reached unanimity on the question of sentence or of guilt. The second was not to impose a death sentence on a person who had previously been acquitted by a lower court. Constitutionality of Section 303 of I.P.C. incorporates punishment for murder by life convict. It contemplates, whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death. In *Mithu v. State of Punjab*<sup>50</sup>, the legality of Section 303 was examined by the Full Bench of the Supreme Court. The majority opinion was that this section violates the guarantee of equality contained in Art. 14 and also the right contained in Art. 21 of the Constitution. The section was held to have been conceived to discourage assaults by the

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<sup>48</sup>*Attorney General of India v. Lachma Devi, AIR (1992) SC 395*

<sup>49</sup>*Smt. Shashi Nayar v. Union of India and others, (1983) Cri. L.J. 811(S.C.)*

<sup>50</sup>*Mithu v. State of Punjab, (1983) 2 SCC 27*



life convicts on the prison staff but the legislatures choose a language which far exceeded its intention. It was, further held that the section proceeds on the assumption is not supported by any scientific data. The majority view was that it mainly violates Art. 21 of the Constitution. In *BhagwanBux Singh and another v. State of U.P.*<sup>51</sup>, this section has been declared unconstitutional because it is violating Arts. 14 and 21 of the Constitution of India. Now it is no longer available for conviction of any offender. A conviction under this section will be altered to one under Section 302. But for awarding death sentence under section 302 it must be established that the case is rarest of rare. If the case cannot be termed as rarest of rare, the sentence would be converted into sentence for life.

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<sup>51</sup>*BhagwanBux Singh and Anr. v. The State of U.P.*, (1977) MANU/SC/0079

## **CONCLUSION/SUGGESTIONS:**

In India Capital Punishment plays an important role in the rarest of rare cases. If we find out ratio of the capital punishment in India, very few cases in which this sentence is granted. There are so many cases in which the Supreme Court converted capital punishment into life imprisonment. These grounds may be as under-

1. It constitutes a cruel, inhuman and degrading punishment;
2. It is irrevocable;
3. It is capable of being inflicted on the innocent;
4. It does not act as a deterrent to crime;
5. It is a violation of the right to life provisions of the Universal Declaration of Human Rights and other international covenants.

Turning to the international situation, we find that the UN General Assembly has taken the official position that it is desirable to abolish the death penalty in all countries, that it should not be introduced for crimes to which it does not already apply, that the crimes to which it applies should be progressively reduced and that it should be employed only for the gravest of crimes. But a large number of UN member states including India have not respected this decision.

Many loopholes exist in the structure of the death penalty. The outcome of the case is decided by the quality of the lawyer defending the accused. Many criminals cannot afford a competent lawyer, resulting in a greater chance of that particular person being issued the death penalty, as opposed to life in prison. A fine line separates these two charges, and a defendant who can afford a competent lawyer stands less of a chance of being assigned the death penalty than one who cannot.

### **Death Penalty Should be Abolished:**

Death penalty should be abolished as there is no scientific or empirical basis to suggest that death penalty acts as a deterrent against any crime.

The execution of Nathuram Vinayak Godse for assassination of none other than the father of the nation, Mahatma Gandhi, has not acted as a deterrent against assassination of many prominent political leaders including former prime ministers Indira Gandhi and Rajiv Gandhi, former Punjab chief minister Beant Singh, MP Lalit Maken and many other prominent political leaders. The interventions of the Supreme Court against rejection of mercy petition of Devender Pal Singh Bhullar, the Guwahati high court against rejection of mercy petition of Mahendra Nath Das and the Madras high court against rejection of mercy petitions of Santhan, Murugan and Perarivalan have established that the decision of the President of India on mercy petitions is further subject to judicial review and this opportunity to appeal has been denied to Afzal Guru, Yakub Memon.

In Recent death sentence case of terrorist Afzal Guru, India must assuage the sentiments of the Afzal Guru's family members who have effectively been not informed about the impending execution. Guru was hanged out of the queue and was denied the right to appeal against the rejection of mercy petition. The state itself must not be flouting or circumvents the rules as it erodes the belief in the rule of law. In the most recent case of Yakub Memon, there was a lot of hue and cry about the arbitrariness of the Indian Judicial System. It was a black mark on the Rule of Law.

India as the land of Valmiki, Lord Buddha and Gandhi must follow its own civilisational values and take effective measures to join the countries which have abandoned retributive justice system and abolished death penalty. Mythologies of India are full of stories about criminals being reformed. Valmiki, the author of the epic Ramayana, was a highway robber known as Ratnakara until he came under the influence of Maharshi Narada to leave the paths of sin. Similarly, according to Buddhist literature, Daku Angulimala (dacoit who wears finger necklace/ garland of fingers) was a ruthless killer who was redeemed by a sincere conversion to Buddhism.

As displayed by the swelling of the stagnant pool of death row inmates, criminals are not deterred by the punishment. An evil deed is not redeemed by an evil deed of retaliation. Justice is never advanced in the taking of human life. Morality is never upheld by legalized murder. This paper suggests the abolition of death penalty as it has failed to prove its deterrence effect.

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