

CAPITAL PUNISHMENT IN INDIA IS VIOLATION OF ARTICLE 21: AN ANALYTICAL STUDY

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Death penalty or capital punishment is a legal process where a person is put to death by the state as a punishment for a crime. The judicial decree that someone be punished in this manner is a death sentence while the actual process of killing the person is an execution. Crimes that can result in a death penalty are known as capital crimes or capital offences. The term capital originates from the Latin *capitalis*, literally "regarding the head" (referring to execution by beheading).

Currently 58 Nation actively practice it, and 97 countries have abolished it (the remaining have not used it for 10 years or allow it only in exceptional circumstances such as wartime). Article 2 of the character of fundamental rights of the European Union prohibits the use of capital punishment.

Currently, Amnesty international consider most countries abolitionist. The United Nations general assembly has adopted in 2007, 2008 and 2010, non-binding resolutions calling for a global moratorium on execution, with a view to eventual abolition. Although many nations have abolished capital punishment , over 60% of the world's population live in countries where execution take place ,such as the China, India , the United States of America and Indonesia. Each of these four nations voted against the General Assembly resolutions.

Among countries around the world, almost all European and many Pacific area states (including Australia, New Zealand and Timor Lester) and Canada have abolished capital punishment. In Latin America, most states have completely abolished the use of capital punishment, while some countries, such as Brazil, allow for capital punishment only in exceptional situations, such as treason committed during wartime. The united state (the federal government and 33 of the states) Guatemala, most of the Caribbean and the majority of democracies in Asia (for example, Japan and India) and Africa (for example, Botswana and Zambia) retain it. South Africa's Constitutional court, in judgment of the case of State v. Makwanyane and another, unanimously abolished the death penalty on 6 June 1995

CAPITAL PUNISHMENT: POSITION IN INDIA

Capital punishment is a legal but rarely carried out sentence in India. Imposition of the penalty is not always followed by execution (even when it is upheld on appeal), because of the possibility of commutation to life imprisonment. In recent times there has been numerous gaps; between the hanging of on auto shanker in 1995 and Dhananjay Chatterjee in 2004, and thereafter until the execution of Ajamal Kasab in 2012 and Afzal Guru in 2013. **Execution of Yakub Memon's death sentence done on July 30th 2015.**

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As of 11 February 2015, there are 475 convicts on death row in India. States with the maximum number of prisoners on death row are Uttar Pradesh (174), Karnataka(61),Maharashtra(50) and Bihar (30).

LAW

Crimes punishable by death in India

Section under IPC or other law	Nature of crime
120B of IPC	Being a party to a criminal conspiracy to commit a capital offense
121 of IPC	Waging, or attempting to wage war, or abetting waging of war, against the Government of India
132 of IPC	Abetting a <u>mutiny</u> in the armed forces (if a mutiny occurs as a result), engaging in mutiny
194 of IPC	Giving or fabricating false evidence with intent to procure a conviction of a capital offense
302, 303 of IPC	Murder
305 of IPC	Abetting the suicide of a minor, mentally ill person, or intoxicated person
Part II Section 4 of Prevention of Sati Act	Aiding or abetting an act of <u>Sati</u>
364A of IPC	Kidnapping, in the course of which the victim was held for ransom or other coercive purposes.
31A of the Narcotic Drugs and Psychotropic Substances Act	Drug trafficking in cases of repeat offenses
396 of IPC	Banditry with murder - in cases where a group of five or more individuals commit banditry and one of them commits murder in the course of that crime, all members of the group are liable for the death penalty.
376A of IPC and Criminal Law (Amendment) Act, 2013	<u>Rape</u> if the perpetrator inflicts injuries that result in the victim's death or incapacitation in a <u>persistent vegetative state</u> , or is a repeat offender. ^[13]
Bombay Prohibition (Gujarat Amendment) Bill, 2009	In <u>Gujarat</u> only - Manufacture and sale of poisoned alcohol which results in death(s). ^{[14][15]}

These Provisions also help to judge to individuals sentencing justice. Thus a heavy duty is cast by the Indian Penal Code on the Judge, of choosing between death and imprisonment of life. The criminal is now expected to be discharged in a highly responsible manner by complying with the

provisions contained in section 354(3) and 235(2) of the Code of Criminal Procedure, 1973 so that the principle of natural justice and fair play its way in The spheres of sentencing. The President and the governor of state grant pardon to be condemned offenders in appropriate cases.

The Supreme Court of India ruled in 1983 that the death penalty should be imposed only in "the rarest of rare cases. "In 1989, the narcotics Drugs and Psychotic substances (NDPS) Act was passed which applied mandatory death penalty for a second offence of "large scale narcotics trafficking". On 16 June 2011, the Bombay High Court ruled that section 31A of the NDPS Act, which imposed mandatory sentence, violated Article 21(Right to Life) of the constitution and that a second conviction need not be a death penalty, giving the judge discretion to decide about awarding capital punishment. In recent years, the death penalty has been imposed under new anti-terrorism legislation for people convicted of terrorist activities.

In December 2007, India voted against a United Nations general assembly resolution calling for a moratorium on the death penalty. In November 2012, India again upheld its stance on capital punishment by voting against the UN General Assembly draft resolution seeking to ban death penalty.

Method

In India the death penalty is carried out by hanging. An attempt to Challenge this method of execution failed in the Supreme Court, which stated in its 1983 judgment that hanging did not involve torture, barbarity, humiliation Or degradation. Briefly the rules relating to administration of death penalty in India maybe analyzed as under:

1. Death Penalty is used very Sparingly

The death penalty is inflicted very sparingly only in cases of murder and the highest offences against the state. Offences punishable with death. Under the Indian Penal system death sentence is an alternative punishment for eight types of offences provided under section 121,132,194,302,305,307,396,and 364-A of the penal code. *As section 303* of the Indian penal code has been struck down by supreme Court being violative of Articles 14 and 21 of the constitution vide *Mithu v State of Punjab Air 1983 SC 473*.

2. Safeguards in Awarding Death Penalty

The whole sentencing process in capital cases is replete with safeguards for the accused viz.

(a) Death Penalty now is an Exceptional punishment

Death penalty has becomes and exceptional punishment for all the eight offences which are punishable in the alternative with 'death' because Section354(3) of the code of Criminal Procedure 1973 now requires the court to assign "special reasons" for such sentence. Accordingly death sentence is rarely resorted to only in extremely heinous cases e.g. pre-planned calculated coldblooded

murder of a murder diabolically conceived and cruelly executed."¹

(b) Accused's Right of pre-sentence Hearing

Section 215(2) of the code of Criminal procedure 1973 is a new advancement sentence hearing in all cases where death penalty is prescribed as an alternative punishment.

¹ AIR 1983 SC PP 466-748 AND AIR 1985 S.C. P48.

Under this provision the accused now in such cases can produce evidence or material before the judge relating to the various factors bearing on the question of sentence or which have a bearing on his (accused) choice of sentence. For example the accused can make his submission on point of sentence that he is the only bread-earner in his. Or he can plead extreme you than his part for not a wading death sentence.

(c) Individualization of Sentence

Moreover Sections 235(2) and 354(3) of the Code of Criminal procedure 1973, jointly require the court to give due consideration to the circumstances connected with the crime as well as to the circumstances of the criminal in fixing the degree of offences.²

(d) Confirmation of Sentence by High Court

Every provision relating to submission of death sentence for confirmation in the code of Criminal procedure 1973 (Section 366-370) seek to ensure that the entire evidence material bearing on the innocence or guilt of the accused and the question of sentence must be scrutinized by the High Court

with utmost care and caution.

Under these provisions the High Court has complete powers to direct further enquiry to be made or additional evidence to be taken to confirm the sentence of death or pass any other sentence warranted by law or to annul or alter the sentence of death or pass any other sentence warranted by law or to annul or alter the conviction or order a new trial or acquit the accused.

(e) Appeal to Supreme Court

Section 379 of the code of criminal procedure, 1973 and Article 136 of the Indian Constitution stand to safeguard the accused by way of appeal to the Supreme Court when he is sentenced to death by the High Court by reversing his acquittal in appeal or when his sentence of death awarded by the sessions judge is confirmed by the High Court.

(f) Pardon, Commutation of Sentence etc.

The president the Governor the Central Government and appropriate estate Government have power to grant pardons or to commute the sentence of death under arts. 72. and 161 of the Constitution and certain relevant provisions of the code of Criminal Procedure 1973.

The president of India is authorised to grant pardon or to commute the sentence of death under Article 72 of the Constitution. The Governors also have concurrent powers to commute the death sentence under Article 161. Similarly the appropriate State Government and the Central Government have

powers to commute the death sentence respectively under section 433 and 434 of the code of Criminal procedure, 1973.d.) P. 216

(g) Legality of capital punishment- Though capital punishment has to be awarded in rarest of the rare cases," yet the Supreme Court held in no uncertain terms that capital punishment is legal and does not violate Arts. 14, 19 and 21 of the Constitution. It has further been held that the mode

²Bechan Singh Vs. state of Punjab 1980

of executing death sentence by hanging as in s. 354(5) of the Cr. P. Code is not violative of Art. 21 of the Constitution as it is not a cruel, barbarous or degrading method. "Men's dearest possession is life, and since it is given to him to live but once, he must so live as not to be scared with the shame of a cowardly and trivial past, so live as not to be tortured for years without purpose, that dying he can say, all my life and my strength was given to the first cause in the world the liberation of mankind." When the constitutional validity of death penalty was questioned on the ground that it was violative of fundamental freedoms guaranteed under Art. 19 of the constitution in *Jag Mohan Singh v. State of U.P.*³ and *Rajendra Prasad. State of U.P.*⁴ the apex Court held that death penalty in itself is not violative as the right to live is taken away in public interest. In the post-*Maneka Gandhi* the Supreme Court while holding the death penalty to be constitutionally valid in *Bachan Singh's*⁵ case observed that it should be awarded only in the rarest of rare cases the rarest of the rare cases doctrine leaving much to the judicial discretion has caused 'inner conflict' in the minds of the judges. Of course, the Supreme Court has laid down guidelines to identify the rarest of rare cases in *Machi Singh's* delivered on 21st July 1983.³⁶ A five-point formula was given to identify the rarest of the rare cases.

THE FIVE FACTORS ARE :-

Manner-- When murder is committed with extreme brutality (Burning the victim alive, or when the body is cut into pieces).

Motive-- When the motive reveals total depravity and meanness (the crime being committed for material gain).

Anti-Social Nature of Crime-- when a murder is socially abhorrent (Bride burning or killing of a Harijan).

Magnitude of the Crime-- When the crime is enormous (multiple murders); and

Personality of the victim-- When the victim is an innocent child, a help less woman, or a reputed public figure (political murder).

But Now from some year's Realised that *Vatheeswarn* was beset with dangerous consequences the Supreme Court. 'Over Ruled' in *Shersingh Vs. State of Punjab*. "In this Case Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed. But no hard fast rule can be laid down that delay exceeding two years quashes the sentence and converts it into sentence of life imprisonment."

³ AIR 1973 S.C. 947

⁴ AIR 1979 S.C. 916

⁵ AIR 1980 S.C. 898

ARTICLE -21 AND CAPITAL PUNISHMENT

Right to life and personal liberty is the most cherished and pivotal fundamental human rights around which other rights of the individual revolve and therefore, the study assumes great significance. The study of right to life is indeed a study of the Supreme Court as a guardian of fundamental human rights. It guarantees right to life and personal liberty to citizens and aliens and is enforceable against the state. Article absolutely prohibits deprivation of a person's life; that capital punishment did not serve any social purpose and the barbaric penalty of death should not be awarded to any person as it had no deterrent effect; that the penalty of death sentence had a dehumanizing effect on the close relations of the victims and it deprived them of their fundamental rights under Article 21 of the Constitution, to a meaningful life; that the execution of capital punishment by hanging was barbaric and dehumanizing and it should be substituted by some other decent and less painful method in executing the sentence. According to death penalty opponents, the wrongly convicted are often "outsiders": racial minorities, people with mild mental retardation, the mentally ill, or nonconformists. The death penalty has often been denounced for being unfairly applied to minorities; compounding this problem, critics point out, are the recently imposed restrictions on the death-penalty appeals process. In an effort to keep condemned prisoners from using repeated appeals simply to postpone their executions, Opponents of capital punishment, furthermore, contend that the unfair and arbitrary manner in which the death penalty is administered warrants its abolition. Supporters of the death penalty, on the other hand, are often skeptical about the innocence of death-row inmates whose convictions have been overturned. They are concerned that exonerations of the "wrongly convicted" may be based on irrelevant legal technicalities rather than solid evidence that proves innocence. Other defenders of capital punishment maintain that today's improved investigative techniques, such as DNA testing, are making it less likely that people will be wrongly executed. similar exonerations indicate that the criminal justice system actually works quite effectively. Moreover, these advocates contend, sentences for murderer toward leniency rather than the other way around. Although public support for capital punishment remains strong, concern about the possibility of wrongful executions is reflected in the writings of criminologists, lawmakers, and theologians. The great ancient law-giver Manu also placed the element of as fear asan essential attribute of judicial phenomenon. According to him, In order to refrain people from sinful murders, death penalty was necessary and in absence of this other as the fish do in water, the stronger eating up the water. Today there are a very few crimes for which death penalty is imposed. Four characteristic of capital punishment may be pointed out in our country:

- (1) Capital punishment is given only for (selected) seven crimes.
- (2) Hanging in the presence of public is totally abolished
- (3) No painful methods are used in executing death sentence.
- (4) Capital punishment is awarded only by a governing authority.

Article 21 of the Indian Constitution provides that "no person shall be deprived of his life and persons liberty except according to the procedure established by law." On the basis of this article, the constitutional validity of capital occasions, if the procedure adopted is "just fair, and reasonable" and is not "fanciful, oppressive, or arbitrary". There was a proposal in mid-1999 from some sources that capital punishment should be awarded to rapists. Which has been successfully made as latest amendment in criminal law in 2013. The new interpretation of article 21 in Maneka Gandhi's case has unheard a new era of expansion of the horizons of right to life

and personal liberty. The wide dimension given to this right now covers various aspects which the founding fathers of the Constitution might or might not have visualized.

'Right to life' and 'personal liberty' is the modern name for what have been traditionally known as 'natural right.'

In Hussainara Khatoon cases, the Supreme Court not only advanced the prison reform in favour of under-trials but also declared the right to speedy trial as an essential ingredient of Article 21.

In Sunil Batra v Dehli Administration, the Supreme Court took note of Article 10 of the ICCPR which state as that all persons of their liberty shall be treated with humanity and with respect for the inherent dignity of the human persons.

The court has distinguished section 302 of the penal code from section 303 and has pointed out as to how section 302 is constitutionally valid, where as section 303 is not as declared in case of Mitthu Singh.

Thus a heavy duty is cast by the Indian penal code on the judge, between death and imprisonment of life. The criminal is now expected to be discharged in a highly responsible manner by complying with the provisions contained in section 354(3) and 235(2) of the code of criminal procedure, 1973 so that the principal of natural justice and fair play its way in the sphere of sentencing. The president and the governor of state grant pardon to be condemned offenders in appropriate cases.

CONCLUSION

In the Indian context, sentencing, by and large, depends on the judicial discretion within the legal limits of penal provisions of the Indian Penal Code and other statutory enactments. However, setting up of training institutes for new entrants in judicial service and refresher courses⁶ for the working .Judges may equip them with the necessary know-how about the techniques of judicial sentencing which may go a long way in reasserting their role as dispensers of even-handed justice.

The magistracy, while awarding the sentence must bear in mind that grading of various offences in the Penal Code is based on their gravity, and the gravity of an offence is generally assessed in terms of social danger, social, disapprobation ; alarm it causes in the society and depravity of the offender. Its for this reason that quite often similar offence committed by two different persons is looked at differently in the matter of sentencing. The criminal act, which we call crime, being related to social behaviour, there cannot be any exact measuring rod to assess its intensity and magnitude and, therefore, any mathematical accuracy of punishment is a myth. It is for this reason that punishment has to be awarded within the broad parameters set by the penal court, its exact quantum being left to the judicial discretion of the sentencing authority. Death penalty in India is in no manner violation of right to life s capital punishment is awarded only in rarest to rare cases only. Indian judiciary has always been keen while awarding death penalty that not even a single innocent be punished and all measures are taken to follow the principles of natural justice. About 26 mercy petitions are pending before the president, some of them from 1992. These include those of Khalistan Liberation Force Bhai Davinder Singh Bhullar

⁶ Sentencing Council are also setup in USA to discuss the problem of sentencing and adopting a uniform policy on judicial sentencing

who was not convicted of any crime, the cases of slain forest brigand Veerappan's four associates—Simon, Gnanprakasham, MeesekarMadaiah and Bilvendran—for killing 21 policemen in 1993; and one Praveen Kumar for killing four members of his family in Mangalore in 1994. In Nilabati Behera v State of Orissa⁷ while justifying its award of compensation for infringement of the right to life, the Court referred to the ICCPR, which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right. In Prem Shankar Shukla v Delhi Administration⁸ while dealing with the handcuffing of prisoners and other humiliations inflicted on persons in custody, the Supreme Court of India observed: After all, even while discussing the relevant statutory provisions and constitutional requirements, court and counsel must never forget the core principle found in Article 5 of the Universal Declaration of Human Rights, 1948: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

In Hussainara Khatoon cases,⁹ the Supreme Court not only advanced the prison reform in favour of under-trials but also declared the right to speedy trial as an essential ingredient of Article 21. Reaffirming as well as paving way for the implementation of Article 14, clause (3) (c) of the International Covenant on Civil and Political Rights[69] which lays down that everyone is entitled "to be tried without delay" and Article 16 of the Draft Principles one quality in the Administration of Justice which provides that everyone shall be guaranteed the right to prompt and speedy hearing the Court directed the release of all those under trials against whom the police had not filed charge sheets within the prescribed period of limitation. Such persons were directed to be released forthwith as any further detention of such under trials would be according to the court, a clear violation of Article 21. In Sunil Batra v Delhi Administration,¹⁰ the Supreme Court took note of Article 10 of the ICCPR which states as that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. The Court then opined that The State shall take steps to keep up to the Standard Minimum Rules for Treatment of Prisoners recommended by the United Nations, especially those relating to work and wages, treatment with dignity, community contact and correctional strategies. In this latter aspect, the observations we have made of holistic development of personality shall be kept in view. The Court further emphasized that the Declaration of the Protection of All Persons from Torture and other Cruel, Inhuman or Degrading Treatment or Punishment adopted by U.N. General Assembly has relevance to our decision.

Thus, the Court has interpreted article 21 with the widest possible amplitude so as to include within its ambit basic human rights guaranteed by international human rights instruments though that has not been incorporated in national legislation.

It is important to demonstrate how judiciary dramatically changed the traditional interpretation of right to life to a modern and flexible interpretation. It was not until 1978 that the Supreme Court breathed substantive life into Article 21 by subjecting state action interfering

⁷ AIR 1993 SC 196

⁸ AIR 1980 SC 1535

⁹ AIR 1979 SC 1369

¹⁰ AIR 1980 SC 1579

with a person's right to life to attest of reasonableness; requiring not only that the procedures be authorized by law, but that they are 'right, just, fair and reasonable.' This transformation paved the way for a substantive re-interpretation of constitutional and legal guarantees and positive judicial intervention. In the case of *Maneka Gandhi v Union of India*,¹¹ the petitioner's passport was impounded 'in public interest' by an order dated July 2, 1977. The Government of India declined 'in the interests of the general public' to furnish the reasons for its decision. Thereupon, the petitioner filed a writ petition under Article 32 of the Constitution to challenge the order. The petitioner contended before the Court that the order of the Government of India does not prescribe 'procedure' within the meaning of Article 21 and if it is held that procedure has been prescribed, it is unfair, unjust and unreasonable. The Supreme Court held that the order passed against the petitioner was neither fair nor proper according to the procedure established by law. The decision given by the Supreme Court in this case is historic and landmark because it is the first of its kind which enhanced the scope of right to life. Specifically, *Maneka Gandhi's* case recognized an implied substantive component to the term 'liberty' in article 21 that provides broad protection of individual freedom against unreasonable or arbitrary curtailment. This paved the way for a dramatic increase in constitutional protection of human rights in India under the mantle of the Public Interest Litigation movement (PIL). As discussed above the ghost of *Gopalan*,¹² was finally laid in *Maneka Gandhi's* case. A Constitutional Bench of Seven judges (overruling *Gopalan*) read into Article 21 a new **History**

Between 1975 and 1991, about 40 people were executed. The number of people executed in India since independence in 1947 is a matter of dispute¹³; official government statistics claim that only 52 people had been executed since independence. At least 100 people in 2007, 40 in 2006, 77 in 2005, 23 in 2002, and 33 in 2001 were sentenced to death (but not executed), according to Amnesty International figures. No official statistics of those sentenced to death have been released.

On 27 April 1995, *Auto Shankar* was hanged in Salem, Tamil Nadu. About 26 mercy petitions are pending before the president, some of them from 1992. These include those of *Khalistan Liberation Force Bhai Davinder Singh Bhullar* who was not convicted of any crime, the cases of slain forest brigand *Veerappan's* four associates—*Simon*, *Gnanprakasham*, *Meesekar Madaiah* and *Bilvendran*—for killing 21 policemen in 1993; and one *Praveen Kumar* for killing four members of his family in Mangalore in 1994. The Capital Punished is most Horrible it is the murder of human being under the authority of Law. death penalty is permissible when Reformation becomes impossible science the infliction of death penalty is the matter for judicial discretions. Court is the highest judicial institution of our nation and thus naturally has significant Role to play in our criminal justice system. The courts are the most significant component of the criminal justice system. Independence and dignity of courts thus become an attribute which is indispensable, to ensure proper functioning of them. Judges must interpret in the light of changing social economic and political conditions.

¹¹AIR 1978 SC 597

¹² A.K. Gopalan vs The State Of Madras, AIR 1950 SC 27

Prior to 1955, judicial discretion in awarding a lesser penalty instead of death sentence was circumscribed by requiring the Judge to record his reasons for awarding a lesser punishment. Judge had the discretion to commute the sentence of death in life imprisonment but when imposition of death sentence necessary, judge had to state Reasons to why a Lesser Penalty would not use, thus the amendment clearly reflected the shift in trend toward death penalty. The court has distinguished Section 302 of the Penal Code from Section 303 and has pointed out as to how Section 302 is constitutionally valid, whereas Section 303 is not. Section 302 is valid for three main reasons:

1. Death sentence provided for in Section 302 is an alternative to the sentence of life imprisonment, whereas under Section 303 it is mandatory.
2. Under Section 354(3), Cr. P.C. special reasons are to be stated, if the normal rule is departed and death sentence is to be imposed. This is possible only in case of Section 302.
3. Under Section 235(2), Cr. P.C., the accused is entitled to be heard on the question of sentence. This applies to Section 302 but has no application to Section 303 .

The law prescribed some semblance of procedure for depriving a person of his life or personal liberty; the procedure prescribed by the law had to be reasonable, fair and just; if not, the law would be held void as violating the guarantee of Article 21. This fresh look at Article 21 has helped the apex court in its new role as the institutional ombudsman of human rights in India.