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## Capital Punishment in India: Constitutional validity of Capital Punishment

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*Capital punishment is the most severe form of punishment given to an offender. This paper will outline the present situation of capital punishment in India. The first segment starts with a brief introduction of Capital punishment, The next section examines the historical background of Capital Punishment in India along with the recent death penalties and method of execution of the death penalty. Then the origin of the 'Rarest of rare' doctrine is analyzed with leading case laws. Then, using case laws, this paper clarifies whether Capital punishment is constitutionally valid or not and how to Right to life can be taken away by the state in accordance with the procedure established by law if the procedure is due process. Finally, an attempt was made to address the fact that a mandatory death sentence for a particular crime is unconstitutional but if it is given in the most heinous crime it is constitutional. Eventually, it was concluded that Capital Punishment is a controversial topic but emphasizing the fact that it is awarded on the basis of facts and nature of the crime then it is reasonable and constitutionally valid.*

**Keywords:** *capital punishment, rarest of rare, constitutionally valid, right to life, due process, heinous.*

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## INTRODUCTION

Capital punishment is a legal penalty also known as the death penalty is the execution of a culprit sentenced to death by a court of law as a punishment for his offence. Capital punishment is an essential part of the Indian criminal justice system. Although, its existence is regarded as immoral by many people but according to me inflicting capital punishment on wrongdoers especially in the case of Rarest of rare crimes acts as a deterrent to potential wrongdoers. It is also the most severe and highest degree of punishment and is awarded for the most heinous crimes against humanity. Those crimes which are punishable by death are referred to as capital crimes. It mainly includes aggravated murders, mass murders, aggravated cases of Rape, terrorism, hijacking, crimes against humanity along with crimes against the state such as sedition, conspiracy against the state, piracy, etc; but it is not necessary that death penalty should be given in all the above-mentioned crimes. Offences are punished by death only when they meet the 'Rarest of rare doctrine'<sup>1</sup>.

## HISTORICAL BACKGROUND

During the British era, there have been innumerable cases where Indians were sentenced to death after a trial or even before it. Indians hardly had access to justice. Also during the time of empires or kingdoms, the king of a particular kingdom had ultimate authority and his statements and orders were adopted as the source of justice. Thus, he had the power to convict any man to death even on a notion no matter if he is guilty or not. The inception of independence brought a new era in the judicial system of India. After independence, India became a democratic state, and the process of imposing capital punishment too changed significantly. Now, Capital punishments for specific offences are provided in accordance with the Indian Penal Code, 1860 along with provisions enshrined in the Constitution of India.

Death penalties data differ from one source to another. According to a study by National Law University in Delhi, a total number of 759 people have been convicted of capital punishment in independent India till date. The last death sentence executed by the justice system in India

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<sup>1</sup> *Bacchan Singh v State of Punjab* AIR 1980 SC 898

took place on 20 March 2020, where four criminals from the 2012 Delhi gang rape and murder popularly known as the 'Nirbhaya'<sup>2</sup> case were executed at the Tihar Jail in Delhi. Prior to the hanging of Nirbhaya convicts, Terrorist Yakub Memon<sup>3</sup> who was convicted in the Mumbai blasts of 1993 was executed on 30 July 2015. Prior to the hanging of Yakub Memon, on 8 February 2013 Muhammad Afzal<sup>4</sup> who was convicted of plotting the 2001 bomb attack on Parliament was hanged. In November 2012, Mohammad Ajmal Amir Qasab<sup>5</sup> who was sentenced in the Mumbai Terror attack of 2008 was hanged. Prior to Qasab, Dhananjay Chatterjee was hanged in 2004 convicted for the case of rape and murder of a teen girl.

### **METHODS OF EXECUTING CAPITAL PUNISHMENT**

Presently, all the ancient methods for executing the death penalty have been abolished and new methods have been adopted to reduce physical pain experienced by the offender. The new methods adopted for the execution of capital punishment are as follows:

- Hanging
- Shooting
- Gas Chamber
- Lethal Injection
- Falling from an unknown height
- Stoning in head
- Shooting by fire squad
- Beheading
- Electrocutation

But mainly hanging and shooting in the head are considered as the most suitable modes for the execution of the death penalty. In India, Most of capital punishment is awarded by hanging on ropes.

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<sup>2</sup> *Mukesh & Anr v State for NCT of Delhi & Ors* (2017) 6 SCC 1

<sup>3</sup> *Yakub Abdul Razak Memon v State of Maharashtra Writ Petition (Cri) No 129 SC*, 2015

<sup>4</sup> *State v Mohd Afzal & Ors* 2003 (71) DRJ 178

<sup>5</sup> *Md Ajmal Md Amir Kasab @ Abu v State of Maharashtra* (2012) 9 SCC 1

## ORIGIN OF THE RAREST OF RARE DOCTRINE

The Doctrine of Rarest of rare came up on account of the landmark judgement in *Bacchan Singh v State of Punjab*<sup>6</sup>, which led to the inception of 'Rarest of Rare Doctrine' along with prescribing the punishment of death penalty in such cases. In this particular case, By a majority of 4:1, the defendability and constitutionality of capital punishment were upheld by the Supreme Court but subsequently, a rule was also set out that the death penalty must be imposed only in Rarest of rare cases. It was also laid down that life imprisonment is a rule whereas capital punishment is an exception but the Supreme court didn't defined or limited the scope of the 'Rarest of rare' which they used in the judgement.

Later on, In the case of *Machhi Singh V. State of Punjab*<sup>7</sup>, the SC attempted to set out rules for not only classifying whether the offence falls into the category of rarest of rare or not but also specified the mitigating circumstances which should be taken into consideration while determining such serious issues. Within the case of *Mithu Singh V. State of Punjab*<sup>8</sup>, Section 303 of IPC which provides for a compulsory death penalty for an individual who commits murder while he is serving for life imprisonment was held to be unconstitutional. Finally, in the year 2008, the SC defined and governed what might comprise a rarest of rare case in the case of *Prajeet Kumar Singh V, State of Bihar*<sup>9</sup>.

Talking about the rarest of rare doctrine, there are some landmark judgements in which the courts have applied this doctrine for coming to a conclusion. In *Shankar V. State of Tamil Nadu*<sup>10</sup>, it was held that since sometimes it may not be possible to eradicate the crime itself, criminals cannot be awarded the death penalty in such cases. Within the case of *T.V. Vatheeswaran V. State of Tamil Nadu*<sup>11</sup>, The SC held that there should be a delay of more than two years in execution of a death penalty should be taken into consideration which is

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<sup>6</sup> *Bacchan Singh* (n 1)

<sup>7</sup> *Machhi Singh v State of Punjab* 1983 SCR (3) 413

<sup>8</sup> *Mithu Singh v State of Punjab* 1988 (3) SCC 607

<sup>9</sup> *Prajeet Kumar Singh v State of Bihar* Appeal (Crl) 1621 of 2007 (SC)

<sup>10</sup> *Shankar v State of Tamil Nadu* (1994) 4 SCC 478 (India)

<sup>11</sup> *TV Vatheeswaran v State of Tamil Nadu* AIR1983 SC 361 (India)

sufficient enough for the convicted person to invoke Article 21 and request the quashing of the death penalty<sup>12</sup>.

### **IS CAPITAL PUNISHMENT CONSTITUTIONAL?**

As we all know that Article 21 of the Constitution provides for the Fundamental right of life and personal liberty. This article guarantees the right to life and personal liberty to all but is it absolute? The answer is No because although everyone has a right to live with human dignity but the state may take away or curtail even this right of life in the name of law and order if it deems fit. But as held in *Maneka Gandhi V. Union of India*<sup>13</sup>, the process must be “Due procedure” because it takes away a human being’s sacred life and it must be fair, reasonable, and free of any biasness. It means that if there is a fair and valid procedure then the state by framing a law can curtail or take away a person's right to life. But not all crimes are punished by the death penalty instead it is reserved only for the most heinous offences. India is one of the countries which has neither abolished the death penalty nor created any specific laws for its legality. It was observed that the judges makes the choice between the death penalty and life imprisonment on the basis of facts and nature of crime on record. Our Indian Justice system is based on the principle of ‘Innocent until proven guilty. Whenever it comes to the death penalty, it draws not only the attention of the public and media houses but also international moguls and organisations.

There are several provisions in the Indian Penal code that prescribe for the death penalty to an offender. Mostly those provisions which provide for both life imprisonment and the death penalty are challenged on the ground that offenders who may have committed the same offence may be treated unequally by the court by giving different punishments which will be a violation of Article 14 of the Indian Constitution. In some cases, offenders are punished with the death penalty while some are punished with life imprisonment for the same offences.

The constitutional validity of capital punishment had been challenged from time to time. The first challenge to the death penalty came in 1973 in the case of *Jagmohan Singh V. State of*

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<sup>12</sup> *KP Mohammad v State of Kerela* (1985) 1 SCC (Cri) 142 (India)

<sup>13</sup> *Maneka Gandhi v Union of India* 1978 SCR (2) 621

Uttar Pradesh<sup>14</sup>, Constitutional validity of Capital punishment is upheld by a unanimous decision of a five-judge bench of the Supreme Court. It was also held that the death penalty doesn't violate Articles 14,19 and 21 and the choice between the death penalty and life imprisonment had been made taking into consideration all the facts and nature of crime brought on record during a trial.

It was challenged again in *Deena V. Union of India*<sup>15</sup> on the ground that hanging by rope is inhuman, cruel, and barbaric and therefore violates Article 21. The SC held that hanging as a method of execution as prescribed by Sec.354(3) of I.P.C is fair and reasonable within the ambit of Article 21. Thus, it is constitutional. In the well-known case of *Ajmal Kasab*<sup>16</sup> who has convicted 80 offences which includes waging war on India, Murder, possessing explosives, and many other charges. He was sentenced to death by the Bombay High Court stating that the only punishment suitable for killing 166 people in the 26/11 attacks in Bombay is a sentence to death. The Supreme Court also upheld the death penalty.

Justice Sarkaria in his majority judgement said that 'I fail to see why so much importance is given to life of someone who had been found guilty of a heinous offence when the interests of the society demand that death penalty should be awarded to him. In the case of *Sher Singh v State of Punjab*<sup>17</sup>, It was held by the court that capital punishment is constitutionally valid within the constraint of rarest of rare doctrine in *Bacchan Singh*<sup>18</sup>. Likewise in *Triveniben v State of Gujarat*<sup>19</sup>, It was asserted by the court that the constitution doesn't prohibit death sentences.

## CONCLUSION

Capital Punishment is a controversial topic some may favour it some may oppose it. Most countries have terminated capital punishment saying that it is brutal and barbaric in nature

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<sup>14</sup> *Jagmohan Singh v State of Uttar Pradesh* AIR 1973 SC 947

<sup>15</sup> *Deena v Union of India* (1983) 4 SCC 645

<sup>16</sup> *Md Ajmal Md Amir Kasab @ Abu* (n 5)

<sup>17</sup> *Sher Singh v State of Punjab* AIR 1983 SC 365

<sup>18</sup> *Bacchan Singh* (n 1)

<sup>19</sup> *Triveniben v State of Gujarat* AIR 1989 SC 142

and violates the right to life and liberty given to the citizens of the countries. However, according to me, it would be right to punish convicts of the most heinous crimes with the death penalty. No matter whether it is brutal in nature, it is effective in creating a deterrent for future offenders and thus reducing criminal offences to some extent. Talking about the fundamental right to life, it is not absolute and it can be taken away by a procedure established by law. Our Constitution provides sufficient defences to the offender such as the right to treatment, right to legal aid, etc. and the right of life can be curtailed or taken away from a convicted felon charged for most heinous crimes against individual or public at large.

Therefore, in my opinion, capital punishment or the death penalty is reasonable and constitutionally valid provided it is not a mandatory punishment but given in rarest of rare crimes or the most heinous crimes. Furthermore, an individual who neither values the life of other persons nor values the integrity of his nation should not be treated with sympathy. Even though it is hard to classify the crimes whether it deserve capital punishment or not. So, the punishment should be based on the facts and nature of the crime. Whenever any court prescribes a death sentence, it provides a specific reason for giving such punishment relating to the special facts and nature of the case.