



# Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820  
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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## Capital Punishment in India and its Constitutional validity

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*Received* 22 March 2022; *Accepted* 06 April 2022; *Published* 12 April 2022

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*Capital Punishment or the death penalty is a kind of punishment that is awarded for offenses that are considered as rarest of rare cases. This punishment involves crimes or offenses like murder, rape with murder, and those which are heinous and traumatizing to society at large. Capital punishment is awarded when the crime committed is so serious that it has the tendency to terrorize society as a whole. Capital punishment or the death penalty is awarded when there is an intention on part of the criminal to commit the crime. Under the Indian penal code capital punishment is awarded for –the abetment of mutiny, if the mutiny is committed as a result of such abetment (Section 132), murder (Section 302), murder by life convict (Section 303), attempt to murder by life convict (Section 307), kidnapping for ransom (Section 364-A), Dacoity with murder (Section 396), criminal conspiracy (Section 120B). This article specifically focuses on capital punishment, its evolution, related case studies, and its constitutional validity in India.*

**Keywords:** *capital punishment, death penalty, constitutional validity, punishment.*

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### INTRODUCTION

Crimes are of various kinds and every kind or type of crime is a threat to humanity. There are certain crimes that are such heinous and grievous that they are considered as rarest of rare crimes. The criminals committing such crimes are awarded capital punishment or the death penalty as a way of setting an example of the consequences of such a commission. The concept

of capital punishment is based on the 'Retributive Theory of Punishment' according to which an offender is required to suffer when the offender breaks the law which will make the response to the crime equal to the offense. The main purpose of this theory is to punish the offender for committing a crime, breaking the laws of the land, and threatening society. Capital punishment is awarded to create a deterrent effect in society to prevent people from doing something by making them afraid of the consequences. Capital punishment in India is awarded in accordance with the laws which provide for awarding the death sentence for the commission of crimes. In India, such punishments are mentioned under the Indian Penal Code. In India capital punishment is a legal punishment and is carried out by hanging the offender. One of the most recent cases where the death penalty or capital punishment was awarded is the case of Nirbhaya where the four convicts were awarded the penalty on 20<sup>th</sup> March 2020<sup>1</sup>.

## EVOLUTION OF CAPITAL PUNISHMENT IN INDIA

Capital Punishment was prevalent in India even before the Independence. India retained several laws during Independence that was made by the British colonial government included -the Code of Criminal Procedure, 1898, and the Indian Penal Code, 1860. "In the CrPc, 1898 death was the only punishment for murder and required the concerned judges to give reasons in their judgment if they wanted to award life imprisonment instead". The Indian Penal Code of 1861 which was retained by India during Independence also provides for the death penalty for murder.<sup>2</sup> During the drafting of the Indian Constitution, several members of the Constituent Assembly expressed the idea of abolishing the death penalty. But, no such provision was incorporated in the Constitution of India which proves that the death penalty has always been considered as a punishment that is required to prevail, for its very existence would prevent people from committing offences where the death penalty or capital punishment could be awarded. "After Independence, private members bills were introduced

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

<sup>2</sup> *Khushi Agrawal, 'All you need to know about capital punishment in India'* (Ipleaders, 27 May 2019)

<<https://blog.iplayers.in/capital-punishment-in-india/>> accessed 18 March 2022

to abolish the death penalty in both Lok Sabha and Rajya Sabha, but none of them were adopted”<sup>3</sup>.

Another way in which the Criminal Law with respect to capital punishment was established in India was through two major legacies of the Benthamite Codification period of 19<sup>th</sup>-century British rule, i.e., IPC, 1860 and CrPc, 1898. “Around ten offences under the IPC prescribe capital punishment and the same so far remains un-amended”<sup>4</sup>.

Some of the cases where the offenders were sentenced to the death penalty are –

- Rajendra Prasad v State of U.P.<sup>5</sup>, February 1979
- Bachan Singh v the State of Punjab<sup>6</sup>, May 1980
- Mithu v State of Punjab<sup>7</sup>, April 1983
- ChannulVerma v State of Chhattisgarh<sup>8</sup>, November, 2018
- Vikram Singh &Anr. v Union of India<sup>9</sup>, 2020
- Mukesh&Anr. v State for NCT of Delhi and Ors<sup>10</sup>, May 2017

## OFFENCES PUNISHABLE WITH CAPITAL PUNISHMENT UNDER THE INDIAN PENAL CODE

- Criminal Conspiracy (Section 120 B)<sup>11</sup>.
- Waging war against the Government of India (Section 121)<sup>12</sup>.
- Abetment of Mutiny, if the mutiny is committed as a result of such abetment (Section 132)<sup>13</sup>.

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<sup>3</sup> *Ibid*

<sup>4</sup> Chaitanya Shah, ‘Capital Punishment in Indian Legal History’ (2020) 6 (4) *International Journal of Legal Developments and Allied Issues*, 111

<sup>5</sup> *Rajendra Prasad v State of U.P.* (1979), AIR 916

<sup>6</sup> *Bachan Singh v State of Punjab* AIR 1980 SC 898

<sup>7</sup> *Mithu v State of Punjab* (1983), AIR 473

<sup>8</sup> *Channu Lal Verma v State of Chhattisgarh* (2018)

<sup>9</sup> *Vikram Singh & Anr. v Union of India* (2015)

<sup>10</sup> *Mukesh & Anr.* (n 1)

<sup>11</sup> *Indian Penal Code, 1860, s 120B*

<sup>12</sup> *Indian Penal Code, 1860, s 121*

<sup>13</sup> *Indian Penal Code, 1860, s 132*

- Giving or fabricating false evidence with intent to procure conviction of capital offence (Section 194)<sup>14</sup>.
- Threatening any person to give false evidence (Section 195 – A)<sup>15</sup>.
- Murder (Section 302)<sup>16</sup>.
- Attempt to murder by Life Convicts (Section 307)<sup>17</sup>.
- Kidnapping for ransom (Section 364 – A)<sup>18</sup>.
- Dacoity with murder (Section 396)<sup>19</sup>.

## CONSTITUTIONAL VALIDITY OF CAPITAL PUNISHMENT IN INDIA

Capital Punishment in India has been prevailing since time immemorial. “India is one of the 78 countries which have retained capital punishment and the same is awarded for rarest of rare cases and for special reasons”<sup>20</sup>. The validity of capital punishment in India is questioned by several abolitionists arguing that penalty in the form of capital punishment is violative of Articles 14, 19, and 21<sup>21</sup> of the Constitution of India. As Indian Criminal Jurisprudence is based on a combination of deterrent and reformatory theories of punishment, therefore, it is mostly argued that though punishment like the death penalty is awarded to create deter amongst the offenders, they should also be given an opportunity to reform themselves. Numerous legal learning luminaries also argue that the existence of the death penalty in India is violative of a person’s right to life<sup>22</sup>. But, it is to be noted that the constitution of India doesn’t expressly hold capital punishment as unconstitutional. The constitutional validity of capital punishment in India has been challenged in numerous cases.

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<sup>14</sup> *Indian Penal Code, 1860, s 194*

<sup>15</sup> *Indian Penal Code, 1860, s 195A*

<sup>16</sup> *Indian Penal Code, 1860, s 302*

<sup>17</sup> *Indian Penal Code, 1860, s 307*

<sup>18</sup> *Indian Penal Code, 1860, s 364a*

<sup>19</sup> *Indian Penal Code, 1860, s 396*

<sup>20</sup> *Tatheer Fatima, ‘Constitutionality of Death Penalty’ (Indian National Bar Association)*

<https://www.indianbarassociation.org/constitutionality-of-death-penalty/#:~:text=In%20Jagmohan%20Singh%20vs.,14%2C%2019%20and%2021%20and%20> > accessed 19 March 2022

<sup>21</sup> *Constitution of India, 1950, art. 14, 19, and 21*

<sup>22</sup> *Ibid*

*Jagmohan Singh v the State of U.P*<sup>23</sup>-In this case, the five (5) judge bench of the Supreme Court by a unanimous verdict upheld the constitutional validity of the death penalty and held that capital punishment is not violative of Articles 14, 19, and 21 of the Constitution of India. In this case, the defense counsel R.K. Garg contended that in accordance with Article 21 of the Constitution of India, no person should be deprived of his/her except according to the procedure established by law. Defense counsel R.K. Garg also contended that there is no procedure provided in the Criminal procedure Code for determining the kind of punishment to be awarded in a particular crime or whether the death penalty or imprisonment is appropriate in the present case. He, therefore, contended that awarding a death sentence is unnecessary and the same is unconstitutional. The Supreme Court of India held that the choice of death sentence is done in accordance with the procedure established by law. It was observed that the judge makes the choice between capital punishment or imprisonment of life on the basis of circumstances, facts, and nature of the crime brought on record during a trial. Therefore, it was held by the Apex Court that the death sentence imposed after the trial in accordance with the procedure established by law is not unconstitutional under Article 21.<sup>24</sup>

*Bachan Singh v State of Punjab*<sup>25</sup>- In this case, the five-judge bench of the Supreme Court of India overruled the judgment given by the Court in Rajendra Prasad v State of U.P. In the Rajendra Prasad case, the Court ruled the death sentence as unconstitutional. When the question of whether the death penalty is constitutional or not arose in the Bachan Singh case, the Supreme Court held that the death penalty as an alternative mode of punishment is not unconstitutional or unreasonable. The Court said that the death penalty or capital punishment is constitutionally valid and doesn't even violate the Fundamental Rights enshrined in the constitution of India. The Fundamental Rights are not absolute rights and are subject to the reasonable restrictions to be imposed by the State. Therefore, the Court held that on the basis of 'special reasons' provided under Section 354 (3) of the Code of Criminal

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<sup>23</sup> *Jagmohan Singh v State of U.P* (1973), AIR 947

<sup>24</sup> *Tatheer Fatima* (n 20)

<sup>25</sup> *Bachan Singh* (n 6)

Procedure and offences which are regarded as 'rarest of rare cases', awarding of capital punishment is constitutionally valid<sup>26</sup>.

### RAREST OF RARE CASES

Offenses like murder, rape of a child, rape with murder, criminal conspiracy, etc., are some of the offences where capital punishment is awarded under the Indian Penal Code. Offenses or crimes which are aggravating or grievous in nature are basically considered as 'rarest of rare crimes' or exceptional cases; because the commission of such an offense may result in intense and extreme anger or annoyance. Capital punishment for an offense can be granted only in these exceptional cases and not otherwise. Therefore, the offense or the crime has to be an exceptional offense falling under the category of 'rarest of rare cases' for awarding capital punishment.

The concept of the rarest of rare cases is explained in *Machhi Singh v the State of Punjab*<sup>27</sup> In this case, circumstances were laid down for when the death penalty should be awarded. Justice Thakkar speaking for the Court held that there are five categories of cases that may be regarded as rarest of rare cases, where the death penalty or capital punishment could be awarded<sup>28</sup>. These are –

1. The manner in which murder is committed–When the manner of the commission of the crime is grievous. For example – burning alive.
2. The intention of the offender – When the murder is committed for selfish reasons. For example – for issues related to property.
3. Offense considered as anti-social – When the offense committed is anti-social in its nature. For example – burning the bride alive for dowry.

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<sup>26</sup> Muskan Jain, 'Case Summary: Bachan Singh v State of Punjab' (Law Lex.Org, 25 June 2020) <<https://lawlex.org/lex-bulletin/case-summary-bachan-singh-vs-state-of-punjab/24029>> accessed 19 March 2022

<sup>27</sup> *Machhi Singh v State of Punjab* (1983), AIR 957

<sup>28</sup> Raashi Vaishya, 'The Doctrine of Rarest of The Rare' (Legal Service India)

<<https://www.legalserviceindia.com/legal/article-726-the-doctrine-of-rarest-of-the-rare.html>> accessed 20 March 2022

4. The number of crimes committed – When the crime committed involves a variety of offences including murder. For example – Robbery along with the murder of several members of the same family.
5. The personality of the victim – when the victim is a renowned personality, a child, or an elderly person.

## CONCLUSION

The death penalty or capital punishment has been prevalent in India since time immemorial. Indian prevalence of the death penalty dates back to the times of Monarchy. For every kind of crime or offense which basically breaks the rules, the death penalty was awarded. There was no concept of grievous or serious offences for awarding capital punishment. It is in the present era that the concepts such as ‘rarest of rare cases’, ‘special reasons’, ‘grievous crimes’, ‘serious offenses’ etc., are considered before awarding the death penalty. The Indian Penal Code provides for awarding of capital punishment for the commission of certain offences. The Fundamental Right of ‘Right to Life’ under Article 21<sup>29</sup> of the Constitution of India is also not an absolute right. Every citizen of India is guaranteed the ‘Right to Life’ and provides that no person has the right to give away their life except in accordance with the procedure established by law, i.e., except under circumstances that require a death sentence. The life of such offenders could be taken away only in accordance with the procedure established by law, i.e., Section 354 (3) of the Code of Criminal Procedure<sup>30</sup> which requires the judge to state reasons for awarding capital punishment. Capital Punishment is still prevalent in India and the same as a medium of punishment is essential to curb crimes as a whole and specifically those which threaten the society at large.

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<sup>29</sup> *Constitution of India, 1950, art. 21*

<sup>30</sup> *Code of Criminal Procedure, 1973, s 354(3)*