



# Capital Punishment: Judicial Discretion in Sentencing and Indian Law

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## ABSTRACT

There has been recent upsurge, alleging judicial bias in sentencing process, especially in awarding capital punishment. Even Apex Court has admitted that doctrine of 'rarest of rare case' is not working properly. Taking note of that, few scholars blamed the very core of sentencing policy, and demanded ban on capital punishment. Their argument is precisely based on constitutional doctrine of 'arbitrariness', 'equality', and 'fairness'. This work examines few of such allegations, and explains that non-implementation of 'rarest of rare' formula may be rooted in lacadiasical approach by the trial courts. However, the doctrine is, constitutionally unassailable.

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## Introduction

According to the National Crimes Records Bureau, Ministry of Home Affairs, Government of India, a total of 1,455 convicts or an average of 132.27 convicts per year were given death penalty during 2001 to 2011. This also implies that on average one convict is awarded death penalty in less than every third day in India. During this period, the highest number of death penalty has been imposed in Uttar Pradesh (370) followed by Bihar (132).<sup>i</sup> Asian Centre for Human Right Report 2013 documents that during the period 2001-2011, sentences for 4,321 convicts were commuted from death penalty to life imprisonment. This clearly indicates that thousands of convicts remain on death row. Interestingly, the highest number of capital punishment commuted to life imprisonment was in Delhi (2462). Does this reflect any disturbing trend?

Recently, after an NGO, PUDR moved application for commuting death sentence of Surinder Koli, accused in Nithari killings; the Allahabad High Court commuted the death sentence to life imprisonment.<sup>ii</sup> Allahabad High had earlier stayed his execution on a Public Interest Litigation. The two-judge bench headed by the Chief Justice D Y Chandrachud based their verdict on the 'assimilation' of four main reasons. *Firstly*, High Court expressed that the delay of 3 and half years in disposal of his mercy petition by the Uttar Pradesh Governor and the President is "unnecessary and unreasonable," Secondly, that, the manner in which execution warrant for Koli was issued by the special CBI court of Ghaziabad was in "violation" of Koli's 'right to due process'.<sup>iii</sup> This is a fact that Koli was kept in solitary confinement since the beginning of his conviction which is illegal under the law.

## Death Sentence and Indian Penal Code

The Indian Penal Code, 1860 provides for capital punishment for criminal conspiracy,<sup>iv</sup> waging or attempting to wage war against the Government of India,<sup>v</sup> abetment of mutiny,<sup>vi</sup> giving or fabricating false evidence in officers leading to the conviction for capital punishment,<sup>vii</sup> Murder,<sup>viii</sup> abetment of suicide committed by a child or insane or delirious person or a

person who is intoxicated,<sup>ix</sup> and murder in Dacoity.<sup>x</sup> Apart from Indian Penal Code, 1860, there are some more special and local laws viz. Unlawful Activities Prevention Act 1967 (as amended in 2004), Defence and Internal Security of India Act 1971, Defence of India Act 1971, Commission of Sati (Prevention) Act 1987, Narcotic Drugs and Psychotropic Substances (Prevention) Act, 1985, as amended in 1988, Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA), Prevention of Terrorism Act 2002 (POTA), Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, Explosive Substances Act 1908 (amended in 2001), Arms Act 1959 (amended in 1988), Air Force Act 1950, the Army Act 1950, the Navy Act 1950, and the Indo-Tibetan Border Police Force Act 1992 providing provision for capital punishment.

## Procedural Changes

There are some interesting facts about imposition of death penalty in India. Except in section 303 of Indian Penal Code, 1860, all other provisions provide life imprisonment, as an alternative to capital punishment. Prior to 1955, Sub section (5) of section 367 of the Code of Criminal Procedure, 1898, enjoined upon the court convicting a person of capital offence, and to record reasons why imprisonment for life instead of death sentence was imposed. Thus, this was the time when imprisonment for life was an *exception*, and death sentence was the *rule*. The position between 1955 and 1973 was governed by the Amending Act 26 of 1955, whereby sub-section (5) of section 367 was omitted. Thus, the court had discretion to inflict either death sentence or imprisonment for life according to the circumstances and exigencies of each case.

The above position was substantially altered after 1973, with coming into force of Code of Criminal Procedure, 1973. Keeping with the current Penological thought, Code of Criminal Procedure, 1973 makes the *imprisonment for life a rule*, and *death sentence as exception*. It enjoins upon the court to record *special reasons* if the death sentence is to be inflicted. In Triveniben, the Supreme Court, after referring to the above amendments, stated.

*"It is thus clear that before 1955 sentence of death was the rule, the alternative sentence had to be explained by reasons. Thereafter it was left to the discretion of the Court to inflict either of the sentences and ultimately in the 1973 Code normal sentence is imprisonment for life except for the special reasons to be recorded sentence of death could be passed. It is therefore clear that this indicates a trend against the sentence of death but this coupled with the decisions ultimately wherein the sentence of death has been accepted as constitutional go to show that although there is a shift from sentence of death to lesser sentence but there is also a clear intention of maintaining this sentence to meet the ends of justice in appropriate cases. It is therefore clear that in spite of the divergent trends in the various parts of the world there is a consistent thought of maintaining the sentence of death on the statute book for some offences and in certain circumstances where it may be thought necessary to award this extreme penalty."*

### **Why Capital Punishment?**

Most societies at some time or other have endorsed the use of the death penalty. Ancient Roman and Judaic cultures practiced retributive justice, adhering to the rule of "an eye for an eye."

The United States inherited its use of capital punishment from European settlers in the seventeenth century, promoting the notion that heinous crimes deserved severe punishment. In the eighteenth century, however, philosophers began to question the ethics of the death penalty. Italian criminologist Cesare Beccaria condemned capital punishment as an ineffective and grossly inhumane deterrent to crime. Conversely, German philosopher Immanuel Kant claimed that execution was the fairest punishment for murder, arguing that even guilt-ridden killers should die in order to gain release from their anguish. Such arguments concerning the ethics of capital punishment continue to spark controversy to the present day.<sup>xi</sup>

Contemporary supporters of capital punishment maintain that execution is the most suitable penalty for those who have deliberately committed murder. They contend that the principles of modern criminal justice require a murderer to face a punishment that is comparable to the harm caused by his crime. Moreover, supporters argue, the death penalty enables society to uphold the worth of innocent human life and to express its justified moral outrage at the crime of murder.

Critics of capital punishment, on the other hand, contend that murder—whether committed by an individual or by the government—is *morally wrong* and can never be justified. For one thing, many argue, the mental anguish experienced by people who have been condemned to death is a form of torture, and the practice of torture has been denounced by the internationally supported Universal Declaration of Human Rights. Furthermore, death penalty opponents maintain, when the state executes killers in an attempt to proclaim that murder is wrong, it undermines its moral authority and ultimately denies the value of each human life.

Supreme Court of India expressed similar opinion in *Bachan Singh v. State of Punjab*<sup>xii</sup> that: "protagonists of the 'an eye of an eye' philosophy demand death". The "Humanists" on the other hand press for the other extreme viz. "death-in-no-case".<sup>xiii</sup> A synthesis to this would be the principle of "rarest-of-rare-cases" formula, whereby apex court whittled down the fear of arbitrary capital punishment.<sup>xiv</sup> Still, there has been constant campaign in the civilized world for and against capital punishment. Latest statistics show that 140 nations have now abolished the death penalty in either law or practice (no executions for 10 years).

Death sentence necessarily results in total deprivation of one's life a life, directly intruding into the domain of Article 21 of the Constitution.<sup>xv</sup> This is why the constitutional validity of death sentence was time and again challenged on the ground of contravention of the right to life under Articles 21 and the right of Equality under Article 14 of the Indian Constitution.<sup>xvi</sup> The main grounds of attack have been that death sentence contravenes the protection of life under Article 21. It was contended that death penalty does not serve any social purpose and it is so rarely executed that it has completely lost its deterrent effect and it deprives the close relatives of their right of company with the executed person. Moreover, the mode of executing death sentence is barbarous and inhuman and many times, it is confirmed only because of the financial or other disabilities of a person who may not have the justice does not require that the sentence of death passed on the accused should be confirmed when the offence was committed more than six years ago been able to have a re-course before the superiors' courts. It does not serve any social purpose and it is so rarely executed that it has completely lost its deterrent effect.<sup>xvii</sup> All these grounds were considered in *Bachan Singh* and the Supreme Courts up held the constitutionality of the death penalty, and laid down that it should be awarded in 'rarest of the rare' case and for *special reasons*.

### **Death Sentence and Evolving Constitutional Principles**

Capital punishment jurisprudence in India has evolved as a humanizing component with increasing demand for application of rights enshrined in Article 21 of the Constitution, which guarantees to every person the right to life, postulates existence with dignity. Any deprivation of life or, for that matter, of personal liberty, must accord with the dictates of Article 21. The procedure for deprivation has to be fair, just and reasonable. However, the constitutional validity of the death penalty has been upheld in *Bachan Singh v. State of Punjab*<sup>xviii</sup>. Another aspect of *liberty and dignity*, often crop up during the execution of the sentence of death. Here again, process of execution must conform to the norms embodied in Article 21. A prolonged delay in the execution of the sentence of death has a dehumanizing effect on the convict and, as a well settled principle of constitutional jurisprudence, is regarded as a deprivation of the right to life itself.<sup>xix</sup> It is a logical extension of the self-same principle that the death sentence, even if justifiably imposed, cannot be executed if supervening events make its execution harsh, unjust or unfair. Article 21 stands like a sentinel over human misery, degradation and oppression. Its voice is the voice of justice and fair play. That voice can never be silenced on the ground that the time to heed to its imperatives is long since past in the story of a trial. It reverberates through all stages—the trial, the sentence, the incarceration and finally, the execution of the sentence."

The right to equality and non-discrimination is the cardinal principle of international human rights law and embodied in Article 14 of the Constitution of India. The Supreme Court of India in a number of judgements including *E.P. Royappa v. State of Tamil Nadu*,<sup>xx</sup> and *Maneka Gandhi v. Union of India*,<sup>xxi</sup> held that State action must not be arbitrary but based on some rational and relevant principle which is non-discriminatory. The action of the State must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law.

In 1980, the Supreme Court in the *Bachan Singh v. State of Punjab*,<sup>xxii</sup> stated that the death penalty “ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed”. Since 1980, the Courts in India awarded death penalty based on “the rarest of rare” doctrine. Once the accused have been convicted and awarded death penalty as per the *Bachan Singh* case, all death row convicts become equal among them. Therefore, any action by the executive following the judicial pronouncements with respect to the death row convicts must follow the principles of equality and non-discrimination.

Judicial Arbitrariness in awarding capital Punishment— Judge Jyotsna Yagnik’s invocation of human dignity while not awarding the death penalty in the Naroda-Patiya massacre case<sup>xxiii</sup> and the Supreme Court’s expression of helplessness while confirming the death penalty of Ajmal Kasab<sup>xxiv</sup>— sentenced in the 26/11 terror attack — go to the heart of the constitutional viability of the death penalty. While it will be debated whether it was appropriate for a trial judge to invoke concerns of *human dignity* at the sentencing stage, but such judgments have also inadvertently demonstrated the inherent unfairness of the death penalty. It is precisely that *unpredictability and inconsistency* in the judicial administration of the death penalty<sup>xxv</sup> that is at the heart of the principled objections to the death penalty.

Some recent discourse on death sentence focuses on equality principle, and suggests that death penalty is served in India in a total ‘discriminatory’ fashion.<sup>xxvi</sup> Such arguments often revolve around constitutional principles such as ‘liberties’, ‘human dignity’ etc. Sentencing discourse should not be blurred with ideals like ‘human dignity’ etc., otherwise it would bound to be misleading. Constitutional ideals are more ‘subjective’, as against sentencing doctrines, which are, and should rightly be, more ‘objective’.

It is tough to deny the allegations of no-coherence in sentencing policy from the standpoint of ‘objectivity’, and that too when we lack authentic data on sentencing. However, to disagree with such one-sided argument, one would claim constitutional rights to disagree. The argument of ‘arbitrariness’ and ‘discrimination’ revolves around the premises, firstly, that *there has been very little discussion on why principled arguments against the death penalty should not apply in Kasab’s case*. Probably, here the author demands greater deliberation over facts and other circumstances for suggesting applicability of *rarest of rare* case formula. Author would painfully admit that Kasab’s case, and later Delhi Gang rape case are the two cases causing a severe ‘setback’ against movement for abolishing death penalty, and in these two cases *common will of ‘collective revenge’* dominated.

Secondly, by invoking ‘human dignity’ in one case and ‘*no meaningful engagement*’ of the same in other (Naroda-Patiya massacre case), the assumed ‘discrimination’ in sentencing policy is miscalculated. Thirdly, it is argued that since ‘*achieving a balance between judicial discretion and individualised sentencing has proved to be an impossible task*’, and it is equally dreadful ‘*to develop a model of administering the death penalty that is consistent and non-arbitrary*’, so ‘*it is better not to try for something impossible*’, and hence, logical is to withdraw death punishment from penal statutes is again farfetched arguments.

I will take second proposition first. Question of ‘human dignity’, invoking constitutional principle of ‘right to life and personal liberties’ and ‘rule of law’ etc. have always been taken in given case to find out mitigating circumstances, if any. Judiciary has always been trying to balance the ‘emotive’

demand for severe punishment and ‘individualised’ punishment for his ‘culpable state of mind’. It is this quest which resulted into formulation of unique principle called *rarest of rare* case. This is to be underlined here that this principle has always been helping the courts, particularly trial courts, in regulating their wide discretion in the sentencing process. It is submitted here that failure of sound application of *rarest of rare* case principle by trial courts or in any given case by higher courts cannot be the ground to scarp such principle or such punishment and arguing the same will tantamount to scraping all penal laws. This will be nothing but logical fallacy.

Third proposition is nothing but logical continuation of second premise. Indian Penal Code or for that matter most of the penal statutes in India, barring few exception such as punishment for dowry death etc., prescribes maximum punishment for any offence, not the minimum. Here, the discretion is with the courts and the same need to be ‘judiciously’ exercised on the basis of given facts and circumstances of the individual case. Again, possibility of leniency shown by one judge and no such favour by another may be argued. Such an argument will be endless. Any argument for limiting discretion of judges and finding out ‘total objectivity’ in criminal law would be nothing but a conjectural argument having no end. Prof. B. B. Pandey, a seasoned criminologist and former professor of University of Delhi has shown in his classic lectures as to how attempts to find out *total objectivity* will result into disaster of criminal justice system. For substantiating this argument one may advance the very fact that Section 303 Indian Penal Code was declared unconstitutional due to giving ‘*no discretion*’ and allowing total objectivity in sentencing.

Alternative Argument: whether rarest of rare case means death only?

In 1983 the Supreme Court decision in *Machhi Singh v. State of Punjab*,<sup>xxvii</sup> laid down the guidelines for the application of the “rarest of rare” rule to specific cases. The guidelines were couched in fairly broad terms that relate to several considerations such as: “Manner of commission of murder”, “Motive for the commission of murder”, “Anti-social or socially abhorrent nature of the crime”, “Magnitude of crime” and “Personality of victim of murder”. Let us take proverb of the majority ruling in *Bachan Singh v. State*,<sup>xxviii</sup> which reads: “in the ‘rarest of rare’ cases ... the alternative option is unquestionably foreclosed”. However, there are few decisions of apex court, like *Surinder Kumar* case,<sup>xxix</sup> and *Lichhamadevi’s* case,<sup>xxx</sup> where the Court fully appreciated the *nature and gravity* of the offence, but still declined to impose death penalty. Thus, these decisions are sufficient enough to establish that sentencing is not a mathematical calculation. Even serious cases may not come into legal category of *rarest of rare* case. So, where is the problem of ‘injudicious discretion’?

Sentencing is often based on ‘a unanimous social opinion’ and ‘social morality and ethics’ which is rooted in the values of individual dignity and equality. Thus, treating “rarest of rare” as a social category would have meant deciding in consonance with the prevalent social opinion on the issue. In this way the Court often deflects major band of criticism against the decision, while retaining a wider discretion for itself on the matter of sentence.

First premise may be more forceful, had it been conceptualized and provides us some alternative argument, such as role of ‘*motive*’ in sentencing policy as argued by Carissa Byrne Hessick,<sup>xxxi</sup> or Professor B. B. Pande.<sup>xxxii</sup> Let us assume that when he states ‘*there has been very little discussion on why principled arguments against the death penalty should not apply in Kasab’s case*’ he is probably, demanding greater discussion

over facts and other circumstances suggesting applicability of *rarest of rare* case formula. This response is not to explain what is already well explained in more than three hundred pages judgment of Supreme Court, but this must be pointed out that court has in-depth explored various circumstances and only after painstaking exploration found him fit for *rarest of rare case*. When judge Jyotsna Yagnik invoked of human dignity for not awarding the death penalty in the Naroda-Patiya massacre case or for that matter justices P. Sathasivam and Justice B. S. Chauhan did in Dara Singh' case, they are not denying that these cases are not serious offence and do not deserve severe punishment but constitutional principles of equality, liberty and human dignity suggests against giving death penalty to 'everyone' connected with serious crimes. In fact, 'human dignity' as used by judge Jyotsna Yagnik, is not to reflect any 'mitigating circumstances', but a word of caution for not categorizing it into *rarest or rare case*. When Justice Aftab Alam and Justice C. K. Prasad confirmed kasab's death sentence they put it very straight that '*hold back the death penalty in this case would amount to obdurately declaring that this Court rejects death as lawful penalty even though it is on the statute book and held valid by Constitutional benches of this Court*'. When judges said these lines they were not taking 'collective revenge' but upholding what law is and what law ought to be for such crimes.

### Summation

Equity and good conscience are the hall-marks of justice. A provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a pre-ordained sentence of death. Section 303 of IPC, unlike providing discretionary death sentence provides mandatory capital punishment. It provides that "whoever, being under sentence of imprisonment for life, commits murder shall be punished with death." However, since here death penalty was mandatory, it was struck down by Supreme Court in *Mithu v. State of Punjab*.<sup>xxxiii</sup>

It cannot be disputed that the outcome of any trial depends to a large extent on the quality of legal advice that the accused receive. This loads the scales in favour of the rich the arbitrariness of the sentencing mechanism in India persuades one to strongly argue against releasing the death penalty but it is the Parliament who has the right to take capital punishment.

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<sup>ii</sup> *PUDR v. Union of India*, (PIL) No 57810 of 2014 (All.)

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

iv Section 120A, Indian Penal Code, 1860

v *Id.*, Section 121

vi *Id.*, Section 195

vii *Id.*, Section 132

viii *Id.*, Section 302

ix *Id.*, Section 305

x *Id.*, Section 305

xi Mary E. Williams, (Edt) *CAPTIAL PUNISHMENT*, Greenhaven Press, (2000), p. 17

xii *Bachan Singh v. State of Punjab* AIR 1980 SC 898

xiii *Ibid.*,

xiv *Machhi Singh v. State of Punjab*, 1983 Cri LJ 1457

xv Article 21 of The Constitution provides that "*No person shall be deprived of his life or personal liberties except according to procedure established by law*".

xvi Article 14 of the Constitution provides that "*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth*".

xvii *Supra* Note 2, See also *Machhi Singh v. State of Punjab* 1983 Cri LJ 1457; *Jagmohan Singh v. State of U.P.* (1973) 1 SCC 20

xviii *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684

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xxxiii *Mithu v. State of Punjab* 1983 AIR 473