



# The Indian Journal for Research in Law and Management

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Editor-in-Chief – Prof. (Dr.) Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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## **“OFF WITH THEIR HEADS”** **IS CAPITAL PUNISHMENT A POSSIBILITY FOR EXECUTIONS?**

*“I regard the death penalty as a savage and immoral institution that undermines the moral and legal foundations of society” - Andrei Sakharov.*

### **INTRODUCTION:**

"Off with their head" refers to a severe punishment, perhaps a person's beheading by a monarch or other powerful person in the Middle Ages<sup>1</sup>. In the case of the *State of Madhya Pradesh vs. Saleem*,<sup>2</sup> the Supreme Court held that “no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment....” All punishments stem from the same principle that wrongdoing must have an associated penalty. The two primary justifications for applying a punishment are the conviction that it is fair and morally acceptable for the wrongdoer to suffer the consequences of their actions and that punishing the wrongdoer will deter future wrongdoers. Similar to other forms of punishment, the death penalty is likewise based on this principle.<sup>3</sup>

Death penalty enforcement persists in many nations despite ongoing worldwide efforts to propose and carry out laws intended to abolish it entirely or at least place a temporary halt on its use. From the time of the Enlightenment until now, the death sentence has always been a topic of ongoing discussion over fundamental principles and human rights.<sup>4</sup> Nonetheless, given the state of the death penalty today, it is imperative that the discussion regarding its abolition or continuation be continued from an international, normative, empirical, and comparative perspective to advance the global conversation on human rights.

### **CONTEXTUAL LAW:**

59 parts of 18 central legislations,<sup>5</sup> encompassing both homicide and non-homicide offenses, provide for the death sentence as a form of punishment. Death sentences are available for both state and central offenses in India, albeit there is no comprehensive list of such provisions.

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<sup>1</sup> Idioms.thefreedictionary.com

<sup>2</sup> (2005) 5 SCC 554; 2005 SCC (Cri) 1329; 2005 Cr LJ 3435; LNIND 2005 SC 1070, Arijit Pasayat and S.H. Kapadia, JJ delivered the judgement.

<sup>3</sup> Text Book on CRPC 2<sup>ND</sup> Edition (2019) Publisher: Lexis Nexis; ISBN: 978-93-8999-125-3; Chapter III: Powers of courts to deliver sentence in cases of conviction of several offences; pg.46

<sup>4</sup> Landmark Judgements That Changed India by Justice Ashok K. Ganguly; Publisher: Rupa; Page 94; ISBN: 978-81-291-3508-7

<sup>5</sup> Death Penalty Report India Vol.1, NLU Delhi; ISBN: 978-95-84272-06-7

A five-judge panel of the Indian Supreme Court last upheld the death penalty's constitutionality in May 1980, holding that it did not violate Article 21 of the Constitution's protection against the deprivation of life.<sup>6</sup> The majority of the judges concluded that the death penalty should only be applied in the "rarest of rare" circumstances, utilizing the sentencing guidelines outlined in the ruling. The death penalty has also been challenged in court, with the Supreme Court ruling that hanging is an execution technique that complies with the Indian Constitution's provisions while the mandatory death penalty has been ruled to be unconstitutional. A right to an obligatory open court hearing in death penalty cases within the court's review jurisdiction has been recognized, even if there is no right to appeal to the Supreme Court in these cases (except in the specific circumstances mentioned above). Prior to this ruling, review petitions challenging the Supreme Court's decision in an appeal involving a death sentence (as with all other cases) were decided in chambers. The Supreme Court upheld a Allahabad High Court<sup>7</sup> ruling and established specific procedural safeguards that must be adhered to when issuing a death warrant to determine the date, time, and location of execution.

Articles 161 and 72 of the Indian Constitution allow those who have been sentenced to death to petition for clemency to either the President or the Governor of a state. The Governor and the President are required by the Constitution to consider the advice of the executive branch when determining whether to grant a request for clemency, but the Constitution makes no mention of how long they have to make a decision. In addition, the executive's excessive and inexplicable delay in dismissing the mercy petition has been recognized as torture and as a basis for commutation.<sup>8</sup> The Supreme Court has established that the President's decision to deny clemency is subject to judicial review on limited grounds.

Two comprehensive reviews of the death penalty have been conducted by the Law Commission of India. In its 262nd Report (August 2015), the Law Commission of India recommended a phased approach to the death penalty's abolition, starting with the removal of the death penalty for all offenses other than those about terrorism.<sup>9</sup>

### **Impervious to the death penalty?**

Despite being declared unconstitutional, India's mandatory death sentence is nonetheless enshrined in the country's laws.

The Supreme Court in *Mithu v. State of Punjab* overturned Section 303 of the IPC, which stipulated an obligatory death penalty for murder committed by an individual serving a life sentence was unconstitutional because it contravened Articles 14 and 21 of the Constitution.<sup>10</sup> It was decided that this Section's underlying presumption—that lifers were a "dangerous breed of humanity as a class"—was based on an incorrect scientific theory. The Court further held that the removal of the judge's discretion

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<sup>6</sup> *Bachan Singh v. State of Punjab* (1980) 2SCC 684. The majority comprising Chief Justice Y.V. Chandrachud and Justices R.S. Sarkaria, A.C. Gupta and N.S. Untiwalia upheld the constitutional validity of the death penalty. In a dissenting opinion delivered in August 1982, Justice P.N. Bhagwati declared the death penalty to be unconstitutional.

<sup>7</sup> *Shabnam v. Union of India & Ors.* (2015) 6 SCC 702, paragraph 21. Also see, *People's Union for Democratic Rights v. Union of India* PIL No. 57810 of 2014 (High Court of Judicature at Allahabad)

<sup>8</sup> *Shamsher Singh v. State of Punjab & Anr* (1974) 2 SCC 831, paragraph 49.

<sup>9</sup> Law Commission of India is an intensive study on the subject of death penalty submitted its 35<sup>th</sup> report in 1967 to the Central Government stating that: ".....having regard, however, to the conditions in India, to the variety of 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 of the country in the present juncture, India cannot risk the experiment of abolition of death penalty.

<sup>10</sup> (1983) 2 SCC 277, paragraph 5.

in sentencing was arbitrary, harsh, and unjust and that it would inevitably result in unfairness. The Arms Act, of 1959, which made the use of prohibited weapons, if it cause a person's death, an offense punishable by death, was overturned by the Supreme Court in the case of *State of Punjab v. Dalbir Singh*.<sup>11</sup>

In the cases mentioned above, mandatory death sentences were ruled to be unconstitutional; however, the fact that they are still included in some central laws raises serious concerns. **Section 27(3)** was found to be unconstitutional because it removed judicial discretion in cases involving the imposition of the death penalty. **Section 3(2)(i) of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, Section 3(1)(g)(i) of the Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002, and Section 195A of the IPC** all still mandate the death penalty.

### India's choices on the death penalty across time:

#### . **Execution penalty under the Indian Penal Code of 1860–**

The authors of the Indian Penal Code of 1860 have declared unequivocally that the death penalty should only be applied extremely seldom and in situations involving murder or the gravest transgression against the state. In addition, sections 34, 149, 109, 120B, 121, 132, 194, 302, 303, 305, 307, 364A,<sup>12</sup> and 195A of the IPC 1860 provide for "death" as an alternative punishment that offenders may receive.

The imposition of mandatory death sentences persisted in Brunei Darussalam, Ghana, Iran, Malaysia, Maldives, Myanmar, Nigeria, Pakistan, Saudi Arabia, Singapore, and Trinidad and Tobago. These sentences are incompatible with the protection of human rights because they preclude the consideration of the defendant's unique circumstances or the circumstances surrounding the specific offense.<sup>13</sup>

#### **B. Call for retaliation–**

The need for vengeance is not new; the death penalty is the final declaration for horrific crimes, which is why the public has demanded the death penalty for rape in the wake of the high rate of rapes in the nation, as evidenced by section 364A, which established the death penalty for abduction for ransom in 1993.

The court stated in *Dhananjay Chatterjee v. State of West Bengal*: "We believe that the severity of the punishment in a particular case should be determined by the crime's atrocity, the offender's behavior, and the victim's defenseless and unprotected state. The imposition of appropriate punishment is how the court reacts to society's cry for justice against the offender's demands. The courts should impose punishment befitting the crime so that the courts reflect the public's abhorrence of the crime. The court must not only keep in mind the rights of the criminal but also the victim of crime and the community at large while deliberating the imposition of appropriate punishment."<sup>14</sup>

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<sup>11</sup> (2012) 3 SCC 346, paragraph 91.

<sup>12</sup> Inserted with effect from 22<sup>nd</sup> May 1993 by Criminal Law (Amendment) Act, 1993.

<sup>13</sup> Amnesty International- Death Sentence and Executions 2017, p 8.

<sup>14</sup> (1994) 2 SCC 220: (1994) 1. JT 33. The accused, a liftman, in an apartment raped and murdered a 14-year-old girl Hetal Parekh, according to the post mortem report, her nose was broken and her windpipe crushed before being raped.

The court stated in *Mahesh v. State of MP*,<sup>15</sup> a case involving multiple brutal murders, that “it would be a mockery of justice if the appellants were allowed to escape the severe penalty of the law when confronted with such evidence and such cruel acts. Giving the appellants a lesser punishment would cast doubt on the nation's justice system. The average person would lose faith in the courts in such cases because he understands and values the language of deterrence more than the reformatory jargon.”

### C. Combating the death sentence:

Following a de facto moratorium on executions since the 1990s, Dhananjay Chatterjee was executed on August 14, 2004, for the rape and murder of a teenage girl. This event reignited a debate among academics, jurists, and judges. It brought up the issue of whether the death penalty should be abolished because it is ineffective in light of the global trend toward its abolition public attention.

The death sentence was once again contested as unconstitutional in *Bachan Singh v. State of Punjab*,<sup>16</sup> a case that resulted in a majority decision (4:1). The argument was grounded in several legal and jurisprudential developments, including the addition of Section 354(3) to the Code, which made the death penalty an exception. In *Bachan Singh*, the majority held that the interpretation of Article 21 in *Maneka Gandhi* gave it a new meaning, stating that "No person shall be deprived of his life or personal liberty except according to procedure established by law." After considering the argument's constitutionality, Justice P. Bhagwati<sup>17</sup> declared in a strong dissent that the death sentence was unconstitutional. The court established the "rarest of the rare" theory, according to which the death sentence ought to be applied only in the most exceptional circumstances, such as when the crime is incredibly violent and life in prison would not be a sufficient substitute.

### D. Error in Evaluation:

The practical application of the aforementioned "Rarest of Rare" theory was not consistently adhered to by later smaller Supreme Court benches. The "rarest of rare" notion was somewhat curtailed in *Machhi Singh and Ors. v. The State of Punjab*,<sup>18</sup> as the bench recommended two more concerns to be taken into account prior to the imposition of the death penalty: (1) Is there a unique aspect of the crime that justifies a death sentence rather than a life sentence in prison? (2) Are the circumstances of the crime such that, even after giving the maximum weight to the mitigating circumstances that speak in the offender's favor, there is no other option but to impose the death penalty? The court's questioning and the reference to weighing aggravating and mitigating circumstances seem to be a weakening of the *Bachan Singh* standards.

*Bachan Singh*'s ratio lost some of its clout when it was evident from the Supreme Court's later rulings in *Lokpal Singh v. State of Madhya Pradesh*<sup>19</sup> that the court attempted to establish a theory of societal need and a demand for justice. A two-judge bench decided in *Rajiv alias Ram Chandra v. State of Rajasthan*<sup>20</sup> that the court would be failing in its duty if it did not respond to society's "cry for justice" against the criminal by imposing the death penalty, thus gradually deteriorating the *Bachan Singh*'s ratio until it reached its zenith.

### E. Limitations of the theory:

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<sup>15</sup> (1987) 3 SCC 80, P-82: AIR 1987 SC 1346, followed in *Mahendra Nath Das v State of Assam*, AIR 1999, SC 1926: (1999) 5 SCC 102: (1999) 3 Scale 700.

<sup>16</sup> *Bachan Singh v State of Punjab*, AIR 1980 SC 980: (1980) 2 SCC 684; 1980 Cr LJ 636.

<sup>17</sup> (1978) 4 SCC 494.

<sup>18</sup> AIR 1983 SC 957: (1983) 3 SCC 470.

<sup>19</sup> AIR 1985 SC 891.

<sup>20</sup> AIR 1996 SC 787.

In *Santosh Kumar Satishbhusan Bariyar v. State of Maharashtra*<sup>21</sup>, the Supreme Court made it abundantly clear that the *Ravji* case and the six cases that followed it were decided *per incuriam*<sup>22</sup>, which means that in the exercise of sentencing discretion, it followed principles that are contrary to the law established by the Supreme Court's Constitution Bench in *Bachan Singh*. It did not consider any mitigating circumstances, and as a result, the death penalty was imposed by decisions that were legal violations.

The rarest of rare doctrines in *Bariyar* was further circumscribed by an additional requirement that the state prove the accused is beyond reform. The safeguards enshrined in articles 14 and 21 of the constitution have brought capital sentencing inside the purview of constitutional adjudication since *Bachan*.

The SC construed the rarest of rare doctrine to mean that by enacting a broad ban on the death sentence, it had given "special grounds" under section 354(3) of the statute for a fresh start. The court further stressed that the sentencing court should view itself as a "forum of principle" and base its decision-making on "principled reasoning," which derives authority from laws or judicial precedent. The court further stressed that justice must be the primary virtue in sentencing. The court criticized the lack of clarity in the capital punishment statute and declared that it violates "constitutional due process and equality." The court deservedly intended that judicial discretion be limited to specific guidelines and clear standards.

#### **F. The right-based strategy:**

The British barrister Edward Fitzgerald has proposed a right-based approach to exercising discretion in capital cases. He argues that the right approach is to begin with a strong presumption against the death penalty and argue that<sup>23</sup> "the presence of any significant mitigating factor justifies exemption from the death penalty even in the most gruesome cases." Fitzgerald goes on to say:

"This stringent approach can be summed up as follows: life in prison should be the standard punishment, with the possibility of the death penalty in the "rarest of rare" circumstances—those in which the offense (s) is exceptionally heinous, the offender has no mitigating circumstances, and the person is deemed beyond rehabilitation".

Fearing "chaotic arbitrariness in the imposition of death sentence," Justice Bhagwati anticipated that the doctrine of rarest of rare cases, as formulated in *Bachan Singh*,<sup>24</sup> would differ from judge to judge based upon the "value system, responses, and social philosophy of the judges" constituting the benches in the Supreme Court. The judge agreed with the findings of Justice Krishna Iyer in the case of *Rajendra Prasad etc. v. State of Uttar Pradesh*<sup>25</sup>, wherein it was determined that multiple variables contribute to the wildly swinging punishment pendulum.

As the last court in the biggest democracy in the world has repeatedly stated, an irreversible penalty and irreparable harm to the most valuable human right—the right to life—cannot be allowed to continue in the current state of uncertainty in which bizarre and capricious methods of capital punishment are currently practiced.

#### **CONCLUSION:**

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<sup>21</sup> (2007) 12 SCC 288.

<sup>22</sup> *Shivaji v State of Maharashtra* (2008) 15 SCC 269; *Mohan Anna Chavan v State of Maharashtra* (2008) 7 SCC 561; *Bank v State of UP* (2008) 11 SCC 113; *Surya Ram v The State of Rajasthan* (1996) 6 SCC 271; *Dayanidhi Bisoi v State of Orissa* (2003) 9 SCC 310; *State of UP v Sultan* (2009) 4 SCC 736.

<sup>23</sup> 'The mitigation Exercise in Capital Cases', in *Death Penalty Conference*, 3-5 June 2005, Barbados Conference Papers and Recommendations, quoted in *Rajesh Kumar v State* (2011) 13 SCC 706, P. 732

<sup>24</sup> (1982) 3 SCC 24, Para 75, P. 116.

<sup>25</sup> (1979) 3 SCC 646, Para 18, P. 659.

The medieval ideal of retributive justice—which holds that someone who has committed a heinous crime like murder ought to be similarly bereft of life—is reinforced by the death penalty.

The global trend about the death penalty indicates a divided response. The international community is divided over the death penalty, with an increasing number of Western nations concluding that it is outmoded and even barbarous in the twenty-first century. Several international organizations, including the United Nations, have periodically called for the death penalty to be abolished globally. The UN Commission on Human Rights has called for a halt to all executions and has urged all member states that still uphold the death penalty to limit the number of offenses for which it may be applied. Additionally, they have urged members to refrain from imposing the death penalty on anyone who is younger than 18 or who suffers from a mental illness.

The ruling rendered in the Dhananjay Chatterjee case on August 14, 2004, sparked discussions challenging the legality of death penalties, particularly among those who are fervently advocating for their abolition.<sup>26</sup> Regarding this intricate matter of life and death, there are differing opinions:

1. It is possible that the certainty of punishment, rather than the severity of the punishment, deters crime; the death penalty has no deterrent value and has not been demonstrated to significantly reduce crime.
2. Additionally, the death penalty is irrevocable; once it is applied, it cannot be reversed. It is possible that maintaining the death penalty could, in some circumstances, result in a miscarriage of justice and the exoneration of those who are guilty.
3. Judges are, without a doubt, men of the highest integrity, endowed with an impartial attitude, and a great desire to administer justice; however, they are also human, and occasionally, despite their responsibility in a murder case, they may make a mistake in judgment and sentence someone to death while imprisoning another in a similar situation. Miscalculations may also occur, which is sometimes unavoidable.

*Given that the death sentence seems morally unjust, does this mean that a torturer should be tortured and a rapist should be raped rather than hanged? These are questions we ought to be asking ourselves at this point.*

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<sup>26</sup> “The Death Penalty World Wide Development in 2004”, Amnesty International, April 2005, Chiradeep S Begga, “Death Penalty Debate Alive and Kicking”, The Times of India, 2 July, 2004 Dhananjay Chaterjee was finally hung to death on 14 August, 2004.