CAPITAL PUNISHMENT IN INDIA: RECENT JUDICIAL TRENDS

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INTRODUCTION

Whenever an accused is put to trial and at the conclusion of the trial, the Judge is of the opinion that the accused has committed such a crime that his very existence is treated as a threat to the society as a whole, he is punished with the gravest punishment of all i.e. capital punishment or death penalty.

The process of sentencing one to capital punishment or giving death penalty to someone is not the same as executing somebody of the same offence. Punishing somebody with death penalty and actually putting somebody to death are quite different as after the punishment there are various stages through which the sentencing or the punishment goes and at each level the veracity of the same is tested and if after sailing through the whole process, if still the sentence is maintained, only then the same reaches the level of carrying out of the execution.

CHALLENGE OF CAPITAL PUNISHMENT ON THE GROUND OF UNCONSTITUTIONALITY

The Supreme Court has time and again through various judgments has redefined the concept of capital punishment. The Supreme Court lays down the law which is followed by all the courts of the country.

The first challenge to the constitutionality of the punishment of death penalty in India came in the 1973 case of *Jagmohan Singh v. State of U.P.*[1]. The petitioners argued that the death penalty violated Articles 14, 19 and 21 of the Constitution of India. It was argued that since the death sentence extinguishes, along with life, all the freedoms guaranteed under Article 19(1) (a) to (g), it was an unreasonable denial of these freedoms and not in the interests of the public. Further, the petitioners argued that the discretion vested in judges in deciding to impose death sentence was uncontrolled and unguided and violated Article 14 of the Constitution of India.

Finally, it was contended because the provisions of the law did not provide a procedure for the consideration of circumstances crucial for making the choice between capital punishment and imprisonment for life, it violated Article 21. The decision of the US Supreme Court in *Furman v. Georgia*[2]

[1] (1973) 1 SCC 20.
[2] 408 U.S. 238.

in which the death penalty was declared to be unconstitutional as being cruel and unusual punishment was also placed before the Constitution Bench.

This case was decided before the Code of Criminal Procedure was re-enacted in 1973, making the death penalty an exceptional sentence.

In Jagmohan's case, the Supreme Court found that the death penalty was a permissible punishment, and did not violate the Constitution. The Supreme Court while disposing off the matter had held that: the impossibility of laying down standards is at the very core of the criminal law as administered in India, which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment. That discretion in the matter sentences as already pointed out, is liable to be corrected by superior courts. The exercise of judicial discretion on well recognized principles is, in the final analysis, the safest possible safeguard for the accused.

The Court also held that: if the law has given to the judge a wide discretion in the matter of sentence to be exercised by him after balancing all the aggravating and mitigating circumstances of the crime, it will be impossible to say that there would be at all any discrimination, since facts and circumstances of one case can hardly be the same as the facts and circumstances of another.

Around the same time as Jagmohan Singh's case, just before the Code of Criminal Procedure of 1973 became law, the Supreme Court also commented on the wisdom of the introduction of the post-conviction hearing on sentence in the case of *Ediga Anamma v. State of Andhra Pradesh.*[3] In commuting the death sentence to life imprisonment, the Court observed that in any scientific system which turns the focus, at the sentencing stage, not only on the crime but also the criminal, and seeks to personalize the punishment so that the reformatory component is as much operative as the deterrent element, it is essential that facts of a social and personal nature, sometimes altogether irrelevant if not injurious at the stage of fixing the guilt, may have to be brought to the notice of the Court when the actual sentence is determined.

The law's changes were, in the view of the court, expressive of a tendency towards cautious, partial abolition and a retreat from total retention. In a statement that reflects concerns that has acquired a resonance, the court said that a legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive

[3] (1974) 4 SCC 443.

ruthlessness, amending the deterrent creed and accenting the trend against the extreme and irrevocable penalty of putting out life.

In *G. Krishta Goud v. State of Andhra Pradesh & Ors.*[4], the accused had been given the death penalty and the same had been affirmed by the supreme court. The convicts preferred a mercy petition before the President of India and the same was dismissed by the President.

The convicts challenged the dismissal of the mercy petition by the President by way of a writ in the high court. The writ petition was dismissed.

Thereafter, the convicts filed a Special leave petition before the supreme court of India. The court while dismissing the SLP held that the court did not have the power to have a judicial review of the executive powers of the President of India under Article 72.

The Supreme Court in Paragraph 8 of the judgment held that the President is expected to, and we are sure will, consider all facts and circumstances bearing on the just discharge of his high duty. When the president is the custodian of the power, the court makes an almost extreme presumption in favour of bonafide exercise. We have not been shown any demonstrable reason or glaring ground to consider the refusal of communication in the present case as motivated by malignity or degraded by abuse of power. We, therefore cannot find out a way to interfere with what the president has done.

The SLP was listed in the supreme court before the bench of A.C. Gupta and V. R. Krishna Iyer JJ, who dismissed the same on October 1975.

In 1979, in the case of *Rajendra Prasad v. State of Uttar Pradesh*[5], the Supreme Court discussed what the "special reasons" in imposing the death sentence could be. The Court found itself confronting, not the constitutionality of the death sentence, but that of sentencing discretion. The Court per majority (of two judges) said that special reasons necessary for imposing death penalty must relate, not to the crime as such but to the criminal.

They drew the focus in sentencing to reformation, even as they held that it was not the nature of the crime alone that would be relevant in deciding the sentence. The Court said, "the retributive theory has had its day and is no longer valid. Deterrence and reformation are the primary social goals which make deprivation of life and liberty reasonable as penal panacea". Significantly, voicing concerns that have

[4] (1976) 1 SCC 157.
[5] (1979) 3 SCC 646.

begun to reemerge, the court asked: "Who, by and large, are the men whom the gallows swallow?" and found that, with a few exceptions, it was "the feuding villager, the striking workers, the political dissenter, the waifs and strays whom society has hardened by neglect into street toughs, or the poor householder-husband or wife driven by necessity of burst of tantrums" who were visited with the extreme penalty.

In 1979, different Benches of the Supreme Court had heard the cases of *Dalbir Singh v. State of Punjab*[6], and *Bachan Singh v. State of Punjab.*[7] While Dalbir Singh relied on Rajendra Prasad to arrive at a decision, the Bench in Bachan Singh noted that the judgment in Rajendra Prasad was contrary to the decision in Jagmohan, and referred it to a Constitutional Bench. This culminated in the landmark decision of the Constitution Bench in the instant case.

The challenge to the death penalty in Bachan Singh was premised, among other things, on irreversibility, fallibility, and that the punishment is necessarily cruel, inhuman and degrading. It was also contended that the penological purpose of deterrence remained unproven, retribution was not an acceptable basis of punishment, and that it was reformation and rehabilitation which were the purposes of punishment.

Four of the five judges hearing this case did not accept the contention that the death penalty was unconstitutional. They overruled Rajendra Prasad, and affirmed Jagmohan, when they held that the death penalty could not be restricted to cases where the security of the state and society, public order and the interests of the general public were threatened. Errors, they held, could be set right by superior courts, and presentence hearing and the procedure that required confirmation by the High Court would correct errors.

In Bachan Singh, the Court adopted the 'rarest of rare' guideline for the imposition of the death penalty, saying that reasons to impose or not impose the death penalty must include the circumstances of the crime and the criminal. This was also the case where the court made a definitive shift in its approach to sentencing. The Court held that the expression 'special reasons' in the context of this provision, obviously means 'exceptional reasons' founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal.

The judgment further held that: it cannot be over emphasized that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in

[6] (1979) 3 SCC 745.
[7] (1980) 2 SCC 684.

accord with the sentencing policy writ large in section 354 (3). Judges should never be blood-thirsty. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the high road of legislative policy outlined in section 354 (3), viz, that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

The only dissenting judge in the five judges bench was Justice Bhagwati, who in his dissenting opinion found the death penalty necessarily arbitrary, discriminatory and capricious. He reasoned that the death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape, from its clutches. This circumstance also adds to the arbitrary and capricious nature of the death penalty and renders it unconstitutional as being violative of Articles 14 and 21. Justice Bhagwati has made the certain observations pertinent to the arbitrariness involved in awarding the death sentence, when he said that now this conclusion reached by me is not based merely on theoretical or a priori considerations. On an analysis of decision given over a period of years we find that in fact there is no uniform pattern of judicial behavior in the imposition of death penalty and the judicial practice does not disclose any coherent guidelines for the award of capital punishment. The judges have been awarding death penalty or refusing to award it according to their own scale of values and social philosophy and it is not possible to discern any consistent approach to the problem in the judicial decisions. It is apparent from a study of the judicial decisions that some judges are readily and regularly inclined to sustain death sentences, other are similarly disinclined and the remaining waver from case to case. Even in the Supreme Court there are divergent attitudes and opinions in regard to the imposition of capital punishment. If a case comes before one Bench consisting of Judges who believe in the social efficacy of capital punishment, the death sentence would in all probability be confirmed but if the same case comes before another Bench consisting of Judges who are morally and ethically against the death penalty, the death sentence would most likely be commuted to life imprisonment. The former would find and I say this not in any derogatory or disparaging sense, but as a consequence of psychological and attitudinal factors operating on the minds of the Judges constituting the Bench - 'special reasons' in the case to justify award of death penalty while the latter would reject any such reasons as special reasons. It is also quite possible that

one Bench may, having regard to its perceptions, think that there are special reasons in the case for which death penalty should be awarded while another Bench may bona fide and conscientiously take a different view and hold that there are no special reasons and that only life sentence should be imposed and it may not be possible to assert objectively and logically as to who is right and who is wrong, because the exercise of discretion in a case of this kind, where no broad standards or guidelines are supplied by the legislature, is bound to be influenced by the subjective attitude and approach of the judges constituting the Bench, their value system, the individual tone of their mind, the color of their experience and the character and variety of their interests and their predispositions. This arbitrariness in the imposition of death penalty is considerably accentuated by the fragmented Bench structure of our courts where Benches are inevitably formed with different permutations and combinations from time to time and cases relating to the offence of murder come up for hearing sometimes before one Bench, some times before another sometimes before a third and so on. Professor Blackshield has in his article on "Capital Punishment in India"[8] pointed out how the practice of Bench formation contributes to arbitrariness in the imposition of death penalty.

In 1991, *Shashi Nayar v. Union of India*[9], the death sentence was once again challenged, among other reasons, for the reliance placed in Bachan Singh on the 35th Report of the Law Commission. The Court turned down the petition, citing the deteriorating law and order in the country, with the observation that the time was not right for reconsidering the law on the subject. The plea 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, was also rejected.

In the past few years, attention has also been drawn to the arbitrary application of the Bachan Singh framework by courts as also to the possibility of judicial error in cases where the death sentence has been imposed. The Supreme Court in *Aloke Nath Dutta v. State of West Bengal*[10], *Swamy Shraddhananda v. State of Karnataka*[11], *Santosh Bariyar v. State of Maharashtra*[12], and *Farooq Abdul Gafur v. State of Maharashtra*[13], amongst other cases, has noticed that sentencing in capital cases has

[8] A.R. Blackshield, Capital Punishment in India – Volume 21, Journal of the Indian Law Institute, Issue of April-June, 1979
[9] (1992) 1 SCC 96.
[10] (2007) 12 SCC 230.
[11] (2008) 13 SCC 767.
[12] (2009) 6 SCC 498.
[13] (2010) 14 SCC 641.

become arbitrary and that the sentencing law of Bachan Singh has been interpreted in varied ways by different Benches of the Court.

Even as the law changed to make the death sentence the exception, and judges were expected to exercise their discretion to adjudge whether or not the death sentence needed to be imposed, in 1983, the Court had to step in to hold that mandatory death sentences were contrary to the rights guaranteed in Article 14 and Article 21.

In the case of *Mithu v. State of Punjab*[14], the Supreme Court was confronted with the mandatory sentence of death enacted in Section 303 of the IPC. The Court held that the mandatory death sentence was unconstitutional, stating that a standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case.

The Court also noted that it is because the death sentence has been made mandatory by section 303 in regard to a particular class of persons that, as a necessary consequence, they are deprived of the opportunity under section 235(2) of the Criminal Procedure Code to show cause why they should not be sentenced to death and the Court is relieved from its obligation under section 354(3) of that Code to state the special reasons for imposing the sentence of death. The deprivation of these rights and safeguards which is bound to result in injustice is harsh, arbitrary and unjust.

In 1983, the Supreme Court in *Deena v. Union of India*[15], rejecting a constitutional challenge to execution by hanging, held that while a prisoner cannot be subjected to barbarity, humiliation, torture or degradation before the execution of the sentence, hanging did not involve these either directly or indirectly. In Deena, too, there was an attempt to revisit the constitutionality of the death sentence, but the court did not reopen the question. In a later decision of *Parmanand Katara v. Union of India*[16], the Court accepted that allowing the body to remain hanging beyond the point of death in the Punjab Jail Manual instructing that the body be kept hanging for half an hour after death was a violation of the dignity of the person and hence unconstitutional.

[14] (1983) 2 SCC 277.
[15] (1983) 4 SCC 645.
[16] (1995) 3 SCC 248.

Delay has been a matter of concern in the criminal justice system, with the motto 'justice delayed is justice denied' being attributed to the plight of both victims of crime as well as the accused. Long terms of incarceration, periods of which are on death row and in solitary confinement, have been the concerns of courts through the years. In the case of *T.V. Vatheeswaran v. State of Tamil Nadu*[17], the Court held that a delay in execution of sentence that exceeded two years would be a violation of procedure guaranteed by Article 21.

However, in *Sher Singh v. State of Punjab*[18], it was held that delay could be a ground for invoking Article 21, but that no hard and fast rule could be laid down that delay would entitle a prisoner to quashing the sentence of death.

A Constitution Bench of the Supreme Court in the case of *Triveniben v. State of Gujarat*[19], considered the question, and held that only executive delay, and not judicial delay, may be considered as relevant in an Article 21 challenge. The Court said that the only delay which would be material for consideration will be the delays in disposal of the mercy petitions or delay occurring at the instance of the Executive. If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether, it is just and fair to allow the sentence of death to be executed.

The Court also held that undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to re-open the conclusions reached by the Court while finally maintaining the sentence of death. No fixed period of delay could be held to make the sentence of death inexecutable.

This was reaffirmed in the case of *Shatrughan Chauhan v Union of India*[20], this case also laid down guidelines for "safeguarding the interest of the death row convicts", which included reaffirming the unconstitutionality of solitary or single cell confinement prior to rejection of the mercy petition by the President, necessity of providing legal aid, and the need for a 14- day period between the rejection of the mercy petition and execution.

[17] (1983) 2 SCC 68.
[18] (1983) 2 SCC 344.
[19] (1989) 1 SCC 678.
[20] (2014) 3 SCC 1.

The Supreme Court also upheld the constitutionality of Section 364A, IPC, which allows for the imposition of the death sentence in cases of kidnapping with ransom. In the case of *Vikram Singh v. Union of India*[21], it had been argued that Section 364A was unconstitutional, among other things, because it denied courts the discretion of awarding a punishment that was not life imprisonment or the death sentence especially in cases of kidnapping which may not warrant such a high punishment. The Supreme Court acknowledged that "punishments must be proportionate to the nature and gravity of the offences for which the same are prescribed. However, it held that Section 364A cannot be dubbed as so outrageously disproportionate to the nature of the offence as to call for the same being declared unconstitutional, saying death sentences would only be awarded in the rarest of rare cases. The Court did not address the question of whether the death sentence was an appropriate punishment for a non-homicide offence, or applicable international law standards on this issue.

SUSTAINABILITY OF CAPITAL PUNISHMENT IN LIGHT OF CONCEPT OF RIGHT TO LIFE

Article 21 of the Constitution of India provides protection of life and personal liberty to every individual and the deprivation of life of anyone is unconstitutional under Article 21 of the Constitution of India. It further states that, 'no person shall be deprived of his life or personal liberty except according to procedure established by law.' Thus, it implies that if there is a procedure for depriving an individual of his life, then the state can do the same, otherwise not. This right has been held to be the heart of the Constitution, the most organic and progressive provision in our living constitution, the foundation of our laws.

According to Bhagwati, J., Article 21 "embodies a constitutional value of supreme importance in a democratic society." Iyer, J., has characterized Article 21 as "the procedural *magna carta* protective of life and liberty.

Concept of Right to Life

Everyone has the right to life, liberty and the security of person. Right to life is undoubtedly the most fundamental of all rights. All other rights add quality to the life in question and depend on the pre-existence of life itself for their operation. As human rights can only be attached to living beings, one might expect the right to life itself to be in some sense primary, since none of the other rights would

[21] (2015) 9 SCC 502.

have any value or utility without it. There would have been no Fundamental Rights worth mentioning if Article 21 had been interpreted in its original sense.

The word 'Life' as referred to in Article 21 of the Constitution of India,[22] is not merely the physical act of breathing. It does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to live with human dignity, right to livelihood, right to health, right to pollution free air, etc. Right to life is fundamental to our very existence without which we cannot live as human being and includes all those aspects of life, which go to make a man's life meaningful, complete, and worth living. It is the only article in the Constitution of India that has received the widest possible interpretation. Under the canopy of Article 21, so many rights have found shelter, growth and nourishment. Thus, the bare necessities, minimum and basic requirements that is essential and unavoidable for a person is the core concept of right to life.

In the case of *Kharak Singh v. State of Uttar Pradesh*[23], the Supreme Court quoted and held that by the term "life" as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by amputation of an arm or leg or the pulling out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world.

In another case titled as *Sunil Batra v. Delhi Administration*[24], the Supreme Court reiterated with the approval the above observations and held that the "right to life" included the right to lead a healthy life so as to enjoy all faculties of the human body in their prime conditions. It would even include the right to protection of a person's tradition, culture, heritage and all that gives meaning to a man's life. It includes the right to live in peace, to sleep in peace and the right to repose and health.

Right to Life, Does Not Include Right to Die

Article 21 of Constitution of India, confers on a person the right to live a dignified life. The question whether right to life also includes right to die came for consideration for first time before the High Court of Bombay in *Maruti Shripati Dubal v. State of Maharashtra*[25]. In this case, the Bombay High Court held that the right to life guaranteed under Article 21 includes right to die, and the Hon'ble High Court struck

[22] Article 21, Constitution of India.
[23] AIR 1963 SC 1295.
[24] AIR 1980 SC 1579.
[25] 1987 Cr. LJ 743 (Bom.)

down Section 309 of the IPC that provides punishment for attempt to commit suicide by a person as unconstitutional.

In *P. Rathinam v. Union of India*[26], a two judge Division Bench of the Supreme Court, took cognizance of the relationship/contradiction between Sec. 309, I.P.C., and Art. 21. The Court supporting the decision of the High Court of Bombay in Maruti Sripati Dubal's Case held that the right to life embodies in Art. 21 also embodied in it a right not to live a forced life, to his detriment disadvantage or disliking. The court argued that the word life in Art. 21 means right to live with human dignity and the same does not merely connote continued drudgery. Thus, the court concluded that the right to live of which Art. 21 speaks of can be said to bring in its trail the right not to live a forced life. The court further emphasized that attempt to commit suicide is in realty a cry for help and not for punishment.

A full Bench of the Supreme Court in *Gian Kaur v. State of Punjab*[27], reviewed the ruling given in *Rathinam v. Union of India*[28]. The question before the court was that if the principal offence of attempting to commit suicide is void as being unconstitutional in respect of Article 21, then how abetment can thereof be punishable under Section 306 of Indian Penal Code, 1860[29]. It was argued that 'the right to die' having been included in Article 21, and Sec. 309 having been declared unconstitutional, any person abetting the commission of suicide by another is merely assisting in the enforcement of his fundamental right under Article 21. The Court overruled the decision of the Division Bench in the above stated case and has put an end to the controversy and ruled that Article 21 is a provision guaranteeing protection of life and personal liberty and by no stretch of imagination can extinction of life' be read to be included in protection of life. The court further observed that right to life is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of right to life.

CONSTITUTIONALITY OF CAPITAL PUNISHMENT IN INDIA

The first challenge to the constitutionality of the death penalty in India came in 1973 in the case of *Jagmohan Singh v. State of U.P.*[30]. The petitioners argued that death penalty violated Articles 14, 19 and 21 of the Constitution of India. It was argued that since the death sentence extinguishes, along with life,

[26] 1994 SCC (3) 394.
[27] 1996 SCC (2) 648.
[28] Id.
[29] Section 306, Indian Penal Code, 1860.
[30] AIR 1973 SC 947.

all the freedoms guaranteed under Article 19(1) (a) to (g), it was an unreasonable denial of these freedoms and not in the interests of the public. Further, the petitioners argued that the discretion vested in judges in deciding to impose death sentence was uncontrolled and unguided and violated Article 14. Finally, it was contended because the provisions of the law did not provide a procedure for the consideration of circumstances crucial for making the choice between capital punishment and imprisonment for life, it violated Article 21. The decision of the US Supreme Court in *Furman v. Georgia*[31] in which the death penalty was declared to be unconstitutional as being cruel and unusual punishment was also placed before the Constitution Bench. This case was decided before the Code of Criminal Procedure was re-enacted in 1973, making the death penalty an exceptional sentence. In Jagmohan Singh's case, the Supreme Court of India found that the death penalty was a permissible punishment, and did not violate the Constitution. The Court held that the impossibility of laying down standards is at the very core of the criminal law as administered in India, which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment. That discretion in the matter sentences as already pointed out, is liable to be corrected by superior courts. The exercise of judicial discretion on well recognized principles is, in the final analysis, the safest possible safeguard for the accused. The Court also held that if the law has given to the judge a wide discretion in the matter of sentence to be exercised by him after balancing all the aggravating and mitigating circumstances of the crime, it will be impossible to say that there would be at all any discrimination, since facts and circumstances of one case can hardly be the same as the facts and circumstances of another.

Around the same time, just before the Code of Criminal Procedure of 1973 became law, the Supreme Court also commented on the wisdom of the introduction of the post-conviction hearing on sentence in the case of *Ediga Anamma v. State of Andhra Pradesh*[32]. In commuting the death sentence to life imprisonment, the Court observed that in any scientific system which turns the focus, at the sentencing stage, not only on the crime but also the criminal, and seeks to personalize the punishment so that the reformatory component is as much operative as the deterrent element, it is essential that facts of a social and personal nature, sometimes altogether irrelevant if not injurious at the stage of fixing the guilt, may have to be brought to the notice of the Court when the actual sentence is determined. The law's changes were, in the view of the court, expressive of a tendency "towards cautious, partial abolition and a retreat from total retention. In a statement that reflects concerns that has acquired a resonance, the court said, "a legal policy on life or death cannot be left for ad hoc mood or individual

[31] 408 U.S. 238, 1972.
[32] AIR 1974 SC 799.

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Four of the five judges hearing this case did not accept the contention that the death penalty was unconstitutional. They overruled Rajendra Prasad[37], and affirmed Jagmohan[38], when they held that the death penalty could not be restricted to cases where the security of the state and society, public order

[33] AIR 1979 SC 916.
[34] AIR 1962 SC 1106.
[35] (1980) 2 SCC 684.
[36] Ibid.
[37] AIR 1979 SC 916.
[38] AIR 1973 SC 947.

and the interests of the general public were threatened. Errors, they held, could be set right by superior courts, and presentence hearing and the procedure required confirmation by High Court would correct errors. In *Bachan Singh*[39], the Court adopted the 'rarest of rare' guideline for the imposition of the death penalty, saying that reasons to impose or not impose the death penalty must include the circumstances of the crime and the criminal. This was also the case where the court made a definitive shift in its approach to sentencing. The Court held that the expression 'special reasons' in the context of this provision, obviously means 'exceptional reasons' founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. The Court further added that it cannot be over emphasized that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in section 354 (3). Judges should never be blood-thirsty. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in section 354 (3), viz, that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed. Justice Bhagwati in his dissenting opinion found the death penalty necessarily arbitrary, discriminatory and capricious. He reasoned that "the death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape, from its clutches. This circumstance also adds to the arbitrary and capricious nature of the death penalty and renders it unconstitutional as being violative of Articles 14 and 21.

In 1991 in *Shashi Nayar v. Union of India*[40], the death sentence was once again challenged, among other reasons, for the reliance placed in Bachan Singh on the 35th Report of the Commission. The Court turned down the petition, citing the deteriorating law and order in the country, with the observation that the time was not right for reconsidering the law on the subject. The plea 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, was also rejected.

[39] (1980) 2 SCC 684.
[40] AIR 1992 SC 395.

In the past few years, attention has also been drawn to the arbitrary application of the Bachan Singh framework by courts as also to the possibility of judicial error in cases where the death sentence has been imposed. The Supreme Court in *Aloke Nath Dutta v. State of West Bengal*[41], *Swamy Shraddhananda v. State of Karnataka*[42], *Santosh Bariyar v. State of Maharashtra*[43], and *Farooq Abdul Gafur v. State of Maharashtra*[44], amongst other cases, has noticed that sentencing in capital cases has become arbitrary and the law of Bachan Singh has been interpreted in varied ways by different Benches of the Court.

Even as the law changed to make the death sentence the exception, and judges were expected to exercise their discretion to adjudge whether or not the death sentence needed to be imposed, in 1983, the Court had to step in to hold that mandatory death sentences were contrary to the rights guaranteed in Article 14 and 21.

In the case of *Mithu v. State of Punjab*[45], the Supreme Court was confronted with the mandatory sentence of death enacted in Section 303 of the IPC. The Court held that the mandatory death sentence was unconstitutional, stating that a standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case. The Court further noted that it is because the death sentence has been made mandatory by section 303 in regard to a particular class of persons that, as a necessary consequence, they are deprived of the opportunity under section 235(2) of the Criminal Procedure Code[46] to show cause why they should not be sentenced to death and the Court is relieved from its obligation under section 354(3) of that Code to state the special reasons for imposing the sentence of death. The deprivation of these rights and safeguards which is bound to result in injustice is harsh, arbitrary and unjust.

Delay has been a matter of concern in the criminal justice system, with the adage 'justice delayed is justice denied' being attributed to the plight of both victims of crime as well as the accused. Long terms of incarceration, periods of which are on death row and in solitary confinement, have been the concerns

[41] (2007) 12 SCC 230.
[42] (2008) 13 SCC 767.
[43] 2009 (6) SCC 498.
[44] (2010) 14 SCC 641.
[45] (1983) 2 SCC 277.
[46] Section 235(2), Criminal Procedure Code, 1973.

of courts through the years. In the case of *T.V. Vatheeswaran v. State of Tamil Nadu*[47], the Court held that a delay in execution of sentence that exceeded two years would be a violation of procedure guaranteed by Article 21.

However, in *Sher Singh v. State of Punjab*[48], it was held that delay could be a ground for invoking Article 21, but that no hard and fast rule could be laid down that delay would entitle a prisoner to quashing the sentence of death. A Constitution Bench of the Supreme Court in the case of *Triveniben v. State of Gujarat*[49], considered the question, and held that only executive delay, and not judicial delay, may be considered as relevant in an Article 21 challenge. The Court said, "the only delay which would be material for consideration will be the delays in disposal of the mercy petitions or delay occurring at the instance of the Executive." If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether, it is just and fair to allow the sentence of death to be executed. The Court also held that undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to re-open the conclusions reached by the Court while finally maintaining the sentence of death. No fixed period of delay could be held to make the sentence of death inexecutable.

This view of the Constitution Bench of the Supreme Court was reaffirmed in the case of *Shatrughan Chauhan v Union of India*[50]. This case also laid down guidelines for "safeguarding the interest of the death row convicts", which included reaffirming the unconstitutionality of solitary or single cell confinement prior to rejection of the mercy petition by the President, necessity of providing legal aid, and the need for a 14 day period between the rejection of the mercy petition and execution.

Recently, the Supreme Court also upheld the constitutionality of Section 364A, IPC, which allows for the imposition of the death sentence in cases of kidnapping with ransom. In the case of *Vikram Singh v. Union of India*[51], it had been argued that Section 364A was unconstitutional, among other things, because it denied courts the discretion of awarding a punishment that was not life imprisonment or the death sentence especially in cases of kidnapping which may not warrant such a high punishment. The

[47] (1983) 2 SCC 68
[48] 1983 SCC (2) 345.
[49] 1989 AIR 1335.
[50] (2014) 3 SCC 1.
[51] SC, Criminal Appeal No. 824 of 2013.

Supreme Court acknowledged that "punishments must be proportionate to the nature and gravity of the offences for which the same are prescribed". However, it held that Section 364A cannot be dubbed as so outrageously disproportionate to the nature of the offence as to call for the same being declared unconstitutional, saying death sentences would only be awarded in the rarest of rare cases. The Court did not address the question of whether the death sentence was an appropriate punishment for a non-homicide offence, or applicable international law standards on this issue.

CONCULSION

The relation between the concept of Capital punishment and of Right to life has been looked into, with emphasis on Article 21 of the Constitution of India, while dealing with the said issue at the national as well as various treaties and conventions at the international level. Various cases which tested the concept of capital punishment and right to life have also been dealt with.

Lastly, it has also been aimed to have a look at the landmark cases in the history of India, which have been decided by the various High Courts as well as the Supreme Court of India, which have time and again tested the constitutionality of the punishment of death penalty in India, the outcome of the same and its relevance in the judicial system, with regard to present times.