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## Avinash Kumar



*Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.*

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# A STUDY ON CONSTITUTIONALITY OF THE CAPITAL PUNISHMENT

AUTHORED BY - ASMA ASHRAF

## ABSTRACT

Capital punishment gathers heated debates in the present time. The death penalty was blamed for too long without having any comprehension of its nuances. It was blamed majorly on the basis of human rights, irreversibility, and arbitrariness. Still, capital punishment passes muster on all accounts. The death penalty was applied historically as a type of punishment for a wide range of crimes, from the most serious offences<sup>1</sup>. The death penalty, also termed capital punishment, is the sentence of execution for a criminal offence. There are two basic reasons for imposing the punishment<sup>2</sup>. One is the opinion that a person who has committed a wrong must suffer for it, while the other is the concept that punishing criminals deters others from doing wrong. The same foundation that underlies other punishments also supports the death penalty. Death penalty or Capital punishment is a significant part of the Indian criminal justice system. The presence of the death penalty is questioned as unethical with the support of India's human rights movement. Nevertheless, this is a peculiar argument, as preserving one individual alive at the expense of the lives of other members of society or potential victims is inconceivable and immoral.

**Keywords:** Capital Punishment, Theories of Punishment, Immoral, Commutation, Circumstances.

## INTRODUCTION

Capital punishment is considered an issue of human rights violation by many but its main purpose is to safeguard society from dangerous criminals who pose a threat to the welfare of society. Crime can be reduced with the death penalty. The death penalty is a constitutional issue that was debated for years. Some consider it a crime deterrent, while others consider it unconstitutional.<sup>3</sup>

The fear of facing the ultimate punishment of the death penalty may prevent some individuals from committing heinous crimes. This is particularly true for people who have already been

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<sup>1</sup> <https://deathpenaltyinfo.org/curriculum/high-school/about-the-death-penalty/history-of-the-death-penalty>

<sup>2</sup> International Journal of Pure and Applied Mathematics Volume 120 No. 5 2018, 911-922

<sup>3</sup> Op.cit. Capital Punishment in India by Dr. Subhash C. Gupta, 2000, p. 1

convicted of a crime and are facing the death penalty for a new crime. In addition, the death penalty can help serve as a closure for the victims' families and as a form of justice for the harm caused by the perpetrator.

The role of justice in the execution of the death penalty is complex. The death penalty evokes divergent opinions among people. Some view it as a just punishment that befits the criminal's actions, while others argue that it lacks fairness due to inconsistent application. As a result, the death penalty remains a contentious and ongoing topic of debate. Despite the controversy surrounding the death penalty, its constitutionality and effectiveness as a crime deterrent cannot be denied. When discussing the role of justice in the death penalty, both justice for the victims of crime and justice for the accused must be considered. The death penalty is often viewed as a form of punishment that does justice to the victims, deters other offenders from committing similar crimes, and as well as retribution for the perpetrator's actions. However, some critics of the death penalty contend that this form of punishment is inhumane, immoral and disproportionate to the crime committed.

To obtain justice, all aspects of the crime must be considered, including the intentions of the perpetrator, the impact on victims and their families, and the potential deterrent effect on others. In the case of the death penalty, justice is served by imposing a punishment proportionate to the crime committed. This form of punishment is often seen as a way to bring justice not only to the offender but also to those affected by his or her actions. The role of justice with regard to the accused should also be considered. In the case of the death penalty, justice is achieved by ensuring that the accused is found guilty beyond a reasonable doubt and that the sentence is not administered indiscriminately or haphazardly. Ultimately, justice is crucial in the death penalty because it protects the rights of both the victims and the accused. Understanding the legal processes and implications of the death penalty will ensure justice for all involved.

This article will explore

- Whether the death penalty is unconstitutional and whether it violates article 21
- The Doctrine of "rarest of rare" cases
- The jurisprudence of capital punishment
- and with regards to "Monoamine Oxidase A" (MAOA gene), which is said to show aggressive and psychological behaviour where those with low MAOA gene are more susceptible to crime than persons without.

## CAPITAL PUNISHMENT IN INDIA

The execution of an individual who has been discovered guilty of a crime & given the death penalty by a court law and is recognized as capital punishment occasionally referred to as the death penalty. The word death penalty is commonly utilized interchangeably with capital punishment, despite the fact that the application of the sentence does not necessarily leads to execution (even when it is affirmed on appeal). This is due to a chance that the sentence might be altered to life in a prison sentence. There has been a minimum of 1,422 executions in India between 1953 and 1963 which led to a gradual decrease in the usage of the death penalty. Though, India has the greatest population in South Asia it has the most effective sporadic executions, commonly numerous years apart. 162 death sentences have been imposed in India in the year 2018, and there have only been 3 executions of the death penalty over the last decade, leaving 426 offenders on death row by the year 2018. The use of the death penalty in India was restricted to rare circumstances due to serious demands against its continued usage.

In the case of *Bachan Singh vs State of Punjab*<sup>4</sup>, the “Supreme Court” (SC) upheld the constitutionality of capital punishment, the judge emphasized that the death penalty is an exception rather than the rule, save in the rarest of situations where there are no other viable options left, and can only be imposed in the most severe cases of extreme guilt. Consequently, the Court continued to support the legitimacy of the death sentence in accordance with the concept of unusual situations, which imbues judicial proceedings with a high assumption in life's favour, recognizing that the death penalty should be reserved for exceptional circumstances. The judges should decide whether or not to prosecute an offender with the death penalty because this has not been established and no clear rules have been set.

### DOES THE CAPITAL PUNISHMENT VIOLATE INDIAN CONSTITUTION'S ARTICLE 21?

I would like to cite a few case laws where the constitutionality of capital punishment was upheld. The constitutionality of the death sentence has been contested in the SC case of *Jagmohan Singh vs. the State of U.P*<sup>5</sup>. It has been contended that the right to life is a basic human right along with death sentence violates Indian Constitution's Article 21. However, the court rejected these claims

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<sup>4</sup>“AIR 1980 SC 898”.

<sup>5</sup>“AIR 1973 SC 947 Cr.LJ 3301973 SCC162”.

and determined that there was no way to prove that the death penalty violated Indian Constitution Article 21.

Deena vs. Union of India<sup>6</sup> case, the execution of capital punishment has been brought before the court and it has been ruled that a prisoner cannot be exposed to degradation, torture, humiliation, or barbarity prior to the execution of the sentence, but hanging did not directly or indirectly entail any of these. Therefore, hanging is not a harsh means of carrying out a punishment. The court declined to revisit the issue of the death penalty's legality despite an attempt. As a result, Indian Constitution Article 21 is not violated.

In Mithu Singh v. State of Punjab<sup>7</sup>, The SC ruled that Indian Penal Code (IPC) Section 303 is unconstitutional because it violates Indian Constitution's Articles 14 & 21, but the death penalty remains in effect in extremely rare cases. Indian Constitution Article 21 ensures the right to life & personal freedom, which includes the right to live with "human dignity". It states that no individual must be stripped of his right unless in accordance with the legal procedure. It asserts that the state could have the authority to take life in the name of the law & the general public.

Rajendra Prasad vs. State of U.P.<sup>8</sup> case, Justice Iyer advocated for the abolition of the death sentence and its preservation for exclusively white-collar offences. But in the Bachchan Singh Case<sup>9</sup>, the majority of the court overturned Rajendra Prasad's decision and determined that section 302 of the IPC, which imposes the death punishment, did not violate Article 21. India is a signatory to the "international convention" on Civil and political rights of 1979, but it has not abolished the death sentence. Instead, it applies it in a rational and not arbitrary manner.

## DOCTRINE OF RAREST OF RARE

When adjudicating matters concerning the imposition of Capital Punishment (the Death Penalty) The court generally uses its perspective to assess the seriousness and severity of the offence committed. Capital Punishment is only imposed in cases when the offence is extreme and terrible, and the commission of such an offence is an extreme occurrence in society, which a prudent person would never consider. Typically, the Judiciary refrains from imposing the death penalty,

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<sup>6</sup>" AIR 1983 SC 1155".

<sup>7</sup>" (1983) 2 SCC 277".

<sup>8</sup>" AIR 1979 SC 916"..

<sup>9</sup>" AIR 1980 SC 898".

instead imposing the maximum punishment of life imprisonment. In India, the “rarest of the rare” case concept is utilized by the courts as a tool to award capital punishment to convicted offenders if proven guilty of committing a heinous crime.

The Indian laws neither upheld the principle of the Death Penalty from a consistent point of view nor it fully deferred. Death Penalty may still be given in some of the rare cases such as in Section 121, 302, 364A, and any other section of the IPC of 1860 that suggests the application of the Death Penalty as a type of punishment

As per the court, the five elements of murder that must be present for the idea of the “rarest of rare” cases to be applied are<sup>10</sup>:

- The victim personality
- The Motive
- The manner in which crimes are committed
- The extent of the crime
- The crime's antisocial or repugnant nature.

The court shall decide the offender's punishment based on the aforementioned guidelines.

Ramnares and Ors vs. State of Chhattisgarh case<sup>11</sup>, The SC requested that the accused receive the death punishment for his brutal gang rape and subsequent murder. The victim was strangled to death while being gang raped by the offender's brother-in-law and his drunken friends. The notion that only the rarest of rare circumstances should be considered for the death penalty was established with the court during the discussion. The SC focuses on the type of offence, the circumstances, the degree of brutality, and the motivation while deciding whether to execute a defendant, coming to the conclusion that it is crucial for the court to consider the facts of each case in the context of the stated principles. However, it seems that considering these principles leads to the conclusion that even the most horrible crimes may not always warrant the death penalty because each case has unique circumstances. The word "rarest of rare" refers to unusual occurrences that stand out for a particular cause. The principle is separated into the two parts listed below:

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<sup>10</sup> “Macchi Singh and Ors v. State of Punjab AIR 1983 SC 957”.

<sup>11</sup> “AIR 2012 SC 1357”.

- The Aggravating Circumstances and
- The Mitigating Circumstances

The Aggravating Circumstances<sup>12</sup> - Only at the court's discretion may the death sentence be imposed-

- A public employee acted in accordance with Section 43 of the CrPC, 1973, in order to legally fulfil their duties
- if the murder was brutal and carried out after careful preparation.
- The Murder demonstrates extreme wickedness.
- The victim was a member of the police, armed forces, or other public officials who were on duty at the time of the murder

The Mitigating Factors are: - The court shall consider the following factors:

The death penalty must not be applied to juvenile offenders.

- It was considered that the accused was justifiable in committing a crime based on facts and circumstances.
- The likelihood that the defendant will not commit a crime against society.
- The defendant's condition demonstrates that he was mentally fragile.
- The act was performed under duress.
- Crime committed while suffering from a mental or emotional disorder.

The Apex Court emphasized that the bench shall not impose a sentence in "the rarest of rare cases" when mitigating circumstances exist. After weighing both aggravating and mitigating factors and applying the principle, the court determined that the guilty party must be sentenced to life in prison. This judgment was based on three significant factors<sup>13</sup>: -

- That the defendant was young
- The cause of death was strangling
- The defendant, who is the victim's brother-in-law, had extramarital affairs with the victim, who was not a legally wedded wife.

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<sup>12</sup>“Mahapatro, S. (2013). Rarest of Rare doctrine and Concept of Social Engineering. Journal of international academic research for multidisciplinary - A global society for Multidisciplinary research. Volume 1. Issue 5. ISSN: 2320 5083”.

<sup>13</sup>“Ramnares and Ors v. State of Chhattisgarh AIR 2012 SC 1357”.

## JURISPRUDENCE OF CAPITAL PUNISHMENT

Capital punishment has a long history, existing in nearly every country throughout human civilization. In Ancient Greece, It was employed for crimes such as murder, treason, arson, and rape, as per the laws of the Draco ( 7th century BCE )<sup>14</sup>. However, Plato, a Greek philosopher argued that it should be reserved for the most incorrigible offenders. Similarly, the Romans used capital punishment for various offences, though citizens were exempted for a short time during the republic<sup>15</sup>. Sir Henry Maine supports this notion, stating that the “ Roman Republic did not abolish death sentence though its non-use was primarily directed by the practice of punishment or exile and the procedure of questions”<sup>16</sup>

To keep the law and order in society, the State should punish the violators. The volume and severity of the penalty were mostly based on the King because there was no clear rule or regulation for such offences in the past. Modern views of punishment evolved throughout time, and the state eventually accepted our voluntary submission of our rights and authority to uphold law & order.

The most appropriate punishment and most powerful deterrent for the worst offences is considered to be the death sentence. Even those who disagree with it believe it to be cruel. The morality of the death sentence is therefore questionable, and many criminologists as well as socialists across the world have long called for its abolition.

## THEORY OF PUNISHMENT

The objective of the death sentence is in making the offender an instance and in discouraging other like-inclined people. Out of the different theories of punishment, the retributive and the deterrent theory offers a defence for the death penalty. The retributive concept of jurisprudence emphasizes the death penalty application for horrendous crimes. The theory is based on the principles- “An eye for an eye” and “a tooth for a tooth”. It contains incommensurate retribution, which is getting in exchange for an unlawful act, not the same but it's equal. The deterrent theory of punishment sets an illustration for the criminal. The notion operates on mainly 2 conditions- First, society gets rid of the criminal when he is executed as a punishment. Second, it makes an

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<sup>14</sup> Op.cit. Capital Punishment in India by Dr. Subhash C. Gupta, 2000, p. 1

<sup>15</sup> <https://www.britannica.com/topic/capital-punishment>

<sup>16</sup> Op.cit. Capital Punishment in India by Dr. Subhash C. Gupta, 2000, p. 1

impression on the general public, which helps to prevent others from committing crimes by raising awareness of them<sup>17</sup>The concept also highlights the necessity of the death sentence as a symbol of society's vehement rejection of the crime. The modern sentencing policy reflects a combination of many or all of these goals. Retribution, justice, deterrence, information, and protection are now recognized to be the goals of penalties. The retributive component is intended to reveal the public's disgust for the offence and to penalize the criminal for his wrong conduct. Significant legislation has placed increasing emphasis on the idea of justice as a goal of punishment, but judicial opinion on this particular goal is divided and rehabilitation rarely takes precedence over deterrence, which means that both the penalty and the offence should receive the same punishment.

India has been reticent to abolish the death penalty and has even voted against the "United Nations General Assembly" resolution in 2007 asking for a suspension of the death sentence. Over 70% of the populace voted in favour of continuing to use the death penalty as a form of retribution and discipline, demonstrating the legitimacy of this course of action and the support of the general public for its continuation. However, taking a human being's life is the most inhumane act. Only those criminals who exhibit no remorse for their cruel behavior are subject to the death penalty; doing so may serve as a warning to others about the repercussions of such behavior and serve as a deterrent to anybody considering engaging in such heinous behavior

The freedom of one person's life cannot be sacrificed at the expense of another, or occasionally numerous others, in society. Therefore, applying the death penalty to terrorists, rapists, and serial killers who have no regard for human life, are blinded by greed for power, and are duped by immoral reasons restores the public's trust in the legal system. However, the judiciary must use caution when applying this ruling and base its conclusions on impartial, well-informed judgment.

## **THE MAOA GENE:**

In short, The MAOA is a mitochondrial enzyme that catabolizes catecholamine neurotransmitters such as dopamine, serotonin, and norepinephrine<sup>18</sup>. It has become clear that the "MAOA gene", which is found on the "X chromosome", is a significant hereditary determinant in relation to

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<sup>17</sup> "Jagmohan Singh v. State of U.P. AIR 1973 SC 947(958)".

<sup>18</sup> "Buckholtz, J. W., and Meyer-Lindenberg, A. (2008). MAOA and the neurogenetic architecture of human aggression.

*Trends Neurosci.* 31, 120–129. doi: 10.1016/j.tins.2007.12.006".

mental illness and aggressive behavior in people. It is associated with various psychological disorders such as depression, antisocial behaviour, and aggression.

In the case of *Mobley vs State*<sup>19</sup> 1994, The finding of a criminal gene in a Dutch family served as the foundation for the defence. Although the family was huge and dispersed throughout several Dutch provinces, they engaged in the same issue 35 times. Many of the males were hostile and prone to violent impulsive crimes like rape and wildfire. Han Brunner, a geneticist at the Institute of Genetics in Nijmegen, was contacted by the ladies in the family who were desperate to learn how to halt the peculiarity that was strangely passed on by women and exhibited exclusively in men.

he biopsychological makeup of a criminal is significantly influenced by genetics. Low MAOA criminals are more likely to exhibit aggression as newborns and violence as adolescents.

People with low MAOA are more violent than those with high MAOA. Subjects processing the gene have a greater risk of being among other offenders. This feature is present for the most part in men with low MAOA since they are at a greater risk of displaying criminal behaviour. It has been found that both genes and the environment affect criminal behaviour. The social environment also affects criminal behaviour<sup>20</sup>.

When criminals with such genes are not eliminated from society. This puts the lives of innocent people in danger. These criminals cannot change their natures and reform themselves. The death penalty is very beneficial to society since it will increase the public's and innocent people's confidence who would otherwise be terrified to leave their homes. Therefore, the majority prefers capital punishment because it makes more people happy and secure. When such an offender is punished for his heinous crimes, it implies that they would not be able to re-offend after being freed from prison, which is rather common, and if they are not to be released, there is little probability of their escaping.

## CONCLUSION

In conclusion, it is pertinent to acknowledge that though there are reports and arguments against the retention of capital punishment. The death penalty is justified to a large extent When an

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<sup>19</sup>" *Mobley V State* 265 Ga. 292 (1995)".

<sup>20</sup> *Nature (MAOA) and Nurture in a Criminal* by Julian Highsmith, Mark Mercado, Jose Hernandez, & Susana Madrigal - UC Merced Undergraduate Research Journal".

offender commits a capital crime, the offender must receive a discipline that's commensurable to the crime<sup>21</sup>. The claim that capital punishment is an inhumane system is- incorrect because torture is avoided and the death penalty is delivered compassionately in current times. Inhibiting future offenders from committing capital crimes through the use of the death penalty increases public safety. Some claim that the death penalty hasn't reduced crime rates. Nevertheless, the fact that it exists makes a nation's criminal justice system look more severe, which discourages future offenders. By delivering this ultimate form of punishment, it sends a message to those who consider committing similar or other serious crimes that the consequences could be grave. The death penalty serves as a form of justice, prioritizing the needs of the victim and granting them the recognition they deserve for their pain and suffering. By holding perpetrators of serious crimes accountable. It sends a clear message that such actions are unacceptable and will be appropriately punished. Moreover, the death penalty acts as an ethical and effective means of ensuring justice for victims, safeguarding society from future offenses, and potentially deterring potential criminals. To sum up, I feel that the death penalty is ethically correct as it helps society extensively, is administered compassionately, and is the only penalty that's commensurable to the offences

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<sup>21</sup> In *Jagmohan Singh v. State of Uttar Pradesh* (1973), *Rajendra Prasad v. State of Uttar Pradesh* (1979), *Bachan Singh v State of Punjab* (1980)