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EVALUATING THE RELEVANCE OF CAPITAL PUNISHMENT: A CRITICAL ANALYSIS OF JUDICIAL PRONOUNCEMENTS IN INDIA

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I. ABSTRACT

This research paper critically evaluates the relevance of capital punishment in India by examining constitutional provisions, statutory frameworks, judicial precedents, and international perspectives. It analyses the evolution of the "rarest of rare" doctrine and explores the judicial inconsistencies in death sentencing. The paper highlights how procedural safeguards under the Bharatiya Nyaya Sanhita and Bharatiya Nagarik Suraksha Sanhita aim to restrict arbitrary imposition of the death penalty. It examines arguments both supporting and opposing capital punishment, drawing attention to the disproportionate impact on the poor and marginalised, the psychological trauma of prolonged death row incarceration, and the global trend towards abolition. The study underscores the shift in judicial thinking from retributive to reformative justice, favouring life imprisonment without remission as a constitutionally sustainable alternative. Drawing from comparative jurisprudence and human rights standards, the research concludes that capital punishment, while legally permitted, is increasingly seen as morally and pragmatically redundant. It proposes reforms aimed at structured sentencing, better legal aid, and a reconsideration of the death penalty's place within a democratic and rights-based legal framework committed to dignity and justice.

II. KEYWORDS

Capital punishment, rarest of rare doctrine, reformative justice, death penalty in India, Judicial discretion.

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III. INTRODUCTION

A. Concept and Historical Evolution of Capital Punishment

Capital punishment is the State's most severe form of penal sanction. It extinguishes the right to life. Ancient societies believed that justice must mirror the harm caused. Hammurabi's Code reflected this with the principle of "lex talionis"—an eye for an eye. The death penalty was a spectacle of power. Its object was deterrence, fear, and retributive balance.[3]

Indian legal consciousness evolved through texts like Manusmriti. It prescribed death for crimes that were believed to disturb dharma—like murder, theft, or treason. Kautilya in Arthashastra advocated for capital punishment as a tool for governance. But he also insisted that punishment must be proportionate, rational, and state-controlled.[4] Buddhist values later introduced mercy into penology. Ashoka's edicts suspended executions, promoting repentance over retribution. India's early traditions thus had both retributive and reformative undertones.

The British colonial state imposed a more rigid penal system. The Indian Penal Code, 1860 codified death for murder, waging war against the state, and dacoity with murder. The colonial government used executions to suppress political dissent and maintain control. The Code of Criminal Procedure, 1898 provided a procedure, but judicial discretion in sentencing was largely unguided.[5]

Post-independence, India retained the death penalty. But the Constitution infused it with procedural and moral checks. Article 21 guaranteed the right to life and personal liberty. It could be curtailed only by a just, fair, and reasonable procedure. The Indian Penal Code remained in force until it was recently repealed and replaced by the Bharatiya Nyaya Sanhita, 2023. The new law narrowed the scope of capital punishment. Section 101 of the

[3] *Hammurabi's Code, c. 1754 BCE, available at https://avalon.law.yale.edu/ancient/hamframe.asp (last visited Apr. 16, 2025).*
[4] Kautilya, Arthashastra, R. Shamasastry trans., (1915).
[5] Indian Penal Code, 1860, §§ 302, 121, 396, repealed by Bharatiya Nyaya Sanhita, 2023.

BNS prescribes death for aggravated murder, such as where the act is committed with extreme brutality or in the course of gang activity. Section 64 of the BNS prescribes capital punishment where rape leads to the death of the woman or causes her to enter a persistent vegetative state.[6]

The procedural law also underwent reform. The Bharatiya Nagarik Suraksha Sanhita, 2023, replaced the old CrPC. Section 398(2) requires courts to hold a separate hearing before sentencing a convict to death. Section 401(3) mandates that courts must record special reasons for awarding the death sentence. These provisions formalise the sentencing hearing laid down in the *Bachan Singh* case and aim to ensure that courts consider mitigating factors before imposing the death penalty.[7]

The evidentiary law too has changed. The Bharatiya Sakshya Adhiniyam, 2023, replaced the Indian Evidence Act. Section 4 of BSA allows evidence only of relevant facts and facts in issue. Sections 23 and 24 bar confessions obtained through coercion or inducement. Sections 57 and 58 regulate the admissibility of electronic and digital evidence. This ensures that capital trials meet the highest standards of proof. A single error can cost a life.[8]

The first major constitutional challenge to capital punishment came in *Jagmohan Singh v. State of U.P.*, AIR 1973 SC 947. The Supreme Court upheld the constitutionality of death penalty. It said that sentencing discretion did not violate Article 21 as long as it followed a valid procedure.[9] In *Rajendra Prasad v. State of U.P.*, (1979) 3 SCC 646, Justice Krishna Iyer pushed the court closer to abolition. He held that retributive justice alone could not justify capital punishment. He warned that poverty and lack of legal aid often led to death sentences.

The Constitution Bench in *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 settled the debate. It upheld the validity of capital punishment but imposed strict guidelines. The

[6] Bharatiya Nyaya Sanhita, 2023, §§ 64, 101, No. 45 of 2023.
[7] Bharatiya Nagarik Suraksha Sanhita, 2023, §§ 398(2), 401(3), No. 46 of 2023.
[8] Bharatiya Sakshya Adhiniyam, 2023, §§ 4, 23, 24, 57, 58, No. 47 of 2023.
[9] Jagmohan Singh v. State of U.P., AIR 1973 SC 947.

Court coined the "rarest of rare" doctrine. It said death should be imposed only when life imprisonment is clearly inadequate. The Court mandated that judges must balance aggravating and mitigating circumstances. Human dignity had to be respected even in the face of heinous crimes.[10]

In *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470, the Court elaborated five categories of cases where death may be appropriate. These included cruelty in execution of the crime, magnitude of harm, or the crime shocking the collective conscience. But later judgments showed inconsistent application. In *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, the Court commuted 15 death sentences on the grounds of delay and mental illness. It ruled that inordinate delay in deciding mercy petitions violated Article 21.[11]

Capital punishment also raises serious concerns about fairness. According to the *Death Penalty India Report* (2016) by Project 39A at NLU Delhi, over 75 percent of death row convicts are from poor, Dalit, or minority backgrounds. Many lacked proper legal representation. This shows how structural inequalities affect sentencing outcomes. The punishment may be legally valid but practically unjust.[12]

India is a retentionist state. But its position is increasingly under scrutiny. Article 6 of the International Covenant on Civil and Political Rights (ICCPR) requires States to restrict death penalty to the most serious crimes. India has not ratified the Second Optional Protocol to the ICCPR, which calls for abolition. But courts have cited international standards. In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, the Court referred to global abolitionist trends while commuting the sentence.[13]

Capital punishment is also entangled with morality. The Gandhian principle of *ahimsa* rejects retribution. Reformative justice focuses on the potential for change. The Supreme

[10] Bachan Singh v. State of Punjab, (1980) 2 SCC 684.
[11] Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1.
[12] Project 39A, Death Penalty India Report (2016), https://www.project39a.com/dpir (last visited Apr. 16, 2025).
[13] Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498.

Court in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 spoke of the need for constitutional morality. Death, once imposed, forecloses reform. It leaves no room for rehabilitation. The question is not whether the offender deserves to die, but whether the State deserves to kill.

The new criminal codes reflect an effort to limit capital punishment without abolishing it. The Bharatiya Nyaya Sanhita, BNSS, and BSA together ensure that its application is rare, reasoned, and reviewable. But its existence remains a moral dilemma. It compels the legal system to confront the limits of justice, the value of life, and the role of the State in taking it away.

B. Research Objective

1. To critically examine the constitutional and statutory framework governing capital punishment in India, with special emphasis on Article 21 and relevant provisions under the Bharatiya Nyaya Sanhita and Bharatiya Nagarik Suraksha Sanhita.
2. To analyse the evolution and judicial application of the "rarest of rare" doctrine and assess its consistency, fairness, and alignment with reformative justice principles.
3. To evaluate the relevance and future of the death penalty in India by comparing Indian jurisprudence with global legal trends and international human rights standards.

C. Research Questions

1. How does the current legal framework in India, including constitutional mandates and procedural safeguards, regulate the imposition of capital punishment?
2. In what ways has the Indian judiciary interpreted and applied the "rarest of rare" doctrine, and does this approach reflect consistency and constitutional morality?
3. How does India's retention and application of the death penalty compare with international practices, and what reforms are necessary to align it with global human rights norms?

IV. CONSTITUTIONAL AND LEGAL FRAMEWORK

A. Constitutional Provisions (Article 21 and Due Process)

Article 21 of the Constitution of India guarantees that no person shall be deprived of life or personal liberty except according to procedure established by law. It's not an absolute right. But any law authorising deprivation of life must meet the test of fairness, non-arbitrariness, and reasonableness. The death penalty, if imposed, must conform to the exacting standards of procedural and substantive due process embedded within Article 21.[14]

In *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27, the Supreme Court initially gave Article 21 a narrow interpretation. The Court held that any procedure established by law was sufficient. Even if it was unjust. That view was overruled in *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248. The Court held that the procedure under Article 21 must be just, fair, and reasonable. Not just any law. This decision expanded the scope of due process and connected Articles 14, 19, and 21 into one coherent doctrine.[15]

Article 21 is now interpreted to include dignity, humane treatment, and the right to a fair trial. In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608, the Court recognised that the right to life includes the right to live with dignity. In *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494, the Court extended Article 21 to cover prison conditions. It declared that torture, solitary confinement, and degrading treatment of death row inmates were unconstitutional. These judgments bring human rights into sentencing and post-conviction stages.[16]

In *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, a Constitution Bench upheld the constitutional validity of capital punishment. But the Court held that it must be used only in the "rarest of rare" cases. The Court stated that life imprisonment is the rule and death

[14] INDIA CONST. art. 21.
[15] *Maneka Gandhi v. Union of India, (1978) 1 SCC 248.*
[16] *Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608; Sunil Batra v. Delhi Administration, (1978) 4 SCC 494.*

penalty is the exception. It introduced a sentencing doctrine that requires balancing aggravating and mitigating circumstances. This principle is now essential to Article 21 compliance in capital sentencing.[17]

This doctrine was refined in *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470. The Court laid out five categories where death sentence might be appropriate—extreme brutality, anti-social nature, impact on collective conscience. However, over the years, courts have shown inconsistencies in applying this test. That inconsistency creates arbitrariness. And arbitrariness violates Article 21.[18]

Procedural due process demands a separate sentencing hearing. The Court mandated this in *Santa Singh v. State of Punjab*, (1976) 4 SCC 190. The old Code of Criminal Procedure had incorporated this in Section 235(2). Now, under the Bharatiya Nagarik Suraksha Sanhita, 2023, this requirement is codified in Section 398(2). This provision states that after a conviction, the court shall hear the accused separately on sentencing before deciding the punishment. It formalises the obligation of hearing mitigating factors before awarding a sentence.[19]

The most critical safeguard is the requirement to record "special reasons" when awarding the death penalty. In CrPC 1973, this was Section 354(3). In the BNSS, 2023, this is now provided under Section 393(3). This section clearly mandates that when the sentence is death, the judgment must explicitly state the "special reasons" for imposing such a penalty. It prevents casual or mechanical imposition of the death sentence. It adds a constitutional filter through the lens of Article 21.[20]

Judicial concern over delays in execution has also shaped due process. In *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, the Court commuted 15 death sentences due to prolonged delay in deciding mercy petitions. The Court ruled that delay causes psychological suffering that violates Article 21. In *T.V. Vatheeswaran v. State of Tamil Nadu*,

[17] *Bachan Singh v. State of Punjab, (1980) 2 SCC 684.*
[18] *Machhi Singh v. State of Punjab, (1983) 3 SCC 470.*
[19] Bharatiya Nagarik Suraksha Sanhita, 2023, § 398(2), No. 46 of 2023.
[20] Bharatiya Nagarik Suraksha Sanhita, 2023, § 393(3), No. 46 of 2023.

(1983) 2 SCC 68, the Court held that execution after prolonged delay was unconstitutional. It recognised that even a lawful sentence becomes arbitrary if executed after inordinate delay.[21]

Article 21 also includes the right to free legal aid and effective representation. In *Hussainara Khatoon v. State of Bihar*, (1980) 1 SCC 81, the Court declared that legal aid is essential for a fair trial. In *M.H. Hoskot v. State of Maharashtra*, (1978) 3 SCC 544, it ruled that the right to appeal includes the right to legal assistance. Without competent representation, a death sentence cannot be fair. The *Death Penalty India Report* (2016) revealed that most death row convicts come from poor and socially disadvantaged backgrounds. Lack of quality legal defence puts them at higher risk of receiving capital punishment.[22]

B. Statutory Basis under the Indian Penal Code and CrPC

The Indian Penal Code, 1860 laid down the substantive legal framework for capital punishment in India. It was a colonial instrument. Yet it continued unchanged for decades. It classified specific offences where death could be imposed. Section 302 provided for death or life imprisonment for murder. Section 121 dealt with waging war against the Government of India. It mandated death or life imprisonment. Section 396 made dacoity with murder punishable with death. Section 364A dealt with kidnapping for ransom and included death penalty among punishments.[23]

Section 376A, introduced post the 2013 Criminal Law Amendment, imposed death where rape resulted in the death of the woman or left her in a persistent vegetative state. It was a legislative response to the public outrage following the Nirbhaya case. These provisions

[21] *Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1; T.V. Vatheeswaran v. State of Tamil Nadu, (1983) 2 SCC 68.*
[22] *Hussainara Khatoon v. State of Bihar, (1980) 1 SCC 81; M.H. Hoskot v. State of Maharashtra, (1978) 3 SCC 544; Project 39A, Death Penalty India Report (2016), https://www.project39a.com/dpir (last visited Apr. 16, 2025).*
[23] Indian Penal Code, 1860, §§ 121, 302, 364A, 376A, 396.

reflected the State's resolve to reserve death for extreme acts of brutality and betrayal of public safety.[24]

The IPC did not prescribe mandatory death in most cases. Section 302, though permitting death, also allowed for life imprisonment. The use of the word "may" reflected legislative intent to leave sentencing discretion with the judiciary. However, Section 303 of the IPC earlier mandated death for a life convict committing murder. In *Mithu v. State of Punjab*, (1983) 2 SCC 277, this provision was struck down. The Court held that it violated Article 21 because it took away judicial discretion and imposed death automatically. That judgment became a landmark in aligning statutory sentencing provisions with constitutional guarantees.[25]

Procedural protections for capital sentencing were codified under the Code of Criminal Procedure, 1973. Section 235(2) required the judge to hear the accused on sentencing after the conviction. It was not merely a formality. It aimed to bring out mitigating factors. Section 354(3) mandated that if the court chose to impose the death penalty, it must record special reasons for doing so. This section incorporated the doctrine laid down in *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684. The law created a presumption in favour of life imprisonment. Death was to be an exception, applied with extreme care.[26]

Appeals and reviews formed another procedural safeguard. Sections 366 and 377 of the CrPC ensured that every death sentence awarded by a Sessions Court was subject to confirmation by the High Court. This confirmation was not mechanical. The High Court had to re-examine the facts, evidence, and sentencing decision independently. Section 374 allowed an appeal to the High Court. Section 389 allowed for the suspension of the sentence during the pendency of an appeal. These provisions added layers of scrutiny before the punishment could be carried out.[27]

[24] Criminal Law (Amendment) Act, 2013, No. 13 of 2013.
[25] *Mithu v. State of Punjab, (1983) 2 SCC 277.*
[26] Code of Criminal Procedure, 1973, §§ 235(2), 354(3), No. 2 of 1974.
[27] Id. §§ 366, 374, 377, 389.

Further, Section 433A of the CrPC limited the power of remission in cases where the sentence was life imprisonment following a conviction for an offence punishable with death. It mandated that such a person shall not be released before serving at least fourteen years of imprisonment. This statutory restriction ensured that judicial intent behind imposing a severe sentence was not diluted prematurely by executive action.[28]

The CrPC also facilitated mercy proceedings under Articles 72 and 161. While the Code did not regulate the exercise of executive clemency directly, it provided for the suspension, remission, and commutation of sentences under Sections 432 and 433. These sections empowered the appropriate government to grant relief in suitable cases. They were often invoked when the convict had spent years on death row or had shown signs of rehabilitation. The executive's power here worked as a constitutional check against errors in judicial verdicts or to respond to humanitarian considerations.[29]

Several Law Commission Reports evaluated the statutory scheme. The 35th Report (1967) supported the retention of the death penalty. It cited India's crime situation and deterrence concerns. The 262nd Report (2015) recommended abolition for all offences except terrorism and waging war. It noted that statutory safeguards were insufficient to prevent arbitrariness. The Commission highlighted the failure of procedural guidelines to eliminate sentencing disparity. These reports revealed that while the statute was constitutionally structured, its application remained vulnerable to inconsistency.[30]

V. JUDICIAL APPROACH TO CAPITAL PUNISHMENT

A. Evolution of the 'Rarest of Rare' Doctrine

The death penalty has always existed in Indian law. What changed was the way courts began to view its legitimacy. Earlier courts showed little hesitation in confirming capital sentences. There was no guiding principle. Sentencing depended more on judicial

[28] Id. § 433A.
[29] Id. §§ 432, 433.
[30] Law Commission of India, 35th Report on Capital Punishment (1967); 262nd Report on Death Penalty (2015).

discretion than constitutional values. This changed with time. The shift came slowly, through precedent, philosophy, and the Constitution.

The first major case that touched the constitutionality of the death penalty was *Jagmohan Singh v. State of U.P.*, AIR 1973 SC 947. The petitioner argued that capital punishment violated Article 21. The Supreme Court rejected the argument. It held that as long as there was a law and the procedure was followed, the death penalty was valid. The Court didn't read into Article 21 any substantive limits. It viewed sentencing purely as a procedural matter.[31]

That view was challenged later in *Rajendra Prasad v. State of U.P.*, (1979) 3 SCC 646. Justice V.R. Krishna Iyer introduced a more humane lens. He argued that death should not be routine. He stressed the relevance of the accused's background. Poverty, lack of education, mental condition all must be considered. He held that Article 21 demands more than just lawful process. It requires fairness in both law and execution. His dissent laid the foundation for what would become the rarest of rare principle.[32]

The doctrine formally emerged in *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684. A Constitution Bench revisited the validity of the death penalty. The Court upheld it. But it imposed a strict condition. Death could only be imposed in the "rarest of rare" cases. Life imprisonment would be the rule. Death would be the exception. The Court said the sentencing court must weigh aggravating and mitigating circumstances. If life imprisonment is not unquestionably foreclosed, death should not be imposed. This test became a constitutional doctrine under Article 21.[33]

The Court did not define "rarest of rare." That created space for future courts to interpret. In *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470, the Supreme Court attempted a structure. Justice Thakkar laid down five categories. Manner of commission when the crime is brutal or grotesque. Motive — if the motive shows depravity. Anti-social nature

[31] *Jagmohan Singh v. State of U.P., AIR 1973 SC 947.*
[32] *Rajendra Prasad v. State of U.P., (1979) 3 SCC 646.*
[33] *Bachan Singh v. State of Punjab, (1980) 2 SCC 684.*

if the act threatens public order. Magnitude — multiple murders or extreme loss of life. Personality of victims, for example, helpless children or public officials. This case gave shape to the Bachan Singh principle but also added ambiguity. Judges began applying their moral intuition in deciding what shocked conscience.[34]

Later cases began to express concern about inconsistency. In *Dhananjoy Chatterjee v. State of W.B.*, (1994) 2 SCC 220, the Court upheld death sentence on grounds of collective conscience. The crime was rape and murder of a schoolgirl. The phrase "collective conscience of society" became a new basis for capital punishment. But this phrase was vague. What shocks society is subjective. What shocks one judge may not move another. *Ravji v. State of Rajasthan*, (1996) 2 SCC 175, wrongly focused only on the brutality of the act, ignoring mitigating factors. The Court later acknowledged this was an error.[35]

The judiciary began acknowledging this arbitrariness. In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, the Supreme Court admitted that several death sentences were imposed without following Bachan Singh. It highlighted misapplication of sentencing principles. It said the doctrine is not merely a moral test. It must be a rigorous legal analysis. The Court stressed that mitigating factors must be meaningfully considered. Ignoring them violates Article 21.[36]

In *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546, Justice Chauhan reviewed several death sentences. He found contradictions in reasoning. In some cases, life was granted despite extreme brutality. In others, death was awarded for similar facts. He stressed that capital sentencing must be uniform. The absence of consistency violates Article 14 and 21. He recommended a Law Commission study on arbitrariness in death sentencing. The 262nd Law Commission Report followed this recommendation and recommended abolition for all crimes except terrorism and waging war.[37]

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[34] *Machhi Singh v. State of Punjab, (1983) 3 SCC 470.*
[35] *Dhananjoy Chatterjee v. State of W.B., (1994) 2 SCC 220; Ravji v. State of Rajasthan, (1996) 2 SCC 175.*
[36] *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498.*
[37] *Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546; Law Commission of India, 262nd Report on Death Penalty (2015).*

Another layer was added in *Mofil Khan v. State of Jharkhand*, (2021) 2 SCC 94. The Court reiterated that rarest of rare cannot mean rare in occurrence alone. It must reflect a crime that is so abhorrent that alternative punishment is unquestionably foreclosed. The test is not only about societal response. It's about constitutional values. Dignity. Reform. Justice. The Court also acknowledged the value of psychological assessment. It held that probability of reform must be assessed before imposing death.[38]

B. Key Supreme Court Judgments

In *Swamy Shraddananda (2) v. State of Karnataka*, (2008) 13 SCC 767, the Supreme Court carved a middle path between death and life imprisonment. The Court introduced the concept of "life imprisonment till natural life" as a substitute for the death penalty in appropriate cases. It held that in situations where the crime is grave but not deserving of death, the convict may be kept in prison for life without remission. This evolved the sentencing structure further. It reduced reliance on capital punishment while ensuring adequate punishment.[39]

In *State of Maharashtra v. Goraksha Ambaji Adsul*, (2011) 7 SCC 437, the Court set aside a death sentence awarded by the lower court. It noted that the trial court had imposed capital punishment without considering mitigating circumstances. The judgment re-emphasised that the right to be heard under Section 235(2) CrPC was not optional. The absence of a separate sentencing hearing renders the sentence vulnerable under Article 21.[40]

In *Shivu v. Registrar General, High Court of Karnataka*, (2007) 4 SCC 713, the Court observed that the brutality of the crime cannot be the sole reason to impose death. It criticised the High Court for relying only on the nature of the crime and not examining the individual

[38] *Mofil Khan v. State of Jharkhand, (2021) 2 SCC 94.*
[39] Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767.
[40] State of Maharashtra v. Goraksha Ambaji Adsul, (2011) 7 SCC 437.

circumstances of the accused. The Court set aside the death sentence and reiterated that mitigating factors form a central pillar of capital sentencing.[41]

In *Mohd. Ajmal Amir Kasab v. State of Maharashtra*, (2012) 9 SCC 1, the Court upheld the death sentence awarded to the lone surviving terrorist of the 26/11 Mumbai attacks. The Court acknowledged that the case satisfied the rarest of rare test, considering the scale of the attack, international impact, and loss of innocent life. The judgment reinforced the principle that terrorism with mass civilian casualties could invite capital punishment. But it also laid down the requirement that the process must still meet all constitutional and statutory safeguards.[42]

In *Union of India v. V. Sriharan alias Murugan*, (2016) 7 SCC 1, a Constitution Bench dealt with the scope of the executive's power to grant remission in cases of life imprisonment. The Court held that in cases where courts award life imprisonment till the end of natural life as a substitute for the death penalty, the executive has no power to remit the sentence under Sections 432 and 433 of CrPC. The judgment gave full effect to the new form of punishment conceptualised in *Swamy Shraddananda (2)*. It provided the judiciary a powerful alternative to death sentence without compromising on justice or fairness.[43]

In *Amit v. State of Uttar Pradesh*, (2012) 4 SCC 107, the Court reversed a death sentence on the ground that the mitigating circumstances were not properly weighed. The Court held that despite the brutal nature of the crime, the absence of a criminal past, young age of the accused, and possibility of reform must be accounted for. The judgment echoed *Bachan Singh* by reinforcing that death must not be awarded unless all other alternatives are unquestionably foreclosed.[44]

In *Kalu Khan v. State of Rajasthan*, (2015) 16 SCC 492, the Court refused to confirm a death sentence despite the heinous nature of the crime. It held that death penalty cannot be imposed merely to satisfy public outrage. The judgment warned that judicial

[41] Shivu v. Registrar General, High Court of Karnataka, (2007) 4 SCC 713.
[42] Mohd. Ajmal Amir Kasab v. State of Maharashtra, (2012) 9 SCC 1.
[43] Union of India v. V. Sriharan alias Murugan, (2016) 7 SCC 1.
[44] Amit v. State of Uttar Pradesh, (2012) 4 SCC 107.

pronouncements must not reflect public sentiment but constitutional values. Even where the crime appears abhorrent, the Court must assess whether the offender is beyond reform. Only then may death be considered justified.[45]

In *Ramnaresh v. State of M.P.*, (2012) 4 SCC 257, the Court laid down sentencing principles. It listed relevant mitigating and aggravating circumstances. Age, criminal history, mental condition, and possibility of reformation were recognised as mitigating. On the other hand, manner of killing, helplessness of victim, and societal impact were treated as aggravating. The Court emphasised a balanced assessment and rejected any mechanical imposition of the death penalty.[46]

In *Mohd. Mannan v. State of Bihar*, (2011) 5 SCC 317, the Court held that lack of mitigating evidence in lower courts due to poor defence representation cannot be a basis for upholding the death penalty. It acknowledged that most accused facing capital charges come from disadvantaged socio-economic backgrounds and often lack competent legal assistance. The Court observed that this imbalance risks converting death penalty into a punishment for poverty and marginalisation.[47]

In *Navneet Kaur v. State of NCT of Delhi*, (2014) 7 SCC 264, the Court commuted the death sentence of Devinder Pal Singh Bhullar due to inordinate delay in deciding his mercy petition. Though initially sentenced under anti-terror laws, the Court applied the principles from *Shatrughan Chauhan*. It held that even in terror-related cases, the convict retains Article 21 protections post-conviction. Delay, mental illness, and jail conditions must all be weighed before allowing an execution to proceed.[48]

In *Bhagwan Das v. State (NCT of Delhi)*, (2011) 6 SCC 396, the Court upheld a death sentence in a case involving honour killing. It held that such crimes are not only socially regressive but strike at the root of equality and liberty. The Court declared that honour killings must be treated with zero tolerance. The judgment reflected the evolving

[45] Kalu Khan v. State of Rajasthan, (2015) 16 SCC 492.
[46] Ramnaresh v. State of M.P., (2012) 4 SCC 257.
[47] Mohd. Mannan v. State of Bihar, (2011) 5 SCC 317.
[48] Navneet Kaur v. State of NCT of Delhi, (2014) 7 SCC 264.

understanding that capital punishment can be used to send a constitutional message in cases where the act undermines the very principles of justice and fraternity.[49]

In *Vikram Singh v. Union of India*, (2015) 9 SCC 502, the Court upheld the validity of the death penalty as a punishment for kidnapping for ransom. It ruled that the punishment was proportionate and within the legislative domain. The judgment confirmed that the constitution does not prohibit capital punishment per se but insists on proportionality and safeguards. The Court emphasised that the legislative intent must be respected unless it offends fundamental rights.[50]

C. Shifting Judicial Trends and Interpretations

Courts have begun moving away from death penalty as a routine punishment. Earlier, capital sentencing depended heavily on the nature of the crime. But newer judgments focus more on the individual offender. Reform and rehabilitation are now central to judicial thinking. Constitutionality is no longer tested in theory. It is measured in outcomes and consistency.

After *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, the doctrine of "rarest of rare" was laid down. But its practical implementation revealed contradictions. In *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470, the Court tried to provide clarity. Yet, over time, sentencing started depending on the judge's perception. This created a space for arbitrary interpretation. That problem remains unresolved.

In *Sangeet v. State of Haryana*, (2013) 2 SCC 452, the Supreme Court acknowledged that the sentencing framework lacked clarity. It observed that the balance between aggravating and mitigating circumstances had become mechanical. The judgment criticised earlier trends where aggravation was presumed based on brutality alone. The Court called for a move towards principled sentencing.[51]

[49] Bhagwan Das v. State (NCT of Delhi), (2011) 6 SCC 396.
[50] Vikram Singh v. Union of India, (2015) 9 SCC 502.
[51] Sangeet v. State of Haryana, (2013) 2 SCC 452.

The Supreme Court also recognised post-conviction suffering. In *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, the Court treated delay in mercy decisions as a ground for commutation. The convict's psychological agony was recognised as a constitutional injury. This was a turning point. It introduced the concept of "death row syndrome." Article 21 was read to protect prisoners even after conviction.

Another shift is seen in the way courts deal with collective conscience. In *Birju v. State of M.P.*, (2014) 3 SCC 421, the Court declined to impose death despite public outrage. It said that sentencing must be based on law, not emotion. The judgment pushed back against populist pressures. Courts reaffirmed their role as guardians of rights—not executors of public demand.

The Law Commission's 262nd Report (2015) gave this movement legitimacy. It noted that the death penalty has no deterrent value. It found that capital punishment was applied disproportionately against the poor and uneducated. The Commission recommended abolition for all crimes except terrorism. Though not binding, the report influenced judicial thinking.

Courts also began valuing the global trend. In *Navneet Kaur v. State of NCT of Delhi*, (2014) 7 SCC 264, the Court acknowledged international principles. Delay, mental health, jail conditions—all mattered. The Court applied the ICCPR's standards on fair trial and human dignity. This reflected a shift towards internationalisation of death penalty jurisprudence.

The recent trend shows restraint. Courts are no longer inclined to impose death unless the crime is beyond all repair. Sentencing is becoming a process, not a formality. Mitigation is no longer optional. Procedural rigour is non-negotiable. Reform is not presumed impossible. It must be tested before death can be considered. The judiciary is cautious now. Courts ask—can this person be reformed? Is the crime truly irredeemable? Does this case leave no alternative? If even one answer is no, death is not imposed. This is the new constitutional standard. Not just legality, but fairness. Not just justice, but dignity.

VI. CRITIQUE AND CONTEMPORARY RELEVANCE

A. Arguments in Support of Capital Punishment

Capital punishment continues to be defended by many scholars, policymakers, and sections of the public. Its justification rests on multiple legal, moral, social, and pragmatic grounds. Supporters argue that it fulfils essential functions within the justice system—retribution, deterrence, proportionality, and closure. They see it not as a violation of constitutional values, but as a reflection of collective conscience and legitimate penal policy.

Retribution forms one of the most ancient justifications. The concept is rooted in the maxim *lex talionis*—a life for a life. Proponents argue that justice must balance the scales. The criminal must pay with the highest price when the offence is of the gravest nature. In this view, death is not vengeance but moral accountability. The punishment reflects the seriousness of the crime and reinforces the idea that certain acts go beyond the pale of reform.[52]

Deterrence is a widely cited justification. It assumes that the threat of execution can dissuade individuals from committing heinous crimes. The irreversible nature of death is seen as a stronger deterrent than imprisonment. Supporters claim that capital punishment sends a public message about the gravity of offences like terrorism, rape, and premeditated murder. While empirical data is debated, some argue that the symbolic value of deterrence cannot be ignored in a society battling violent crime.[53]

Proportionality in sentencing is another key argument. It suggests that punishments must fit the degree of harm caused. In crimes involving extreme brutality, multiple killings, or offences against the State, capital punishment is viewed as proportionate. Life imprisonment in such cases is considered inadequate, both morally and legally. Supporters point to provisions like Section 101 of the Bharatiya Nyaya Sanhita, 2023

[52] Hugo Adam Bedau, Retribution and the Theory of Punishment, 75 J. PHIL. 601 (1978).
[53] Ernest van den Haag, The Ultimate Punishment: A Defence, 99 HARV. L. REV. 1662 (1986).

which retains capital punishment for murder with aggravating factors, affirming the legislature's faith in its necessity for certain categories of offences.[54]

Legislative endorsement continues to back the retentionist position. The Criminal Law (Amendment) Acts of 2013 and 2018 expanded the scope of capital punishment. Sections like 64 of the BNS, 2023 continue to provide death penalty for rape resulting in death or persistent vegetative state. These amendments, passed with overwhelming support in Parliament, show that India's lawmakers consider it an essential tool for justice in certain categories of offences.[55]

Supporters argue that the judiciary has developed enough safeguards to prevent its misuse. The "rarest of rare" doctrine ensures restraint. Mandatory separate sentencing hearings under Section 398(2) of the BNSS, 2023, and the requirement to record special reasons under Section 393(3), act as procedural barriers against arbitrary use. Judicial review, mercy petitions, and clemency powers under Articles 72 and 161 create multiple layers of scrutiny. These checks make the process constitutionally robust.[56]

International norms are invoked selectively. While global trends show movement towards abolition, many countries with advanced legal systems still retain the death penalty. The United States, Japan, Singapore, and China continue to execute convicts under stringent legal procedures. Supporters argue that India's stance is not anomalous and reflects sovereign legal choices based on its own socio-legal realities.[57]

The complexity of Indian society—diverse, populous, with varying levels of development—is another argument. Supporters contend that a uniform abolition policy may not suit India's unique conditions. Rising crimes against women, children, and the

[54] Bharatiya Nyaya Sanhita, 2023, § 101, No. 45 of 2023.
[55] Bharatiya Nyaya Sanhita, 2023, § 64, No. 45 of 2023.
[56] Bharatiya Nagarik Suraksha Sanhita, 2023, §§ 393(3), 398(2), No. 46 of 2023.
[57] United Nations Office on Drugs and Crime, Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (2010), https://www.unodc.org (last visited Apr. 16, 2025).

State's integrity demand strong legal deterrents. Abolishing death penalty, they argue, may send the wrong message and erode public confidence in justice delivery.

B. Arguments Against Capital Punishment

Capital punishment is increasingly criticised as an outdated, ineffective, and morally problematic form of punishment. Opponents challenge its constitutionality, question its deterrent effect, highlight systemic biases, and call attention to its irreversibility. They argue that the practice contradicts the modern ideals of justice, rehabilitation, and human dignity, and fails to meet the evolving standards of constitutional morality.

The foremost objection lies in its incompatibility with Article 21 of the Constitution, which protects life and liberty and demands that no person be deprived of life except through just, fair, and reasonable procedure. Critics argue that the arbitrary and inconsistent application of the death penalty violates this principle. Despite the "rarest of rare" doctrine laid down in *Bachan Singh*, courts have struggled to apply it uniformly. Studies show that sentencing often depends more on the judge than the law. Such unpredictability, in a system dealing with irreversible punishment, is constitutionally intolerable.[58]

Deterrence, once considered the strongest justification, is now questioned. There is little empirical evidence proving that death penalty is more effective than life imprisonment in reducing crime. The Law Commission of India in its 262nd Report (2015) concluded that there is no conclusive proof that capital punishment acts as a special deterrent. Other democratic nations have abolished it without experiencing a spike in violent crime. Critics argue that better policing, timely trials, and social reforms are more effective deterrents than executions.[59]

The death penalty is criticised for its inherent risk of miscarriage of justice. Indian criminal justice is not immune to errors. Investigations are often flawed. Legal aid is

[58] Law Commission of India, 262nd Report on the Death Penalty (2015).
[59] Id.

frequently inadequate. Forensic systems remain underdeveloped. As a result, innocent persons may be wrongfully convicted and executed. Once carried out, capital punishment cannot be reversed. The irreversible nature of the death penalty in a fallible system makes its continued existence dangerously unjust.[60]

Social justice arguments dominate abolitionist discourse. Studies, including the Death Penalty India Report (2016), show that most individuals sentenced to death come from poor, backward, and marginalised communities. They lack competent legal representation. They cannot effectively present mitigating evidence. This creates a system where punishment is not based only on crime, but also on class, caste, and access to legal resources. Critics argue that capital punishment, in practice, becomes punishment for the poor.[61]

Arguments also emerge from within India's legislative and judicial changes. The Bharatiya Nyaya Sanhita, 2023, although retaining the death penalty in limited cases under Sections 64 and 101, reflects a restrained legislative approach. New procedural safeguards in the BNSS, 2023 under Sections 393(3) and 398(2) demonstrate increased judicial caution. Abolitionists argue that if the law is already narrowing the scope, it signals a moral and policy shift that should culminate in full repeal.[62]

Death penalty is not necessary to satisfy victims' families. Many victim rights groups now advocate for alternatives. They believe that closure comes through justice and support, not executions. The trauma of prolonged appeals and uncertainty often delays healing. Critics argue that a sentence of life without remission can satisfy demands of justice without inflicting more suffering.[63]

[60] Amnesty International, India: Justice in Jeopardy – Death Penalty in India (2011).
[61] Project 39A, Death Penalty India Report (2016), https://www.project39a.com/dpir (last visited Apr. 16, 2025).
[62] Bharatiya Nyaya Sanhita, 2023, §§ 64, 101; Bharatiya Nagarik Suraksha Sanhita, 2023, §§ 393(3), 398(2).
[63] Murder Victims' Families for Human Rights, Dignity Denied: The Experience of Murder Victims' Families Who Oppose the Death Penalty, (2009), https://www.mvfhr.org.

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VII. COMPARATIVE JURISPRUDENCE

Legal systems across jurisdictions reflect divergent views on capital punishment. Some endorse it narrowly with strict procedural safeguards. Others abolish it entirely, citing evolving human rights standards. Comparative jurisprudence offers lessons for Indian law, especially as the country grapples with inconsistencies and moral complexities surrounding the death penalty.

The United Kingdom abolished capital punishment for murder in 1965 and extended the abolition to all crimes in 1998. British jurisprudence emphasised that the irreversible nature of death makes it incompatible with the fallibility of human institutions. The UK, as a signatory to the European Convention on Human Rights, aligns its legal framework with Protocol No. 13, which bans capital punishment even in wartime. The UK model is reformative in spirit and sees no place for executions in a modern democracy.[64]

Canada abolished the death penalty for ordinary crimes in 1976 and later extended it to all crimes under military law in 1998. Canadian courts have held that the death penalty violates Section 7 of the Canadian Charter of Rights and Freedoms, which guarantees the right to life, liberty, and security of the person. In *United States v. Burns*, the Supreme Court of Canada refused extradition of suspects to a country where they could face the death penalty, unless assurances against execution were given. The Canadian jurisprudence views state-sanctioned executions as inherently cruel and incompatible with the principles of fundamental justice.[65]

Germany stands as a strong abolitionist country. The Basic Law (Grundgesetz) explicitly prohibits capital punishment under Article 102. Post-World War II jurisprudence shaped German criminal philosophy into one rooted in dignity, reformation, and restraint. The German Constitutional Court reinforces that the human being, regardless of their acts,

[64] European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 13, ETS No. 187 (2002).
[65] *United States v. Burns, [2001] 1 SCR 283 (Can.).*

remains a bearer of dignity. Germany rejects retribution-based punishment and frames criminal justice in terms of rehabilitation and social reintegration.[66]

The United States retains the death penalty in federal law and in 27 states, but its application is shrinking. The U.S. Supreme Court has laid down evolving standards of decency through its Eighth Amendment jurisprudence. In *Atkins v. Virginia*, the Court barred executions of intellectually disabled persons. In *Roper v. Simmons*, it prohibited execution of juveniles. Though not abolished nationally, U.S. courts increasingly emphasise proportionality, mitigation, and procedural fairness. Yet, critics highlight racial bias, socio-economic disparity, and wrongful convictions as continuing problems. The debate within American law reflects a tension between retributive tradition and human rights evolution.[67]

In South Africa, the Constitutional Court in *State v. Makwanyane* struck down the death penalty in 1995. The judgment interpreted the right to life and dignity under the post-apartheid Constitution. The court held that retribution cannot justify state execution, especially in a country seeking to rebuild a humane, inclusive legal order. The decision also noted the risk of arbitrariness and the moral duty of the State to uphold human dignity even in punishing the gravest crimes. The South African model integrates justice, dignity, and reconciliation, rejecting the death penalty as unjust.[68]

The International Criminal Court does not recognise death as a legitimate punishment. Even for the gravest crimes—genocide, war crimes, crimes against humanity—the Rome Statute prescribes imprisonment only. This reflects an international consensus that capital punishment is no longer appropriate in global criminal law. International courts stress accountability, not execution. Rehabilitation and proportionality are now core principles of cross-border legal systems.[69]

[66] Basic Law for the Federal Republic of Germany, art. 102 (1949).
[67] Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002).
[68] *State v. Makwanyane, 1995 (3) SA 391 (CC) (South Africa).*
[69] Rome Statute of the International Criminal Court, arts. 77–78, U.N. Doc. A/CONF.183/9 (1998).

VIII. CONCLUSION AND SUGGESTIONS

The death penalty in India is constitutionally permitted but its use has narrowed. The doctrine of "rarest of rare" ensures that life is the rule and death the exception. Yet, judicial inconsistency, procedural errors, and socio-economic bias expose its flaws. Sentencing often depends more on the bench than on principles. This arbitrariness contradicts the constitutional guarantee of equality and due process under Articles 14 and 21.[70]

Legislative changes under the Bharatiya Nyaya Sanhita, 2023 and the Bharatiya Nagarik Suraksha Sanhita, 2023 introduce crucial procedural safeguards. Section 393(3) mandates special reasons to be recorded for a death sentence. Section 398(2) ensures a separate sentencing hearing. These provisions, like their predecessors under the CrPC, reinforce that capital punishment must be reasoned, fair, and deeply considered. They signal a shift in legislative intention toward caution and restraint.[71]

However, even these safeguards cannot remove the possibility of error. The irreversible nature of execution makes capital punishment incompatible with a fallible system. Wrongful convictions, inadequate legal aid, and systemic biases remain concerns. The *Death Penalty India Report* (2016) confirmed that the majority of death row inmates are poor, illiterate, and belong to socially marginalised communities. This structural imbalance makes equal justice difficult to achieve.[72]

The psychological suffering endured by prisoners on death row, described as "death row phenomenon" or "death row syndrome," adds to the inhumanity. Prolonged delays in appeals, mercy petitions, and executions leave convicts in a state of constant anxiety. The

[70] *Bachan Singh v. State of Punjab, (1980) 2 SCC 684.*
[71] Bharatiya Nagarik Suraksha Sanhita, 2023, §§ 393(3), 398(2), No. 46 of 2023; Bharatiya Nyaya Sanhita, 2023, §§ 64, 101, No. 45 of 2023.
[72] Project 39A, Death Penalty India Report (2016), https://www.project39a.com/dpir (last visited Apr. 16, 2025).

Supreme Court in *Shatrughan Chauhan v. Union of India* acknowledged that such suffering may violate Article 21. The law cannot allow torture in the name of punishment.[73]

Global jurisprudence is steadily moving toward abolition. More than two-thirds of countries have abolished the death penalty in law or practice. Protocol No. 13 to the European Convention and Article 6 of the ICCPR reflect a global consensus that capital punishment is incompatible with human dignity. Even international criminal tribunals do not impose death for crimes like genocide or war crimes. India's continued use of the death penalty places it at odds with emerging global norms.[74]

Reform should guide the future. Parliament should re-examine the necessity of death penalty provisions under Sections 64 and 101 of the BNS. Capital punishment may be restricted to exceptional cases involving terrorism or acts against the sovereignty of the State. Sentencing guidelines should be codified to avoid arbitrariness. Life imprisonment without remission should be encouraged as a more humane alternative.[75]

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