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THE DEATH PENALTY UNDER BHARATIYA NYAYA SANHITA: JUSTICE, RETRIBUTION, OR AN OUTDATED PRACTICE?

Khushi Sharma¹

I. ABSTRACT

"Justice is not found in punishment alone, but in understanding the value of human life." The death penalty remains one of the most debated aspects of India's criminal jurisprudence. With the enactment of the Bharatiya Nyaya Sanhita, 2023 (BNS), replacing the colonial-era Indian Penal Code, 1860 (IPC), the discussion has resurfaced over whether the death penalty aligns with modern constitutional morality. This paper explores the legal, moral, and philosophical dimensions of capital punishment in India under the BNS framework. Through an examination of historical evolution, constitutional principles, and landmark as well as recent judicial decisions, it assesses whether the death penalty today represents justice, retribution, or an outdated practice. The analysis maintains a neutral stance, emphasizing that the debate must reconcile justice with humanity in an evolving legal order. In continuation of this discourse, the introduction of the Bharatiya Nyaya Sanhita, 2023 has renewed national attention on whether capital punishment remains an effective and ethically defensible component of India's criminal justice system. The persistence of the death penalty under the BNS, despite global shifts toward abolition, highlights the tension between societal expectations of retribution and the constitutional commitment to human dignity, fairness, and proportionality. This paper therefore extends the discussion by examining not only the legal foundations of capital punishment under the BNS but also the broader ethical, social, and global considerations that shape its contemporary relevance. The expanded analysis aims to contribute to an informed and balanced understanding of whether the death penalty today serves the true purpose of justice or represents a vestige of an older penal philosophy.

II. KEYWORDS

Death penalty, Bharatiya Nyaya Sanhita, rarest of rare doctrine, constitutional morality, criminal justice reform, human dignity

¹ 3rd semester B.A.LL.B(H) Student. Email: khushi.sharma.gnballb29@iilm.edu

III. INTRODUCTION

The concept of the death penalty evokes strong emotional, moral, and legal responses. For some, it symbolizes justice – a rightful retribution for heinous crimes. For others, it represents an outdated and inhumane punishment incompatible with the ideals of a democratic and rights-based state. India's legal system has, over the years, oscillated between these two poles of thought. With the advent of the Bharatiya Nyaya Sanhita, 2023, the issue once again commands attention.

The BNS, in replacing the IPC, retains provisions that authorize capital punishment for specific crimes such as murder, terrorism, and aggravated sexual offences. This legislative continuity signals that India is not yet ready to abandon the death penalty. However, it also opens a critical space for re-evaluating its philosophical and constitutional foundations.

A. RESEARCH OBJECTIVES

- To analyse the legal framework of the death penalty under the Bharatiya Nyaya Sanhita, 2023.
- To examine constitutional principles and judicial interpretations governing capital punishment in India.
- To evaluate whether the death penalty serves deterrent, retributive, or reformatory objectives.
- To identify ethical, social, and human rights concerns associated with capital punishment.

B. RESEARCH QUESTIONS

- Does the Bharatiya Nyaya Sanhita justify the continued retention of the death penalty?
- How have constitutional principles such as Article 21 and the “rarest of rare” doctrine shaped India's death penalty jurisprudence?
- Is the death penalty effective in achieving deterrence or delivering

retributive justice?

- What social, ethical, and human rights issues are associated with capital punishment in India?

C. RESEARCH HYPOTHESES

This research is based on the hypothesis that the death penalty, though retained under the Bharatiya Nyaya Sanhita, is increasingly incompatible with evolving constitutional morality and human rights standards. It is assumed that capital punishment fails to demonstrate proven deterrence and disproportionately impacts marginalized communities. The study further hypothesizes that Indian jurisprudence is gradually shifting toward a reformatory approach, indicating that the death penalty may no longer serve the objectives of modern criminal justice and may be an outdated punitive practice.

D. RESEARCH METHODOLOGY

The research adopts a doctrinal and qualitative methodology, relying on statutory interpretation, judicial precedents, and scholarly literature. Comparative international perspectives are incorporated to contextualize India's position within global trends. The study also analyses socio-legal data and human rights reports to understand the practical implications of retaining the death penalty under the BNS.

E. LITERATURE REVIEW

The discourse on the death penalty in India has evolved through diverse scholarly contributions across legal theory, constitutional law, criminology, and human rights.

- **Historical & Philosophical Literature:** Early writings by Kautilya and the Manusmriti justified harsh punishments for maintaining social order. Modern scholars such as H.L.A. Hart and Kant debate moral justifications of retribution versus human dignity.
- **Constitutional & Jurisprudential Literature:** Authors like Upendra Baxi, A.P. Singh, and Justice P.N. Bhagwati critique capital punishment as incompatible with Articles 14 and 21. The "rarest of rare" doctrine introduced by the Supreme Court receives extensive academic analysis

for inconsistency and excessive judicial discretion.

- **Human Rights & Reform Literature:** International human rights bodies and Indian think tanks (e.g., NLU Delhi's Death Penalty Research Project) highlight systemic discrimination, wrongful convictions, and socio-economic patterns among death row inmates.
- **Comparative Studies:** Research comparing India with South Africa, the UK, and the US emphasises a global movement away from capital punishment due to evolving standards of decency.
- **Post-BNS Literature:** Recent commentaries examine how the Bharatiya Nyaya Sanhita retains death penalty provisions but enhances procedural safeguards, reflecting a transitional stage between retributive and reformative justice models.

IV. HISTORICAL EVOLUTION OF THE DEATH PENALTY IN INDIA

The roots of the death penalty in India can be traced back to ancient jurisprudence. The Manusmriti and Arthashastra justified severe punishments, including death, for maintaining societal order. However, the modern legal framework was established during British rule under the Indian Penal Code, 1860, which prescribed the death penalty for crimes such as murder (Section 302), waging war against the government (Section 121), and dacoity with murder (Section 396).

Post-independence, the framers of the Constitution chose not to abolish the death penalty. Instead, they entrusted Parliament and the judiciary with ensuring that its application remained consistent with constitutional morality. The Supreme Court, in *Jagmohan Singh v. State of Uttar Pradesh* (1973), upheld the constitutional validity of the death penalty, reasoning that the sentencing process itself offered adequate safeguards under Article 21 of the Constitution.

However, the jurisprudential framework evolved significantly in later years. The Court in *Bachan Singh v. State of Punjab* (1980) introduced the landmark "rarest of rare" doctrine, asserting that the death penalty should be imposed only when life

imprisonment appears inadequate. This principle continues to guide Indian sentencing today.

V. THE DEATH PENALTY UNDER THE BHARATIYA NYAYA SANHITA, 2023

The BNS, despite replacing a 160-year-old code, retains death as a punishment for multiple offences.

Clauses corresponding to IPC provisions maintain continuity:

- Clause 101 (similar to Section 302 IPC) allows death or life imprisonment for murder.
- Clause 110 prescribes death for aggravated rape leading to death or vegetative state.
- Clause 113 applies death to terrorism and organized crime causing death.

While the BNS preserves the structure of capital punishment, it emphasizes procedural justice mandating stricter pre-trial and sentencing safeguards. The legislature, in retaining death penalty provisions, appears guided by public perception of deterrence and moral outrage. Yet, the emphasis on proportionality signals growing sensitivity to human rights and fairness.

VI. CONSTITUTIONAL FRAMEWORK AND JURISPRUDENTIAL SAFEGUARDS

Article 21 guarantees the right to life and personal liberty, and its scope has expanded through judicial interpretation. In *Maneka Gandhi v. Union of India* (1978), the Supreme Court held that the procedure established by law must be “fair, just, and reasonable.” This interpretation elevated the protection of life beyond procedural formalism.

Applying this doctrine to the death penalty, the Court in *Bachan Singh* reaffirmed that capital punishment is constitutional only if awarded under a just, reasonable, and fair process. Later, in *Machhi Singh v. State of Punjab* (1983), the Court elaborated on the “rarest of rare” criteria, identifying aggravating and mitigating

circumstances to guide judicial discretion.

More recently, *X v. State of Maharashtra* (2024), reaffirmed the need for individualized sentencing. The Court emphasized socio-economic conditions, potential for reformation, and psychological assessment as key considerations before awarding death. This reflects a gradual humanization of India's capital sentencing jurisprudence

VII. LANDMARK JUDICIAL PRONOUNCEMENT

- **Bachan Singh v. State of Punjab (1980)** – Constitutional validity upheld; “rarest of rare” principle evolved.
- **Machhi Singh v. State of Punjab (1983)** – Provided concrete categories for applying the doctrine.
- **Mithu v. State of Punjab (1983)** – Mandatory death under Section 303 IPC struck down as arbitrary and unconstitutional.
- **Shatrughan Chauhan v. Union of India (2014)** – Recognized right against inhuman treatment; long delays in execution can justify commutation.
- **Re: Death Penalty Sentencing Review (2025)** – Post-BNS judgment urging uniform sentencing framework and calling for restraint in imposing capital punishment.

Together, these cases form a coherent constitutional narrative: while the death penalty is legally permissible, its use must be rare, reasoned, and humane.

VIII. THEORIES OF PUNISHMENT AND THEIR RELEVANCE

The death penalty engages core theories of criminal justice:

- **Retributive Theory:** This theory sees punishment as moral vengeance – society's right to inflict pain proportionate to the offence. The death penalty, in this sense, represents ultimate retribution for extreme moral transgressions.
- **Deterrent Theory:** Advocates argue that the fear of death deters potential offenders. Yet empirical data remains inconclusive. The Law Commission

of India (262nd Report, 2015) acknowledged that deterrence value is largely symbolic rather than factual.

- **Reformative Theory:** Reformative justice seeks rehabilitation over destruction. Opponents of the death penalty argue that execution forecloses any chance of reformation. The Supreme Court, in *X v. State of Maharashtra* (2024), echoed this view by emphasizing that even convicts deserve a chance to change.
- Modern jurisprudence in India reflects a synthesis: Punishment must protect society but also respect human dignity. The death penalty thus survives only as a last resort, when reformation is deemed impossible.

IX. ETHICAL, MORAL, AND SOCIAL DIMENSIONS

Ethically, the death penalty challenges the moral legitimacy of the State in taking life. If the right to life is the most fundamental of all rights, its deprivation must face the strictest scrutiny. The irreversible nature of the death penalty intensifies its moral burden. Socially, death sentencing in India often mirrors inequality. Studies show that the majority of death row inmates belong to marginalized communities with limited access to quality legal aid. The Death Penalty India Report (NLU Delhi, 2023) found that over 74% of death row prisoners were economically disadvantaged. Recognizing this, the Supreme Court in *Re: Death Penalty Sentencing Review* (2025) emphasized empathy, equality, and procedural safeguards to ensure justice is not determined by privilege. Mahatma Gandhi's warning that "an eye for an eye will make the whole world blind" resonates with the moral dilemma India faces: can justice be achieved through the deliberate taking of life?

X. COMPARATIVE AND INTERNATIONAL PERSPECTIVE

Globally, over two-thirds of nations have abolished the death penalty in law or practice. The United Kingdom, India's colonial model, abolished it in 1965. South Africa, through *State v. Makwanyane* (1995), held it violated dignity and equality.

The international community, through Article 6 of the International Covenant on Civil and Political Rights (ICCPR), urges progressive abolition. India, while retaining

it, restricts its use in compliance with the “rarest of rare” principle – demonstrating partial alignment with global norms. Countries like the United States retain capital punishment, but its application has sharply declined. India’s trajectory mirrors this – fewer executions, longer delays, and growing judicial restraint.

XI. ARGUMENTS SUPPORTING RETENTION

- **Deterrence and Public Safety:** Supporters claim the fear of death prevents heinous crimes.
- **Retributive Justice:** For victims’ families, execution represents closure and moral equilibrium.
- **Public Confidence:** Retaining the penalty is said to uphold faith in the criminal justice system.
- **Judicial Discretion:** The “rarest of rare” doctrine ensures case-by-case balance.
- **National Security:** The death penalty remains vital for terrorism and waging war offences under BNS clauses.

XII. ARGUMENTS SUPPORTING ABOLITION

- **Possibility of Wrongful Conviction:** India’s criminal justice system is fallible; wrongful execution is irreversible.
- **Violation of Human Dignity:** Execution undermines Article 21’s spirit of life and liberty.
- **Ineffectiveness as Deterrent:** No proven causal link exists between capital punishment and reduced crime.
- **Reformative Justice:** Life imprisonment allows remorse, rehabilitation, and moral growth.
- **Global Human Rights Standards:** Progressive democracies increasingly view capital punishment as incompatible with evolving standards of decency.

XIII. POLICY REFORMS AND FUTURE DIRECTIONS

The Re: Death Penalty Sentencing Review (2025) judgment marked a significant step toward reform by urging uniform sentencing guidelines, judicial training, and pre-sentencing reports.

Policy initiatives should now focus on:

- Institutionalizing mitigation hearings before sentencing.
- Ensuring psychological evaluation of offenders.
- Enhancing legal aid at all appellate and mercy stages.
- Encouraging restorative justice mechanisms, emphasizing victim-offender dialogue.

India may not abolish capital punishment soon, but it can transform its administration into one that values fairness and proportionality over vengeance.

XIV. CONCLUSION

The Bharatiya Nyaya Sanhita, 2023 preserves the death penalty but also mirrors a slow evolution in India's criminal philosophy. The judiciary's growing insistence on fairness, proportionality, and human dignity signals a gradual shift from retributive justice to reformatory rationality. Whether the death penalty represents justice, retribution, or an outdated practice ultimately depends on society's conscience. The balance lies in ensuring that punishment never eclipses humanity. As India strides forward with the BNS, it must decide whether justice should mean retribution or redemption.

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