



Capital punishment under the Bharatiya Nyaya Sanhita, 2023 - constitutional morality, human rights protection, and the future of the death penalty in India

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Abstract

This article undertakes a comprehensive doctrinal and analytical examination of capital punishment under India's Bharatiya Nyaya Sanhita, 2023 (BNS), which replaced the colonial-era Indian Penal Code, 1860 (IPC). The primary objective is to critically assess whether the retention of the death penalty within the BNS framework aligns with prevailing human rights principles, constitutional morality as evolved through Indian jurisprudence, and contemporary global standards of criminal justice. Employing a doctrinal methodology supplemented by comparative constitutional analysis and human rights law frameworks, this study interrogates the legislative rationale behind preserving capital punishment while simultaneously professing reformative aspirations.

The article traces the evolution of India's death penalty jurisprudence from the watershed judgment in *Bachan Singh v. State of Punjab* (1980), which institutionalised the 'rarest of rare' doctrine, through subsequent decisions that have both reinforced and destabilised its application. It examines the specific provisions of the BNS prescribing the death penalty, comparing these against their IPC antecedents, and evaluates the degree to which substantive reform has been achieved. The constitutional dimensions are explored through Articles 14 and 21 of the Constitution of India, with particular attention to the doctrines of proportionality, due process, and equal protection.

The article further situates India's retentionist position within the international human rights framework, including the International Covenant on Civil and Political Rights (ICCPR), United Nations General Assembly moratorium resolutions, and global abolition trends. Empirical concerns—including delays in mercy proceedings, socio-economic disparities in sentencing, wrongful conviction risks, and arbitrariness—are critically evaluated. The article concludes that while the BNS represents a degree of procedural modernisation, it does not fundamentally reform the philosophy of capital punishment. Recommendations are advanced for stricter sentencing guidelines, mandatory review mechanisms, greater transparency in mercy procedures, and a gradual movement towards abolition or legislative moratorium.

Keywords: Capital punishment, Bharatiya Nyaya Sanhita, human rights, Article 21, Rarest of Rare Doctrine, constitutional morality, death penalty jurisprudence

Introduction

Historical Background of Capital Punishment in India

Capital punishment has occupied a contested position in India's legal and moral landscape since before independence. Rooted in Mughal and colonial penal traditions, the formalisation of the death penalty in India found its statutory expression in the Indian Penal Code, 1860—a legislative product of colonial governance authored by Lord Macaulay's Law Commission. Under the IPC, capital punishment was prescribed for offences including murder (Section 302), waging war against the state (Section 121), and dacoity with murder (Section 396), among others. The Code vested the judiciary with discretion in sentencing, a feature that would later generate considerable controversy regarding arbitrariness and inconsistency.

Post-independence India inherited this colonial penal architecture without fundamental restructuring. The framers of the Constitution, while guaranteeing the right to life under Article 21, did not expressly prohibit capital punishment, thereby leaving its constitutional validity to be determined by the judiciary over subsequent decades. Early jurisprudence largely upheld the constitutionality of the death penalty, subjecting it to the 'procedure established by law' standard. It was only through decades of constitutional litigation that a more robust framework of procedural safeguards, mitigating circumstances, and the 'rarest of rare' doctrine emerged.

The Transition from IPC to BNS, 2023^[42]

The enactment of the Bharatiya Nyaya Sanhita, 2023^[42], represented the most significant overhaul of Indian criminal law since colonial times. Replacing the IPC and the Code of Criminal Procedure, the BNS was accompanied by the Bharatiya Nagarik Suraksha Sanhita, 2023^[15], and the Bharatiya Sakshya Adhinyam, 2023^[15], forming a tripartite legislative reform. The stated objectives of this reform included decolonisation of the legal framework, modernisation of criminal law, and alignment with contemporary values of justice and human rights.

However, a critical examination reveals that the BNS has largely retained the architecture of capital punishment from its predecessor. The renumbered provisions continue to prescribe the death penalty for a similar range of offences, with certain additions reflecting contemporary security concerns. Scholars and practitioners have debated whether this retention reflects considered deliberation or a failure of transformative courage in criminal law reform. The question of whether a new statutory name can obscure a substantively unchanged penal philosophy is central to this inquiry.

The Abolitionist-Retentionist Divide

The global discourse on capital punishment is divided between abolitionist and retentionist perspectives. Abolitionists contend that state-sanctioned execution is

inherently violative of human dignity, inconsistent with rehabilitative aims of criminal justice, and carries an unacceptable risk of irreversible miscarriage of justice. Retentionists, on the other hand, argue that the death penalty serves critical deterrent and retributive functions and may be justified in the most heinous cases as an expression of collective moral condemnation. India has institutionally adopted a modified retentionist position, reserving the death penalty for only the most exceptional cases.

Research Questions and Methodology

This article addresses two primary research questions: first, does the BNS reform the underlying philosophy of capital punishment in India, or does it merely replicate the colonial-era framework with new nomenclature; and second, is the death penalty as presently administered in India compatible with the constitutional guarantees of Article 21 and the principle of human dignity? The methodology employed is doctrinal legal research, involving systematic analysis of primary legal sources including constitutional provisions, statutory enactments, and judicial decisions, supplemented by comparative constitutional analysis and the international human rights law framework.

Evolution of Death Penalty Jurisprudence in India

1. Constitutional Challenges and Early Adjudication

The constitutional validity of capital punishment first came before the Supreme Court of India in *Jagmohan Singh v. State of Uttar Pradesh* (1973) ^[5]. The Court, speaking through a five-judge bench, upheld the constitutionality of the death penalty under Section 302 IPC, holding that the discretion vested in judges to impose capital punishment was not arbitrary but was guided by established legal principles. The Court further held that the right to life under Article 21 was subject to procedure established by law, and the IPC provided such a procedure. The judgment dismissed the argument that the absence of sentencing guidelines rendered the provision unconstitutional. While this decision firmly established the constitutional legitimacy of the death penalty, it did not resolve questions of arbitrariness in its application.

A significant shift in judicial philosophy occurred in *Rajendra Prasad v. State of Uttar Pradesh* (1979) ^[10], wherein Justice V.R. Krishna Iyer, writing for a divided bench, articulated a progressive view that the death penalty should be reserved for the most extreme cases, emphasising the reformatory potential of the offender and the societal and environmental factors contributing to the crime. Justice Iyer's minority opinion introduced the concept that socio-economic deprivation and the circumstances of the accused should be accorded decisive weight in sentencing. While not the majority view, this judgment planted the intellectual seed for the doctrine that would follow.

2. The Rarest of Rare Doctrine: *Bachan Singh v. State of Punjab* (1980) ^[2]

The landmark judgment in *Bachan Singh v. State of Punjab* (1980) ^[2], rendered by a five-judge constitutional bench, remains the foundational authority on capital punishment in India. The majority, authored by Justice P.N. Bhagwati, upheld the constitutional validity of the death penalty but imposed a critical limitation: the sentence should be imposed only in the 'rarest of rare cases,' when the alternative of life imprisonment is 'unquestionably foreclosed.' The Court enumerated several aggravating and

mitigating circumstances that must be weighed against each other in a bifurcated sentencing hearing, conducted separately from the guilt determination phase.

The judgment established that mitigating circumstances—including the young age of the accused, the probability of reform, the absence of prior criminal record, and the possibility of mental disturbance—must be given equal weight with aggravating factors. Critically, *Bachan Singh* positioned the death penalty as exceptional and life imprisonment as the rule, inverting what had previously been an unstructured exercise of judicial discretion. Despite its progressive intent, the doctrine's indeterminacy—what exactly constitutes 'rarest of rare'—has been a persistent source of controversy and inconsistency in its application.

3. *Machhi Singh v. State of Punjab* (1983) ^[6]

In *Machhi Singh v. State of Punjab* (1983) ^[6], the Supreme Court attempted to operationalise the *Bachan Singh* framework by identifying specific categories of cases that might qualify as 'rarest of rare.' These included cases involving extreme brutality, multiple murders, the murder of vulnerable victims such as children, the murder of a bride for dowry, and socially abhorrent crimes. While this categorisation provided greater definitional clarity, critics have argued that it inadvertently reintroduced arbitrariness by inviting courts to make case-by-case determinations based on the 'shock to the collective conscience' standard, a deeply subjective measure susceptible to populist influence.

4. *Shatrughan Chauhan v. Union of India* (2014) ^[13]

Shatrughan Chauhan v. Union of India (2014) ^[13] addressed systemic procedural failures in the administration of capital punishment, particularly concerning prolonged delays in the disposal of mercy petitions. The Supreme Court held that inordinate delay in the execution of a death sentence, caused by executive inaction, could itself constitute cruel and inhuman treatment violative of Article 21. The judgment established that the condemned prisoner retains fundamental rights during the period of delay and that mental illness arising from prolonged incarceration on death row may constitute sufficient grounds for commutation of sentence. This decision extended constitutional protection to the post-conviction phase, thereby enriching the procedural framework around capital punishment.

5. Development of Mitigating Circumstances and Procedural Fairness

The trajectory from *Jagmohan Singh* to *Shatrughan Chauhan* reflects an increasing judicial emphasis on individualised sentencing, procedural fairness, and the irreversibility of the death penalty as a basis for extreme caution. The Supreme Court has repeatedly emphasised that the sentencing court must elicit and genuinely consider the personal circumstances of the accused, going beyond the bare facts of the offence. The Court in *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009) ^[12] acknowledged the inconsistency in the application of the rarest of rare doctrine across different benches, suggesting the need for more structured sentencing guidelines. These judicial developments form the constitutional context within which the BNS must now be evaluated.

Capital Punishment under the *Bharatiya Nyaya Sanhita, 2023* ^[42]

1. Offences Prescribing the Death Penalty under BNS

The *Bharatiya Nyaya Sanhita, 2023* ^[42] retains capital punishment as a sentencing option for a range of serious

offences. Section 103 of the BNS (corresponding to Section 302 IPC) prescribes the death penalty or life imprisonment for murder. Section 104 provides for the death penalty in cases of murder by a life convict. Sections pertaining to waging war against the Government of India (Section 147), abetting mutiny (Section 150), and seditious conspiracies that endanger the state are similarly punishable by death. Significantly, the BNS introduces new offences or expands existing ones. Section 66, dealing with terrorism-related activities, and provisions addressing organised crime under Section 111 carry the death penalty in cases resulting in death. The BNS also retains capital punishment for offences related to kidnapping for ransom where the victim is killed (Section 140), rape resulting in death or leaving the victim in a persistent vegetative state (Section 66), and gang rape of a minor under certain aggravated circumstances. The inclusion of these provisions reflects parliamentary acknowledgment of emerging threats and public demands for severe punishment in cases of crimes against women and children.

2. Comparison with the Indian Penal Code Framework

Comparing the BNS with its predecessor, the IPC, several observations emerge. First, the structural framework is largely preserved: capital punishment remains discretionary in most cases, with the judiciary retaining the power to impose either death or life imprisonment depending on the circumstances. Second, the BNS has not introduced any new procedural safeguards at the legislative level to guide judicial discretion in capital sentencing—a missed opportunity for statutory codification of the mitigating circumstances jurisprudence developed by the Supreme Court. Third, the BNS does expand the death-eligible offences in certain areas, particularly in relation to organised crime and terrorism, reflecting a trend toward greater severity in response to evolving criminal threats.

The IPC's Section 303, which provided a mandatory death sentence for murder committed by a life convict, was struck down in *Mithu v. State of Punjab* (1983) ^[8] as unconstitutional due to its mandatory nature denying judicial discretion. The BNS equivalent, Section 104, retains the death penalty for this category but as a discretionary option, consistent with the constitutional requirement. This represents an improvement in statutory drafting, though the practical implications depend entirely on judicial implementation.

3. Reformative Philosophy or Colonial Penal Continuity?

The central question is whether the BNS represents a genuine departure from colonial penal logic or merely cosmetic renaming of pre-existing provisions. The colonial penal system was designed primarily for the purposes of deterrence, incapacitation, and state security, with limited concern for rehabilitation or restorative justice. The IPC's death penalty provisions reflected this instrumental philosophy. The BNS, despite its rhetoric of decolonisation and alignment with Indian constitutional values, has not fundamentally reconceptualised the purpose or philosophy of capital punishment.

Several scholars have argued that genuine decolonisation of criminal law would require a critical interrogation of whether state-sanctioned killing aligns with the Gandhian principles of non-violence, the constitutional commitment to

human dignity, and India's civilisational ethos. The BNS does not engage with these questions at the level of statutory drafting. The legislative statement of objects and reasons focuses on procedural streamlining and modernisation but offers limited philosophical justification for the retention of the death penalty. This suggests that the legislature's decision to retain capital punishment was driven more by path dependency and political pragmatism than by principled engagement with human rights norms.

4. Sentencing Discretion and Legislative Intent

The legislative intent behind retaining capital punishment in the BNS appears to be twofold: to send a strong deterrent signal in cases of the most heinous crimes, and to preserve alignment with established judicial doctrine, particularly the Bachan Singh framework. The discretionary nature of capital sentencing under BNS preserves space for judicial consideration of individual circumstances. However, the absence of legislatively prescribed sentencing guidelines creates a continuing risk of inconsistency and arbitrariness in judicial outcomes, as documented by empirical research on capital sentencing patterns in India. The legislature's silence on reform of the mercy petition process and the absence of provision for independent sentencing review represent further limitations of the BNS framework.

Human Rights and Constitutional Dimensions

1. Article 21: Right to Life and Dignity

Article 21 of the Constitution of India guarantees that no person shall be deprived of their life or personal liberty except according to procedure established by law. The Supreme Court has progressively expanded the scope of Article 21 to encompass not merely the negative right against arbitrary deprivation of life but a positive obligation of the state to protect and promote human dignity. In *Maneka Gandhi v. Union of India* (1978) ^[7], the Court held that the procedure established by law must be fair, just, and reasonable—importing the due process standard into Article 21.

The tension between capital punishment and Article 21 is profound. The death penalty, by definition, permanently extinguishes the right to life. Proponents argue that this extinction is constitutionally permissible because it occurs through a legally established procedure following conviction for a heinous crime. Critics contend that the irreversibility of execution precludes any meaningful remedy for wrongful conviction, and that the evolving jurisprudence of Article 21—which now encompasses rights to dignity, identity, mental health, and rehabilitation—is fundamentally incompatible with state-sanctioned killing. The Supreme Court's recognition in *Francis Coralie Mullin v. Union Territory of Delhi* (1981) ^[4] that the right to life includes the right to live with basic human dignity lends support to this critical view.

2. Article 14: Equality and Non-Arbitrariness

Article 14 guarantees equality before the law and equal protection of the laws. In the context of capital punishment, Article 14 requires that the imposition of the death penalty not be arbitrary, discriminatory, or based on impermissible classifications. The Supreme Court in *E.P. Royappa v. State of Tamil Nadu* (1974) ^[3] held that arbitrariness itself is antithetical to equality, establishing a conceptual link between Articles 14 and 21 in the context of state action affecting fundamental rights.

Empirical evidence from India's death row population reveals troubling patterns of inequality. Prisoners sentenced to death are disproportionately from marginalised communities, including religious minorities, Scheduled Castes, Scheduled Tribes, and persons living in poverty. Research by Project 39A at the National Law University, Delhi, has documented that a substantial proportion of death row prisoners are from economically disadvantaged backgrounds and were represented by legal aid lawyers with limited resources. This pattern suggests that the administration of the death penalty is influenced by socio-economic factors extraneous to the legal standards of sentencing, thereby implicating Article 14's guarantee of equal protection.

3. Doctrine of Proportionality

The doctrine of proportionality, increasingly applied by the Supreme Court in fundamental rights adjudication, requires that state action be rationally connected to a legitimate governmental objective, necessary for that objective, and proportionate in its impact on fundamental rights. Applied to capital punishment, the proportionality doctrine raises the question whether the death penalty—as a permanent, irreversible measure—is necessary when the alternative of life imprisonment achieves the same penological objectives of incapacitation and denunciation.

The Supreme Court in *Bachan Singh* itself implicitly applied a proportionality analysis in requiring that the death penalty be restricted to cases where life imprisonment is 'unquestionably foreclosed.' However, the inconsistency with which this standard has been applied by different benches suggests that proportionality review of capital sentences remains inadequately institutionalised in Indian practice. The absence of a specialist sentencing court with consistent standards, as recommended by the Law Commission of India in its 262nd Report (2015) ^[29], perpetuates disproportionality in outcomes.

4. Due Process and Fair Trial Guarantees

The right to a fair trial, enshrined in Articles 21 and 22 and elaborated through the BNS's procedural codes, is a critical safeguard for death-eligible defendants. Due process concerns in capital cases include the adequacy of legal representation, the reliability of prosecution evidence, the neutrality of the sentencing authority, and the availability of appellate review. Research has documented systemic deficiencies in each of these areas in the Indian capital punishment system, including inadequate legal aid, over-reliance on confessional evidence of doubtful reliability, and insufficient attention to mitigating circumstances in sentencing hearings.

5. Wrongful Convictions and Miscarriage of Justice

Perhaps the most compelling argument against the death penalty from a due process perspective is the risk of executing an innocent person. Wrongful convictions occur in every criminal justice system, and India is no exception. Cases such as that of Dhananjay Chatterjee, where questions about the adequacy of the investigation were raised, and the experience of death row exonerations globally, illustrate the irreversibility of this risk. Once a death sentence is executed, no subsequent judicial finding of innocence can provide meaningful remedy. This irreversibility fundamentally distinguishes the death penalty from all other

punishments and demands the highest standards of procedural protection, which the Indian system does not consistently deliver.

International Human Rights Perspective

1. International Covenant on Civil and Political Rights

India acceded to the International Covenant on Civil and Political Rights (ICCPR) in 1979. Article 6 of the ICCPR, while not prohibiting the death penalty outright for retentionist states, establishes that the right to life is the supreme human right and mandates that capital punishment, where retained, shall be imposed only for the most serious crimes, pursuant to a final judgment rendered by a competent court, with the right to seek pardon or commutation. The United Nations Human Rights Committee has interpreted 'most serious crimes' narrowly to encompass only intentional killing, excluding drug offences, robbery, and other non-lethal crimes.

India's BNS provisions prescribing the death penalty for offences other than intentional murder—including certain terrorism-related activities that may not result in individual deaths—potentially exceed the threshold permitted by ICCPR Article 6 as interpreted by the Human Rights Committee. India has not ratified the Second Optional Protocol to the ICCPR, which calls for the abolition of the death penalty, but its obligations under the Covenant require that capital punishment be applied only within the strictest limitations.

2. UN General Assembly Resolutions and Global Abolition Trends

The United Nations General Assembly has passed successive resolutions—most recently Resolution 75/183 in 2020 ^[20]—calling upon states that retain the death penalty to establish a moratorium on executions with a view to eventual abolition. While these resolutions are non-binding, they reflect an evolving international normative consensus that capital punishment is incompatible with respect for human dignity. As of 2024, over 106 countries have abolished the death penalty in law or practice, constituting a substantial majority of the international community. India has consistently voted against these resolutions, maintaining its position that capital punishment is a matter of national sovereignty and that its restricted application represents an adequate safeguard.

3. Comparative Perspective: United Kingdom, United States, and European Union

A comparative analysis illuminates divergent approaches to capital punishment. The United Kingdom abolished the death penalty for murder in 1965 and for all offences in 1998, becoming a leading advocate for global abolition and incorporating this commitment into its relationship with the European Union. The European Union treats the abolition of capital punishment as a fundamental value and a prerequisite for membership, having enshrined this requirement in the EU Charter of Fundamental Rights. The United States, by contrast, retains the federal death penalty and capital punishment in numerous states, though its application has declined significantly in recent decades amid concerns about wrongful convictions, racial disparities, and the inadequacy of legal representation for capital defendants. The U.S. Supreme Court's decisions in *Atkins v. Virginia* (2002) and *Roper v. Simmons* (2005) ^[1, 11],

exempting intellectually disabled individuals and juveniles from execution, reflect a similar evolution toward restricting the death penalty's scope.

4. India's Position in International Law

India's approach to capital punishment reflects a studied pragmatism that acknowledges international norms while asserting national prerogative. India has engaged constructively with the ICCPR framework and has submitted periodic reports to the Human Rights Committee, defending its death penalty provisions on the grounds of exceptional application and robust judicial oversight. However, the documented arbitrariness, delays, and socio-economic bias in India's capital punishment system weaken this defence. India's aspiration to a permanent seat on the United Nations Security Council and its broader global diplomatic profile create additional pressure to align its domestic human rights practices more closely with international standards.

Ethical and Philosophical Dimensions

1. Retributive Justice and the Death Penalty

Retributive theory holds that punishment is a morally deserved response to wrongdoing, that offenders should receive their just deserts, and that the gravity of the punishment should be proportionate to the gravity of the offence. On this account, the death penalty may be justified as the proportionate response to the most heinous crimes, including the deliberate taking of innocent life. This view has deep roots in both Western moral philosophy—most notably in Kant's categorical imperative—and in various religious and cultural traditions. The Supreme Court's reference in sentencing decisions to the 'shock to the collective conscience' standard partially reflects a retributive rationale, articulating the community's moral judgement that certain crimes demand the ultimate punishment.

2. Deterrence and Empirical Evidence

Deterrence theory justifies punishment as a means of preventing future crime by making the costs of offending outweigh the benefits. The claim that the death penalty has a unique deterrent effect greater than that of life imprisonment is empirically contested. Criminological research across multiple jurisdictions has failed to establish a consistent causal relationship between the death penalty and reduced homicide rates. Countries that have abolished capital punishment have not experienced corresponding increases in violent crime. In India, where the majority of capital crimes are committed in circumstances of passion, intoxication, or extreme socio-economic stress, the rational calculation required for the death penalty to function as a deterrent is often absent. The continued imposition of capital punishment on deterrence grounds, in the absence of reliable empirical support, raises serious questions about the legitimacy of this justification.

3. Reformatory and Restorative Justice Models

The reformatory theory of punishment, which emphasises the rehabilitation and reintegration of the offender into society, is fundamentally incompatible with capital punishment. The BNS, like the IPC before it, pays lip service to reformatory goals while retaining the most irreversibly anti-reformatory of all punishments. Restorative justice models, which centre the needs and participation of

victims and communities in the response to crime, offer alternative frameworks for addressing the harm caused by the most serious offences without recourse to execution. Some scholars have argued that genuine restorative justice—through meaningful engagement with victims' families, truth-telling processes, and rehabilitation programmes—may provide more durable forms of closure and societal healing than state execution.

4. Constitutional Morality versus Populist Demands

The tension between constitutional morality and popular morality is nowhere more acute than in debates about capital punishment. High-profile cases—such as the execution of Ajmal Kasab following the 2008 ^[25] Mumbai attacks, and of Yakub Memon in 2015 ^[26]—were accompanied by intense public debate, with popular sentiment strongly favouring execution as an expression of national solidarity and moral condemnation. The Supreme Court, in *Navej Singh Johar v. Union of India* (2018) ^[9], distinguished between constitutional morality—grounded in the foundational values of the Constitution—and popular morality, which may reflect majoritarian prejudice or emotional reactions. The Court affirmed that constitutional adjudication must be guided by constitutional morality even when it conflicts with popular sentiment. The death penalty debate requires precisely this kind of constitutional grounding, free from the pressures of public opinion and political expediency.

Empirical and Practical Concerns

1. Death Row Statistics in India

Project 39A's annual Death Penalty India Reports provide essential empirical data on the administration of capital punishment in India. As of 2023 ^[42], India's death row population stood at over 500 prisoners awaiting execution, with sentences spanning multiple decades in some cases. The overwhelming majority of these prisoners were convicted of offences related to murder and sexual violence. A disproportionate number were from marginalised socio-economic backgrounds, with limited access to quality legal representation at the trial stage. These statistics paint a picture of a death penalty system that is administered neither swiftly nor uniformly.

2. Delays in Mercy Petitions and Execution

One of the most documented systemic failures in India's capital punishment administration is the prolonged delay between the imposition of a death sentence and its execution or commutation. Mercy petitions to the Governor or the President may remain pending for decades, during which the condemned prisoner exists in a state of profound uncertainty and psychological torment. The Supreme Court in *Shatrughan Chauhan* held that prolonged delay could itself constitute grounds for commutation, but this judicially imposed remedy does not address the structural causes of delay, including inadequate executive attention to mercy petitions, complex multi-tiered judicial review processes, and the absence of a fixed timeline for executive decision-making.

3. Mental Health Considerations

Prolonged incarceration on death row has severe and well-documented mental health consequences. Research has established that the combination of isolation, uncertainty, and proximity to execution produces psychological

disorders including depression, anxiety, and post-traumatic stress disorder. The Supreme Court in *Shatrughan Chauhan* acknowledged that supervening mental illness may preclude execution, but no systematic mechanism exists in Indian law to assess and address the mental health of condemned prisoners throughout their incarceration. The failure to address mental health as a central concern in capital cases represents a significant gap in the humanity of the system.

4. Arbitrariness in Sentencing Patterns

Empirical research has documented considerable arbitrariness in the application of the 'rarest of rare' doctrine. Cases with objectively similar facts have resulted in different outcomes depending on the composition of the judicial bench, the quality of legal representation, the geographic jurisdiction, and other legally irrelevant factors. The Supreme Court in *Santosh Bariyar* acknowledged this arbitrariness and called for more structured sentencing but stopped short of mandating specific reforms. The persistence of this arbitrariness is constitutionally troubling given the irreversible nature of the death penalty and the guarantee of equal treatment under Article 14.

Critical Evaluation

The Bharatiya Nyaya Sanhita, 2023 ^[42] presents itself as a transformative legal instrument suited to a confident, modern, democratic India. Yet a critical evaluation reveals that its treatment of capital punishment represents, at best, modest procedural improvement and, at worst, an abdication of the transformative opportunity presented by comprehensive criminal law reform.

The BNS does not codify the mitigating circumstances jurisprudence developed by the Supreme Court over four decades. It does not establish a specialist capital sentencing court or require pre-sentencing reports on the personal circumstances of the accused. It does not provide for mandatory independent review of all death sentences by a higher judicial authority. It does not set any time limit for the disposal of mercy petitions. It does not address the documented socio-economic bias in the composition of the death row population. In all these respects, the BNS is a missed opportunity.

The inconsistency in the application of the rarest of rare doctrine remains the defining characteristic of India's capital punishment jurisprudence. The doctrine's indeterminate standards—'shock to collective conscience,' 'balance of aggravating and mitigating circumstances'—invite inconsistency and are ill-suited to the adjudication of cases where the ultimate sanction is at stake. The Supreme Court's own inconsistency on this question, with different benches reaching different conclusions on comparable facts, has been openly acknowledged and criticised by the Court itself. The tension between national sovereignty and global human rights norms is particularly acute in this context. India's position that capital punishment, in its restricted 'rarest of rare' form, is consistent with international human rights standards is difficult to sustain given the documented arbitrariness, delay, socio-economic bias, and procedural deficiencies in its administration. India's continued resistance to UN General Assembly resolutions calling for a moratorium positions it alongside a diminishing minority of states that persist with executions, including nations with widely criticised human rights records.

The question of whether capital punishment is constitutionally sustainable in contemporary India cannot be answered in the abstract. The Supreme Court has not overruled *Bachan Singh*, and the constitutional validity of capital punishment is presently settled law. However, the trajectory of constitutional jurisprudence—its progressive expansion of Article 21, its emphasis on dignity, proportionality, and due process—creates increasing theoretical tension with the death penalty's retention. Whether the Court will eventually conclude, as some jurisdictions have, that this tension is irresolvable and that capital punishment is per se unconstitutional remains an open question of profound importance.

Conclusion and Suggestions

Conclusion

This article has critically examined the legal, constitutional, and ethical dimensions of capital punishment under the Bharatiya Nyaya Sanhita, 2023 ^[42]. The analysis demonstrates that the BNS, despite its reformative aspirations and decolonising rhetoric, does not fundamentally alter the philosophy or administration of capital punishment in India. The rarest of rare doctrine remains the governing standard, but its inconsistent application, combined with systemic procedural deficiencies, creates a capital punishment system that is constitutionally precarious and humanly inadequate.

From the perspective of human rights, the death penalty as currently administered in India falls short of the standards required by Article 21, the principle of equal treatment under Article 14, the doctrine of proportionality, and India's obligations under the ICCPR. The international trend toward abolition, the empirical evidence against deterrence, and the irreversibility of wrongful execution collectively make a compelling case for systemic reform.

The article does not adopt a dogmatically abolitionist position. It recognises the legitimate role of democratic deliberation in determining the appropriate limits of criminal punishment and the genuine moral complexity of responding to the most heinous crimes. However, it argues that the current administration of the death penalty in India cannot be defended on constitutional, human rights, or empirical grounds and that reform—and ultimately abolition—is both legally necessary and morally justified.

Suggestions

Several concrete reforms are advanced. First, the legislature should enact statutory sentencing guidelines for capital cases, incorporating the mitigating circumstances jurisprudence developed by the Supreme Court into the BNS framework, to reduce arbitrariness and ensure equal protection. Second, a mandatory pre-sentencing report, prepared by trained social workers and psychologists, should be required in all capital cases before the sentencing hearing, to ensure that the court has adequate information about the personal circumstances of the accused.

Third, a mandatory independent judicial review mechanism should be established for all death sentences, modelled on specialised capital appeals courts in other jurisdictions, with specific expertise in capital sentencing and human rights. Fourth, the executive mercy petition process should be reformed to require disposal within a fixed period—not exceeding two years from the date of petition—with reasons recorded in writing, greater transparency in decision-

making, and independent human rights oversight. Fifth, the mental health of all death row prisoners should be assessed at regular intervals by qualified professionals, with findings reported to the sentencing court and considered in any subsequent review proceedings.

More broadly, India should establish a Law Commission or Parliamentary Committee inquiry into the feasibility of a legislative moratorium on executions, with a view to eventual abolition. Such a moratorium would align India with the global consensus, provide space for evidence-based deliberation about the purposes and effects of capital punishment, and signal India's commitment to human rights norms consistent with its democratic and constitutional values. The BNS, as a new beginning for Indian criminal law, presents an opportunity that has not yet been fully realised. The path from this incomplete reform to genuine transformative justice requires the courage to confront the most difficult questions about the relationship between the state, human dignity, and the taking of life.

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