
THE DEATH PENALTY IN INDIA: EVALUATING ITS MORAL LEGITIMACY AND PRACTICAL EFFECTIVENESS IN THE LIGHT OF CONSTITUTIONAL VALUES AND HUMAN RIGHTS STANDARDS

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ABSTRACT

The death penalty, or capital punishment, occupies one of the most contested intersections of law, ethics, and governance in contemporary India. Despite a constitutional framework premised on the values of Life, dignity, and equality anchored in Article 21 of the Constitution - India continues to retain capital punishment, administered in the rarest of rare cases as enunciated by the Supreme Court of India in *Bachan Singh v. State of Punjab (1980)*. This research paper undertakes a comprehensive examination of the death penalty in India through three converging lenses: its moral legitimacy under philosophical and jurisprudential traditions, its practical effectiveness as a deterrent to crime, and its compatibility with India's constitutional values and international human rights obligations. Drawing upon judicial pronouncements, legislative history, empirical studies, comparative jurisprudence, and academic scholarship, the paper argues that capital punishment, as presently practised in India, is morally indefensible, practically unproven as an effective deterrent, and constitutionally precarious given its irreversibility and the systematic inequalities in its application. The paper identifies five central research questions and proceeds through a structured analysis culminating in a call for abolition or, at minimum, a comprehensive moratorium and legislative review. The findings have implications not only for Indian domestic law but for India's standing in the global human rights discourse.

Keywords: Capital Punishment, Death penalty, Article 21, Rarest of Rare Doctrine, Human Rights, Deterrence, Constitutional Law, Abolition, India.

I. INTRODUCTION

Few questions in law and political philosophy are as ancient and as unresolved as the legitimacy of the state taking a human life in the name of justice. Capital punishment has existed in virtually every human civilisation, from Hammurabi's Code through Athenian democracy to the empires of Asia and the colonial legal orders of the modern era. In India, the tradition of state sanctioned execution is both pre-colonial and colonial in its roots, surviving the drafting of the Constitution in 1950 and persisting through seven decades of republican governance. As of 2023, India remains one of fifty- five countries that still retain the death penalty in law and practice, placing It in a global minority that also includes China, the United states, and several nations in the Middle East and Africa.

The persistence of capital punishment in India invites rigorous scrutiny from multiple directions. Constitutionally, it sits in tension with Article 21 the right to life and personal liberty which the Supreme Court has progressively expanded into a comprehensive guarantee of dignity and personhood. Philosophically, it implicates the deepest questions of retributive justice, human dignity, and the limits of state power. Empirically, it raises questions about deterrence that decades of criminological research across multiple jurisdictions have failed to resolve in its favour. And from a human rights perspective, it conflicts with India's obligations under international instruments including the International Covenant on Civil and Political Rights (ICCPR), to which India is a state party.

The Supreme Court's attempt to reconcile these tensions through the rarest of rare doctrine established in *Bachan Singh v. State of Punjab (1980)* has produced a body of jurisprudence that is simultaneously nuanced and deeply inconsistent. Studies by the Death Penalty Research Project at National Law University Delhi, Law Commission reports, and comparative analyses have consistently demonstrated that the application of capital punishment in India is marked by arbitrariness, socio economic bias, and procedural irregularities that call into question the very foundations upon which the doctrine was constructed.

This paper proceeds as follows. Section II surveys the existing literature. Section II surveys the existing literature. Section III sets out the research questions. Section IV provides a constitutional and legislative analysis. Section V examines the moral philosophical debate. Section IV provides a constitutional and legislative analysis. Section V examines the moral philosophical debate. Section VI evaluates the empirical evidence on deterrence.

Section VII analyses the human rights framework. Section VIII examines comparative jurisprudence. Section IX contains the discussion and findings, and section X concludes.

II. LITERATURE REVIEW

The literature on capital punishment in India spans legal scholarship, judicial analysis, empirical criminology, and moral philosophy. A review of this body of work reveals three broad streams of inquiry, each informing a different dimension of the debate. **A. Constitutional and Judicial Scholarship.**

The foundational texts in India constitutional scholarship on capital punishment centre on the Supreme Court's major pronouncements. The seminal case of *Bachan Singh v. State of Punjab*, AIR 1980 SC 898, decided by a five-judge constitutional bench, is the starting point for virtually all subsequent analysis. The majority opinion authored by Justice P.N. Bhagwati upheld the constitutional validity of Section 103 of the Bhartiya Nyaya Sanhita (2023) and Section 393(3) of the BNSS, which mandated the recording of special reasons before the imposition of the death sentence. The Majority formulated the *rarest of rare* test a standard that has been the subject of intense scholarly critique.

Upendra Baxi, one of India's foremost legal scholars, has argued that the *rarest of the rare* doctrine was intended to provide a principled framework for the exercise of judicial discretion but has instead produced a jurisprudence of judicial subjectivity. In his analysis of subsequent cases most notably *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470, which added five categories of cases qualifying as 'rarest of rare' Baxi demonstrates how the doctrine has been applied inconsistently, producing outcomes that cannot be reconciled by any coherent principle.¹

Vrinda Grover and Jayna Kothari, writing on the gendered dimensions of capital punishment in India, have drawn attention to how courts have applied the doctrine differently in cases involving crimes against women - including rape and murder - often treating public outrage as a substitute for principled reasoning. The death sentences imposed in the aftermath of the 2012 Delhi gang rape case, upheld by the Supreme Court in *Mukesh v. State (NCT of Delhi)*, (2017) 6 SCC 1, became a flashpoint for debates about the relationship between populist pressure and

¹ Upendra Baxi, 'The Death Penalty in India: The Rarest of Rare Doctrine and Its Discontents' in Law Commission of India, 262nd Report (2015) Annexure VIII.

judicial independence.²

The Law Commission of India's 262nd Report (2015), titled 'The Death Penalty', represents the most comprehensive official review of capital punishment in India to date. Chaired by Justice A.P. Shah, the Commission recommended the abolition of the death penalty for all offences except terrorism- related offences and waging war against the state. The Report systematically reviewed constitutional jurisprudence, empirical evidence, and comparative practice, and concluded that the death penalty as applied in India was arbitrary, discriminatory, and irreversible.³

B. Empirical Research on Deterrence and Application

The Death Penalty India Report (2016), produced by the Death Penalty Research Project at National Law University Delhi (NLU Delhi), is the most rigorous empirical study of capital punishment in India to date. Based on interviews with 385 of the 385 prisoners on death row in India at the time, the study found that 74.1% of death row prisoners came from marginalised communities Scheduled Castes, Scheduled Tribes, and religious minorities. The study also found that 62.2% were economically vulnerable, and that the majority had been represented by legal aid lawyers with inadequate resources.⁴

Anup Surendranath and Bikram Jeet Batra's analysis of the Supreme Court's capital sentencing jurisprudence from 2000 to 2015, published as part of the NLU Delhi Death Penalty Research Project, demonstrates the systemic inconsistency in the application of the *rarest of rare* doctrine. Their study found in that in a substantial number of cases, sentences of death were subsequently commuted or acquitted on appeal, raising fundamental questions about the reliability of the capital sentencing process.⁵

On the question of deterrence, the international literature is largely settled in the negative. The National Research Council of the United States concluded in 2012 that studies on the deterrent effect of capital punishment are 'fundamentally flawed' and should not be used to inform

² Vrinda Grover and Jayna Kothari, 'Gendered Violence and the Death Penalty' in Death Penalty Research Project, NLU Delhi (2016).

³ Law Commission of India, 262nd Report: The Death Penalty (Government of India, 2015), paras 1.1–1.15.

⁴ Death Penalty Research Project, National Law University Delhi, Death Penalty India Report, Vol. I (2016), pp. 3–47

⁵ Anup Surendranath and Bikram Jeet Batra, 'Hanging by a Thread' in Death Penalty India Report, Vol. II (NLU Delhi, 2016), pp. 1–90.

judgements about the effect of death penalty on homicide rates. Similar conclusions have been reached by the United Nations Secretary-general's quinquennial reports on capital punishment, which note the absence of credible evidence that the death penalty deters crime more effectively than other punishments.⁶

C. Philosophical and Human Rights Scholarship

The philosophical literature on capital punishment is anchored in two competing traditions: the retributivist and the abolitionist. The retributivist tradition, associated with Immanuel Kant's argument that the murderer has forfeited his right to life and that justice demands a proportional response, provides the most intellectually rigorous defence of capital punishment. In the Indian context, this tradition finds expression in judicial rhetoric about crimes that 'shock the conscience' of society.⁷

In contrast, the abolitionist tradition drawing on the work of Cesare Beccaria, John Stuart Mill's later writings, and contemporary scholars such as Hugo Adam Bedeau argues that the state does not have the moral authority to take human life, that execution does not restore the harm caused by crime, and that the irreversibility of death makes any error irremediable. In the Indian philosophical tradition, the influence of Gandhian non-violence (*ahimsa*) provides a culturally resonant foundation for abolition, though it has rarely been directly engaged by Indian courts.⁸

In international human rights law, the trajectory is clearly abolitionist. The Human Rights Committee, interpreting Article 6 of the ICCPR, has progressively narrowed the permissible scope of capital punishment. General Comment No. 36 (2019) of the Human Rights Committee declared that 'all measures of abolition should be considered as progress in the enjoyment of the right to life', and that states retaining capital punishment must restrict its use to the 'most serious crimes' interpreted strictly as intentional killing.⁹

III. RESEARCH QUESTIONS

This research is structured around the following five primary research questions:

⁶ National Research Council (US), *Deterrence and the Death Penalty* (National Academies Press, 2012), p. 2.

⁷ Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press, 1996), pp. 105–108.

⁸ Hugo Adam Bedeau (ed.), *The Death Penalty in America: Current Controversies* (Oxford University Press, 1997), pp. 17–40.

⁹ Human Rights Committee, General Comment No. 36, CCPR/C/GC/36 (2019), para 37.

1. Is the death penalty in India constitutionally valid under Article 21 of the Constitution of India, and has the Supreme Court's *rarest of rare* doctrine provided a sufficiently principled, non- arbitrary framework for its application?
2. Does capital punishment possess moral legitimacy in the context of a constitutional democracy premised on the values of human dignity, equality, and the rule of law, having regard to both retributivist and abolitionist philosophical traditions?
3. Is there credible empirical evidence that capital punishment serves as an effective deterrent to crime in India, and how does India's experience compare with international evidence.
4. To what extent is the application of capital punishment in India consistent with India's international human rights obligations, including those arising under the International Covenant on Civil and Political Rights (ICCPR), and with evolving standards of international human rights law?
5. What systematic structural reforms- including possible abolition- are warranted in light of evidence of discriminatory application of capital punishment against marginalised communities, the risk of irreversible miscarriages of justice, and global trends toward abolition?

IV. CONSTITUTIONAL AND LEGISLATIVE ANALYSIS

A. The Constitutional Framework

The Constitution of India does not expressly prohibit or sanction capital punishment. Article 21 provides that 'No person shall be deprived of his life or personal liberty except according procedure established by law.' The Supreme Court's interpretation of this provision has evolved dramatically since 1950. In *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27, the court adopted a narrow reading of Article 21, holding that any procedure prescribed by statute was sufficient to justify deprivation of life. This interpretation, which would have validated the death penalty as long as it was procedurally prescribed, was fundamentally revised in *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, where the court held that the procedure must also be 'just, fair, and reasonable'.¹⁰

¹⁰ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, per Bhagwati J.

This progressive constitutionalisation of Article 21 created the doctrinal space for the challenge to capital punishment that came before the Supreme Court in *Bachan Singh*. The majority (4:1) upheld Section 103 BNS and the discretionary sentencing regime, but did so on the understanding that the *rarest of rare* doctrine would provide a principled, restrained framework. Justice Bhagwati, dissenting, argued that the imposition of capital punishment was inherently arbitrary and violated the equality guarantee under Article 14, a position that has attracted significant scholarly support in the decades since.¹¹

B. The Rarest of Rare Doctrine: Theory and Practice

The *rarest of rare* doctrine requires courts to consider the totality of circumstances both aggravating and mitigating before imposing a death sentence, and to impose it only when the alternative of life imprisonment is ‘unquestionably foreclosed’. The doctrine was operationalised in *Machhi Singh v. State of Punjab*, which identified five categories of cases: manner of commission, motive, anti-social nature of the crime, magnitude, and personality of the victim.¹²

In Practice, the doctrine has not operated as intended. Studies by the NLU Delhi Death Pealty Research Project found that between 2000 and 2015, of the cases in which the Supreme Court confirmed death sentences at the sessions court level, a significant proportion were subsequently commuted upon mercy petitions or further appeals. In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, the Supreme Court itself acknowledged the ‘unacceptable inconsistency’ in the application of the *raest of rare* doctrine, nothing that identical facts had produced different outcomes in different batches.¹³

The Supreme Court’s three judge bench in *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546, attempted to systematise the balancing exercise by introducing a three-part test: crime test, criminal test, and rarest-of-rare test. However, this attempt at systematisation has itself been applied inconsistently, and critics have argued that it merely replaces one set of subjective criteria with another. The fundamental difficulty is structural: capital sentencing in any system involves an irreducibly subjective assessment that no doctrinal framework can fully

¹¹ *Bachan Singh v. State of Punjab*, AIR 1980 SC 898, dissent per Bhagwati J.

¹² *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470, paras 38–39.

¹³ *Santosh Kumar Sa-shbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, para 15.

discipline.¹⁴

C. Legislative Framework and Statutory Context

Capital punishment in India is prescribed under multiple statutes. The principal provision is Section 103 of Bharatiya Nyaya Sanhita, 2023,(which came into force on 1 July 2024), which prescribes death or imprisonment for life for murder. Other capital offences include waging war against the state (Section 147 of BNS), dacoity with murder (Section 310 of BNS), and specified offences under the Protection of Children from Sexual Offences Act, 2012 (POCSO), the Unlawful Activities (Prevention) Act, 1967 (UAPA), the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS), and the Army Act, 1950.¹⁵

Notably, the Bharatiya Nyaya Sanhita, 2023, which replaced the Indian Penal Code, did not abolish capital punishment despite the Law Commission's 2015 recommendation. This represents a political choice to retain capital punishment even as the legislative framework was comprehensively overhauled- a choice that merits independent scrutiny from a constitutional and human rights perspective.¹⁶

V. MORAL AND PHILOSOPHICAL ANALYSIS

A. The Retributive Case

The most intellectually coherent defence of capital punishment rests on retributivist grounds. Kant argued in *The Metaphysics of Morals* that the murderer has, by his act, forfeited his own right to life, and that the community has not merely a right but a duty to execute him that anything less would be to treat both the criminal and the victim with disrespect. This argument has a formal elegance: it treats punishment as a matter of proportional justice rather than social utility, and it respects the criminal as a rational agent responsible for his choices.¹⁷

In the Indian judicial context, the retributivist impulse is evident in the language used to justify death sentences the crime is described as 'barbaric', 'shocking to the collective conscience', or as calling for 'commensurate punishment'. This language reflects a deeply human intuition about proportionality that should not be dismissed. However, the retributivist argument faces

¹⁴ Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546, para 41.

¹⁵ Bharatiya Nyaya Sanhita, 2023.

¹⁶ Bharatiya Nyaya Sanhita, 2023, Sec-ns 103, 147, 310.

¹⁷ Kant, *Metaphysics of Morals* (1996), p.106.

several serious objections in the Indian constitutional context.

First, the argument from proportionality assumes that death is the only proportionate response to certain killings, which is itself a contestable moral claim. Life imprisonment without remission may equally satisfy the demands of proportionality while preserving the possibility of reform. Second, the retributivist argument does not address the possibility of error: if a wrongfully convicted person is executed, the state has itself committed a killing, which cannot be undone. Third, the constitutional framework of Article 21 does not merely protect procedural regularity but substantive justice and an institution that is demonstrably applied in an arbitrary and discriminatory manner cannot satisfy the substantive demands of Article 14 (equality) and Article 21 read together.¹⁸

B. The Utilitarian and Abolitionist Case

The utilitarian case against capital punishment proceeds on three grounds: the failure of deterrence, the cost of the criminal justice resources consumed by capital cases, and the risk of irreversible error. On deterrence, the weight of empirical evidence is examined in Section VI. On the risk of error, the Indian experience is instructive: the Supreme Court has itself acknowledged, in *P. Rathiram v. Union of India*, AIR 1994 SC 1844, and in several mercy petition cases reviewed by constitutional benches, that courts have reached different conclusions on materially identical facts a phenomenon inconsistent with any claim that capital sentencing operates as a reliable mechanism of justice.¹⁹

The abolitionist argument grounded in human dignity goes deeper than utility. The claim, associated with Hugo Adam Bedau and subsequently incorporated into international human rights instruments, is that every human being possesses an irreducible dignity that the state may not extinguish - regardless of the gravity of the person's offence. This argument draws on the constitutional text itself: if Article 21 guarantees the right to life with dignity, the state cannot constitutionally claim the right to annihilate that dignity permanently.²⁰

From the perspective of Indian philosophical and cultural traditions, the Gandhian principle of *ahimsa* (non-violence) and the concept of *Karuna* (compassion) provide indigenous resources

¹⁸ H.M. Seervai, *Constitutional Law of India*, Vol.2 (2013), pp. 1010 - 1030

¹⁹ *P. Rathiram v. Union of India*, AIR 1994 SC 1844.

²⁰ Hugo Adam Bedau, 'The Case Against the Death Penalty' in Bedau (ed.) (1997), pp. 525-562

for an abolitionist position. The drafters of the Constitution, operating in the aftermath of a liberation struggle that was premised on non-violent resistance, did not formally encode these values in relation to capital punishment, but they are consistent with the humanist project of the Constitution as a whole.²¹

VI. EMPIRICAL ANALYSIS: DOES THE DEATH PENALTY DETER CRIME?

A. The Theoretical Framework of Deterrence

The deterrence theory of punishment holds that the threat of punishment deters rational actors from committing crimes. For capital punishment to serve as an effective deterrent, potential offenders must be aware of the death penalty, perceive the risk of its imposition as significant, and weigh this risk against the anticipated benefit of the crime. Each of these conditions is problematic in the Indian context.

Most homicides in India are not premeditated national calculations. They arise from domestic violence, sudden provocation, intoxication, communal conflict, or organised crime contexts in which the long term threat of punishment has limited behavioural influence. The argument that a potential murderer will be deterred by the prospect of capital punishment (which affects only a minuscule fraction of convicted murderers, given the *rarest of rare* doctrine and the lengthy review process) presupposes a level of rational deliberation inconsistent with the circumstances of most killings.²²

B. International Empirical Evidence

The International empirical literature on deterrence is substantial and largely consistent in its findings. The landmark 2012 report of the National Research Council of the United States ‘Deterrence and the Death Penalty’- reviewed three decades of econometric studies and concluded that they were ‘fundamentally flawed’ because they could not control for the many other variables affecting homicide rates. Countries that have abolished the death penalty have not experienced increases in homicide rates; in many cases, homicide rates have declined.²³

Comparative studies across states in the United States which provides a natural experiment due

²¹ Cons-tu-on of India, Preamble; see also Granville Aus-n, The Indian Cons-tu-on: Cornerstone of a Na-on (OUP, 1966), pp. 50-75.

²² Death Penalty India Report, Vol. I (2016), pp. 48-78

²³ National Research Council (US), Deterrence and the Death Penalty (2012), Chapter 2.

to variation in capital punishment laws across states have consistently failed to demonstrate that death penalty states. A comprehensive study by Donohue and Wolfers (2005), published in the Stanford Law Review, found that the choice of statistical model had more influence on the results than the presence of capital punishment, demonstrating the fundamental unreliability of econometric deterrence research in this area.²⁴

C. The Indian Context

In India, the execution of prisoners has been extremely rare between 1995 and 2012, no executions were carried out. Yakub Memon was executed in 2015 for the 1993 Bombay bombings, and the four convicts in the 2012 Delhi gang rape case were executed in March 2020 the first executions in India since 2015. This extreme rarity means that the threat of capital punishment is operationally marginal: even those convicted of capital offences have an extraordinarily low probability of being executed given the multiple layers of appellate and mercy petition review.²⁵

The Law Commission's 262nd Report reviewed the available evidence and concluded that there was 'no empirical evidence' to support the claim that the death penalty has a greater deterrent effect on crime in India than life imprisonment. The Commission noted that the NCRB data on crime rates did not show any correlation between the (extremely rare) use of capital punishment and changes in homicide rates. The deterrence argument, in the Indian context, is not merely unproven; it is implausible given the structure of the sentencing system.²⁶

VII. INTERNATIONAL HUMAN RIGHTS FRAMEWORK

A. Treaty Obligations

India ratified the International Covenant on Civil and Political Rights (ICCPR) in 1979. Article 6 of the ICCPR protects the right to life and provides that in countries that have not abolished the death penalty, it may be imposed only for the 'most serious crimes'. India has not ratified the second protocol to the ICCPR, which aims at the abolition of the death penalty, nor has it signed the Optional Protocol to the Convention Against Torture (OPCAT). This places India

²⁴ John J. Donohue and Jus-n Wolfers, 'Uses and Abuses of Empirical Evidence' (2005) 58 Stanford Law Review 791, 794

²⁵ Amnesty International, Death Sentences and Executions 2022 (2023), pp. 6-10

²⁶ Law Commission of India, 262nd Report (2015), paras 5.1 5.20

at the more permissive end of the international spectrum, though still bound by the evolving interpretation of Article 6.²⁷

The Human Rights Committee's General Comment No. 36 (2019) represents the most authoritative contemporary interpretation of Article 6 ICCPR. The Comment holds that the death penalty may only be applied for international killing, that it must never be applied for drug offences (contrary to the NDPS Act), terrorism offences (contrary to the UAPA), or offences under military law absent a finding of intentional killing. India's statutory framework of capital punishment extends significantly beyond this narrow permissible category, making it incompatible with India's treaty obligations.²⁸

B. United Nations Resolutions and Global Trends

The UN General Assembly has adopted resolutions calling for a moratorium on the use of the death penalty in 2007, 2008, 2010, 2012, 2014, 2016, 2018, 2020, and 2022 each time with an increasing number of supporting states. India has consistently voted against these resolutions, positioning itself alongside a shrinking minority of retentionist states. As of 2025, 145 countries have abolished capital punishment in law or in practice, representing a clear global trend toward abolition.²⁹

The Universal Periodic Review (UPR) process of the UN Human Rights Council has also repeatedly called upon India to abolish capital punishment or at minimum impose a moratorium. India has consistently rejected these recommendations, citing the sovereignty of its domestic judicial and legislative processes. This posture is legally defensible as a matter of state sovereignty but is difficult to reconcile with India's stated commitment to human rights leadership in international forums.³⁰

C. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty

The UN Economic and Social Council's Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (1984) require, inter alia, that capital punishment be imposed only for the most serious crimes, that it not be carried out upon persons below 18 years at the

²⁷ International Covenant on Civil and Political Rights, 1996, Article 6.

²⁸ Human Rights Committee, General Comment No. 36 (2019), paras 29-35.

²⁹ UN General Assembly Resolution 62/149 (2007) and subsequent biennial resolutions.

³⁰ Universal Periodic Review, India: Third Cycle Report, UN Doc A/HRC/WG.6/32/L.10 (2019)

time of the offence or upon pregnant women, that the accused be entitled to adequate legal representation, and that the sentence not be carried out pending appeals and mercy petitions. India's law formally complies with several of these requirements, but the empirical evidence on the quality of legal representation the NLU Delhi study found that the overwhelming majority of death row prisoners were represented by legal aid counsel raises serious questions about substantive compliance.³¹

VIII. COMPARATIVE JURISPRUDENCE

A. The United Kingdom and the Commonwealth

The United Kingdom abolished capital punishment for murder in 1969 and for all remaining offences in 1998. The European Conventions on Human Rights (ECHR), Protocol 13, prohibits the death penalty in all circumstances. Commonwealth jurisdictions that have abolished capital punishment include Australia (1985), Canada (1998), New Zealand (1989), and South Africa (1995).

South Africa's Constitutional Court, in *S v. Makwanyane* (1995), struck down the death penalty as inconsistent with the new Constitution's guarantees of dignity and equality a decision that has significant resonance for the Indian Constitutional analysis given the structural similarities between the two constitutions.³²

The South African Constitutional Court's reasoning in *Makwanyane* is particularly instructive. Justice Chaskalson, writing for the court, held that the right to dignity, the right to life, and the prohibition of cruel, inhuman, or degrading punishment were mutually reinforcing and that capital punishment violated all three. The Court declined to defer to legislative or popular sentiment, holding that the protection of fundamental rights was a judicial, not a majoritarian, function. This reasoning maps closely onto the Indian Supreme Court's expanding jurisprudence on Article 21.³³

B. The United States

The United States represents the most extensively litigated capital punishment system in the

³¹ UN ECOSOC, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Resolution 1984/50

³² *S v. Makwanyane*, 1995 (3) SA 391 (CC), per Chaskalson P.

³³ *Ibid.*, paras 301-325

world. The Supreme Court has progressively restricted the scope of capital punishment through the Eighth Amendment's prohibition of cruel and unusual punishment: in *Atkins v. Virginia*, 536 U.S. 551 (2005) (exempting juvenile offenders), and *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (restricting capital punishment to crimes resulting in death). The American experience demonstrates both the malleability of constitutional doctrine in restricting capital punishment and the political challenges of abolition in a democracy where public opinion remains divided.³⁴

C. China and Other Retentionists States

China carries out the largest number of executions in the world, estimated by Amnesty International at several thousand per year (the exact figure is a state secret). China's continued use of capital punishment for drug offences, corruption, and other non-violent crimes is explicitly inconsistent with international human rights standards. India, by situating itself among retentionist states, risks its human rights credibility in contexts where it seeks to criticise other nations' rights records.³⁵

IX. DISCUSSION AND FINDINGS

A. Constitutional Findings

On the first research question constitutional validity the analysis reveals a deep structural tension. The *Bachan Singh* majority's upholding of capital punishment rested on the premise that the *rarest of rare* doctrine would operate as a principled, non-arbitrary check. Four decades of jurisprudence have demonstrated that this premise has not been borne out. The inconsistency documented by the Supreme Court itself in *Bariyar* and by empirical research suggests that the capital sentencing in India does not satisfy the standards of non-arbitrariness required by Articles 14 and 21, as expanded in *Maneka Gandhi*. There is a strong argument that the constitutional premises of *Bachan Singh* should be revisited by a larger constitutional bench in light of this evidence.³⁶

³⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

³⁵ Amnesty International, *Death Sentences and Executions 2022* (2023), pp. 34-38

³⁶ Anup Surendranath, 'Rarest of Rare' (2018) 18 Oxford University Commonwealth Law Journal 130, 145.

B. Moral Philosophical Findings

On the second research question moral legitimacy the analysis favours the abolitionist position on balance. The retributivist argument, while intellectually coherent in the abstract, does not survive engagement with the structural realities of capital punishment in India. A system that disproportionately executes the poor, the marginalised, and those represented by under resourced legal aid counsel cannot claim moral legitimacy on the basis of proportional justice. Proportional justice requires not only that the punishment fit the crime but that its imposition be itself just which requires procedural equality, reliability, and freedom from arbitrary discrimination.

C. Empirical Findings on Deterrence

On the third research question deterrence the findings are unambiguous. There is no credible empirical evidence that capital punishment deters crime in India more effectively than the alternative of life imprisonment. The theoretical conditions for deterrence (rational premeditation, awareness of punishment, significant perceived risk) are not satisfied in the context of most capital offences in India. The extreme rarity of executions makes the deterrent threat operationally negligible. The Law Commission's 2015 finding remains unrebutted: deterrence provides no valid justification for retaining capital punishment in India.

D. Human Rights Findings

On the Fourth research question human rights compatibility the analysis reveals significant incompatibility between India's capital punishment framework and its international obligations. The extension of capital punishment to drug offences under NDPS, terrorism under UAPA, and other non-intentional killing offences violates the 'most serious crimes' threshold of Article 6 ICCPR as interpreted by General Comment No. 36. The discriminatory application of capital punishment against marginalised communities violates Article 26 ICCPR (equality before the law). India's consistent opposition to UN moratorium resolutions is politically understandable but legally inconsistent with the trajectory of treaty body interpretation.

E. Structural and Systemic Findings

On the fifth research question structural reforms the evidence points clearly toward abolition, or at minimum a comprehensive moratorium. The three structural failings of India's capital

punishment system arbitrariness, discriminatory application, and irreversibility in the face of proven error are not susceptible to piecemeal reform. The Law Commission's 262nd Report, the NLU Delhi Death Penalty India Report, and the consistent findings of academic scholarship converge on this conclusion. Short of abolition, a moratorium pending legislative review, the restriction of capital punishment to intentional killing as required by international law, and significant improvements to legal aid for capital defendants would represent necessary first steps.³⁷

X. CONCLUSION

The death penalty in India is a legal institution in profound tension with the constitutional values that animate the republic. It is morally contested, empirically unjustified, constitutionally precarious, and internationally non-compliant. The *rarest of rare* doctrine the judicial architecture designed to contain capital punishment within principled limits has not fulfilled its promise. The result is a system in which the sentence of death is imposed inconsistently, reviewed inconsistently, and executed upon a population that is disproportionately poor, marginalised, and under-represented.

This paper does not argue that the crimes for which death sentences are imposed are not grave they are. But the gravity of the offence is not sufficient to justify an irreversible punishment administered by a fallible institution in an unequal society. The correct response to grave crime is not an institution that compounds the injustice of the crime with the injustice of arbitrary, discriminatory, and potentially erroneous state killing, but a system of punishment that achieves the goals of justice, deterrence, and rehabilitation through means that are reliable, proportionate, and reversible.

The path forward in India requires, at minimum: (i) a legislative moratorium on executions pending a comprehensive parliamentary review; (ii) restriction of capital punishment to intentional killing in compliance with India's ICCPR obligations; (iii) abolition of the death penalty for drug offences and other non-violent crimes; (iv) significant investment in quality legal aid for capital defendants; and (v) the establishment of an independent Capital Punishment Review Commission to examine all pending death row cases. The ultimate goal, consistent with the global trend and with the humanist values of the Indian Constitution, should

³⁷ Law Commission of India, 262nd Report (2015), Recommendations, paras 7.1 7.10.

be complete abolition.

India occupies a unique position in the world: a democracy of continental scale, with a constitutional tradition deeply committed to human dignity, equality, and the rule of law, and a civil society that has produced some of the world's most rigorous scholarship on capital punishment. The question is whether that tradition and that scholarship will, in time, transform the political will necessary to bring India's law into alignment with its constitutional values. The evidence and argument presented in this paper suggest that the case for abolition is not merely defensible it is compelling.

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