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# CAPITAL PUNISHMENT: A CONSTITUTIONAL DILEMMA IN INDIA

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## ABSTRACT

This paper explores the constitutional, ethical, and societal aspects of the death penalty in India, questioning its viability in modern society. While countries like Germany and South Africa have abolished it in favour of restorative justice, nations such as the USA and China retain it due to cultural and political divides. In India, capital punishment is governed by the *Bhartiya Nyaya Sanhita* and shaped by *Bachan Singh v. State of Punjab*<sup>1</sup> and *Machhi Singh v. State of Punjab*,<sup>2</sup> which established the "rarest of rare" doctrine. However, its subjective nature has led to inconsistencies and debates over fairness. Constitutional safeguards under Articles 21, 72, and 161<sup>3</sup> play a crucial role in balancing individual rights with judicial discretion, emphasizing the need for a just and nuanced approach.

The paper further explores the moral and ethical dimensions of capital punishment, focusing on its impact on human dignity, compatibility with international human rights standards, and effectiveness as a deterrent. Empirical evidence from countries practicing the death penalty fails to establish its deterrent effect, challenging its necessity. Ethical debates pivot on whether justice should prioritize retribution or rehabilitation, with critics arguing that the irreversible nature of executions risks wrongful convictions and perpetuates systemic inequalities.

India's death penalty attitude is formed by cases such as the R G Kar murder-rape, Nirbhaya, and 26/11 attack that fuel the calls for justice. The country's religious ethos of non-violence conflicts with the call for revenge, while marginalized populations are confronted with institutional biases. The paper examines international trends with calls for more equitable reforms. Based on the examination of such alternatives as life terms of imprisonment without parole and restorative justice, it urges the re-examination of the death penalty's place and the need for the country to transition toward more humane justice.

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<sup>1</sup> *Bachan Singh v. State of Punjab*, [1983] 1 SCR 145 A.

<sup>2</sup> *Machhi Singh v. State of Punjab*, 1983 AIR 957.

<sup>3</sup> India Const. art. 21, 72, 161.

## I. Introduction

Capital punishment, one of the most ancient criminal sanctions, has been employed for atrocious crimes throughout civilizations. Although deeply ingrained in the past, changing values and legal systems have influenced its practice, fuelling ongoing debates regarding whether it is moral and relevant in the modern day. Retribution, deterrence, and rehabilitation form the philosophical foundations of this punishment.<sup>4</sup> Retribution follows the "eye for an eye" model, providing satisfaction for victims' families, but deterrence enthusiasts contend that execution stops crime from being committed again. The detractors wonder if justice should be about rehabilitation rather than taking away the ability for it by using execution.

Global attitudes toward the death penalty have shifted dramatically in the last century, with most countries abolishing it due to its perceived inhumane nature and limited effectiveness as a deterrent. Nations like Norway and Germany have embraced rehabilitation and restorative justice, whereas countries such as the United States and China continue to practice capital punishment, though with varying degrees of public support.<sup>5</sup> The UN advocates abolishing the death penalty due to wrongful executions, bias, and lack of deterrence evidence. However, countries like India retain it, reflecting cultural, legal, and political divides.

India's stance on capital punishment blends historical practices with modern law. The Indian Penal Code, introduced under British rule, included the death penalty, a provision retained in the *Bhartiya Nyaya Sanhita*. The debate over its morality and constitutional validity continues, questioning whether it serves justice or is outdated. As India navigates global trends toward abolition, the issue remains contentious, highlighting the need to reassess its ethical and legal implications.

## II. Capital Punishment in Indian Law: Provisions and Practices

The *Bhartiya Nyaya Sanhita* (BNS) and *Bhartiya Nagarik Suraksha Sanhita* (BNSS), along with special laws, govern capital punishment in India for crimes such as murder (Sec. 103 BNS),<sup>6</sup> waging war (Sec. 147 BNS),<sup>7</sup> terrorism (UAPA), and aggravated sexual assault (POCSO Act). The BNSS requires High Court confirmation of death sentences to ensure

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<sup>4</sup> Lewis F. Powell, Jr., *Commentary: Capital Punishment*, 102 Harv. L. Rev. 1035 (1989).

<sup>5</sup> Death Penalty Information Center, *Countries That Have Abolished the Death Penalty Since 1976* (Sept. 25, 2024), <https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976>.

<sup>6</sup> *Bhartiya Nagarik Suraksha Sanhita*, 2023, § 103, No. 46, Acts of Parliament, 2023.

<sup>7</sup> *Bhartiya Nagarik Suraksha Sanhita*, 2023, § 147, No. 46, Acts of Parliament, 2023.

procedural safeguards. While Article 21<sup>8</sup> protects the right to life, it permits the death penalty under due process, and Articles 72<sup>9</sup> and 161<sup>10</sup> empower the President and Governors to grant clemency, ensuring capital punishment is applied fairly and sparingly.

**‘Rarest of Rare’ Doctrine: Evolution and Key Judgments:** The judiciary in India has shaped the application of the death penalty through key judgments. In *Bachan Singh v. State of Punjab*,<sup>11</sup> the Supreme Court upheld the death penalty's constitutionality but limited it to the "rarest of rare" cases involving extreme culpability where no alternative punishment would suffice. This doctrine was further elaborated in *Machhi Singh v. State of Punjab*,<sup>12</sup> which considered factors like the crime's brutality, motive, and societal impact. While the "rarest of rare" principle aims to restrict the death penalty to exceptional cases, its subjective interpretation has led to debates over fairness and consistency. Nonetheless, it remains central to India's approach, ensuring the death penalty is reserved for the most heinous crimes.

### III. Moral and Ethical Dimensions of Capital Punishment

#### A. The Death Penalty and the Value of Human Life: A Philosophical Perspective:

The death penalty raises ethical questions about human life's sanctity, balancing state authority and individual dignity. Critics argue it undermines life's intrinsic value, drawing from Kantian ethics, which stresses on treating individuals as ends, not means for deterrence or retribution. On the other hand, proponents of the death penalty invoke utilitarian principles, arguing that it serves the greater good by removing dangerous individuals from society and deterring future crimes.<sup>13</sup> This dichotomy between the inviolability of human life and the purported utility of capital punishment forms the crux of the philosophical debate surrounding the death penalty.

#### B. Capital Punishment and Human Rights: Global and Indian Viewpoints:

Capital punishment has been widely criticized for its inconsistency with fundamental human rights, particularly the right to life as enshrined in Article 3 of the Universal

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<sup>8</sup> India Const. art. 21.

<sup>9</sup> India Const. art. 72.

<sup>10</sup> India Const. art. 161.

<sup>11</sup> *Bachan Singh v. State of Punjab*, [1983] 1 SCR 145 A.

<sup>12</sup> *Machhi Singh v. State of Punjab*, 1983 AIR 957.

<sup>13</sup> Hood, R. (2024, December 23). *Capital punishment | Definition, Debate, Examples, & Facts*. Encyclopedia Britannica. <https://www.britannica.com/topic/capital-punishment/Arguments-for-and-against-capital-punishment>

Declaration of Human Rights.<sup>14</sup> The UN and other global organizations push for abolishing the death penalty due to wrongful executions, bias, and inhumanity, as more countries move toward its abolition. India, however, retains the death penalty for certain heinous crimes such as terrorism and aggravated murder. While the Indian Constitution guarantees the right to life under Article 21,<sup>15</sup> the Supreme Court has upheld the constitutionality of the death penalty in the "*rarest of rare*" cases, thereby attempting to strike a balance between individual rights and societal needs. Critics argue that this approach is fraught with inconsistencies and subjectivity, leading to potential violations of human rights.

### **C. Is the Death Penalty a Deterrent? Analysing Empirical Evidence:**

The death penalty as a crime deterrent remains contentious with arguments that it deters crime but no empirical relationship between executions and crime rates seems present from studies done within the U.S., for instance.<sup>16</sup> Research indicates that states without the death penalty often have similar or even lower violent crime rates. In India, the lack of comprehensive data makes it challenging to evaluate the death penalty's deterrent effect. Opponents argue that the certainty and swiftness of punishment, rather than its severity, play a more significant role in crime prevention, questioning the notion that capital punishment is a unique or essential deterrent.

### **D. The Ethical Debate: Justice vs. Vengeance:**

The ethical debate on the death penalty centres on justice versus vengeance. Supporters argue it ensures justice by imposing proportional punishment for heinous crimes, rooted in retributive justice and moral accountability.<sup>17</sup> Critics, however, contend that it is often driven by societal anger rather than a genuine pursuit of justice.<sup>18</sup> They advocate for rehabilitation and addressing root causes of crime instead of perpetuating violence. Additionally, the irreversible nature of capital punishment raises ethical concerns, particularly the risk of wrongful executions, making its moral justification highly contentious.

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<sup>14</sup> *Universal Declaration of Human Rights*, art. 3, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948).

<sup>15</sup> India Const. art. 21.

<sup>16</sup> Retributivist Arguments against Capital Punishment. (2004). *Journal of Social Philosophy*, 35(II), 188.

<sup>17</sup> "Death Penalty Debate," Britannica.com, <https://www.britannica.com/procon/death-penalty-debate> (last visited Mar. 2, 2025).

<sup>18</sup> *Id.*

#### IV. Global Trends and Practices

##### A. International Human Rights Law and the Death Penalty: UN Perspectives:

International human rights law has consistently pushed for abolishing the death penalty, arguing that it violates the right to life and human dignity. The United Nations has been a strong opponent, with the International Covenant on Civil and Political Rights (ICCPR) urging countries to phase it out over time. Although Article 6 of the ICCPR<sup>19</sup> permits the death penalty for the "most serious crimes," it also urges nations to move toward abolition. The UN General Assembly has repeatedly called for moratoriums on executions, urging member states to reconsider capital punishment. It emphasizes concerns over wrongful convictions, discrimination, and the irreversible nature of executions, which undermine justice and fairness.<sup>20</sup>

##### B. Countries That Have Abolished Capital Punishment: Lessons for India:

Many countries, including Norway, Germany, and South Africa, have abolished the death penalty, prioritizing rehabilitation over retribution.<sup>21</sup> They argue this strengthens human rights and promotes a more humane justice system. Germany, for example, emphasizes reintegration in its post-WWII legal framework.<sup>22</sup> South Africa abolished the death penalty in 1995, citing its incompatibility with the right to life and dignity enshrined in its constitution. These examples offer valuable lessons for India, where debates about capital punishment's morality and efficacy continue. Abolitionist countries demonstrate that alternatives like life imprisonment without parole can address public safety concerns while upholding human rights.

##### C. Retentionist vs. Abolitionist Countries: Comparative Analysis:

The global divide between retentionist and abolitionist countries underscores deep cultural, legal, and political differences. Retentionist countries like the United States, China, and Saudi Arabia continue to justify the death penalty on grounds of deterrence, retribution, and public safety. These nations often cite cultural or religious reasons for

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<sup>19</sup> International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>20</sup> Shanzay Noor & Aitzaz Ajmal (2022) United Nations resolution for Moratorium on death penalty and its implications on counter terrorism, Cogent Social Sciences, 8:1, 2110196, DOI: 10.1080/23311886.2022.2110196.

<sup>21</sup> Death Penalty Info. Ctr., Countries That Have Abolished the Death Penalty Since 1976 (Sept. 25, 2024), <https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976>.

<sup>22</sup> *Id*

retaining capital punishment. Abolitionist countries argue the death penalty is inhumane, error-prone, and ineffective as a deterrent. Studies show they do not have higher crime rates than retentionist nations, challenging its necessity for public safety. This suggests capital punishment reflects societal attitudes and politics more than empirical evidence.

## **V. The Indian Perspective:**

### **A. Public Perception of Capital Punishment in India**

Public perception of capital punishment in India is deeply divided. On one hand, many citizens view the death penalty as an essential tool for delivering justice, particularly in cases involving heinous crimes such as rape and terrorism.<sup>23</sup> High-profile cases like the recent R G Kar rape-murder, Nirbhaya gang rape-murder in 2012 and many other heinous cases have fuelled public demand for swift and harsh punishments, including capital sentences. At the same time, more people are recognizing the flaws in the justice system, from the risk of wrongful convictions to the unfair burden it places on marginalized communities. This dichotomy reflects the tension between public emotions and the principles of justice and fairness.

### **B. Role of Religion and Culture in Shaping Attitudes Toward the Death Penalty**

Religion and culture play a significant role in shaping Indian attitudes toward the death penalty. Hinduism, Buddhism, and Jainism, which emphasize non-violence and forgiveness, often conflict with the practice of capital punishment. However, cultural norms and societal values in India frequently prioritize retribution, particularly in cases involving crimes against women and children.<sup>24</sup> The interplay between religious teachings and cultural expectations creates a complex framework that influences public and judicial attitudes toward the death penalty.

### **C. High-Profile Cases and Their Impact on India's Death Penalty Debate**

High-profile cases have significantly influenced India's death penalty debate. Cases like the 2001 Parliament attack, the 26/11 Mumbai attacks, and the R G Kar rape-

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<sup>23</sup> B.G. Pandey, Delhi Nirbhaya Rape Death Penalty: What Do Hangings Mean for India's Women? (Mar. 20, 2020), <https://www.bbc.com/news/world-asia-india-50812776>.

<sup>24</sup> Killing and Harming, RE:ONLINE, <https://www.reonline.org.uk/knowledge/hindu-worldview-traditions/killing-and-harming/> (last visited Mar. 3, 2025).

murder have shaped public opinion and judicial practices.<sup>25</sup> These cases often evoke strong emotional responses, leading to demands for capital punishment as a deterrent and a form of justice. While these cases have reinforced the perception of the death penalty as a necessary tool for justice, they also highlight the challenges of ensuring fairness and consistency in its application.

#### **D. Capital Punishment and Marginalized Communities: A Study of Bias in India**

Studies have revealed that marginalized communities, including Scheduled Castes, Scheduled Tribes, and economically disadvantaged groups, are disproportionately affected by the death penalty in India. These groups often lack access to adequate legal representation and face systemic biases within the criminal justice system. This raises critical questions about the fairness and equity of capital punishment in India. Critics argue that the death penalty perpetuates existing social inequalities, making its application inherently unjust.

### **VI. Challenges and Controversies of the Death Penalty and the Way Forward: Alternatives to Capital Punishment:**

#### **A. Arbitrary Application of the Death Penalty: Issues of Fairness and Justice**

One of the most significant challenges associated with the death penalty is its arbitrary application. Studies reveal that judicial decisions in capital punishment cases often vary widely based on subjective factors such as judicial discretion, public opinion, and the socio-political climate.<sup>26</sup> This inconsistency undermines the principle of fairness in justice. The lack of clear, objective guidelines exacerbates the problem, leaving the system vulnerable to bias and error. For instance, similar cases may result in disparate outcomes, leading to questions about the equitable application of justice.

#### **B. Socioeconomic Factors Influencing Death Penalty Sentences in India**

The socioeconomic background of defendants plays a pivotal role in determining their likelihood of receiving a death sentence. Marginalized communities, including those from economically disadvantaged backgrounds, are disproportionately represented on

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<sup>25</sup> Death Penalty: Executions in India Post-2000 Before Nirbhaya Case, LiveLaw (Mar. 20, 2020), <https://www.livelaw.in/top-stories/death-penalty-executions-in-india-post-2000-before-nirbhaya-case-154115>, (last visited Mar. 3, 2025).

<sup>26</sup> Arbitrariness, Death Penalty Information Centre, <https://deathpenaltyinfo.org/policy-issues/arbitrariness> (last visited Mar. 3, 2025).

death row in India. Inadequate legal representation due to financial constraints often results in unfair trials.<sup>27</sup> Furthermore, systemic issues such as caste-based discrimination and limited access to resources amplify these disparities, raising ethical concerns about the justice system's impartiality.

### **C. Mental Health, Juveniles, and Capital Punishment: Legal and Ethical Dilemmas**

The imposition of the death penalty on individuals with mental health issues or juveniles presents unique legal and ethical challenges. International human rights frameworks discourage the execution of such individuals, yet inconsistencies persist in their application.<sup>28</sup> In India, while the law ostensibly excludes juveniles and those with severe mental illnesses from capital punishment, gaps in implementation and assessment mechanisms often result in violations. These cases highlight the need for a more humane and nuanced approach to justice.

### **D. Exploring Life Imprisonment as an Alternative: Global and Indian Experiences**

Life imprisonment without parole offers a viable alternative to the death penalty, aligning with global trends toward abolishing capital punishment. Countries such as Norway and Germany have demonstrated the effectiveness of life sentences in ensuring public safety while upholding human rights. In India, however, the implementation of life imprisonment as an alternative requires reforms to address issues like prison overcrowding, the psychological impact of prolonged incarceration, and the need for rehabilitation programs.

### **E. Reforming India's Death Penalty Framework: Policy and Legislative Recommendations**

A comprehensive overhaul of India's death penalty framework is imperative to address its inherent challenges. Policy recommendations include introducing stricter criteria for imposing the death penalty, enhancing legal aid for marginalized communities, and ensuring the consistent application of existing laws. Legislative reforms should

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<sup>27</sup> Arbitrariness, Death Penalty Information Centre, <https://deathpenaltyinfo.org/policy-issues/arbitrariness> (last visited Mar. 3, 2025).

<sup>28</sup> Youth, Death Penalty Information Centre (Dec. 12, 2024), <https://deathpenaltyinfo.org/policy-issues/juveniles>.



prioritize transparency in the mercy petition process, enforce international human rights standards, and promote alternatives like life imprisonment and restorative justice. These changes can foster a more equitable and humane justice system while upholding the principles of fairness and accountability.

## VII. Conclusion

The global trend toward abolishing capital punishment highlights a growing acknowledgment of its ethical, legal, and practical shortcomings. Countries like Norway, Germany, and South Africa illustrate how societies can uphold justice and public safety through humane alternatives such as rehabilitation, restorative justice, and life imprisonment without parole. These measures align with principles of human dignity and the sanctity of life, demonstrating that justice systems can prioritize reintegration over retribution while fostering fairness and human rights. India, with its deep cultural heritage rooted in compassion and non-violence, is well-positioned to lead by example in the global movement for abolition.

Achieving this goal in India necessitates a phased and multi-faceted approach. Strengthening alternatives such as life imprisonment without parole, coupled with improved prison conditions and rehabilitation programs, can address public safety concerns more humanely. Judicial reforms, including clear guidelines to mitigate arbitrariness in death penalty cases, stronger procedural safeguards, and enhanced legal aid, are essential for ensuring fairness and consistency. Additionally, greater transparency in the mercy petition process, standardized timelines, and accountability measures would reduce uncertainties for death row inmates. Public awareness campaigns emphasizing the ethical concerns, risks of wrongful execution, and the lack of evidence supporting deterrence can further shift societal attitudes toward abolition.

Ultimately, legislative action is crucial to remove capital punishment from Indian law, supported by judicial advocacy to narrow the scope of the "*rarest of rare*" doctrine. Aligning with international human rights frameworks, ratifying relevant protocols, and committing to a moratorium on executions would affirm India's dedication to global human rights standards. Abolishing the death penalty is a moral imperative that reflects a commitment to dignity, equality, and humanity—values enshrined in India's Constitution.

By embracing this path, India can pave the way for a more compassionate, equitable, and justice-oriented society.