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DEATH PENALTY: CONSTITUTIONAL PERSPECTIVE IN INDIA

AUTHORED BY - ANURAG VERMA

INTRODUCTION

The death penalty is the execution of an individual by the state as punishment for a serious crime. Death Penalty (*also called capital punishment*) is when the courts give a **legal punishment** of death to a person for **committing a very serious crime**. The word “**capital**” comes from the Latin word “*caput*” which means “*head*”—because in ancient times, people were literally beheaded as punishment.¹ It is considered the most severe form of criminal penalty and is often reserved for crimes classified as **heinous offences**.

Justice VR Krishna Iyer described death penalty as a judicial murder which was no different from a criminal murder. It may also be characterised as inhuman, excessive and also irreversible, offering the accused no chance of reformation. Thus, more than two-third countries of the world have abolished death penalty.²

In India, the death penalty remains legal and is primarily awarded in cases where the courts deem the crime to be of an extreme nature that warrants the harshest possible punishment. The death penalty in India is constitutionally valid but has been upheld under the “rarest of rare” doctrine, meaning it's reserved for the most exceptional cases of crime. It is permissible under Article 21 of the Constitution, provided there is a valid law, a fair trial, and careful consideration by the courts. The philosophy behind capital punishment has often revolved around three key factors:

- **Retribution:** The idea that the severity of the punishment must be proportionate to the gravity of the offense.
- **Deterrence:** The belief that imposing the death penalty serves as a deterrent to potential offenders. But as stated by the General Assembly of the United Nations, “there is no conclusive evidence of the deterrent value of the death penalty” (UNGA Resolution

¹ *Capital Punishment in India*, Rau IAS Compass, <https://compass.rauias.com/current-affairs/capital-punishment-india/>

² <http://www.amnestyusa.org/our-work/issues/death-penalty>

65/206).

- **Rehabilitation:** The counter-argument that justice should allow room for reform and that capital punishment removes this possibility.

HISTORICAL BACKGROUND

- **Ancient Indian Texts: Manusmriti & Arthashastra**

Even in ancient India, punishment was considered necessary to keep society in order.

- i. **Manusmriti** (a Hindu legal text) believed that strong punishments—even death—were okay for crimes that harmed the peace of society. It focused on the idea that fear of punishment keeps people disciplined.
- ii. **Arthashastra**, written by Chanakya (Kautilya), also supported the death penalty in some cases. It was more practical—it said rulers should use punishment to protect the kingdom and keep law and order.

Thus, death penalty existed in ancient India, but it was supposed to be rare and for serious threats.

- **British Colonial Influence**

When the British ruled India, they introduced the **Indian Penal Code (IPC) in 1860** (now, *Bharatiya Nyaya Sanhita (BNS), 2023*³). This law made the death penalty a punishment for many crimes, such as:

- Murder (*Sec 302 IPC, now Sec. 101 BNS*)
- Waging war against the government (*Sec 121 IPC, now 147 BNS*)
- Dacoity with murder (*Sec 396 IPC, now 310 BNS*)

In 1931, Shri Gaya Prasad Singh tried to pass a Bill⁴ to abolish the death penalty for crimes under the Indian Penal Code. However, his motion was ultimately defeated after the Home Minister of the time, Sir John Thorne, stated that the British government did not consider it wise to abolish capital punishment. The British used the death penalty quite freely—even for political reasons. Freedom fighters like Bhagat Singh, Rajguru, and Sukhdev were hanged under these laws.

So, during British rule, the death penalty became a formal part of Indian criminal law and continued even after Independence.

³ *Death Penalty: Capital Punishment in BNS (Bharatiya Nyaya Sanhita)*, Lawgical Shots. https://lawgicalshots.com/death-penalty-capital-punishment-in-bns-bharatiya-nyaya-sanhita/#google_vignette

⁴ Bill introduced on 27th January, 1931, and on the 17th February, 1931

- **Post-Independence**

India became independent in 1947 and some leaders and legal experts did question whether death penalty should be retained or not. The Indian Constitution gave a lot of importance to “**Right to Life**” (**Article 21, Constitution of India**⁵)—so some people thought the death penalty was against that right. At the same time, others believed that India wasn’t ready to completely remove it because of the serious crimes happening in society. Several reports of the Law Commission of India were published in the matter of capital punishment.⁶ In its 262nd Report⁷, has recommended the abolition of death penalty in all but two instances—crimes of terrorism and waging war against the State. So, the death penalty was retained, but courts were told to use it very carefully and only in rare cases.

- **2019: The Abolition Debate in Parliament**

In 2019, The **Death Penalty (Abolition) Bill**⁸, was introduced in Lok Sabha. The bill proposed the abolition of the Death Penalty completely and its replacement with Life Imprisonment.

But the **bill was rejected**. Most MPs felt that India still needed the death penalty to deal with crimes like terrorism, brutal murders, and crimes against women or children. This showed that even though the debate had started, the government and society were not ready to end it.

CONSTITUTIONAL VALIDITY

Since the incorporation of Code of Criminal Procedure, 1898, while imposing the death sentence, the courts were obliged to provide 'special reasons' for not imposing the death sentence.⁹ The true departure from death sentence as a norm to an exception came after the introduction of Code of Criminal Procedure re-enacted in 1973.¹⁰ The CrPC 1973 introduced Section 354(3), the section mandated that judge must provide 'special reasons' for inflicting or

⁵ Article 21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

⁶ 35th Report and 187th Report of the Law Commission of India

⁷ Justice Ajit Prakash Shah Former Chief Justice of Delhi High court Chairman Law Commission of India Government of India.

⁸ Bill No. 168 of 2019 by Shrimati Kanimozhi Karunanidhi, M.P

⁹ "The Code of Criminal Procedure, 1973", *Legislative Department, Ministry of Law and Justice*.

¹⁰ "The 262nd Report of the Law Commission of India - The Death Penalty". *Law Commission of India*

imposing the death sentence.¹¹ Also, the CrPC 1973 introduced the Section 235(2), which allowed the post-conviction hearing on sentencing which drastically changed the jurisprudence allowing a careful evaluation and analysis of circumstances revolving around the jurisprudence of death sentence.

The first major case was *Jagmohan Singh v. State of U.P. (1973)*¹². In this case, the petitioners said that the death sentence was unfair and went against **Article 14 (Right to Equality)**¹³ and **Article 21 (Right to Life)**¹⁴. However, the Supreme Court ruled that the death penalty was allowed under the Constitution. The Court said that judges must be given the freedom to choose between life imprisonment and the death penalty based on the facts of each case.

In *Ediga Anamma v. State of Andhra Pradesh (1974)*¹⁵ and *Rajendra Prasad v. State of U.P. (1979)*¹⁶—the Court said that Death Penalty should be given only when absolutely necessary, and the criminal shows no chance of being reformed. Things like the person's age, past behaviour, and life circumstances must be considered before giving the death sentence. The Court departed from retributive theory and emphasized on the deterrence and reformatory theory as the social goals. Furthermore, the Court held that the 'special reasons' required to impose the capital punishment must not relate to the crime, but focus must be on the criminal.¹⁷ Later, in *Bachan Singh v. State of Punjab (1980)*¹⁸, the Supreme Court said that Death penalty is constitutional, but it should be used only in the '*Rarest of Rare*' cases, and that the purpose of punishment should not only be to punish the criminal but also to reform them. Judges must look at:

- The severity of the crime
- The possibility of reform
- The circumstances of the criminal

¹¹ When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

¹² 1973 AIR 947; 1973 SCR (2) 541

¹³ "*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*"

¹⁴ Article 21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹⁵ 1974 AIR 799; 1974 SCR (3) 329

¹⁶ 1979 AIR 916; 1979 SCR (3) 78

¹⁷ "The 262nd Report of the Law Commission of India - The Death Penalty", *Law Commission of India*.

¹⁸ AIR 1980 SC 898.

It is a legal principle which means that 'Death Penalty' as a punishment should only be used when the crime is extremely serious and shocking and to determine it, the 'balance sheet test'¹⁹ is such a negotiable instrument that draws up a table to compare the aggravating and mitigating circumstances around the case and the criminal in order to judge whether it falls under the 'rarest of rare' standard. Although, the court didn't give an exact definition. Instead, it gave some guidelines. Judges have to look at two sides:

1. Nature of the Crime

Is the crime:

- Extremely brutal, shocking, or inhuman?
- Against innocent and vulnerable victims (like children, pregnant women)?
- A threat to society or national security (like terrorism)?
- Done with **no remorse**, just for pleasure, revenge, or cruelty?

Example: Nirbhaya case – brutal gangrape + murder = fits '*rarest of rare*'.

2. Criminal's Background

Is the person:

- Young, poor, or mentally unstable?
- Capable of reforming or changing?
- Forced into the crime (under pressure or threat)?
- A first-time offender?

Further, in *Mithu vs. State of Punjab (1983)*²⁰, the court discussed Section 303 of the IPC which provided for a mandatory death sentence for offenders serving a life sentence.^{[73][74]} This section was based on the logic that any criminal who has been convicted for life and still can kill someone is beyond reformation and so, the only suitable punishment left would be death. It

¹⁹ Referring to United States Supreme Court, *Vasant Sampat Dupare vs. State of Maharashtra*, (2015) 1 SCC 253. notes that the balance sheet test draws up a balance sheet comparing aggravating and mitigating circumstances around the case and the criminal. 'Aggravating circumstances' point to facts such as (a) whether the murder has been committed after careful planning and involves extreme brutality; (b) if the murder involves exceptional circumstances;

(c) if the murder is of a member of armed forces of the Union or police force or public servant, etc. Similarly, 'Mitigating circumstances would include facts such as : (a) That the offence was committed under the influence of extreme mental or emotional disturbance; (b) age of the accused; (c) the probability that the accused can be reformed or rehabilitated; (d) that the accused acted under the duress or domination of another person etc. Aggravating circumstances refer to facts surrounding the crime itself, and the mitigating circumstances refer to facts about the criminal, going beyond the crime itself.

²⁰ 1983 AIR 473; 1983 SCR (2) 690

was discussed that the original idea behind drafting of this section was to discourage assaults by life convicts on the prison staff, but the language chosen by the legislature had widely exceeded its intention. It was held that Section 303 violated right to equality and right to life and personal liberty as conferred under Articles 14 and 21 of the Constitution.

OFFENCES PUNISHABLE BY DEATH IN INDIA

Under the <i>Bharatiya Nyaya Sanhita (BNS), 2023</i>	
Section 65(2) (<i>Sec. 376AB IPC</i>)	Rape of a child below 12 years of age
Section 66 (<i>Sec. 376A IPC</i>)	Rape causing death or leaving the victim in a persistent vegetative state
Section 70(2) (<i>Sec. 376DB IPC</i>)	Gang rape of a child under 18 years of age
Section 71 (<i>Sec. 376E IPC</i>)	Repeat offenses in the context of rape
Section 103(1) (<i>Sec. 302 IPC</i>)	Punishment of Murder
Section 103(2) (<i>Sec. 302 IPC</i>)	Mob Lynching
Section 104 (<i>Sec. 303 IPC</i>)	Murder by a prisoner serving a life sentence
Section 107 (<i>Sec. 305 IPC</i>)	Abetment of suicide of a child or person of unsound mind
Section 109(2) (<i>Sec. 307 IPC</i>)	Attempted murder by a prisoner serving a life sentence
Section 111(2)(a)	Organized crime offenses causing death
Section 113(2)(a)	Terrorism resulting in the death of any person
Section 140(2) (<i>Sec. 364A IPC</i>)	Kidnapping or abducting in order to murder or for ransom
Section 147 (<i>Sec. 121 IPC</i>)	Waging war against the Government of India
Section 160 (<i>Sec. 132 IPC</i>)	Abetment of mutiny, if mutiny is actually committed in consequence
Section 230(2) (<i>Sec. 194 IPC</i>)	Giving or fabricating false evidence leading to the conviction and execution of an innocent person
Section 232(2) (<i>Sec. 121 IPC</i>)	Threatening any person to give false evidence

	resulting in the death of an innocent person
Section 310(3) (<i>Sec. 396 IPC</i>)	Felony murder while committing dacoity or banditry
Under Other Special Laws	
Unlawful Activities (Prevention) Act (UAPA), 1967	Terrorist acts resulting in death
Protection of Children from Sexual Offences (POCSO) Act, 2012	Child sexual abuse laws
The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989	Where violence is brutal and leads to death
Narcotic Drugs and Psychotropic Substances Act (NDPS), 1985	Repeat drug trafficking offenses involving large quantities
Commission of Sati (Prevention) Act, 1987	Abetment of Sati
Army Act, 1950	Offenses in relation to the enemy, mutiny, and desertion
Assam Rifles Act, 2006	Offenses in relation to the enemy, mutiny, and desertion
Border Security Force Act, 1968	Offenses in relation to the enemy, mutiny, and desertion
Coast Guard Act, 1978	Mutiny and civil offenses
Indo-Tibetan Border Police Force Act, 1992	Offenses in relation to the enemy, mutiny, desertion, and civil offenses
Maharashtra Control of Organised Crime Act, 1999	Organised crime resulting in death
Karnataka Control of Organised Crime Act, 2000	Organised crime resulting in death
Bombay Prohibition (Gujarat Amendment) Act, 2009	Death caused by the consumption of spurious liquor ("Laththa")
Defence of India Act, 1971	Acts contravening provisions with intent to wage war or assist external aggression
Geneva Conventions Act, 1960	Grave breaches of the Geneva Conventions
Explosive Substances Act, 1908	Use of explosive substances likely to endanger life or cause serious harm

EXECUTION PROCESS OF DEATH PENALTY

1. Trial Court Conviction

- A Sessions Court convicts the accused for a crime punishable by death (ex. murder, rape).
- If the judge thinks the case qualifies under the “*rarest of rare*” doctrine, they may sentence the person to death.

2. Automatic Appeal to the High Court

- As per **Section 407, BNSS** (Sec. 366 CrPC), every death sentence must be confirmed by the High Court.
- Even if the convict doesn’t appeal, the sentence won’t be final until the High Court agrees.

3. Appeal to the Supreme Court

- If the High Court confirms the death sentence, the convict can file a special leave petition (SLP) under **Article 136 of the Constitution**.
- Supreme Court can:
 - i. Uphold the death penalty
 - ii. Reduce it to life imprisonment
 - iii. Acquit the person

4. Review and Curative Petitions

After the SC confirms the sentence, the convict can still:

a. File a Review Petition: Heard by the same judges who passed the verdict (in open court, if it's a death penalty case – *Mohd. Arif v. The Registrar, Supreme Court of India*).

b. File a Curative Petition

- This is the last legal remedy before mercy petitions.
- Reviewed by the senior-most judges of the Supreme Court.

5. Mercy Petition to the President/Governor

Under **Article 72 (President)**²¹ or **Article 161**²² (**Governor**):

- The convict can request mercy, asking for commutation (death → life imprisonment).
- These petitions are sent via the Ministry of Home Affairs.

Section 473(2) under the **Bharatiya Nagarik Suraksha Sanhita (BNSS)**

introduces new guidelines on:

- **Timelines for Appeals:** Limits the time for filing an appeal to ensure timely disposal of death penalty cases.
- **Mandatory Psychological Evaluation:** Requires a full psychological assessment of the convict before execution.
- **Regulation of Clemency Procedures:** Introduces a structured timeline for the President and Governors to decide on mercy petitions.

6. Execution Warrant

If all petitions are rejected:

- The trial court issues a “**black warrant**” (formal order to hang the convict).
- The jail is notified, and a date/time for execution is set.

7. Final Execution

- As per **Section 393, BNSS** (Sec. 354(5) CrPC), the execution is by hanging.
- Time: Usually early morning (around 5–6 AM).
- Conducted inside a central jail in the presence of the jailor, magistrate, and doctor.

DELAY IN DEATH SENTENCES-

Delays in the legal system are a big problem. A famous saying is “*justice delayed is justice*”

²¹ Article 72: Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases-

(1)The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence--(a)in all cases where the punishment or sentence is by a Court Martial;(b)in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;(c)in all cases where the sentence is a sentence of death.

²² It grants the Governor of a state the power to grant pardons, reprieves, respites, or to suspend, remit, or commute the sentence of any person convicted of an offense against a state law. This power is similar to the President's power under Article 72 but is limited to offenses that fall under the state's executive power and does not extend to federal or military offenses. The exercise of this power is subject to judicial review in certain situations.

denied.” This affects both the victims of crime and the people accused. The Supreme Court has time and again reiterated that Article 21 is the paramount principle on which the rights of accused are based. Article 21 guarantees that no person shall be deprived of his life or personal liberty except according to a procedure established by law. The protection under this Article is available to all the persons, including convicts and continues till their last breath. Unexplained and inordinate delay in disposal of mercy petitions subjects the convict to an excruciatingly long wait, along with severe mental, physical and psychological suffering. Delay in execution of death sentence has a dehumanizing effect on the person, and is in contravention to Article 21 as it deprives a person of his "right to life" without any compliance to the procedure established by law. The expeditious disposal of mercy petitions would be acting as per the procedure established by law.²³

In *T.V. Vatheeswaran v. State of Tamil Nadu (1983)*²⁴, the Court said that if the execution is delayed by more than two years, it could go against Article 21 of the Constitution, which protects the right to life and personal liberty.

But in *Sher Singh v. State of Punjab (1983)*²⁵, the Court said that not all delays are enough to cancel a death sentence — each case must be looked at carefully.

In *Triveniben v. State of Gujarat (1989)*²⁶, the Court made an important distinction. It said that only delays caused by the government, such as taking too long to decide mercy petitions, can be used to challenge a death sentence. Delays caused by court processes, like appeals, do not count in the same way.

Court's power in case of delay-

The Court said that very long delays in carrying out a death sentence can give a prisoner the right to come to court under **Article 32**²⁷ (which lets people approach the Supreme Court for

²³ Case Comments: Shatrughan Chauhan V. Union of India: Examining The Role of Supervening Factors in Commutation of Death Sentence by Ananya Kumar Singh and Vatsal Joshi, B.A.LL.B (Hons.) III Year, National Law Institute University, Bhopal

²⁴ 1983 SCR (2) 348

²⁵ 1983 AIR 465; 1983 SCR (2) 582

²⁶ 1989 AIR 1335; 1989 SCR (1) 509

²⁷ Article 32: Remedies for enforcement of rights conferred by this Part- (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2)The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

their fundamental rights). But the court will only look at the delay and what happened after the final sentence—not re-open the whole case. Also, there is no fixed time limit after which the sentence must be cancelled—it depends on the situation.

And finally, to protect the rights of people on death row—

In *Shatrughan Chauhan v. Union of India (2014)*²⁸, the Supreme Court made some important rules, these included:

- Solitary confinement is not allowed before the mercy petition is decided.
- Prisoners must be given legal help.
- There must be at least a 14-day gap between rejecting a mercy petition and carrying out the execution.²⁹□

CONCLUSION

The concept of capital punishment in India is deeply rooted in a blend of historical context, legal tradition, and moral philosophy. Originating from ancient legal codes that prescribed severe penalties for heinous crimes, the framework evolved under British colonial rule, solidifying the Indian Penal Code of 1860 as the primary legal document housing capital offenses. This historical foundation was carried forward into the post-independence era, setting the stage for contemporary legal debates.

The cornerstone of the current debate is the constitutional validity of the death penalty. While many nations have abolished capital punishment, India has consistently upheld its use. This is primarily anchored in Article 21 of the Constitution, which guarantees the right to life and personal liberty, but crucially adds the caveat: "except according to the procedure established by law." This phrase provides the legal and constitutional sanction for the state to deprive an individual of life, provided due process is meticulously followed. The Supreme Court reinforced this stance in the landmark *Bachan Singh* case (1980), introducing the "rarest of rare" doctrine. This doctrine is a critical safeguard, ensuring that the ultimate penalty is reserved only for the most exceptional and extreme cases, where life imprisonment is deemed an inadequate alternative.

²⁸ MANU/SC/0043/2014

²⁹ "Death Penalty in India" by Ruchira Mathur, <https://blog.finology.in/Legal-news/death-penalty-in-india>

The importance of the death penalty in India, from a legal perspective, is framed within the theory of deterrence and retributive justice. Proponents argue that it serves as a necessary deterrent against the most brutal and shocking crimes against humanity, such as certain forms of murder, terrorism, and egregious sexual offenses. The argument posits that the finality of the punishment provides a sense of justice and closure for victims' families and for society at large, reinforcing the moral fabric and authority of the law. The current legal framework, including recent expansions in the Bharatiya Nyaya Sanhita, reflects a continued legislative belief in capital punishment as an essential tool for maintaining social order and public safety.

However, the modern application is fraught with complexities. Concerns over arbitrary application, socio-economic biases, and the lengthy judicial process necessitate continuous judicial scrutiny. The Supreme Court's recent emphasis on structured sentencing procedures and adequate consideration of mitigating factors highlights an ongoing effort to ensure fairness and prevent miscarriages of justice.

In conclusion, the death penalty in India is a complex, legally sanctioned instrument of justice, validated by the Constitution and rooted in historical precedent. Its existence reflects a societal and legislative belief in its importance for specific, extreme cases. Yet, its application remains a deeply debated topic, subject to rigorous judicial oversight and evolving interpretations of human rights. The challenge for the Indian legal system continues to be the delicate balance between delivering justice for the most heinous crimes and upholding the core constitutional principles of fairness, due process, and the inherent dignity of all individuals, even those who have committed the most grievous wrongs.