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CAPITAL PUNISHMENT UNDER THE POCSO ACT: RAREST OF RARE DOCTRINE, JUDICIAL STAYS, AND THE TENSION BETWEEN CHILD PROTECTION AND CONSTITUTIONAL SAFEGUARDS

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A Critical Analysis with Reference to

Atul Nihale v. State of Madhya Pradesh (SLP (Crl) No. 4126-4127/2026)

ABSTRACT

The Protection of Children from Sexual Offences Act, 2012 (POCSO Act) represents India's most comprehensive legislative effort to shield children from sexual abuse and exploitation. Its 2019 amendment introduced the death penalty for aggravated penetrative sexual assault — a provision that has generated sustained judicial debate. This paper examines the constitutional legitimacy, doctrinal application, and evolving judicial approach to capital punishment under the POCSO Act, anchored in the recent Supreme Court order in *Atul Nihale v. State of Madhya Pradesh (SLP (Crl) No. 4126-4127/2026)*, where the Supreme Court stayed a triple death sentence awarded for the rape and murder of a five-year-old girl in Bhopal, directing a mitigation investigation before final sentencing. The paper traces the historical trajectory of capital punishment in India, analyses the "rarest of rare" doctrine from *Bachan Singh v. State of Punjab (1980)* through the *Macchi Singh* framework, and examines how these principles operate within the POCSO framework under the new *Bharatiya Nyaya Sanhita, 2023 (BNS)*. It critically evaluates the tension between mandatory minimum sentencing and judicial discretion in capital cases, the role of mitigating factors, the constitutional challenge under Articles 14, 19, and 21, and the implications of the Supreme Court's institutional approach to death sentence review. The paper argues that while the punitive imperative of child protection justifies severe sentencing, the constitutionally mandated individualised sentencing framework requires robust procedural safeguards before the irrevocable sentence of death is affirmed. The paper concludes with a call for a structured mitigation framework in POCSO capital cases as a matter of constitutional necessity.

Keywords: *POCSO Act, Death Penalty, Rarest of Rare, Capital Punishment, Child Sexual Assault, BNS, Mitigation, Atul Nihale, Bachan Singh, Judicial Discretion*

I. INTRODUCTION

On March 10, 2025, a Special POCSO Court in Bhopal sentenced Atul Nihale to death on three counts for the kidnapping, rape, and murder of a five-year-old girl. The Madhya Pradesh High Court upheld the capital sentence in January 2026, describing the crime as "a barbaric act of a depraved mind" warranting the "rarest of rare" classification. In March 2026, the Supreme Court of India stayed the execution pending a fresh review of mitigation evidence, directing a mitigation investigation report, psychological evaluation, and prison conduct assessment before the final sentencing question could be decided. The case encapsulates one of the most fraught legal questions in contemporary Indian criminal jurisprudence: when does the gravity of child sexual violence, on its own, justify the ultimate and irreversible penalty of death?

India amended the POCSO Act in 2019 to introduce the death penalty for aggravated penetrative sexual assault, particularly where the victim is below twelve years of age or where the offence results in death. The amendment came in the wake of public outrage over the Kathua and Unnao cases and reflected a legislative consensus that the existing punitive framework was inadequate in the face of extreme child sexual crimes. Yet the introduction of capital punishment into the POCSO framework has not been without judicial scepticism. Courts have consistently affirmed that the death penalty, even in the most heinous cases, demands individualised sentencing — a careful balance of aggravating and mitigating circumstances before the irrevocable sentence is imposed.

This paper offers a comprehensive legal analysis of capital punishment under the POCSO Act. It proceeds in eleven parts. It begins with the historical evolution of capital punishment in India, moves through the legislative architecture of the POCSO Act and its 2019 amendment, examines the foundational "rarest of rare" doctrine and its application in child sexual assault cases, analyses the Atul Nihale case in depth, addresses the role of mitigation, the transition to the BNS framework, constitutional dimensions, comparative perspectives, and culminates in a critical assessment and policy recommendations.

II. HISTORICAL EVOLUTION OF CAPITAL PUNISHMENT IN INDIA

2.1 Colonial Foundations

Capital punishment in India is rooted in Section 302 of the Indian Penal Code, 1860, a colonial statute that prescribed death for murder without qualification. Under British

administration, the death penalty was frequently applied, and there was no constitutional or statutory framework for calibrated sentencing. The courts were given largely discretionary power, which was exercised inconsistently across provinces.

2.2 Post-Independence Constitutional Framework

India's Constitution, adopted in 1950, did not explicitly abolish capital punishment. Article 21 guarantees the right to life "except according to procedure established by law," implicitly permitting deprivation of life through due legal process. Article 72 and Article 161 respectively vest the President and Governor with clemency powers — a constitutional recognition of the fallibility of courts in capital matters. The early post-independence judiciary rarely interfered with death sentences, and the IPC framework remained the primary governing law.

2.3 Bachan Singh and the Rarest of Rare Standard

The seminal shift came with *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, where a Constitution Bench of the Supreme Court, by a 4:1 majority, upheld the constitutional validity of the death penalty but imposed a critical limitation: capital punishment must be reserved for the "rarest of rare cases" where the alternative of life imprisonment is "unquestionably foreclosed." The majority authored by Justice P.N. Bhagwati articulated a proportionality framework requiring courts to draw up a balance sheet of aggravating and mitigating circumstances, with mitigating factors accorded full weightage. Justice V.R. Krishna Iyer dissented, advocating complete abolition.

Bachan Singh marked the constitutional domestication of capital punishment. It retained the penalty but subjected it to a structured doctrinal test, the consequences of which continue to reverberate in every capital case that comes before Indian courts — including those under the POCSO Act.

2.4 From Macchi Singh to the Modern Era

In *Macchi Singh v. State of Punjab*, (1983) 3 SCC 470, the Supreme Court operationalised the *Bachan Singh* framework by identifying five categories of cases where death may be warranted: the manner of commission, the motive, the anti-social or socially abhorrent nature of the crime, the magnitude of the crime, and the personality of the victim. The *Macchi Singh* categories have been consistently applied in POCSO capital cases and serve as the primary analytical grid for High Courts confirming death sentences. Over the decades,

however, the Supreme Court has grown increasingly cautious about confirming capital sentences, commuting several on the basis of supervening mitigating factors such as delay in execution, mental illness, or institutional failure.

III. THE POCSO ACT, 2012: LEGISLATIVE FRAMEWORK AND THE 2019 AMENDMENT

3.1 Legislative History and Object

Prior to the enactment of the POCSO Act, child sexual abuse was inadequately addressed under the IPC. Sections 375 (rape), 354 (outraging modesty), and 377 (unnatural offences) were the primary provisions, but they contained numerous definitional lacunae — they were gender-neutral neither in victim nor offender, they lacked age-specific aggravation, and they did not cover the full spectrum of child sexual conduct. India's ratification of the United Nations Convention on the Rights of the Child (UNCRC) in 1992 created international obligations that the existing framework failed to discharge.

The POCSO Act, 2012 was enacted to comprehensively address these gaps. It defines and penalises penetrative sexual assault (Section 3), aggravated penetrative sexual assault (Section 5), sexual assault (Section 7), and aggravated sexual assault (Section 9), child pornography, and sexual harassment. It creates a gender-neutral victim category (all persons under eighteen years), establishes Special Courts and Special Public Prosecutors, mandates child-friendly trial procedures, imposes obligations of confidentiality, and creates a statutory presumption of guilt under Sections 29 and 30 — reversing the ordinary burden of proof in recognition of the evidential difficulties in prosecuting child sexual crime.

3.2 The Criminal Law (Amendment) Act, 2018 and POCSO Amendment, 2019

Following the rape and murder of an eight-year-old girl in Kathua, Jammu and Kashmir, and the Unnao rape case involving a sitting member of the Legislative Assembly, public pressure resulted in urgent legislative action. The Criminal Law (Amendment) Act, 2018 enhanced minimum sentences under the IPC for rape of women below twelve years to twenty years or life imprisonment or death. The POCSO (Amendment) Act, 2019 further amended the framework to introduce the death penalty specifically within the POCSO framework, amending Sections 4, 5, and 6 as follows:

- Section 4(2): Punishment for penetrative sexual assault where the victim is below twelve years — minimum twenty years rigorous imprisonment, extendable to life imprisonment or death.

- Section 5: Enhanced aggravating circumstances triggering Section 6, including cases where the victim dies or is left in a vegetative state, cases of repeated assault, gang assault, or assault by persons in positions of trust.
- Section 6(1) and 6(2): Punishment for aggravated penetrative sexual assault — minimum twenty years rigorous imprisonment extendable to life imprisonment or death.

3.3 Legislative Intent and the Deterrence Debate

The 2019 amendment was primarily deterrence-driven. Parliament's statement of objects and reasons emphasised the need for enhanced punishment to create a "strong deterrent" against child sexual crime. However, the empirical basis for this deterrent claim is contested. Studies examining the impact of the 2018 criminal law amendments on rape rates have not demonstrated a statistically significant deterrent effect. Critics have argued that the principal causes of child sexual violence — patriarchal culture, absence of sex education, institutional impunity, and poor conviction rates — are not addressed by enhancing punishment for the relatively rare cases that reach a conviction. Moreover, the mandatory minimum sentencing under POCSO limits judicial flexibility in cases where the offence falls within the statutory definition but the factual circumstances call for a more nuanced response.

3.4 Procedural Architecture Under POCSO

The Act creates a robust procedural architecture designed to protect child victims. Special Courts designated under Section 28 are given exclusive jurisdiction over POCSO offences. Section 19 imposes a duty on every person, including police officers, social workers, and medical personnel, to report offences under the Act. Section 35 mandates completion of the trial within one year. Child-friendly recording of evidence, in-camera proceedings, and prohibition on aggressive cross-examination of the child victim are among the key protections built into the statute. Despite these provisions, delays — as seen in the Atul Nihale case, where the offence occurred in September 2024 and trial concluded in March 2025 — remain common.

IV. THE "RAREST OF RARE" DOCTRINE: FROM BACHAN SINGH TO POCSO

4.1 The Doctrinal Framework

As elaborated in Bachan Singh, the "rarest of rare" test requires courts to undertake a two-stage inquiry. At the first stage, the court must ask whether the case is one of the most

extreme culpability such that no other sentence will suffice. At the second stage — and critically — the court must give serious consideration to mitigating circumstances and ask whether imposing life imprisonment is not sufficient. It is only when the balance-sheet, after full consideration of mitigation, conclusively favours death that capital punishment may be imposed. This bidirectional inquiry has often been inadequately applied by trial courts, a deficiency that the Supreme Court has repeatedly corrected on appeal.

4.2 Application in Child Sexual Assault Cases

Indian appellate courts have consistently held that child sexual assault cases, by their nature, carry significant aggravating weight. The vulnerability of the victim, the degree of trust violated (where the offender is a family member or neighbour), the physical and psychological damage inflicted, and — most critically in post-POCSO jurisprudence — the concurrent murder of the child victim, have been treated as powerful aggravating factors. The Macchi Singh personality-of-victim category expressly recognises cases involving "a child or a helpless woman or woman who was at the mercy of the offender" as warranting the highest moral condemnation.

Illustrative decisions in the pre-BNS era include *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546, where the Supreme Court confirmed death for the rape and murder of a nine-year-old girl; *Swamy Shraddananda v. State of Karnataka*, (2008) 13 SCC 767, where life imprisonment without remission was substituted for death as an intermediate category; and *Dhananjay Chatterjee alias Dhana v. State of W.B.*, (1994) 2 SCC 220, one of the few cases where death was actually executed, involving the rape and murder of a schoolgirl. These decisions collectively establish that POCSO-type crimes — rape and murder of a young child by a trusted adult — represent the paradigm "rarest of rare" case in Indian jurisprudence.

4.3 The Evolving Caution: Commutation Trends

Notwithstanding this punitive trajectory, the Supreme Court has in recent years shown increasing caution in affirming death sentences, even in cases involving child victims. In *Ramesh A. Naika v. Registrar General, High Court of Karnataka*, 2025 SCC OnLine SC 575, the Supreme Court catalogued a series of cases where death had been commuted to life without remission, identifying mitigating factors including mental illness, intellectual disability, socio-economic deprivation, young age, and potential for reformation. The Court in that case appeared to signal a reluctance to apply the death penalty where thorough mitigation investigation had not been conducted — a principle directly relevant to *Atul Nihale*, where the

Supreme Court has directed such an investigation before deciding the sentencing question.

4.4 Criticisms of the Rarest of Rare Doctrine in Practice

The doctrine has attracted substantial academic criticism. Professor Upendra Baxi has described it as a "capricious lottery" given the inconsistency in its application across different benches. A 2016 report of the Law Commission of India (Report No. 262) recommended abolition of the death penalty for all offences except terrorism and waging war against the State, noting that the doctrine fails to deliver principled, consistent outcomes. The Commission found that death sentences are disproportionately imposed on those from marginalised socio-economic backgrounds — a concern directly raised by the Atul Nihale defence, which cited his status as a labourer.

V. ATUL NIHALE v. STATE OF MADHYA PRADESH: A CASE STUDY

5.1 Facts of the Case

On September 24, 2024, a five-year-old girl went missing from her home in the Shahjahanabad area of Bhopal, Madhya Pradesh, shortly after telling her grandmother she would return after fetching a book from a nearby anganwadi. When she did not return, frantic searches commenced and her father lodged a missing person complaint at the Shahjahanabad Police Station. On September 26, 2024, police were alerted to a foul odour emanating from the residential flat of Atul Nihale, a thirty-year-old labourer, at Bajpai Nagar, Eidgah Hills. The accused's mother and sister allegedly obstructed police entry, claiming the odour was caused by dead rats. Police entered and recovered the child's body from a plastic water tank concealed in the bathroom.

The post-mortem conducted at AIIMS Bhopal recorded ten major injuries including fatal injuries to the child's genitalia caused by a sharp-edged weapon. The medical examination confirmed sexual assault and homicidal death through excessive bleeding. DNA evidence, blood-stained clothing, and a kitchen knife were recovered from Nihale's flat pursuant to his disclosure statement under Section 23 of the Bharatiya Sakshya Adhinyam, 2023 (BSA). The prosecution examined twenty-two witnesses. The accused abjured guilt and claimed false implication.

5.2 Trial Court Judgment

The Special POCSO Court, Bhopal convicted Atul Nihale on March 10, 2025, under the following provisions: Section 64(2)(1) of BNS read with Sections 5(j)(i) and 6 of the

POCSO Act (aggravated penetrative sexual assault resulting in death), Section 64(2)(m) of BNS read with Sections 5(l) and 6 of the POCSO Act (penetrative sexual assault causing serious bodily harm), Section 66 of BNS read with Sections 5(j)(iv) and 6 of the POCSO Act (aggravated sexual assault with instrument), Section 87 of BNS (murder), and Section 103 of BNS along with Section 238(a) (causing disappearance of evidence). Death sentences were awarded on three counts — a triple capital sentence, which was described as one of the first such convictions under the new BNS/POCSO framework.

5.3 Madhya Pradesh High Court Confirmation

On January 23, 2026, the Madhya Pradesh High Court upheld the capital sentence, dismissing the criminal appeal filed by Nihale and answering the statutory death reference under Section 407 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) in the affirmative. A Division Bench comprising Justices Vivek Agarwal and Ramkumar Choubey described the crime as a "barbaric act of a depraved mind" in which "every ounce of evidence drips with barbarity." The High Court categorised the case squarely within the "rarest of rare" standard on the basis of the extreme violence inflicted, the tender age of the victim (five years), the deliberate concealment of the body, Nihale's criminal antecedents, and the absence of mitigating factors. The High Court rejected the defence's submissions regarding socio-economic background and marital status as insufficient grounds for leniency.

5.4 The Supreme Court Stay

The Supreme Court, in SLP (Crl) No. 4126-4127/2026, before a Bench of Justices Vikram Nath, Sandeep Mehta, and NV Anjaria, stayed the execution of Nihale's death sentence on March 11, 2026. The Bench called for comprehensive case records and simultaneously directed: (i) a Probation Officer's report on the convict's socio-economic background; (ii) a prison report on his conduct and work performed during incarceration; (iii) a psychological evaluation; and (iv) permission for mitigation investigator Devika Rawat of the Square Circle Clinic at NALSAR University of Law to interview the convict in jail under conditions of confidentiality, without prison officials within hearing range.

The Supreme Court's approach in Atul Nihale reflects the Court's institutional recognition that the confirmation of a death sentence requires a full and individuated mitigation inquiry — one that the High Court's proceedings had not adequately undertaken. The stay does not suggest the Court favours commutation; rather, it signals that the constitutional framework demands procedural completeness before the irreversible may be imposed.

5.5 Significance of the Case

The Atul Nihale case is legally significant on several counts. First, it is among the earliest death sentence cases to arise under the BNS/BNSS/BSA framework — the new criminal law trilogy that replaced the IPC, CrPC, and Indian Evidence Act respectively. This makes it a critical test of how the new statutory language maps onto established sentencing jurisprudence. Second, the triple death sentence — on three separate counts — raises unresolved questions about cumulative capital sentencing and whether a court may legally award death on multiple counts arising from a single transaction. Third, the Supreme Court's direction for a professional mitigation investigation through the Square Circle Clinic at NALSAR — a practice increasingly common in American capital jurisprudence but nascent in India — signals a potential shift in how Indian courts approach the mitigation phase of capital sentencing. Fourth, the case once again highlights the systemic delay in death row review, with the execution now suspended pending further hearings.

VI. THE ROLE OF MITIGATION IN POCSO CAPITAL SENTENCING

6.1 Mitigation as a Constitutional Imperative

The constitutional foundation for mandatory mitigation consideration was laid in *Bachan Singh*, where the Supreme Court held that mitigating circumstances must be "accorded full weightage." The Court identified illustrative mitigating factors: extreme youth, mental illness or intellectual disability, provocation, prior clean record, and the likelihood of reformation. Over time, the Court has added socio-economic deprivation, social background, and personal history of abuse as relevant mitigating considerations. Critically, the Court has held that mitigation consideration is not a matter of grace but of constitutional right — a failure to genuinely engage with mitigation taints the sentencing exercise and may constitute a ground for commutation.

6.2 The Gujarat High Court Model and the Supreme Court's Commutation Trend

In *State of Gujarat v. Kishanbhai*, (2014) 5 SCC 108, the Supreme Court, while commuting a death sentence for rape and murder, directed that all State governments constitute Victim Compensation Committees and mandated that trial courts undertake a sentencing hearing separate from the conviction hearing — giving the convict a meaningful opportunity to present mitigation evidence. This bifurcated approach has not been uniformly implemented by trial courts, particularly in POCSO cases where the time pressure created by Section 35's one-year trial deadline leaves little space for a thorough mitigation phase.

The commutation trend is significant: between 2000 and 2023, the Supreme Court commuted over one hundred death sentences. A 2023 report of the Project 39A at the National Law University Delhi, titled "Death Penalty India Report," found that a large proportion of death row prisoners had intellectual disabilities, mental illness, or trauma histories that had not been placed before the trial courts during sentencing — a direct consequence of the absence of a structured mitigation investigation framework.

6.3 Professional Mitigation Investigation: A Nascent Practice

The Supreme Court's direction in Atul Nihale for a professional mitigation investigator from the Square Circle Clinic at NALSAR University of Law is reflective of a growing institutional effort to introduce structured mitigation investigation into Indian capital jurisprudence. Project 39A, the Square Circle Clinic, and similar university-based capital defence units have argued that the current system of relying on probation reports — typically cursory documents prepared by overworked probation officers with no forensic or psychological training — is constitutionally inadequate for life-or-death sentencing decisions.

Professional mitigation investigation involves a comprehensive social history of the convict, including childhood trauma, education, employment, family dynamics, substance use, and mental health history. It may also involve expert neuropsychological evaluation. In the United States, the Supreme Court held in *Wiggins v. Smith* (2003) and *Rompilla v. Beard* (2005) that failure to conduct adequate mitigation investigation constitutes constitutionally deficient assistance of counsel. While these decisions are not binding in India, they reflect a jurisprudential norm increasingly influential on the Indian Supreme Court's evolving capital sentencing framework.

6.4 The POCSO-Specific Challenge: Mandatory Minimum vs. Mitigation

The POCSO Act's enhanced sentencing framework creates a structural tension with the mitigation imperative. Section 6 prescribes a mandatory minimum of twenty years rigorous imprisonment for aggravated penetrative sexual assault, with the maximum being life imprisonment or death. When the maximum is death, courts are confronted with a binary sentencing choice — life (with or without remission) or death — and the mandatory minimum forecloses the possibility of shorter sentences even in cases with significant mitigation. Courts have not fully resolved whether the mandatory minimum sentencing in POCSO offences is consistent with the constitutional requirement of individualised sentencing, a question that may eventually require authoritative determination by the Supreme Court.

VII. CAPITAL PUNISHMENT UNDER THE BNS, 2023: CONTINUITY AND CHANGE

7.1 The New Criminal Law Framework

The Bharatiya Nyaya Sanhita, 2023 (BNS), the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), and the Bharatiya Sakshya Adhiniyam, 2023 (BSA), which replaced the IPC, CrPC, and Indian Evidence Act respectively with effect from July 1, 2024, represent the most significant restructuring of India's criminal law architecture since independence. The new framework renumbers offences and introduces new provisions, but in the domain of sexual offences against children, the substantive law is largely continuous with the predecessor framework. Capital punishment for murder and certain sexual offences is retained.

7.2 Sexual Offences Under the BNS

Section 64 of the BNS corresponds to the former Section 376 of the IPC, prescribing punishment for rape. Section 64(2) provides enhanced punishment — minimum twenty years rigorous imprisonment to life imprisonment or death — for rape where the victim is below twelve years of age, a woman with intellectual disability, or where the rape results in death or persistent vegetative state. Section 65 provides for punishment of rape of women below sixteen years. Section 70 addresses gang rape.

Critically, POCSO offences remain governed by the POCSO Act itself, which operates in parallel with the BNS. In cases such as Atul Nihale where both BNS and POCSO provisions apply, the court is required to navigate the interplay between the two frameworks on questions of conviction and sentencing. The BNSS under Section 407 provides for the statutory death reference procedure — requiring the High Court to confirm the death sentence before it can be executed — maintaining the established safeguard from the former CrPC framework.

7.3 New Provisions and Their Implications for POCSO Capital Cases

The BNS introduces Section 106, which criminalises hit-and-run causing death, and Section 113, which addresses terrorist acts — neither directly relevant to child sexual assault. More pertinently, the BNS retains community service as a new form of punishment (Section 4) and introduces organised crime provisions (Section 111), reflecting a broader punitive palette. However, for capital sentencing in child sexual assault cases, the doctrinal framework remains unchanged: the "rarest of rare" standard, the Bachan Singh/Macchi Singh categories, and the constitutional requirement of mitigating factor consideration all continue to govern,

regardless of whether the offence is labelled under IPC Section 302 or BNS Section 103.

VIII. CONSTITUTIONAL ANALYSIS: ARTICLES 14, 19, AND 21

8.1 Article 21 and the Right to Life

Article 21 provides that no person shall be deprived of life or personal liberty "except according to procedure established by law." In *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, the Supreme Court held that the procedure must be fair, just, and reasonable — importing substantive due process into Article 21. In the capital punishment context, this has been interpreted to require: (a) that the death sentence may only be imposed after a fair trial; (b) that the trial must include a meaningful opportunity to present mitigation; (c) that the convict on death row must have access to legal representation throughout the appellate and mercy petition process; and (d) that undue delay in execution may itself violate Article 21. The Supreme Court in *Triveniben v. State of Gujarat*, (1989) 1 SCC 678, held that inordinate and inexplicable delay in execution following conviction can be a ground for commutation, though it is not an automatic right.

In the POCSO capital sentencing context, the Article 21 framework demands that the death penalty be imposed only after the individualised inquiry mandated by *Bachan Singh* — including genuine engagement with mitigation evidence. The Supreme Court's stay in *Atul Nihale* and its direction for a mitigation investigation can be read as a direct application of the procedural requirements flowing from Article 21.

8.2 Article 14 and Equal Treatment in Sentencing

Article 14 guarantees equality before the law. In the capital sentencing context, this creates a constitutional demand for consistency: similarly situated convicts must not be treated differently on the basis of arbitrary factors such as the bench that heard the case, the quality of legal representation, or the region of the country where the crime occurred. The empirical literature on capital sentencing in India has consistently found that the race-to-death is unevenly distributed — offenders from lower socio-economic backgrounds, marginalised communities, and poorly represented groups are more likely to be sentenced to death. This structural inequality may constitute an Article 14 violation, though the Supreme Court has not yet ruled definitively on systemic discrimination as a ground for commutation.

8.3 Article 19 and the Right to Freedom

While Article 19 is not directly implicated in the sentencing context (it does not

guarantee freedom from lawful punishment), it is relevant in the context of the preventive detention of death row prisoners and the conditions of their incarceration. Several death row prisoners in India have spent decades awaiting execution under conditions that the National Human Rights Commission and civil society organisations have documented as amounting to cruel and inhuman treatment. The question of whether the conditions of death row imprisonment itself violate Article 19 read with Article 21 has not been authoritatively resolved.

8.4 The Constitutionality of the 2019 POCSO Amendment

No authoritative constitutional challenge to the death penalty provisions introduced by the 2019 POCSO amendment has yet been decided by a Constitution Bench. The facial constitutionality of these provisions — given the Bachan Singh precedent — appears secure. However, the constitutional vulnerability of the mandatory minimum sentencing framework (twenty years without judicial discretion to reduce below that threshold) remains an open question, particularly given the Supreme Court's consistent insistence on individualised sentencing. A case could be made that the mandatory minimum forecloses individuated consideration in cases where the mitigating circumstances would justify a lesser sentence, thereby violating the procedural requirements of Article 21 as interpreted in Bachan Singh.

IX. COMPARATIVE PERSPECTIVES

9.1 United States

The United States Supreme Court has developed an extensive capital jurisprudence relevant to child sexual assault cases. In *Kennedy v. Louisiana*, 554 U.S. 407 (2008), the Court held that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result in the victim's death — reasoning that the "evolving standards of decency" did not sanction such a penalty for non-homicidal offences. This decision is directly inapplicable in India, where the death penalty is imposed for child rape only when the offence results in death or falls within the aggravated categories under POCSO — but it illustrates how constitutional proportionality reasoning may impose limits on capital punishment in child sexual assault cases. The American emphasis on mitigation investigation through the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases has significantly influenced the Project 39A and Square Circle Clinic models in India.

9.2 United Kingdom and European Approach

The United Kingdom abolished the death penalty in 1969 and is a signatory to Protocol 13 of the European Convention on Human Rights, which prohibits capital punishment in all circumstances. The European Court of Human Rights has held that extradition of a person to a country where they face the death penalty may itself violate Article 3 of the ECHR (prohibition of inhuman or degrading treatment). For child sexual offences, the UK framework provides for mandatory life sentences with minimum tariff periods — an approach that captures the punitive demand for long incarceration without the irreversibility of execution.

9.3 South Africa

South Africa's Constitutional Court abolished the death penalty in *State v. Makwanyane*, 1995 (3) SA 391, reasoning that capital punishment is inherently cruel and inhuman and violates the right to dignity under the South African Constitution. The South African approach reflects a rights-based rather than deterrence-based philosophy — a position that the Indian Law Commission's 2015 report partially endorsed in recommending abolition for ordinary offences. For child sexual assault, South Africa relies on life imprisonment and mandatory minimum sentences under the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

X. CRITICAL ANALYSIS AND WAY FORWARD

10.1 The Punitive Demand vs. the Reformatory Imperative

The central tension in POCSO capital sentencing is between two legitimate but competing imperatives. On one side stands the punitive demand: the rape and murder of a young child is among the most morally reprehensible acts a human being can commit, and the victim's right to justice — as well as society's right to protection — demands a proportionate response. On the other side stands the reformatory imperative, which our constitutional framework has embedded in the sentencing process through *Bachan Singh*: the possibility of reformation must be genuinely considered, and the irrevocable sentence of death must be reserved for cases where reformation is conclusively foreclosed.

These two imperatives are not inherently irreconcilable. The "rarest of rare" doctrine, properly applied, can accommodate both: it provides for death only in the extreme cases while requiring genuine mitigation consideration to ensure that the penalty is not imposed capriciously. The problem, as the Supreme Court has repeatedly found, is that this doctrine is inconsistently and often superficially applied at the trial and High Court levels. The *Atul Nihale*

case is instructive: the Special Court and the Madhya Pradesh High Court both concluded that the case warranted death, yet the Supreme Court has determined that the mitigation inquiry was incomplete before that conclusion could be reached.

10.2 The Mandatory Minimum Problem

The mandatory minimum sentencing under Sections 4(2) and 6 of the POCSO Act creates a structural constraint on judicial discretion that is in some tension with the constitutionally mandated individualised sentencing approach. While mandatory minimums in non-capital cases may serve legitimate penological purposes, their application in cases where death is the maximum penalty demands more careful constitutional scrutiny. Parliament may wish to consider whether the mandatory minimum framework, as currently structured, adequately accommodates the range of factual circumstances that can arise under the POCSO Act — from cases of extreme premeditated violence to cases involving adolescent relationships at the margins of the statutory definition.

10.3 The Case for a Structured Mitigation Framework

The most concrete recommendation that emerges from this analysis is the institutionalisation of a structured mitigation framework in all POCSO capital cases. This should include: (i) mandatory bifurcation of conviction and sentencing hearings; (ii) mandatory appointment of a professional mitigation investigator in capital cases, funded by the State; (iii) mandatory psychological and neuropsychological evaluation of all capital convicts before sentencing; (iv) a standardised mitigation report format to be filed with the trial court before sentencing; and (v) enhanced legal aid resources at the sentencing stage. Such a framework would not weaken child protection — the conviction and the protection of the public remain unaffected. It would, however, ensure that the sentencing decision is made on a full evidential foundation, as the Constitution requires.

10.4 Statistics and the Deterrence Question

The National Crime Records Bureau (NCRB) data for 2023 recorded 51,833 cases of crimes against children, of which 38,911 cases (approximately 75%) were crimes under the POCSO Act. Conviction rates under POCSO remain below 30% nationally, a consequence of evidential challenges, witness turning hostile, and the absence of adequate forensic infrastructure. Against this backdrop, the deterrent value of the death penalty is difficult to establish empirically. What is clear from the NCRB data is that the incidence of child sexual

crime has not significantly declined since the 2019 amendment. Deterrence-based justifications for capital punishment in POCSO cases must therefore be interrogated critically rather than accepted at face value.

10.5 The Question of Abolition

The Law Commission of India's 262nd Report (2015) recommended abolition of the death penalty for all offences except terrorism. The Report noted that the penalty is disproportionately imposed on the poor and marginalised, that the risk of executing innocent persons is real, and that the deterrence rationale is empirically unsupported. However, the political consensus in India — particularly in the wake of high-profile child sexual assault cases — currently runs strongly in favour of retention. Any legislative movement toward abolition of the death penalty for POCSO offences would require sustained democratic deliberation and is unlikely in the near term. The more productive direction for reform is procedural: ensuring that when death is imposed, it is imposed through a constitutionally complete process.

XI. CONCLUSION

The rape and murder of a five-year-old child is a crime that calls for the highest moral condemnation that a legal system can express. India's legal framework — through the POCSO Act, the BNS, and the constitutionally anchored "rarest of rare" doctrine — provides for that condemnation in the form of capital punishment. The Atul Nihale case, in which the Supreme Court stayed a triple death sentence and directed a comprehensive mitigation investigation, is not a retreat from that condemnation. It is an insistence that the sentence, if it is to be imposed, must be imposed through a constitutionally complete process.

The broader jurisprudential lesson of Atul Nihale is that the introduction of the death penalty into the POCSO framework — however politically necessary it appeared in the aftermath of Kathua and Unnao — has not resolved the procedural challenge of sentencing in capital child sexual assault cases. The "rarest of rare" doctrine, mandatory minimum sentencing, and the constitutional requirements of individualised sentencing and genuine mitigation consideration remain in productive tension, generating a stream of capital cases that reach the Supreme Court for final resolution.

Three reforms are urgently needed. First, a mandatory bifurcated sentencing process in all POCSO capital cases, with a dedicated sentencing hearing that affords the convict a genuine

opportunity to present mitigation. Second, a publicly funded professional mitigation investigation framework, modelled on the work of the Square Circle Clinic and Project 39A, to be made available as of right to every capital convict under POCSO. Third, the Supreme Court should provide authoritative guidance on the interplay between the mandatory minimum sentencing provisions of the POCSO Act and the constitutional requirement of individualised sentencing — a question that remains, as yet, unresolved.

Capital punishment, wherever it is retained, demands the highest procedural standards. In cases involving the most vulnerable victims — children — the punitive demand is understandable and legitimate. But it must be satisfied through a process that is constitutionally complete: one that considers not only the gravity of the crime but the full humanity of the person to be sentenced. This is not a concession to the perpetrator. It is a commitment to the integrity of the legal system that speaks on behalf of the child.

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