

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

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THE AFTER LIFE OF SECTION 303 IPC: CONSTITUTIONAL CONUNDRUM IN SECTION 104 BNS

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ABSTRACT

Section 104 of the Bharatiya Nyaya Sanhita, 2023 as an improvised core of Section 303 of Indian Penal Code, 1980, where sentencing framework permitting imprisonment for the “remainder of natural life” as an addition to the death penalty. While intended to strengthen the judicial discretion and the unconstitutionality of its predecessor Section 303 Indian Penal Code, the provision raises critical constitutional concerns. Although the aim of this section is to deal with very serious crimes and reduce the use of the death sentence, it has created confusion in criminal law with its ambiguity under the basis of reformation. India’s criminal justice system has always supported the idea that even convicted persons should have a chance to reform.

This paper critically analyses Section 104 of the Bharatiya Nyaya Sanhita, 2023, with a focus on its treatment of murders committed by lifeconvicts and the legislative shift toward a mandatory penalty framework. It highlights the doctrinal confusion surrounding the assumption that all life convicts are hardened, beyond reformation offenders an assumption contradicted by judicial precedent and the principle that mitigating factors do not disappear merely because the offender is already serving life imprisonment. The paper further examines the penological conundrum created by Section 104, where the legislative mandate significantly narrows judicial discretion, undermining constitutional requirements of individualized sentencing, proportionality, and the right to meaningful consideration of reformation. Drawing from committee reports, case law, and sentencing theory, it argues that Section 104 introduces structural inconsistencies into India’s criminal justice system and risks normalising an overly retributive approach that conflicts with evolving constitutional and human-rights standards.

Keywords: Reformation, Judicial Discretion, Individualised Sentencing, Consitutional Morality, Article 21 Dignity

INTRODUCTION

The reform of Indian criminal law by means of the Bharatiya Nyaya Sanhita, 2023 ("BNS"), a replacement for the colonial era statutes, attempts to recalibrate long contested questions of sentencing and judicial power. Perhaps its most significant and debated change is Section 104 of BNS¹ (hereinafter Section 104), a provision that reoccupies the legislative space once held by Section 303 of the Indian Penal Code² (hereinafter Section 303). Section 303, struck down in **Mithu v. State of Punjab (1983)**³ (hereinafter **Mithu**), had mandated the death penalty for life convicts who committed murder, an approach the Honorable Supreme Court condemned as procedurally unfair, substantively arbitrary, and incompatible with Articles 14 and 21 of the Indian constitution.

Section 104 reintroduces a scheme for the same category of prisoners but restores judicial discretion by allowing imprisonment for the rest of one's natural life or the death penalty. This seems, prima facie, to be in conformity with the principles enunciated in **Mithu**. However, whether this change cures the deeper constitutional defects remarked upon in **Mithu** is an issue that has been left open.

This paper discusses the constitutional evolution from Section 303 IPC to Section 104 BNS, arguing that while the BNS remedies the most glaring flaw is the absence of judicial discretion where it does not fully address the structural and doctrinal concerns set out in the **Mithu** judgment. Ultimately, Section 104 stands at the crossroads of the offender's right to reformation and the State's duty to safeguard society, presenting a continuing conundrum at the heart of modern criminal jurisprudence.

II. TEXTUAL COMPARISON OF SECTION 303 IPC AND SECTION 104 BNS

Section 303 of the Indian Penal Code:

"Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death."

Whereas the amended Section 104 of the Bharatiya Nyaya Sanhita, 2023 states:

"Whoever, being under sentence of imprisonment for life, commits murder, shall be punished

¹ Bharatiya Nyaya Sanhita, 2023, s.104

² Indian Penal Code, 1860, s.303 (repealed)

³ *Mithu v. State of Punjab*, (1983) 2 SCC 277

with death or with imprisonment for life, which shall mean the remainder of that person's natural life."

III. HISTORICAL BACKGROUND AND PENOLOGICAL ORIGINS OF SECTION 303 IPC

The framers of the Indian Penal Code had to address various problems, one being the punishment for murder committed by a life convict, which became Section 303. During the period in which Section 303 was enacted, theories such as deterrence and retribution were highly influential. During the colonial period, the framers failed to account for the wide range of murders committed by life convicts, holding a narrow view of the problem. Prison officials were predominantly British, and other provisions were specially designed for members of the ruling class, for example, the choice of jurors.

Section 303 was intended to address these concerns, particularly the perceived need to prevent murders of parole officers by indigenous prisoners. If even the maximum available punishment of life imprisonment was insufficient to deter the offender, the legislature presumed that only death could serve as an adequate response. Thus, the history of Section 303 is a byproduct of deterrent and retributive theories.

IV. WHY SECTION 303 BECAME CONSTITUTIONALLY UNSUSTAINABLE

"We have no doubt that if a strictly penological view was taken of the situation dealt with by Section 303, the framers of the Code would have had a second thought on their decision to make the death sentence mandatory, even without the aid of the constitutional constraints which operate now." - Mithu

From the aforesaid historical context and the internal logic of Section 303, it becomes evident why the provision was constructed as it was, and equally, why in a modern constitutional order it could not survive. The section was predicated on an archaic assumption that life-convicts constitute a uniformly dangerous class, an assumption which lacks any empirical foundation.

As the Royal Commission on Capital Punishment (1949–1953) observed,

"There is a popular belief that prisoners serving a life sentence form a specially troublesome and dangerous class. That is not so... most find themselves in prison because they yielded to

temptation under circumstances unlikely to recur.”⁴

By proceeding on this false premise, the provision absolutely eliminated the chances of reformation, remission, or rehabilitation, and imposed a mandatory death sentence solely on the offender’s status, rather than on an individualized assessment of culpability.

V. HOW SECTION 303 VIOLATED ARTICLES 14 AND 21

Such a rigid, automatic penalty violated the doctrine of individualized sentencing, the principle of proportionality, and the *audi alteram partem* rule, since it denied the accused any opportunity to be heard on sentence.

As noted by Sarkaria, J., in *Dilip Kumar Sharma v. State of Madhya Pradesh*, Section 303:

“Draconian in severity, relentless and inexorable in operation”⁵,

Leaving no scope for judicial discretion, mitigation, or evaluation of circumstances. In effect, the provision substituted judicial judgment with legislative compulsion, extinguishing the core constitutional values of human dignity and fair procedure under Articles 14 and 21.

VI. SECTION 104 BNS: A LEGISLATIVE ATTEMPT TO PAINT THE CRACKS OF SECTION 303

While Section 303 and Section 104 share the same core, the newer section differs from its predecessor in three crucial aspects being:

1. Irrational and arbitrary mandatory death penalty and total elimination of judicial discretion violating Article 21 as in *Maneka Gandhi v. Union of India*⁶ violating Article 14 and 21 as in *Bachan Singh v. State of Punjab*⁷ classifying out life convicts for automatic execution bearing no nexus to the object of mandatory death punishment while also violating *Bachan Singh*, which held that the death penalty must only be sentenced after weighing aggravating and mitigating factor.
2. This is mainly amended in Section 104 where giving life imprisonment till natural life becomes the default maximum sentence where the judiciary could discrete for the safest possible safeguard for the accused and that Section 104 restores the judicial discretion presenting two alternative sentences being life imprisonment till natural life or the death penalty, certainly not violating Article 14 and 21.

⁴ Royal Commission on Capital Punishment, *Report* (1949–1953)

⁵ *Dilip Kumar Sharma v. State of Madhya Pradesh*, (1976) 1 SCC 560

⁶ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248

⁷ *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684

VII. The Need for Individualised Sentencing and Reformation

A proper evaluation of sentencing in cases involving life-convicts demonstrates why the extreme cases of sentences where there is no room for reformation, remission and rehabilitation where the mere fact that an offender is already serving a life does not diminish the importance of considering the mitigating factors where in fact, they have to be considered with special safeguards in evaluating the mitigating factors.

Consider, for instance, a prisoner who has endured persistent harassment, humiliation, or physical abuse at the hands of a prison official. If such a prisoner reacts violently and causes the official's death, the act may technically amount to murder; yet it would be unjust to insist that he be automatically condemned to life imprisonment till natural life or very rarely death without opportunities for rehabilitation.

The defect becomes clearer when considering murders committed by life convicts while on parole or bail. It remains indefensible to deny such individuals the opportunity to argue why the extreme penalty should not apply. A system that renders circumstances irrelevant and forces judges to hide their own sense of justice behind statutory command cannot claim fairness.

Punishment cannot be determined merely by the label of the offence; it must reflect culpability, motive, and surrounding circumstances. Any other system resembles authoritarian criminal justice rather than a constitutional order grounded in equity, fairness, and individualized sentencing.

VIII. ARBITRARY CLASSIFICATION BETWEEN LIFE CONVICTS: THE MITHU CRITIQUE

The irrationality of such a classification becomes further evident when comparing life-convicts who commit murder while still serving their sentence with those who commit murder after completing long periods of incarceration. There is no logical basis to assume that an individual who commits murder after release deserves greater judicial consideration than one who commits the offence while still incarcerated. If anything, a person who reoffends after years of imprisonment may arguably be less reformed. Yet Section 303 treated the former more favorably for no constitutionally relevant reason, illustrating the arbitrary nature of the provision.

Under a mandatory regime, however, this nuance becomes irrelevant and excludes the accused from society which becomes the only permissible punishment. It is difficult to reconcile such a rigid rule with the constitutional requirement that sentencing must be guided by reasonableness and proportionality, even when the offence occurs within the prison walls.

IX. SENTENCING SAFEGUARDS RESTORED UNDER SECTION 104 BNS

“The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary”, (Chandrachud, J, as he then was)” – Mithu

Under Section 303, sentencing safeguards were meaningless. Section 354(3) Code of Criminal Procedure now Section 354(3) Bharatiya Nagarik Suraksha Sanhita, 2023⁸ required “special reasons” for imposing death, yet Section 303 permitted no alternative sentence. Section 235(2) CrPC now Section 258(2) BNSS⁹, which grants the accused the right to be heard at sentencing was rendered an empty formality.

With Section 104, an alternative sentence now exists. Therefore, Sections 354(3) and 235(2) CrPC automatically apply once more. If the death penalty is imposed, the accused must be heard, mitigating factors must be evaluated, and the court must record “special reasons”.

X. LEGISLATIVE HISTORY AND THE FAILED ATTEMPT TO ABOLISH SECTION 303 IPC

The trajectory of Section 303 IPC reveals that its constitutional demise was long overdue. On December 11, 1972, the Government introduced a Bill in the Rajya Sabha to amend the Penal Code. One of the most significant proposals was the deletion of Section 303, recognizing its incompatibility with evolving standards of criminal justice.

The Committee’s recommendations were unequivocal. It proposed that the bifurcated scheme under Sections 302 and 303 be unified under a single murder provision and, crucially, that the imposition of death penalty on a life-convict for committing murder should not be mandatory. The Committee emphasized that sentencing must remain a judicial function, rooted in

⁸ Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 354(3); Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 22 of 2023), s. 359(3)

⁹ Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 235(2); Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 22 of 2023), s. 258(2)

discretion, proportionality, and consideration of mitigating factors; principles fundamentally incompatible with Section 303's inexorable mandate. To effectuate these reforms, the Committee suggested inserting Clause 125 (New) to delete Section 303 from the Penal Code. The Joint Committee's Report was presented to the Rajya Sabha on January 29, 1976, and The Indian Penal Code (Amendment) Bill, XLII-B of 1972¹⁰, was accordingly placed before the House. Yet, what Parliament had proposed was ultimately undone by political circumstances rather than principle. A mid-term parliamentary election intervened; the Government changed, and the Bill lapsed without revival. The legislative process, painstaking and deliberative, was left suspended in time. What was poised to be a landmark reform in India's criminal jurisprudence was lost in the churn of electoral politics.

This legislative inertia is deeply regrettable. There is little doubt that Clause 125, which sought the deletion of Section 303, would have passed with minimal opposition. Its failure was not substantive but circumstantial.

"The self-confidence which is manifested in the legislative prescription of a computerised sentence of death is not supported by scientific data. There appears to be no reason why in the case of a person whose case falls u/s 303, factors like the age and sex of the offender, the provocation received by the offender and the motive of the crime should be excluded from consideration on the question of sentence. The task performed by the legislature while enacting Section 303 is beyond even the present human ability which has greater scientific and sophisticated resources available for compiling data, than those which were Available in 1860 when Section 303 was enacted as part of the Indian Penal Code." – Mithu

XI. POST-BACHAN SINGH JURISPRUDENCE AND THE CONSTITUTIONAL SHIFT IN SENTENCING

The constitutional evolution of India's capital sentencing jurisprudence further demonstrates why a provision like the erstwhile Section 303 could not survive, and why its modern counterpart Section 104 must necessarily preserve judicial discretion. With the landmark ruling in Bachan Singh, the Supreme Court decisively held that the death penalty is constitutionally valid only when reserved for the "rarest of rare" cases, where life imprisonment is

¹⁰ report of the Joint Committee on the Indian Penal Code (Amendment) Bill, 1972, Clause 125 proposal, Report presented Jan. 29, 1976

unquestionably foreclosed. This doctrinal shift fundamentally altered the landscape of sentencing, transforming death from a routine statutory outcome to an exception of the highest order.

In the post Bachan era, the death sentence has been imposed with extreme restraint. The Court has repeatedly affirmed that life imprisonment is the rule; death is the judicial exception, justified only when aggravating circumstances overwhelmingly eclipse all mitigating factors. Crucially, this balance can be struck only when the court is free to evaluate the individual circumstances of the offender and freedom that Section 303 once denied. Mandatory death penalties starkly violate this principle, for they extinguish the judicial function of weighing culpability, mental state, motive, possibility of reformation, and the specific contextual pressures that may have provoked the act.

This framework also underscores the functional distinction between Sections 103 and 104 of the BNS, 2023. Section 103, which generally prescribes punishment for murder, and Section 104, which deals with murder committed by a person under a life sentence, must both be interpreted considering the “rarest of rare” standard. While Section 104 identifies a heightened gravity due to the convict’s custodial status, it does not and cannot override the constitutional necessity of judicial discretion. The very survival of Section 104 depends on the fact that it allows courts to choose between life imprisonment till the end of natural life and death, based on “special reasons” recorded in writing.

It is this discretion that keeps Section 104 within constitutional bounds. Since death is now an extraordinary and narrowly confined penalty, the judiciary overwhelmingly prefers life imprisonment, unless the factual matrix reveals such exceptional depravity that alternative punishment is wholly inadequate. In most cases under Section 104, the courts would still gravitate toward life imprisonment, especially when the internal dynamics of prison life provocation, self-defense, custodial violence, or mental fragility form crucial mitigating factors that a mandatory regime would have ignored altogether.

Thus, the post Bachan constitutional order makes it clear: any provision that mandates death must fail, because proportionality and individualized sentencing are foundational to Article 21. Section 104 survives only because death is rare, judicial scrutiny is rigorous, and discretion is constitutionally indispensable.

XII. DOES SECTION 104 TRULY CURE THE DEFECTS IDENTIFIED IN MITHU?

It is apparent that the movement from Section 303 IPC to Section 104 of the BNS represents a deliberate legislative attempt to realign India's criminal law with contemporary constitutional standards and evolving penological values. At first glance, the new provision appears responsive to the core defects identified in *Mithu*, particularly the abolition of the mandatory death penalty and the restoration of judicial discretion. Yet the reform remains, at best, partial. Section 104 does not explicitly incorporate the reformatory ideal that modern penology demands, nor does it address the structural principles raised in *Mithu* concerning irrational classification, absence of individualized sentencing, and the extreme polarity of outcomes that previously led to constitutional invalidation. The statute removes rigidity but fails to provide a sentencing framework, leaving courts to navigate constitutional constraints through judicial creativity rather than legislative guidance.

This legislative incompleteness becomes more evident in the light of *Madras Bar Association v. Union of India*, where the judiciary clarified that merely introducing discretion does not automatically cure the constitutional infirmities that tainted Section 303. The Court noted that while Section 104 satisfies the minimal constitutional threshold by avoiding mandatory death, it nevertheless reflects poor legislative diligence: it neither articulates a coherent sentencing philosophy nor provides a principled classification that distinguishes the "life-convict offender" from other categories in a way that withstands Article 14 scrutiny. Section 104 ultimately relies on judicial interpretation for constitutional survival, underscoring the inadequacy of the legislative reform.

CONCLUSION

Ultimately, Section 104 resembles an old engine placed in a new chassis cosmetically modernized but as a transitional provision caught between the punitive logic of its predecessor and the reformatory culture demanded by contemporary constitutional morality. Without a clearly structured sentencing matrix, without explicit recognition of reformation as a constitutional value under Article 21, and without rational criteria guiding when death versus life imprisonment till natural life is appropriate, Section 104 remains dependent on extensive judicial elaboration. Thus, Section 104, though improved, ultimately leaves intact the very conundrum that *Mithu* sought to resolve, reaffirming that the right to reformation cannot merely

be preserved through discretion but must be structurally embedded within the law itself.

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