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WHEN THE STATE TAKES LIFE: RETHINKING CAPITAL PUNISHMENT IN A CONSTITUTIONAL DEMOCRACY

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Abstract

The question of the state's right to take a human life has always been with us, even though it is a topic that has been largely abandoned by criminal law; it has been raised by every society and has become one of the most debated issues in contemporary constitutional democracies. The question of what the right of the State is to take the life of a human being in the name of justice has always been with us, although at a time when criminal law has largely eliminated it.[1] Retentionists support capital punishment because they consider it an essential tool for deterrence and retributive justice. At the same time, abolitionists believe that it is a final punishment given by a criminal justice system that can be arbitrary, discriminatory and humanly flawed.[2]

This paper questions the viability of retaining the death penalty in view of the values of dignity, equality, fairness and rule of law enshrined in the Constitution. It discusses various theories of punishment – retributive, utilitarian, reformative, and restorative – and then explores the constitutional history of the death penalty in India. A special feature is the discussion on the "rarest of rare" doctrine, which was first developed in Bachan Singh v State of Punjab and later applied by the Indian courts.[3]

The paper also explores the empirical evidence on deterrence, wrongful convictions, sentencing inequities and judicial inconsistencies, which are discussed in relation to the findings of the Law Commission of India's 262nd Report, Project 39A and contemporary constitutional

[1] Sandra L. Babcock, *International Law and the Death Penalty: A Toothless Tiger, or a Meaningful Force for Change?*, in **ARCS OF GLOBAL JUSTICE** 89 (Margaret M. deGuzman & Diane Marie Amann eds., Oxford Univ. Press 2018)
[2] Carol S. Steiker & Jordan M. Steiker, **COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT** 1–5 (Belknap Press 2016); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 **STAN. L. REV.** 703, 704–10 (2005).
[3] *Bachan Singh v. State of Punjab*, (1980) 2 S.C.C. 684.

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scholarship, and finds an unmistakable global trend towards abolition in international human rights law that raises significant questions about the continued retention of capital punishment in India.[45]

While the requirement for effective punishment for the worst crimes justifies retaining capital punishment, it is argued that the irrevocability of execution and the clear lack of uniformity in sentencing and the constitutional protection of life under Article 21 greatly diminishes its normative basis. The paper concludes that the power to execute is not the standard of legality for democracy; rather, a constitutional democracy's legitimacy is based on its capacity to execute justice while maintaining human dignity, constitutional morality and the rule of law.

Keywords: Capital Punishment; Death Penalty; Article 21; Constitutional Morality; Human Rights; Sentencing; Rule of Law; Criminal Justice.

I. Introduction

Between the word 'convicted' and the word 'death' hangs an ancient empire. An execution is more than the punishment of a single man; it's a statement about what the State thinks justice should be. But all constitutional democracies are faced with an inconvenient question: "Can a government that was created to preserve life be allowed to willfully end it without compromising the very principles it is built upon?"

There is no more controversial issue in criminal law than the right to capital punishment. The death penalty is the most severe punishment in the law and is irreversible, irrevocable and final. The sentences may be changed at a later stage by appeal, judicial review, executive clemency or the payment of compensation. An execution does not allow any such correction. After it is

done, even if one finds out that one is innocent afterwards, it is too late.[6]

The issue of the death penalty is thus not limited to criminal law. At its centre is a radical

[4] Law Commission of India, **Report No. 262: The Death Penalty** (2015); Rajgopal Saikumar, *Negotiating Constitutionalism and Democracy: The 262nd Report of the Law Commission of India on Death Penalty*, 12 **SOCIO-LEGAL REV.** 81 (2016)
[5] Babcock, supra note 1, at 89–95.
[6] Hugo Adam Bedau, *The Case Against the Death Penalty* (ACLU, 1992).

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struggle between two visions of justice.[7] One imagines punishment as justice comes for the crime, as a moral reaction to something out of the ordinary, as a balance to the unbalanced crime. The other sees punishment as a means of constitutional governance which must be dignified, proportionate, equal and capable of human reform.[8]

The death penalty has been a part of organised society since the earliest legal civilisations. Public executions were not only designed to punish the wrongdoer, but also to affirm the power of the State through the spectacle of punishment, as was outlined in the Code of Hammurabi, the Roman law and the "Bloody Code" of Medieval English criminal law.[9] But the Enlightenment seriously undermined this view. In On Crimes and Punishments, Cesare Beccaria challenged the morality and efficacy of execution, maintaining that certainty of punishment, not severity, is the key to deterrence, and that this affected constitutional thought later and was the intellectual cornerstone of the global abolitionist movement.[10]

India is part of a unique discourse on this international debate. While capital punishment is constitutionally sound, it has been gradually restricted in practice by judicial interpretation. Later, the Supreme Court in Bachan Singh v State of Punjab held that the death penalty was constitutionally valid but also adopted the principle of the "rarest of rare" cases, a principle which was further explored in the case of Machhi Singh v State of Punjab, where subjects such as the "collective conscience of society" and other factors were introduced that could lead to inconsistencies in sentencing and subjectivity.[11][12]

There has now been growing empirical evidence for these concerns. After a thorough analysis of international developments, sentencing guidelines, and constitutional principles, the Law Commission of India concluded in its 262nd Report that the death penalty should be abolished for all common crimes and kept only for those connected to terrorism.[13]

[7] Babcock, supra note 1; William A. Schabas, **THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW** (3d ed. 2002)
[8] Sunstein & Vermeule, supra note 2, at 716–40
[9] Roger Hood & Carolyn Hoyle, **THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE** (5th ed. 2015).
[10] Cesare Beccaria, **ON CRIMES AND PUNISHMENTS** (Henry Paolucci trans., Bobbs-Merrill 1963) (1764).
[11] *Bachan Singh v. State of Punjab*, (1980) 2 S.C.C. 684.
[12] *Machhi Singh v. State of Punjab*, (1983) 3 S.C.C. 470.
[13] Law Commission of India, **Report No. 262: The Death Penalty** (2015); Saikumar, supra note 4.

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Following these, empirical studies were done by Project 39A at the National Law University,[14] Delhi have provided evidence that overwhelmingly almost all death row prisoners are from economically and socially disadvantaged backgrounds, raising serious concerns of equality before the law, effective legal representation, and fairness of sentencing outcomes and practices of trial courts. More recent scholarship has also shown that trial courts often use rhetorical language concepts like the 'collective conscience of society' without taking into account mitigating factors and contribute to the arbitrariness in the imposition of capital punishment.[15]

International issues add further complications to India's retention of the death penalty. Since 1948, when the Universal Declaration of Human Rights was adopted, a significant number of States have either abolished capital punishment by law or have not put it into practice.[16] Capital punishment remains the law in several countries, including India, China, the United States, and Japan, but the balance of international opinion is strongly in favour of its abolition.[17]

The discussion, then, is not about who deserves the death penalty and who doesn't. Instead, it poses a deeper constitutional challenge: Can a civilised democratic State still claim to impose a punishment that cannot be reversed, even with recognition of the flaws in its criminal justice system? This paper addresses this question by exploring the philosophical arguments for capital punishment, the Indian constitutional history of death penalty jurisprudence, empirical arguments about deterrence and arbitrariness and comparative developments in international law. It contends that the real power of a constitutional democracy lies not in killing, but in ensuring justice on the basis of dignity, equality, and the rule of law.

II. Is there a moral argument for the state to take life?

Before a question can be raised about the legality of the State deliberately taking the life of a human being, a question must first be raised about the morality of the State executing one. First, one is to ask whether the State's action in deliberately killing a human being is a moral act before one asks whether it is a legal one.

[14] Project 39A, National Law University Delhi, **Death Penalty India Report** (2016); Project 39A, *Submissions to the U.N. Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions* (2022)
[15] Anoop Surendranath, *Recognising the Arbitrariness in Award of Death Penalty: An Analysis of Trial Court Judgments in the State of Madhya Pradesh in 2018* (SSRN Working Paper, 2021).
[16] Babcock, supra note 1, at 89–103; Amnesty International, *Death Sentences and Executions* (Annual Reports)
[17] Talha Burki, *The Death Penalty Continues Unabated Globally*, 397 **Lancet** 1531 (2021).

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The debate over capital punishment is not only a debate about sentencing, but it is a philosophical debate about what punishment is for, and what is moral about the power of the State. Whether or not the State has the power to execute an individual depends on the interpretation of the concept of justice. All legal systems dispense punishment but for different motives. According to some theories, punishment is justified as a punishment for wrongdoing, while others view it as a deterrent to crime, a reforming or rehabilitative goal, or a way to make amends to the victims and to society.[18]

These rival visions have had a significant impact on constitutional law around the world and play an important role in judicial reasoning in death penalty cases. Capital punishment is an issue that must be understood in the context of the philosophical principles that underlie modern criminal justice.

Prosocial Justice: What is the Greatest Good for the Greatest Number?

The rationale of capital punishment, which is the oldest and possibly the most obvious, is retributive justice. Retribution is based on the concept that a person deserves punishment. The notion of the legitimacy of punishment does not rely on the fact that punishment deters crime or rehabilitates the offender, but on the moral responsibility of the person who has deliberately infringed upon the rights of another.[19]

Immanuel Kant was the most powerful to express this principle.[20] Kant rejected utilitarian considerations and said that the motive for punishment should never be to achieve social good. Rather, punishment is a purpose unto itself: just punishment must be meted out in accordance with the merits of the person's actions. As such, when a society ends, Kant says it still has a moral duty to kill the last murderer who is still convicted of the crime; otherwise, it's an injustice to the murdered and to society.[21]

The retributive justification still has a significant impact on contemporary criminal jurisprudence. When people want a man's death in connection with the most cruel offences, the idea of "proportionality" and "moral accountability" inevitably comes to mind. The reasoning is simple: some crimes are so grave that death is the only punishment that is commensurate with the crime. In this respect, the death penalty is not meted out for revenge but rather as the

[18] Carol S. Steiker & Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* 1–15 (Belknap Press 2016)
[19] H.L.A. Hart, *Punishment and Responsibility* 8–13 (2d ed. 2008).
[20] Immanuel Kant, *The Metaphysics of Morals* 105–07 (Mary Gregor trans., Cambridge Univ. Press 1996).
[21] *Id.* at 106.

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highest form of justice itself.

Jurisprudence in India also manifests features of retributive reasoning. The Supreme Court has repeatedly affirmed the principle of individualised sentencing, but in the context of the 'collective conscience of society', it seems to have the impression that some offences evoke so strong an expression of moral outrage that only the harshest punishment can restore the public faith in the administration of justice, as evidenced by the judgments since Machhi Singh v. State of Punjab.[22]

But retributivism has also received equally virulent criticism. In modern constitutional democracies, justice is separated from vengeance and punishment is held to be consistent with the inherent dignity of all people, even those who have committed serious offences. It has been claimed by critics that the State's deliberate perpetration of the crime it is supposed to prevent may be a violation of the moral values that it is meant to uphold. Many scholars today have stated that though punishment is justified to avenge the crime, they do not believe that the execution of the criminal is justified, as it is a murder that is even more calculated than the crime itself.[23]

Utilitarianism and the Deterrence Debate

Utilitarianism is different from retributive theory in that it considers only the social costs of punishment. Jeremy Bentham thought that punishment was an evil in itself, as suffering is inflicted intentionally. As such, punishment should only be used when it avoids further harm by decreasing future criminal activity.[24]

This attitude is applied to the death penalty, and the result is the deterrence argument. Even though the execution of criminals could be considered a violation of their rights as human beings, one could argue that it is a right to God's mercy that is being denied by stopping people from killing innocent ones. In this sense, the legitimacy of the death penalty relies not on "moral desert," but on empirical effectiveness.

This argument is current and strong in the defence of capital punishment. Their argument shifts the debate from a matter of rights of offenders to one of the constitutional duty of government to protect potential victims, if reliable evidence proves that executions deter innocent lives from

[22] *Machhi Singh v. State of Punjab*, (1983) 3 S.C.C. 470.
[23] Albert Camus, *Reflections on the Guillotine*, in *Resistance, Rebellion and Death* 151 (Justin O'Brien trans., 1963); Rajgopal Saikumar, *Negotiating Constitutionalism and Democracy*, 12 Socio-Legal Rev. 81 (2016).
[24] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789).

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being lost.[25]

But the empirical findings are very mixed. In fact, the Law Commission of India, after a review of recent decades' worth of criminological evidence, determined that there was no definitive evidence that capital punishment is more deterrent than life imprisonment,[26] While many international studies have confirmed that abolitionist nations have homicide rates similar to—or lower than—those of retentionist nations.[27]

Such uncertainty creates a serious constitutional issue. Execution is irreversible and thus requires a very high level of justification. When the key argument is based on conflicting factual assumptions rather than on proven empirical evidence, it grows harder to justify the deterrent approach in a constitutional system that guarantees respect for life and due process.

Transformative Justice and the Constitutional Value of Human Dignity

In modern constitutional democracies, the reformative theory of punishment has been adopted more and more over the assumption that criminal acts are not always proof of permanent moral failure. However, the motivations for punishment should not be limited to retribution but also allow for the potential for personal change, as crime tends to result from a combination of poverty, social exclusion, psychological trauma, poor education, and structural inequality.[28]

The reformative aspect of criminal justice has always been recognised by the Indian constitutional jurisprudence. It has been very clear from the Supreme Court's interpretation of Article 21 that the dignity of the individual is inherent and which the State should respect and the sentence should not only be a reflection of the brutality of the offence, it should also consider the character, background, mental state and prospects of the offender.[29]

In Bachan Singh v. State of Punjab, the Supreme Court expressed its view that even when the accused commits a grave offence, the option of life imprisonment should not be lost and the court should weigh aggravating and mitigating factors before punishing with death.[30] This constitutional interpretation was evident in the case of Bachan Singh.

This constitutional view is supported by empirical research carried out by Project 39A. The studies indicate that death row prisoners are disproportionately members of economically disadvantaged communities, that their educational opportunities are limited, and that they often

[25] Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703, 716–40 (2005).
[26] Law Commission of India, *Report No. 262: The Death Penalty* (2015).
[27] Sandra L. Babcock, *International Law and the Death Penalty*, in *Arcs of Global Justice* 89 (2018).
[28] H.L.A. Hart, *supra* note 19.
[29] *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248.
[30] *Bachan Singh v. State of Punjab*, (1980) 2 S.C.C. 684.

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are poorly represented by lawyers.[31] These findings suggest that there are systemic factors, or inequities, in the capital sentencing process that argue for extreme judicial restraint.

Restorative Justice and Constitutional Morality

Restorative justice is a newer philosophy that focuses on the wrong that has been done rather than punishment. Instead of contemplating the punishment of offenders, restorative justice seeks to find a way for victims, offenders and society to find healing after a criminal wrong has occurred.[32]

Restorative justice has limited practice when it comes to homicide, but raises a big constitutional question. Does it really rehabilitate victims, or does it simply finish the legal process without resolving real social problems? But, as in victimological research more generally, the family of the victim needs to be helped not just with the symbol of their loved one's death but with the emotional, psychological and financial assistance.[33]

This is a stance that is similar to that of constitutional morality. Constitutional democracies are what they are because there's more to it than just public anger and collective feeling. Punishment should not deviate from constitutional principles of dignity, equality, fairness and the rule of law, even if society calls for the severest punishment.

Finding a Common Ground

None of the above theories can solve the discussion about capital punishment by itself. Retribution vividly conveys the argument that punishment can be merited, although it does not provide much reason to believe that death is necessary. Utilitarianism appears to be a pragmatic justification, but its empirical premises are hotly debated. Reformative justice is based on current constitutional principles of dignity and rehabilitation and is criticised for its failure to sufficiently recognise the seriousness of some crimes. Restorative justice expands the conversation and emphasises healing instead of retribution, though it has not yet expanded to capital offences.

The constitutional question is not whether one theory is preferable to the other, but rather how the constitution's competing philosophies should be exercised in the greatest of the State's irreversible powers. In this constitutional context, the Indian judiciary has tried to balance the concerns of punishment, dignity, deterrence, and justice in its development of capital

[31] Project 39A, National Law University Delhi, *Death Penalty India Report* (2016)
[32] Howard Zehr, *The Little Book of Restorative Justice* (2002).
[33] Steiker & Steiker, *supra* note 18, at 255–90.

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punishment jurisprudence.

III. The Historical Evolution of Capital Punishment in India: From Colonial Era to Constitutional Limitations.

The history of capital punishment in India is not only the history of a criminal punishment, but it is also the history of a struggle between the State's coercive powers and the constitutional rights of the individual. Every single restriction on the death penalty is a reflection of such a balancing act.

In order to have an understanding of the current debate on Capital Punishment in India, it is essential to look at the history of Capital Punishment. The existing Indian state of the death penalty is not the result of a single legislation or a single judgement; it has developed over more than a century in the Indian Constitution. The law on capital punishment has changed over time and has been a product of changing notions of justice, proportionality, and the right to life, from its beginnings in colonial criminal law to the current "rarest of rare" doctrine.[34]

The roots of capital punishment in the colonies.

Capital punishment has a much longer history than the modern Indian State. During these eras, such as the Code of Hammurabi, Roman law, and medieval English criminal law, executions were recognised as the ultimate punishment for a variety of crimes and were closely tied to the authority of the sovereign rather than individual rights.[35] Punishment was used to teach both the wrongdoers and the ruler to whom he belonged that he had to be obeyed.

Colonial India's capital punishment system was greatly influenced by the English criminal justice system. By the eighteenth century, Britain had established a notorious "Bloody Code" that mandated over 200 offences, ranging from quite minor property crimes to the death penalty.[36] This predilection for the death penalty was carried over by the British into their colonial ventures and was then enforced in the colonies.

This was given a statutory form in India in the Indian Penal Code 1860, which was prepared by Lord Thomas Babington Macaulay. In the 19th century, Victorian ideas about criminal justice — deterrence and retribution — were not taken into account when considering

[34] Roger Hood & Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th ed. 2015).
[35] William A. Schabas, *The Abolition of the Death Penalty in International Law* (3d ed. 2002
[36] Carol S. Steiker & Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* 6–38 (Belknap Press 2016).

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proportionality, individual sentences or constitutional constraints on State power. Legislative powers were the key to the legality of executions; there was little judicial review.[37]

The Indian Federal Union, the Indian Union of Muslim League, and the Congress Parties

The Constitution of India, which came into force in 1950, had a significant impact on the nature of capital punishment. In contrast to colonial government, constitutional democracy gave fundamental rights protection for all uses of State power, even criminal punishment.

Curiously, the Constituent Assembly had nothing to say about the death penalty, although it had discussed at length the protection of life and personal liberty. Instead, Article 21 guaranteed that no person shall be deprived of life or personal liberty except "according to the procedure established by law".[38] Thus, the Constitution in itself did not either expressly allow or forbid capital punishment. Instead, it referred the issue to Parliament and the judiciary, leaving the latter to develop the Constitution as it went.

In the early decades after Independence, the Indian courts typically took a deferential stance on legislative policy. The penalty of death remained a permissible option under the Penal Code, and judicial review was more about fairness than about proportionality. The interpretation of fundamental rights during the seventies, however, after the Maneka Gandhi case, made Article 21 from a procedural guarantee into a substantive guarantee of fairness, reasonableness and non-arbitrariness, which would later in turn change the interpretation of the constitutional concept of the death penalty itself.[39]

The presumption has been overturned by the Code of Criminal Procedure, 1973.

The enactment of the Code of Criminal Procedure, 1973, was one of the most important legislative changes in the death penalty jurisprudence of India. The earlier Code of Criminal Procedure of 1898 permitted death as the usual punishment for murder, unless the sentencing court gave reasons for handing down life sentences. The colonial legislature presumed that the death penalty was the regular punishment for the particularly serious offence of murder.

This presumption was reversed in the 1973 Code. Parliament failed to do away with the death penalty, but it clearly showed its preference for the measure to be used judiciously, and therefore the ordinary punishment was life imprisonment, with capital punishment being exceptional.[40]

[37] The Indian Penal Code, No. 45 of 1860, §§ 121, 302 (India).
[38] INDIA CONST. art. 21
[39] *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248.
[40] Code of Criminal Procedure, No. 2 of 1974, § 354(3) (India).

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This reform is very important. In effect, the burden for the first time was placed on the state to justify execution and not just life imprisonment. Sentence courts no longer had the discretion to impose any sentence; they were expected to give weighty reasons as to why the usual sentence of life imprisonment would be inadequate in the context of the case.

The constitutional doctrine governing capital punishment was then based on this statutory change.

The Early Constitutional Approach of the Supreme Court.

The constitutional validity of capital punishment first came before the Supreme Court in Jagmohan Singh v. State of Uttar Pradesh.[41] The petitioners contended for the first time before the Supreme Court that there was a lack of clear guidelines for the imposition of death sentences and that the same constituted an arbitrary deprivation of life, in violation of Articles 14, 19 and 21 of the Constitution.

The Supreme Court rejected the challenge by upholding the constitutional validity of the death penalty. At the time, Article 21 was interpreted narrowly, and the Court saw the sentencing discretion of the experienced judge as sufficient to protect against arbitrariness, notwithstanding that it was primarily based on considerations about the circumstances of the offence and the offender.[42]

But Jagmohan quickly garnered a lot of criticism. Scholars expressed doubt about whether there is sufficient judicial restraint if it is left to judges to decide on a sentence in an arbitrary way, without any specific guidelines. The judgment also came before the Supreme Court's broad reading of Article 21 in Maneka Gandhi, which had a much narrower view of personal liberty.

In Rajendra Prasad v. State of Uttar Pradesh, Justice Krishna Iyer highlighted that the death sentence must be reserved for "extraordinary social danger" and that there is a "constitutional value of human dignity" that must be considered in sentencing.[43] The Court's focus on the "reformative objectives" of criminal justice, rather than simply the severity of the crime, marks a shift toward a more progressive stance. Rajendra Prasad did not put an end to the constitutional debate, but he did make a much more limited conception of capital punishment and provided intellectual roots for future Court decisions.

The divergent judicial views created a lot of confusion about the constitutional requirements

[41] *Jagmohan Singh v. State of U.P.*, (1973) 1 S.C.C. 20.
[42] Id.
[43] *Rajendra Prasad v. State of U.P.*, (1979) 3 S.C.C. 646.

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for the death penalty. One was Jagmohan stressing the discretion of the judges and legislative policy, and the other was Rajendra Prasad, highlighting constitutional morality and reformative justice. It was critical to settle this tension.

The opportunity came in Bachan Singh v. State of Punjab (1980), a Constitution Bench decision which completely altered the landscape of the death penalty jurisprudence in India. The Supreme Court struck a balance between the competing interests of deterrence, retribution, and constitutional dignity and judicial restraint by enforcing the constitutionality of capital punishment while at the same time limiting it to the "rarest of rare" cases. The judgment still sets the limits of the constitutional framework of the death penalty in India and continues to be an important foundation for the thinking on sentencing in the country.

IV. The Constitutional Framework and the ‘Rarest of Rare' Principle: Judges' Sincere Efforts to Humanise Capital Punishment

The jurisprudence of the Supreme Court of India on the death sentence is not just a collection of criminal appeals; rather, it is an ongoing discussion on the meaning of life, dignity, equality and justice of a democracy, and it is to be tested in extraordinary cases.

The notion of "legality" of capital punishment in India is not solely based on legislative approval. Instead, it has been preserved by judicial constitutionally fashioned safeguards to protect life from losing its meaning through its arbitrary deprivation. The Supreme Court began to shift the nature of capital sentencing in the late twentieth century from a matter of broad judicial discretion to one subject to constitutional values of proportionality, fairness, individualised sentencing and human dignity.[44]

This culminated in a unique Indian constitutional law doctrine, the "rarest of rare" doctrine, which seeks to balance the right of the State to impose a death sentence with the constitutional guarantee in Article 21 to everyone that no one shall be deprived of life save according to just, fair and reasonable procedure. The doctrine, however, with its lofty intentions, has still been one of the most contentious issues in the jurisprudence of the Indian Constitution.

Bachan Singh v. State of Punjab: constitutional validation with constitutional restraint.

In Bachan Singh v. State of Punjab, the question before the Court was whether the imposition

[44] INDIA CONST. arts. 14, 21.

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of death sentences violates Articles 14, 19 and 21 of the Constitution, which allow for arbitrary deprivation of life.[45]

The petitioner stated that the death penalty was irreversible and that there were no objective standards to determine sentences, making it inconsistent with the constitutional rights to equality and personal liberty. The challenge was further enhanced by the Supreme Court's restrictive reading of Article 21 in the Maneka Gandhi case, where it was determined that any law that takes away the "right to life" must comply with 'fairness', 'reasonableness' and 'non-arbitrariness '.[46]

The Supreme Court upheld the constitutionality of the death penalty by four judges majority. At the same time, however, the same Court placed big constitutional restrictions on its use. The majority did not advocate total abolition, but Justice Bhagwati had made a strong case for the abolition of capital punishment as it entailed arbitrary and discriminatory sentencing, and thus infringed upon Article 14.[47] This ultimately gave a fresh direction to the Indian sentencing jurisprudence.

The Court's formulation was, in fact, a conscious constitutional compromise, and it was decided that death should be reserved for the "rarest of rare cases when the alternative option is unquestionably foreclosed.[48] The Court ruled that life imprisonment was the normal sentence for murder and death was the extraordinary exception, rather than being a regular punishment for murder.

What was also important was the Court's emphasis on individual sentences. In this way, the Court overturned the strict-offence-focused approach to sentencing and recognised that constitutional justice must not be limited to the seriousness of the offence but must also take into account the person of the offender and their various personal circumstances, including age, background, mental state, rehabilitation potential and other factors.[49]

The Bachan Singh judgement is thus a great balancing act on the part of the Constitution. It didn't require the end of capital punishment or an unlimited judicial discretion. Rather, it sought to retain the power of the legislature but to keep it under constitutional control.

Machhi Singh: Shedding light on, or muddying, the doctrine?

In Machhi Singh v. State of Punjab, the Supreme Court revisited the doctrine three years later,

[45] *Bachan Singh v. State of Punjab*, (1980) 2 S.C.C. 684.
[46] *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248.
[47] *Bachan Singh*, (1980) 2 S.C.C. at 751 (Bhagwati, J., dissenting)
[48] *Id.* at 749.
[49] *Id.* at 751–52.

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looking to offer more guidance with respect to the cases where capital punishment may be warranted.[50]

The judgment noted that there are general categories of murder which could fall under the "rarest of rare" doctrine, such as the most brutal murders, most extreme crimes of depravity, multiple homicide victims, and crimes that shock the collective conscience of society.[51]

While it was meant to be a way of achieving uniformity, Machhi Singh used the phrase "collective conscience of society," which was to be the target of continued criticism.

There's no denying that it's a rhetorically appealing expression, and the constitutional ambiguity is quite real. Courts do not typically provide guidance on how collective conscience is to be identified, measured or differentiated from short-term "public outrage. Democratic societies are pluralistic and so lack a single, coherent, moral sensibility that can be objectively judged. That means that it is very easy for people's feelings to get into the sentencing process, instead of being guided by the constitution.[52]

Educational studies have later been in agreement with these concerns. This has led to the suggestion that while trial courts have been using the collective conscience concept, they have comparatively less focus on mitigating circumstances and their obligation to impose sentences that take into account the particularities of the individual case.[53] Therefore, while the language of collective conscience was being used by trial courts, their discretion was being broadened, not narrowed, by their use of this concept.

Mithu v. State of Punjab: a case concerning the limits of the constitution.

In Mithu v. State of Punjab, the Supreme Court reviewed the provisions of Section 303 of the Indian Penal Code, which provided for the death penalty for those serving life imprisonment who had committed murder.[54]

The provision was found to be unconstitutional by the unanimous voice of the Court. It had concluded that capital punishment meant that the judge had no opportunity to take into account any attenuating circumstances, and thus did not comply with Articles 14 and 21. The Court concluded that individualised sentencing was not a matter of judicial policy, but a constitutional imperative "flow[ing] directly from the guarantees against arbitrary State action.

[50] *Machhi Singh v. State of Punjab*, (1983) 3 S.C.C. 470.
[51] Id.
[52] Rajgopal Saikumar, *Negotiating Constitutionalism and Democracy: The 262nd Report of the Law Commission of India on Death Penalty*, 12 **Socio-Legal Rev.** 81 (2016).
[53] Anoop Surendranath, *Recognising the Arbitrariness in Award of Death Penalty: An Analysis of Trial Court Judgments in the State of Madhya Pradesh in 2018*.
[54] *Mithu v. State of Punjab*, (1983) 2 S.C.C. 277.

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Mithu greatly enhanced the constitutionality of Bachan Singh. The decision acknowledged that arbitrariness does not only occur with excessive judicial discretion, but also occurs when there is no judicial discretion at all, such as in the case of legislation. There must be controlled discretion and judicial discretion. There must be structured discretion and individualised discretion.

Santosh Kumar Bariyar: Rules of State and Rule of Law

In Bachan Singh, the Supreme Court had laid down the parameters for the applicability of the "rarest of rare" doctrine; however, subsequent rulings by the Supreme Court have shown varying degrees of consistency in applying the doctrine. In response to this emerging trend of uncertainty, the Court in Santosh Kumar Bariyar v. State of Maharashtra reviewed the entire capital sentencing jurisprudence.[55]

The Court noted that in the past, there were several cases where the brutality of the offence had been emphasised without taking into account any mitigating circumstances that were constitutional to consider in relation to the person who committed the offence. It stressed that sentencing should be based on a "true balancing exercise" and not an automatic reaction of public outcry or media attention.

Perhaps most importantly, the Court noted that the application of the death penalty had been unevenly applied in the past, and thus the potential for arbitrary sentencing exists. The Court noted that this is especially concerning because killing is the ultimate use of State power.

The judgment thus reiterated that Bachan Singh is the supreme constitutional body and warned the courts below from “thinking up” the doctrine into the subjective concepts which are not based on constitutional reasoning.

Shatrughan Chauhan hails from Jalandhar, Punjab.

The case was about the delay in the decision on mercy petitions filed by condemned prisoners.[56] The Supreme Court had said that when mercy petitions are pending for an "inordinate delay", it is a separate constitutional argument for the court to commute the death sentence to life imprisonment. The Court acknowledged that a prolonged detention with the threat of execution hanging over one's head constitutes an exceptional form of psychological anguish, which is referred to as the "death row phenomenon.

The decision was a major development in the rights of condemned prisoners and increased the

[55] *Santosh Kumar Bariyar v. State of Maharashtra*, (2009) 6 S.C.C. 498.
[56] *Shatrughan Chauhan v. Union of India*, (2014) 3 S.C.C. 1.

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safeguards of the procedures they would need to follow. It also identified mental illness, procedural irregularities and other humanitarian issues as pertinent constitutional issues irrespective of the end of judicial proceedings.

In doing so, the Court reiterated an underlying constitutional principle – that a man's manhood does not cease to exist when he is convicted. The obligation of the State to respect the dignity is an obligation that lasts until the very end of the punishment.

Judicial Inconsistency: The Ongoing Constitutional Struggle

Even after decades of constitutional development, Indian death penalty jurisprudence is still grappling with a basic problem of uniformity.

Project 39A is also instructive about the way the "rarest of rare" doctrine has left the sentencing process open to a lack of consistency and arbitrariness among individual judges, who are more inclined to view and assess aggravating and mitigating factors subjectively than to interpret a constitutionally sound sentence.[57][58]

This inconsistency has a serious constitutional issue. It is hard to see how the constitutional principle of equality before the law can be upheld when similarly situated offenders are treated differently depending on the composition of the Bench, where they are brought before the Bench, or what the public may think of them.

In this regard, the Supreme Court has clearly shifted capital punishment from a "criminal punishment" to a "constitutional remedy," but the Court's jurisprudence has also consistently produced a paradox. Each successive judgment has aimed to minimise arbitrariness, but has at the same time created new interpretative confusion. The debate about the constitutionality of the death penalty has thus moved on from a question of whether it is legal to one of how it can be implemented in a way that respects the constitutional rights of equality, fairness and human dignity.

V. Is the Death Penalty Just? Empirical Evidence and the Problem of Arbitrariness: Deterrence

The State must be prepared to offer evidence that capital punishment serves the security of society, not simply rhetoric, if it does so. Justice, especially when it allows for the irrevocable forfeiture of life, requires evidence, not rhetoric.

[57] Law Commission of India, **Report No. 262: The Death Penalty** (2015).
[58] Project 39A, National Law University Delhi, **Death Penalty India Report** (2016).

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The two most usual justifications for retaining the death penalty are that, first, it deters those who commit particularly heinous offences and, second, it meets a demand of society for "justice" in that it is the most severe punishment for the most culpable offenders. Although these arguments have a lot of intuitive appeal, there is more to constitutional adjudication than intuition. It requires the State to show that its harshest measures are both necessary and effective in accomplishing the ends of government that it purports to serve.[59]

Thus, the contemporary debate has moved from the moral philosophy of the abstract to the empirical. Instead of questioning whether or not executions deter crime, researchers are more frequently considering whether they actually do. The conclusions of this empirical investigation have had profound effects on judicial reasoning, legislative reform and international human rights discourse.

The Deterrence Debate: Assumption or Evidence?

The deterrence hypothesis is based on the straightforward idea that potential homicide offenders are deterred from committing homicide offences by the fear of execution. The death penalty, being the final punishment, is considered by rational people to be the punishment for deeds that bring them to face this irrevocable consequence.[60]

This is an argument used by retentionist governments as justification for capital punishment. There is a tendency to demand strict punishments in India after every act of terror, sexual violence or violence, especially when the killing is gruesome. The question of whether a harsher punishment will deter more is a common assumption in the public discourse.[61]

Criminal behaviour, however, has been repeatedly shown in criminological research not to be the outcome of an entirely rational calculation. Crimes of passion, domestic violence and sexual offences, organised crime and acts of terror are often committed not under the influence of reason or cost-benefit analysis, but of emotion, ideology, mental illness, drunkenness, or socio-economic pressures. Thus, it is more often than not the assurance of detection or conviction that has a greater influence on criminal behaviour than the severity of punishment.[62]

However, the Law Commission of India, after reading decades of criminological literature and comparing it with evidence from other countries, found that there was no conclusive empirical evidence that capital punishment has an additional deterrent effect on crime over life

[59] Law Commission of India, *Report No. 262: The Death Penalty* (2015).
[60] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789).
[61] Roger Hood & Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th ed. 2015).
[62] Law Commission of India, *supra* note 49.

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imprisonment, and hence the Commission thought that deterrence cannot be used as a proper constitutional basis for retaining the death penalty for ordinary crime.

The Counter-Argument: Can Executions Save Innocent Lives?

Although there is no agreement, there are still some scholars who stand by the deterrence hypothesis. If there is evidence that executing people reduces subsequent killings, then there are significant moral issues about abolition, say Cass Sunstein and Adrian Vermeule.[63]

The argument is a significant change in the philosophical discourse. Instead of whether or not offenders are deserving of execution, they ask themselves what the government's duty is and ask the question of whether or not governments have an obligation to protect innocent citizens. By not using capital punishment, the refusal to do so could indirectly lead to otherwise preventable deaths if executions are shown to be a proven deterrent.

Although intellectually influential, this argument ultimately depends upon empirical certainty that has thus far proved elusive. There have been several studies with conflicting findings on the relationship between deterrence and homicide. This is partly because many social, economic, demographic and institutional factors affect homicide rates. As a result, constitutional courts are cautious in approving irreversible punishments when they are based on disputed statistics.

The problem of infinite regress.

The most powerful constitutional argument against capital punishment is that it is irrevocable. No criminal justice system, regardless of safeguards, is free from the possibility of human error. Witnesses can be lied to, witness testimony may not be reliable later, confessions can be obtained through intimidation, investigative procedures may be violated, and interpretation of the law can change over time.[64]

The life sentence lets these mistakes be rectified by appeals, review petitions, curative petitions, executive clemency and discovery of exculpatory evidence at a later date. Once execution has been completed, there is no opportunity to correct. Even if someone proves his innocence, if he has lost his life, it can't be brought back.

This concern has great constitutional value as Article 21 guarantees one's life. In most respects, constitutional democracies allow some faults to exist in the institutions of government. Where

[63] Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703, 716–40 (2005).
[64] Hugo Adam Bedau, *The Case Against the Death Penalty* (ACLU 1992).

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the consequence of error is that a person dies, though, the level of justification demanded by the Constitution is very high.

Capital Sentencing and Socio-Economic Bias

The issue of capital punishment also touches on the deeper issues of equality before the law. Project 39A's groundbreaking empirical studies provide clear evidence that a disproportionate number of death-row prisoners come from poor family backgrounds, have limited formal education, are from socially marginalised communities, and are not well represented by legal counsel.[65]

The findings contradict the notion of capital punishment as a "neutral" tool of criminal justice. The availability of skilled attorneys, resources, psychological evaluations and mitigation evidence can have a significant impact on sentencing. The final punishment is thus frequently an extension of the larger structural inequalities and is not necessarily a direct result of a person's individual culpability.

The Supreme Court has been a source of recognition of the constitutional significance of individualised sentencing. However, empirical research shows that, relative to mitigating factors about the offender's personal circumstances, trial courts remain much more focused on aggravating circumstances, thereby potentially turning constitutional discretion into judicial subjectivity.[66]

Arbitrariness and the "Judicial Lottery"

An often-cited constitutional objection to the death penalty is its uneven use. Offenders charged and convicted of similar offences can be sentenced very differently based on the attitudes of the Bench they sit in front of, the strength of legal representation, geographic location, or judicial philosophy.

The Law Commission's 262nd Report had noted that while the constitution has been amended over the years, the practice of arbitrariness remains a feature of the sentencing process in India.[67] Project 39A had also noted that there was a wide variance in the consideration of aggravating and mitigating factors by different trial chambers.

Similar issues have been raised globally. The death penalty in the United States is rare, random and inconsistent with the Constitution, as Justice Potter Stewart once famously noted, when

[65] Project 39A, National Law University Delhi, *Death Penalty India Report* (2016).
[66] Anoop Surendranath, *Recognising the Arbitrariness in Award of Death Penalty: An Analysis of Trial Court Judgments in the State of Madhya Pradesh in 2018*.
[67] Law Commission of India, *supra* note 49.

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one is "struck by lightning.[68] The U.S. death penalty is rare, random and unconstitutional, as Justice Potter Stewart once famously observed: struck by lightning.

This is a direct contravention of Article 14 of the Constitution. Equality before the law requires a substantially similar treatment of similarly situated individuals.[69] When the final step of execution is left to subjective elements of a judge's discretion, rather than to objective constitutional criteria, the legitimacy of the death penalty is constitutionally challenged.[70]

Assess the Empirical Evidence

Combined, modern empirical studies give a very complicated picture. The evidence available does not unequivocally prove that capital punishment is a uniquely effective deterrent to crime, nor do the facts justify the claim that the execution of the death penalty is invariably constitutional, in terms of equality, fairness and fairness and non-arbitrariness.

This doesn't automatically mean that it's unconstitutional. But it seriously undermines the main points in its defence. Where deterrence is still far from certainty, wrongful convictions are still possible, socio-economic disparities are still there, and judicial inconsistencies are still there, even with the constitutional protections, the burden is increasingly going to those who would like to justify the final word of the State to execute.

This uncertainty is not something to be taken lightly by a constitutional democracy based on dignity, equality and the rule of law. The final sanction is legitimate only if the legal system is able to deliver justice in an exceptional manner in terms of fairness, consistency, and reliability. It is one of the most fundamental issues faced by modern criminal jurisprudence whether contemporary constitutional practice meets that challenge.

VI. Conclusion and Recommendations

The issue of capital punishment is essentially a matter of crime and punishment as well as of the State's constitutionality. Empirical evidence does not definitively prove that the death penalty deters more effectively than life-serving terms. Retributive justice says that some offences deserve the severest punishment; however, there is no definitive evidence to prove the death penalty is a more effective deterrent than life-serving terms. Furthermore, while there have been judicial protections since Bachan Singh and later, there remains the possibility of

[68] Project 39A, *supra* note 55.
[69] Carol S. Steiker & Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* 154–255 (Belknap Press 2016).
[70] *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring).

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wrongful convictions, socio-economic inequalities and arbitrariness that detract from the fairness of capital sentencing.[71]

The deliberate trend towards abolition internationally demonstrates the expansion of appreciation that there are limitations on the State's punitive power, derived from the right to life and human dignity. Despite using the death penalty, India has been gradually narrowing its usage by introducing the 'rarest of rare' principle. However, there are significant constitutional problems due to the erratic nature of sentencing and structural weaknesses in the criminal justice system.[72]

In this paper, it is suggested that the state of India gradually has to end the death sentence and augment the use of life sentences, augment legal aid, improve forensic investigation, ensure effective life sentence compensation and rehabilitation of the victims. A criminal justice system that is fair, consistent and constitutionally accountable will serve justice better than a system that has an irreversible punishment that is susceptible to error. At the end of the day, the right to take life is not what makes the constitutional democracy legitimate but its promise to secure human dignity while respecting the rule of law.

[71] *Bachan Singh v. State of Punjab, (1980) 2 S.C.C. 684; Santosh Kumar Bariyar v. State of Maharashtra, (2009) 6 S.C.C. 498; Law Commission of India,* ***Report No. 262: The Death Penalty*** *(2015); Project 39A, National Law University Delhi,* ***Death Penalty India Report*** *(2016).*

[72] Sandra L. Babcock, *International Law and the Death Penalty*, in **ARCS OF GLOBAL JUSTICE** 89 (2018); Roger Hood & Carolyn Hoyle, **THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE** (5th ed. 2015); Howard Zehr, **THE LITTLE BOOK OF RESTORATIVE JUSTICE** (2002)