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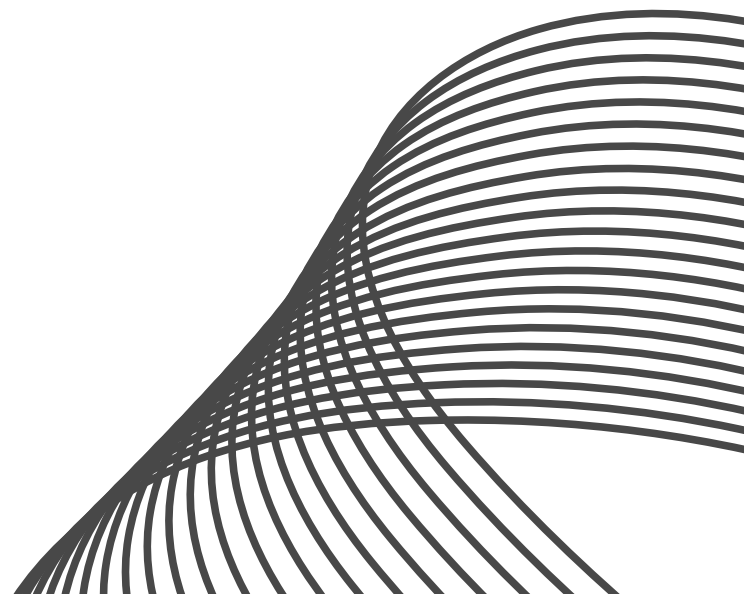
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DEATH PENALTY AND THE CONSTITUTION OF INDIA: BALANCING RETRIBUTION WITH HUMAN RIGHTS

~ Alok Singh ¹

Abstract

The debate over the death penalty in India underscores a tension between justice and human rights. The Constitution safeguards rights under Article 21, ensuring life and liberty can only be limited by fair procedures, supported by Articles 14, 19, and others. Judicial interpretations have shaped the application of the death penalty, acknowledging factors like the accused's social background and establishing the "rarest of rare" doctrine to limit its use. Recent rulings from the Supreme Court have increasingly emphasized humane treatment, addressing delays and the dignity of life. This article questions whether the capital punishment system aligns with constitutional principles of equality and justice or persists in a retributive approach conflicting with contemporary human rights standards.

Keywords

Capital Punishment, Rarest of the Rare, Human Right, Legal Safeguards.

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INTRODUCTION:

Capital Punishment is one of the forms of punishment for which the discourse and debates never ends. The nature of crimes are getting heinous and severe every day. The number and gravity of rape cases are increasing rapidly. Thirty years before, this was so rare, that all cases of rape and murder of children lead to capital punishment. But the increasing rapes have somehow normalised its application to capital punishment. Capital Punishment was considered constitutional. There have been many instances where it was pleaded to abolish it. But time and again the judiciary has put efforts into streamline the entire area in such a way where human rights are upheld and capital punishment also remains as an option. *Bachan Singh* case and *Macchi Singh* case is appreciated for bringing this. This endeavour continues in cases such as *Swamy Shraddananda(2) v. State of Karnataka*, *Shatrughan Chauhan v. Union of India*, and even in recent rulings of *Nithari case* and *Vasanta Dupara*. The legislature on the other hand has not only unabolished this punishment, but since 2013 kept on increasing offences for which capital punishment is one of the form. In this paper, the analysis of the capital punishment, its legal framework, constitutional safeguards, and judicial rulings are critically examined.

LEGAL FRAMEWORK AND CONSTITUTIONAL SAFEGUARDS OF CAPITAL PUNISHMENT:

Capital Punishment or death sentence is provided as one of the punishments under the *Bhartiya Nyaya Sanhita, 2023* (BNS, 2023).² Applying the earlier substantive criminal law of Indian Penal Code, 1860, it continued to provide capital punishment as one of the punishment for offences relating to act of waging war against government of India,³ abetment of mutiny (if it is committed),⁴ giving false evidence that leads to execution of innocent,⁵ threatening a person to give false evidence which leads to death of an innocent,⁶ murder,⁷ attempt to murder by life convict,⁸ abetment of suicide of child or unsound person,⁹ kidnapping for ransom,¹⁰ dacoity with

² Section 3 BNS

³ Section 147 BNS, 121 IPC

⁴ Section 160 BNS, 132 IPC

⁵ Section 230 BNS, 193 IPC

⁶ Section 232(2) BNS, 195A IPC

⁷ Section 103 BNS, 302 IPC

⁸ Section 109(2), 307(2) IPC

⁹ Section 107 BNS, 305 IPC, 396 IPC

¹⁰ Section 140 BNS, 364A IPC

murder,¹¹ rape of minor under 12,¹² causing death or persistent vegetative state when committing rape,¹³ gang rape of minor,¹⁴ repeated offence in rape cases.¹⁵ It also added capital punishment for new offences such as mob lynching,¹⁶ organised crime,¹⁷ terrorist acts.¹⁸ Further, the Section 303 of Indian Penal Code, 1860¹⁹ that dealt with murder by a life convict was declared unconstitutional in *Mithu v. State of Punjab*.²⁰ It was declared unconstitutional for leaping forward from judicial discretion and providing death sentence as mandatory form of punishment. In the BNS, 2023 this provision was revived by providing judicial discretion through death sentence and life imprisonment as forms of punishment when murder by life convict is committed.²¹ In summation previously in Indian Penal Code, 1860 there were thirteen offences (plus one being declared unconstitutional) punishable with capital punishment. The new code, BNS, 2023 provided for these thirteen (plus one) equalling fourteen offences. In addition, there were three new offences for which capital punishment is prescribed. The new code deals with seventeen offences punishable with capital punishment compared with thirteen of the previous code.

Within these capital punishment cases, there are procedural safeguards by law so as to protect human rights and fair trial in such cases. A sentence for capital punishment could only be passed by session court (Sessions Judge or Additional Sessions Judge) with mandatory requirement of confirmation from High Court,²² and by the High Court without any requirement of confirmation. Special Reasons must be recorded when person is sentenced to capital punishment.²³ Immediately after the sentence, the certified copy must be provided.²⁴ When order is submitted for confirmation

¹¹ Section 310(3) BNS

¹² Section 65(2) BNS, 376AB dealt with rape of a women under 12

¹³ Section 66 BNS, 376A IPC

¹⁴ Section 70 BNS. In the previous code, the gang rape of minor was categorised into two, gang rape of minor under 16 and gang rape of minor under 12 (376 DA, 376DB of IPC). Capital Punishment was prescribed only for gang rape of minor under 12 years. In the new code, this categorisation is removed and dealt with gang rape of minor.

¹⁵ Section 71 BNS, 376E

¹⁶ Section 103(2) BNS deals with Murder by a Group: “When a group of five or more persons acting in concert commits murder on the ground of race, caste or community, sex, place of birth, language, personal belief or any other similar ground each member of such group shall be punished with death or with imprisonment for life and shall also be liable to fine.”

¹⁷ Section 111 BNS

¹⁸ Section 113(2) BNS

¹⁹ Section 303 IPC

²⁰ *Mithu v State of Punjab* (1983) 2 SCC 277.

²¹ Section 104 BNS, Section 303 IPC

²² Section 407, 408-412.

²³ Section 402

²⁴ Section 404

the accused is kept in judicial custody and not police custody. Further, confirmation order of the High Court must be signed by two judges to ensure checks and balances. This emphasizes due process, transparency and protection of accused persons. The execution is conducted by the Session court by issuing warrant when order of capital punishment is passed by High Court in appeal, revision or confirmation.²⁵ Further, Chapter 34 ranging from Section 453-456 of Code of Criminal Procedure deals with Execution, Suspension, Remission and Commutation of Sentences. In Remission and Commutation both the punishment is reduced, but in commutation there is change in nature and in remission there is no such change in nature. This execution is postponed when appeal to the Supreme Court is pending.²⁶ Further, the Code of Criminal Procedure requires mandatory commutation to Life Imprisonment in case of pregnant women.²⁷

In addition to the specific legal framework, the Constitution protects the human rights. The Constitution of India acts a core element for the protection of rights. Article 21 of the Constitution guarantees right to life and personal liberty. This right could only be compromised by a procedure established by law. This procedure must be in form and in substance a due procedure.²⁸ It must be just, fair and reasonable. After order is passed either by Sessions Court (alongwith confirmation) or the High Court, the person sentenced to death could approach the Higher Court through Appeal,²⁹ Special Leave Petition,³⁰ Review Petition³¹ and Curative Petition.³² In these, the Supreme Court order may pass any order for doing complete justice³³ and such orders are binding.³⁴ After all remedies are exhausted, the person may submit a plea or mercy before the President or Governor under Article 72 or 161 of the Constitution. When all these are rejected, then only death warrant or black warrant is issued in which the date, time and place of execution is provided. In practice, the execution takes place in early mornings, the condemned is transferred to isolated cell, religious texts may be provided for spiritual solace, the person may meet family members. Further, medical examination is conducted so as assure fitness in execution as person who are mentally ill, pregnant, or having a disease are not executed. The execution takes place in

²⁵ Section 453 and 454

²⁶ Section 455

²⁷ 456 BNSS

²⁸ *Maneka Gandhi v Union of India* (1978) 2 SCR 621.

²⁹ Art. 130-132 of Constitution

³⁰ Art. 136

³¹ Art. 137

³² *Rupa Ashok Hurra v. Ashok Hurra* AIR 2002 SC 177

³³ Art. 142

³⁴ Art. 141

presence of Jail Superintendent, Executioner (or hangman), two constables, medical practitioner, and human right observer. Usually, the body is kept hanging for around 30 minutes to ensure the death.

ANALYSIS OF JUDICIAL DECISIONS:

In the post-independent India, *Jagmohan Singh v. State of Uttar Pradesh*,³⁵ *Ediga Amma*,³⁶ and *Rajendra Prasad v. State of Uttar Pradesh*³⁷ were the initial cases in which the constitutionality of capital punishment was challenged. In the *Jagmohan Singh case*³⁸ the capital punishment was held constitutional. The court also cautioned about fairness in the process of capital punishment. Here the balance between aggravating and mitigating factors must be there. In *Ediga Anamma v. State of Andhra Pradesh*,³⁹ the court reflected on many fundamental rights to protect human rights in capital punishment. It pointed factors such as crime and not just crime is essential. Here, personal and social circumstances of the offender, their poverty, youth, mental imbalance, family feuds, etc. must be studied. This would be the mitigating factors. The court defined exceptional cases very narrowly such as causing traumatic threat to social order such as by person being a repeated offender, or his participation in in organised crime, terrorism acts, killing police officer on duty, victim being a child, woman or helpless person, etc.

In the *Rajendra Prasad case*,⁴⁰ the court pointed to do complete justice, the capital punishment could only be given by the judicial authority in exceptional cases. By this and only this, that the social justice in such process prevail. Justice Krishna Iyer linked the doctrine to the ideas of social justice and constitutional morality. This case was decided after 1973 in which new code of procedural criminal law was enacted. The exceptional reasons could be figured out by brutality of act committed. In these cases, human rights and reformation were provided as a primary goal.

In this *Ediga Amma case*⁴¹ is appreciated to moving forward from the discretionary approach to discretion with prudence approach. In the latter, discretion is there, but it must be combined with principles established. *Ediga Amma case*⁴² and the ruling of *Rajendra Prasad case*⁴³ lead to

³⁵ *Jagmohan Singh v State of Uttar Pradesh* (1973) 1 SCC 20.

³⁶ *Ediga Anamma v State of Andhra Pradesh* (1974) 4 SCC 443.

³⁷ *Rajendra Prasad v State of Uttar* (1979) 3 SCC 646.

³⁸ *Jagmohan Singh v State of Uttar Pradesh* (n 34).

³⁹ *Ediga Anamma v State of Andhra Pradesh* (n 35).

⁴⁰ *Rajendra Prasad v State of Uttar* (n 36).

⁴¹ *Ediga Anamma v State of Andhra Pradesh* (n 35).

⁴² *ibid.*

⁴³ *Rajendra Prasad v State of Uttar* (n 36).

Bachan Singh case.⁴⁴ The *Bachan Singh*,⁴⁵ the five judge bench upheld constitutionality of capital punishment. It introduced three things rarest of the rare doctrine in relation to capital punishment, consideration of aggravating and mitigating factors, and crime and the criminal test. Later, a constitutional bench in *Macchi Singh v. State of Punjab*⁴⁶ elaborated on five factors that would lead to justification of capital punishment cases. These factors include the way the crime is committed, the motive behind the crime, the nature of crime and if it affects the collective conscience of the society, the magnitude of crime committed, and the nature of victim. After this, the ruling of *Mithu Singh v. State of Punjab*⁴⁷ established judicial discretion is of primal importance in cases of capital punishment. Without the discretion, the legislature cannot draft something as offence and punishable with capital punishment. Mandatory death sentence eliminates judicial discretion.

Following this, in *Dhanjoy Chatterjee v. State of West Bengal*⁴⁸ a security guard was convicted for committing the murder and rape of a schoolgirl. He was sentenced to death after considering factors such as crime against women and children, need to establish strong deterrence, etc. In *Swamy Shraddhananda(1) v. State of Karnataka*⁴⁹ the accused murdered for property gain. Considering factors such as motive, greed, betrayal of trust, and brutality, the court awarded capital punishment. The case of *Bachan Singh* was applied for shocking the collective conscience. In *Rajiv Gandhi Assassination case or State of Tamil Nadu v. Nalini*,⁵⁰ the assassins of Prime Ministers were sentenced to capital punishment. Here the court awarded capital punishment for acts of terrorism and political assassination. In *Mohd Afzal Guru v. State*⁵¹ (commonly known as Parliament Attack case) Afzal Guru was convicted in terrorist attack of the parliament. The same was considered under rarest of rare category as it being a crime of high magnitude that breaches the collective conscience of society and it being a threat to national security.

Then in *Swamy Shraddananda(2) v. State of Karnataka*⁵² was the review of the *Swamy Shrraddananda (1)*. In this case court evolved special category of life imprisonment i.e. life

⁴⁴ *Bachan Singh v State of Punjab* (1980) 2 SCC 684.

⁴⁵ *ibid*.

⁴⁶ *Machhi Singh v State of Punjab* (1983) 3 SCC 470.

⁴⁷ *Mithu v State of Punjab* (n 19).

⁴⁸ *Dhananjoy Chatterjee v State of West Bengal* (1994) 2 SCC 220.

⁴⁹ (1999) SCC (Cri) 914

⁵⁰ (1999) SCC (Cri) 914

⁵¹ (2005) 11 SCC 600

⁵² *Swamy Shraddananda (2) v State of Karnataka* (2008) 13 SCC 767.

imprisonment for remainder of natural life without remission. This was a new innovative path after the *Bachan Singh case*. Here, the balance between deterrence with human right is appreciated. This case is appreciated for providing an alternative to capital punishment. This was a doctrinal innovation towards a human rights dimension of sentencing policy. It deals with cases in which the offence is neither too harsh for awarding capital punishment nor too narrow for disallowing the same. In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*⁵³ the court commuted capital punishment to death sentence for conviction of kidnapping and murder of a youth. In the case, the earlier cases were criticised for inconsistently applying the “*rarest of the rare*” doctrine. Many a times, the mitigating factors are ignored and only the crime committed is considered. The court recognised flaws in capital punishment in this case. The court pointed the capital punishment could only be imposed when other forms of punishments are completely inadequate.

The case of *Shatrughan Chauhan v. Union of India*⁵⁴ dealt with plea of multiple death row convicts. There was inordinate delay in deciding mercy petition by the President or Governor. They were kept in solitary confinement in this time. The court pointed undue delay in mercy petition is a ground of commutation to life imprisonment. Mental suffering of the death row prisoner must be considered. This shifted towards human rights sensitivity in such cases. This case shows the Supreme Court not just defined rarest of the rare but also went beyond in defining the procedure in capital punishment cases.

In *Yakub Memon v. State of Maharashtra*,⁵⁵ the 1993 Bombay serial blast convict. Considering gravity of terrorism and mass killing of more than two hundred people, the court upheld the capital punishment. In this case, the entire process of review petition, curative petition and mercy petition took very long time. Considering the gravity the capital punishment was allowed. The death sentence hearing of *Nirbhaya Rape Case*⁵⁶ is a classic example of human right approach. But in taking use of these rights, the accused used multiple mercy petitions in different times and there was an abuse of the process of law.

Recently in 2025, in *Surendra Koli case*⁵⁷ (commonly called as *Nithari Killings*), Surendra Koli was accused of multiple murders and rape of children from 2005 to 2007. He was sentenced to

⁵³ *Santosh Kumar Satishbhushan Bariyar v State of Maharashtra* (2009) 6 SCC 498.

⁵⁴ *Shatrughan Chauhan v Union of India* (2014) 3 SCC 1.

⁵⁵ AIR ONLINE 2013 SC 661

⁵⁶ [2017] 6 S.C.R. 1

⁵⁷ <https://www.thehindu.com/news/national/nithari-killings-supreme-court-acquits-prime-accused-surendra-koli-in-last-pending-case/article70265652.ece>

death in 2011. In 2025, his curative petition was allowed. The Supreme Court criticised inconsistencies in evidence and procedural lapses. His release was ordered. In *Vasanta Sampta Dupara*,⁵⁸ the convict was sentenced to death sentence in 2017 for rape and murder. The court held, the accused has opportunity to file Writ Petition under Article 32 when procedural safeguards and sentencing policies are not followed.

CRITICAL ANALYSIS:

Capital punishment has often been criticised because of possibility of errors and irreversibility of sentence. For instance, the Section 230 and 232 of the BNS, 2023 itself deals with situation when false evidence or fabrication in evidence leads to conviction and execution of a person. Even legislatures foresaw the irreversibility in procedure. In many studies it has been suggested to resort to alternate mechanism for capital punishment. The recent ruling of *Nithari case* highlights these inconsistencies. Whenever any small lapse happens be it in evidence, be it in discretion, the life is taken away. Had the accused no means to avail legal aid to file the review and curative petitions, even in this case he would have been sentenced. Life Imprisonment without remission⁵⁹ is one of these. But it is not free from challenges.

One of the human right concerns is regarding the mode of execution. There are different modes of execution apart from hanging such as firing squad, lethal injection, etc. In army firing squad, or shooting is allowed in Armed force. The 187th Law Commission Report recommends firing squad as more humane such as lethal injection.

CONCLUSION:

The above analysis shows the consistent endeavours of the Supreme Court in protecting human rights, victims' right and the convicts' right in the award of capital punishment. These cases also highlight, different corollary in arbitrary application of the rarest of the rare doctrine. Even today evidence lapses are there. Time and again there have been various studies venturing against the capital punishment. But very little endeavours are made about the alternatives of capital punishment. With the increasing gravity and nature of offences can a person who be sentenced to death in rarest of the rare case be treated in same par with the person sentenced to life imprisonment. Considering the gravity what are ways of assuring effective alternate. When Life Imprisonment without remission is given the convict of terrorist act encounters the convict of

⁵⁸ 2025 INSC 1043

⁵⁹ *Swamy Shraddananda (2) v. State of Karnataka* (n 51).

murder. It is essential to study the practical approaches of ensuring effective alternative to capital punishments.

