

**BALANCING RETRIBUTION AND REFORM: CONTEMPORARY CHALLENGES IN
RAPE AND MURDER JURISPRUDENCE**

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ABSTRACT

India's criminal justice system confronts an enduring tension between retributive and reformative philosophies, particularly in rape and murder cases. Through doctrinal analysis of landmark Supreme Court decisions and comparative international perspectives, this study exposes fundamental challenges in achieving equilibrium between punishment and rehabilitation. The "rarest of rare" doctrine established in Bachan Singh v. State of Punjab³ has produced inconsistent application across cases including Machhi Singh⁴, Dhananjay Chatterjee,⁵ and the Nirbhaya case.⁶ Contemporary issues—populist punitivism, media-driven justice, gender sensitivity versus procedural fairness, and competing victim-accused rights—reveal implementation gaps and judicial arbitrariness. Drawing upon comparative insights from the United Kingdom, United States, and South Africa, this paper proposes comprehensive reforms including structured sentencing guidelines, victim rehabilitation mechanisms, enhanced judicial training, and restorative justice principles to harmonize retribution with reformation while upholding constitutional morality and human dignity.

Keywords: Retributive justice, Reformative theory, Death penalty, Rarest of rare doctrine, Constitutional morality, Restorative justice

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³ Bachan Singh v. State of Punjab, (1980) 2 SCC 684.

⁴ Machhi Singh v. State of Punjab, (1983) 3 SCC 470.

⁵ Dhananjay Chatterjee v. State of West Bengal, (1994) 2 SCC 220.

⁶ Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1.

INTRODUCTION

India's criminal justice system operates at the crossroads of competing imperatives: societal demands for retribution against heinous crimes and constitutional commitments to human dignity and reformation⁷. This tension intensifies in rape and murder cases that shock collective conscience yet require measured judicial responses consistent with constitutional values⁸. The Constitution's guarantee of equality, liberty, and life with dignity creates a framework simultaneously demanding justice for victims while protecting accused persons' fundamental rights.⁹

Since *Bachan Singh* (1980) established the “rarest of rare” doctrine,¹⁰ courts have struggled to define when capital punishment becomes constitutionally permissible. The brutal 2012 gang rape and murder of Jyoti Singh (Nirbhaya) catalyzed nationwide protests and comprehensive legislative reforms through the Criminal Law (Amendment) Act, 2013.¹¹ However, these developments exposed fundamental questions about justice's nature—whether punishment should primarily serve retributive, deterrent, or reformative purposes.¹² Contemporary challenges have intensified debate. Populist punitivism, amplified by media cycles and social activism, creates unprecedented pressure on courts to deliver swift, severe punishments.¹³ This paper examines whether India's criminal justice system can achieve principled balance between retributive justice and reformative ideals while upholding constitutional morality and human rights.

THEORETICAL FRAMEWORK

Retributive Justice

Retributive theory, rooted in *lex talionis* (“an eye for an eye”), posits that punishment must be proportionate to moral culpability and crime gravity¹⁴. This theory views crime as violating moral order, creating debts payable through commensurate suffering.¹⁵ In India,

⁷ India Const. art. 21.

⁸ *Id.*

⁹ India Const. arts. 14, 19, 21.

¹⁰ *Bachan Singh*, (1980) 2 SCC at 718.

¹¹ The Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India).

¹² Mukesh, (2017) 6 SCC at 82-84.

¹³ Anup Surendranath et al., *The Enduring Gaps and Errors in Capital Sentencing in India*, 32 Nat'l L. Sch. India Rev. 47, 52-55 (2020).

¹⁴ Immanuel Kant, *The Metaphysics of Morals* 141-47 (Mary Gregor trans., Cambridge Univ. Press 1996) (1797).

¹⁵ *Id.*

retributive principles find expression in the Indian Penal Code's graduated punishments reflecting offense seriousness.¹⁶ The Supreme Court recognized retribution as legitimate penological objective in *Dhananjay Chatterjee*, describing certain crimes as "so brutal, savage and diabolical" that they warrant ultimate penalty.¹⁷ However, pure retributivism faces criticism for inflexibility and failure to account for mitigating circumstances or transformation potential.¹⁸

Reformative Justice

Reformative theory shifts from punishment to rehabilitation, premising that offenders can transform into law-abiding citizens through appropriate interventions.¹⁹ This approach emphasizes addressing underlying social, psychological, and environmental factors contributing to criminal behavior.²⁰ India's constitutional framework provides strong support for reformative approaches. Article 21's guarantee of life with dignity extends to prisoners, mandating humane treatment and rehabilitation opportunities.²¹ The Probation of Offenders Act, 1958,²² and Juvenile Justice Act, 2015,²³ embody reformative principles by prioritizing rehabilitation. The Supreme Court observed in *Mohd. Hanif Quareshi* that punishment's ultimate aim is transforming offenders into useful societal members.²⁴

Critics argue that reformative approaches may inadequately address societal demands for accountability and deterrence, particularly regarding heinous crimes.²⁵ Reformative theory also faces practical challenges including resource constraints, inadequate rehabilitation infrastructure, and difficulties assessing genuine reformation.²⁶

Restorative Justice and Constitutional Morality

Restorative justice seeks repairing harm through dialogue involving victims, offenders, and communities, emphasizing accountability, reparation, and healing.²⁷ While India's system

¹⁶ Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, §§ 299-377 (India).

¹⁷ *Dhananjay Chatterjee*, (1994) 2 SCC at 224.

¹⁸ Anup Surendranath, *supra* note 11, at 58-61.

¹⁹ Probation of Offenders Act, 1958, No. 20, Acts of Parliament, 1958 (India).

²⁰ Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016 (India).

²¹ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, 283-84.

²² Probation of Offenders Act, 1958, § 4.

²³ Juvenile Justice Act, 2015, § 3.

²⁴ *Mohd. Hanif Quareshi v. State of Bihar*, AIR 1958 SC 731, 738.

²⁵ Anup Surendranath, *supra* note 11, at 62-64.

²⁶ National Crime Records Bureau, Prison Statistics India 2022, at 45-67 (2023).

²⁷ Howard Zehr, *Changing Lenses: Restorative Justice for Our Times* 181-95 (25th anniv. ed. 2015).

remains predominantly retributive, restorative principles have gained recognition.²⁸ The Supreme Court endorsed victim-offender mediation in appropriate cases and emphasized victim compensation as integral justice component.²⁹ Section 357A of the Code of Criminal Procedure mandates state governments establish victim compensation schemes.³⁰

Constitutional morality, as articulated by Dr. B.R. Ambedkar and developed through judicial interpretation, provides overarching framework for evaluating punishment theories.³¹ In *Navtej Singh Johar*, the Supreme Court distinguished “public morality” based on shifting prejudices from “constitutional morality” rooted in fundamental values of justice, liberty, equality, and fraternity.³² Constitutional morality demands that criminal jurisprudence be guided by reason, dignity, and proportionality rather than public outcry or majoritarian sentiment.³³

EVOLUTION OF INDIAN JURISPRUDENCE

Statutory Framework

The Indian Penal Code, 1860, establishes comprehensive offense and punishment frameworks.³⁴ Section 302 prescribes death penalty or life imprisonment for murder, while Section 376 addresses rape with graded punishments reflecting aggravating circumstances.³⁵ The Code of Criminal Procedure, 1973, particularly Sections 235(2) and 354(3), mandates bifurcated proceedings requiring courts hear parties separately on sentencing and record special reasons when awarding death penalty.³⁶

Constitutional provisions establish foundational protections. Article 14 guarantees equality and prohibits arbitrary state action.³⁷ Article 21—guaranteeing no person shall be deprived of life or liberty except according to procedure established by law—has been transformatively interpreted in *Maneka Gandhi* to require that procedures be just, fair, and reasonable.³⁸

The ‘Rarest of Rare’ Doctrine

²⁸ Ankush Shivaji Gaikwad v. State of Maharashtra, (2013) 6 SCC 770, 779-80.

²⁹ *Id.* at 780-81.

³⁰ Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974, § 357A (India).

³¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, 132-38.

³² *Id.* at 134.

³³ *Id.* at 136-38.

³⁴ Indian Penal Code, 1860.

³⁵ *Id.* §§ 302, 376.

³⁶ Code of Criminal Procedure, 1973, §§ 235(2), 354(3).

³⁷ India Const. art. 14.

³⁸ *Maneka Gandhi*, (1978) 1 SCC at 283.

Bachan Singh v. State of Punjab (1980) fundamentally reshaped death penalty jurisprudence.³⁹ A five-judge Constitution Bench, by 4:1 majority, upheld capital punishment's constitutional validity while imposing significant constraints.⁴⁰ Justice Sarkaria articulated the “rarest of rare” principle: death penalty should be awarded only when alternative options are “unquestionably foreclosed.”⁴¹

The Court established sentencing framework requiring judges consider both aggravating and mitigating circumstances.⁴² Aggravating factors include manner of commission, motive, brutality, and victim vulnerability, while mitigating circumstances encompass offender's age, mental state, reform potential, and absence of criminal antecedents.⁴³ The judgment emphasized individualized sentencing, rejecting standardized death-eligible crime categories.⁴⁴

Justice Bhagwati's dissent presciently warned that Section 354(3) CrPC's “special reasons” requirement provided insufficient guidance, leaving judges with “unguided standardless discretion” vulnerable to subjective application.⁴⁵ His apprehension that death sentences would be “arbitrarily and freakishly imposed” has been validated by subsequent empirical research demonstrating significant sentencing inconsistencies.⁴⁶

Application and Expansion: Machhi Singh to Nirbhaya

In *Machhi Singh* (1983), the Supreme Court sought greater specificity by identifying five categories warranting capital punishment: manner of commission shocking collective conscience; certain motives (contract killings); anti-social or socially abhorrent nature (dowry deaths); magnitude (mass murders); and personality of victim.⁴⁷ While attempting to structure sentencing discretion, *Machhi Singh* paradoxically expanded death penalty scope by creating broad categories rather than narrowing application⁴⁸

Dhananjoy Chatterjee (1994) involved rape and murder of 18-year-old Hetal Parekh by a

³⁹ *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684.

⁴⁰ *Id.* at 716-18

⁴¹ *Id.* at 718.

⁴² *Id.* at 719-21.

⁴³ *Id.*

⁴⁴ *Id.* at 720.

⁴⁵ *Id.* at 747 (Bhagwati, J., dissenting).

⁴⁶ Piyush Verma, *The Inevitable Inconsistency of the Death Penalty in India*, SSRN 5-8 (2021), <https://ssrn.com/abstract=3891234>.

⁴⁷ *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470, 488-89.

⁴⁸ Anup Surendranath, *supra* note 11, at 70-72.

security guard.⁴⁹ The Supreme Court upheld death sentence, describing the crime as “pre-planned cold blooded brutal murder” falling within “rarest of rare” category.⁵⁰ The case exposed socioeconomic disparities in death penalty application, as Dhananjoy was an illiterate man from marginalized background without resources for effective legal defense.⁵¹ The 2012 Nirbhaya case triggered unprecedented public outrage and systemic reforms.⁵² In *Mukesh v. State* (2017), the Supreme Court upheld death sentences for four convicts, describing the crime as reflecting “extreme depravity” and “diabolic” conduct shocking “collective conscience of society.”⁵³ The case led to the Criminal Law (Amendment) Act, 2013, which substantially reformed sexual offense provisions, expanded rape definition, introduced new offenses, and enhanced punishments.⁵⁴ Section 376A IPC prescribes minimum twenty years rigorous imprisonment, extendable to life imprisonment or death, for rape causing death or persistent vegetative state.⁵⁵

Critics questioned whether Nirbhaya sentencing was unduly influenced by media frenzy and public pressure rather than principled legal analysis.⁵⁶ The case highlighted tensions between demands for swift retributive justice and commitments to fair trial rights and due process.⁵⁷

CONTEMPORARY CHALLENGES

Populist Punitivism and Media Trials

Contemporary India witnesses pronounced “penal populism”—political responses to crime fear through harsher punishments, often contrary to expert recommendations.⁵⁸ This phenomenon intensified following Nirbhaya, with media outlets conducting “trials by publicity” creating overwhelming pressure for death sentences.⁵⁹ Research demonstrates that 24-hour news coverage, sensationalist reporting, and social media mobilization significantly influence judicial outcomes, particularly in high-profile sexual violence cases.⁶⁰

⁴⁹ Dhananjoy Chatterjee v. State of West Bengal, (1994) 2 SCC 220.

⁵⁰ *Id.* at 224.

⁵¹ Bikram Jeet Batra, *Dhananjoy Chatterjee Case: A Critical Analysis*, 3 Indian J. L. & Just. 88, 93-95 (2012).

⁵² The Criminal Law (Amendment) Act, 2013.

⁵³ Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1, 82-84.

⁵⁴ The Criminal Law (Amendment) Act, 2013, §§ 5-9.

⁵⁵ Indian Penal Code, 1860, § 376A.

⁵⁶ Anup Surendranath, *supra* note 11, at 75-78.

⁵⁷ *Id.*

⁵⁸ *Id.* at 52-55.

⁵⁹ *Id.*

⁶⁰ *Id.* at 54.

Media trials undermine constitutional safeguards by violating presumption of innocence, compromising fair trial rights, influencing judicial decision-making, and converting courtrooms into “moral theatres” where judges feel compelled to respond to public outcry.⁶¹ In *State of Maharashtra v. Rajendra Javaliba*, the Supreme Court cautioned that “trial by press” is “totally unconstitutional and contemptuous” as it interferes with justice administration.⁶² However, effective mechanisms to prevent media influence remain inadequate.⁶³

Studies indicate trial courts frequently ignore structured discretion framework, with 36% of death sentences imposed same day as conviction without conducting mandatory sentencing hearings.⁶⁴ Such pronouncements reflect retributive fury rather than careful application of sentencing principles mandated by *Bachan Singh*.⁶⁵

Gender Sensitivity Versus Procedural Fairness

Sexual violence cases create acute tensions between gender sensitivity and procedural rights.⁶⁶ Post-2013 reforms introduced victim-centric provisions: mandatory female police officers for recording statements, prohibition of character assassination during cross-examination, in-camera proceedings, and compensation schemes.⁶⁷ These measures recognize secondary victimization women often face within the criminal justice system.⁶⁸

However, concerns arise regarding potential erosion of accused rights.⁶⁹ The shift from “innocent until proven guilty” to *de facto* presumption of guilt in rape cases, restrictions on cross-examination potentially impeding effective defense, and enhanced punishments based on victim gender rather than proportionality raise constitutional questions.⁷⁰ In *Deepak Gulati v. State of Haryana*, the Supreme Court cautioned against false accusations and emphasized need for procedural safeguards.⁷¹

The gender-specific definition of rape under Section 375 IPC excludes male, transgender, and

⁶¹ *State of Maharashtra v. Rajendra Javaliba*, (1999) 2 SCC 453, 456.

⁶² *Id.*

⁶³ Anup Surendranath, *supra* note 11, at 56.

⁶⁴ Project 39A, Death Penalty Sentencing in Trial Courts: A Study of Capital Cases in India 32-35 (2020).

⁶⁵ *Id.*

⁶⁶ The Criminal Law (Amendment) Act, 2013, §§ 7-8.

⁶⁷ *Id.*

⁶⁸ Supreme Court of India, Handbook on Combating Gender Stereotypes 12-18 (2023).

⁶⁹ *Deepak Gulati v. State of Haryana*, (2013) 7 SCC 675, 683-84.

⁷⁰ *Id.*

⁷¹ *Id.* at 684.

non-binary victims from statutory protection.⁷² This violates Article 14's equality guarantee and contradicts the Supreme Court's recognition of transgender rights in *NALSA v. Union of India*⁷³ and constitutional morality principles articulated in *Navtej Singh Johar*.⁷⁴ The Supreme Court's *Handbook on Combating Gender Stereotypes* (2023) represents positive progress in sensitizing judges to avoid prejudicial assumptions.⁷⁵

Victim Rights Versus Accused Rights

Criminal jurisprudence traditionally focused on state-accused relationships, marginalizing victims to passive witnesses.⁷⁶ Contemporary reforms recognize victims' autonomous rights including participation in proceedings, notification of bail hearings, right to legal representation, and compensation.⁷⁷ The Bharatiya Nagarik Suraksha Sanhita, 2023 (replacing CrPC), strengthens victim rights through enhanced compensation, protection, and participation provisions.⁷⁸

However, victim rights must be reconciled with accused rights to prevent criminal processes from becoming merely adversarial between victims and accused.⁷⁹ Presumption of innocence, right against self-incrimination, right to legal representation, and right to fair trial remain fundamental constitutional protections.⁸⁰ In *Mofil Khan v. State of Jharkhand*, the Supreme Court emphasized balancing victim rights with justice administration integrity.⁸¹

The challenge intensifies in cases involving severe public outrage.⁸² Demands for immediate execution conflict with appellate rights, review petitions, and mercy jurisdiction.⁸³ Restorative justice offers potential reconciliation by bringing victims, offenders, and communities together in structured dialogue focused on healing and accountability.⁸⁴ While promising for certain offense categories, its applicability to heinous crimes remains debatable

⁷² Indian Penal Code, 1860, § 375.

⁷³ *NALSA v. Union of India*, (2014) 5 SCC 438, 455-58.

⁷⁴ *Navtej Singh Johar*, (2018) 10 SCC at 136-38.

⁷⁵ Supreme Court of India, *Handbook on Combating Gender Stereotypes* 5-7 (2023).

⁷⁶ *Ankush Shivaji Gaikwad*, (2013) 6 SCC at 779.

⁷⁷ Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023, §§ 355-360 (India)

⁷⁸ *Id.*

⁷⁹ *Mofil Khan v. State of Jharkhand*, (2021) 2 SCC 480, 489.

⁸⁰ India Const. art. 21.

⁸¹ *Mofil Khan*, (2021) 2 SCC at 489.

⁸² *Mukesh*, (2017) 6 SCC at 82-84.

⁸³ *Bikram Jeet Batra*, *supra* note 49, at 95-97.

⁸⁴ *Howard Zehr*, *supra* note 25, at 181-95.

and culturally contested in India.⁸⁵

Inconsistency in Sentencing and Death Penalty Application

Perhaps the most fundamental challenge facing Indian capital jurisprudence is “inevitable inconsistency”—the thesis that death penalty application remains inherently arbitrary regardless of procedural safeguards.⁸⁶ Empirical research reveals alarming disparities: similarly situated offenders receive vastly different sentences, socioeconomically marginalized defendants face disproportionately higher death penalty rates, and judicial subjectivity overwhelms objective standards.⁸⁷

Project 39A’s research on death penalty sentencing documented systematic violations of *Bachan Singh* principles: 36% of death sentences imposed same-day without bifurcated hearings, inadequate consideration of mitigating circumstances, over-reliance on crime severity while ignoring offender circumstances, and inconsistent application of “rarest of rare” threshold.⁸⁸ Appellate courts correct many errors, with only 5% of trial court death sentences ultimately confirmed, but this high reversal rate itself demonstrates foundational inconsistencies.⁸⁹

The absence of statutory sentencing guidelines leaves judges with unbounded discretion.⁹⁰ The Malimath Committee (2003) and Madhava Menon Committee (2007) recommended establishing sentencing commissions and guidelines, but legislative action remains absent.⁹¹ In *State of Punjab v. Prem Sagar*, the Supreme Court acknowledged “urgent need” for sentencing guidelines, yet this exhortation went unheeded.⁹²

Recent Supreme Court decisions reflect internal incoherence.⁹³ In *Manoj v. State of Madhya Pradesh* (2022), a three-judge bench mandated enhanced procedures including proactive judicial inquiry into mitigating factors.⁹⁴ However, less than a month later, a different bench

⁸⁵ *Id.*

⁸⁶ Piyush Verma, *supra* note 44, at 5-8.

⁸⁷ *Id.* at 9-12.

⁸⁸ Project 39A, *supra* note 62, at 32-35.

⁸⁹ *Id.* at 38-41.

⁹⁰ *State of Punjab v. Prem Sagar*, (2008) 7 SCC 550, 558.

⁹¹ Committee on Reforms of Criminal Justice System (Malimath Committee), Report 128-35 (2003); Expert Committee on Prison Reforms (Madhava Menon Committee), Report 87-92 (2007).

⁹² *State of Punjab*, (2008) 7 SCC at 558.

⁹³ *Manoj v. State of Madhya Pradesh*, (2022) 4 SCC 1.

⁹⁴ *Id.* at 18-21.

in *Manoj Pratap Singh v. State of Rajasthan* bypassed these requirements.⁹⁵ Such inconsistency undermines public confidence and reinforces perceptions of arbitrariness.⁹⁶

COMPARATIVE PERSPECTIVES

United Kingdom: Abolition and Rehabilitation

The United Kingdom abolished capital punishment through the Murder (Abolition of Death Penalty) Act 1965, implemented despite majority public support for retention.⁹⁷ Abolition followed Parliamentary debates emphasizing wrongful executions (Timothy Evans, Derek Bentley cases), ineffectiveness as deterrent, and state's ethical inability to take life.⁹⁸ British sentencing policy emphasizes rehabilitation and proportionality.⁹⁹ Life sentences with minimum terms allow individualized assessment of reformation and public safety.¹⁰⁰ The European Convention on Human Rights prohibits death penalty under Protocol 13, regarding capital punishment as inhuman and degrading treatment incompatible with human dignity.¹⁰¹

United States: Constitutional Proportionality

The United States presents a complex picture with federal system allowing state-level variations.¹⁰² The Supreme Court's Eighth Amendment jurisprudence establishes proportionality as central requirement, holding punishments must not be "cruel and unusual."¹⁰³ In *Furman v. Georgia* (1972), the Court struck down arbitrary death penalty statutes, leading states to adopt guided discretion systems.¹⁰⁴

Subsequent decisions refined proportionality doctrine.¹⁰⁵ *Coker v. Georgia* (1977) held death penalty disproportionate for rape not resulting in death,¹⁰⁶ and *Kennedy v. Louisiana* (2008) extended this principle to child rape.¹⁰⁷ These rulings establish that capital punishment should be reserved for homicidal crimes, recognizing life's irreversible nature distinguishes

⁹⁵ *Manoj Pratap Singh v. State of Rajasthan*, (2022) 10 SCC 581.

⁹⁶ *Chhannu Lal Verma v. State of Chhattisgarh*, (2019) 8 SCC 464, 472.

⁹⁷ Murder (Abolition of Death Penalty) Act 1965, c. 71 (U.K.).

⁹⁸ Death Penalty Project, The Abolition of the Death Penalty in the United Kingdom: 50 Years On 15-22 (2015).

⁹⁹ *Id.* at 23-28.

¹⁰⁰ *Id.*

¹⁰¹ European Convention on Human Rights Protocol No. 13, May 3, 2002, E.T.S. No. 187, art. 1.

¹⁰² *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972).

¹⁰³ U.S. Const. amend. VIII.

¹⁰⁴ *Furman*, 408 U.S. at 239-40.

¹⁰⁵ *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

¹⁰⁶ *Id.* at 598-600.

¹⁰⁷ *Kennedy v. Louisiana*, 554 U.S. 407, 446-47 (2008).

murder from other offenses.¹⁰⁸ American experience demonstrates that guided discretion systems theoretically structure sentencing, yet racial and socioeconomic disparities persist.¹⁰⁹

South Africa: Transformative Constitutionalism

South Africa's Constitutional Court abolished death penalty in *S v. Makwanyane* (1995) shortly after apartheid's end.¹¹⁰ The Court held that capital punishment violated constitutional rights to life, dignity, and freedom from cruel punishment.¹¹¹ Justice Chaskalson's judgment emphasized that death penalty is irreversible, making errors irreparable; inherently arbitrary despite procedural safeguards; fails as deterrent; and incompatible with transformative constitutional values.¹¹² South Africa's abolitionist stance reflects commitment to *ubuntu* (humanity toward others) and restorative principles over retribution.¹¹³

Global Trends

Globally, 144 countries are abolitionist in law or practice, with only 55 retentionist countries.¹¹⁴ International human rights instruments including the International Covenant on Civil and Political Rights (ICCPR) Second Optional Protocol advocate abolition.¹¹⁵ This abolitionist momentum reflects growing consensus that state-sanctioned killing violates fundamental human dignity regardless of crime gravity.¹¹⁶

CRITICAL ANALYSIS

Doctrinal Incoherence

The “rarest of rare” doctrine, though conceptually sound, suffers from inherent vagueness rendering consistent application impossible.¹¹⁷ Justice Bhagwati’s dissent in *Bachan Singh* correctly predicted that subjective judicial philosophy would dominate, producing arbitrary outcomes.¹¹⁸ Four decades of jurisprudence validate this concern—no objective standard

¹⁰⁸ *Id.*

¹⁰⁹ Roger Hood & Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* 234-48 (5th ed. 2015).

¹¹⁰ *S v. Makwanyane*, 1995(3) SA 391 (CC) (S. Afr.).

¹¹¹ *Id.* para. 146.

¹¹² *Id.* paras. 83-95.

¹¹³ *Id.* para. 111.

¹¹⁴ Roger Hood & Carolyn Hoyle, *supra* note 107, at 11-13.

¹¹⁵ International Covenant on Civil and Political Rights Second Optional Protocol, G.A. Res. 44/128, U.N. Doc. A/RES/44/128 (Dec. 15, 1989).

¹¹⁶ Roger Hood & Carolyn Hoyle, *supra* note 107, at 11-13.

¹¹⁷ *Bachan Singh*, (1980) 2 SCC at 747 (Bhagwati, J., dissenting).

¹¹⁸ *Id.*

distinguishes “rarest of rare” from merely “rare” cases.¹¹⁹

Machhi Singh’s categorical approach contradicted *Bachan Singh*’s individualized sentencing mandate, creating confusion about whether crime categories or individual circumstances should predominate.¹²⁰ Subsequent decisions oscillate between these approaches without principled resolution.¹²¹ The Supreme Court’s acknowledgment in *Chhannu Lal Verma v. State of Chhattisgarh* that death sentences are “arbitrarily and freakishly imposed” constitutes judicial admission of systemic failure.¹²²

Procedural Inadequacy and Fair Trial Deficits

Empirical evidence demonstrates widespread procedural violations undermining fair trial guarantees.¹²³ Same-day sentencing without bifurcated hearings, inadequate consideration of mitigating evidence, perfunctory application of balance sheet methodology, and socioeconomic biases affecting access to effective legal representation systematically compromise sentencing integrity.¹²⁴ Without statutory mandates, judicial guidelines remain precatory, vulnerable to being honored in breach.¹²⁵

Constitutional Morality Versus Popular Sentiment

Constitutional morality demands that criminal justice be guided by reasoned principles rather than majoritarian anger.¹²⁶ However, populist punitivism, amplified by media trials, increasingly drives sentencing outcomes.¹²⁷ Courts face pressure to respond to societal outrage by awarding death penalties, transforming sentencing into symbolic gesture rather than individualized assessment.¹²⁸ When courts invoke “collective conscience” as sentencing justification, they risk substituting mob sentiment for constitutional reasoning.¹²⁹

Reformative Deficit

India’s theoretical commitment to reformative justice diminishes significantly for serious

¹¹⁹ Piyush Verma, *supra* note 44, at 6-8.

¹²⁰ *Machhi Singh*, (1983) 3 SCC at 488-89.

¹²¹ Anup Surendranath, *supra* note 11, at 70-72.

¹²² *Chhannu Lal Verma*, (2019) 8 SCC at 472.

¹²³ Project 39A, *supra* note 62, at 32-35.

¹²⁴ *Id.*

¹²⁵ Anup Surendranath, *supra* note 11, at 78-81.

¹²⁶ Navtej Singh Johar, (2018) 10 SCC at 136-38.

¹²⁷ Anup Surendranath, *supra* note 11, at 52-55.

¹²⁸ *Id.*

¹²⁹ *Id.* at 54-56.

crimes like rape and murder.¹³⁰ Imprisonment conditions rarely facilitate genuine reformation.¹³¹ Overcrowded prisons (capacity 433,033; population 573,220 as of 2022), inadequate rehabilitative programs, and prolonged pre-trial detention undermine reformative potential.¹³² Even for death row convicts, prolonged incarceration offers no reformative intervention, converting imprisonment into prolonged torture awaiting execution.¹³³

Victim- Centric Justice: Incomplete Transformation

While legislative reforms enhanced victim rights, implementation remains inadequate.¹³⁴ Victim compensation schemes suffer from low awareness, bureaucratic hurdles, insufficient funding, delayed disbursements, and inadequate amounts.¹³⁵ More fundamentally, criminal justice's retributive focus provides limited healing for victims.¹³⁶ Punishment of offenders does not restore what was lost or address trauma.¹³⁷ Restorative approaches emphasizing dialogue, acknowledgment, reparation, and community support could better serve victim interests, yet remain marginal in Indian practice.¹³⁸

RECOMMENDATIONS

Establishment of Sentencing Commission

Parliament should enact a Sentencing Act establishing independent Sentencing Commission comprising retired Supreme Court judges, legal scholars, criminologists, and social scientists.¹³⁹ The Commission should formulate presumptive sentencing guidelines providing structured frameworks for determining appropriate sentences while preserving judicial discretion for exceptional circumstances.¹⁴⁰

Sentencing guidelines should specify: categorical ranking of offense seriousness; presumptive sentencing ranges; comprehensive list of aggravating and mitigating factors with relative weightings; mandatory procedural requirements for sentencing hearings; appellate

¹³⁰ National Crime Records Bureau, *supra* note 24, at 45-67.

¹³¹ *Id.*

¹³² *Id.* at 12-15.

¹³³ Sunil Batra v. Delhi Administration, (1980) 3 SCC 488, 514-16.

¹³⁴ Ankush Shivaji Gaikwad, (2013) 6 SCC at 780-81.

¹³⁵ *Id.*

¹³⁶ Howard Zehr, *supra* note 25, at 181-95.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Committee on Reforms of Criminal Justice System (Malimath Committee), *supra* note 89, at 128-35

¹⁴⁰ *Id.*

review standards; and periodic revision mechanisms based on empirical data.¹⁴¹ This approach reduces arbitrariness while maintaining flexibility for individualized justice.¹⁴²

Procedural Reforms

Statutory amendments should mandate: minimum 30-day gap between conviction and sentencing hearing; comprehensive pre-sentence investigation reports covering offender's social background, mental health, criminal history, employment, and family circumstances; mandatory consideration of psychiatric evaluations, probation officer reports, and victim impact statements; recorded reasons for each aggravating and mitigating factor accepted or rejected; and enhanced legal aid provisions ensuring competent representation at sentencing phase.¹⁴³

Appellate courts should adopt stringent standards for reviewing sentencing decisions, treating procedural violations as reversible errors rather than curable defects.¹⁴⁴ Death penalty cases warrant *de novo* sentencing review rather than mere correctness standard.¹⁴⁵

Victim Rehabilitation and Restorative Justice

Comprehensive victim rehabilitation frameworks should include: enhanced compensation amounts indexed to inflation and actual harm; streamlined disbursement procedures with strict timelines; psychological counseling and trauma therapy; vocational training and employment assistance; medical treatment including reconstructive procedures; legal assistance beyond criminal proceedings; and long-term support services.¹⁴⁶

Restorative justice pilots should be implemented for appropriate offense categories, particularly juvenile crimes, first-time offenders, and cases where victims desire direct engagement.¹⁴⁷ Victim-offender mediation, family group conferencing, and community-based reintegration programs should supplement rather than replace criminal proceedings, providing additional avenues for accountability and healing.¹⁴⁸

Reformative interventions in Prisons

¹⁴¹ *Id.* at 130-33.

¹⁴² *Id.*

¹⁴³ Manoj, (2022) 4 SCC at 18-21.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 21.

¹⁴⁶ Ankush Shivaji Gaikwad, (2013) 6 SCC at 780-81.

¹⁴⁷ Howard Zehr, *supra* note 25, at 181-95.

¹⁴⁸ *Id.*

Prison reforms should prioritize: infrastructure upgrades reducing overcrowding to international standards; comprehensive classification systems separating prisoners by offense severity, age, and reformation potential; individualized rehabilitation plans including education, vocational training, psychological counseling, and substance abuse treatment; prison staff training in rehabilitative approaches; earned remission incentives encouraging positive behavior; family visitation facilities maintaining social bonds; and pre- release preparation and post-release support.¹⁴⁹

Proportionality Review

The Supreme Court should develop explicit proportionality doctrine for capital sentencing, holding death penalty unconstitutional for non-homicidal crimes absent extraordinary circumstances.¹⁵⁰ Legislative amendments should eliminate mandatory death penalty provisions, ensuring all capital sentences result from individualized assessment.¹⁵¹

A comprehensive review of death penalty's continued validity should be undertaken by Constitution Bench considering: empirical evidence on deterrence effectiveness; inevitable arbitrariness despite procedural safeguards; socioeconomic disparities in application; global abolitionist momentum; constitutional morality principles; and availability of alternative sanctions (life imprisonment without parole) serving legitimate penological objectives.¹⁵² While immediate abolition may be politically unfeasible, moratorium on executions pending comprehensive review would provide space for informed debate and evidence-based policymaking.¹⁵³

Gender- Sensitive Reforms

Gender-neutral reform of sexual offense provisions should recognize all genders as potential victims while maintaining enhanced protections for particularly vulnerable groups.¹⁵⁴ Mandatory judicial training programs on gender sensitivity, trauma-informed practices, and implicit bias should be implemented.¹⁵⁵ Training should address: avoiding victim-blaming and character assassination; recognizing dynamics of sexual violence; maintaining

¹⁴⁹ Expert Committee on Prison Reforms (Madhava Menon Committee), *supra* note 89, at 87-92.

¹⁵⁰ *Kennedy v. Louisiana*, 554 U.S. at 446-47.

¹⁵¹ Bachan Singh, (1980) 2 SCC at 720.

¹⁵² Carolyn Hoyle, *Efforts Towards Abolition of the Death Penalty: Challenges and Prospects*, in The Oxford Handbook of the Death Penalty 567-82 (2023).

¹⁵³ *Id.*

¹⁵⁴ NALSA, (2014) 5 SCC at 455-58.

¹⁵⁵ Supreme Court of India, Handbook on Combating Gender Stereotypes 5-7 (2023).

procedural fairness for accused; effective cross-examination without re-traumatization; and dignified courtroom language and conduct.¹⁵⁶

Curbing Media Trials

Contempt of court provisions should be effectively enforced against media outlets conducting pre-trial publicity prejudicing fair trial rights.¹⁵⁷ Guidelines should balance press freedom with judicial independence, prohibiting prejudicial reporting until verdict while permitting post-conviction analysis.¹⁵⁸ Public legal education initiatives should enhance understanding of criminal justice principles, due process importance, and dangers of mob justice.¹⁵⁹

Institutional Capacity Building

Specialized training for judges, prosecutors, and defense counsel on death penalty and sexual offense litigation should be mandatory.¹⁶⁰ National Judicial Academy and State Judicial Academies should develop comprehensive curricula incorporating international best practices, constitutional jurisprudence, and empirical research.¹⁶¹ Legal aid systems require substantial strengthening through enhanced budgets, better compensation attracting competent advocates, specialized panels for capital cases, and quality assurance mechanisms.¹⁶²

CONCLUSION

India's criminal justice system stands at a critical juncture where theoretical commitments to fairness, dignity, and reformation confront practical realities of public outrage, media pressure, and resource constraints.¹⁶³ Current frameworks, despite constitutional soundness and judicial pronouncements affirming balanced approaches, suffer from implementation gaps producing arbitrary, inconsistent, and occasionally unjust outcomes.¹⁶⁴

The “rarest of rare” doctrine has proven unworkable in practice, leading to what Justice

¹⁵⁶ *Id.* at 12-18.

¹⁵⁷ *State of Maharashtra v. Rajendra Javaliba*, (1999) 2 SCC at 456.

¹⁵⁸ *Id.*

¹⁵⁹ Anup Surendranath, *supra* note 11, at 85-87.

¹⁶⁰ Expert Committee on Prison Reforms (Madhava Menon Committee), *supra* note 89, at 95-98.

¹⁶¹ *Id.*

¹⁶² *Id.* at 102-05.

¹⁶³ *Bachan Singh*, (1980) 2 SCC at 747 (Bhagwati, J., dissenting).

¹⁶⁴ Piyush Verma, *supra* note 44, at 5-8.

Bhagwati presciently termed “unguided standardless discretion.”¹⁶⁵ Populist punitivism, amplified by media trials, increasingly displaces principled adjudication with performative justice responding to public outcry rather than constitutional reasoning.¹⁶⁶ The tension between victim rights and accused rights, while often portrayed as zero-sum, actually requires nuanced balancing recognizing legitimate interests of both.¹⁶⁷

Comparative analysis demonstrates that global trends favor abolition of capital punishment and emphasis on rehabilitation over retribution.¹⁶⁸ The United Kingdom’s Parliamentary leadership in abolition despite public opposition, the United States’ evolving proportionality jurisprudence, and South Africa’s transformative constitutional approach each offer valuable insights.¹⁶⁹ While direct transplantation of foreign models faces contextual challenges, underlying principles—dignity, proportionality, procedural fairness, and evidence-based policymaking—have universal applicability.¹⁷⁰

The path forward requires courage: legislative courage to enact sentencing guidelines constraining arbitrariness; judicial courage to resist populist pressures and apply constitutional principles consistently; executive courage to invest in rehabilitation infrastructure and victim support systems; and societal courage to engage in mature debate about punishment purposes transcending retributive impulses.¹⁷¹

Ultimately, the goal must be a criminal justice system that acknowledges crime’s grievous harm to victims and society while recognizing offenders’ human dignity and reformation potential.¹⁷² Punishment should serve legitimate purposes—public safety, accountability, victim vindication—without degenerating into vengeance or spectacle.¹⁷³ The Constitution’s promise of justice, liberty, equality, and dignity demands nothing less.¹⁷⁴

¹⁶⁵ Bachan Singh, (1980) 2 SCC at 747 (Bhagwati, J., dissenting).

¹⁶⁶ Anup Surendranath, *supra* note 11, at 52-55.

¹⁶⁷ Mofil Khan, (2021) 2 SCC at 489.

¹⁶⁸ Roger Hood & Carolyn Hoyle, *supra* note 107, at 11-13.

¹⁶⁹ *Id.* at 234-67.

¹⁷⁰ *Id.*

¹⁷¹ Committee on Reforms of Criminal Justice System (Malimath Committee), *supra* note 89, at 128-35.

¹⁷² India Const. art. 21.

¹⁷³ Navtej Singh Johar, (2018) 10 SCC at 136-38.

¹⁷⁴ India Const. pmbl.

As Mahatma Gandhi observed, “An eye for an eye will make the whole world blind.”¹⁷⁵ This wisdom, central to India’s independence movement, should guide contemporary criminal justice philosophy.¹⁷⁶ Retribution has its place in acknowledging harm and affirming societal values, but must be tempered by reformation recognizing human capacity for change and constitutional morality prioritizing dignity over vengeance.¹⁷⁷



¹⁷⁵ Mahatma Gandhi, *An Autobiography: The Story of My Experiments with Truth* 276 (Mahadev Desai trans., Beacon Press 1957) (1927).

¹⁷⁶ *Id.*

¹⁷⁷ Navtej Singh Johar, (2018) 10 SCC at 136-38.