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Capital Punishment in India: A Critical Analysis of the “Rarest of Rare” Doctrine, Judicial Sentencing and the President’s Clemency Power under Article 72

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ABSTRACT

Capital punishment is the most irreversible form of State power and therefore demands an unusually reliable legal process. This article examines the Indian death-penalty framework through the connected questions of the “rarest of rare” doctrine, individualised judicial sentencing and presidential clemency under Article 72 of the Constitution. It uses doctrinal and analytical research, examining the Constitution, the Bharatiya Nyaya Sanhita, 2023, the Bharatiya Nagarik Suraksha Sanhita, 2023, leading Supreme Court decisions, Law Commission reports, international standards and empirical scholarship on death-row prisoners. The analysis finds that Indian law formally treats life imprisonment as the rule and death as the exception, but that the application of broad expressions such as “collective conscience” and “exceptional depravity” has produced avoidable uncertainty. The principal weakness is not the absence of safeguards on paper, but the uneven quality of mitigation investigation and sentencing reasoning. Courts may possess detailed evidence concerning the offence while lacking reliable information about poverty, childhood trauma, mental health, intellectual disability, prison conduct and prospects of reform. Article 72 remains an essential constitutional safety valve, yet delay, incomplete records, inadequate representation and limited transparency can undermine its corrective function. The article argues for a structured mitigation protocol, specialised defence assistance, reasoned appellate scrutiny, complete clemency records and accountable timelines. It concludes that the legitimacy of retention cannot be separated from the fairness, consistency and dignity-protective operation of every stage preceding execution.

Keywords: Capital Punishment, Rarest of Rare Doctrine, Judicial Sentencing, Mitigation, Article 72, Presidential Clemency, Human Dignity

I. INTRODUCTION

Capital punishment presents a constitutional problem that ordinary sentencing does not. The State claims authority to punish the most serious crimes, but the punishment selected is final

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even if the conviction or the sentence is later shown to be wrong. The question is therefore not only whether a particular offence is grave. It is whether a fallible criminal justice system can identify, with principled consistency, the small class of cases in which imprisonment is unquestionably inadequate, and whether it can do so without allowing public anger, social status or unequal access to legal assistance to determine who lives and who dies.

India retains capital punishment while constitutionally restricting its use. The Bharatiya Nyaya Sanhita, 2023 (“BNS”) continues to make death an alternative punishment for murder and for several other offences. The Bharatiya Nagarik Suraksha Sanhita, 2023 (“BNSS”) requires a separate hearing on sentence, special reasons for imposing death and confirmation by the High Court. Articles 14 and 21 of the Constitution add requirements of equality, fairness and non-arbitrariness. Article 72 gives the President the power to pardon, commute, remit or suspend a sentence of death. These safeguards operate sequentially, but their existence does not guarantee their meaningful application.

The literature identifies three persistent concerns. First, the “rarest of rare” doctrine does not supply a mechanical definition of rarity. Second, sentencing remains vulnerable to crime-centred reasoning when courts lack an adequate record about the offender and the possibility of reform. Third, executive clemency can be impaired by delay and incomplete consideration even though it is designed to correct exceptional injustice. This article connects these concerns and argues that the constitutional legitimacy of retention depends upon institutional reliability at every stage. It first outlines the conceptual and policy foundations of capital punishment, and then examines the statutory and constitutional framework, the judicial development of the doctrine, Article 72, and the reforms necessary to reduce arbitrariness.

II. RESEARCH METHODOLOGY AND CONCEPTUAL FRAMEWORK

This is a doctrinal and analytical study. Its primary materials are the Constitution of India, the BNS, the BNSS, selected special statutes, reported decisions of the Supreme Court, Law Commission reports and relevant international instruments.¹ Secondary materials include books, journal scholarship and empirical studies concerning capital sentencing and the socio-economic circumstances of death-row prisoners.² The method is comparative within Indian precedent: cases are read according to their treatment of aggravating circumstances, mitigation, reformation, proportionality and procedural fairness. The article does not claim to be a statistical survey of every capital case and does not rely on interviews or original fieldwork.

¹ International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171.

² DEATH PENALTY RESEARCH PROJECT, NATIONAL LAW UNIVERSITY, DELHI, DEATH PENALTY INDIA REPORT (2016).

Capital punishment is qualitatively different from imprisonment. Imprisonment unjustly imposed destroys liberty, but the conviction can in principle be reversed and release ordered. Execution removes the possibility of correction, rehabilitation and remorse. The irreversible character of the sanction means that procedural safeguards must be understood substantively. A hearing that exists only in form, counsel who lacks the time to investigate, or a mercy file that omits material mitigation may satisfy a checklist while failing the constitutional purpose of the safeguard.

Retentionist arguments generally rely on retribution, deterrence, incapacitation and the expressive claim that some offences demand the strongest condemnation. These arguments cannot be dismissed merely because they are politically unpopular. Yet the deterrence evidence remains contested, and retribution cannot by itself answer the equality and fallibility problems created by an irreversible punishment. Abolitionist analysis emphasises dignity, the possibility of wrongful conviction, discriminatory administration and the moral difficulty of authorising the State to kill. The decisive constitutional question is whether death is necessary and reliably administered when life imprisonment remains available.

III. CONSTITUTIONAL AND STATUTORY FRAMEWORK

Article 21 permits deprivation of life only by a procedure established by law, but after *Maneka Gandhi v. Union of India* that procedure must be just, fair and reasonable.³ Article 14 requires that discretion be guided by relevant and consistent standards.⁴ A statute authorising death therefore does not make every eligible offence a death case. The sentencing court must explain why the particular offender and the particular offence cross the constitutional threshold.

In *Jagmohan Singh v. State of Uttar Pradesh*, the Supreme Court upheld the constitutional validity of capital punishment.⁵ *Bachan Singh v. State of Punjab* later supplied the controlling limitation: life imprisonment is the ordinary rule, death is an exception, and death may be imposed only in the “rarest of rare” cases when the alternative option is unquestionably foreclosed.⁶ The constitutional compromise depends upon individualised consideration of both the crime and the offender. *Mithu v. State of Punjab* confirms the same principle negatively: a mandatory death sentence is invalid because it prevents consideration of individual circumstances.⁷

³ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (India).

⁴ INDIA CONST. arts. 14, 21; see *Maneka Gandhi v. Union of India*, *supra* note 3.

⁵ *Jagmohan Singh v. State of Uttar Pradesh*, (1973) 1 SCC 20 (India).

⁶ *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 (India).

⁷ *Mithu v. State of Punjab*, (1983) 2 SCC 277 (India).

The BNS makes death an alternative punishment for murder under section 103 and for other specified offences, including certain aggravated sexual offences, terrorism-related offences, organised crime resulting in death, waging war against the Government of India and murder committed in the course of dacoity. Section 104 preserves a choice between death and imprisonment for the remainder of natural life where murder is committed by a person already under sentence of imprisonment for life.⁸ Special statutes, including the Unlawful Activities (Prevention) Act, 1967, the Protection of Children from Sexual Offences Act, 2012 and the Narcotic Drugs and Psychotropic Substances Act, 1985, also retain a discretionary capital punishment.⁹ The statutory field is broad, but eligibility is not selection.

The BNSS requires the accused to be heard on sentence and requires special reasons where death is imposed. The High Court must confirm a Sessions Court death sentence before it is executed, and appeal, review and curative jurisdiction provide further judicial safeguards. Section 456 of the BNSS requires the High Court to commute the sentence where a woman sentenced to death is found to be pregnant.¹⁰ In *Mohd. Arif v. Registrar, Supreme Court of India*, the Court required an oral hearing in review petitions involving a sentence of death.¹¹ These safeguards reflect the principle that capital sentencing is a distinct constitutional phase, not a routine consequence of conviction.

The sentencing hearing must obtain information that the trial on guilt may not reveal: age, upbringing, poverty, education, trauma, mental health, intellectual disability, family circumstances, prior conduct, prison behaviour and capacity for reform. *Santa Singh v. State of Punjab*¹² and *Allauddin Mian v. State of Bihar*¹³ make clear that the hearing cannot be an empty formality. *Manoj v. State of Madhya Pradesh* further emphasises social-history, probation, psychological and prison material.¹⁴ Without such information, the court risks treating the absence of mitigation evidence as proof that mitigation does not exist.

IV. THE “RAREST OF RARE” DOCTRINE AND JUDICIAL SENTENCING

Bachan Singh requires a balancing of aggravating and mitigating circumstances and a finding that life imprisonment is unquestionably foreclosed. It does not authorise death merely because a murder is horrifying. The offender’s circumstances and the possibility of reformation remain

⁸ Bharatiya Nyaya Sanhita, 2023, §§ 65(2), 66, 70(2), 71, 103, 104, 111(2)(a), 113(2)(a), 147, 310(3).

⁹ Unlawful Activities (Prevention) Act, 1967, § 16(1)(a); Protection of Children from Sexual Offences Act, 2012, § 6 (as amended in 2019); Narcotic Drugs and Psychotropic Substances Act, 1985, § 31A.

¹⁰ Bharatiya Nagarik Suraksha Sanhita, 2023, §§ 258(2), 393(3), 407–412, 415(2), 453–456.

¹¹ *Mohd. Arif v. Registrar, Supreme Court of India*, (2014) 9 SCC 737 (India).

¹² *Santa Singh v. State of Punjab*, (1976) 4 SCC 190 (India).

¹³ *Allauddin Mian v. State of Bihar*, (1989) 3 SCC 5 (India).

¹⁴ *Manoj v. State of Madhya Pradesh*, (2023) 2 SCC 353 (India).

central. The doctrine's strength lies in its insistence upon restraint; its weakness lies in the absence of a sufficiently structured method for applying that restraint.

Machhi Singh v. State of Punjab attempted to operationalise *Bachan Singh* by identifying categories concerning the manner in which the murder was committed, its motive, its anti-social or socially abhorrent nature, its magnitude and the personality of the victim.¹⁵ These categories assisted courts in describing exceptional cases, but they also encouraged a focus on the spectacle of the crime. Expressions such as the shocking of the "collective conscience of the community," and appeals to society's demand for justice, may explain why an offence attracts public condemnation, but they do not demonstrate that the individual offender cannot be reformed. Public sentiment may be relevant to the social context of punishment, yet it cannot substitute for constitutional reasoning.

Later decisions exposed deviations from the balancing approach. In *Ravji alias Ram Chandra v. State of Rajasthan*, the Court reasoned that it is the nature and gravity of the crime, rather than the circumstances of the criminal, that is germane to the choice of sentence; that reasoning, and the decisions which followed it, were later held to be *per incuriam* of *Bachan Singh*.¹⁶ *Aloke Nath Dutta v. State of West Bengal*, *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* and *Mohd. Farooq Abdul Gafur v. State of Maharashtra* restored attention to the offender and to the need to determine whether life imprisonment is genuinely inadequate.¹⁷ *Sangeet v. State of Haryana* observed that the balance-sheet approach wrongly compares aggravating circumstances pertaining to the crime with mitigating circumstances pertaining to the criminal, which are distinct elements that cannot be compared with one another, and that the *Bachan Singh* threshold had been most variedly and inconsistently applied,¹⁸ while *Shankar Kisanrao Khade v. State of Maharashtra* replaced the balancing exercise with three cumulative tests: the crime test, the criminal test, which requires that no mitigating circumstance favour the accused, and a rarest-of-rare test that the Court described as society-centric rather than judge-centric.¹⁹

The most important contemporary development is the movement from abstract mitigation to evidential mitigation. Reformation cannot be assessed responsibly from counsel's last-minute

¹⁵ *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470 (India).

¹⁶ *Ravji alias Ram Chandra v. State of Rajasthan*, (1996) 2 SCC 175 (India); held *per incuriam* of *Bachan Singh*, along with the decisions which followed it, in *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498 (India).

¹⁷ *Aloke Nath Dutta v. State of West Bengal*, (2007) 12 SCC 230 (India); *Bariyar*, *supra* note 16; *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641 (India).

¹⁸ *Sangeet v. State of Haryana*, (2013) 2 SCC 452 (India).

¹⁹ *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546 (India).

submission or from the mere fact of conviction. It requires a social investigation and, where relevant, a professional assessment. Prison conduct can be relevant, but it must be interpreted carefully; good conduct should not be treated as a prerequisite for dignity. Mental illness, intellectual disability and the effects of prolonged incarceration may affect both culpability and the humanity of execution. A reliable sentencing record also demands competent and adequately funded defence representation.

The creation of a special category of imprisonment for the remainder of natural life, recognised in *Swamy Shraddananda (2) v. State of Karnataka*²⁰ and affirmed in *Union of India v. V. Sriharan*,²¹ offers an intermediate response where ordinary remission is considered inadequate but death is not justified. It may reduce the pressure to use death as the only available expression of condemnation. However, it must not become a disguised form of hopeless punishment. Sentencing must remain connected with proportionality, reform and the constitutional commitment to human dignity.

The central doctrinal conclusion is that “rarity” must be offender-sensitive. A case cannot become rare solely because the crime is brutal, the victim is vulnerable or public attention is intense. The court should record, separately and concretely, the aggravating circumstances, the mitigating circumstances, the evidence of reformation and the reasons for which life imprisonment is foreclosed. This structure would not eliminate discretion, but it would make discretion reviewable and reduce inconsistent outcomes.

V. PRESIDENTIAL CLEMENCY UNDER ARTICLE 72

Article 72 authorises the President to grant pardons, reprieves, respites and remissions, or to suspend, remit or commute sentences, in cases involving a court martial, offences within the Union executive field and all sentences of death. The power is exercised on the aid and advice of the Council of Ministers under Article 74. It is not an appellate jurisdiction and does not duplicate the judicial process. Its constitutional purpose is to permit consideration of mercy, public interest and supervening circumstances that may not have been fully addressed in adjudication.

In *Maru Ram v. Union of India*²² and *Kehar Singh v. Union of India*,²³ the Supreme Court explained that clemency is a constitutional power and not a private act of grace. The executive may examine the record and the relevant circumstances, but the power is not beyond review.

²⁰ *Swamy Shraddananda (2) v. State of Karnataka*, (2008) 13 SCC 767 (India).

²¹ *Union of India v. V. Sriharan*, (2016) 7 SCC 1 (India).

²² *Maru Ram v. Union of India*, (1981) 1 SCC 107 (India).

²³ *Kehar Singh v. Union of India*, (1989) 1 SCC 204 (India).

Epuru Sudhakar v. Government of Andhra Pradesh confirms that clemency may be judicially reviewed on limited grounds such as *mala fides*, irrelevant considerations, non-application of mind, arbitrariness or a failure to consider relevant material.²⁴ Courts do not ordinarily substitute their own view of mercy; they ensure that constitutional decision-making has occurred.

Delay is a particularly serious issue in death cases. In *Shatrughan Chauhan v. Union of India*, the Court recognised that unexplained or excessive delay, considered together with the prisoner's mental condition and the surrounding circumstances, may justify commutation.²⁵ The punishment is not only the execution at the end of the process; years of uncertainty, isolation and anticipation can produce severe psychological suffering. Delay attributable to the prisoner cannot be assessed in the same way as unexplained administrative delay. The relevant inquiry must be fact-sensitive and must examine the entire record.

A meaningful mercy process requires a complete file. It should include the judgment, the appellate and review orders, mitigation material, prison conduct, medical and psychological reports, family circumstances, legal representations and any new developments. The condemned person must receive legal assistance and a genuine opportunity to make a representation. The BNSS now provides a statutory procedure for mercy petitions, including timelines for filing and for the transmission of records and comments.²⁶ The statutory framework is valuable, but timelines should operate as accountability standards rather than as a reason to reject a petition mechanically.

Transparency must be balanced with institutional confidentiality. The executive need not publish every internal deliberation, but the decision should demonstrate that the relevant materials were placed before the competent authority and considered. A concise statement of reasons would improve public confidence and permit limited judicial review without converting Article 72 into an appeal. Where the decision is set aside, the reconsideration must be genuine and not a ritual repetition of the earlier file.

VI. FINDINGS AND RECOMMENDATIONS

The first finding is that Indian law contains a substantial network of safeguards, but that the safeguards are unevenly implemented. The most serious gap is the difference between a formal sentencing hearing and an informed sentencing inquiry. Courts cannot decide that reform is impossible without evidence capable of supporting that conclusion.

²⁴ *Epuru Sudhakar v. Government of Andhra Pradesh*, (2006) 8 SCC 161 (India).

²⁵ *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1 (India).

²⁶ Bharatiya Nagarik Suraksha Sanhita, 2023, § 472.

Second, crime-centred language remains a source of inconsistency. The seriousness of the offence is indispensable, but “collective conscience,” brutality and victim impact should not displace the analysis of the offender. The third finding is that socio-economic disadvantage can affect the quality of investigation, defence, expert evidence and clemency representation. Formal equality is insufficient where capital litigation is resource-intensive and legal aid is intermittent.

A structured mitigation protocol should therefore be mandatory from the early stage of a capital prosecution. It should require a defence-led social investigation, the collection of educational and medical records, an assessment of mental and intellectual functioning, family interviews, prison reports and a reasoned assessment of reformation. Courts should identify on the record the material considered and the material unavailable. The State should maintain specialised capital-defence panels with adequate remuneration and continuity through appeal and clemency.

Every death judgment should use a clear sequence: aggravating circumstances, mitigating circumstances, evidence of reform, proportionality, and the reasons for which life imprisonment is foreclosed. High Courts should independently audit compliance rather than treating confirmation as a procedural formality. Review courts should be especially attentive to omitted mitigation and unreliable sentencing records. The intermediate whole-life option should be used cautiously and with clear consideration of remission and rehabilitation.

The mercy process should have a complete and standardised record, fixed administrative responsibility, reasonable timelines and legal assistance. The decision should briefly identify the relevant constitutional and factual considerations. Delay should be monitored institutionally, and unexplained delay should trigger prompt review. Prison conditions, solitary confinement, mental illness and family access should be treated as constitutional matters throughout the process. These reforms do not resolve the fundamental abolitionist objection, but they are necessary while capital punishment remains in law.

The historical movement from a formal preference for death to a presumption in favour of life imprisonment is important to the present constitutional analysis. The amendment of section 367(5) of the Code of Criminal Procedure, 1898 by the Code of Criminal Procedure (Amendment) Act, 1955, which removed the requirement that a court record its reasons for not awarding death, displaced the colonial assumption that death should ordinarily follow conviction for a capital offence. The later requirement of “special reasons” under the 1973 Code, continued in section 393(3) of the BNSS, reversed the starting point: the court must

justify the exceptional punishment, not explain why it chose life.²⁷ This allocation of the responsibility to give reasons matters because an irreversible sentence cannot be sustained by silence, formulaic language or a bare description of the crime.

The constitutional history also shows why retention cannot be assessed only by examining the text of the penal provisions. In the early period, sentencing discretion was treated as part of the ordinary judicial process. The post-*Maneka* understanding of Article 21, however, requires a fair and reasonable procedure, and Article 14 demands protection against arbitrary differentiation. Capital sentencing consequently involves a heightened form of proportionality review. The court must identify the legitimate penal purpose served by the sentence, explain why a lesser punishment cannot achieve that purpose, and demonstrate that the decision is based on reliable information about the individual before it.

A further difficulty arises from the relationship between legislative expansion and constitutional restriction. Parliament has made death available for offences involving aggravated sexual violence, terrorism, organised crime, false evidence resulting in an execution and other exceptional conduct. The existence of several capital provisions may communicate strong condemnation, but it also increases the need for a common sentencing discipline. If each statutory offence develops its own vocabulary of exceptionalism, similarly situated offenders may receive different outcomes. The “rarest of rare” limitation must therefore operate across offence categories, subject to the statutory elements of the offence, rather than becoming a separate and variable test for each legislative field.²⁸

The practical reliability of sentencing depends on the timing and quality of the mitigation investigation. A defence lawyer appointed immediately before sentencing may be unable to obtain school records, medical histories, family testimony or expert assessments. Poverty often makes the problem invisible: the absence of documents is treated as the absence of a relevant history. A court that wishes to make an informed decision should permit reasonable time after conviction, direct the collection of a social investigation report and ensure that the accused can respond to adverse material. The prosecution should also disclose information bearing on mental condition, age, vulnerability and prison conduct. These measures protect accuracy without converting mitigation into an excuse for the offence.

²⁷ Code of Criminal Procedure (Amendment) Act, 1955 (Act 26 of 1955) (omitting from § 367(5) of the Code of Criminal Procedure, 1898 the requirement that a court record its reasons for not awarding the sentence of death); Code of Criminal Procedure, 1973, § 354(3); Bharatiya Nagarik Suraksha Sanhita, 2023, § 393(3).

²⁸ See Bharatiya Nyaya Sanhita, 2023, §§ 4(a), 65(2), 66, 70(2), 71, 103–104, 107, 109(2), 111(2)(a), 113(2)(a), 147, 230(2), 232(2), 310(3); Bharatiya Nagarik Suraksha Sanhita, 2023, § 393(3).

The offender-focused inquiry must remain distinct from an assessment of public sympathy. Mitigation is not confined to extraordinary personal tragedy. It includes any circumstance that bears on culpability, capacity, moral choice, mental condition, vulnerability, prospects of reform or the proportionality of the sentence. A person may be responsible for a grave offence and still not meet the constitutional threshold for execution. The discipline of separating aggravation from mitigation helps prevent the emotional force of the offence from overwhelming the legally required inquiry into the person who is to be punished.²⁹

Trial-court reasoning deserves particular attention because most capital sentencing is initiated there. Appellate courts may correct an inadequate sentence, but appellate review is constrained by the record created at trial. If the first court does not investigate mitigation, later courts may face an evidentiary vacuum and may unconsciously rely on the prosecution's account of the offence. High Court confirmation should therefore examine not only whether the judgment contains the words "rarest of rare," but also whether the sentencing court actually tested the alternative of life imprisonment against a developed factual record. Confirmation is strongest when it operates as an independent evaluation rather than as a presumption that the trial court's conclusion is correct.

The clemency stage supplies a different, though complementary, form of constitutional protection. The President may consider developments after trial, the prisoner's conduct, mental illness, delay, family circumstances, public interest and material that was not effectively presented in court. This does not mean that Article 72 is an unstructured power to disregard judicial findings. It means that the executive must exercise its constitutional responsibility with a complete record and an attentive consideration of the circumstances that may make an execution unjust. Judicial review should remain limited, but limited review is meaningful only when the decision-making process is capable of being examined.

Delay must be analysed institutionally and individually. A long period may result from the prisoner's own litigation, from administrative inaction, from repeated transfers between departments or from a combination of causes. The relevant question is not a single numerical threshold but whether the State's conduct has subjected the prisoner to a form of prolonged and degrading uncertainty. The authority deciding mercy should record the chronology, identify responsibility for avoidable delay and consider the prisoner's mental and physical condition. Where delay has materially altered the human circumstances of the case, commutation may be necessary even if the original sentence was lawfully imposed.³⁰

²⁹ See *Manoj*, *supra* note 14; *Santa Singh*, *supra* note 12; *Allauddin Mian*, *supra* note 13.

³⁰ See *Shatrughan Chauhan*, *supra* note 25.

Transparency in mercy administration can be improved without disclosing every confidential exchange. A standard file should identify the judgments considered, the representations received, the medical and prison materials examined, the explanation for delay and the reasons supporting the final recommendation. A concise decision record would reduce the risk that a petition is rejected because a material document never reached the competent authority. It would also permit a reviewing court to distinguish a genuine exercise of constitutional judgment from a mechanical repetition of earlier recommendations. The same principles should inform gubernatorial clemency under Article 161, while respecting the separate constitutional roles of the Union and the States.

The reforms proposed here are compatible with both retentionist and abolitionist perspectives. A retentionist may regard them as necessary conditions for a constitutionally limited death penalty. An abolitionist may regard them as evidence that the system must continually add safeguards because no procedure can remove the risk of irreversible error. In either view, the minimum constitutional position is clear: death cannot be selected merely because the crime is shocking, the public demands severity or the offender is socially unpopular. The State must show disciplined reasoning, reliable information and a genuine consideration of life imprisonment.³¹

A final institutional safeguard should be a continuing review of capital-sentencing outcomes. Courts and law-enforcement agencies should maintain anonymised data on the use of death, commutation, acquittal, sentencing delays, legal representation and the consideration of mitigation. Such information would allow Parliament, the courts and legal-aid authorities to identify recurring disparities. It would also give substance to the constitutional promise of equal protection, which cannot be tested by doctrine alone. Empirical review should not replace judicial judgment; it should reveal whether the stated safeguards operate consistently for poor, marginalised and legally vulnerable accused persons.³²

Appellate confirmation should also examine the quality of the trial record. The High Court is not limited to asking whether the Sessions Court used the correct formula. It must consider whether the accused had a meaningful opportunity to present mitigation, whether the prosecution disclosed relevant material, whether expert evidence was necessary and whether the reasons for rejecting life imprisonment are intelligible. A judgment may be lengthy and still fail this standard if it repeats the facts of the crime but does not explain the offender's

³¹ See LAW COMMISSION OF INDIA, REPORT NO. 262, THE DEATH PENALTY (2015); International Covenant on Civil and Political Rights, *supra* note 1, art. 6.

³² See DEATH PENALTY INDIA REPORT, *supra* note 2.

circumstances. Confirmation is therefore a constitutional safeguard against both factual error and defective reasoning.³³

The same principle applies to review and curative proceedings. Because review in a death case may be the final judicial opportunity before executive consideration, an oral hearing is not a ceremonial addition. It allows counsel to identify omitted mitigation, inconsistent precedent, changes in mental condition or procedural defects that may not be apparent from a written petition. The extraordinary nature of curative jurisdiction should not be misunderstood as permission to ignore a substantial failure to conduct the sentencing inquiry required by Articles 14 and 21.³⁴

A reliable system must also distinguish between the legal validity of a conviction and the continuing justification for an execution. New evidence may not unsettle guilt but may materially affect sentence. Rehabilitation in prison, serious mental illness, intellectual disability, advanced age, prolonged delay or changed family circumstances may arise after trial. These developments explain why appellate review and Article 72 remain complementary rather than competing powers. The judicial process determines legality and sentence on the record; clemency permits constitutional consideration of later human circumstances and of the public interest.

This distinction supports a restrained understanding of finality. Finality is necessary for criminal justice, but it cannot mean that an irreversible punishment must proceed despite a materially changed constitutional position. The State's interest in enforcing judgments is strongest where the process is reliable and the sentence remains proportionate. Where the record reveals a serious procedural omission or supervening suffering, reconsideration protects rather than weakens the rule of law. It confirms that public power is exercised through accountable institutions and not through the momentum of an old decision.

VII. CONCLUSION

The Indian capital-punishment framework is constitutionally defensible only on the premise that death is exceptional, that sentencing is individualised and that every meaningful safeguard operates with heightened reliability. The “rarest of rare” doctrine in *Bachan Singh* places a demanding limit on judicial power, but its purpose is weakened when crime-centred language

³³ See Bharatiya Nagarik Suraksha Sanhita, 2023, §§ 407–412; *Allauddin Mian*, *supra* note 13.

³⁴ See *Mohd. Arif*, *supra* note 11; *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388 (India); *Vasanta Sampat Dupare v. Union of India*, 2025 INSC 1043 (India) (setting aside a sentence of death in a petition under Article 32 and directing a fresh sentencing hearing where the mitigation inquiry required by *Manoj* had not been conducted).

replaces a reasoned assessment of the offender and when mitigation is investigated only after the sentence has effectively been decided.

The BNS and the BNSS preserve death as an alternative punishment, not as an automatic consequence of conviction. Articles 14 and 21 require fair, non-arbitrary and dignity-conscious decision-making. High Court confirmation, appeal, review, curative jurisdiction and Article 72 provide successive opportunities to prevent an irreversible wrong. Yet legal design alone cannot overcome inadequate representation, incomplete records, inconsistent sentencing or unexplained executive delay.

The principal argument of this article is therefore institutional: the legitimacy of capital punishment cannot be measured only by the gravity of the crimes for which it is imposed. It must also be measured by the quality of the process through which an individual is selected for death. A structured mitigation inquiry, transparent reasoning, specialised representation, rigorous appellate review and a responsive clemency procedure are minimum requirements. The deeper abolitionist concern remains that no system can make an irreversible punishment completely safe. At the very least, constitutional governance demands that the State never impose death through an uninformed, inconsistent or hurried process, and that the possibility of human reform remain visible until the final decision.
