Death by Discretion: The Troubling Power of Judges in Capital Sentencing

Abstract:

The death penalty remains a part of India's criminal justice system, despite growing concerns regarding its application. Given its irreversible nature, capital punishment must be imposed only in strict accordance with clear legal standards and beyond reasonable doubt. However, the Indian legal framework lacks the necessary statutory clarity and consistency in this regard. This manuscript critically examines key legislations that prescribe the death penalty, including the Bharatiya Nyay Sanhita, 2023, and evaluates the significant disparity between the high rate of death sentences awarded and the relatively low frequency of executions.

A major focus of the study is the broad judicial discretion in sentencing, which has resulted in inconsistent and often arbitrary application of the death penalty. The manuscript analyzes leading case law to illustrate how judges interpret sentencing principles differently, particularly in the absence of codified guidelines. Although the "rarest of rare" doctrine has been established by the judiciary, its vague articulation and lack of binding criteria have undermined its effectiveness.

This paper also highlights documented instances of wrongful sentencing and execution, raising serious questions about the reliability and fairness of the current system. It concludes by recommending the establishment of clear, statutory guidelines to regulate judicial discretion, thereby ensuring a more uniform and just application of the death penalty in India.

Keywords:

Death Penalty, Rarest Of Rare, Discretion, Judicial Bias, Judicial Inconsistencies, Inordinate Delay

Introduction

Death is a Certain Uncertainty — the phrase may seem paradoxical, yet it encapsulates a profound truth. From the moment of birth, every individual carries the unshakable knowledge that death is inevitable. What remains unknown is its timing — whether it strikes in the next moment or after decades. This very uncertainty, paradoxically, grants us the psychological resilience to accept mortality as a natural part of life. *But what if that uncertainty were taken away?* Imagine being told the precise day and hour of your death. The emotional burden of such knowledge would be nothing short of harrowing. For those sentenced to death by a court of law, this haunting scenario becomes a grim reality. Capital punishment strips away the ambiguity of death and replaces it with a scheduled finality — cold, clinical, and irreversible.

Given the irrevocable nature of the death penalty, it becomes imperative to critically examine the discretionary power wielded by judges in imposing such sentences. In India, as in many jurisdictions, the absence of uniform standards and the wide latitude available to the judiciary in capital cases present a deeply troubling concern. The life of a person can hinge not on the gravity of the crime alone, but on subjective interpretations, varying thresholds for "rarest of rare" cases, and even personal judicial philosophy. While the theoretical debate over the abolition or retention of capital punishment continues — and will likely persist for generations — the reality is that, until a global consensus for abolition is achieved, this form of punishment will remain part of our legal framework. Therefore, it becomes not only important but ethically urgent to ensure that its application is consistent, transparent, and devoid of arbitrariness.

As long as the death penalty exists, the interpretation and implementation of the law surrounding it must rise to the highest standards of justice — where discretion is exercised with restraint, and where human fallibility is not allowed to seal irreversible fates.

Capital Punishment In India: Legislations Providing For Death Penalty

Capital punishment has been an integral part of the Indian legal system since ancient times. If we look closely we find that there was only a handful of legislation providing for capital punishment in India before and at the time of independence. However, there has been a rise in the number of legislations providing for capital punishment after independence. It may be noted that India has

steadily increased the number of crimes punishable by the death penalty, with a particular focus on sexual offenses.[1]

Offences Punishable with Death or Life Imprisonment under Bharatiya Nyaya Sanhita, 2023[2]: One of the prominent pieces of legislation that has the most provisions providing the death penalty in India is the Bharatiya Nyaya Sanhita, 2023, which provides for the death penalty as one of the punishments for several offences. Some of the offences are as follows:

1. *Rape Resulting in Death or Permanent Coma*

Section 66, BNS 2023: If the act of rape results in the victim's death or leaves them in a permanent vegetative state (coma), the offender shall be punished with rigorous imprisonment of not less than 20 years, which may extend to life imprisonment (meaning for the remainder of the person's natural life), or with the death penalty.

2. *Gang Rape of a Minor (Below 18 Years)*

Section 70(2), BNS 2023: In the case of gang rape involving a girl under 18 years of age, each participant shall be punished with imprisonment for life (natural life) or with death. Additionally, a fine shall be imposed, which may be directed toward the victim's medical and rehabilitation expenses.

3. *Repeat Offenders of Rape or Gang Rape*

Section 71, BNS 2023: A person previously convicted of rape or gang rape who commits the crime again shall be punished with life imprisonment (natural life) or death.

4. *Murder*

Section 103, BNS 2023: Murder is punishable with death or imprisonment for life. If five or more persons murder on the grounds of race, caste, religion, sex, place of birth, language, or similar factors, all participants are liable for life imprisonment or death.

5. *Murder by a Life Convict*

[1] Aparna Surendranath & Mehul Pathak, *Legislative Expansion and Judicial Confusion: Uncertain Trajectories of the Death Penalty in India*, (2022) 11(3) Int'l J. Crime Just. Soc. Democr. 70.
[2] Bharatiya Nyaya Sanhita, 2023(Act 45 of 2023).

Section 104, BNS 2023: A person serving a sentence of life imprisonment who commits murder again is punishable with death or life imprisonment.

6. *Abetment of Suicide (Minor, Intoxicated, or Insane Person)*

Section 107, BNS 2023: Any individual who abets the suicide of a minor, an intoxicated person, or a person of unsound mind shall be punished with death or life imprisonment.

7. *Attempted Murder by Life Convict Causing Injury*

Section 109(2), BNS 2023:A life convict who attempts to commit murder and causes injury shall be punished with life imprisonment or death.

8. *Terrorist Act Resulting in Death*

Section 113(2)(a), BNS 2023:If a terrorist act leads to the death of any person, the offender shall be punished with death or life imprisonment, and shall also be liable to fine.

9. *Kidnapping/Abduction for Ransom or to Cause Death*

Section 140(2), BNS 2023: A person who kidnaps or abducts with the intent to murder, to extort ransom, or to coerce action from any person or government, and threatens or causes death or injury, shall be punished with death or life imprisonment and shall also be liable to fine.

10. Waging War Against the Government of India

Section 147, BNS 2023: Whoever wages, attempts to wage, or abets the waging of war against the Government of India shall be punished with death or imprisonment for life, and shall also be liable to a fine.

11. *Abetment of Mutiny*

Section 160, BNS 2023: Anyone who abets a mutiny (rebellion) in the armed forces, and if such mutiny occurs as a result, shall be punished with death, life imprisonment, or imprisonment up to 10 years, along with a fine.

12. *False Evidence Leading to the Execution of an Innocent Person*

Section 230(2), BNS 2023: If a person gives or fabricates false evidence during judicial proceedings and it results in the conviction and execution of an innocent person, the offender shall be punished with death.

13. *Dacoity Resulting in Murder*

Section 310(3), BNS 2023: If five or more persons commit dacoity and one of them commits murder during the act, each participant shall be punished with death, life imprisonment, or rigorous imprisonment for not less than 10 years, along with a fine.

Apart from this, several other legislations provide for the death penalty as one of the punishments.[3]

However, with the increase in the number of legislations providing for capital punishments, there has also been a substantial change in the application of those enactments. Under Criminal Procedure Code 1898, the death sentence was to be given as a rule for offences for which the death penalty was prescribed and life imprisonment was to be an exception. But with the amendment of the criminal code in 1955 and 1973 such a position had undergone a sea of change, and under section 354(3) of the erstwhile Cr.P.C of 1973 death sentence was to be awarded as an exception whereas life imprisonment is to be awarded as a rule. The same provision has been incorporated in the new Bharatiya Nagarik Suraksha Sanhita 2023.[4]

Justice or Judgment? The Sole Discretion of Judges in Death Penalty Cases and Its Implications

Under both the erstwhile Criminal Code of 1898 and the Criminal Procedure Code of 1973, *the end decision on whether the punishment of death or life imprisonment was to be awarded lay solely with the judge*. This provision has been carried forward in the new Bharatiya Nagarik Suraksha Sanhita 2023[5](*hereinafter BNSS*). Section 393(3) of BNSS states that: *If a person is convicted of a crime that can be punished with the death penalty or with life imprisonment or a fixed prison term, the court must explain the reasons behind the sentence it chooses. If the death*

[3] Death Sentence In India Legal? Supreme Court Guidelines, available at: https://lawchakra.in/blog/death-sentence-india-legal-supreme-court-guidelines/(last visited on 10 June 2025).
[4] Bharatiya Nagarik Suraksha Sanhita, 2023 (Act. 46 of 2023).
[5] *Ibid.*

penalty is given, the judgment must also clearly state the specific and exceptional reasons for imposing such a sentence.[6]

Thus the several issues that germinate from such discretionary power of the judges may be discussed as under:

i) Capital Punishment – A Deterrence or Retribution?

According to the well-accepted principle, the theories of punishment may be categorized into five broad headings:

1. Deterrence theory
2. Retributive theory
3. Preventive theory
4. Compensatory theory
5. Reformative theory.

Capital punishment by its very nature may be categorized either as a deterrent or a retributive form of punishment. But with the advancement of civilization and the growth in awareness of human rights the demand for the abolition of the death penalty reached a heightened crescendo. So it was at that time the world powers, which were unwilling or unsure regarding the abolition of capital punishment, categorized the death penalty as a deterrent punishment and not a retributive one. By doing this two things were achieved, Firstly, the gruesomeness of capital punishment was diluted from being a brutal and uncivilized form of punishment to something necessary to deter others from committing such horrible crimes, and secondly, to limit the awarding of the death sentence to only some truly horrible crimes (this would not be possible if it was regarded as a retributive punishment for the victims and relatives of crimes would demand death for every gruesome offences like murder or rape, just to satiate their desire for revenge).

So apart from some Islamic countries death penalty is now regarded as a mode to warn others rather than to follow the principle of "eye for an eye and tooth for a tooth". So under Indian law, it is widely accepted as an unwritten rule, that the death penalty aims at deterrence rather than retribution. But in *Dhananjay Chatterjee* v. *State of West Bengal*[7] the Supreme Court held that based on "*public abhorrence" of crime death sentence may be required to be imposed to satisfy*

[6] *Id*. S.394.
[7] 1994(2) SCC 220

society's cry for justice". Similar views were expressed by the court in *Surajram* v. *State of Rajasthan*[8] So if the trial courts are to follow the above decisions and rationale, as the guiding principle, given by the Supreme Court then all murder cases have to be punished with a death sentence since society would always want the principle of "eye for an eye and tooth for a tooth" to be followed.

ii) Rarest of Rare principle: Is it followed?

Supreme Court had tried to come up with a formulation about handing of death sentence in *Balwant Singh* v.*State of Punjab*[9], *Santa Singh* v.*State of Punjab*[10] , and *Ediga Annamma* v.*Andhra Pradesh*[11].

In *Ediga Annamma*'s case Supreme Court had given a set of guidelines for awarding the death sentence or life imprisonment in cases involving capital offences. Justice Krishna Iyer, speaking through the court observed " Where the murderer is young or too old, the clemency of penal justice helps him. Where the offender suffers from socio-economic, psychic or penal compulsions, insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible".

It was to answer the question being raised against the desirability of judicial discretion, the Supreme Court of India tried to provide a principle that was to govern the court's decision in awarding capital punishment for offence of murder. This principle was called the "*rarest of rare*" which was formulated by the court in the case of *Bachan Singh* v.*State of Punjab*[12]. The court laid down:

"Death penalty doesn't serve any purpose and is barbaric and inhumane and opposed to civilized social and moral values…. The sentence of death should be resorted to only where the case falls in this trap of rarest of rare category". However, this decision of the court had a widespread implication and shed a completely new light on the question of sentencing. But the biggest fault of this principle was that the court failed to lay down as to what group of cases would fall under the rarest of rare category.

[8] AIR 1997 SC 18.
[9] AIR 1976 SC230.
[10] AIR 1976 SC 2386.
[11] AIR 1974 SC 799.
[12] AIR 1980 SC 898.

So in continuation of the process to lay an effective guideline for sentencing of the death penalty the apex court in *Machi Singh* v.*State of Punjab*[13] laid down certain guidelines as to the category of cases which would fall within the category of rarest of rare. Those guidelines may be summarized as follows:

a. Manner of commission of murder
b. Motive
c. Anti-social or socially abhorrent nature of the crime
d. Magnitude of the crime
e. Personality of the victim of murder

Moving forward in *Lehana* v.*State of Haryana*[14], the Supreme Court observed that criminal justice deals with complex human problems and diverse human beings. A judge has to balance the personality of the offender with the circumstances, situation, and reactions and choose the appropriate sentence to be imposed. The court after surveying its earlier decisions and the legislative policy held that life imprisonment is the rule and the death sentence an exception.

iii) Inconsistencies In The Guidelines: Adding To The Confusion

Despite a large number of guidelines, the number of cases in which it is followed is few for there seems to be constant changes made in the guidelines by the Supreme Court itself. In V. *Mohini Giri* v.*Union of India,*[15] the Supreme Court declined to lay down guidelines about the award of the death penalty where it was observed that" we do not think that the judicial discretion of the bench hearing the appeal can be curtailed in any manner by issuing guidance".

Moreover, some judges have demonstrated *gracelessness* in accepting the narrowing down of the field where the death sentence can be awarded. Thus in *Amrik Singh* v.*State of Punjab*[16], A.P Sen. J has spoken with withering contempt of the compassionate sentiments of human feelings which have established the principle of rarest of rare. To him, the "unfortunate result " of the rarest of rare principles was that capital punishment is seldom employed and when he commuted the sentence of death to life imprisonment it was because he was " *left with no alternative*".

[13] AIR 1983 SC 957.
[14] (2002)3 SCC 76.
[15] AIR 2003 SC 642.
[16] 1998 Supp. SCC 685.

If we look into various case laws in connection with the murder, we feel that the judges themselves are not sure as to which type of offences should be punished with death. This may have to do with the plethora of ever-changing guidelines regarding it. Thus we see that in the exercise of the discretionary powers of the judges, we find inconsistencies in the punishment awarded for similar kinds of offences. So sometimes we find that the number of victims plays a role in what kind of punishment an offender gets and sometimes the brutality of the offence itself matters. This disturbing practice can be highlighted by looking into some of the decided cases.

In *Ravji alias Ramchandra* v.*State of Rajasthan*[17], the murder of five people in a cold and calculated manner including his wife and three minor children has been regarded to be falling under the "rarest of rare categories".

Similarly in *Govinda Sami* v.*State of Tamil Nadu*[18], the murder of five people in a brutal manner to grab properties was held to be a crime fit to be punishable with death. A similar view was once again expressed by the Hon'ble Supreme Court in *Narayan Chetan Ram Chaudhary* v.*State of Maharastra*[19]. But in *Shamsul Kanwar* v. *State of U.P*, the Supreme Court had held that the number of victims is not an *ipso facto* ground for the application of the rarest of rare principles.

The courts have also taken into account the age of the accused in awarding. For as of now a juvenile even though he may be just a few days shy of attaining majority, cannot be punished with death or a sentence of imprisonment exceeding three years. This glaring shortcoming was highlighted in the infamous *Delhi rape case*. But long before that the courts have been inconsistent with the handing of the death penalty to accused who are very young even though they have attained majority. So in *Omprakash* v.*State of Haryana,*[20] the young age of the accused was regarded to be a mitigating factor in handing of life imprisonment even though the accused had murdered seven members of a family.

But in *Ram Deo Chauhan* v.*State of Assam*[21], the Hon'ble Supreme Court held that the fact that the accused was a young person at the time of occurrence cannot be considered as a mitigating factor as the offence committed by him was of extreme brutality, causing the death of four people and was thus sentenced to death.

[17] AIR 1996 SC 787.
[18] AIR 1998 SC 2889.
[19] AIR 2000 SC 3352.
[20] AIR 1999 SC 1332.
[21] AIR 2000 SC 2979.

iv) The Death Penalty Dilemma: Judicial Inconsistencies in Child Rape and Murder Cases

Moreover, when we look into the heinous offence of rape and murder, society feels that it is one offence that can only be punished with the death penalty. The clamor for the death penalty for rape reached a crescendo after the infamous Delhi rape incident on 16th December 2012. But sadly when we look into the decisions of the courts concerning the heinous offence of rape and murder of minor girls we see several inconsistencies. For in *Molai and another* v.*State of M.P*[22] where the accused raped and murdered a girl of sixteen years and then dumped her body in a septic tank, the court held that it was an offense which fell within the category of rarest of rare and awarded death penalty to the accused.

But *i*n *Amit alias Ammu* v.*State of Maharashtra*[23] the Supreme Court commuted the sentence of death of the accused who had raped and then murdered a girl of 12 years of age to life imprisonment. Similarly in *Raju* v.*The State of Haryana*[24] the death sentence awarded by the trial court for the rape and murder of an eleven-year-old girl was commuted to life imprisonment.

So it is surprising that the Supreme Court in one case regards murder and rape of a minor as falling under the rarest of rare categories, but the same court in another case regards it to fall outside the category of rarest of rare. So what are the parameters for the trial courts in deciding such offences? If the highest court of the land is itself inconsistent in its treatment of a particular kind of an offence then we can't accept much from the lower courts.

v) Bride Burning and Capital Punishment: Divergent Judicial Interpretations Across Cases

Similarly, another offence that invokes great abhorrence and disgust is the case of the bride burning for dowry. Such dowry deaths are unforgivable crimes that warrant maximum punishment for the killing of another human being by the people she trusts just for monetary gain. But when we go through some of the decisions of the apex court we once again find several inconsistencies. So in *State (Delhi Adm.)* v.*Laxman Kumar*[25] the court held the offence of bride burning for dowry to be treated as rarest of rare to be punished with the death penalty. Similarly in *Kailash Kaur* v.*State of Punjab*[26], the court once again reiterated the severity of the offence of

[22] AIR 2000 SC 177.
[23] AIR 2003 SC 3131.
[24] AIR 2001SC 2043.
[25] (1985)4 SCC 476.
[26] AIR 1987 SC 1368.

bride burning for dowry and regarded it to be falling under the rarest of rare case. In 1989 in *Allaudin Mian* v.*State of Bihar*[27], the court once aging followed its earlier ruling.

But in 1996 in the case of *Ravindra Trimbak Chowthmal* v.*State of Maharashtra*[28], the Supreme Court overturned its earlier ruling regarding bride burning and observed:

"*The present case was thus a murder most foul….we have given considerable thought to the question and we have not been able to place the case in that category which could be regarded as "rarest of rare" type. This is because dowry deaths have ceased to belong to that species of killing. The increasing number of dowry deaths would bear to this*"[29].

So the simple understanding of the above observation of the court would be that "dowry murder" would not fall in the rarest of rare category because of its growing number and incidence. So if there is a spurt in incidences of violent offences then it would cease to be violent because it is happening frequently? But to my understanding, the frequency of an offence does not lessen its severity and gruesomeness.

vi) Delay In Execution Of Death Sentence: Search For Uniformity

Another aspect in connection with the death penalty which is completely at the mercy of judicial discretions the commutation of the sentence of death into life imprisonment when there is a delay in the execution of the sentence. In this area the practice has been very inconsistent. In *Ediga Anamma* v.*State of Andhra Pradesh*[30] , the court while commuting the death sentence to life imprisonment, observed:

"The brooding horror of hanging which has been haunting the prisoner in her condemned cell for over two years….has an ameliorative impact"

In *T.*V.*Vatheswaran* v.*State of Tamil Nadu,*[31] the court held that a delay exceeding two years in the execution of a sentence of death would be sufficient to commute the death sentence into life imprisonment. However in the same year in *Sher Singh* v. *State of Punjab*[32], the Supreme Court refused to fix any time limit for commuting of death penalty on the grounds of inordinate delay.

[27] AIR 1989 SC 1456
[28] (1996)4 SCC 148
[29] *Ibid.*
[30] 1994 AIR SCW 2083.
[31] 1983 SC 361
[32] AIR 1983 SC 465

Similarly in *Triveniben* v.*State of Gujarat*[33], the Supreme Court held that while it had the power to commute the sentence of death to life imprisonment in cases of prolonged delay in the execution of the death sentence however *no fixed period of delay could be given for commutation of sentence of death into lesser punishment*.

Recently the Hon'ble Supreme Court in several cases has commuted the sentence of death into life imprisonment. In *Ajay Kumar Pal V.. Union of India And Another*[34] on 12.12.2014 held that if there is undue, unexplained, and inordinate delay in execution due to pendency of mercy petitions or if the executive as well as the constitutional authorities have failed to take note of/consider the relevant aspects, this Court is well within its powers under Article 32 to hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone however, only after satisfying that the delay was not caused at the instance of the accused himself.

Similarly in *Shatrughan Chauhan* v.*Union of India*[35] Supreme Court commuted the death sentences of 15 death convicts to life sentences. These death row convicts approached the apex court as a final resort after their mercy petitions were dismissed by the President of India. The Court in this batch matter held that various supervening circumstances which had arisen since the death sentences were confirmed by the Supreme Court in the cases of these death row convicts had violated their Fundamental Rights to the extent of making the actual execution of their sentences unfair and excessive.

In V.*Sriharan* v.*Union of India,*[36] the remaining three persons punished with the death penalty in the Rajiv Gandhi assassination case had their death sentence penalty commuted to life imprisonment on the ground of inordinate delay. So one sincerely hopes that now there will be some form of uniformity in dealing with unwarranted delay in the execution of death sentence.

vii) Judicial Discretion or Judicial Bias? Examining the Role of Personal Beliefs in Adjudication

The absence of a uniform principle for the exercise of the judge's discretionary power has made its exercise more on the personal feelings of the judges rather than on the law. The disturbing

[33] AIR 1989 SC 143.
[34] [2014 STPL(Web) 845 SC).
[35] (2014) 3 SCC 1.
[36] (2014) 4 SCC 242.

aspect of such an unguided exercise of discretion may be brought about by referring to some decided cases. *Harbans Singh* v.*State of U.P.*[37]provides an appropriate example of an unfettered exercise of such discretion. In this case, four persons were convicted under section 302 of IPC. All four were found to be equally guilty of committing murder. One of the accused died in an encounter with the police. The remaining three were sentenced to death on May 1, 1975. All three preferred separate appeals to the Supreme Court. Their appeals met with different fates at the hands of different benches of the court. Special Leave petition of the second accused was dismissed and he was hanged on October 6, 1981. The Special Leave petition of the third accused was admitted and his death sentence was commuted to life imprisonment. The Supreme Court dismissed the special leave petition of the fourth accused. His petition to the President Of India under Art.72 was also rejected. However before his execution could be carried out he filed another writ petition under Art.32, pointing out that the death sentence of the co-accused had been commuted. The Supreme Court stayed the execution and to maintain propriety and decorum referred the matter back to the President of India so that he could commute the death sentence to life imprisonment.

Another instance of such an unfettered exercise of judicial discretion was in *Kehar Singh* v.*State (Delhi Adm.)*[38], this case dealt with the offence of assassination of Smt. Indira Gandhi, Balbir Singh was acquitted while Kehar Singh was executed along with Satwant Singh, though all were charged with the same offence. This was because the former had a different set of judges deciding the case. Congress MP and senior counsel Kapil Sibal who fought and lost the case for the petitioners stated" *The society cannot be so irrational as to see a man hanged if one of the judges in the highest court opines that he should be acquitted. The majority view in this case was entirely wrong*"[39].

Similarly in *Devender Pal Singh Bhullar* v.*State*[40], a Sikh terrorist accused of carrying out a bomb blast that killed nine and injured former Congress chief M.S.Bitta in 1993 was sentenced to death on split verdict. While Apex court Justices B.N. Agarwal and Arijit Passayet concurred on the special Court ruling granting the death penalty, Justice Shah on the other hand acquitted Bhullar. The discrepancy in the judgment along with other similar cases prompted a review

[37] (1982)2SCC 101.
[38] AIR 1988 SC 1883.
[39] *Ibid.*
[40] AIR 2002 SC 1661.

petition arguing that death sentences should only be passed if the judges were unanimous in their decision. But the same was promptly rejected by the same majority.

The irrevocable nature of capital punishment should make it a punishment that is handed out based on sound and well-developed guidelines. Such discretion cannot be left to the sweet will and personal likes and dislikes of a judge. No doubt judges are human beings too, not impervious to human fallacy, but when in your hand resides the life and death of another human being then you are required and expected to be unmoved and unaffected by your personal feelings.

Such discrepancies can be highlighted by the following. Dhananjay Chaterjee was sentenced to death for the rape and murder of 14-year-old Hetal Parekh. The sentence was carried out on 14th August 2004. The judge who sentenced him was Judge R.N. Kali(Sessions Judge) Alipore Court. The interesting fact was that the same judge in 1992, a year before Dhananjay was sentenced to death, had heard a case relating to the rape and murder of a 12-year-old girl by a local youth named Goutam Biswas, and had sentenced him to life imprisonment.[41] So now the question arises, what extra was there in Dhanajay's case to warrant the awarding of the death penalty in that case whereas only life imprisonment was handed in an almost similar case? The answer may lie somewhere in the state of mind of the judge at that particular moment rather than on some grounded reasons.

viii) Differences In Interpretation Of the "Rarest Of Rare" Principle Between the Supreme Court And Trial Courts (Including High Courts)

In matters of cases of murder, it is the trial court (Sessions Court) that decides the cases punishable with death. The sentence of death passed by the trial court has to be confirmed by the High Court. Such a decision may be appealed against before the Supreme Court, subject to certain provisions. But surprisingly there is a consistent contradiction between the apex court and the lower courts especially when it comes to the awarding of the death sentence. This has resulted in several reversals of the High Court's confirmation of the death penalty by the apex court. An analysis of the reported decisions indicates that the Supreme Court has commuted death sentences in a large number of cases. This reveals a startling reality that the application of the "rarest of rare" principle, in awarding of death penalty, is primarily by the Session's court or

[41]One hangs, other goes free - Contrasting fates of similarly accused before same judge, *available at*:https://www.telegraphindia.com/india/one-hangs-other-goes-free-contrasting-fates-of-similarly-accused-before-same-judge/cid/714877(last visited on 11 June 2025).

the trial court and the 24 High Courts (which are the confirming courts). Dr. R. Prakash has pointed out that "*So if the disparity in appreciation and application of the principle between these courts and the apex court varies in a large number of cases, then what apart from the finality of the Supreme Court's judgment guarantees the correctness of the sentences imposed in the rest of the cases by the lower courts?*" [42]

So does it mean that the lower Courts are most of the time arriving at a wrong judgment or in other words not correctly exercising their discretion? When we statistically look into a large number of cases, we rarely find a sentence of life imprisonment awarded by the lower court being converted into the death penalty by the Supreme Court. But when it comes to the death penalty, in a large number of cases when it is appealed before the Supreme Court, it is commuted into life sentences. So does it mean that the trial court's interpretation of the rarest of rare principles is a restricted one?

In *Panchhi* v.*State of U.P,*[43] four members of the family of the accused became killers of four members of another family as a result of a long history of quarrels. The accused made 27 attacks with axes and *daranti* on the deceased. The other three accused included a septuagenarian, a youth in his prime, and a mother who had given birth to a child even while undergoing the sentence. The four accused were handed the death penalty by the trial court and the same was confirmed by the High Court. However, on appeal, the Supreme Court commuted the sentence for all to life imprisonment. Apart from mentioning that the thirst for retaliation was the possible motive for the crime the Apex Court was silent on what mitigating factor had been taken into consideration for such commutation.

As if the on-off attitude of the judges in the exercise of their discretion was not enough in some cases to highlight the conflict in the exercise of such discretion between the High Court and the Supreme Court. In *AG of India* v.*Lichhamadevi*[44], the High Court of Rajasthan in a case of bride burning awarded not only the death penalty to the accused but also ordered it to be carried out in the open i.e. public hanging. However, on appeal, the Supreme Court roundly condemned the High Court's judgment on public hanging and also commuted it to life imprisonment. In this case, we see that although the High Court was so convinced of the gravity of the crime that it

[42] Dr R Prakash, "Criminal Appellate Jurisdiction of the Supreme Court with Particular Reference to Death Sentence and Life Imprisonment Cases" (2003) 2 *SCC* 17.
[43] AIR 1998 SC 2726.
[44] 1989 Supp. SCC 264.

thought it proper to punish it not only with death but also by public hanging, the Supreme Court not only denounced the public hanging but also regarded the crime to be not one falling under "rarest of rare principle". How can there be so much difference in the interpretation of the principle between the judges of the two different courts?

Similarly in *State* v.*Nalini,*[45] the designated court that tried the Rajiv Gandhi assassination case found all the twenty-six accused guilty and recommended that all of them be awarded a death sentence. However on appeal except for the four accused, the sentence of the rest was commuted to life imprisonment. There was lots of hue and cry from the national as well as international community as it was felt that the judgment was influenced by emotions rather than by reasoning. *It is to be noted that all of the four accused person's death penalty was commuted to life imprisonment in 2014*.[46]

Similarly, *Shankarlal Gyarasilal Dixit* v.*State of Maharastra*[47]also provides an example of the difference in interpretation and application of the prevalent guidelines by the lower courts and the Apex court. In this case, the Sessions Court and the High Court convicted the accused of the crime of rape and murder of a five-year-old girl and imposed the death penalty but on appeal to the Supreme Court, the accused was acquitted on re-appraisal of the evidence.

In *Shidaganda Ningappa Ghandaver* v.*State of Karnataka*[48] even when the requisite "special reasons" for awarding of death sentence were given by the Sessions and High Court, the Supreme Court was willing to agree that this was a proper case for awarding the death sentence.

A look into the following cases further highlights the conflict between the High Court and the Supreme Court in matters of awarding the death penalty.

In *Dhuli Chand and another* v.*The State*[49], the question before the High Court was whether the sentence of death awarded by the Sessions Court to the appellants for killing innocent persons and looting and burning their properties during the riots of 1984 in Delhi was warranted or not. The High Court was of the view that the case fell in the category of" arrest of rare" case and that

[45] 1999(3) SCALE 241.
[46] Trial on Rajiv Gandhi Assassination: SC Asks TN to Maintain Status Quo, *available at*: http://www.ibtimes.co.in/trial-on-rajiv-gandhi-assassination-sc-asks-tn-to-maintain-status-quo-539964(last visited on 11 June 2025).
[47] (1981) 2 SCC 220.
[48] (1981) 1 SCC 164.
[49] 1998 Cri.L.J 988.

the sentence has to be deterrent enough to send a message to prevent such incidents in the future. So accordingly death penalty was awarded by the sessions court and confirmed by the High Court.

But in *Manohar Lal alias Munna and another* v.*The State(NCT of Delhi),*[50] we see that the same reasoning as in the previous case has not been followed. This case also relates to the riots in Delhi which was due to the assassination of Prime Minister Smt. Indira Gandhi. In this case, the accused had killed four persons by setting them ablaze during the Delhi riots. Both the trial court and the High Court confirmed the death sentence, but on appeal, the Supreme Court commuted it to life imprisonment observing that though the crime was gruesome it was not related to any special or personal enmity towards the deceased and the assassination of the Prime Minister had blinded the accused which resulted in temporary frenzy and therefore sentencing the accused to death would not be proper.

On the analysis of these two judgments, one delivered by the High Court and the other by the Apex Court, we see that though the background, manner of murder and impact it had on the society are far or less similar in both cases, there was so much divergence in the interpretation and an application of the "rarest of rare" principle, so much so that it makes us wonder whether we are talking about the same riot and brutal murder of innocent people or different ones.

Further, although the normal practice is that where the trial court or the High Court has imposed lesser punishment or acquitted an accused in offences involving the possibility of awarding a death sentence, the Supreme Court rarely overturns it. However, *Devendra Pal Singh Bhullar* v.*State*[51]*,* held that though in cases where lesser punishment or acquittal has been awarded by the trial court imposition of the death penalty would not be proper such practice is not of universal application and for a good and compelling reason a departure can be made.

From the number of cases that we have seen, it is obvious that the judges have sometimes arrived at a completely perplexing conclusion. But what is more worrisome is the fact that there has been a consistent divergence in the interpretation and application of the "rarest of rare" principle between the judges of the trial and High Courts on one hand and the Supreme Court on the other hand.

[50] AIR 2000 SC 420.
[51] AIR 2002 SC 1661.

Thus the provision for judicial discretion was always an important factor in the awarding of capital punishment. However, it is interesting to note that no legislative guidelines have been provided for the exercise of such discretion by the judges. Officially, when Afzal Guru was hanged in 2013 for a Parliament terrorist attack case, he was the 57th victim, but according to People's Union for Democratic Rights (PUDR) which has unearthed government records show that 1,422 executions were carried out just in one single decade (1953-1964)[52]. If this is the figure for a decade the real number of executions in the country should be manifold.

Surprisingly, the legislature chose to be silent in a matter of such importance. Several theories have been propounded for such legislative inaction. One of the theories, as laid down by *Ratanlal*[53] states that:

"Circumstances which are properly and expressly recognized by the law calling for increased severity of punishment are principally such as consisting in the manner in which the offence is perpetrated. These conditions naturally include several particular, as of time, place, person, and things varying according to the nature of the case. Circumstances which are to be considered in alleviation of punishment are:

1) The minority of the offender,
2) The old age of the offender,
3) The condition of the offender
4) The order of the superior military
5) Provocation
6) When offence was committed under a combination of circumstances and influence of motives which are not likely to recur either concerning the offender or to any other,
7) The state of health and sex of the delinquent"

Thus in the absence of such legislative guidelines or for that matter any guidelines, this exercise of discretion is highly questionable and so the point to be considered is whether such discretion is called for or not.

[52] Number of Execution Much Higher Than 55, *available at:* http://timesofindia.indiatimes.com/india/Number-of-executions-much-higher-than-55/articleshow/1046770.cms(last visited on 11 June 2025).
[53]Ratanlal and Dhirajlal, *The Law of Crimes* 134 (23rd ed., Vol. I, 1982).

In the American case of *Dennis Council MC. Gauta* v.*State of California*[54] it was indicated that no formula of full proof nature is possible that would provide a reasonable criterion in determining just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime of the murder and is the absence of such full proof formula, the discretionary judgment upon facts of each case I the only way.

The Indian Supreme Court seems to have based its decision on the need for discretion on the above decision in *Jag Mohan Singh* v.*State of U.P*[55], in this case, the Supreme Court held that this sentencing discretion is to be exercised judicially on "well-recognized principle" after balancing all the aggravating and mitigating circumstances of the crime.

In *Shanker* v.*State of Tamil Nadu* [56]the Supreme Court formulated that the court has to exercise its discretion judicially in choosing either a life sentence or the sentence of death for murder and this choice depends upon the particular circumstances of the case.

Similarly, *Jashubhaga Bharat Singh Gohil* v.*State of Gujarat*[57], stated that in a matter of death sentence, the court is required to answer new challenges and mould the sentencing system to meet these challenges.

Conclusion

Thus in the end it can be said that judicial discretion is imperative since every offence, how it is committed, the mental state of the perpetrator, and various other aspects connected with that offence cannot be cataloged; it is near impossible to do so. But what can be done is that there should be in place definite legislative guidelines providing a parameter for the judges (both of the lower as well as the apex court) to exercise their discretion in cases involving the death penalty. Unguided exercise of judicial discretion has many pitfalls. As a result of divergent interpretations of the existing guidelines between the lower courts and the apex court, and inconsistency in the application of the rarest of rare principles in similar cases, the justification and deterrence value of capital punishment has eroded.

[54] (1971) 402 US 183.
[55] AIR 1973 SC 947.
[56] 1994 AIR SCW 2083.
[57] 1994 AIR SCW 2360.

So from the various case laws we can see that there exist inconsistencies in the awarding of the death sentence and the guidelines that have been provided is inadequate or misinterpreted. The death penalty is the ultimate punishment for there is no scope of rectification once it is carried out. Its irrevocability makes it imperative for the judges to get it right, there should be no grounds for doubt. To support this point reference can be made to an article that was published in *Frontline* magazine where it was stated that the eminent former judges had appealed to the President of India to commute the sentence of death of 13 convicts on the ground that they were victims of erroneous judgment according to Supreme Court's admission. The Supreme Court while deciding three cases held that seven of its judgments awarding the death sentence were rendered *per incuriam*(meaning out of error or ignorance) and contrary to the binding dictum of the " rarest of rare " principle. The saddest part of it was that two people namely Rajiv Rao and Surja Ram, who had been wrongly sentenced to death had already been executed on May 4th,1996 and April 7th, 1997 respectively.[58]

In the case of *Manoj* v. *State of Madhya Pradesh*(2022)[59], the Supreme Court recognized the need for a more balanced and consistent approach to sentencing, stressing the importance of considering mitigating circumstances and the potential for reform as key objectives of punishment. The case brought attention to the inconsistent application of mitigating factors and the lack of clear guidelines on how they should be evaluated, prompting the Court to take *suo motu* cognizance of the issue.

It is also interesting to note that even when the quorum of the Supreme Court decided on converting a sentence of death into that of life imprisonment the reasoning of judges varied, showcasing the extent of personal interpretation involved in such decision making. A three-judge bench of the Supreme Court expressed differing views on the effectiveness of the death penalty. One judge opined that capital punishment has failed as a deterrent, while the other two noted that a larger bench had already upheld its validity, limiting its application to the 'rarest of rare' cases.[60]

So it is desirable that the judges use utmost care in handling of death penalty and this can be ensured only if we have concrete and uniformly accepted guidelines. Some heinous offences like

[58] A case against the death penalty , *available at*:http://www.frontline.in/navigation/?type=static&page=flonnet&rdurl=fl2917/stories/20120907291700400.htm(last visited on 11 June 2025).
[59] *Manoj* v. *State of M.P*, 2022 SCC OnLine SC 677.
[60] *Chhannu Lal Verma* v. *The State Of Chhattisgarh,* AIR 2019 SC 243.

rape and murder of minors, bride burning and cold-blooded murder cannot be regarded to fall outside the purview of the rarest of rare principles just because the frequency of these offences has increased drastically. Similarly when two or more persons are accused of the same offence punishable with death, then there seems to be no logic in handing out a death sentence to one and a lesser punishment to another. When such things happen then the very purpose of the death penalty, which is said to be deterrence, becomes questionable. These inconsistencies can be removed to a great extent if the are either elaborate legislative or judicial guidelines.

Framing of such guidelines may be a tedious and a long process, but it needs to be done. It is suggested that the following may be taken into account in the framing of such guidelines:

Firstly, we can categorize the offences especially murders into murders punishable by death and murders punishable with life imprisonment. Such demarcation will curtail the arbitrary exercise of discretionary powers of the judges. The murder of a child, woman, or members of the armed forces, terrorist activities resulting in the death of innocent persons, and killing of people purely for financial gain should be categorized as one punishable with a death sentence.

Secondly, awarding of the death penalty should only be for deterrence purposes for if we bring retribution within the ambit of the death penalty then the desire for blood lust cannot be satisfied as society will always seek for the death of the perpetrator of heinous offences. So when the punishment of death is categorized as a deterrent then we take away from the judges the discretion to satisfy the blood lust of the society. There are various instances in our country where society has taken matters into its own hands to punish the accused. Whenever this happens there is only one explanation –retribution. So if we take away from the judges their discretionary power to satisfy such retributory demand then it is expected that there will be more uniformity in the awarding of death sentences.

Thirdly, whenever a sentence of death has to be awarded then it should only be based on concrete evidence beyond doubt. This will ensure that an innocent will not be punished and secondly, it will ensure that the judges will avoid handing the death penalty on circumstantial grounds.

Fourthly, a reasonable time frame should be fixed for the trial and appeal of cases where the death penalty has been handed. We see from recent judgments that a large number of death sentences are being commuted to life imprisonment on grounds of inordinate delay in the execution of death sentences. Such delay can also be attributed to the accused who will try to

utilize all the options available to him for his acquittal or commutation of his death penalty. This generally takes a lot of time and in this, the executive is also to be blamed as they take lots of time to decide over the mercy petition of the accused. So even for horrendous offences like the assassination of the former Prime Minister of India, Rajiv Gandhi, the perpetrator's sentence of death was recently commuted to life imprisonment on grounds of inordinate delay. So this takes out the sting from the death penalty as being deterrence.

Lastly, the executive must also be brought into the purview of such guidelines in deciding mercy petitions with emphasis on the speedy disposal of such petitions, where sets of guidelines including the time limit for deciding mercy petitions should be enumerated.

It is impossible to do away with capital punishment in a single day, as lots of legal, social, and political implications must be looked into, before the abolition of capital punishment. But we can formulate water-tight guidelines to ensure the application and execution of the death penalty in a uniform and transparent manner.

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