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**A CRITICAL ANALYSIS ON DEATH PENALTY AND GENDER BIAS**

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**ABSTRACT:**

The application of the death penalty to women in India is a controversial topic with strong roots in gender biases, legal frameworks, and societal norms. The purpose of this article is to investigate the legal issues, societal attitudes, and historical background of the death penalty for women in India. It examines the contradiction that exists between laws that support gender equality and the harsh reality that women who are charged with serious crimes often receive disproportionate sentences. The death penalty's application to women in India is a reflection of the judiciary's pervasive gender bias. Even though the constitution contains provisions that support equality, the actual situation is very different. Women who are sentenced to death frequently face systemic obstacles brought on by societal biases, inadequate legal counsel, and arbitrary assessments of their guilt. This article aims to examine the historical context, legal considerations, and societal perceptions surrounding the death penalty for women in India. This article also discusses about various changes in pre independent and post independent India in execution of death penalty. The Supreme Court in State of Himachal Pradesh v. Nirmala Devi addressed gender bias in sentencing by considering the nature of the offense, the offender's culpability, and the impact on the victim, rather than the offender's gender. The court confirmed the accused's duties as the mother and two-year amnesty sentence. But the court emphasized that since gender bias in post-independence India has been exposed, gender should not be seen as a

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mitigating factor when it comes to the death penalty. This article also explores the views of different nations regarding the execution of female offenders within their borders.

**KEYWORDS:** Death Penalty, Women Offenders, Gender Bias.

### **INTRODUCTION:**

Death penalty is also known as “Capital punishment”. It is the highest form of punishment for heinous crimes. It is a judicial killing of an accused as a form of punishment. According to criminologist Garofalo, “death penalty as the most efficient means of eliminating criminals” and Sir James Fitz Stephen favored the death penalty by stating “No other punishment deters man as effectually from committing crimes as the punishment of death”<sup>2</sup>. However, death penalty was only awarded in “rarest of rare cases”.

Indian Penal Code recognize death penalty as a form of punishment. Section 53 of IPC, provides that “*The punishment to which offenders are liable under the provisions of this code—Firstly, Death*”<sup>3</sup>

Various methods were being used for inflicting death penalty across the world which includes gas chamber, guillotine, electric chair, firing squad, gas chamber and hangman’s rope. However In India, death penalty is executed by way of hanging till the death. Section 354(5) of Code of Criminal Procedure provides that “*When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead*”.<sup>4</sup>

Another method of execution used in India is by shooting. The firing squad can execute a convict who has been sentenced to death. The only organizations that can carry out the death penalty in this way are the Army, Air Force and Navy. According to the Army Act 1950, the martial justice recognizes both hanging and shooting as methods of execution.

### **CAPITAL OFFENCES:**

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<sup>2</sup>M. Ponnian, Criminology & Penology, Allahabad Law Agency Publication, 3<sup>rd</sup> Edition.

<sup>3</sup>Section 53 of the Indian Penal Code, 1860.

<sup>4</sup>Section 354 of the Code of Criminal Procedure, 1973.

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The following are capital offences under IPC, for which death penalty will be awarded by the courts.

<b>SECTION UNDER IPC</b>	<b>NATURE OF CRIME</b>
Section 121	Treason for waging a war against the Government of India
Section 132	Abetment of mutiny
Section 194	Giving or fabricating false evidence with intent to procure conviction of capital offence
Section 195	Giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment or imprisonment for life
Section 195 A	Threatening any person to give false evidence
Section 302	Punishment for murder
Section 303	Punishment for murder by life-convict
Section 305	Abetment to suicide of child or insane person
Section 307	Attempt to murder
Section 364A	Kidnapping for ransom
Section 376A	Punishment for causing death or resulting in persistent vegetative state of victim
Section 376AB	Punishment for rape on women under 12 years of age
Section 376DB	Punishment for gang rape on women under 12 years of age
Section 376E	Punishment for repeat offenders

The following are offences under various statutes, for which death penalty will be awarded by the courts.

<b>ACT</b>	<b>NATURE OF CRIME</b>
Section 41 of Sati (Prevention) Act,	Abetment to Sati

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1987

Section 31A of

The Narcotics Repeated commission of offences involving commercial quantity of any

Drugs and narcotic drugs

Pyschotropic

Substances Act,

1985

**CATEGORY OF OFFENDERS EXEMPTED FROM DEATH PENALTY:**

In India, There are certain categories of persons who are exempted from death penalty.

**CATEGORY OF****OFFENDERS : RELEVANT LAW:**

Minor

Section 21 of Juvenile Justice Act 2015 provides that “No minor in conflict with the law shall be sentenced to death”.

Pregnant women

Section 416 of Code of Criminal Procedure 1973 provides that “If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to imprisonment for life”

Insane persons

In the case of Shatrughan Chauhan v. Union of India<sup>5</sup>, The Court held that death penalty shall not awarded to people with mental illness or insanity.

**AGGRAVATING AND MITIGATING FACTORS:**

The decision to give a death sentence in a criminal case is heavily influenced by aggravating and mitigating factors. Aggravating factors are circumstances that advocate for the imposition of the death penalty. On the other hand, mitigating factors lessen the defendant's culpability or show the crime as less deserving of the ultimate punishment.

<sup>5</sup>(2014) 3 SCC 1.

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#### A). Aggravating Factors:

Where a person is found guilty for committing an offence punishable with death or imprisonment for life the court is bound to consider aggravating circumstances and should award appropriate punishment. The following are aggravating circumstances which may call for extreme penalty of capital punishment:

1. pre-planned, cold-blooded or brutal murder;
2. killing of all family members;
3. rape with murder;
4. killing of an innocent, defenceless child or old/ infirm person;
5. double, triple or several murders;
6. killing through hired professional murderers;
7. killing of several persons by throwing bombs, by organised crime, terrorism, etc;
8. killing by an offender convicted in the past and having a previous criminal record, and something unusual or uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for extreme penalty.

#### B). Mitigating Factors

The following circumstances on the other hand, are held to be extenuating circumstances or mitigating for not awarding extreme penalty:

1. Age of the offender (i.e) too young or too old;
2. Suffering from mental disorder;
3. others similarly situated were not awarded extreme penalty ;
4. offence without premeditation or oblique motive;

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5. long lapse of time or unreasonable delay;
6. moral justification of the act;
7. mental condition of the offender;
8. where there is only circumstantial evidence;
9. subsequent remorse by the offender; and
10. difference of opinion as to sentence among judges.

### **CONCEPT OF RAREST OF RARE:**

One of the most significant instances that raises the legitimacy of the death penalty is **Bachan Singh v. State of Punjab**<sup>6</sup>, which gave rise to the idea of the "rarest of rare cases." This was the case that gave rise to the idea of the "rarest of the rare cases" and continues to be the subject of discussion regarding whether the death penalty is consistent with Article 21 of the Constitution. While upholding the death sentence, the Supreme Court stated that it is incompatible with a genuine and unwavering respect for human life to take a life via the use of the legal system.

That should only be done in extremely rare circumstances, such as when there is no doubt that the other option is closed off. Judges have always wondered when and under what circumstances the death penalty can be applied, what crimes are punishable by it, how much of an impact it has on the punishment, and whether the victim will receive justice. It was also established that the Court must give equal weight to the criminal and the crime when determining whether or not there are "special reasons" in a given case. Investigating the aggravating or mitigating factors is necessary. Factors such as the accused's age, mental state, and whether the act was carried out on orders from a higher authority has to be considered to decide the punishment

In this case, Justice Bhagwati was the only one to disagree, but the problem was that his ruling was rendered just two full years after the verdict was rendered. Thus, a few of his most important objections to the death penalty were never raised. Furthermore, he felt that Article 14, which

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<sup>6</sup> Bachan Singh v. State of Punjab, AIR 1982 SC 1325.

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protects equality before the law, is plainly broken by this very idea. Furthermore, it is against Articles 19 and 21 because there is no established procedure for when the state may take away someone's life or personal freedoms. In addition to discussing the cruelty and irresponsibility associated with the death penalty, Justice Bhagwati demonstrates through reason and statistical evidence why the death penalty is ineffective in achieving any of the 3 penological goals

Another case where the mandatory death penalty under Section 303 was ruled to be unconstitutional and thus invalid was **Mithu v. State of Punjab**<sup>7</sup>. The section was founded on the idea that a person too cold-blooded and unreformed to be permitted to live is a criminal who has been given a life sentence and is still capable of killing.

Section 303 was removed from the IPC after the judges in Mithu's case ruled that it was unconstitutional under Articles 14 and 21 of our Constitution.

Additionally, in the cases of **Sher Singh v. Punjab**<sup>8</sup> and **T.V. Vatheeswaram v. State of Tamil Nadu**.<sup>9</sup> The Supreme Court had to decide whether a protracted delay in carrying out the death penalty was sufficient justification for commuting it to life in prison. The majority in the second case disagreed with the first, which established that the convict had sufficient grounds to invoke section 21 and receive a lighter sentence in such a circumstance.

In the **Machhi Singh case**,<sup>10</sup> the court established a set of standards for determining whether a case qualifies as rarest to rarest. Here is an analysis of the criteria:

1. Method of murder: When a murder is carried out in a way that provokes strong, widespread indignation in the community, such as when the victim's home is set on fire with the goal of baking her alive, it is considered immensely cruel, ridiculous, diabolical, rebellious, or reprehensible.

b. When the victim dies as a result of being tortured for cruel deeds.

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<sup>7</sup> Mithu v. State of Punjab, AIR 1983 SC 473.

<sup>8</sup> Sher Singh v state of Punjab (2013) 2 ShimLC 1023.

<sup>9</sup> T.V. Vatheeswaran v. State of Tamil Nadu, (1983) 2 SCC 68.

<sup>10</sup> Machhi Singh v. State of Punjab, (1983) 3 SCC 470.

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C. When the victim's body is savagely chopped or dismembered.

2. Murder's motivation - When the intention behind a murder is complete depravity and cruelty; an example of this would be a hired killer who kills only to get paid.

b. A cold-blooded murder with a deliberate plan to seize property or achieve some other self-serving objective.

3. The socially repugnant aspect of crime: the murder of a member of a marginalized group.

This also includes cases of the bride being burned, also referred to as "dowry death."

4. The crime's magnitude: when the percentage of crimes is extremely high, as in the case of several murders, for instance.

5. Victim's Personality: This includes cases where the murder victim is a public figure, an innocent child, an elderly or disabled woman, etc.

**Santosh Kumar Bariyar v. State of Maharashtra**<sup>11</sup>, the Supreme Court decided that, the rarest of rare decree fills in as a rule in upholding Section 354(3) and sets up the arrangement that life detainment is the standard and demise discipline is an exception. Section 303 of the Indian Penal Code commanded capital punishment for all guilty parties carrying out an actual existence punishment. This segment was struck down as being held illegal. The year 2008 represented the instance of **Prajeet Kumar Singh v. State of Bihar**<sup>12</sup>, wherein the court governed precisely on what might comprise a rarest of rare case. The Court held that a capital punishment would be granted just, when a homicide is submitted in a very ruthless, unusual or obnoxious way in order to excite serious and extraordinary irateness of the community.

### **CONSTITUTIONAL VALIDITY OF THE RAREST OF RARE DOCTRINE**

An examination of the "Rarest of Rare Doctrine's" constitutional validity only because the death penalty was under the Supreme Court's jurisdiction in Jagmohan Singh v. State of Uttar Pradesh

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<sup>11</sup> Santosh Kumar Satishbhushan Bariyar v. State Of Maharashtra (2009) 6 SCC 498.

<sup>12</sup> Prajeet Kumar Singh v State of Bihar (2008) 4 SCC 434.

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was its validity contested. It was determined that Articles 14, 19, and 21 of the Constitution are violated by Section 302 of the IPC. The court maintained the constitutionality of the death penalty and ruled that no law can legitimately take away a person's life unless it is for the purpose of open intrigue and that the right to life is the cornerstone of opportunity recognized under Article 19. Therefore, it is hard to accept that the death penalty was so absurd or unnecessary in the open. The inconvenience of the death penalty as established by law cannot be deemed unlawful if the entire process of imposing a death sentence on an offender under the CrPC is legitimate.

According to the argument made in **Maneka Gandhi v. Union of India**,<sup>13</sup> the Supreme Court evaluated the interrelationships between Articles 14, 19, and 21 in each corrective imprisonment law, taking into account both procedural and substantive factors.

### **DEATH PENALTY FOR WOMEN OFFENDERS:**

In India, The number of women offenders sentenced to death is very low as compared to men. No women offenders have been hung since 1955. It indicates the patriarchal biases which result in lenient treatment of women while sentencing and clemency process.

#### A). Pre - Independence:

The first recorded execution of a woman in India dates back to 1817 when a woman named Kali was hanged in the city of Pune for her involvement in the murder of her husband.

#### B). Post Independence:

In **Rattan Bai Jain Case**, the accused was the first woman executed in independent India. She was hanged on January 3, 1955 in Tihar Jail. She was executed for poisoning and killing three girls. she worked as the manager of a sterility clinic and murdered girls who were employees of her clinic, suspecting that they had affairs with her husband<sup>14</sup>

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<sup>13</sup>AIR 1978 SC 597.

<sup>14</sup>Oishika Banerji, First woman to get death penalty in India, <https://blog.ipleaders.in/first-woman-to-get-death-penalty-in-india/> (Last Visited 17<sup>th</sup>Nov, 2023)

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In case of **Nalini v. State of Tamil Nadu**<sup>15</sup>, The accused, one of the convicts in the assassination of former Prime Minister Rajiv Gandhi in 1991. She provided shelter and accompanied the suicide bomber, Dhanu. she was being tried along with 25 other accused individuals under various criminal charges, including terrorism and murder. After the trial, she was found guilty and sentenced to death by the trial court. However, she later filed an appeal before the Supreme Court of India challenging the death penalty imposed on her. She was convicted under section 302 with read of section 120A of IPC. The court observed that she had no prior criminal record before this incident. Also, she displayed good conduct during her imprisonment and showed prospects of being successfully rehabilitated. The Supreme Court commuted her death sentence into imprisonment for life.

In **Ediga Anamma v. State of Andhra Pradesh**<sup>16</sup>, The accused, a married woman, who was in a illicit relationship with a man. The man had sexual intimacy with another woman, Anusuya. In a fit of rage, the accused jealously murdered her rival her and her baby with a chisel and mutilated the deceased's face and buried the baby's body under the river sand. The Trial court sentenced her to death for murder and the High Court confirmed the sentence. However, Justice Krishna Iyer allowed the appeal and commute her death sentence into a life imprisonment on the ground she was a mother of child.

In case of **Renuka shinde & Anr. v. State of Maharashtra**<sup>17</sup>, The accused individuals, who were Indian serial killers, were found guilty of kidnapping thirteen children and murdering five of them between 1990 and 1996. They committed these crimes along with their mother, Anjanabai. The motive behind the kidnappings was to take the children to crowded areas where one of the group members would attempt to steal from people. If the thief was apprehended, they would either use the child to gain sympathy or cause a distraction by harming the child. Eventually, the kidnapped children were killed. The Sessions Court at Kolhapur determined that the sisters were responsible for kidnapping thirteen children and murdering six of them. This conviction was then upheld by the Bombay High Court in 2004. However, due to the delay in

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<sup>15</sup>(1999) 5 SCC 253.

<sup>16</sup>(1974) 4 SCC 443.

<sup>17</sup>Criminal Appeal No: 722 of 2015.

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reaching a decision regarding their mercy petitions, the Bombay High Court ultimately commuted their death sentence to life imprisonment.

In case of **Shabnam v. Union of India**<sup>18</sup>, The accused in conspiracy with her lover Saleem, planned and committed the murders of her family on the night of 15 April 2008 in Amroha district of Uttar Pradesh. The victims were Shabnam's father, mother, two brothers, a sister and her nephew. The prosecution's case was that Shabnam, who was having an affair with Saleem, conspired to kill her family members because they did not approve of their relationship. The murders were committed as a motive to eliminate possible opposition to their relationship and to ensure the inheritance of the property. After investigation, both Shabnam and Saleem were arrested and charged under Section 302 of the Indian Penal Code for murder. A district court later convicted and sentenced them to death in 2010. Her mercy petition was rejected by president. The Supreme also confirmed their death sentence.

#### **DEATH PENALTY AND GENDER BIAS:**

Otto Pollak in his book 'The Criminality of Women' mentioned that women offenders have always been at the forefront. His theory of the chivalry hypothesis explains how it is difficult for the legal system to criminalize women and impose punishments that are adequate to what they would ideally have judged their male counterparts for the exact crimes. This led to the development of the thesis. paternalism. or the hypothesis of bad wife. According to it, it includes chivalrous expectations of a woman in fulfilling the stereotypical roles assigned to her by society. Following or breaking such rules ultimately boils down to how much sympathy such an abusive woman receives. This theory justifies that a "evil woman" should to be hanged, not only because she falls outside what describes a woman's parameters, but also because she has the same characteristics as the man condemned to death.

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<sup>18</sup>2015 SCC OnLine SC 484.

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Article 14 of the Indian Constitution provides that “*The state shall not deny equality before law and equal protection of law within the territory of India*”<sup>19</sup>. However, the state unintentionally denying equality before law on the grounds of gender while implementing death sentence.

In India, the number of women death row inmates are comparatively very lesser to men. The National Law University of Delhi recently conducted a study on capital punishment, which is referenced in this report but has limited scope. The study focuses solely on data from death row inmates between July 2013 and January 2015. According to the findings, only 4 percent of the individuals on death row during that period were women. It is important to note that this percentage reflects the timeframe of the study and not the overall number of females convicted or executed since India gained independence. In fact, unofficially, no woman has ever been executed by the death penalty in independent India. The report also indicates that there is no official stance on this matter. The recent execution of the offenders in the Nirbhaya Rape case brings the unofficial total to 759.9 executions. The study reveals that, at the time of investigation, there were 373 individuals on death row (excluding Tamil Nadu), with 12 of them being women. Warrants were issued for each of these cases. It suggests that life imprisonment should be the norm, with the death penalty reserved as a rare exception, and that specific justifications should be documented in the ruling when capital punishment is warranted.<sup>20</sup>

In **Phoolan Devi Case**, where a woman who was popularly known as “Bandit Queen” was an accused of several serious crimes, including murders and robbery. However, because she was presented as a victim of social and systemic injustice, as a result of which she was never prosecuted for the crimes.<sup>21</sup>

In **Nalini Case**<sup>22</sup>, The Supreme Court judgement was solely based on the fact that she was the weaker sex and powerless, the judge ruled that she could not withdraw once the conspiracy began. Her status as a mother was also taken into account. Because the child's father had already

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<sup>19</sup> Article 14 of the Indian Constitution, 1950.

<sup>20</sup>Aastha Prakash, The Death Penalty is Biased Towards Women, <https://lawbhoomi.com/the-death-penalty-is-biased-towards-women/> (Last visited on 18<sup>th</sup> Nov, 2023)

<sup>21</sup>Subhash Ahlawat, The Death Penalty in India: An Examination of Gender Bias, <https://subhashahlawat.com/blog/the-death-penalty-in-india> (Last visited on 18th Nov,2023)

<sup>22</sup>Nalini v. State of T.N., AIR 1955 SC 253.

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been sentenced to death, commuting her sentence would prevent the child from becoming an orphan. These criteria prevented her case from falling into category of rarest of rare. Her sentence was commuted to life imprisonment. In the year of 2023, she was acquitted.

In **Ediga Anamma Case**<sup>23</sup>, Justice V.R. Krishna Iyer issued the Supreme Court ruling that altered the young woman's capital punishment to life imprisonment. This decision emphasizes the judiciary's prevailing inclination towards protectionism and paternalism, frequently leading to leniency towards female criminals. The Supreme Court has made it clear that favorable actions towards women are permissible under Article 15(1), as long as they are not based solely on gender and do not discriminate. This underscores the tendency of the court system to sympathize with female convicted murderers.

In **Renuka Shinde Case**<sup>24</sup>, part from both being women, the Court found no other factors in favor of the appellant. Additionally, the manner in which each child was taken and killed, along with the nature of the offense, clearly demonstrates the appellants' extreme maliciousness. These appellants have been engaged in criminal activities for a significant period and continued to do so until apprehended by the police. However, due to the delay in seeking mercy petitions the Bombay High Court commuted their sentence into life imprisonment.

### **SUGGESTIONS AND CONCLUSION:**

Gender bias in sentencing need to be addressed. The court should consider the nature of the offence, the culpability of the offender, and the impact of the offense on the victim, rather than the gender of the offender or the victim. In the case of *State of Himachal Pradesh v. Nirmala Devi*<sup>25</sup>, the Supreme Court had to decide the amount of punishment for a woman who was convicted of several crimes, including robbery and murder. The woman was 40 years old and the mother of three minors. Justice A.K. Sikri pointed out that gender is not necessarily a mitigating factor in the world, and to ensure gender equality, female criminals must be treated the same as men. The Supreme Court confirmed the duties of the accused in the case under

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<sup>23</sup> *Ediga Anamma v. State of A.P.*, AIR 1974 SC 799.

<sup>24</sup> *Renuka Shinde & Anr. v. State of Maharashtra*, Criminal Writ Petition No: 3103 of 2014.

<sup>25</sup> Cr.M.P.No. 1153 of 2018.

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review as the mother of the accused and confirmed the two-year amnesty sentence of the district court. The Supreme Court added that when assessing a woman's gender as a mitigating circumstance, a case-specific, not a strict, rule must be used. When a woman belongs to a terrorist group, there is no room for sympathy. This approach, although acceptable to the argument, forgets that the non-implementation of the death penalty for women in post-independence India has clearly exposed an obvious gender bias in that male and female criminals are not treated equally. Therefore, gender of women shall not be considered as a mitigating factor while awarding death penalty.

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