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PUBLIC OPINION, PENAL POPULISM AND CAPITAL PUNISHMENT IN INDIA

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ABSTRACT:

Of all the punishments employed to uphold law and order in society, the death penalty is regarded as the most severe. Since the beginning of time, it has been applied as a form of punishment. Different nations have different execution techniques. But the arguments against the death penalty, however, have not changed over time. In an era marked by 24-hour media cycles, social media mobilization, and electoral politics, criminal justice particularly capital sentencing has become increasingly susceptible to public outrage and populist rhetoric. This article examines the influence of public opinion and penal populism on death penalty discourse and policy in democratic systems. It argues that penal populism, driven by electoral incentives, media sensationalism, and emotional public responses to crime, often compromises constitutional safeguards and human rights obligations. Using India as the primary jurisdiction of study and drawing comparative insights from the United States and Europe, it critically examines how populist pressures infiltrates judicial reasoning through doctrines such as the “collective conscience of society”. This article critiques the tension between democratic responsiveness and principled justice, concluding that constitutional democracies must insulate capital sentencing from populist pressures.

Keywords: Death penalty, penal populism, public opinion, democracy, constitutionalism, human rights.

1. Introduction

The death penalty occupies a uniquely fraught position within democratic constitutional systems. Unlike other forms of punishment, capital punishment permanently extinguishes life and forecloses the possibility of correction, rehabilitation, or judicial error being remedied¹. Despite this, several democracies continue to retain the death penalty, often invoking public

morality, deterrence, and societal outrage as justifications. The term “capital punishment” originates from the Latin word *capitalis*, meaning “of the head” or “regarding the head” derived from *caput* (head). It historically referred to executions by beheading, where the condemned person literally paid with their head for severe crimes. While the phrase originated from the practice of beheading, it has come to mean any punishment involving the death penalty.

Crime, particularly violent and sexual offences, is frequently politicized, sensationalized, and deployed as a sign of moral signaling.² In such context, penal policy becomes a means of demonstrating responsiveness to public anger rather than a product of constitutional reasoning or penological evidence. While in India, the death penalty is maintained for certain offenses under the Indian Penal Code and specific statutes, its judicial implementation is regulated by the “rarest of rare” doctrine¹ This article examines how penal populism and public opinion interact with death penalty jurisprudence in democratic societies. It focuses on the constitutional role of courts, asking whether judicial institutions are resisting or internalizing populist pressures in capital cases. The central claim, advanced is that the reliance on public sentiment, whether explicit or implicit, is fundamentally incompatible with constitutional morality and the counter-majoritarian function of the judiciary.

2. Research Questions and Methodology

2.1 Research Questions

1. In what ways does penal populism influence death penalty jurisprudence in democratic societies?
2. How does public opinion, mediated through political discourse and the media shape judicial reasoning in capital cases?
3. Is the judicial invocation of concepts such as the “collective conscience of society”³ constitutionally defensible?

2.2 Methodology

This paper adopts a doctrinal and comparative constitutional methodology. Primary sources include constitutional texts, judicial decisions of constitutional courts, and official reports such as Law Commission studies. Secondary sources include scholarly literature in constitutional

¹ Bachan Singh v. State of Punjab (1980) 2 SCC 684

² Machhi Singh And Others v. State of Punjab (1983) 3 SCC 470; 1983 AIR 957

law, criminology, and political theory. Empirical reference is made to data published by the National Crime Records Bureau (NCRB) to contextualize public perception of crime vis-à-vis actual crime trends.⁴

3. Theoretical and conceptual framework

3.1 penal populism

According to critical legal theory, law is closely linked to politics⁵. The concept of penal populism was articulated by Anthony Bottoms and further developed by scholars such as David Garland⁶. The idea of penal populism relates to political and legislative practices that emphasize public outrage, fear, and a desire for harsher punishment rather than expert knowledge, proportionality, and rehabilitative justice. Penologist Anthony Bottoms described this occurrence as ‘populist punitiveness,’⁷ highlighting that the methods by which officials exploit public reactions to crime to advance their own electoral ambitions profoundly affect the criminal justice system. In the context of capital punishment, penal populism manifests in demands for the death penalty as a symbolic reaffirmation of social order. The punishment becomes less about individualized culpability and more about satisfying collective anger.

Over the past twenty years, penal populism has had a considerable influence on Indian criminal law. Linked to an increase in mass media and the privatization of news outlets, coverage of major criminal incidents such as the 2008 Mumbai terrorist attacks, the 2012 Nirbhaya rape case, and the 2024 Kolkata rape-murder has driven law reform⁸. Taking advantage of the public’s limited understanding of criminal processes due to procedural delays, politicians offered overly harsh tough-on-crime measures, which ultimately helped them gain political power. In short, Penal populism is characterized by:

- Emphasis on **severity of punishment** over certainty or fairness
- Reliance on **public emotion, media narratives, and moral panic**
- Marginalization of expert opinion, criminological evidence, and human rights norms

⁴ National Crime Records Bureau (NCRB), *Crime in India 2022* (Ministry of Home Affairs, Government of India, 2023).

⁵ John Pratt, *Penal Populism* (Routledge 2007).

⁶ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001)

⁷ Anthony Bottoms, *The Philosophy and Politics of Punishment and Sentencing* in C. Clarkson & R. Morgan (eds), *The Politics of Sentencing Reform* (Oxford: Clarendon Press, 1995)

⁸ The Hindu, Kolkata doctor rape and murder case: A timeline of events (Sept 2024) <https://www.thehindu.com/news/cities/kolkata/kolkata-doctor-rape-and-murder-case-timeline-of-events/article68625226.ece> > Accessed 22nd January 2026

Politicians in India operate in a highly visible, democratic environment. Public attitudes toward capital punishment create **informal but powerful electoral incentives**:

- Supporting commutation or opposing the death penalty in cases with strong public outrage can be politically costly, risking accusations of being “soft on crime.”
- Conversely, aligning with public demand for execution signals decisiveness and responsiveness, enhancing political legitimacy.

This dynamic nature positions public opinion as a **tool of accountability**, indirectly shaping policy outcomes through the democratic mechanism of potential electoral consequences

3.2 public opinion and legislative policies

Public opinion significantly influences legislative responses to crime. In India, episodes of extreme violence particularly terrorism and sexual offences, often provoke widespread public outrage. Public opinion on crime is rarely formed through careful engagement. NCRB statistics consistently show that while reporting of certain crimes has increased, this doesn't correlate with a proportional rise in violent crime warranting extreme penal responses.⁹

The execution of Mohammad Afzal Guru, convicted for his role in the 2001 attack on the Indian Parliament, remains one of the most significant illustrations of how public opinion intersects with capital punishment in India.¹⁰ Media coverage of the Parliament attack and Afzal Guru's involvement framed the case within a narrative of terrorism and national security. This framing intensified public demand for the harshest punishment, equating the death penalty with justice, deterrence, and national resolve. Such moments generate strong demands for severe punishment, including the death penalty, which in turn place pressure on lawmakers. As a result, legislative reforms have tended to strengthen punitive measures rather than move toward abolition. This reflects a political calculus in which retaining capital punishment is seen as aligning with popular demands for justice, deterrence, and retribution.

This societal scrutiny establishes an **informal standard of accountability**, compelling governments and executives to act in alignment with the collective moral expectations of society. For example, in the **Nirbhaya case**, the government responded to nationwide protests

⁹ Times of India, 28,522 murder cases registered in India in 2022, 78 every day: NCRB (Dec 4, 2023), <https://timesofindia.indiatimes.com/india/28522-murder-cases-registered-in-india-in-2022-78-every-day-ncrb/articleshow/105721382.cms> > Accessed on 29 th January 2026

¹⁰ State (NCT of Delhi) v. Navjot Sandhu , (2005) 11 SCC 600 <https://indiankanoon.org/doc/1769219/> > Accessed on 29 th January 2026

by swiftly enacting the **Criminal Law (Amendment) Act, 2013**,¹¹ expanding punishments for sexual crimes and reinforcing the death penalty in extreme cases.

3.3 Media trial

The phenomenon of the “media trial” has emerged as a significant conduit through which penal populism influences criminal justice outcomes in democratic societies. Media trials refer to the sustained, sensationalized coverage of cases that pre-empt judicial determination and fames the accused as either morally irredeemable or emblematic of societal decay. Media coverage often goes beyond factual reporting, framing criminal cases with **emotive language, selective emphasis, and narrative framing** that highlights the brutality of the crime, the identity of the accused, or the suffering of victims. This creates a **collective emotional response**, intensifying public pressure for punitive action. While media trials can raise awareness and highlight injustices, they also carry significant risks. Portraying the accused as guilty before due process undermines the **presumption of innocence**, can exert indirect pressure on judicial independence, and may encourage **populist or politically motivated decisions**. Complex legal issues, mitigating circumstances, and procedural debates are often overshadowed by sensationalized reporting that favors dramatic storytelling over nuanced legal analysis.

Essentially, trial by media refers to the phenomenon where media outlets attempt to pronounce the accused guilty before their actual trial occurs. In this process, media channels often conduct their own investigations parallel to those of law enforcement agencies. Moreover, with the media being seen as the voice of the public, there has been a trend where it assumes the role of a "public court."

Judges have repeatedly expressed deep concern over the phenomenon of media trials, emphasizing that pervasive or sensationalized coverage can compromise judicial impartiality. It is believed that media trials of pending cases negatively impact the reliability of the judiciary.¹²Continuous media reporting, often highlighting selective evidence or framing narratives in a prejudicial manner, risks shaping public perception and exerting subtle psychological pressure on judges themselves. The potential for cognitive bias, stress, and

¹¹ The Criminal Law (Amendment) Act, 2013, Act No. 13 of 2013, Parliament of India, 2 April 2013 <https://legislative.gov.in/actsofparliamentfromtheyear/criminal-law-amendment-act-2013> > Accessed on 2nd February 2026

¹² State of Maharashtra v. Rajendra Jawanmal Gandhi, AIR 1997 S.C. 3986

external influence threatens not only the fairness of individual verdicts but also the broader integrity of the judicial process. Moreover, when media narratives preemptively assign guilt or innocence, they undermine the foundational principle that justice must be administered free from external pressures, thereby eroding public confidence in the independence and impartiality of the judiciary.

4. Balancing political accountability and constitutional morality

In cases involving terrorism or sexual violence, political authorities may face intense pressure to endorse executions or expedite capital punishment, even when mitigating factors—such as the age, mental health, or background of the offender—warrant a more measured approach. This creates a structural tension between **democratic responsiveness** and **constitutional morality**, where adherence to the rule of law, due process, and human rights norms may conflict with the perceived demands of society.

Democratic governance is premised on political accountability, elected representatives are expected to remain responsive to public opinion and social concerns. In the domain of criminal justice, this accountability often manifests through legislative amendments, executive policy decisions, and public declaration advocating stringent punishment for serious crimes. However, when political accountability is allowed to dominate constitutional adjudication, it risks transforming penal policy into a reflection of transient public emotion rather than a principled expression of constitutional values. The democratic responsiveness can conflict with rational, principle-based justice, particularly in cases of serious crimes that provoke moral outrage.

This tension is particularly evident in the administration of **mercy petitions** and the timing of executions. Political actors, while formally constrained by legal procedures, must navigate a landscape in which delays or commutations may provoke public criticism. Consequently, the death penalty becomes not merely a legal sanction but also a **symbolic instrument of political legitimacy**, raising concerns about whether executive discretion is exercised in alignment with constitutional values or popular sentiment.

Scholars argue that overemphasis on public sentiment can result in **reactive penal policies** that

prioritize speed and severity over justice and rehabilitation¹³. In India, the interplay between media narratives, electoral politics, and judicial outcomes underscores the systemic challenge of ensuring that capital punishment is administered **based on law and principle rather than populist pressures**.

Constitutional morality serves as the normative counterweight to majoritarian impulses. It demands fidelity to the foundational principles of the constitution. The supreme court of India has consistently recognized constitutional morality as a guiding standard for judicial decision making, emphasizing that constitutional interpretation cannot be subordinated to prevailing social morality or electoral pressure.¹⁴

Ultimately, achieving a balance requires insulating legal and executive decision-making from purely emotional or symbolic imperatives while maintaining sufficient responsiveness to legitimate societal concerns. The challenge lies in **operationalizing accountability without compromising constitutional morality**, a delicate equilibrium that defines the ongoing debate over the death penalty and penal populism in India.

Nevertheless, judicial reasoning occasionally incorporates notions of the “**collective conscience of society**”,¹⁵ effectively acknowledging popular sentiment as a factor in sentencing. While this approach aligns legal outcomes with public morality, it risks conflating societal anger with constitutional obligation, thereby giving indirect effect to penal populism.

5. Comparative constitutional perspective

A comparative constitutional analysis reveals that democratic responses to the death penalty are closely linked to how constitutional systems manage the tension between popular sentiment and rights- based adjudication. Jurisdictions that have retained capital punishment tend to exhibit greater susceptibility to penal populism, whereas those that have abolished it have done so by explicitly prioritizing constitutional morality over majoritarian preferences.

¹³ R. Hamel & S. Tait, “Populism, Public Opinion, and Penal Policy: The Risks of Reactive Criminal Justice,” *Punishment & Society* 19, no. 3 (2017): 265–288.

¹⁴ *Navej Singh Johar v. Union of India*, (2018) 10 SCC 1 https://main.sci.gov.in/supremecourt/2016/29610/29610_2016_Judgement_06-Apr-2018.pdf > Accessed on 2nd February 2026

¹⁵ *Machhi Singh & Ors v. State of Punjab*, (1983) 3 SCC 470; 1983 AIR 957

In contrast to India's cautious retention of the death penalty, European constitutional systems have categorically rejected capital punishment as incompatible with human dignity and the right to life. This position is firmly entrenched in European human rights law, most notably in Article 2 of the EU Charter of Fundamental Rights, which explicitly prohibits the death penalty in all circumstances.¹⁶ The absolute nature of this prohibition reflects the European Union's staunch opposition to capital punishment and its broader commitment to the protection of fundamental rights. Through constitutional guarantees, judicial enforcement, and regional human rights instruments, Europe has established a legal framework in which the death penalty is regarded as inherently incompatible with modern standards of justice and human dignity.

A clear judicial example of this position is seen in the case law of the Court of Justice of the European Union, which has held that Member States must refuse extradition to third countries where there is a real risk of the death penalty being imposed, unless reliable assurances are given that it will not be applied.¹⁷ This jurisprudence gives practical effect to Article 2 of the EU Charter of Fundamental Rights, reinforcing the absolute nature of Europe's rejection of capital punishment. This approach demonstrates a strong adherence to constitutional morality, treating the right to life as non-negotiable and beyond majoritarian override.

On the other hand, the United States, unlike many democracies continues to retain the death penalty, albeit with stringent procedural safeguards. The 8th and 14th Amendments of the Constitution provide significant protections for death penalty cases.¹⁸ The 8th Amendment prohibits "cruel and unusual punishment" and therefore affects the method of execution and its constitutionality.¹⁹ Because the 14th Amendment guarantees due process and equal protection there are process requirements like bifurcated trials where guilt is decided in a separate proceeding from sentencing.²⁰ Empirical studies have constantly demonstrated racial, geographic, and socio-economic disparities in the imposition of death penalty, raising serious concerns under the Equal Protection Clause.²¹

¹⁶ Charter of Fundamental Rights of the European Union, 2016 O.J. (C 202) 389 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016P/TXT> > Accessed on 4th February 2026

¹⁷ Case C-182/15, *Petruhin*, EU:C:2016:630 (Sept. 6, 2016)

¹⁸ U.S. Senate, The Constitution of the United States of America, <https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution.htm> > Accessed on 6th February 2026

¹⁹ U.S. Const. amend. VIII.

²⁰ U.S. Const. amend. XIV.

²¹ David c. Baldus, George Woodworth & Charles a. Pulaski, equal justice and the death penalty (1990)

Although the U.S. Supreme Court has acknowledged the arbitrary nature of capital sentencing in *Furman v. Georgia* (1972)²², it subsequently permitted the resumption of the death penalty in *Gregg v. Georgia*(1976)²³, on the assumption that procedural guidelines could curb arbitrariness. In practice, however, public outrage and political pressure continue to shape death sentencing, particularly in high- profile cases.²⁴

6. Constitutional critique and human rights implications

From a constitutional standpoint, penal populism represents a structural distortion of democratic governance. It compromises judicial independence, violates equality before law by producing arbitrary outcomes, and erodes human dignity by instrumentalizing the accused as a vessel for collective anger. A central constitutional concern lies in the erosion of equality before law²⁵. When sentencing outcomes are influenced by media attention, political climates, or the emotional resonance of a particular crime.

Penal populism also compromises **procedural due process**. In high- profile cases, intense public scrutiny creates implicit pressure on prosecutors and judges to conform to dominant narrative of guilt and deservedness. In the Indian context, the judicial invocation of the “**collective conscience of society**” illustrates the constitutional dangers of penal populism. While framed as reflecting societal values, the doctrine lacks a clear constitutional foundation and provides no objective, reviewable standard. Its reliance on perceived public morality risks subordinating constitutional morality grounded in dignity, proportionality, and reasoned adjudication—to transient majoritarian emotion. This shift is constitutionally problematic, as it permits public outrage to function as a sentencing determinant in a domain where constitutional discipline is most required.

Beyond constitutional considerations, penal populism raises serious human rights concerns. The death penalty directly implicates the right to life, recognized under Article 21 of the Indian Constitution and Article 6 of the International Covenant on Civil and Political Rights

²² *Furman v. Georgia*, 408 U.S. 238 (1972)

²³ *Gregg v. Georgia*, 428 U.S. 153 (1976)

²⁴ The Guardian, Spate of high profile US death penalty cases fuels public outrage and anger (Dec.19, 2024) <https://www.theguardian.com/world/2024/dec/19/death-penalty-executions-innocence-public-outrage> >

Accessed on 10th February 2026

²⁵ Article 14 constitution of India

(ICCPR)²⁶. When public outrage, media sensationalism, or political pressures influence sentencing, the risk of arbitrary and disproportionate punishment increases, violating both domestic and international human rights norms.

4. Conclusion

The persistence of the death penalty in democratic societies reflects not merely a debate over punishment, but a deeper constitutional anxiety about the state's capacity to govern crime through ordinary legal means. When institutions fail to deliver timely justice, effective policing, or meaningful victim support, capital punishment is often elevated as a symbolic assertion of authority rather than a rational instrument of criminal justice. When punishments become responsive to public outrage and media-driven narratives, the constitutional architecture designed to restrain state power begins to erode from within. The danger lies not only in excessive punishment, but in the gradual normalization of emotive reasoning within judicial decision making.

In India, this distortion of constitutional adjudication is most evident in the judicial invocation of concepts such as the "collective conscience of society", which risks transforming constitutional courts from counter-majoritarian institutions into conduits of public anger.

From a comparative perspective, the experience of abolitionist democracies demonstrates the constitutional legitimacy is strengthened not weakened when punishment is insulated from populist pressures. Ultimately, this study contends that the continued retention of the death penalty in populist penal crime represents a constitutional contradiction. A democracy committed to the rule of law cannot allow punishment to serve as a surrogate for governance failure or as an instrument of moral spectacle. The most coherent constitutional response lies either in decisively insulating capital sentencing from public opinion or in recognizing that abolition itself is necessary to preserve the integrity of constitutional democracy.

²⁶ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>
> Accessed on 15th February 2026