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## CONSTITUTIONAL VALIDITY OF CAPITAL PUNISHMENT: JUDICIAL REFORMS & CHANGING NORMS

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### **INTRODUCTION**

The Constitutional validity of capital punishment has been subject to significant scrutiny in multiple instances before the Supreme Court of India. India is among the countries that have yet to fully eliminate the death penalty, and it has not implemented legislation that expressly examines the constitutionality or legality of capital punishment. In the context of India, the imposition of the death penalty is structured around the principle of the "rarest of rare" hypothesis. The initial legal challenge to the death penalty in India occurred in 1973 through the court proceedings of *Jagmohan Singh v. State of Uttar Pradesh*<sup>1</sup>. The verdict and ruling were rendered prior to the re-enactment of the Code of Criminal Procedure (CrPC) in 1973, during which the death penalty was officially recognised as an exceptional and seldom form of punishment. The matter under consideration pertained to the scrutiny of the legitimacy of capital punishment, particularly with regard to its infringement upon Articles 19 and 21 of the Indian Constitution. The determination of the death penalty is contingent upon the legally established system, as ruled by the Supreme Court. Moreover, during the course of the legal proceedings, it was determined that the supreme court renders a verdict regarding the imposition of either a life sentence or a death sentence, taking into account various factors including the nature of the offence, the notion of culpability, and the contextual information presented to the court during the trial. The growth of the highest court's opinions during the process of delivering judgements and judgements on heinous crimes has prompted numerous inquiries into past rulings.

### **CONSTITUTIONALITY**

In *Jagmohan Singh v. Uttar Pradesh*<sup>2</sup>, Initially, the legitimacy of the death penalty was called into question on the grounds that it contravened Articles 19 and 21 by virtue of its absence of procedural requirements. There has been a contention that the procedure delineated in the

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<sup>1</sup> 1973 AIR 947

<sup>2</sup> 1973 AIR 947

Criminal Procedure Code is confined to the determination of culpability and does not encompass the application of capital punishment. The Supreme Court rendered a verdict affirming that the imposition of the death punishment adheres to the constitutionally prescribed procedure. The Judge assesses the circumstances, facts, and nature of the offence presented during the trial to decide whether to inflict the death penalty or life imprisonment. As a result, a panel comprising five judges rendered a verdict affirming that the death sentence was not in contravention of Articles 14, 19, and 21 of the constitution, so warranting its legal acceptability. Subsequent to this ruling, there was no longer any ambiguity regarding the constitutionality of the death penalty. The initial contention about the validity of the death penalty was grounded on the contention that it contravened Articles 19 and 21, due to its deficiency in adhering to a sufficient procedural framework. There has been a contention that the procedure delineated in the Criminal Procedure Code is confined to the determination of culpability and does not encompass the application of capital punishment. The Supreme Court rendered a verdict affirming that the imposition of the death punishment adheres to the constitutionally prescribed procedure. The Judge assesses the circumstances, facts, and nature of the crime presented during the trial to determine whether to inflict a capital sentence or life imprisonment. Therefore, a panel comprising five members of the Court reached the determination that the imposition of the death penalty did not contravene the provisions outlined in Articles 14, 19, and 21, so establishing its constitutional validity. Subsequent to this ruling, there was no longer any ambiguity regarding the constitutionality of the death penalty.

In the 1979 case of *Rajendra Prasad v. State of UP*<sup>3</sup>, The Supreme legal issued a ruling stipulating that the imposition of the death penalty should be contingent upon the establishment, through legal proceedings, that the perpetrator poses an enduring and substantial risk to the well-being of the general population. Justice Krishna Lyer argues that the imposition of the death penalty should be limited to three distinct types of offenders: those engaged in white collar offences, persons who provide a substantial risk to society as lethal killers, and those who perpetrate crimes that undermine the established social structure. Following the trial, the Supreme Court rendered a decision affirming that the imposition of the death penalty upon an individual found guilty of murder under Section 302 of the Indian Penal Code (IPC) did not contravene any essential tenets of the Constitution.

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<sup>3</sup> 1979 AIR 916

Later on, in *Bachan Singh v. the State of Punjab*<sup>4</sup> case, The five-judge panel of the Supreme Court rendered a decision affirming the reasonableness of the death penalty, so determining that it does not contravene the provisions outlined in Articles 14, 19, and 21 of the Indian Constitution. By a majority ratio of 4:1, the bench in this instance overturned the judgement rendered in the *Rajendra Prasad* case. The prevailing viewpoint of the bench asserted that the application of the death sentence is limited to instances that are deemed exceptionally unusual. According to Justice Bhagwati's dissenting opinion, the death sentence is deemed illegal due to its violation of Articles 14 and 21, and is also deemed unpleasant from other perspectives. The Supreme Court's ruling in this case states that the challenge to the constitutionality of Section 302 of the Indian Penal Code (IPC) in relation to the death penalty, as well as the challenge to the constitutionality of Section 354(3) of the Code of Criminal Procedure, 1973, is unsuccessful and is dismissed, in accordance with the majority opinion. The Writ petitions and related matters can now be presented for hearing before the division bench, following the customary procedure, in order to evaluate the individual cases based on their merits, in accordance with the principles outlined in the majority opinion.”

In *Deena v. Union of India*<sup>5</sup>, The validity of Section 354 (5) of the Code of Criminal Procedure, 1973 was subject to scrutiny due to concerns that the execution technique of hanging, as prescribed by this section, was deemed to be cruel, inhumane, and degrading, so contravening the provisions of Article 21. A suggestion was made for the State to provide a compassionate and dignified process for implementing the death penalty. The majority decision of the Court concluded that the execution of the death penalty via hanging by rope, as described in Section 354 (5), did not violate the rights protected by Article 21. The constitutionality of Section 354 (5) of the Code of Criminal Procedure (Cr.P.C.), which stipulates hanging as the mode of execution, was established by the Court. This provision is deemed to establish a fair, just, and reasonable procedure, as stated by Article 21.

The Court concluded that hanging by rope is the most efficient and least painful method of carrying out the death penalty, based on the conclusions of the U.K. Royal Commission in 1949, the perspective of the Director General of Health Service of India, and the 35th report of the Law Commission. The judicial panel concluded that the act of hanging by rope does not possess superiority over alternative procedures, such as electrocution, fatal gas, shooting, or lethal injection. In recent times, the Supreme Court has invalidated two enduring conventions

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<sup>4</sup> (1982)3SCC24

<sup>5</sup> 1983 AIR 1155

in the context of capital prosecutions. The original protocol was to abstain from enforcing capital punishment in instances where the judges overseeing the trial had not reached a unanimous consensus on both the issue of culpability and the matter of the suitable punishment. One of the guiding principles was to abstain from administering the death penalty to an individual who had previously been exonerated by a lower court.

### **PROCEDURE AFTER IMPOSITION OF DEATH PENALTY**

Following the imposition of the death penalty, the procedure that follows

1. Confirmation from the highest court in the land According to Section 366 of the Criminal Procedure Code, it is mandatory for the court of the session to present the case proceedings to the high court of the appropriate state for the purpose of confirming the sentence, subsequent to its imposition within the session. The court has the duty to ensure that individuals who have been condemned to jail custody with a warrant are transferred until the High Court confirms the sentence.
2. Investigation as well as additional evidence According to Section 367 of the Criminal Procedure Code, the High Court possesses the jurisdiction to mandate a subsequent investigation into the incident or the collection of additional evidence at any given moment that is relevant to the culpability or innocence of the convicted individual.
3. The authority of the High Court to either uphold convictions or impose penalties As per the stipulations outlined in Section 368 of the Criminal Procedure Code, the High Court is vested with the power to affirm a conviction, impose an alternative punishment deemed appropriate by the court, or amend the charges and mandate a fresh trial. The court will be unable to proceed with the confirmation of the penalty until the deadline for filing an appeal has elapsed.
4. Verification of the newly formulated sentence As per the provisions outlined in Section 369 of the Criminal Procedure Code, it is required that any order or sentence submitted to the High Court for confirmation must get the approval and signature of at least two judges. The aforementioned principle is applicable irrespective of whether the sentence under consideration is a novel penalty or one that has already been rendered by the High Court.
5. The court of session will receive a copy of the order that has been delivered. The expeditious transmission of the confirmation of the sentence by the court or any other order issued by the Honourable High Court to the Court of Session is mandated by Section 371 of the Criminal

Procedure Code. Furthermore, it is necessary to attach the seal of the High Court and the official signature of the High Court Official to the document.

### **REMEDIES AVAILABLE TO THE CONVICT**

These cases can be adjudicated in many types of courts, including session court, trial court, fast track court, or special court facilities. Subsequently, it is imperative for the Supreme Court to grant its affirmation of the issued death warrant. In essence, the criminal has the option to submit a maximum of four petitions challenging a death sentence that has been imposed against them. There are four types of petitions:

1. After the confirmation of the death sentence by the High Court under section 366 of CrPC, the convict may approach the Supreme Court challenging the high court decision.
2. Review Petition after the Supreme Court decision, the convict can file a review petition. Review petition is filled under Article 145 of Constitution of India and it basically when the convict finds any error in the judgment of the Supreme Court
3. Curative Petition After the dismissal of review petition the convict can file a curative petition. In normal cases curative petition is the last resort available for redress of grievances of the court. But in case of the death penalty, the convict can go for a mercy petition after this to the president of India or governor of the state.
4. Mercy Petition After the high court or Supreme Court finalizes the capital punishment, the convict may file a mercy petition to the president of India (Article 72 of Constitution of India) or the governor of the state (Article 161 of Constitution of India) depending on the circumstances for which capital punishment is awarded. The president or the governor may grant pardon to the convict or delay in execution or reduce the punishment or uphold the original sentence. The execution can only be carried out if the governor and the president rejects the mercy petition filed with either of them.

In the significant NIRBHAYA CASE, both the Supreme Court and the president dismissed all four forms of petitions.

The convict has the option to submit a petition to the Supreme Court challenging the decision made by the president. The imposition of the death penalty occurs subsequent to the resolution of the petition. Once the petition has been resolved, a black warrant is issued. Upon the execution of the black warrant, the court proceeds to determine the specific date, time, and

location for the execution of the convict's death, commonly referred to as the imposition of the death sentence. Upon the issuance of the black warrant, the prisoner is transferred from the death cell to an alternative cell. The district magistrate visits the correctional facility to document the final statement of the inmate, while simultaneously executing a will in the presence of the inmate.

### **POWERS OF THE PRESIDENT AND THE GOVERNOR IN DEATH SENTENCE**

Upon exhausting all alternative legal recourse, an individual on death row has the option to seek clemency from the initial residents of the nation. The submission of this petition necessitates the involvement of either an authorised representative or the convict themselves outside of the jail facility. The power to suspend, remit, or commute sentences in specific circumstances is granted to the President and Governors by Article 72 and 161 of the Constitution. The President and Governors has the prerogative to diminish or revoke penalties alone subsequent to the courts' issuance of a conviction and the imposition of a sentence. The authorities provided in Article 72 and 161 are tasked with the responsibility of ensuring equitable and rational conduct by the President and Governors. The scope of authority vested in the President under Article 72 surpasses that of the Governor, as it grants the President the ability to grant pardons to individuals who have been sentenced to death and Court Martial.

In the case of *Kuljeet Singh alias Ranga v. Lt. Governor of Delhi*<sup>6</sup>, The Supreme Court rejected a lawsuit that aimed to establish that the President had violated his executive authority to bestow mercy, as mandated by Article 72 of the Constitution, by refusing to grant him mercy.

In the case of *Mohinder Singh v. State of Punjab*<sup>7</sup> The Supreme Court has been deemed to lack the jurisdiction to entertain any application for a stay of execution during the pendency of a mercy petition before the President of India, as it is deemed unmanageable. To initiate a stay of execution, it is necessary to submit a formal plea to the President of India.

### **RATIONALITY OF DEATH PENALTY**

There is a lack of explicit definitions of the term "punishment" under the Indian Penal Code. Conversely, the concise rendition of the Oxford Dictionary defines it as the action of exposing a wrongdoer to the repercussions of their deeds. The punishment is administered to the

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<sup>6</sup> 1982 AIR 774

<sup>7</sup> AIR1965SC79

individual who is suspected of perpetrating the offence with the intention of imparting a lesson and deterring future recurrence of the act. Furthermore, the second aim of the punishment is to educate individuals who are on the brink of participating in unlawful activities and intend to engage in criminal behaviour.

When a crime occurs, not only does the victim suffer, but the entire nation's conscience is deeply disturbed. There is a strong demand for the offender to be held accountable. The punishment also acts as a remedy for the wounded emotions of society. This is due to the fact that the victim is not the sole individual who experiences harm in that regard. Currently, the state serves as a comforting remedy for the harm inflicted upon society by penalising the individual who has done the wrongdoing. Unlike the act of murder driven by primal instincts, death as a means of punishment is separate from the act of killing.

The death sentence is often regarded as one of the most severe and punitive measures that may be enforced. Due to its profound implications for the fundamental sustenance of human life, the penalty imposed is of the utmost magnitude. The establishment of capital punishment can be attributed to the desire for a well-organized society, as it represents a form of legalised and justifiable homicide. The primary objective of capital punishment is to address instances of severe disorder and the actions of anti-social individuals in accordance with societal norms and expectations. The utilisation of the death sentence has been justified throughout history based on the principles of retribution and deterrence.<sup>8</sup>

The expression "an eye for an eye, and a tooth for a tooth" denotes a type of retribution that has been ascribed to humanity since ancient times, prior to the establishment of a cohesive community of accountable individuals. The institution of the death sentence for murder and other secular offences can be attributed to the contemporary state's increasing recognition of its duty to uphold peace and order regardless of the consequences. Due to this circumstance, the death penalty stands as the sole instrument within the repertoire of the developed nations and the sole means at the disposal of those who bear the duty of upholding legal and societal harmony.

It is the sole method to eliminate individuals with a hardened disposition who are irredeemable and pose a persistent danger and adversary to humanity, society, and the government's duty to safeguard life, property, and the overall welfare of the community.

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<sup>8</sup> Calvert, Brian. "Locke on Punishment and the Death Penalty." *Philosophy*, vol. 68, no. 264, 1993, pp. 211–29. JSTOR, <http://www.jstor.org/stable/3751163>. Accessed 21 Nov. 2024.



**RECENT RULINGS ON CAPITAL PUNISHMENT**

1) Case: Mukesh & Anr. vs. State for NCT of Delhi & Ors<sup>9</sup>. (Nirbhaya Case)

Bench: Justice Dipak Misra, Justice Ashok Bhushan, and Justice R. Banumathi

Case details: A 22-year-old woman was subjected to severe physical assault, sexual assault, and torture by the perpetrator, which ultimately led to her death. These horrific acts took place inside a private bus while she was travelling.

Throughout the course of the proceedings: On January 2, 2013, Altamas Kabir, the Chief Justice of India at the time, inaugurated the Fast Track Court (FTC). The purpose of establishing this court is to accelerate the trial process for instances pertaining to sexual offences. Legal proceedings were commenced by the Federal Trade Commission (FTC) on January 17, 2013, against a group of five individuals who were identified as adults. Ram Singh, a prisoner, committed suicide at Tihar jail on March 11, 2013. The death penalty was imposed on all four prisoners by the trial Court on September 13, although the fifth accused, who was a minor, was sentenced to a three-year term at a probation home. The ruling of the trial Court was then overturned by the High Court, which subsequently upheld the death penalty for all four defendants on March 13, 2014. The matter was later presented to the Supreme Court, which subsequently issued an order to suspend the execution of all four defendants on March 15, 2014. The parents of the victim submitted a formal appeal to the Delhi High Court in February 2019, seeking the issuance of death warrants for the defendants. Furthermore, the convicted individuals have filed petitions with the highest court seeking a reevaluation of their sentences for death. In the Nirbhaya gang rape case of 2012, the Supreme Court issued a directive on March 20, 2020, mandating the imposition of capital penalty on all four offenders who were convicted. The horrific crime was perpetrated through the participation and coordination of six individuals who operated a bus masquerading as public transportation, with the intention of enticing passengers and engaging in illicit acts with them, as determined by the Supreme Court's ruling. Justice R. Banumathi voiced her view without any hesitation that the aggravating factors were more significant than the mitigating factors. She perceived no justification for altering the capital punishment imposed by the lower courts to a life imprisonment sentence for the duration of the offender's lifetime. All four criminals were executed at 5:30 am in Tihar Jail.

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<sup>9</sup> 2017 (6) SCC 1

2) Mohammed Ajmal The case of Mohammad Ajmal Kasab versus the State of Maharashtra<sup>10</sup>

Bench: Aftab Alam and C.K. Prasad.

Case facts: Kasab was convicted of 80 counts, including murder, waging war against India, possession of explosives, and other penalties. The individual received a death sentence for four charges and a life imprisonment sentence for five charges. The execution occurred on 21/11/12 at Yerwada Central Jail in Pune.

Throughout the course of the proceedings: The primary dispute during the court proceedings centred on the issue of whether the defendant, Kasab, received a fair and unbiased trial. During the proceedings, the subject matter was sufficiently addressed, as Kasab was initially granted legal representation from Pakistan in compliance with his explicit request. Furthermore, the Supreme Court also provided him with legal counsel, albeit the decision to accept or decline it rested solely with the appellant. Additionally, it can be concluded that there was no violation of the constitutional requirements. In addition, the highest court ensured that the appellant was subjected to a fair and appropriate capital punishment, given that he was accused of committing a horrific act of causing the death of innocent victims. Further considerations in this particular instance revolve around the lawyer's inadequate allocation of time for preparation, involvement in acts of hostility towards the government of India, and participation in a conspiracy.

Supreme Court ruled: The Supreme Court issued five death punishments and five life imprisonments to the accused due to his abhorrent and heinous conduct.

### **JUDICIAL APPROACH**

The implementation of the death penalty in India is founded on the concept of 'the rarest of rare' circumstances. The death penalty, as stipulated by the Indian Penal Code (IPC), is a punitive measure of great severity, involving the imposition of capital punishment upon individuals convicted of grave offences. Within this particular setting, an inquiry emerges over the jurisdiction of a state to terminate an individual's life if that individual has exceeded the boundaries of what is deemed cruel. Due to this particular issue, the participants were segregated into two separate groups. The initial cohort comprises moralists who assert the necessity of this punitive measure as a means to dissuade individuals who hold similar viewpoints. Individuals affiliated with the second faction, commonly known as progressives, contend that it is merely a legal action of terminating someone's life as mandated by the court.

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<sup>10</sup> AIR 2012 SUPREME COURT 3565

An examination of the legal principles that regulate criminal prosecution demonstrates that the imposition of the death penalty is only authorised in the most exceptional or exceedingly rare instances that entail a substantial degree of criminality and, thus, present an imminent and severe danger to society. In order to ascertain the appropriateness of imposing capital punishment, it is imperative to analyse not only the level of culpability for the offence, but also the personal attributes of the individual, the contextual factors, and the severity of the transgression<sup>11</sup>.

Hence, it is imperative to ascertain the appropriate penalty based on the severity of the transgression committed by the individual, as well as the societal reaction to that transgression. The Indian legal system has a lack of consistency in its position about the death penalty and does not clearly prohibit its application. In the Indian context, the imposition of the death penalty is limited to highly extraordinary circumstances, specifically those falling within the purview of Section-121 (insurrection against the state), Section-302 (homicide), Section-364A (abduction with ransom), and analogous transgressions. The topic under consideration relates to the Indian Penal Code (1960). Mortality implies that capital offences are punishable by death. The most notable occurrences, which include the imposition of harsh capital sentence, pertain to acts of homicide perpetrated during an animal surgical procedure and instances of physical assault. It is possible to further classify the 'rarest of rare doctrine' into two distinct sub-categories: In the context of death punishment, aggravating circumstances and mitigating circumstances pertain to various elements that possess the potential to have influence on a judge's determination. When confronted with aggravating circumstances, the court possesses the authority to administer capital punishment. Nevertheless, when mitigating factors are present, the court will refrain from imposing the death penalty unless there are highly extraordinary circumstances

## **RAREST OF RARE SCENARIO**

### **PROGRESSION OF THE DOCTRINE**

The Supreme Court's ruling in the case of *Maneka Gandhi v. Union of India*<sup>12</sup> introduced a fresh perspective on the interplay between Article 14, 19, and 21 of the Indian Constitution.

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<sup>11</sup> STEFFEN, LLOYD, and DENNIS R. COOLEY. "The Death Penalty." *The Ethics of Death: Religious and Philosophical Perspectives in Dialogue*, 1517 Media, 2014, pp. 101–48. JSTOR, <https://doi.org/10.2307/j.ctt9m0vrp.6>. Accessed 21 Nov. 2024.

<sup>12</sup> 1978 AIR 597

The statement asserts that the punishment of an individual for a crime they have committed must satisfy the requirements of all three Articles, both procedurally and substantively. In the case of *A.K. Gopalan v. State of Madras*<sup>13</sup>, a six-judge court determined that if an accused person is convicted and then given a punitive detention or incarceration, it falls outside the protection of Article 19.

The accused in the case of *Bachan Singh v. State of Punjab*<sup>14</sup> was found guilty of the offence of triple homicide. The defendant's case was adjudicated by the Sessions Court, resulting in the imposition of the Death Penalty. Following this, the case was presented to the High Court, which subsequently rejected the appeal and upheld the decision made by the Sessions Court. The Constitutionality of the death punishment imposed on the defendant convicted under section 302 of the Indian Penal Code was ultimately examined by the Supreme Court. The constitutional validity of Section 354(3) of the Code of Criminal Procedure (CrPC) was also subject to scrutiny, along with its extent. The Supreme Court, in a majority of 4:1, dismissed the appeal, so affirming that the aforementioned sections do not contravene the Constitution. The term 'Rarest of Rare Case' was initially introduced in the legal case of *Machhi Singh v. State of Punjab*<sup>15</sup>. The Supreme Court attempted to establish certain criteria by which it can be established whether a case falls under the category of 'Rarest of Rare Case' or not

### **RAREST OF THE RARE' DOCTRINE**

The rarest of rare doctrine was introduced by the supreme court in the *Bachan Singh* case in 1980. Subsequently, life imprisonment became the prevailing norm, while the death sentence became an exceptional measure in India, reserved for the most severe situations.

The court in the *Machhi Singh* case established certain criteria for evaluating the circumstances under which a case may be classified as rarest to rarest. The following criteria are examined:

1. Manner of committing murder -When a murder is carried out in a highly cruel, absurd, evil, defiant, or morally wrong way, it is intended to provoke a strong and extreme anger from the community. For instance,

a. When the victim's residence is deliberately ignited with the aim of causing her demise through baking.

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<sup>13</sup> 1950 AIR 27

<sup>14</sup> SUPRA

<sup>15</sup> 1983 AIR 957

b. When the victim is subjected to torment as a result of cruelty that ultimately leads to her demise.

c. When the victim's body is subjected to ruthless mutilation or fragmentation.

2. Motive for murder - When a murder is carried out with complete depravity and cruelty, such as

a. when a hired murderer kills only for the purpose of receiving monetary compensation. b. A ruthless homicide characterised by a deliberate plan to acquire ownership of property or pursue personal benefits.

3. Socially heinous nature of crime - When an individual from a disadvantaged social group is killed. Instances of bride burning, commonly referred to as dowry death, are also encompassed within this category. The scale of a crime refers to instances where the proportion of criminal activity is significantly elevated, such as in cases involving several homicides.

4. Personality of the Victim of the Murder - In instances where the victim of a homicide is an innocent kid, a vulnerable lady or individual (because to advanced age or physical impairment), a prominent public figure, and so on

### **What is the scope of the Doctrine of Rarest of Rare?**

In the case of *Jagmohan Singh v. State of U.P.*<sup>16</sup>, The constitutionality of the capital sentence was supported by the Supreme Court, which asserted that it functions not just as a deterrent but also as a symbolic manifestation of society's disapproval of criminal behaviour. The Court further held the belief that India could not bear the financial burden of engaging in the experimentation of abolishing capital punishment.

The affirmation of the constitutionality of *Bacchan Singh* was recently reiterated. Hence, the case of *Bacchan Singh* led to the formulation of the subsequent propositions:

- i. The application of capital punishment should be limited to situations involving the highest level of accountability, refraining from its implementation until it is deemed absolutely essential
- ii. Before making the decision to abstain from capital punishment, it is crucial to carefully evaluate the particular circumstances surrounding the offender. (Determinants that exacerbate or mitigate the gravity of a situation)

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<sup>16</sup> 1973 SCR (2) 541

- iii. The prevailing standard is life imprisonment, but the death penalty is an infrequent event.
- iv. In essence, the death sentence should be employed just when life imprisonment fails to sufficiently penalise the crime, considering the particular circumstances surrounding the offence.
- v. In order to reach a fair equilibrium between the two, it is imperative to construct a balance sheet that include all elements that exacerbate or ameliorate a condition, while also giving equal weight to the ones that enhance the situation.

The Court coined the term "Rarest of Rare" to describe cases involving a crime that is both uncommon and unique, and would be considered extraordinary by any reasonable person in society. It is employed when there is no other penalty that is deemed sufficient for the gravity of the offence. The court elucidated the scope of the "rarest of rare" concept by delineating five precise criteria that were employed to ascertain its relevance in a particular case.

### **Functioning of the 'Doctrine of the Rarest of Rare'**

The Supreme Court of India, in the Bachan Singh case<sup>17</sup>, introduced the idea of rare to uncommon situations to offer justices direction in determining whether to impose life imprisonment or the death penalty. The text did not offer additional information regarding the most exceptional and remarkable cases. As a result, the matter of formulating guidelines for judges to exercise their judgement remained unresolved, leading to heightened confusion and incongruity in judicial decisions. The Supreme Court, in the Machhi Singh case<sup>18</sup>, developed a hierarchical classification of occurrences, ranging from the least frequent to the most rare. The fundamental tenets established in prior legal decisions in the Machhi Singh case, which sought to guarantee equitable treatment within these classifications, remain intact.

The court's ruling in the legal case of Dharm Bhagre versus State of Maharashtra<sup>19</sup> established that the determination of punishment is within the purview of the judge's exercise of judgement. When contemplating punishment, it is crucial to analyse significant elements such as the underlying reason, the gravity of the offence, and the modus operandi employed. In a similar vein, the legal dispute between Jagmohan Singh and the State of Uttar Pradesh might be examined. Justice Palekar, representing a unanimous court, asserted that the imposition of the

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<sup>17</sup> SUPRA

<sup>18</sup> SUPRA

<sup>19</sup> 1973 AIR 476

death penalty is permissible in instances where the act of murder was characterised by wicked planning and merciless execution, or when the victim held a prominent social status, resulting in substantial societal upheaval. The primary aim was to implement the death penalty in the most extreme cases. The definition of the rarest of the rare occurrences is a highly debated topic worldwide.

Although the principle in question lacks a precise definition, it has been implemented by considering the severity of the offence perpetrated by the perpetrator. In the context of the death penalty, India exhibits a diverse range of perspectives. These perspectives do not unequivocally endorse or contradict the topic; instead, they focus on a restricted range of occurrences. Conversely, the situation became increasingly intricate as the incidence of criminal activity escalated and instances of severe criminal conduct became more prevalent. The Supreme Court of India has established certain evaluating criteria within the framework of the Machi Singh case. The death penalty is not in violation of Article 21 of the Indian Constitution, which ensures the right to life and personal liberty, as long as it does not infringe upon the rights of others.

This assertion holds true on the condition that the death penalty does not infringe upon the rights of individuals. Based on the research undertaken by the Law Commission in 2015, it is suggested that the most efficacious approach to safeguarding the nation would involve the entire abolition of capital punishment, save in cases involving terrorism. The execution rate in India is comparatively low due to the nation's emphasis on the criteria employed in the administration of capital punishment. This is evident from the data indicating that the number of fatalities throughout the period spanning from 2004 to 2015 was limited to a just four individuals.

### **LAW COMMISSION REPORT OF 2015**

The Supreme Court referred the issue of the death penalty in India to the Law Commission of India in the cases of Santosh Kumar Satishbhushan Bariyar v. Maharashtra and Shankar Kisanrao Khade v. Maharashtra<sup>20</sup>. The purpose of this reference was to enable a current and well-informed discussion and debate on the subject.

The Commission has previously been requested to investigate the death penalty, with particular emphasis on the 35th Report ("Capital Punishment", 1967), which is a significant report on this

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<sup>20</sup> SUPRA

matter. The Report advocated for the continuation of the death sentence in India. In the case of *Bachan Singh v. UOI*, The Supreme Court has upheld the legitimacy of the death penalty, albeit with a restriction on its use to solely the most extraordinary and infrequent situations. This measure was implemented to mitigate the capriciousness of the penalty. However, there have been notable changes in the social, economic, and cultural conditions of the nation since the 35th edition.

Furthermore, the issue of arbitrariness has been a prominent concern in the adjudication of capital punishment cases over the course of the last 35 years, subsequent to the development of the most influential legal precedent on this subject. In light of the sensitive nature of the death penalty, the Commission made the decision to conduct a comprehensive research on the matter. In May 2014, the Commission issued a consultation paper to solicit public comments on the subject matter. The Commission also conducted a one-day Consultation on "The Death Penalty in India" on 11 July 2015 in New Delhi, with the aim of achieving the same objective. Subsequently, following thorough debates, long deliberations, and comprehensive study, the Commission has formulated the current Report. The recommendation of the Commission in the matter is sent herewith in the form of the Commission's Report No.262 titled "The Death Penalty", for consideration by the Government.

The concept of retribution holds considerable importance in the implementation of punitive measures. However, it should not be reduced to mere punishment. The principle of retributive justice, which entails imposing punishment commensurate with the extent of harm inflicted, is incongruous with the constitutionally mandated framework of our criminal justice system. The efficacy of lethal punishment in achieving constitutionally valid penological aims is limited. There is a tendency to neglect the essential components of restorative and rehabilitative justice when we fixate on the death penalty as the ultimate manifestation of justice for victims. The prioritisation of capital punishment diverts attention from other concerns within the criminal justice system, including insufficient investigative measures, crime prevention strategies, and the safeguarding of the rights of crime victims.

The implementation of suitable victim compensation programmes by the government is essential for the rehabilitation of those who have been victimised by crime. Concurrently, it is crucial for courts to exercise the jurisdiction granted to them by the Code of Criminal Procedure, 1973 in order to grant proper compensation to victims in suitable cases. Prominent defendants often employ intimidation and other manipulative tactics to suppress the testimony



of victims and witnesses. Hence, it is crucial to establish a comprehensive witness protection programme. The need for police reforms to improve and streamline the investigation and prosecution process is widely acknowledged<sup>21</sup>.

It is crucial that prompt measures are taken to effectively tackle this issue. The Law Commission of India's 262nd report has proposed the elimination of the death sentence for all crimes, with the exception of those associated with terrorism. The study has been generally recognised as a significant development in Indian death penalty jurisprudence, sometimes referred to as "historic," "seminal," "decisive," and even more eloquently described as a "paradigm shift."

However, what advancements has it achieved by suggesting modifications to the language of exception? The research proposes the substitution of the rarest of rare criteria, which is now the exception to the elimination of the death sentence, with terrorism cases. The term "replace" is not a suitable description for the report due to an intriguing conflation: The concept of "rarest of rare" refers to a criterion of judicial examination, whereas "terrorism" denotes a classification of criminal conduct.

The Commission has made a comprehensive set of recommendations, which can be summarized as follows:

1. It is recommended by the Commission that the government expeditiously enact measures encompassing police reforms, witness protection plans, and victim compensation schemes. From the year 1955, when the necessity of presenting specific justifications for the imposition of life imprisonment rather than capital punishment was eliminated, to 1973, when specific justifications were mandated for the imposition of the death penalty, and ultimately to 1980, when the Supreme Court imposed limitations on the application of the death penalty to the most exceptional and exceptional circumstances, the evolution of our legal system exemplifies the trajectory we must pursue in order to progress.

2. Due to the broadened scope and enhanced scope of the Right to life, along with the reinforced due process obligations in the State-individual interactions, and the prevailing principles of constitutional morality and human dignity, the Commission has reached the determination that it is imperative for India to progress towards the abolition of capital punishment.

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<sup>21</sup> Bernaz, Nadia. "Life Imprisonment and the Prohibition of Inhuman Punishments in International Human Rights Law: Moving the Agenda Forward." *Human Rights Quarterly*, vol. 35, no. 2, 2013, pp. 470–97. JSTOR, <http://www.jstor.org/stable/24518024>. Accessed 21 Nov. 2024.

3. While there is no legitimate legal justification for classifying terrorism as distinct from other crimes, there is a widespread apprehension that the removal of capital punishment for terrorism-related crimes and the act of engaging in warfare will affect the security of the nation.

4. In contrast, the Commission perceived no justification for further delay in initiating the initial phase of eliminating the death penalty for all crimes, excluding those associated with terrorism. This can be attributed to the consideration of issues raised at the legislative level. Consequently, the Commission proposed the abolition of the death sentence for all offences, save for those associated with terrorism and those involving the conduct of war.

5. Moreover, the Commission sincerely aims for the trend towards complete abolition to be swift and enduring, without any reversal.

### **VIEW OF ABOLITION**

The death penalty is a time-honored tradition that has existed since the beginning of human civilization. In antiquity, the monarch would enforce capital punishment, typically through decapitation, upon anybody who intentionally defied any directive given by the monarch or neglected to meet any moral duty entrusted to them. Following this, it was officially included in the Indian Penal Code of 1860, so granting legal recognition to the practice, which has since been deemed legitimate in India. In the twentieth century, a movement arose with the aim of abolishing the death sentence, leading to the subsequent adoption of this position by various states and the elimination of capital punishment.

However, the practice of capital punishment has endured in India. The issue at hand has sparked significant deliberation and disagreement, as proponents of human rights have presented compelling arguments in support of the elimination of capital punishment. The promotion of the abolition of the death penalty is a key objective of the International Covenant on Civil and Political Rights. Although the value of human life has diminished in numerous nations, numerous countries have opted to eliminate it<sup>22</sup>.

The death penalty serves as a means to effectively curtail all forms of human suffering and eradicate any potential for experiencing emotions such as sadness or happiness. Presently, inside our country, the debate around capital punishment has assumed a heightened significance. The proponents of abolition have enhanced their campaigns by presenting more

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<sup>22</sup> Zimring, Franklin E. "The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code." *Columbia Law Review*, vol. 105, no. 4, 2005, pp. 1396–416. JSTOR, <http://www.jstor.org/stable/4099437>. Accessed 21 Nov. 2024.

persuasive arguments. The authors contend that society has the capacity to proficiently regulate its criminal elements without relying on such a severe mode of retribution. The various rationales for abolition encompass:

Advocates for the abolition of the death penalty present several compelling arguments.

1. Wrongful execution of individuals who are not guilty

Throughout history, there have been documented cases in which individuals who were found to be innocent have been sent to capital punishment, and regrettably, this phenomenon is expected to endure in the foreseeable future. Irrespective of the degree of complexity of a legal system, it will certainly continue to be vulnerable to human mistakes. Between the years 2000 and 2014, around 20% of individuals who received capital punishment sentences from trial courts were subsequently exonerated by the Supreme Court and high courts. A grand total of 443 individuals were found guilty and sentenced to capital punishment, only to later be absolved of all accusations.

2. Arbitrariness

Denotes the characteristic of being determined by random selection or individual caprice, rather than by any objective rationale or framework. The potential for arbitrary application of the death penalty must be disregarded. The utilisation of capital punishment frequently exhibits inequity and prejudice towards those who experience economic disadvantages, are affiliated with minority groups, or are affiliated with particular racial, ethnic, political, or religious groupings. According to the Death Penalty India Report 2016 (DPIR) published by the National Law University Delhi, a significant majority of those who get a death penalty in India, over 75%, are affiliated with socio-economically disadvantaged communities such as Dalits, Other Backward Classes (OBCs), and religious minorities..

3. Cruel

Capital punishment is incongruous with the principles of human rights and dignity. The implementation of capital punishment represents a breach of the fundamental entitlement to life, which is undoubtedly the most essential among all inherent human rights. Furthermore, it constitutes a breach of the entitlement to be exempt from torture, as well as any other manifestation of cruel, inhuman, or degrading treatment or punishment. Furthermore, the death sentence erodes the inherent dignity of every individual.

4. Prevention of undesirable behavior through the threat of punishment or negative consequences.

The deterrent efficacy advocated by proponents of the death penalty is lacking. According to UNGA Resolution 65/206, the United Nations General Assembly has expressed the view that the available evidence is inadequate to substantiate the claim that the death sentence functions as a viable deterrent. It is imperative to underscore that a growing cohort of law enforcement experts in jurisdictions where capital punishment remains in practice are duly scrutinizing its efficacy as a deterrent to criminal activity.

5. Popular sentiment

The support of death punishment by the general population does not inherently imply that the state has the authority to take an individual's life. Throughout history, there have been notable occurrences where a significant portion of the population expressed support for egregious infringements upon human rights, only to subsequently face strong condemnation. Prominent persons and politicians bear the responsibility of bringing attention to the inherent contradiction between capital punishment and the fundamental tenets of human rights and dignity. It is important to emphasise the correlation between the public's support for capital punishment and their desire for a society free from crime. However, there are more effective methods for preventing crime.

6. Against the global trend:

As to the Amnesty Report, over two thirds of countries worldwide had effectively abolished the death penalty, either by legal means or in practice, by the conclusion of 2021. This stands in opposition to the global pattern.

### **VIEW IN FAVOUR OF RETENTION**

The Law Commission of India recommended a prudent strategy in its 35th report, issued in 1967. Furthermore, the commission expressed its endorsement for the perpetuation of the death sentence as an infrequent and extraordinary method of retribution. The argument posited that a thorough examination of the existing facts in India was necessary in order to evaluate the issue of retention and abolition. Hence, proponents of capital punishment underscore the significance of critically assessing their arguments within the context of the prevailing conditions in India. The arguments that align with other countries may not necessarily align with India. Various governments, or even individual states within a single state, may hold

divergent viewpoints regarding law and order. Despite India's vast territorial expanse, a significant portion of its population lacks literacy skills. Regrettably, some locations within India lack the supplementary legal characteristics that function as a deterrent to homicide in Western nations. The characteristics encompassed are education, uniformity, wealth, sustainability, and an awareness of shortcomings<sup>23</sup>. The proponents of retentionism put out a number of justifications, which are outlined below:

### **Counterarguments opposing the elimination of capital punishment**

#### **1. Crime prevention**

Primarily, the adoption of capital punishment will function as a deterrence for subsequent criminal activities. The application of the most severe penalty for the most egregious offences can serve as a means of deterring future crimes. This phenomenon has a substantial influence on the field of human psychology. When an individual possesses knowledge of the substantial penalties associated with participating in a particular behaviour, and the adverse outcomes of said behaviour significantly surpass any potential advantages, it becomes evident that they will abstain from partaking in said action.

#### **2. Ensuring fairness and equity in legal proceedings**

Moreover, the utilisation of capital punishment ensures the effective dispensation of justice. The main purpose of the Preamble to the Indian Constitution is to provide fair and impartial administration of justice to all Indian citizens, in addition to other objectives. It is imperative to consider the methods via which justice can be achieved. Is it not equitable and justifiable that an individual who has perpetrated the most abhorrent transgressions, poses a substantial threat to society, and exhibits no regret or manifestation of compassion, be subjected to capital punishment? Human rights defenders have raised inquiries regarding the exact entitlements that are anticipated to be possessed by these offenders. To what extent do citizens possess faith in the court system's capacity to effectively administer punishment commensurate with the gravity of their transgressions? These inquiries unambiguously establish the foundation for a viewpoint that approaches the elimination of capital punishment with significant scepticism<sup>24</sup>.

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<sup>23</sup> BARRY, KEVIN M. "THE LAW OF ABOLITION." *The Journal of Criminal Law and Criminology* (1973-), vol. 107, no. 4, 2017, pp. 521–59. JSTOR, <https://www.jstor.org/stable/48572973>. Accessed 21 Nov. 2024.

<sup>24</sup> Sinha, S. B. "To Kill Or Not To Kill: The Unending Conundrum." *National Law School of India Review*, vol. 24, no. 1, 2012, pp. 1–29. JSTOR, <http://www.jstor.org/stable/44283747>. Accessed 21 Nov. 2024.

3. Judicial reasoning refers to the process by which judges analyze and interpret legal principles and apply them to specific cases in order to reach a decision.

Moreover, the administration of the death penalty is not characterised by capriciousness. In India, the imposition of the death penalty is not carried out in the absence of substantiating evidence or without any logical or rational support. First and foremost, as previously mentioned, the utilisation of capital punishment is limited to highly extraordinary circumstances. Although the death sentence has been carried out, the guilty person still has the right to request clemency, which may lead to the reduction of the death penalty to life imprisonment as a result of unreasonable delays. Upon receipt of the mercy petition, the executive possesses the jurisdiction to commence an autonomous inquiry and request supplementary evidence. The executive branch possesses the power to offer clemency and commute the death penalty to life imprisonment for the guilty defendant if further evidence is presented, particularly information that is not included in the court records.

In addition, there are specific and objective criteria, determined by previous cases that must be satisfied in order for a death sentence to be changed to life imprisonment<sup>25</sup>.

It was also recommended that the court, in exercising its discretion, examine the following factors as mitigating factors for granting the lower punishment of life imprisonment:-

1. The act was perpetrated during a period of extreme mental or emotional instability experienced by the accused.
2. The age of the accused is a determining factor in determining whether they should be condemned to death.
3. The probability of the accused refraining from engaging in criminal acts of violence that may potentially endanger society;
4. The probability of the accused being able to undergo rehabilitation;
5. The accused held the belief that he was morally justified in engaging in the offence, taking into consideration the specific facts and circumstances of each individual case.
6. The accused acted under the influence of someone in a position of authority

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<sup>25</sup> PHILLIPS, SCOTT. "LEGAL DISPARITIES IN THE CAPITAL OF CAPITAL PUNISHMENT." *The Journal of Criminal Law and Criminology* (1973-), vol. 99, no. 3, 2009, pp. 717–56. JSTOR, <http://www.jstor.org/stable/20685056>. Accessed 21 Nov. 2024.

7. The accused's condition indicated a mental impairment, which hindered his ability to fully understand the illegal nature of his actions..

Nevertheless, for a court to implement these rules, it is imperative to inquire and address the subsequent two inquiries:

- Does the crime include any extraordinary characteristic that makes a life sentence insufficient and necessitates the imposition of a death sentence?
- Is it justifiable to impose a death sentence based on the facts of the crime, even while taking into account the significant mitigating characteristics that support the offender?

In order to determine the appropriateness of imposing the death penalty, the court is required to evaluate whether the case may be classified as "extremely rare cases." This assessment should consider the specific circumstances of the case and the responses acquired from the designated inquiries.

#### 4. Human rights

Instances of life-sentenced prisoners fleeing custody have been documented in the historical records of Indian prisons. In the context of this specific circumstance, the matter of collective security within society becomes apparent. The potential threat to society posed by a convicted criminal cannot be disregarded, as it is often concealed under the guise of human rights. Furthermore, it is irrational to grant "human" rights to individuals who have entirely relinquished their inherent humanity. This is especially relevant for persons who are not amenable to rehabilitation. The individuals in question are not deserving of the right to life as a result of their abhorrent activities that pose a threat to the well-being of others. The utilisation of the death penalty, also referred to as capital punishment, ought to be exclusively implemented in the most extraordinary and extraordinary situations. Various conflicts are currently unfolding worldwide among social activists, legal reformers, judges, jurists, lawyers, and administrators in their efforts to eliminate the death penalty<sup>26</sup>.

These debates are occurring globally. Human beings do not possess the characteristics of angels or demons, as they do not solely engage in either benevolent or malevolent actions. Neither angels nor devils are present in them. Due to the inherent characteristics of human

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<sup>26</sup> Malkani, Bharat. "THE OBLIGATION TO REFRAIN FROM ASSISTING THE USE OF THE DEATH PENALTY." *The International and Comparative Law Quarterly*, vol. 62, no. 3, 2013, pp. 523–56. JSTOR, <http://www.jstor.org/stable/43301578>. Accessed 21 Nov. 2024.

beings, it is unattainable to completely eliminate all occurrences of criminal behaviour from society; in fact, it is inconceivable that such a feat could be achieved. Offenders are an integral component of our society, and it is incumbent upon us to impart the necessary knowledge to them, enabling them to transform into law-abiding members of society. In order to facilitate the enjoyment of fundamental human rights by criminals, it is imperative to undergo a paradigm change in our perception of them. Conversely considering the viewpoint of victims, it is crucial to ensure they receive justice; otherwise, there is a substantial likelihood that they may resort to self-inflicted legal action. If this happens, it could potentially lead to disorder. Therefore, to mitigate the occurrence of this situation, it is imperative to guarantee that the penalty is both obligatory and commensurate.

#### 5. Moral inquiry

Abolitionists argue that the government's execution of individuals is ethically reprehensible, while an alternative perspective might be presented in support of this stance. This implies that the presence of capital punishment signifies the acknowledgment by the government of the intrinsic value of prisoners, as they are seen as independent individuals with the capacity to exercise their own agency and assume full responsibility for their deeds. The abolition of capital punishment on the grounds of immorality entails the perception of offenders as morally devoid individuals who should be granted pardons for even the most abhorrent crimes they have committed.

### **INTERNATIONAL TRENDS**

The international environment regarding the death sentence – both in terms of international law and state practice – has developed in the previous decades. Globally, nations are categorized according to their stance on the death penalty, using the following classifications:

- ☐ Abolitionist for all crimes
- ☐ Abolitionist for ordinary crimes
- ☐ Abolitionist de facto
- ☐ Retentionist

As of the conclusion of 2014, 98 nations had officially abolished all crimes, 7 countries had only abolished ordinary crimes, and 35 countries had implemented abolitionist measures. This resulted in a total of 140 countries worldwide that were either legally or practically abolitionist. There are 58 countries that are considered retentionist, as they continue to include the death



sentence in their legal framework and have employed it in recent times.<sup>71</sup> This list includes several highly populous countries, including India, China, Indonesia, and the United States. Consequently, a significant portion of the global population could potentially be vulnerable to this form of punishment. Nevertheless, only a limited number of nations persist in employing and upholding capital punishment. There has been a noticeable shift away from the utilisation of capital punishment in recent decades.

This phenomenon can be attributed to the fact that several nations have either completely abolished the practice of capital punishment or have ceased its implementation altogether. The United States of America is an anomaly when compared to its close allies and other democratic nations, as it persists in the practice of implementing the death sentence. In contrast, a significant proportion of nations maintain the perspective that the death penalty is a violation of human rights, notwithstanding the absence of explicit prohibition on its utilisation within international legal frameworks. In order to ascertain the standards of morality in the United States and identify the types of punishment that should be considered cruel and unusual in accordance with the Eighth Amendment, it is crucial to study the global implementation of capital punishment. A considerable proportion of justices serving on the Supreme Court have cited international law as a means to bolster their own rulings pertaining to capital punishment.

It is crucial to bear in mind the potential application of the death penalty to certain categories of defendants, such as juvenile offenders. Various conflicts may occur between nations that enforce capital punishment and those that do not. Nations that do not have capital punishment express significant apprehension when a member of their populace is confronted with capital punishment within the United States.<sup>27</sup>

## **CAPITAL PUNISHMENT IN INTERNATIONAL HUMAN RIGHTS TREATIES**

The Indian Constitution asserts that India is a democratic, sovereign, socialist, and secular republic that upholds the principles of social, economic, and political justice for all its citizens. It also guarantees the freedom of thought, expression, belief, faith, and worship, as well as equality of status and opportunity. Additionally, the Constitution aims to foster fraternity among its citizens, thereby safeguarding the dignity of individuals and promoting national

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<sup>27</sup> Johnson, David T. "American Capital Punishment in Comparative Perspective." *Law & Social Inquiry*, vol. 36, no. 4, 2011, pp. 1033–61. JSTOR, <http://www.jstor.org/stable/41349667>. Accessed 21 Nov. 2024.

unity. India is a democratic nation characterised by its vast size and diversified cultural environment.

The origins of human rights in the prehistoric community lack empirical evidence. The rationale behind this assertion is that the individual who pioneered the natural theory was the proponent of the concept that individuals had inherent and essential rights from birth, with the most significant being the right to life, freedom, and property. The International Covenant of 1966 encompasses a comprehensive framework of human rights, incorporating human rights as a fundamental provision within its framework. The Preamble of the Constitution of India also contains an explicit mention of the "Dignity of India."

The Constitution of India delineates the fundamental rights of its citizens in Articles 12 to 36. These fundamental rights are inherent, essential, and inherent rights that provide protection to the citizens of our nation. The significance of human rights lies in their role in safeguarding human liberty, enhancing human nature, and promoting social and economic well-being. Given that these fundamental rights are universally available to all individuals and citizens of India, a pertinent inquiry emerges regarding the fate of individuals or accused individuals who get a death sentence. Do individuals lack access to the fundamental rights that are widely recognised as universally applicable? Can the implementation of capital punishment be considered a breach of Articles 14, 19, and 21 of the Constitution of India?

Within the domain of international human rights law, the International Covenant on Civil and Political Rights (often referred to as the "ICCPR") holds significant prominence as a pivotal instrument that pertains to the establishment of capital punishment. The International Covenant on Civil and Political Rights (ICCPR) does not remove the use of the death sentence; nonetheless, Article 6 includes assurances concerning the right to life and includes critical safeguards that signatories who continue to use the death penalty are required to adhere to.

Only one instrument, namely the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), specifically addresses the abolition of the death penalty. This treaty is available for signatures from governments worldwide. The pact garnered the signatures of three signatories and 81 states, and subsequently came into effect in 1991. Provisions under the International Covenant on Civil and Political Rights (ICCPR) and the

Convention on the Rights of the Child (CRC) explicitly prohibit the imposition of capital punishment upon individuals below the age of 18<sup>28</sup>.

The Convention on the Rights of the Child (CRC) had received approval from 195 governments by July 2015. The Torture Convention and the UN Committee against Torture have served as legal frameworks that have established restrictions on the use of the death penalty and the implementation of essential protective measures. The recognition of the death sentence as a form of torture or cruel, inhuman, or degrading treatment or punishment (CIDT) is not explicitly addressed in the Torture Convention. Nevertheless, UN organisations have identified some techniques of execution and the occurrence of death row as manifestations of CIDT.

Throughout the evolution of international criminal law, the Nuremberg and Tokyo courts, established in the aftermath of World War II, both sanctioned the imposition of capital penalty. However, subsequent to that period, international criminal tribunals have determined that the death penalty is not a permissible means of punishment.

India has formally endorsed the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC), while also being a signatory to the Torture Convention, but without ratification. Once a state has ratified a treaty, it is legally bound to comply with the obligations specified in the treaty, as per international law. Even if a treaty has been signed but not yet ratified, the state is required to abstain from actions that might undermine the goals and intentions of the pact<sup>29</sup>.

In a series of resolutions adopted in 2007, 2008, 2010, 2012, 2014, 2016 and 2018, the General Assembly urged States to respect international standards that protect the rights of those facing the death penalty, to progressively restrict its use and reduce the number of offences which are punishable by death.

### **PROPOSED CHANGES: 2023 CRIMINAL LAW AMENDMENTS**

Union Home Minister Amit Shah introduced three revised Bills to the Lok Sabha on December 12 to replace the previous criminal laws that were created during the British era, after the withdrawal of the original versions in August of this year. These three measures will replace

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<sup>28</sup> Steiker, Carol S., and Jordan M. Steiker. "The American Death Penalty and the (In)Visibility of Race." *The University of Chicago Law Review*, vol. 82, no. 1, 2015, pp. 243–94. JSTOR, <http://www.jstor.org/stable/43234696>. Accessed 21 Nov. 2024.

<sup>29</sup> Steiker, Carol S. "No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty." *Stanford Law Review*, vol. 58, no. 3, 2005, pp. 751–89. JSTOR, <http://www.jstor.org/stable/40040280>. Accessed 21 Nov. 2024.

the Indian Evidence Act of 1872, the Code of Criminal Procedure (CrPC) of 1973, and the Indian Penal Code (IPC) of 1860. The Bharatiya Nyaya (Second) Sanhita Bill, 2023 is set to supersede the Indian Penal Code (IPC), while the Bharatiya Nagarik Suraksha (Second) Sanhita, 2023 will replace the Criminal Procedure Code (CrPC) of 1973.

Additionally, the Bharatiya Sakshya (Second) Bill, 2023 will replace the Indian Evidence Act of 1872. After their introduction in August, they were sent to a 31-member Parliamentary Standing Committee, led by BJP MP Brij Lal, for examination.

The panel, after seeking input from experts and stakeholders, approved its report on the Bills on November 7. Opposition MPs identified multiple flaws and proposed over 50 amendments. The Opposition MPs, in their dissent notes, criticised the limited representation of diverse specialists, raised concerns about the rushed introduction of the new legislation, and emphasised that they are essentially a replication of the current laws.

“Grammatical and language errors have been corrected. The Bills were examined at length by the Standing Committee and it was necessary to include the suggestions. There are no major changes. Had we continued with the old Bills, several official amendments would have had to be made, so we decided to introduce new Bills instead. Adequate time, 48 hours, has been given to members to study the Bills...We do not want to pass such important pieces of legislation in a hurry,” Mr. Shah said while introducing the revised Bills<sup>30</sup>.

## **PRINCIPAL ASPECTS OF THE BILL**

The Bharatiya Nyaya Sanhita (BNS) continues to encompass a significant portion of the offences outlined in the Indian Penal Code. Community service is one of the forms of punishment that is included. The criminalization of seditiousness has been abolished. One potential solution involves the implementation of a novel criminal offence targeting activities that pose a threat to the sovereignty, unity, and integrity of India.

The BNS includes the inclusion of terrorism as a criminal offence. Acts of terrorism encompass actions undertaken with the explicit aim of jeopardising the cohesion, authenticity, and safeguarding of the nation, as well as intimidating the broader populace or causing disturbances to public order. Organised crime has been incorporated as a novel criminal offence. The range

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<sup>30</sup> Monica Sakhrani, and Maharukh Adenwalla. “Death Penalty: Case for Its Abolition.” *Economic and Political Weekly*, vol. 40, no. 11, 2005, pp. 1023–26. JSTOR, <http://www.jstor.org/stable/4416329>. Accessed 21 Nov. 2024.

of offences encompasses activities such as abduction, coercion, and diverse manifestations of cybercrime, which are executed on behalf of a criminal syndicate. The classification of small organised crime as a criminal offence has been established.

If a group of five or more individuals commits murder based on specific identity markers, such as caste, language, or personal belief, it will be regarded an offence. The penalty for this offence can range from seven years to life imprisonment or execution.