

Capital Punishment and Its Constitutional Validity

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ABSTRACT

Capital punishment, or the death penalty, is a highly debated issue worldwide, raising questions about morality, ethics, and its consistency with constitutional values. The justice of the death sentence, its effect on human rights, and its compliance with constitutional protections are the main topics of dispute in India. This article looks at the death penalty's constitutional legitimacy in India, a country where it is still an accepted form of punishment. By analyzing constitutional principles, significant judicial rulings, and shifting societal norms, it evaluates whether capital punishment aligns with fundamental rights and due process. The death penalty has always been a topic of intense controversy. This paper critically examines the death penalty's legitimacy in view of India's newly proposed Bharatiya Nyaya Sanhita (BNS, 2023), which aims to take the place of The Indian Penal Code (1860 IPC). Opinions regarding constitutional legitimacy of the death sentence vary widely. This article looks to explore the historical context of capital punishment and analyze its constitutionality within the Indian legal framework. To fully understand the polarized views surrounding this issue, it is crucial to examine key judicial rulings that have shaped the legal discourse and established significant precedents. Key judicial rulings have established a continuous and interconnected framework that helps develop a comprehensive understanding of capital punishment. The debates between abolitionists and retentionists offer valuable perspectives, guiding the search for a reasoned and rational resolution to the issue. The contrast between India's stance and the global approach to the death penalty prompts reconsideration of whether it should be abolished. It is crucial to recognize that humans require both reformation and punishment, depending on the nature of the offense, and punishment should be determined after carefully evaluating all aspects of the crime. This paper aims to provide a thorough analysis of facts, reports, and legal precedents to foster a well-rounded and clear understanding of the concept of capital punishment.

Keywords: death penalty, punishment, constitutionality, reformatory justice, international scenario, Proportionality of Punishment

INTRODUCTION

The institution of capital punishment, as ancient as human civilization itself, has been a subject of intense debate and scrutiny for centuries. The ethical, moral, and legal implications of this practice have been questioned by philosophers, jurists, and human rights activists alike. The purpose of punishment is to instill remorse, ensure justice for the victim, and can act as a disincentive to society. When a punishment achieves one or more of these objectives, it becomes necessary to impose various types of penalties, including the death sentence.

The capital punishment, commonly known as the death sentence," is the harshest form of punishment. Under national laws, capital punishment is reserved for the most severe crimes against humanity, such as murder, homicide, and rape. It involves the legally authorized execution of a criminal found guilty of a grave offense and was given a death sentence by a judge. It's important to distinguish this from extrajudicial killings, which occur without legal procedures. Although the definition and application of such crimes have varied across different countries, states, and time periods (Gupta, 1986), capital punishment has consistently referred to the death sentence. Its main objectives are deterrence—sending a clear signal that such actions are unacceptable—and incapacitation, preventing the offender from committing further serious crimes. While both are essential, deterrence and incapacitation are particularly emphasized. Today, executions may be conducted by methods such as hanging, electrocution, lethal injection, or firing squad. However, with the growing momentum of Indian Human rights movement, the justification for death penalty is increasingly being challenged.

Additionally, as stated in the Human Rights Declaration of the United Nations¹ and the Fundamental Rights protected by the Indian Constitution², the death sentence violates fundamental human rights. The debate over capital punishment remains ongoing, with some advocating for its retention while others push for its abolition. To fully grasp the complexities of this issue, it is crucial to examine it in detail.

Considering the gravity of the death sentence as the worst type of punishment available, evaluating its constitutionality is of great significance. This issue is particularly relevant in India, where the death penalty is still legally enforced. Analyzing its constitutionality raises important questions about fundamental rights, due process, and shifting societal standards, offering valuable insights into possible legal reforms and policy changes. The following issues are briefly addressed in this article: -

- a) The constitutional provisions regulating the use of the death punishment in India outline the legal framework under which capital punishment is allowed.
- b) Key judicial decisions have addressed the death penalty's constitutionality, significantly shaping its interpretation and setting important legal precedents.
- c) The death penalty's implementation is increasingly evaluated in light of evolving societal values and global human rights standards, raising questions about its alignment with modern justice systems.

HISTORICAL BACKGROUND OF INDIAN DEATH PENALTY

The history of death penalty spans centuries, with diverse cultures and civilizations employing methods such as beheading, crucifixion, stoning, and drowning. In ancient Rome, executions often served as public spectacles for entertainment. However, as Christianity gained influence, there was a gradual shift toward more humane punishments, and only the most serious crimes were now eligible for the death penalty.

- **Ancient and Medieval Period**
- The Manusmriti, an ancient Hindu legal text, mandated the death penalty for various offenses, including violence, adultery, and defamation of the Brahmins³ (priestly class).

¹ Universal Declaration of Human Rights 1948.

² Constitution of India, Part III - Fundamental Rights. (1950). Government of India. Available at: <https://legislative.gov.in/constitution-of-india> (Accessed on Sept.8, 2024).

³ Crime and Punishment in Ancient India" by U.C. Sarkar (1920).

- During the Maurya Empire (322-185 BCE), capital punishment was commonly implemented, utilizing methods such as impalement, being trampled by elephants, and burning alive.
- In the medieval period, Islamic rulers like the Delhi Sultans and the Mughals continued to enforce the death sentence, mostly for offenses against the state or faith⁴.
- **British colonial rule**
- IPC 1860, created during British rule, formalized death punishment for offenses such as homicide, waging war against the state, abetting mutiny, and certain types of theft.
- Public hangings were prevalent during British rule, with notable executions, including those of revolutionaries like Bhagat Singh and Rajguru in 1931, causing significant public outcry.
- **Post-independence era**
- After gaining independence in 1947, India continued to retain the death penalty, though its application was initially limited.
- The procedure for criminal law later restricted the death sentence to "rarest of rare" cases, reserved for instances of exceptional depravity.
- In the 1980s, new legislation expanded death penalty to include crimes pertaining to drug trafficking and terrorism.
- Since the 1990s, India has shown increasing reluctance to carry out executions, leading to long intervals between hangings.
- The most recent execution in India occurred in 2020, when due to their involvement in the 2012 Delhi gang rape case, four men were hung⁵.

THEORIES OF PUNISHMENT

Theories of punishment provide frameworks for justifying why society penalizes individuals who break the law. These theories seek to explain the reasoning behind various forms of punishment, encompassing both retributive approaches and rehabilitative methods. The main theories of punishment include:

1. Deterrent Theory of Punishment:

According to the deterrence theory, punishment, including the death penalty, is justified as it aims to discourage individuals from committing crimes. The term "deterrent" means "discouraging," and in this context, it refers to imposing a penalty so severe that it prevents the offender from engaging in future criminal behavior⁶. The theory posits that punishment creates fear among potential criminals, deterring them from committing crimes.

The Crime Deterrence theory is crucial to the criminal justice system because it not only helps control crime but also safeguards societal interests by instilling fear among those who might otherwise commit offenses.

2. Retributive Theory of punishment:

Considering the principle of "an eye for an eye," this theory argues that punishment should act as a form of justice for both society and the victim. Its purpose is to curb personal desires for revenge by ensuring

⁴ Mughal Administration" by P. Saran (1973).

⁵ Nirbhaya Case: All Four Convicts Hanged in Delhi's Tihar Jail" - Indian Express, March 20, 2020.

⁶ A Theory of Justice by John Rawls (1971).

that justice is administered by the state⁷.

3. Preventive Theory of punishment:

This theory aims to prevent future crimes by incapacitating the criminal, usually through imprisonment. Critics contend that incarceration might exacerbate a criminal's behavior, but the theory maintains that by removing the offender from society, potential harm is avoided⁸.

4. Reformatory Theory of punishment:

With advancements in criminal science, there has been a significant shift in criminological research towards understanding the social and economic factors that contribute to criminal behavior. This modern approach emphasizes rehabilitating offenders rather than seeking retribution⁹. However, critics are concerned that focusing on reform might undermine the effectiveness of prisons as a form of punishment.

5. Incapacitation Theory of punishment:

This theory seeks to prevent future crimes by physically restraining offenders, either through imprisonment or capital punishment¹⁰. Its focus is on removing the threat posed by dangerous individuals to ensure public safety.

6. Compensatory Theory of punishment:

This theory focuses on compensating victims for the losses they have incurred due to a crime. It emphasizes holding criminals accountable for the harm caused to victims. In some instances, the state may also be held responsible for failing to adequately protect its citizens¹¹.

7. Utilitarian Theory of punishment:

Rooted in the principle of maximizing societal happiness, this theory advocates for punishment that deters future crime while minimizing harm. The utilitarian theory is essentially "emotivist" in nature, suggesting that the overall benefits of punishment to society outweigh the suffering it causes¹². It aims to achieve the greatest good by reducing crime rates and ensuring that punishment acts as a deterrent to others.

A FUNDAMENTAL CHALLENGE: THE INDIAN CONSTITUTION AND THE DEATH SENTENCE

The Indian Constitution is often described as a 'bag of borrowings' due to its incorporation of elements from various international constitutions, notably those of the America, United Kingdom, Canada, among others. It enshrines fundamental principles such as the freedom of life

and maintains the rule of law by making sure that no person is above the law. Numerous constitutional provisions safeguard the right to life, which the Constitution views as basic and unalienable¹³.

⁷ The Death Penalty: An American History by Robert Dwyer (2007).

⁸ Punishment and Modern Society" by David Garland 1990.

⁹ Punishment and Reformation: A Study of the Penitentiary System" by Frederick Howard Wines (2nd edition, 1919).

¹⁰ Punishment and Responsibility: Essays in the Philosophy of Law" by H.L.A. Hart (2nd edition, 2008).

¹¹ The Rationale of Punishment" by Jeremy Bentham (1830).

¹² The Limits of the Criminal Sanction" by Herbert L. Packer (1968).

¹³ Constitution of India, Article 21 - Protection of Life and Personal Liberty. (1950). Government of India. Available at: <https://legislative.gov.in/constitution-of-india> (Accessed on Sept.8, 2024)

The death penalty directly impacts several constitutional articles, including Articles 21 (Right to Life), 14 (Prohibition of Discrimination), 15 (Right to Equality), and 16 (Equality of Opportunity), and 19 (Freedom of Speech and Expression). Two key questions arise regarding the India's constitutionalism regarding the death penalty: first, if the death punishment is entirely unconstitutional and should be eliminated under any circumstances, and second, whether the provisions for capital punishment under the Bharatiya Nyaya Sanhita (formerly the IPC)¹⁴ are themselves unconstitutional, or if they align with the fundamental principles of the Indian Constitution. To thoroughly address these questions, it is essential to examine a series of landmark cases that have profoundly influenced the judicial perspective on capital punishment in India. These cases offer important insights into the constitutional debates concerning the death penalty, particularly regarding its alignment with fundamental rights, due process, and the evolving concept of justice. Examining these important rulings will help us better comprehend how the courts have interpreted the death penalty's legitimacy and practical use.

THE LANDMARK JUDGMENTS AND LAWS LAID DOWN

The judiciary has consistently served as the guardian of justice, playing a crucial role in protecting the essential liberties that the Indian Constitution protects. As the supreme interpreter of the law, the judiciary ensures, legal provisions adhere to constitutional principles and that justice is upheld in all aspects of governance. The constitutional validity of capital punishment was first scrutinized within the landmark case of **JAGMOHAN SINGH V. STATE OF UP**¹⁵ In this case, it has been widely argued that the punishment of death violates Art. 14, 19, and 21 of the Constitution of India. It was argued that the death sentence essentially suspends the freedoms granted by Article 19(1)(a), (b), (c), (d), (e), and (g) because it puts an end to life. Additionally, it is contended that the powers given to courts in ascertaining whether to inflict the capital punishment is erratic & lacks guidance, hence violating Article 14. Lastly, it is contended that the law didn't offers a clear mechanism for considering the necessary and crucial conditions when deciding between the death penalty and life in prison, so contravening Constitutional Art. 21. However, in the notable case of **FURMAN V. GEORGIA IN THE UNITED STATES**,¹⁶ the death sentence was declared not in accordance with the Constitution on the grounds of being cruel and penalty. Despite this, in the Indian case of Jagmohan Singh v. State of UP, where the constitutionality of punishment of death was advocated, the Constitution Bench, comprising five judges, upheld the death sentence as constitutionally valid. Hence, the death sentence was not deemed against constitution in this context.

In **EDIGA ANAMMA V. STATE OF ANDHRA PRADESH**¹⁷, the Apex Court examined the rationale behind the after conviction introduction hearings for death sentences prior to the implementation of the procedure for Criminal Law. The Court deliberated about the potential to commutation of death sentences to imprisonment for life. The ruling was that imprisonment for life should be the default punishment and the death should be eliminated. The Court's decisions indicate that the protracted discussion on the death sentence had a reformatory effect, indicating a move toward more humane sentencing procedures.

¹⁴ The Bharatiya Nyaya Sanhita 2023, Chapter II, Section 4.

¹⁵ AIR.1973 SC 947.

¹⁶ 408 U.S. 238 (1972).

¹⁷ AIR 1974 SCC 443

In case of **RAJENDRA PRASAD V. STATE OF UTTAR PRADESH**¹⁸, The idea of "Special Reasons" needed to apply the death penalty was covered in great detail by the Supreme Court. The case moved the emphasis on the point of sentencing discretion from the validity of the capital sentence. There was a claim made that the retributive idea of punishment was out of date and no longer applicable to modern society. In the end, the Court determined that judges should have the authority to decide whether to apply the death sentence or life in prison, independent of presidential orders. The historic case of **BACHCHAN SINGH V. STATE OF PUNJAB**¹⁹ overturned the ruling in *Rajendra Prasad v. State of Uttar Pradesh*²⁰. The Apex Court held that Art. 21 of the Indian Constitution is not violated by the death sentence clause included in Section 302 of the Indian Penal Code. The Court upheld the constitutional provision that grants the State the authority to take a person's life as long as it follows a legally prescribed process. Thus, the *Bachchan Singh v. State of Punjab* case established that the death penalty doesn't inherently transgress the fundamental tenets of the Indian Constitution. This case was significant because it established the rule that the punishment of death should only be applied in extremely extraordinary conditions. Justice P.N. Bhagwati, on the other hand, disagreed, claiming that the death sentence is intrinsically unfair, discriminatory, and arbitrary. He raised concerns about its implementation by arguing that it breaches Articles 14 and 21 of the Constitution.

The following rules for applying the "rarest of rare case" approach were established in the **MACHHI SINGH AND OTHERS V. STATE OF PUNJAB**²¹ case.

1. The way whereby the crimes are perpetrated
2. An incentive to commit crimes
3. A socially repugnant or antisocial behavior
4. The impact of the offence
5. Victims who were part of the offence

In 1991, the death punishment was brought up once more in case of **SHASHI NAYAR V. UNION OF INDIA**²², challenging its constitutionality based on the precedent set by the *Bachchan Singh* case. The Court ruled that the method of execution by hanging is not excessively barbaric or dehumanizing and found no need to replace it with a less painful form of punishment. The plea was rejected, partly due to prevailing circumstances in the nation at the time, which weren't deemed appropriate for reconsidering the matter.

However, as times evolved, the Apex Court addressed arbitrary application of the death sentence in several important cases, including **ALOKE NATH DUTTA V. STATE OF WEST BENGAL**²³, *Swamy SHRADDHANANDA V. STATE OF KARNATAKA*²⁴. The Court scrutinized the application of the death sentence interpreting the guidelines established in *Bachchan Singh* in various contexts. Recognizing the potential for arbitrariness and the misuse of judicial discretion, the Supreme Court intervened to ensure adherence to constitutional principles enshrined in Art. 21 (Freedom of Life) and 14 (Equality rights), aiming to prevent injustice and preserve the rule of law. In the landmark case of

¹⁸ AIR 1979 SC 646.

¹⁹ AIR 1980 SC 898.

²⁰ Supra 18.

²¹ AIR 1983 SC 957.

²² AIR 1992 SC 96.

²³ AIR 2007 SC 230.

²⁴ AIR 2008 SC 767.

MITHU V. STATE OF PUNJAB²⁵, Section 303 of the Indian Penal Code stipulated that anyone convicted of murder who was already serving a life sentence would be executed, was declared unconstitutional and subsequently repealed. The Court observed that life convicts, due to their confinement, are subject to specific conditions that can affect their behavior, which may not be the case for individuals not under such punishment. The mandatory nature of Section 303 did not allow the court to consider these particular circumstances, leading to a situation where the protections and privileges provided by both the Criminal Procedure Code and the Constitution were disregarded. This led to the conclusion that such mandatory sentencing was harsh, arbitrary, and unjust, resulting in a denial of fair judicial process and constitutional protection. The validity of the death sentence was contested in the well-known case of **DEENA V. UNION OF INDIA**²⁶ due to the manner of execution²⁷. The Court decided that there must be no direct or indirect humiliation, torture, or barbarism involved in the act of executing a criminal. The Court determined that hanging as a form of execution did not qualify as such brutal torture.

However, this decision was later overturned in **PARMANAND KATARA V. UNION OF INDIA**²⁸. In this instance, it was found that the manual for the Punjab jail requirement that the person be left hanging for 30 minutes following death violated the person's dignity. The Court underlined that both the Constitution's protection of basic rights and the concepts of human dignity were violated by this behavior.

Delays in carrying out the death penalty have raised serious concerns because they illustrate the idea that "justice delayed is justice denied," which has an impact on both accused people and victims.

The Court decided in the historic case of **T.V. VATHEESWARAN V. STATE OF TAMIL NADU**²⁹ that a more than two years have passed since the death penalty was carried out amounted to a transgression of the procedural and substantive protections given by Article 21 of the Constitution.

But in the well-known decision of **SHER SINGH V. STATE OF PUNJAB**³⁰, the Court recognized that a pause might be a legitimate justification for applying Article 21. However, it was also held that there is no strict rule that delay would automatically result in the quashing of the death sentence. Every case needs to be evaluated in light of its unique facts and circumstances.

The Apex Court's Constitution Bench ruled in the matter of **TRIVENIBEN V. STATE OF GUJARAT**³¹ that an execution delay that results from executive rather than judicial grounds is still illegal under Art. 21 of the Constitution of India. The person is entitled to ask the court to consider if it is still reasonable and equitable to execute death sentence if there is an excessive postponing the execution of the condemned prisoner. In **SHATRUGHAN CHAUHAN V. UNION OF INDIA**³², the Supreme Court upheld earlier rulings, highlighting the necessity of providing protections for death row inmates. Before the President's mercy plea was denied, the Court reaffirmed that solitary or single-cell detention is unlawful and addressed other important concerns about how death row inmates are treated.

²⁵ AIR 1983 SC 277

²⁶ AIR 1983 SC 645.

²⁷ Bharatiya Nagarik Suraksha Sanhita 2023, Section 393(5).

²⁸ AIR 1995 SC 248.

²⁹ AIR 1983 SC 68.

³⁰ AIR 1983 SC 344.

³¹ AIR 1989 SC 678.

³² AIR 2014 SC 241.

THE NIRBHAYA DECISION

The defendants in the recent **MUKESH & ANR V. STATE NCT OF DELHI & ORS**³³ case—also referred to as the Nirbhaya case—were put to death at Tihar Jail on March 20, 2020. This execution was seen by many, including the Prime Minister of India, as a significant step in delivering justice and providing relief to the victim's family and the broader justice system.

However, the action was met with criticism from Amnesty International India, which condemned the death penalty as an inadequate solution. They said that the death sentence violates human rights standards and termed the execution a "dark stain" on India's history of respecting human rights.

LAW COMMISSION REPORTS ON DEATH SENTENCE

- The Law Commission on Capital Punishment's 35th and Fifth Report: In India, the debate over death sentence has been a noteworthy issue. The Indian Law Commission addressed this topic in its 35th Report³⁴ initially recommending a brief moratorium on the death sentence as an experiment, with the possibility of reintroducing it later. However, in its 2015 report, the Commission shifted its stance, promoting the repeal of the death sentence in India. This change in perspective reflects ongoing discussions and evolving views on capital punishment in the country.
- The 187th Law Commission Report on the Method of Executing Death Sentences: Report of the Law Commission No. 187 in 2003 focused on the methods of executing death sentences rather than on the constitutionality of capital punishment itself. The Report compared various methods of execution, including hanging, lethal injection, and shooting. It recommended incorporating lethal injection alongside hanging as an option, taking into account international standards and contemporary views on human decency³⁵. This recommendation reflects a broader consideration for more humane and dignified execution methods, a perspective also supported by the Supreme Court, which has emphasized the need for execution methods that are certain, humane, and respectful of human dignity.
- 262nd Report of Law Commission on Abolition of Death Sentence: In 2015, the Indian Law Commission, under the leadership of Justice A.P. Shah, released its 262nd Report. The death sentence should be abolished for all offenses, with the exception of terrorism and war-related offenses. The Commission's suggestions included implementing police reforms, enhancing witness protection, and improving victim compensation³⁶. It highlighted the evolving perspective on the right to life and encouraged India to take steps to abolish the death penalty completely, reflecting a significant shift towards more progressive and humane approaches to criminal justice.

³³ AIR 2017 SCC 1.

³⁴ Law Commission of India. *The 35th Report on Capital Punishment (1967)*. Death Penalty. Law Commission of India Reports. AdvocateKhoj. Copyright 2024. Available at: [\(www.advocatekhoj.com/library/lawreports/deathpenalty/2.php?Title=Death%20Penalty&STitle=The%2035th%20Report%20on%20Capital%20Punishment%20\(1967\)\)](http://www.advocatekhoj.com/library/lawreports/deathpenalty/2.php?Title=Death%20Penalty&STitle=The%2035th%20Report%20on%20Capital%20Punishment%20(1967)) (Accessed on Sept. 9, 2024).

³⁵ Law Commission of India. *The 187th Report of the Law Commission on Death Penalty*. Law Commission of India Reports. AdvocateKhoj. Copyright 2024. Available at: [\(www.advocatekhoj.com/library/lawreports/deathpenalty/16.php?Title=Death%20Penalty&STitle=The%20187th%20Report%20of%20the%20Law%20Commission\)](http://www.advocatekhoj.com/library/lawreports/deathpenalty/16.php?Title=Death%20Penalty&STitle=The%20187th%20Report%20of%20the%20Law%20Commission) (Accessed on Sept. 9, 2024).

³⁶ Dristi, E. *262nd Report of the Law Commission of India*. Latest Current Affairs for Competitive Exams. 3 September 2015. Available at: [\(www.edristi.in/hi/%E0%A4%B9%E0%A5%8B%E0%A4%AE/en/262th-report-of-the-law-commission-of-india\)](http://www.edristi.in/hi/%E0%A4%B9%E0%A5%8B%E0%A4%AE/en/262th-report-of-the-law-commission-of-india) (Accessed on Sept. 9, 2024).

CONTENTIONS OF RETENTIONISTS: THE PENOLOGICAL JUSTIFICATIONS

People who are at the side of retaining the death sentence are known as retentionists. The following are the main points raised by the “35th Report of the Law Commission” about the reasons behind the use of the death sentence: -

Deterrence- The death sentence is still in place primarily for the deterrent effect, which works to make people afraid to commit crimes in the first place. It is a consideration not just for the death sentence but for all forms of punishment.

The concept of deterrence pertains to the imposition of dread and terror in order to prevent members of society from committing crimes. Since everyone is afraid of dying, the death sentence acts as a deterrence and is not comparable to incarceration in any manner. The Apex Court has frequently upheld the death sentence to have a deterrent effect since the Bachchan Singh case. The court ruling in **Mahesh v. State of Madhya Pradesh**³⁷ declared that general public comprehends words primarily intended for deterrent rather than reformation.

Retribution- In its most fundamental sense, it alludes to taking revenge for the crime that was done. But it should never be misinterpreted as an eye for an eye punishment since, in its most advanced manifestation; it's a public denunciation of the offense to enact justice.

Rather than emphasizing crime prevention, the notion of vengeance focuses on the transgression committed and treating the person fairly. According to certain claims, the blame is effectively applied when those who have done wrongdoing with intent and willingness are punished for their actions and deserve negative outcomes³⁸. There are two basic ideas regarding the retribution: either it is an explicit demand for retaliation, such as tooth for tooth or eye for an eye, or it is simply pure revenge.

Incapacitation- It was stated that some people have inherent qualities that make them cruel and evil, making them unreformable even after rehabilitation. As a result, if an offender is released into society, they are no better than wolves living in a civilized society, and their life must be ended.

CONTENTIONS OF ABOLITIONISTS: IS IT A NEED OF AN HOUR?

The argument on capital punishment has never stopped, with many people calling for its abolition while others who favor it have always been there. The Apex Court referred the question of the death sentence to the Law Commission in two landmark cases: **SHANKAR KISANRAO KHADE V. STATE OF MAHARASHTRA**³⁹ & **SANTOSH KUMAR SATISHBHUSHAN BARIYAR V. STATE OF MAHARASHTRA**⁴⁰. In the latter case, the Court cited the Law Commission to conduct current, reliable research on the topic because there was a dearth of empirical and experimental data on the death penalty.

1. The Inability to Reverse the Execution

The most significant disadvantage of the death penalty is its irreversibility. Once it is executed, there's no chance to make things right, if an innocent person is executed. This irreversible nature can lead to a miscarriage of justice rather than the administration of true justice.

³⁷ AIR 1987 SC 80.

³⁸ Paul Robinson and John Darley, “Does Criminal Law Deter”, 173 Oxford Journal of Legal Studies (2004).

³⁹ (2013) 5 SCC 546.

⁴⁰ (2009) 6 SCC 498.

For example, in **YAKUB ABDUL RAZAK MEMON V. STATE OF MAHARASHTRA**⁴¹, the case sparked extensive debate and controversy among judges regarding the appropriateness and fairness of the death sentence, highlighting concerns about the potentiality of errors in sentencing. Such cases underscore the critical issue that, even when the death sentence is implemented, the potential for judicial error remains, and once the sentence is carried out, it cannot be undone. This inherent risk challenges the human rights protection and raises significant ethical and legal questions about the use of capital punishment.

2. No Deterrence Effect

There is no substantial proof indicating the death sentence effectively more successfully deters crime than life in jail. Data from various jurisdictions, including India, show that the presence of the death sentence has not halted the increase in crime rates. For instance, despite the death sentence being in place since the codification of criminal law in 1860, crime rates in India have continued to rise.

In contrast, after Canada abolished the death sentence in 1976, its Homicide rate has consistently declined, reaching its lowest level since 1966 by 2016. Moreover, crimes like rape and terrorism are often committed impulsively or by individuals who are not deterred by the fear of death. Such acts are driven by immediate urges or ideological motivations, and offenders may not consider the consequences before committing the crime⁴². This indicates that the death penalty might be a futile measure, as it does not address the underlying causes of these crimes and may not significantly impact criminal behavior.

3. The Declining Scope of Clemency

The President using his pardoning authority under Article 72 of the Indian Constitution has faced criticism for delays and perceived arbitrariness. The Law Commission's reports have highlighted flaws in the Indian legal system particularly in how mercy petitions are handled.

In the case of **STATE V. MOHD AFZAL AND ORS**⁴³ (Parliament assault's case), Afzal Guru's clemency petition was delayed significantly before being turned down, and he was secretly killed. Similarly, in the **RANGA BILLA CASE**⁴⁴, the President rejected the mercy petition without providing a clear rationale, which raised concerns about arbitrariness in the procedure for making decisions. On the other hand, the Apex Court in **KEHAR SINGH V. UNION OF INDIA**⁴⁵ upheld that the President's power to grant pardons is an executive function and not a right that individuals can claim, which underscores the limitations of judicial review over executive clemency decisions.

4. The Human Rights Question

Human rights activists frequently criticize the death penalty for undermining fundamental human rights and natural rights. They argue that if a mother has the right to make decisions about her own child, including the right to end that child's life, it is contradictory and unjust for the state to have the power to execute individuals as punishment.

Activists view the death sentence as a manifestation of a violent culture rather than a resolution to crime. They contend that it is a cruel, arbitrary, and inhumane form of justice that disregards the intrinsic

⁴¹ 2013) 13 SCC 1.

⁴² Rainer, J., and A. B. Weidenfeld. *Capital Punishment and Crime Rates: A Global Review*. Routledge, 2016. (Accessed on Sept. 10, 2024).

⁴³ 2003 VIIAD Delhi 1.

⁴⁴ State vs Jasbir Singh @ Billa And Kuljeet, 17 (1980) DLT 404.

⁴⁵ 1989 AIR 653.

worth of every person. From this perspective, eliminating the death sentence is seen as a necessary step in protecting and upholding human rights.

THE OPINION OF MASSES

Public opinion significantly influences the legal system, particularly concerning the death sentence. The effect of public sentiment on the imposition of capital punishment can be profound, as the public's views and reactions often shape legal and judicial decisions.

In the high-profile case of **MUKESH & ANR. V. STATE FOR NCT OF DELHI & ORS** (frequently referred to as the Nirbhaya case), the Apex Court highlighted that the brutality that the nation's conscience had been "shocked and shaken" by the crimes perpetrated by the prisoners. The Court highlighted that such cases, which come into the category of "Rarest of the Rare," often lead to public pressure for the death penalty. This pressure can result in a heightened tendency to impose capital punishment, reflecting the influence of societal outrage on legal outcomes.

KOLKATA RAPE AND MURDER CASE

The RG Kar Hospital case has incited significant public outrage and mobilization across Bengal, as evidenced by recent media reports. Both *The Times of India*⁴⁶ and *Sunday Guardian*⁴⁷ highlight the intense public reaction to the alleged rape and murder, including widespread protests and emotional responses from the community. The masses have demonstrated strong demands for justice, organizing candlelight vigils and rallies to express their dissatisfaction with the authorities' handling of the case. Public sentiment is characterized by anger and a call for accountability, with civic groups and activists playing a vital part in raising the voices of the victims' families. Media coverage has played a key role in shaping and reflecting public opinion, underscoring the case's profound impact on local and broader societal discourse. The ongoing protests and public outcry reveal a deep commitment to ensuring that those responsible are held accountable and that such incidents are prevented in the future.

THE BHARATIYA NYAYA SANHITA: EXPANDING CAPITAL PUNISHMENT AMIDST GLOBAL ABOLITION TRENDS

The rise of death sentence violations under the Bharatiya Nyaya Sanhita (BNS, 2023) has alarmed the People's Union for Democratic Rights (PUDR)⁴⁸. Introduced in Parliament in session of August, the BNS aims to update IPC, 1860 by addressing modern issues related to punishment and justice. However, while the BNS retains the death sentence for offences already specified in the IPC, it has added four new offenses subject to the death penalty: terrorist actions (Clause 111), mob murder (Clause 101(2)), organized crime (Clause 109), and women under the age of eighteen being raped by a gang (Clause

⁴⁶ Roy, Poulami. "When We Were Shattered, We Were Offered Money': Here's What Happened with Victim's Parents in RG Kar Hospital Horror." *The Times of India*, 5 September 2024. Available at: <https://timesofindia.indiatimes.com/city/kolkata/kolkata-rape-muder-case-i-wish-all-culprits-lose-sleep-rg-kar-docs-parents-after-joining-candlelight-protest/articleshow/113073613.cms> (Accessed on Sept. 10, 2024).

⁴⁷ Sharma, Tikam. "Protest Continues to Rage in Bengal in RG Kar Case." *The Sunday Guardian Live*, 31 August 2024. Available at: <https://sundayguardianlive.com/news/protest-continues-to-rage-in-bengal-in-rg-kar-case> (Accessed on Sept. 10, 2024).

⁴⁸ People's Union for Democratic Rights. Review of Death Penalty Punishments in Bharatiya Nyaya Sanhita 2023. Available at: www.pudr.org/press-statements/review-death-penalty-punishments-in-bhartiya-nyaya-sanhita-2023 (Accessed on Sept. 11, 2024).

70(2)). Because of this, the BNS now lists 15 crimes in total that are capital punishment equivalent to 11 crimes previously.

Notably, the Standing Committee of Parliament on Home Affairs did not provide any insightful analysis on the death sentence when it accepted the Bill with recommendations in November 2023. Disregarding the stakeholder concerns regarding the necessity of reexamining the death sentence, particularly in perspective of the worldwide movement towards its abolition, the Committee has opted to construe the complaints mainly as a matter of judicial fallibility. It stated that "the justification for a vehement resistance to the death sentence is to protect an innocent person from being wrongfully hanged to death and because the legal system can be flawed." The Committee sent the issue to the Government for review after giving it no more thought.

The BNS's greater application of the death sentence and its review process require careful reconsideration, but there's also a critical issue with the vague and ambiguous language used to define certain offenses. This is especially problematic with regard to Organized Crime and Terrorist Acts. The BNS states, if someone "commits or attempts to commit" a terrorist attack or an organized crime resulting in death, they may be sentenced to death. While it mirrors the Unlawful Activities (Prevention) Act (UAPA) in defining terrorist acts, the BNS broadens the range to encompass actions intended "To incite fear in the public" or "To cause disturbances in the peace." Similarly, the definition of Organized Crime is unclear, lacking specific definitions for terms like 'gang,' 'mafia,' and 'crime ring.' It also considers a "criminal organization" to be a "organized crime syndicate" without clarifying what constitutes such an organization⁴⁹. The vague language and broad definitions in the BNS could lead to significant interpretative flexibility, particularly concerning death penalty judgments.

The BNS's escalation of the death penalty today goes against the judicial trend of reducing the death penalty. As of 2022, there were 113 nations worldwide that had abolished the death sentence. India did, however, vote against the death penalty's repeal at the UN General Assembly in 2022. The lack of consistency in India's death penalty sentencing process is seen in the fact that, although a huge instances of death sentences are still being issued by trial courts, the country's top court has only affirmed the death penalty for seven individuals between 2007 and 2022.

According to the According to the "Yearly Statistics on Death Sentence made by Project 39A⁵⁰" and "NCRB's Annual Prison Statistics 2022," 190 individuals were given the death penalty in 2022 alone." By 2022, there were 539 inmates on death row. The Supreme Court recognized this lack of consistency and in 2022 took on its own notice of the issue, referring it to a Constitution Bench. Despite this, the BNS keeps applying the death penalty more widely, demonstrating a disrespect for both national legal issues and worldwide trends.

It is crucial to challenge the increasing application of the death punishment in the BNS. The People's Union for Democratic Rights (PUDR) has consistently resisted capital punishment on principled basis. We contend that the death sentence is inherently retributive and contradicts the principles of reformatory justice. We highlight the inherent arbitrariness in death sentences, point out discriminatory practices in executions, and emphasize the lack of empirical evidence linking the death penalty to crime deterrence.

⁴⁹ Ibid.

⁵⁰ Project 39A — Annual Statistics 2022." Project 39A, www.project39a.com/annual-statistics-report-2022. (Accessed on Sept.10, 2024).

In a democratic society, there is no justification for the death penalty, as it validates the power of the state to take a citizen's life.

INTERNATIONAL SCENARIO

Regarding the death penalty, there are four categories of nations worldwide.

1. Nations where all punishments carry the death sentence are exempt.
2. Nations where common offenses are the only ones for which the death sentence is applied.
3. Countries that preserve capital sentence.
4. Nations that legalized the death sentence but do not execute it out.

Beheading, hanging, lethal injection, and shooting are the execution techniques that will be utilized in 2023. As stated by Amnesty International⁵¹, eliminating death punishment is the aim of many international agreements. This includes the International Covenant on Civil and Political Rights and its Second Optional Protocol. In terms of the number of executions in 2023, China, Iran, Saudi Arabia, Somalia, and the US were in that order. Since this information is held as a state secret, it is unknown how frequently China actually applies the death penalty. China continues to be the nation that executes the greatest number of individuals globally. The thousands of other killings that are believed to have taken place there are not included in the global tally of at least 1,153 executions. Only two countries—Saudi Arabia and Iran—accounted for 89% of all executions that were documented, excluding China.

Amnesty International reported “2,428 executions in 52 countries in 2023—a little decline from 2,016 in 2022. At least 27,687 individuals were reported to be on death row globally by the end of 2023”. Additionally, there was a 31% increase in executions from the 883 recorded in 2022 to at least 1,153 executed in 16 nations⁵².

The international landscape of the death sentence is diverse and evolving. The United Nations has been a strong advocate for abolition, promoting frameworks such as the International Covenant on Civil and Political Rights (ICCPR) and its Second Optional Protocol to eliminate capital punishment. Various UN General Assembly resolutions have also sought to progressively restrict its use. From a human rights standpoint, the death punishment is mostly taken as incompatible with the Right to live and freedom from torment. Regional differences are evident: Europe and the Americas are largely moving away from capital punishment, while it remains more common in parts of Asia and the Middle East. Nonetheless, the global trend is increasingly towards abolition, reflecting an expanding consensus on the significance of upholding Human rights and dignity.

THE OVERALL EVALUATION

The death sentence cannot be applied equitably or logically. With any form of penalty, there is always a risk of misuse, leading to potential injustice for some individuals. The paradox is striking: A mother is entitled to bring a child into the world, yet she is devoid of the ability to end its life after birth. Although societal evils may be at their peak, this does not support the continuation of the death sentence. In today's context, where crime rates and societal dynamics have evolved, capital punishment appears outdated. The true measure of a punishment's efficacy is not just its impact on those who commit crimes

⁵¹ “Death Penalty - Amnesty International.” *Amnesty International*, 9 July 2024. Available at: www.amnesty.org/en/what-we-do/death-penalty (Accessed on Sept. 10, 2024).

⁵² Ibid.

but also how it affects and is perceived by innocent individuals⁵³. This broader perspective is crucial in evaluating the effectiveness and the death penalty's morality.

CONCLUSION

Capital punishment is frequently viewed as barbaric and inhumane when imposed by the judiciary, and it is often criticized as a blemish on societies that pride themselves on ethical and humanitarian values. Statistical evidence reveals that the death sentence has not effectively deterred offence, as crime rates in India continue to climb. International legal trends increasingly oppose capital punishment, and many countries have moved towards restricting its use or abolishing it altogether, limiting its application to only the most heinous crimes. This shift is driven more by moral considerations than legal arguments. Recent findings from the National Crime Records Bureau (NCRB) and ongoing debates about the death penalty have reignited discussions about whether India should eliminate capital punishment for severe offenses. The Supreme Court has historically exercised discretion in imposing this extreme form of punishment, often acknowledging the moral and ethical concerns associated with it. Critics argue that capital punishment is fundamentally immoral on multiple grounds, including issues of morality and decency. The death sentence fails to meet the goals of justice and contradicts the principles of human dignity. As such, there is a growing consensus that death punishment needs to be eliminated, as it does not contribute to a just legal system and is inconsistent with respect for human life and dignity.

⁵³ Singh Avi, Is it the time to abolish the death penalty, The Hindu, available at: <https://www.thehindu.com/opinion/op-ed/is-it-time-to-abolish-the-death-penalty/article25735508.ece>, (Last Modified July 28, 2018). (Accessed on Sept. 11, 2024).