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A Critical Analysis of Capital Punishment in India

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ABSTRACT:

India, we live in is a developing nation and since it is about to become a developed nation, many activities are also changing and we as a nation is experiencing a lot of new advancements. Everyone is becoming reckless in order to be the best. Which has resulted into negligent behaviour, competitiveness and vigilantism among the people etc. This recklessness has resulted into various criminal activities and hence, impacted severely. In India, crime rates have been rising rapidly, causing widespread concern. This increase highlights the need for effective measures to address the root causes and ensure safety in society. However, Indian legislation and statutory provisions have helped to curb such problems but still they proved to be unfruitful and incompetent. The Indian legal system imposes various types of punishments based on the severity of crimes. These include capital punishment (death penalty), life imprisonment, imprisonment (which can be rigorous or simple), confiscation of property, and monetary fines. Each punishment is designed to serve justice while considering the nature of the offense and its impact. The reason for increasing such offences or crimes is the less or ineffective punishment given to the wrongdoer. The punishment should be given in such a way that would deter the person from doing such a crime again. Among all of these punishments, the most rigorous or harshest is the death penalty. This paper focuses on thriving the validity of capital punishment or in a way critically evaluate the stance of the death penalty awarded across the globe and in India. This paper also involves the precedents outlined regarding capital punishment and the procedure of awarding it. The research paper will critically evaluate the "Rarest to Rare" judgment and will help in giving insightful observations to change the application of the same.

KEYWORDS: Capital punishment, Mercy Petition, Clemency Power.

Introduction:

The society we live in, works according to some rules and regulations so as to maintain peace and order in the society. The Constitution plays a very important role in stating that whosoever commits and crime will be punished as according to law. United States of America was the first country to take initiative to abolish capital punishment. Capital Punishment in India is referred to death penalty. Death Penalty is enshrined under **section 53 of Indian Penal Code, 1860** or **Section 4 of Bhartiya Nyaya Sanhita, 2023.**

The High Court has power to award the capital punishment as per **section 368 of Code of Criminal procedure**. The death penalty is reserved for the most serious crimes that deeply shock society. In such cases, the public expects the judiciary to impose the death penalty on those responsible perpetrators[1]. When the court sympathizes with the death row prisoner they might commute his punishment to life imprisonment.

Recent research suggests that delaying the trial of death row inmates can increase the perceived effectiveness of the death penalty. However, such delays also cause additional hardship for the prisoner and their family, including extended emotional and logistical burdens. 561 prisoners on the death row in 2023 which has been the highest in the last 19 years. The NCRB report of 2004 suggests 563 death row prisoners in that year[2].

Meaning of capital punishment:

Capital punishment, in India, known as the death penalty, is the process of sentencing wrongdoers or offenders to death for committing the capital offenses. The specific crimes and circumstances that qualify for the death penalty are outlined in laws enacted by U.S. Congress or state legislatures.

The practice of killing someone as a punishment for allegedly committing a crime is known as capital punishment, sometimes known as the death sentence or what was once known as judicial homicide. It is authorized by the government.

This form of punishment, often referred to as judicial homicide, involves the government's authority to impose and carry out the death sentence. A death sentence is the legal decision that mandates this punishment, while the act of enforcing it is called execution.

[1] https://ijcrt.org/papers/IJCRT22A6337.pdf

[2] Highest Death Row Population in India - 561 Prisoners | India News - Times of India

There are different methods of capital punishment:

Methods of Capital Punishment (Ancient and Medieval Era)

1. **Burning at the Stake**: Historically used for punishing heretics, witches, and women suspected of wrongdoing by setting them on fire in public.
2. **The Wheel**: A person was tied to the outer rim of a wheel, which was then rolled over sharp objects to inflict fatal injuries.
3. **Guillotine**: Commonly used during the French Revolution, this device featured sharp blades to swiftly decapitate the individual.
4. **Hanging**: The most common method, where the prisoner is executed by suspending them with a noose, often leading to death by neck fracture.
5. **Executioner's Axe**: Popular in 16th and 17th century Germany and England, an executioner, often hooded, would behead the convict with an axe or sword.
6. **Firing Squad**: The prisoner is tied to a pole or seated in a chair, blindfolded, and marked, usually with a cloth patch over the heart, before being shot by a group of shooters.
7. **Gas Chamber**: The prisoner is sealed in an airtight chamber, and hydrochloric acid is mixed with another substance to produce lethal gas.
8. **Electrocution**: Using the electric chair, the prisoner is strapped in place, and electric current is passed through their body, causing death. The head and body are often shaved to ensure proper contact with the electrodes.
9. **Lethal Injection**: The most modern method, involving the intravenous delivery of three lethal drugs to cause a painless death.

Historical background of capital punishment:

The death penalty is one of the oldest forms of punishment in history. It has been practiced in nearly every nation at some point in time. The earliest record of the death penalty dates back to the Code of King Hammurabi of Babylon in the 18th century B.C., where it was prescribed for 25 specific offenses. The Draconian Code of Athens later mandated the death penalty for all crimes.

In 17th and 18th-century England, death was the punishment for numerous offenses, though it was not applied as extensively as the law allowed. At one point, 222 crimes, including theft, were punishable by death. This led to reforms in Britain, where capital punishment was removed for 100 of these offenses.

Evolution of the Death Penalty in India

The imposition of a punishment requiring the death of an individual is referred to as a "death sentence." Conversely, the act of implementing such a death sentence is termed an "execution."

In ancient times, executions were carried out through various methods that often-involved extreme cruelty and torture, such as burning at the stake, breaking on the wheel, slow strangulation, crushing under the feet of elephants, and similar practices.

However, with the advent of constitutional principles advocating fair procedure, a strong emphasis emerged on ensuring that punishments are equitable, humane, and devoid of unnecessary suffering. As a result, methods involving torture gradually fell out of practice, replaced by the notion that punishments should be swift and humane.

In medieval period, the rule of Mughal emperors shifted the advent of punishing a person with death. They specifically introduced different types of barbaric punishments to be awarded to a person who commits an offence which is so grave that it is to be punished with death.

During the British colonial administration they introduced a centralized legal system in India, specifying 12 offenses punishable by death. This framework influenced the Indian Penal Code (IPC) of 1862, which formalized the death penalty. Over time, additional crimes have been included under its scope. Henceforth, in new introduced Bhartiya Nyaya Sanhita, 2023 the crimes punishable with death is increased to 15 offences.

Crimes Punishable by Death Under Indian Law i.e. Bhartiya Nyaya Sanhita, 2023 :

1. **Rape causing death or resulting in a permanent vegetative state** (Section 66).
2. **Gang rape** (Section 70(2)).
3. **Repeat offenders guilty of rape** (Section 71).
4. **Murder** (Section 103).
5. **Murder by a life convict** (Section 104). Note: The Supreme Court in *Mithu v. State of Punjab (AIR 1983 SC 473)* declared the mandatory death penalty unconstitutional.

6. **Abetment of suicide of a minor, insane, or intoxicated person** (Section 107).
7. **Attempted murder by a life convict in a way if injury is caused** (Section 109(2)).
8. **Organized crime offenses causing death** (Section 111(2)(a))
9. **Terrorist acts** (Section 113(2)).
10. **Kidnapping or abduction with intent to murder or demand ransom** (Section 140(2)).
11. **Waging war or abetting war against the Government of India** (Section 147).
12. **Abetting mutiny actually carried out** (Section 160).
13. **Fabricating false evidence leading to the death of an innocent person** (Section 230(2)).
14. **Threatening any person to give false evidence resulting in the death of an innocent person** (Section 232(2))
15. **Dacoity accompanied by murder** (Section 310(3)).

This evolution of laws reflects the seriousness with which capital punishment is treated and its gradual alignment with constitutional principles and human rights.

Objective Behind Capital Punishment:

The law is made to achieve certain objectives and its provisions are the same. The Indian Penal Code of 1860 was drafted with deterrence as its primary objective. The framers emphasized strict punishments to discourage criminal behavior.

The reason behind awarding capital punishment has been this only and is framed in keeping mind the circumstances and mitigating factors. Punishments should strike a balance by being strict enough to discourage crime but not excessively harsh. They must remain humane while ensuring they are not too lenient to lose their deterrent effect[3].

The death penalty has served deterrence from time immemorial. While it may be driven by a desire for revenge, seeking restitution or satisfaction for wrongs done, the greatest deterrent effect may come from the fear of being sentenced to death[4].

The proponents of various theories attempt to explain the functions of different forms of punishment over the period. These include: Theories of Retribution, which focus on punishment as a response to wrongdoing; Theories of Deterrence, which aim to discourage criminal behavior through fear of punishment; Theories of Preventive Measures, which seek to prevent future crimes by incapacitating offenders; Theories of Expiation, which involve offenders atoning for their crimes; and Theories of Reformative Measures, which emphasize rehabilitating offenders to reintegrate them into society.

Arguments for Retention of the Capital Punishment:

The judiciary has upheld its constitutionality, emphasizing its role in safeguarding the life and liberty of individuals within society. It is considered more economical and less cruel than life imprisonment, which leaves individuals to die indefinitely without hope of release.

It helps prevent prison overcrowding and provides significant value in satisfying victims of crime. Social contract theories have endorsed the state's right to penalize criminals in the interest of justice, viewing it as a necessary and effective tool. "Individuals who commit heinous crimes, show no remorse, and pose a serious threat to society should be isolated to protect public safety."

It serves both a deterrent and retributive function, aligning with the primary goals of justice administration. It acts as a substitute for private vengeance, making the sentence essential for societal protection. Good laws and proper implementation can prevent the misuse and abuse of the death penalty, which functions as a form of societal self-defense against criminals.

Retentionist countries: Countries which retains the death penalty for ordinary crimes.

Type of Country	Number
Abolitionist for all crimes	106
Abolitionist for ordinary crimes	7
Abolitionist in practice	29
Retentionist countries	56

[3] Committee on Reforms of Criminal Justice System, 2003

[4] Krishna, ed., 2007

Arguments against the retention of Capital Punishment: Capital punishment raises serious ethical concerns. Taking a life, when we cannot create one, is inherently unjust. If an innocent person is wrongly executed, the mistake is irreversible. Moreover, it offers no economic or social benefits and stands against moral values. The punishment eliminates any chance for the offender to reform or seek redemption. History shows that the death penalty neither effectively deters crime nor serves a meaningful retributive purpose. It is an outdated, harsh, and vengeful practice that tarnishes the dignity of society and reflects a lack of humanity.

Literature Review

Sana Humd (2022)[5]. The article examines the penalization of capital punishment in India. It critically examines the conflicting views of honorable courts, policymakers, commentators, human rights activists, and the Law Commission of India on whether the death penalty should be abolished, retained, or replaced with alternatives practiced in other countries. In doing so, it analyzes the penal provisions in various laws supporting capital punishment in India, including a critical examination of the gaps in its enforcement and implementation. The article references contradictory landmark judgments by India's honorable courts and reviews the suggestions made by the Law Commission of India in its 262nd Report to see if legislators have considered them for future adoption. Additionally, it discusses the theories supporting capital punishment and the systems of capital punishment in other countries.

Himanshu Gupta (2018)[6]**.** The discussion regarding whether the death sentence should be permitted in the modern world is a secondary aspect within the Indian Criminal Justice system. The primary and most pertinent question in the Indian context is whether the death sentence can realistically be carried out in India. Unfortunately, it's quite challenging, at least procedurally, if not technically, to execute the death sentence in India. The concept of the death sentence has been a topic of debate worldwide for a considerable period. The prevailing public opinion leans towards abolishing the death penalty as it is seen to violate human rights on a broad scale. Contemporary legal scholars argue that if killing is inherently wrong, no legal or social sanction can make it right. If it is morally wrong for an individual to take another's life, the same principle applies to the state. There is ongoing debate about the effectiveness of the death penalty as a deterrent, with many arguing that it has not shown any tangible effect in reducing the number of murders, rendering its imposition entirely futile. In India, accused individuals, under the protections of the Indian Criminal Justice system, have numerous avenues to delay their execution after being found guilty by the apex court. These avenues include filing a Review Petition, a Curative Petition, and a Mercy Petition concurrently to the Governor and the President. Furthermore, delays in disposing of Mercy petitions provide grounds for commuting the sentence.

Balwant Singh (1994)[7]**.** This paper examines the nature and implementation of "imprisonment for life" as a form of punishment under the Indian Penal Code and similar laws, focusing specifically on whether the punishment enacted under the Indian Penal Code of unenforceable and misconceived. The discussion about the nature and implementation of life imprisonment has been a topic of extensive debate. It has been examined at various levels, including by the Central Law Commission, state legislatures, Parliament, and the Supreme Court, focusing on its practicality and enforceability.

Capital punishment in India:

There are multiple reasons behind crime rate and wrong doers in India such as economic vulnerability, educational profile, caste and religious profile. In the Project 39A report, according to the national figures, 74.1% of the prisoners sentenced to death in India are economically vulnerable according to their occupation and landholding.[8]

23% of prisoners sentenced to death had never attended school. A further 9.6% had barely attended but had not completed even their primary school education. 76% (279 prisoners) of prisoners sentenced to death in India are backward classes and religious minorities.7 In India, there is no single stroke linked to the death penalty.

In India, the death penalty is not a widely used practice. In our nation, the severity of the offence determines whether the Court of Session grants a death sentence; the High Court must uphold this decision. The Indian Supreme Court may then hear an appeal. Section 368 of the Criminal Procedure Code, 1973 provides the authority to High Courts for confirmation of death sentence.

In short, the death penalty is only given in the offences which are heinous and very serious in normal duration which fall under the category of rarest of rare cases[9]. In India only two methods for capital punishments are followed which are hanging and shooting.

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[5] Sana Humd. Abolition of Capital Punishment in India: The Need of the Hour. Society & Sustainability. 4 (2). 2022. Abolition of Capital Punishment in India | Society & Sustainability

[6] Himanshu Gupta. Can Capital Punishment Ever Be Justified: A Critical Study. The Law Brigade (Publishing) Group. 4 (6). 2018.

[7] Balwant Singh. Punishment Of Imprisonment For Life : Misconceived And Unworkable. Journal of the Indian Law Institute. 36 (2). PUNISHMENT OF IMPRISONMENT FOR LIFE : MISCONCEIVED AND UNWORKABLE on JSTOR

[8] Project 39A — Death Penalty India Report

[9] The Capital punishment systems in India!

MODES OF EXECUTION OF DEATH SENTENCE: -

In India, the execution of a death sentence is primarily carried out through two methods**: *hanging by the neck until death or execution by firing squad*.** Once a death sentence is pronounced and upheld—despite the exhaustion of all possible legal remedies available to the convict—its execution is governed by Section 354(5) of the Code of Criminal Procedure, 1973, which proposes the mode of accomplishment as dangling by the neck until death.

Hanging by neck till death was given under Section; 368(1) of code of Criminal Procedure of 1889. Amendment to same was done in the year 1973.

section 354(5) which clearly states that-

"Hanging by neck is a style of punishing a person awarded with death penalty and so"

The imposition of the death sentence by hanging is enshrined in various legal provisions, including military law. For instance, under the preview of Section 34(a) of the *Air Force Act, 1950* it permits the courts-martial to award the death penalty for specific offenses tallied under Sections 34(a) to 34(o) of the Act. Moreover, Section 163 of the same Act vests discretionary authority in courts-martial to determine the mode of execution.

Analogous provisions exist in the *Army Act, 1950* and the *Navy Act, 1957*, granting courts-martial similar discretion in determining the method of execution when imposing a death sentence.

In the Landmark case of ***Deena* v. *Union of India*[10]**, the Hon'ble Supreme Court laid down a threefold test for determining the validity of the mode of execution of a death sentence. The judgment underscores that the method of execution must adhere to the following essential criteria:

1. It should be swift and certain.
2. It must not involve unnecessary physical suffering.
3. It should not lead to public degradation of the individual sentenced.

These principles underline the necessity of ensuring that the execution of a death sentence complies with constitutional mandates of dignity and humane treatment.

In this matter, the constitutional validity of Section 354(5) of the Code of Criminal Procedure was contested on the grounds that execution by hanging constitutes a cruel and inhumane punishment, thereby violating the right to life and personal liberty guaranteed under Article 21 of the Constitution of India.

Death Penalty and International Law:

Human rights are moral principles with legal implications that belong to every individual just by virtue of their humanity.

1. ***The International Covenant on Civil and Political Rights*** ('ICCPR') is a significant international human rights document that addresses the use of the death penalty. Article 6 highlights the importance of protecting the right to life and sets key safeguards that states retaining the death penalty must follow.[11]
2. Similarly, Article 37(a) of the ***Convention on the Rights of the Child (CRC),*** like the International Covenant on Civil and Political Rights (ICCPR), explicitly bans the death penalty for individuals under 18 years of age. As of July 2015, the CRC had been ratified by 195 countries, underscoring its near-universal acceptance.

Constitutional Validity of Death Penalty in India:

The Fundamental Right to life and personal liberty to every individual is given under **Article 21** of the Constitution of India It stipulates that no person shall be deprived of their life or personal liberty apart from per a procedure established by law. Judicial interpretation has clarified that this provision implies the state may deprive an individual of their life only if the procedure established by law is fair, just, and reasonable.

The judicial stance on capital punishment in India has been varied, with some judges endorsing it and others opposing it.

In ***Sher Singh* v. *State of Punjab*** Justice Chandrachud[12], delivering the opinion of a three-judge bench of the Supreme Court, held that the death penalty is constitutionally valid and permissible within the framework laid down in ***Bachan Singh* v. *State of Punjab***. This remains the law of the land.

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[10] (1983) 4 SCC 645

[11] India. Law Commission of India, Report No.262 on Death Penalty, August 2015, p.40-41

[12] A.I.R. 1983 S.C 365

In ***Triveniben* v. *State of Gujarat***[13], the Supreme Court downrightly declared that the Indian Constitution does not bar the imposition of the death penalty. However, the judiciary has also raised concerns regarding its application.

In ***Rajendra Prasad* v. *State of UP***[14], Justice Krishna Iyer emphasized that the death penalty violates Articles 14, 19, and 21 of the Constitution unless exceptional circumstances justify its imposition. He further outlined two essential prerequisites for imposing the death penalty:

1. Special reasons must be overtly chronicled for awarding the death sentence.
2. The death penalty must be reserved for extraordinary cases.

The Law Commission of India, in its 262nd Report published in August 2015, suggested ending the death penalty for all crimes, except in cases involving terrorism or acts of war against the state. This recommendation reflects an evolving perspective on the use of capital punishment in India.[15]

PROCEDURE FOR DEATH PENALTY: -

The high court must confirm the verdict of the death penalty awarded by sessions court. Following a conviction by the High Court, the individual found guilty retains the right to file an appeal before the Supreme Court.

If the Supreme Court refuses the petition, the convict has last option to apply for 'mercy Petition' to the President of India and Governor of State. The origins of clemency powers can be traced back to Section 295 of the Government of India Act, 1935. This provision vested the Governor-General, as the Crown's representative, with the authority to exercise these powers.

However, the makers of the constitution retained this power with some modifications in Article 71 and 161 of Constitution of India. Once the convict has exhausted all the legal remedies including appeals, review petitions, curative petitions, and mercy petitions to the President or Governor then the Black Warrant is issued. It serves as the final order for carrying out the death sentence and is directed to the jail authorities responsible for the execution.

Impact of Implementation of death penalty on the Crime Rate of India:

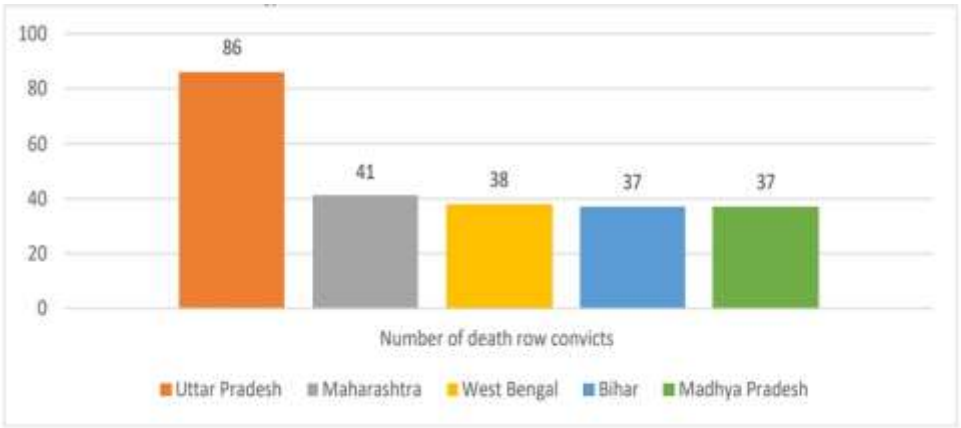
The National Law University, Delhi, recently released the 6th edition of its ***Death Penalty in India: Annual Statistics Report, 2021*,** as part of Project 39A. This report provides a comprehensive yearly overview of the death penalty in India, highlighting key legislative and international developments.

As per the report, the number of prisoners on death row in India amplified from 404 in the year 2020 to 488 by December 31, 2021, marking a nearly 21% rise from the previous year (Dhawan, 2022).

The number of death row inmates has reached its highest level since the National Crime Records Bureau (NCRB) began maintaining records in 2004, when the figure stood at 563 (Ahmed et al., 2020). As of December 31, 2021, Uttar Pradesh had the largest number of death row inmates in India, with 86 individuals awaiting execution.

It was followed by Maharashtra with 41, West Bengal with 38, and Madhya Pradesh with 37. Notably, West Bengal had the highest number of individuals newly sentenced to death that year.

Number of Death Row Convicts:



[13] A.I.R. 1989 S.C 142

[14] A.I.R. 1979, S.C.p.916

[15] CAPITAL_PUNISHMENT_IN_INDIA.pdf

Although no death row inmates have been executed in India since the four convicts in the Nirbhaya gang rape and murder case in 2020, data from the National Crime Records Bureau (NCRB) indicates that 29,272 murder cases were reported in 2021. This figure shows a minor increase of 0.3% compared to the 29,193 cases recorded in 2020. In 2019, the recorded number of murder cases was slightly lower at 28,915. Furthermore, 2021 witnessed a significant rise in kidnapping and abduction cases, with 101,707 incidents reported, reflecting a 19.9% increase from the 84,805 cases registered in 2020 (NCRB, 2021).

Commutation of death penalty to life imprisonment:

In legal terms, commutation refers to the reduction of a punishment originally imposed for a crime. For instance, a sentence of ten years imprisonment might be reduced to five years through commutation. This concept is distinct from a pardon, which completely nullifies the conviction. An example of resentencing or commutation would be altering a death sentence into rigorous imprisonment.

The constitutional authority to commute sentences is vested in the President and the Governors under Articles 72 and 161 of the Indian Constitution, respectively. Additionally, both the Central and State Governments possess statutory powers to commute sentences. Section 475 of the *BNSS*, titled "Power to Commute Sentence," elaborates on the extent of this statutory authority. A significant amendment introduced by the *BNSS* pertains to the limitations on commuting death sentences. Previously, under Section 433(a) of the CrPC, a death sentence could be commuted to "any other punishment" provided under the IPC.

However, the *BNSS* narrows this discretionary power by mandating that a death sentence can only be commuted to life imprisonment. Similarly, the provision limiting the commutation of any sentence into a fine now applies only to offences carrying a maximum punishment of three years or less.

Death Row Cases and Clemency Powers: The Constitution grants the President of India and the Governors of States the authority to pardon, reduce, or change sentences, including those involving the death penalty.[16] This power of clemency bestowed by the Constitution on the President and the Governor of a State is exclusive and absolute. It cannot be curtailed by any statutory provisions of the CrPC (sections 432, 433, 433A), the Prison Acts or rules. However, this power of the President or Governor is to be exercised reasonably and on the advice of the respective council of ministers.[17] "The exercise of the authority to decide on a mercy petition, besides the decision to reject such a petition, can be legally dared on specific grounds. These include failure on the part of the President or Governor to apply their mind, disregard of relevant materials, reliance on irrelevant considerations, influence by political or external factors, or an arbitrary exercise of their powers."[18] However, there is limited judicial review on the exercise of the constitutional power[19] as the judiciary only intervenes in cases where the exercise of power "deficiencies the due care and meticulousness or has become whimsical."[20] Excessive and unwarranted delay in disposal of mercy petition by the President or Governor and the resultant delay in execution of death sentence becomes a relevant factor in commuting death sentence to life imprisonment.[21]

While the matter is pending before the courts for a final decision, the executive process for the commutation of a death sentence can be initiated.[22] Where the Supreme Court in conclusion gave, the death sentence or dismissed the special leave petition, it is the duty of the Superintendent of the jail to inform the convicted prisoner of the same.[23] Following this, the convict is granted a duration of seven days to file a mercy petition, either with the Governor in the case of a State or with the President in the case of a Union Territory.[24] In case the mercy petition is rejected by the Governor, it is forwarded to the Secretary, Ministry of Home Affairs ('MHA'), Government of India. The President after examining the case on its merits[25], gives his decision, which is nonjusticiable, even if no reason is given.[26] The power and the procedure to exercise this power are carried out at the discretion of the executive. The Court has refused to spell out any guidelines for the exercise of this power as it has held the power under Article 72 to be of the "widest amplitude".

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[16] The Constitution of India 1950, arts. 72 and 161

[17] See Maru Ram v. Union of India, (1981) 1 SCC 107; State (NCT of Delhi) v. Prem Raj, (2003) 7 SCC 121; Ramraj @ Nabhoo @ Bhinu v. State of Chhattisgarh, (2010) 1 SCC 573; Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1. [Emphasis mine].

[18] Vibhute (2017), supra.

[19] See Epuru Sudhakar v. Government of Andhra Pradesh, (2006) 8 SCC 161; Narayan Dutt v. State of Punjab, (2011) 4 SCC 353.

[20] Shatrughan Chauhan (2014), 3 SCC 1.

[21] 1 See Vivian Rodrick v. State of West Bengal, (1971) 1 SCC 468; State of Uttar Pradesh v. Paras Nath Singh, AIR 1973 SC 1973; N. Sreeramlu v. State of Uttar Pradesh, (1974) 3 SCC 314; S. Parthasarthi v. State of Andhra Pradesh, (1974) 3 SCC 376; Ragubir Singh v. State of Haryana, (1975) 3 SCC 37.

[22] In re Maddela Yerra Channugadu, AIR 1954 Mad 911.

[23] Devender Pal Singh Bhullar v. State (NCT of Delhi), (2013) 6 SCC 195, [23].

[24] Ibid.

[25] Kehar Singh v. Union of India, (1989) 1 SCC 20, [11].

[26] G. Krishta Goud v. State of A.P., (1976) 1 SCC 157; Maru Ram v. Union of India, (1981) 1 SCC 107.

Delay in Execution of Death Penalty:

Violating Human Dignity Under Article 21[27] of the Indian Constitution, the procedure established by law, depriving life or personal liberty of a person, has to be fair and just. It cannot be bizarre, impulsive, cruel, or arbitrary.[28] Human dignity, available to all persons in India[29], has been accorded an extremely high value under article 21, read with articles 14 and 19. This principle mandates that the state must not impose imprisonment unless it adheres to a legal framework that is inherently fair, just, and reasonable in its procedural application.[30] Accordingly, the question arises as to whether death-row convicts have the right to be treated as human beings till they are put to gallows. Do they terminate to be human beings' lacking human dignity during confinement and are thereby defensibly starved of freedoms or rights of humanity, or human dignity?[31]

Inordinate delay in the execution of the death penalty has often been a major cause of concern especially in the well-known cases such as that of Mumbai terror (26/11) attack convict Ajmal Kasab, Parliament blast's convict Afzal Guru, and the recent 2012 Delhi gang-rape case.

The procedure under the Indian law usually results in a considerable lapse of time between the imposition of death sentence by a sessions court and the final acceptance or rejection of the mercy petition by the President/Governor. This is on account of the requisite confirmation of death sentence by the high court, permissible appeals therefrom to the Supreme Court and thereafter mercy petition by the convict to the President/Governor. During this period, the convict endures immense psychological torment, living under the constant shadow of death.

In ***T.V. Vatheesmaran V State of Tamil Nadu***[32], a division bench of the Supreme Court comprising Justices O. Chinnappa Reddy and R.B. Misra deliberated on whether a prolonged delay in carrying out a death sentence violates the fundamental rights guaranteed under Article 21 of the Constitution. The issue raised was whether such a delay could entitle a death row prisoner to have the death penalty commuted to life imprisonment. Relying on the opinions of Lord Scarman and Lord Brightman **in *Noel Riley V. A.G. of Jamaica*[33]**, opined: It is of course true that a period of anguish and suffering is an inevitable consequence of sentence of death. However, an extended delay, beyond the period necessary for appeals and the consideration of clemency petitions, is unjustifiable. It is insufficient to argue that the individual seeks to cling to life. In reality, the inherent human instinct to survive is what renders such prolonged delays cruel and degrading.

The prisoner endures extreme psychological torment from alternating between hope and despair, compounded by the uncertainty of their fate. The profound effects of such suffering on a person's mental, emotional, and physical well-being are extensively documented. During the wait for a decision on the mercy plea, the condemned individual is subjected to what can only be described as a "slow and lingering death, which is something more than the mere extinguishment of life."[34] Prolonged detention, awaiting execution of death sentence, has a dehumanizing impact on the prisoner. The "brooding horror of hanging" tortures the prisoner, daily. This prolonged agony and its dehumanizing impact are constitutionally significant, rendering the process unjust, unfair, and unreasonable under Article 21.

Delay as a Ground for Commutation:

Judicial Review of Clemency A few cases must be analysed to deal with the question of delay as a ground for commutation of death penalty. Two decisions of ***Devender Pal Singh Bhullar* v. *State (NCT of Delhi)*[35]** and ***Mahendra Nath Das* v. *Union of India*[36]** are pronounced by Justice G.S. Singhvi in a division bench which accordingly reflects a consistency in the reasoning. The petitioner in Bhullar, had been held responsible for the death of the Senior Superintendent of Police of Chandigarh, through the use of remote-controlled bombs. Nine individuals lost their lives in an attack targeting the then-President of the Youth Congress, which involved the use of forty kilograms of RDX. The accused was convicted under Sections 419, 420, 468, and 471 of the Indian Penal Code (IPC); Sections 2, 3, and 4 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA); and Section 12 of the

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[27] Constitution of India, 1950, Art. 21 - Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

[28] See Maneka Gandhi v. Union of India, (1978) 1 SCC 248; Charan Lai Sahu v. Union of India, (1990) 1 SCC 613.

[29] Shruti Bedi & Sebastien Lafrance, 'The Justice in Judicial Activism: Jurisprudence of Rights and Freedoms in India and Canada' in S. Khurshid, L. Malik & Y.P. Singh (eds.) The Supreme Court and the Constitution (Wolters Kluwer 2020) 67.

[30] Jolly George Varghese v. Bank of Cochin, (1980) 2 SCC 360.

[31] K.I. Vibhute, 'Right to Human Dignity of Convict under Shadow of Death and Freedoms Behind the Bars in India: A Reflective Perception' (2016) 58 JILI 15, 23.

[32] T.V. Vatheesmaran v. State of Tamil Nadu, (1983) 2 SCC 68.

[33] Noel Riley v. A.G. of Jamaica, (1982) 3 W.L.R. 557 (569-70) (P.C.).

[34] S.B. Sinha, 'To Kill Or Not To Kill: The Unending Conundrum' (2012) 24(1) National Law School of India Review, 24.

[35] *2013) 6 SCC 195, [23]*

[36] AIR 2013 SC 334

Passports Act, 1967. The Supreme Court subsequently rejected the review petition. In the case of ***M.N. Das***, the petitioner, who was serving a life sentence for the murder of Rajen Das, committed another murder while released on bail.

He was then sentenced to death by the Sessions Court which was subsequently confirmed by the High Court. Upon appeal, the Supreme Court highlighted the severe aggravating factors surrounding the murder. These included the victim being struck with a sword, his hand amputated, and his beheading—acts committed despite the perpetrator already serving a life sentence. Given the gravity of these circumstances, the court deemed the death penalty to be the sole appropriate course of action.

Delivered 20 days after Bhullar, M.N. Das's case also grappled with the delay of the executive in responding to the petitioners' clemency petitions. Following these two cases, the Chief Justice of India established a larger bench in the ***Shatrughan Chauhan's case***[37], case to address the issue of whether delays could serve as a valid basis for commuting a death sentence. This case involved the adjudication of twelve distinct writ petitions. While eleven of the twelve writs' petitions dealt with pleas for commutation of death sentences, one petition was a solitary plea by the People's Union for Democratic Rights with a prayer to set guidelines for dealing with similar mercy petitions. There was one plea for commutation solely on the ground of mental illness, one on grounds of delay in hearing the clemency petition as well as mental illness, one case was challenged on the grounds of both delay and the conditions of solitary confinement, while the others were based exclusively on the prolonged delay by the executive in resolving the mercy petitions.

The Terror Exception

In the case of ***Devender Pal Singh Bhullar***, the Supreme Court deliberated on a critical issue: whether individuals involved in acts of terrorism, who frequently commit heinous crimes, are entitled to constitutional safeguards against inordinate delays in the rejection of their mercy petitions by the President or Governor. Additionally, the Court examined whether such delays constitute a significant factor warranting the commutation of their death sentences to life imprisonment, thereby imposing an obligation on constitutional courts to consider this as a mitigating circumstance. The court determined that individuals convicted as terrorists under the Terrorist and Disruptive Activities (Prevention) Act, 1987, and comparable laws, are not entitled to any leniency. As a result, the delayed rejection of their mercy petitions cannot be considered a significant mitigating factor.

On January 21, 2014, in the ***Shatrughan Chauhan*** judgment, the Supreme Court of India held that "inexplicable delays caused by the executive are inexcusable." The Court emphasized that Article 21 of the Constitution, which guarantees the right to life, extends beyond the sentencing stage and encompasses the execution phase. The prolonged delay in carrying out a death sentence has a dehumanizing impact on the convict. The Court further ruled that if the delay in execution is due to factors beyond the convict's control, it necessitates the commutation of the death sentence.

The Court also reinforced that the power exercised under Articles 72 and 161 by the President and the Governor, respectively, is not merely discretionary but a constitutional duty. Given the significance of these offices, the Constitution does not impose a specific time limit for resolving mercy petitions. However, the Court held that these petitions should be decided within a reasonable period. When there is an unjustifiable, unexplained, and excessive delay, it becomes the Court's responsibility to intervene. The right to seek mercy under Articles 72 and 161 is a constitutional entitlement, not subject to the whims of the executive. Fulfilling constitutional duties with diligence is essential; otherwise, judicial intervention becomes necessary to uphold constitutional values.

This was not the first time the Supreme Court addressed the issue of delays in executing death sentences. Before ***Shatrughan Chauhan***, the Court issued similar directives in a series of cases,1983 **T.V. Vatheeswaran v.** ***State of Tamil Nadu***[38]**,** ***Sher Singh*** **v.** ***State of Punjab*** **(1983)**[39]**,** ***Triveniben*** **v.** ***State of Gujarat*** **(1988)**[40]**,** ***Madhu Mehta*** **v.** ***Union of India*** **(1989)**[41]**,** ***Daya Singh*** **v.** ***Union of India*** **(1991)**[42]**,** ***Mahindra Nath Das*** **v.** ***Union of India*** **(2013)**[43]**,** and ***Devender Pal Singh Bhullar*** **v.** ***State of NCT of Delhi*** **(2013)**[44]**.** For example, in the ***Sher Singh case*** of 1983, the Court urged both the Government of India and State governments to expedite the processing of petitions filed under Articles 72 and 161 of the Constitution, or Sections 432 and 433 of the Criminal Procedure Code, suggesting that they be resolved within three months. Despite these clear recommendations, the government repeatedly failed to follow this advice, as evidenced by the delays in mercy petitions of numerous death row convicts.

In ***Shatrughan Chauhan***, the Court specifically recommended that the government include "delay" in disposing of mercy petitions as a legitimate ground for commuting a death sentence in the guidelines used to evaluate such petitions. The Court suggested the inclusion of delay as a criterion in view of the

[37] Shatrughan Chauhan (2014), supra (20)

[38] (1983) 2 SCC 68

[39] (1983) 2 SCC 344

[40] (1988) 4 SCC 574

[41] 1989 AIR 2299

[42] 1991 AIR 1548

[43] (2013) 6 SCC 253

[44] Sher Singh v. State of Punjab (2013) 6 SCC 195

evolving jurisprudence on the subject. Following this landmark decision, several death sentences were commuted by the Supreme Court and High Courts. For example, on February 18, 2014, in the case of ***V. Sriharan alias Murugan* v. ..., *Union of India*[45]**, the Supreme Court commuted the death sentences of four convicts, reiterating the need to include delay as a factor in the guidelines for mercy petitions.

However, the Ministry of Home Affairs (MHA) has continued to reject delay as grounds for converting death sentences into life imprisonment, in disregard of the Supreme Court's rulings. A striking example is the case of Holi ram Bordoloi. On June 23, 2014, the MHA recommended that the President reject the mercy petition of Bordoloi, despite an over eight-year delay in its resolution by the Governor of Assam and the President. Bordoloi was convicted for the murder of three people in Assam's Mori gaon district in 1996. He was sentenced to death by the trial court in 2003, with the sentence confirmed by the Guwahati High Court in March 2004 and by the Supreme Court in April 2005[46]**.** In June 2005, Bordoloi submitted a mercy petition to the Governor of Assam. According to information obtained through an RTI filed by the Asian Centre for Human Rights (ACHR) on July 9, 2013, Bordoloi's petition was still pending with the President of India.

On February 6, 2014, ACHR filed a complaint with the **National Human Rights Commission (NHRC)** requesting that Bordoloi's death sentence be commuted based on the ***Shatrughan Chauhan*** ruling. On February 25, 2014, the NHRC issued a notice to the MHA requesting a report. The MHA replied on April 4, 2014, but before the NHRC could complete its proceedings, the MHA recommended rejecting Bordoloi's mercy petition. On July 5, 2014[47], the President ultimately denied the petition, despite the eight-year delay in its resolution, making it a clear case for commutation under the principles established in ***Shatrughan Chauhan*.**

This case underscores the continued disregard for Supreme Court guidelines concerning delays in the disposal of mercy petitions, raising serious concerns about justice for death row inmates.

In the case of **Devender Pal Singh Bhullar[48]**, who was charged with criminal conspiracy for an attempted assassination of the then-President of the Indian Youth Congress through a series of bomb blasts at Raisina Road, New Delhi, on September 11, 1993, which resulted in the deaths of nine individuals, a complex legal battle unfolded. Bhullar was convicted by the Designated TADA Court in New Delhi on August 25, 2001, and sentenced to death. In 2001, the Supreme Court, by a majority decision of 2:1, upheld Bhullar's conviction and death sentence. However, the case was contentious, as one of the three judges on the bench, Justice M. B. Shah, delivered a dissenting opinion, overturning Bhullar's conviction and ordering his release. Justice Shah's dissent highlighted the divided views on Bhullar's culpability.

The majority judgment of the Supreme Court acknowledged the dissent but upheld Bhullar's conviction and death penalty. In light of this, the judgment recommended that when Bhullar's mercy petition was considered, the government should seek the opinion of Justice M. B. Shah, the presiding judge who had dissented, under Section 472& 473 of the Bhartiya Nagarik Suraksha Sanhita (BNSS).

Section 472 & 473 of the BNSS stipulates that when a request for remission of a sentence is made to the government, it has the discretion to consult the presiding judge of the court that confirmed the conviction, seeking the judge's opinion on whether the remission should be granted or denied. This provision aims to ensure that a legal expert familiar with the case weighs in on the matter before the executive takes a final decision.

Bhullar had submitted his mercy petition to the President of India on January 14, 2003. However, it was not until May 2011 that the President rejected his petition, following the recommendation of the Ministry of Home Affairs (MHA). The MHA's advice to the President mentioned that the Supreme Court had suggested consulting Justice M. B. Shah under Section 432(2) of the CrPC. However, despite this recommendation, there was no record or confirmation that the government had ever approached Justice Shah for his input before making the decision.

In a later statement, Justice M. B. Shah revealed that he was never consulted by the government regarding Bhullar's mercy petition, despite the Supreme Court's suggestion and the provisions of Section 472 & 473 BNSS**.**[49] This failure to seek his opinion, as required by the legal framework and emphasized by the Court, raised significant concerns about procedural lapses in the handling of mercy petitions. The lack of consultation with Justice Shah, who had expressed a dissenting view in Bhullar's case, further complicated the already controversial debate over Bhullar's conviction and the death penalty. This procedural oversight underscores the importance of adhering to legal safeguards, especially in cases involving capital punishment, where the stakes are irrevocably high.

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[45] AIR 2014 SC 1368

[46] Holi ram Bordoloi v. State of Assam (Appeal (Crl.) 1063 of 2004

[47] . STATEMENT OF MERCY PETITION CASES – REJECTED by the President of India as on 01.08.2014 *available at* http://rashtrapatisachivalaya.gov.in/pdfs/mercy.pdf

[48] Devender Pal Singh Bhullar v. State (NCT of Delhi), (2002) 5 SCC 234

[49] Dissenting judgment of Justice M B Shah in Devender Pal Singh v. State (NCT of Delhi) *is available at*: http:// judis.nic.in/supremecourt/imgst.aspx?filename=18351

Delay and 'Supervening Circumstances': Grounds for Commutation

The question of delay as a ground for commutation of death sentences has arisen in numerous cases. Nevertheless, on interpretation of the contradictory decisions in ***Vatheeswaran***, ***Sher Singh V. State of Punjab***[50] and ***Javed Ahmed Abdul Hamid Pawala V. State of Maharashtra***[51], the Supreme Court felt that the issue ought to be referred to a constitution bench. Consequently, the court's earlier final order in Triveniben has been the main source of law on the issue of delay as a ground for commutation of the death penalty: Excessive and unjustified delay in carrying out a death sentence allows the convicted individual to seek relief under Article 32 of the Constitution. However, the court's review in such cases is limited to assessing the duration and reasons for the delay after the sentence has been conclusively upheld through the judicial process. The court does not have the authority to revisit or overturn the findings that led to the confirmation of the death penalty.

This Court, however, may consider the question of inordinate delay in light of all circumstances of the case to decide whether the execution of the sentence should be carried out or should be altered into imprisonment for life. There is no defined timeframe of delay that renders a death sentence unenforceable. In this context, the ruling in ***Vatheeswaran***[52] [...] has been set aside. The interpretation of ***Triveniben*** [53] may have been misunderstood to imply that any delay in resolving a clemency petition mandates the courts to convert a death sentence into life imprisonment.

However, this is not true as the above ratio of the judgment clarifies the position detailing the requisite elements of the power of the courts:

i) the court may examine the nature of the delay;

ii) ii) the court may examine the circumstances that ensued after the imposition of the death sentence;

iii) iii) the court may not reopen the question of the guilt of the accused;

iv) iv) no fixed period can be prescribed to define the term 'delay';

v) the court must entertain the question of delay in light of all circumstances of the case.[54]

Inherent Gaps in "Rarest to Rare" Judgement:

Several judges of the Supreme Court have expressed strong opposition to the death penalty, calling for its abolition. Justice **A.K. Ganguly** of the Supreme Court has criticized capital punishment, labeling it as "inhumane, anti-life, undemocratic, and reckless," despite its continued legality within the existing judicial system. He also highlighted the ambiguity in applying the 'rarest of rare' doctrine for awarding the death penalty, as its interpretation often varies among judges. Justice Ganguly stressed the need for extreme caution, urging judges to carefully consider both mitigating and aggravating factors before handing down a death sentence.

Justice Krishna Iyer, in a recent address to a Human Rights organization, passionately advocated for the abolition of capital punishment.

The constitutional validity of the death penalty has been challenged before the Supreme Court of India on multiple occasions. In ***Jagmohan Singh V. State of Uttar Pradesh***[55], the Supreme Court unanimously upheld the constitutionality of the death penalty, with all five judges on the Bench in agreement.

In the case of ***Rajendra Prasad V. State of Uttar Pradesh***[56]**,** Justice Krishna Iyer highlighted that the imposition of the death penalty has profound implications on the right to life enshrined under Article 21 of the Constitution of India. However, since it is sanctioned by law, and Article 21 does not contain the term "due process," the death penalty remains valid. He further clarified that two conditions must be met for imposing capital punishment:

1. Specific reasons must be documented for imposing the death sentence in a given case.
2. He argued that the death penalty should be reserved for the rarest of rare cases involving exceptionally grave circumstances.

The matter was subsequently revisited in the landmark judgment of ***Bachan Singh v. State of Punjab*** by a Constitution Bench comprising five judges. This case, which drew upon observations made by Justice Krishna Iyer, explored the ethical, societal, and spiritual aspects of the death penalty, while upholding its constitutionality.

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[50] Sher Singh, supra(12)

[51] AIR 1985 SC 231

[52] Vatheeswaran, supra 32

[53] Triveniben (1989), supra, [23].

[54] Zubin Dash & Shashank Singh, 'A Case Against Delay as a Ground for Commutation of Death Sentences' (2014) 7 NUJS L. Rev. 321, 341.

[55] AIR 1973 SC 947

[56] Rajendra Prasad, Supra 14

However, Justice Bhagwati, in his dissenting opinion in ***Bachan Singh***, provided several arguments for why the death penalty should be deemed unconstitutional, as it violates Articles 14 and 21. He also highlighted its undesirability from various perspectives, one of his key concerns being that the death penalty is irrevocable, making any miscarriage of justice permanent and irreparable.

But if we talk about favour of death penalty case of ***Jagmohan Singh vs. State of Uttar Pradesh (1973).***

In ***Bachan Singh***, the Supreme Court, through a unanimous verdict, reaffirmed the constitutional validity of capital punishment. The Court concluded that the death penalty did not violate Articles 14, 19, or 21 of the Constitution. The challenge to its validity was based on the argument that the sentencing procedure lacked comprehensive safeguards under Articles 19 and 21, as the Criminal Procedure Code (Cr.P.C.) focused only on determining guilt, not the imposition of the death penalty.

The Court clarified that the selection between a death sentence and life imprisonment is guided by the procedure established by law, with the sentencing judge required to weigh the facts, circumstances, and the nature of the offense presented during the trial. It emphasized that under Article 21, deprivation of life is permissible when carried out according to a lawful procedure. The judgment stressed the necessity of judicial discretion and careful consideration of mitigating and aggravating factors in deciding whether a life sentence or capital punishment is warranted.

The decision in ***Bachan Singh*** marked a significant shift in the approach to capital punishment, particularly in its emphasis on individualized sentencing. This ruling, delivered by a Constitution Bench, departed from the rigid categorization of death-eligible offenses established in ***Rajendra Prasad.*** The ***Bachan Singh*** judgment firmly rejected the idea of standardizing categories for death sentences, recognizing that such an approach undermines the core principle of individual justice. Instead, it laid out a framework centered on the consideration of mitigating factors and affirmed that life imprisonment should be the default punishment under Section 302 of the IPC, in alignment with the legislative intent expressed in Section 354(3) of the CrPC. However, the judgment's lack of clear procedural and normative guidelines allowed later decisions to distort the original framework. This section explores the framework set by ***Bachan Singh*** on capital sentencing, followed by a discussion of the resulting inconsistencies and confusion that have arisen over its four-decade-long application.

It is argued that the inherent ambiguities within *Bachan Singh* have contributed to the nonappearance of a evocative and consistent capital sentencing process. The Supreme Court, while assessing the constitutionality of the death penalty under Section 302 of the IPC, was tasked with resolving two key issues: first, whether the death penalty provision under Section 302 was constitutional, and second, the validity of the sentencing procedure based on 'special reasons' as outlined in Section 354(3) of the CrPC. The majority opinion concluded that Section 302 met the constitutional standards of reasonableness under Articles 19 and 21. Regarding the second issue, the Court noted that Section 354(3) vested excessive discretion in the judiciary, risking arbitrary application of the death penalty. Nonetheless, the Court held that the 1973 amendments to the CrPC addressed previous concerns from the ***Jagmohan*** case. It also acknowledged that a rigid formulation of 'special reasons' would be impractical, as it would hinder judges from fully considering the nuances of each case. Consequently, the Court established broad guidelines that aligned with the legislative intent expressed in Section 354(3), which required courts to balance aggravating and mitigating factors related to the crime and the criminal, and to ensure that life imprisonment was genuinely not a viable alternative.

According to *Bachan Singh*, in deciding between life imprisonment and the death penalty, courts must weigh both the nature of the offense and the characteristics of the offender. The relative importance of aggravating and mitigating factors depends on the specific circumstances of each case. However, a critical aspect that has been overlooked is the Court's guidance on considering mitigating factors with a 'liberal and expansive' approach. Notably, the majority opinion did not extend this approach to aggravating factors, which was consistent with the legislative preference that life imprisonment should be the default sentence, with the death penalty being the rare exception.

The Court's majority opinion also suggested that the determination of 'special reasons' under Section 354(3) requires judges to find that life imprisonment is clearly not a feasible alternative. Thus, under the framework set out in ***Bachan Singh***, the death sentence can be imposed when aggravating factors outweigh mitigating ones or when the possibility of life imprisonment is unequivocally foreclosed. Despite this, ***Bachan Singh*** itself contains several ambiguities, leading to interpretations that deviate from its original framework. The central issue of uncertainty arises from the lack of clarity on sentencing factors. While the framework instructs judges to consider both aggravating and mitigating factors, it fails to provide a clear conceptual basis for this requirement or to establish the relationship between these two sets of factors.

Moreover, ***Bachan Singh*** does not clarify the penological reasoning behind the consideration of factors such as age, socio-economic background, mental state, and potential for reformation. By simply stating that these factors are relevant without further elaboration, it left future judges with broad discretion to determine their significance. The absence of a solid theoretical foundation for the framework has had a direct impact on the fairness and consistency of sentencing proceedings. With no clear guidelines, the collection, presentation, and consideration of sentencing factors are subject to low standards, undermining the integrity of the process. The lack of judicial discourse on these critical aspects has significant implications for the fairness of trials, especially in cases where sentencing proceedings are of questionable quality.

This section will now explore the crucial procedural and substantive aspects of capital sentencing left unresolved by ***Bachan Singh***, which are as follow: [57]

1) Why are Mitigating Circumstances Relevant?

[57] *Available at:* https://repository.nls.ac.in/cgi/viewcontent.cgi?article=1077&context=nlsir

2) Onus to Produce Sentencing Material.
3) Evidentiary Standards
4) Remedying Sentencing Errors
5) Weighing Aggravating and Mitigating Factors
6) Considering the Alternative of Life Imprisonment

Analysis of the Doctrine with Reference to the Nirbhaya Case

The ***Nirbhaya case***[58], one of the most harrowing incidents of sexual violence in history, shook the collective conscience of the nation. It highlighted the alarming prevalence of such crimes and sparked widespread outrage across societal, legal, and political spheres. Justice Dipak Mishra poignantly remarked during the judgment, "We appear to be existing in a primitive and uncivilised culture," underscoring the gravity of the offence. The tragic incident, which occurred on December 16, 2012, became a pivotal moment, leading to significant legal reforms aimed at addressing crimes against women. The four primary perpetrators were executed on March 20, 2020, following years of legal proceedings. This case served as a catalyst for re-evaluating the judicial approach to sexual assault, especially under the "rarest of the rare" doctrine applied in capital punishment cases.

Case Facts

On the night of December 16, 2012, a brutal crime unfolded in a moving bus in Delhi. The accused—Vinay Sharma, Akshay Thakur, Mukesh Kumar, Pawan Gupta, a juvenile offender, and Ram Singh (who later died by suicide)—lured the victim and her male companion aboard by offering them a ride. Once inside, the victim was subjected to a barbaric gang rape, during which foreign objects were forcibly inserted into her body, causing severe internal injuries. Following the assault, the perpetrators attempted to crush the victim and her companion under the wheels of the bus but failed. Both victims were later found gravely injured and abandoned on the roadside.

The forensic and medical examinations revealed the extreme brutality of the crime, which left the victim with irreversible injuries and ultimately led to her death.

Imposition of Death Penalty

The case was expedited through Fast Track Courts, which awarded the death penalty to the convicts. This decision was subsequently upheld by the Delhi High Court. The matter was later brought before the Supreme Court, where a bench of six judges confirmed the death sentences after an exhaustive review of the case. Key findings that influenced the court's decision included:

- The presence of severe bite marks on the victim's body, particularly on sensitive areas.
- The use of sharp objects that caused fatal internal injuries, including the rupture of the victim's intestines.
- The inhumane act of throwing the victim and her companion out of the moving bus after the assault.
- The deliberate attempt by the perpetrators to run over the victims with the bus to escape detection.

Application of the "Rarest of the Rare" Doctrine

The Supreme Court noted that the aggravating factors in this case far outweighed any mitigating circumstances. The heinousness of the act, marked by sheer cruelty and barbarity, left no room for leniency. Justice Dipak Mishra observed that the crime reflected an act of unthinkable savagery and had not only shaken societal morals but also exposed glaring inadequacies in the safety measures for women and children. The bench reaffirmed the applicability of the "rarest of the rare" principle, emphasizing that such a crime warranted the highest punishment permissible under the law to uphold justice and serve as a deterrent.

While some believed that the crime was of such a nature that it has to fall under the category of "Rarest to Rare" whereas few communists were of the view that it was a deliberate action by the court to do so because of media trial and the public pressure.

Pardoning Powers of the President and Governor in case of Death Penalty:

An intriguing aspect of examining the presidential pardoning power lies in the dynamic approach taken by the judiciary. This section delves into key case laws and explores the scope and limitations of judicial oversight over the President's power to pardon. The discussion is structured into three distinct phases: *pre-Maru Ram*, *Maru Ram*, and *post-Maru Ram*.

[58] (2017) 6 SCC 1

Pre-Maru Ram Phase

In one of the landmark cases where the Court analysed the subject of forgiving power of an executive is the case of ***K.M.Nanavati* v. *State of Bombay***.[59] In this case, the Court focused on the exercise of the pardoning power by the Governor of Maharashtra. Given the conceptual similarities and relevance to the issue under consideration, it is discussed in detail below. Commander Nanavati of the Indian Navy was convicted of murder by the Bombay High Court and sentenced to life imprisonment. However, the Governor of Bombay suspended his sentence while he appealed the verdict in the Supreme Court. Notably, at that time, the Court had established a rule under Article 145[60] of the Constitution, which required a petitioner serving a life sentence to first surrender their sentence before the petition could be heard, unless the Court directed otherwise. Nanavati argued before the Supreme Court that the Governor's order granted him an exemption from this rule.

In a majority decision of 4 to 1, the Supreme Court declared the Governor's order to be constitutionally invalid. The order was deemed effective only while the case was under consideration before the Court after the filing of the petition for special leave, but not beyond that point. ***Seervai*** argued in Court that while the judiciary had the authority to suspend a sentence or grant bail during the hearing of a special leave petition, this did not diminish the executive's power to grant a pardon in its full scope.

As a result, the Court delved into the analysis of the pardoning power itself. It determined that the judiciary's power to suspend a sentence during the pendency of the special leave petition overlapped with the executive's powers in this domain. Consequently, the Court adopted a principle of harmonious interpretation between the two branches of government. ***Seervai***, who later critiqued the majority opinion, argued that the principle of harmonious construction had been wrongly applied, contending that the judgment created unnecessary conflict between two constitutional provisions where none previously existed."[61]

In the Nanavati case, the Court, through the exercise of judicial review, imposed an entirely new constraint on the pardoning power. It is important to note, however, that in the case of ***Sarat Chandra Rabha* v. *Khagendra Nath,***[62] the same bench of the Court unanimously embraced the dissenting opinion of Justice Kapur from the Nanavati case. In the Rabha case, the Court clearly delineated between judicial and executive powers, asserting that these two operate on separate planes and do not interfere with one another.

Another significant case where the Supreme Court addressed the issue of the Pardoning Power is ***G. Krishta Goud* v. *State of Andhra Pradesh***.[63] This case stemmed from the refusal of the President of India to grant mercy to the petitioners, who were convicted murderers. In response, the petitioners approached the Supreme Court seeking a review of the President's denial of clemency. This rewording maintains the meaning while ensuring originality. Let me know if you need further adjustments.

In this case, the Court emphasized that the pardoning power vested in both the President and the Governor has deep historical roots as a sovereign authority, politically it functions as a residual power, and humanistically, it serves as a means of administering intangible justice. The Court expressed its reluctance to interfere with the President's decision through judicial review. Justice Krishna Iyer articulated the following:

"In a republic, no power is without responsibility, as the ultimate authority lies with the people who are both the source and the beneficiaries of public power. However, two constraints exist within our constitutional framework. The Court cannot act as an omniscient, omnipotent, or omnipresent entity. Moreover, when the Constitution assigns certain powers to the highest executive, excluding judicial review by implication, it would be an unnecessary intrusion for the Court to assume an unlimited superpower role."

Therefore, although the Court initially hesitated to challenge the decision, it is crucial to note that the judgment begins with the assumption that public power is never exercised irresponsibly. Ultimately, Justice Krishna Iyer cautioned that should there be clear evidence of arbitrary or malicious misuse of power, the Supreme Court would not remain passive or powerless.

While the Court initially demonstrated significant hesitation, its interpretation and activist stance eventually led to the imposition of limitations on the pardoning powers of the President and the Governor.

Maru Ram Phase

A pivotal case on this matter is of ***Maru Ram V. Union of India.***[64] which sought to challenge the constitutionality of Section 433A of the Code of Criminal Procedure, 1973. This provision made it mandatory for two categories of offenders to serve a minimum of fourteen years in detention. The

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[59] MANU/SC/0063/1960: AIR 1961 SC 112.

[60] Article 145 states that subject to the provisions of any law made by the Parliament, the Supreme Court may from time to time, with approval of the President, make rules for regulating generally the practice and procedure of the Court and an inclusive list is mentioned thereafter.

[61] Seervai, "*Constitutional Law of India*", Volume 2, p. 2103.

[62] MANU/SC/0190/1960: AIR 1961 SC 334.

[63] MANU/SC/0116/1975: (1976) 1 SCC 157.

[64] MANU/SC/0159/1980: AIR 1980 SC 2147

petitioners argued that Section 433A was incompatible with Section 433(a), which they viewed as a legislative equivalent to the pardoning power granted under the Constitution. In its judgment, delivered by Justice Krishna Iyer, the Court emphasized that while the constitutional and statutory powers related to pardoning are alike, they are not identical, despite their coextensive nature.

Justice Iyer noted that all public powers, including those outlined in the Constitution, must be exercised responsibly, without arbitrariness or mala fide intentions. The Court further observed that establishing guidelines to ensure fair and equal implementation of these powers was essential to maintain their validity. Notably, this judgment marked the first instance where the Court advocated for the creation of guidelines governing the exercise of the President's pardoning power. This was intended to prevent discriminatory practices, such as where two individuals convicted for the same offense receive different sentences due to irrelevant factors like religion, caste, color, or political affiliation.

The *Maru Ram* case represents a shift from the earlier ***Krishta Goud case***[65], in which the Court was initially hesitant to engage in judicial review. In contrast, in *Maru Ram*, Justice Krishna Iyer firmly endorsed judicial review and urged the government to establish clear guidelines for exercising the pardoning power, signalling a stronger stance on ensuring fairness in such decisions.

Post-Maru Ram Phase

An important case in this context is ***Kehar Singh* v. *Union of India***[66], where Singh was convicted under Section 120B in conjunction with Section 302 of the Indian Penal Code for the assassination of then Prime Minister, Smt. Indira Gandhi, and was sentenced to death. Following the conviction, Singh filed a petition requesting the President to exercise his powers under Article 72 of the Constitution. The President denied the request, asserting that he could not reconsider the merits of a case that had been definitively settled by the highest court.

Upon reviewing the petitioner's appeal, the Supreme Court held that the President, in exercising his powers under Article 72, has the authority to examine the evidence from the criminal case and arrive at a different conclusion regarding the accused's guilt or the sentence. The Court emphasized that the President operates on a separate level from that of the judiciary.

This decision aligns with the stance taken in ***Rabha's case***[67], where the distinction between the powers of the executive and the judiciary was underscored, implicitly disagreeing with the approach in ***Nanavati's case***[68]. Furthermore, the Court reaffirmed that it does not have the authority to examine the merits of the President's use of pardoning powers, and its role is limited to the boundaries outlined in ***Maru Ram's case***.

An important aspect of the judgment was the Court's stance on the formulation of guidelines, which had been previously suggested in *Maru Ram's case*. The Court determined that there was no necessity for specific guidelines, as the provisions of Article 72, along with its historical application and existing case law, already provided adequate clarity.

Thus, the decision in ***Kehar Singh*** [69]reinforced the principles from *Maru Ram* regarding judicial review of the President's pardoning powers. However, there has been growing concern among legal scholars that the judiciary's examination of the pardoning power could inadvertently encroach upon the President's constitutional authority, possibly delving into the substantive merits of the case. The author believes that this concern is unwarranted, as the Indian judiciary has maintained a balanced approach to such scrutiny. In fact, in the more recent case of ***Epuru Sudhakar.* v. *Govt. of A.P.***[70]**,** the Supreme Court adhered to the principles established in *Maru Ram's case*.

Clemency Powers of the President

The clemency power vested with the President of India[71] is an executive prerogative distinct from the judiciary and cannot be considered as a mechanism for appeal. It serves two primary functions: rectifying potential judicial errors and offering relief from disproportionately harsh penalties. The President's pardoning authority encompasses the following forms:

- **Pardon**: A pardon nullifies both the conviction and the sentence, freeing the individual from all legal repercussions, punishments, and disqualifications related to the crime. It is the most complete form of clemency, fully restoring the individual's legal status and rights.

[65] (1976) 1 SCC 157

[66] (1989) 1 SCC 20, [11]

[67] AIR 1972 SC 2535

[68] Nanavati Case, Supra 59

[69] Kehar Singh, Supra 66

[70] MANU/SC/4440/2006

[71] https://vajiramandravi.com/quest-upsc-notes/powers-of-the-president/

- **Commutation**: This involves replacing a more severe punishment with a lighter one. For instance, a death sentence may be commuted to life imprisonment, which can then be reduced to either rigorous or simple imprisonment. Unlike a pardon, commutation does not eliminate the conviction but modifies the severity of the punishment.
- **Remission**: Remission involves shortening the length of a sentence while maintaining its original nature. It reduces the duration of the punishment but does not alter its character or relieve the convict of culpability.
- **Respite**: Respite offers a reduced sentence, often in consideration of exceptional circumstances such as the convict's health condition or pregnancy. It may involve a temporary or permanent reduction in the severity of the sentence.
- **Reprieve**: A reprieve is a temporary delay in the execution of a sentence, particularly in death penalty cases. It allows the convict time to seek a pardon or commutation, typically to facilitate further legal review or petitions for clemency.

Principles Governing the President's Clemency Power

As enshrined in Article 72 of the Indian Constitution, the exercise of the President's pardoning power is governed by various principles, which delineate its scope, application, and limitations. The Supreme Court, in numerous rulings, has clarified these principles, including:

- A mercy petition does not entitle the petitioner to an oral hearing with the President.
- The President is permitted to reassess the evidence and may form a conclusion different from that of the courts.
- The power is exercised on the advice of the Union Cabinet.
- The President is not required to disclose reasons for the decision.
- Relief can be granted not only for excessively harsh sentences but also in cases of clear judicial errors.
- The Supreme Court has refrained from imposing detailed guidelines for the exercise of this power.
- Judicial review of the President's decision is restricted to cases involving arbitrariness, irrationality, bad faith, or discrimination.
- A subsequent mercy petition does not automatically halt the execution of the sentence if the previous one was denied.

Case laws related to death penalty:

The Supreme Court has delivered a series of landmark judgments affirming the legality of the death penalty as a form of capital punishment. Nevertheless, the question of the death penalty's constitutionality remains a subject of ongoing debate, particularly concerning its compatibility with fundamental rights and human rights principles.

"I support the death penalty because I believe, if administered swiftly and justly, capital punishment is a deterrent against future violence and will save other innocent lives."[72]

In the case of ***Bachan Singh* v. *state of Punjab***[73], This case addressed the constitutional legitimacy of capital punishment and is considered a pivotal ruling in legal history. Delivered by a five-judge bench, it is renowned for formulating the "rarest of the rare" doctrine. The court concluded that the death penalty should be imposed only in exceptional and extraordinary circumstances, emphasizing its application in the most extreme cases.

In the case of ***Machi Singh* v. *State of Punjab***[74], In this case, the Court outlined several important factors that must be considered when imposing the death penalty:

1. The method used to carry out the murder
2. The underlying motive behind the act
3. The degree to which the crime is anti-social or morally reprehensible
4. The scale or severity of the crime committed
5. The characteristics or nature of the victim involved in the murder

[72] George W. Bush

[73] (1982)3SCC24

[74] (1983) AIR 957

In the case of ***Jagmohan Singh* v. *State of Uttar Pardesh***[75], The Supreme Court ruled that under Article 21, the deprivation of life is constitutionally valid, provided it follows the procedure established by law.

In the case of ***Mithu* v. *state of Punjab***[76], this case is regarded as a pivotal decision in examining the constitutionality of Section 303 of the Indian Penal Code (IPC), which mandated the death penalty for prisoners serving a life sentence who committed murder while incarcerated. The Court concluded that Section 303 contravened Articles 14, 19, and 21 of the Constitution.

The case of ***Maninder Singh Pandher & Surinder Koli* v. *State of Uttar Pradesh***[77] pertains to the infamous **Nithari serial murders**, which occurred in Noida, Uttar Pradesh, in 2006, shocked the nation due to the brutal nature of the crimes. The case involved multiple murders, rapes, and the alleged cannibalism of victims, primarily targeting young girls. The accused were Maninder Singh Pandher, the owner of a house where the crimes took place, and Surinder Koli, his domestic helper. Below is a unique summary of the case and its legal journey:

- Trial Court: The Special CBI Court convicted both Pandher and Koli and sentenced them to death, recognizing the heinous nature of the crimes.
- Allahabad High Court:
    - Upon appeal, the High Court acquitted Maninder Singh Pandher, citing insufficient evidence to link him directly to the murders.
    - The court upheld the death sentence for Surinder Koli, ruling that he was primarily responsible for the murders and that the crime fell under the "rarest of rare" category.

Supreme Court Judgment:

1. For Surinder Koli: The Supreme Court upheld the death penalty for Koli, stressing that his actions were so brutal and depraved that they necessitated capital punishment. The court emphasized the severity of the crime, noting the irreversible harm caused to the victims and society.
2. For Maninder Singh Pandher: Although Pandher's conviction was reinstated for one of the cases, his role in the murders was seen as less direct compared to Koli, leading to a more limited sentence for him.

Legal Significance:

- **Doctrine of "Rarest of Rare"**: This case highlighted the use of the "rarest of rare" doctrine in determining the appropriateness of the death penalty. The brutal nature of Koli's actions made this case a fitting example of when capital punishment is justified.
- **Circumstantial Evidence**: The case also illustrated the importance of circumstantial evidence in criminal trials, as there was no direct eyewitness testimony, yet Koli's involvement was sufficiently established through forensic evidence and witness statements.
- **Judicial Review and Justice**: The differing verdicts from the Trial Court, High Court, and Supreme Court reflect the layered judicial process and the careful review required to balance the rights of the accused with the need for justice in such serious crimes.

The Nithari case continues to be a reference point in discussions about the criminal justice system, particularly regarding sentencing for exceptionally grave crimes. It underscores the delicate balance between ensuring justice for victims while safeguarding the rights of the accused.

Legislative Developments on the Capital Punishment: -

The POSCO Act underwent another amendment in 2019 following the heinous gang rape and murder of a veterinarian in Telangana. In response, the Andhra Pradesh Legislative Assembly enacted changes to the Indian Penal Code (IPC), specifically introducing a provision for the death penalty in cases of non-homicide penetrative sexual assault on children.[78] The amended bill proposes that individuals convicted of rape should be sentenced to death, with cases required to be heard and resolved within 21 days. It also revises IPC Section 376 to mandate the death penalty in rape cases. Furthermore, new sections—354E, 354F, and 354G—were introduced to specifically address the harassment of women, sexual assault of children, and aggravated sexual assault on children, respectively.

Conclusion:

In our view, the death penalty in India touches on important issues surrounding its use, its legal foundation, and the ethical debates surrounding it. The "rarest of the rare" doctrine, established by the Indian Supreme Court, is central to how capital punishment is applied. This principle attempts to limit its

[75] (1973) AIR 947

[76] 1983 AIR 473

[77] (2011) 4 SCC 29

[78] Annual Statistical Report, “Death Row Population” available at http://www.project39a.com (last visited on 13th Oct 2020)

use to the most egregious crimes, such as terrorism, mass murder, and crimes against humanity, in order to ensure that it is not applied arbitrarily or excessively.

Here are a few points that can be elaborated upon or clarified in your paper:

- **Constitutional Validity**: While India retains the death penalty, it must be consistent with constitutional provisions, particularly Article 21, which guarantees the right to life. The challenge is balancing the state's power to impose capital punishment with the protection of individual rights. The Indian Supreme Court has historically dealt with this issue through various rulings, ensuring that the death penalty is not imposed arbitrarily.
- **Moral and Ethical Considerations**: As you've mentioned, one of the key debates around the death penalty is its morality. Critics argue that it devalues human life and can be seen as a form of state-sanctioned violence. The moral argument against the death penalty often emphasizes the possibility of judicial error, wrongful convictions, and the irreversibility of execution.
- **Deterrence Argument**: Supporters of capital punishment argue that it serves as a deterrent to serious crime, especially in cases involving terrorism and mass violence. However, studies on the effectiveness of the death penalty as a deterrent remain inconclusive. The fear of death, as you mention, may deter some criminals, but there is no definitive evidence that capital punishment is more effective than long-term imprisonment in preventing serious crime.
- **Judicial Discretion**: The role of judicial discretion in imposing the death penalty is crucial. While the "rarest of the rare" doctrine is designed to limit the scope of capital punishment, it requires judges to make subjective determinations about the nature of the crime and the culpability of the accused. This discretion can sometimes lead to inconsistencies in sentencing, which has been a point of contention.
- **International Perspectives**: Globally, there is a trend towards the abolition of the death penalty, with over two-thirds of countries having abolished it in law or practice. India remains one of the countries where it is still retained, alongside other nations like China, Iran, and the United States. The movement towards abolition is often driven by concerns over human rights, the potential for wrongful convictions, and the belief that life imprisonment is a sufficient deterrent.
- **Alternative Punishments**: While the death penalty is often seen as the most extreme form of punishment, there is ongoing debate about the effectiveness of long-term imprisonment and rehabilitation. The focus in many countries has shifted towards rehabilitation and reform, especially for non-violent offenders. In India, however, life imprisonment is often seen as insufficient for the most heinous crimes.

According to us, the capital Punishment in India should be retained since it is the only punishment which has a deterrent effect. Moreover, we also believe that there should be certain amendments in the criminal justice system and its working alongside there is need to re interpret the “Rarest to Rare” judgement looking onto loopholes in it.

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