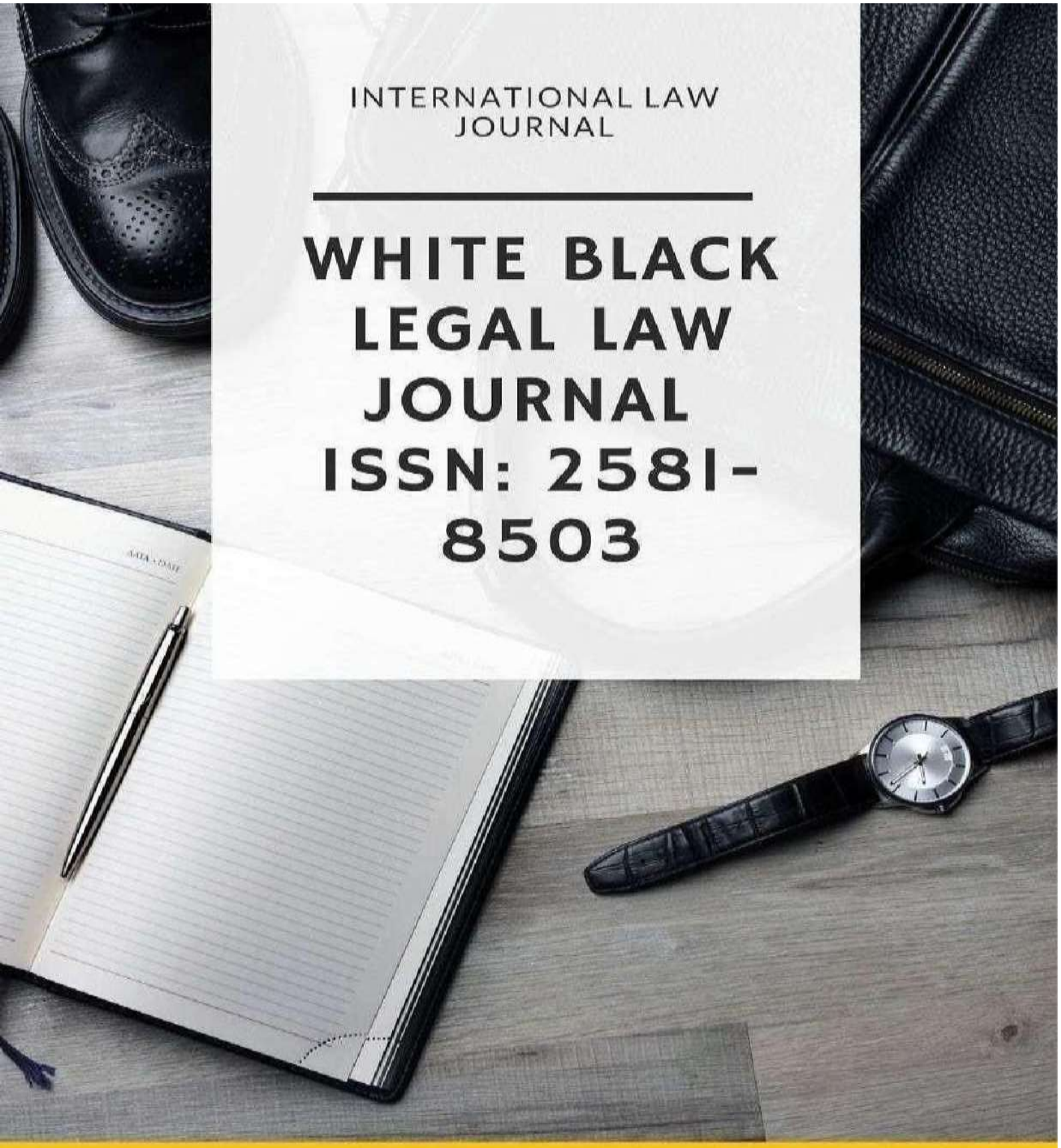

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SENTENCING POLICY IN INDIA: A DIVE INTO CAPITAL PUNISHMENT

AUTHORED BY - ABHISHEK KUMAR SINGH[1i]

ABSTRACT

The policy related to sentencing serves as an essential element for the proper functioning of the criminal justice system of a country which creates an assurance for the citizens that actions have equal consequences for individuals who commits crimes in the society as well as fear of death/capital punishment in the mind of the individual who commits an offence. This research paper offers an all-inclusive overview of sentencing policy of India regarding the capital punishment, which includes and talks about the legal foundations and key principles for awarding capital punishment. The article further researches about previous evolutions and potential reforms in passing capital punishment. India's approach to sentencing has evolved significantly, shifting focus from retribution theory of punishment to a more nuanced view that balances penal measures with the potential for offender rehabilitation. In the case of Bachan Singh vs. State of Punjab, the Apex Court had stated and observed that the performing the death sentence is not only cruel but also inhuman as it makes the convict undergo unimaginable physical pain and suffering. In Indian criminal justice system, there exist an inconsistency at the stage of sentencing in a criminal trial of similar cases and the key factor for that inconsistency is judicial discretion. The Penal Code & the new sanhita and other penal statutes of India specifies a wide range for deciding the duration of imprisonment in a specific offence provided because of that the third pillar of Democracy i.e., Judiciary holds considerable discretionary powers while deciding the appropriate quantum of punishment in the criminal proceedings. The 'Code of Criminal Procedure' & now 'Bharatiya Nagarik Suraksha Sanhita' and other provisions provides certain factors as guidelines for judges to consider while formulating sentence in a case. The research paper aims to explore the Indian Criminal Justice system and discover the existing discrepancies and provide a suitable solution to this issue.

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Keywords: Judicial Discretion, Mitigating & Aggravating Factors Sentencing Guidelines, Capital Punishment.

1. INTRODUCTION

In India there exists an extraordinary mix of common law and statutory provisions in the criminal justice system but there are significant challenges i.e., the non-existence of a parliamentary codified sentencing policy, etc.

The Bharatiya Nyaya Sanhita[ii] (BNS) and Indian Penal Code[iii] (IPC) strictly provides various offences and their equivalent punishments with keeping in mind the reformative theory of punishment but the criminal courts hold the discretion power regarding sentencing as prescribed in the penal code, which is largely unfettered and guided by a complex interplay of factors, judicial pronouncements, and often, individual judicial philosophies. The issue of absence of a codified sentencing policy has been raised several times because it rases a critical question of whether the sentence passed is fair and consistent with the ideology followed in India.

The concept of sentencing refers to an act done by a Session Judge or a Magistrate in a criminal proceeding where he passes a statement concerning the punishment which will be imposed on the accused/offender for their proved crime. This sentence, when applied, it converts into punishment.

Black's Law Dictionary defines 'Sentence guidelines' as "A set of standards for determining the punishment that a convicted criminal should receive, based on the nature of the crime and the offender's criminal history"[iv].

"The main purpose of the sentence broadly stated is that the accused must realize that he has committed an act which is not only harmful to the society of which he forms an integral part but is harmful to his own future both as an individual and as a member of the society."[v]

The act of imposition of punishment on accused/guilty person for the offence committed by that person is called Sentencing in criminal law. Sentencing has been described as a

'social battleground' and 'wasteland in the law' by philosophers. In India, sentencing policy is usually referred as the principles, rules and guidelines that are being followed for some time based on the jurisprudence Indian criminal justice system. There of various factors that are considered by a criminal court before passing of sentence to guarantee that the punishment which passed is just, fair and proportional to the nature and gravity of the crime.

In India, the sentencing policy is uncodified unlike United States of America, leading to significant challenges in ensuring consistency, fairness, and transparency in the administration of justice. This research paper critically examines the implications of the absence of a uniform sentencing framework in India, exploring the discretionary powers of judges, the disparities in sentencing decisions, and the lack of legislative guidelines. By analysing key judicial precedents and existing legal frameworks, the study highlights the impact of this uncodified approach on the principles of proportionality, deterrence, and reformation. It also evaluates the need for codified sentencing guidelines to bridge gaps, reduce arbitrariness, and enhance the credibility of the justice system. The dissertation concludes by proposing reforms aimed at achieving a balanced and systematic sentencing policy that aligns with constitutional ideals and evolving societal expectations.

Section 4[vi] depicts different types of punishments that a court of law has been authorized to can give to an offender/wrongdoer while after deciding guilt of the accused in the case. The following are the types provided under BNS:

a. "Death i.e., Capital Punishment
b. Life Imprisonment i.e., imprisonment for remainder of a person's natural life;
c. Imprisonment, there are two types of imprisonment defined and they are
    i. Rigorous, and
    ii. simple
d. Forfeiture of property
e. Fine
f. Community service"

Earlier in IPC[vii], the sixth type of punishment was not present i.e., community service. It is a new type of punishment that has been introduced in India, which has previously been followed in developed countries for some time. Although, the BNS has not provided any definition of

community service in the Sanhita, but the Bharatiya Nagarik Suraksha Sanhita[viii] provides an explanation in Section 23[ix] of the Sanhita which explains it as the "work which the court may order a convert to perform as a form of punishment that benefits the community, for which he shall not be entitled to any remuneration".

The legality and constitutionality of a Death penalty has been challenged several times before Supreme Court, particularly in three landmark judgments which were decided based on whether capital punishment/Death Penalty is constitutional and legal and whether it should be abolished or not.

The Supreme Court of India cases which were Historic in the field of capital punishment, these cases developed the present jurisprudence related to death punishment, these first case that talked the death penalty is the case of **Jagmohan Singh v. State of Uttar Pradesh**[x]. The Apex Court stated and held the death penalty is constitutional and not violative of Article 21[xi]. The court also stated that discretion in the matter of sentence must be applied judicially while balancing all the aggravating and mitigating circumstances as at that time jurisprudence was focused on the crime and not on the criminal/accused.

The next case which came was **Bachan Singh v. State of Punjab**[xii] in the year 1980 before the Supreme Court of India, in the aforesaid case the court developed and passed the Doctrine of the 'rarest of the rare cases' and the court also upheld the ratio set in the case of Jagmohan Singh[xiii] i.e., capital punishment is constitutional and not violative of fundamental rights.

Further in the case of **Macchi Singh v. State of Punjab**[xiv], the Supreme Court of India had propounded a 5 parameters (factors) test to check whether the case falls under the Doctrine of "rarest of the rare cases".

A crucial aspect of this analysis will be an examination of the arguments for and against a codified sentencing policy in India. Proponents of codification often argue for increased predictability, reduced judicial discretion, and greater consistency in sentencing outcomes. They contend that a codified framework would enhance public trust in the justice system and ensure fairer treatment for all offenders. Conversely,

opponents of codification emphasize the importance of judicial discretion in individualizing sentences to reflect the unique circumstances of each case. They argue that a rigid sentencing grid could lead to inflexible and potentially unjust outcomes, failing to account for mitigating factors and the complexities of human behaviour.

2. OBJECTIVES

- To investigate and interpret the existing sentencing laws of India.
- To analyze the discrepancy in sentences passed in similar cases.
- To study how past court rulings illuminate the variations in sentencing.
- To highlight the importance of implementing consistent sentencing standards as recommended by various law commission reports.

3. REVIEW OF LITERATURE

I. In ***Society and the Criminal***[xv], the author discusses the causes of crime, the evolution of criminal tendencies, and the societal mechanisms to prevent and address criminal activities. The author delves into the sociological and psychological factors that influence criminal behaviour, emphasizing the role of social structures, family, education, and economic conditions. The concept of sentencing is examined as a crucial aspect of the criminal justice system. The author explores how sentencing serves as both a deterrent and a rehabilitative tool within society.

II. In the article titled as ***Disparity in Sentencing Policy in India***[xvi]**,** the researcher examines the inconsistencies and unfairness within the Indian criminal justice system's sentencing practices. The article highlights how judges have significant discretion in sentencing, leading to varying punishments for similar crimes. The absence of comprehensive sentencing guidelines contributes to this disparity, as there's no standardized framework for judges to follow and explore how factors like socioeconomic background, caste, and religion can influence sentencing outcomes, leading to unequal treatment.

III. The article titled as ***Sentencing Disparity in The Indian Criminal Justice System***[xvii] examines the issue of inconsistency in sentencing decisions within India's legal framework. The article highlights how the absence of structured sentencing guidelines and the wide discretion afforded to judges contribute to disparities, undermining the principles of fairness and justice. It also analyses how similar cases often result in vastly

different sentences due to subjective judicial interpretations and opinions of Judges across different High Courts of the country.

4. CAPITAL PUNISHMENT

"*I have been a judge on this Court for more than twenty-five years … After all these years, however, only one conclusion is possible: the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair.*" [xviii]

~ Judge Boyce Martin[xix]

Capital punishment is a type of punishment which is given to an offender at the end of the trial where the accused is held guilty for the offence which in nature is heinous, grave, and detestable, which varies from country to country, gravity and seriousness of the nature of the crime, and from age to age.

In Indian Penal Code, the word 'Punishment' has not been defined but Black's Law Dictionary defines 'Punishment' as "A sanction — such as a fine, penalty, confinement, or loss of property, right, or privilege — assessed against a person who has violated the law"[xx].

In layman's terms, Punishment is what is given to someone when they break a rule or law. It is a consequence for their action as the Newton has said 'Every action has equal and opposite reaction', in similar sense the principle of rule of law provides that the accused should be punished equally for their crime. The punishment has variety of forms from a first-time warning to imprisonment in a prison. The goal of punishment is to make people understand that actions have consequences and to dissuade the citizens from doing the similar punishable acts again.
In IPC and BNS, each offence provides only their maximum & minimum punishment and the penalty of fine but does not specify the amount or a range under which the penalty should be set or awarded to the victim.

Black's Law Dictionary also defines 'Sentence' as "The judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer <a sentence of 20 years in prison>"[xxi] and 'Capital Punishment' as "The sentence of death for a serious crime. — Also termed death penalty"[xxii].

The legality and constitutionality of a Death penalty has been challenged several times before Supreme Court, particularly in the following landmark judgments which were decided based on whether capital punishment/Death Penalty is constitutional and legal and whether it should be abolished or not.

Firstly, in the case of **Jagmohan Singh v. State of Uttar Pradesh**[xxiii], the Supreme Court of India stated and held the death penalty is constitutional and not violative of Article 14[xxiv], 19[xxv] and 21[xxvi]. The court also stated that discretion in the matter of sentence must be applied judicially while balancing all the aggravating and mitigating circumstances as at that time jurisprudence was dedicated only to the crime and the nature of the accused/criminal was not considered. In the case of **Rajendra Prasad v. State of U.P.**[xxvii], the focus of the court was shifted from the crime to the criminal behaviour as court stated that under Section 354[xxviii]/393[xxix], the courts must record the special reasons in the judgment of the case for imposing death sentence on the accused and the special reasons mentioned in the judgment for imposing sentence of death must be related to the nature & behaviour of the criminal and not on the crime.

Secondly, the Supreme Court of Indian **Bachan Singh vs. State of Punjab**[xxx], in this case the court developed passed the Doctrine of the 'rarest of the rare' cases and the court also upheld the ratio set in the case of Jagmohan Singh i.e., punishment of death is constitutional and does not violate the constitution as it is not the only punishment, there is also the option of passing the punishment of life imprisonment. In this case the Session Judge tried convicted Bachan Singh for 3 murders and punished him with death penalty. The High Court dismissed the appeal and confirmed the conviction. The issue before the Supreme Court of India was whether death penalty in Section 302[xxxi] and procedure u/s 354(3) CrPC are constitutionally valid. In this case, the focus of the court was on both the crime and the criminal. When making a decision, the courts must carefully weigh the factors that make a situation worse i.e., aggravating factors against those that make it better i.e., mitigating factors. Ensure that the factors that lessen the severity of the situation are thoroughly considered. The court held that the provisions of IPC and CrPC are constitutionally valid and made guidelines regarding when a death penalty can be imposed. Extreme penalty should only be given in rarest of rare cases.

In the case of **Macchi Singh v. State of Punjab**[xxxii], the Supreme Court of India had

propounded a 5 parameters (factor) test to check whether the case falls under the Doctrine of "rarest of the rare cases". Firstly, how the offence was committed by the accused, whether it was brutal, grotesque etc., as to arouse extreme outrage in the community. Secondly, what was the motive behind the commission of the offence. Thirdly, whether the crime was anti-social or socially abhorrent in nature, for example, dowry-death or killing to remarry in order to extract dowry once again. Fourthly, what is the magnitude of offence committed and fifthly, the personality of the victim.

In this case, **Mithu Singh v. State of Punjab**[xxxiii], the accused was already in prison for the offence of murder under section 302[xxxiv] and while serving his sentence he committed another murder and was given the punishment to death under Section 303[xxxv]. The accused filed an appeal before the Supreme Court of India challenging the constitutionality of section 303[xxxvi] and the judgment and order of the trial court. While deciding the case, the Court stated that Section 303[xxxvii] is violative of Article 14[xxxviii] and Article 21[xxxix] as it only prescribes the punishment of death which violates the right to life and liberty.

In the case of **Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra**[xl], the two-Judges Bench of Supreme Court of India held that the punishment of death should only be imposed when the punishment of life imprisonment cannot be imposed on an accused. The court stated that the trial courts must employ a two-step assessment to decide whether death penalty is necessary:

i. Whether the case falls under the doctrine of 'rarest of the rare', the trial court must decide. The court shall also register and record all the aggravating and mitigating circumstances in a form of a list.
ii. Whether the accused can be reformed in the prison during his lifetime.

And, if the court decide that the offender who has committed the offence cannot be "reformed or rehabilitated" in any way, then the courts must also provide the reason for same.

In the case of **Shatrughan Chauhan v. Union of India**[xli], the Three-Judges Bench held that the sentence of capital punishment is commutable if there is an excessive delay while execution of pending mercy petitions. At that stage, the consideration of the gravity and nature of the offence is not taken while commuting the death sentence.

In the case of **State of Bihar vs. Hari Kishun Sada**[xlii]**,** the SC again reiterated that Death sentence should be reserved for the 'rarest of rare cases.' The SC held that the capital punishment should only be used in the absolute worst crimes i.e., rarest of rare cases. As the accused person involved was a young person with no previous criminal record, the court decided to alter the sentence of the accused person from death to life in prison. The Court felt that the life sentence would be a suitable punishment for the crime accused committed, without resorting to execution, as the crime didn't qualify as the "rarest of rare". In a recent case of **State of Kerala vs. Narendra Kumar & Another**[xliii]**,** Kerala High Court refused to impose Death Penalty on the accused Triple Murder. The D.V. Bench comprising of Mr. Justice A.K. Jayasankaran Nambiar and Mr. Justice Syam Kumar V. M. of the Kerala High Court held that "While the facts and circumstances proved against the appellant before us clearly point to his involvement in a gruesome triple murder, we would not go so far as to categorise it as the "rarest of the rare" so as to impose the death sentence on him".

5. INTERNATIONAL PERSPECTIVE

The 'Second Optional Protocol to the International Covenant on Civil and Political Rights'[xliv] is a key international agreement focused on the abolition of the death penalty. It was adopted and proclaimed by General Assembly of the United Nations vide resolution no. 44/128 on 15 December 1989 and it came enforce on July 11, 1991. The primary purpose and goal of the protocol is to eliminate the death penalty within the jurisdictions of its State Parties and to reinforce the right of life, as provided in the 'International Covenant on Civil and Political Rights'[xlv] (ICCPR). The 'Second Optional Protocol' gives the State Parties a privilege to reserve the right to impose the punishment of death penalty "in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime".

The State Parties that have signed and ratified the Protocol, they have also committed not to proceed with any more death execution with in the member state/ State Party. At present total of 92 countries have signed and ratified the protocol and 105 countries are still to sign the protocol including India and there are no countries that have signed the protocol but not ratified the protocol.

The aforesaid Protocol represents a significant step in the global movement towards the

abolition of capital punishment. It strengthens the international human rights laws by providing a clear legal framework for the abolition of the death penalty. In essence, the 'Second Optional Protocol' is a vital instrument for promoting and protecting the fundamental right to life.

'International Covenant on Civil and Political Rights' does not put an end to the punishment of death penalty completely but it provides a restrictive provision.

Article 6[xlvi] sets important limitations on the use of death penalty by a member state of ICCPR, these limitations are:

(i) the offence committed by the accused must be of "most serious crimes";
(ii) the death penalty cannot be passed retroactively;
(iii) the punishment of death cannot be imposed on an individual who is below the age of 18 years or on pregnant women;
(iv) the person upon whom the death penalty is imposed has a right to seek pardon or commutation.

6. CONCLUSION

The present study which took a dive into the present India's capital punishment sentencing policy highlights the different discords surrounding this issue. This exploration reveals those significant inconsistencies and potential for bias. The "rarest of rare" doctrine, despite its intent, has not effectively prevented arbitrary application of the death penalty. Factors such as socioeconomic background, access to legal resources, and judicial prejudice continue to influence sentencing outcomes. The urgent need for comprehensive reforms, including clearer guidelines, enhanced judicial training, and improved legal aid, is paramount to ensure a more just and equitable system. The present study has also revealed that the punishment of death can be imposed on total of seventeen offences under Bharatiya Nyaya Sanhita. Previously the number of offences punishable with capital punishment were less i.e., fourteen but BNS has introduced two new offences. Firstly, the Section 111 which defines the offence Organised crime and provides its punishment along with it and secondly, the section 113 which defines the acts which can be considered as Terrorist Act under BNS and both the offences carry with them the possible punishment off death.

A thorough review of the death penalty's relevance in light of evolving human rights standards is also essential.

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