Playing Hangman in 'Civilized' Society:

Discursively constructing India's Retention of Capital Punishment in an Age of Abolition

Dissertation

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The maintenance of law and order by the use of punishment is the science of government

(Kautilya: 1.4.3)

1 Introduction

It is undeniable that capital punishment is less popular than it once was. In 1950 only eight states had abolished capital punishment for all crimes[1], but as of May 2011, 96 states had abolished capital punishment for all crimes, nine had abolished it for ordinary crimes, and Amnesty International (AI) regarded a further 34 states to be *de facto* abolitionists[2] (Amnesty International 2011b). Although Europe and Latin America continue to constitute the majority of the *de jure* abolitionist states, a number of Sub-Saharan African states (e.g. Senegal [2004], Rwanda [2007], Gabon [2010]) and a handful of Asian states (e.g. Nepal [1997], Bhutan {2004], Philippines [2006]) have also become abolitionists. Indeed, while not going as far as abolishing capital punishment in law, a variety of states in Asia and Africa have been categorised by AI as *de facto* abolitionists (e.g. Algeria, Sri Lanka, Myanmar) (*ibid.*).

[1] Henceforth, I use 'abolition' and 'abolitionist' to refer to the abolition of capital punishment. I use 'retention' and 'retentionist' to refer to the states where it is still practiced.

[2] Amnesty define a *de facto* abolitionist as a state that has not executed anyone for at least 10 years became of an explicit moratorium policy (Amnesty International 2011b).

Furthermore, although abolition has been an issue of debate dating back to the Universal Declaration of Human Rights and its proclamation of the 'right to life' in 1948, its space on the UN General Assembly agenda has grown with the adoption of the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*[3] in 1989, and the adoption of resolutions calling for a 'Moratorium on the use of the death penalty' in 2007, 2008, and 2010. Abolition, therefore, is increasingly taking on the appearance of an international human rights *norm*, i.e. abolition is increasingly being understood as a *standard of appropriate* state behaviour to warrant inclusion in the "civilized world where this inhuman and barbaric punishment has already been rejected" (Council of Europe Press Division 2006a).

Yet, despite strong claims that abolition has become a "kind of universal moral consensus" (Ravaud and Trechsel 1999: 89), the abolitionist 'norm' is by no means *universally* accepted as a *global* norm. Fifty-eight states retain capital punishment and appear to regard it as a perfectly legitimate form of state practice (Amnesty International 2011b). It is important to note that, as of 2003, 57 percent of the world's population lived in countries where the death penalty was in use (Truskett 2003); while in 2010 at least 23 states undertook judicial executions and courts in 67 states sentenced people to death (Amnesty International 2011a). Indeed, criminologist Sir Leon Radzinowicz (1999: 293), does "not expect substantial further decrease in the appointment and use of capital punishment in the foreseeable future…[because]…most of the countries likely to embrace the abolitionist cause have by now done so." The remaining "recalcitrant group of states"

[3] This protocol declared that "no one within the jurisdiction of a State Party to the present Protocol shall be executed" (Article 1.1) and that "each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction" (Article 1.2) (United Nations 2006: 53).

he continues, "are particularly unlikely to be sympathetic to the argument that capital punishment…should be rejected on the grounds that it violates the right to life of every individual."

In this paper, I adopt an International Relations (IR) perspective to explore the retention of capital punishment in the context of an abolition 'norm'. Capital punishment is not a typical issue area for IR, a discipline historically built to study the 'big issues' of interstate war and peace. An IR perspective, however, is valuable in understanding the retention or abolition of capital punishment. Firstly, abolition has taken on the characteristics and logic of a global norm. It is reasonable, therefore, to conclude that a decidedly 'international' perspective is appropriate. Secondly, state practices within the domestic realm of the state are not isolated and insulated from the larger 'society of states'. Indeed, the practices that state elites regard as appropriate for governing the subjects of the state arise, in part, from the norms and values of 'rightful state action' held by the larger 'society of states' (Reus-Smit 1999).

Of the main IR paradigms Constructivism has become synonymous with the study of international 'norms'. Constructivists are interested in how norms that permeate the wider social order can shape international relations. Indeed, a prominent feature of Constructivist scholarship has been an interest in the ability of non-state actors, traditionally seen as powerless in international relations, to formulate and spread 'norms' that can shape "the politics of legitimacy to alter the nature and conduct of sovereign states" (Reus-Smit 2008: 402). Thus far, this scholarship has tended to focus on positive cases of 'successful' 'norm' transmission and policy convergence (Legro 1997). In response, a number of Constructivist-influenced scholars (Katzenstein 2006; Saari 2008;

Johnson 2006; Bae 2007) have studied the abolition 'norm' as one of the 'dogs that don't bark', i.e. one of the cases where normative diffusion has been unsuccessful and state practices have remained unaltered (Checkel 1999). This paper adds to this literature by providing an account for the retention of capital punishment in a new case – India – using a different question to previous literature.

1.1 Empirical Research Methodology

"Among nations that retain the death penalty as a criminal punishment", write Johnson and Zimring (2009: 11), "India is as extraordinary in its policies and practices as the PRC or any place else". "If the rest of the world shared India's execution rate over the course of the most recent decade" they continue, "there would have been – worldwide – just over one execution every other year." Indeed, as it is commonly proposed[4], and empirically backed[5], that democracies tend to be abolitionists, India's continued use of capital punishment appears somewhat deviant. Indeed, in largely retentionist Asia,[6] India's very low execution rate is also somewhat deviant. As a case of a state retaining capital punishment, therefore, India is an interesting puzzle that has certain qualities of a 'deviant case'[7].

Ultimately, compliance with the abolition norm comes down to a series of decisions made by state policymaking elites. Policymakers, however, do not approach "politics with a

[4] For example, Burt (1994), Hood (1998), Sarat (2001), and Schabas (2002).

[5] For example, Neapolitan (2001), Anckar (2004), and Neumayer (2008).

[6] Following Johnson and Zimring (2009) and Hood (2002) I define Asia exclusive of 'Western Asia', 'Central Asia' and the Pacific Islands.

[7] Deviant cases, writes Lijphart (1971: 692) are those "whose outcomes either do not conform to theoretical expectations or do not fit the empirical patterns observed in a population of cases of which the deviant case is considered to be a member."

blank slate on to which meanings are written…Their appreciation of the world…is necessarily rooted in collective meanings already produced, at least in part, in domestic political and cultural contexts" (Weldes 1999: 9). Hence, rather than reducing an understanding of 'compliance' to, "the choice or rejection of the norm by a decision maker" I attempt to produce "a social account of the configurations of intersubjective meanings that made possible the very thinkability and imaginability of these choices" (Hopf 2002: 280). As such I ask a 'how possible' question about Indian retention, i.e. I explore "how meanings are produced and attached to various social subjects/objects, thus constituting particular interpretive dispositions which create certain possibilities and preclude others" (Doty 1993: 298). That is to say, unlike Bae's (2007) account of abolition norm rejection/adoption, I examine "the background of social/discursive practices and meanings" which make compliance or noncompliance to the international norm possible (Doty 1993: 298).

I understand discourse as both a set of "socio-cultural resources used by people in the construction of meaning about their world and their activities" (Ó Tuathail and Agnew 1992: 192-193); and "a structure of 'meaning-in-use'" (Weldes and Saco 1996: 373), i.e. "a language or system of representation that has developed socially in order to make and circulate a coherent set of meanings" (Fiske 1987: 14). What this means for studying 'norms', therefore, is that 'norms' are not understood as being inside people's heads but manifest in the representations they make of the world through language and other symbolic practices (Laffey and Weldes 1997). Therefore, I draw on a collection of 'texts' (e.g. speeches, debate transcripts, government documents) from the international and domestic contexts of direct relevance to capital punishment in India, which I treat "as sets

of signifying practices that constitute a 'discourse' and its 'reality'" (Howarth et al. 2000: 4). I then analyse how the linguistic elements are combined, or 'articulated', together in order to produce specific meaningful representations of the world; and how these representations 'interpellate' actors i.e. how representations both entail subject positions/identities and 'hail' actors into them (Laffey and Weldes 2004).

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The rest of this paper is divided into three sections. Wiener (2008) writes that "as observable units, norms not only cause or structure behaviour but also evolve in relation to social interaction." The former element, "reflects the facticity of norms as an observable and arguable disputed social fact" while the latter "sheds light on the perceived validity of norms, for example why the death penalty is considered as legitimate in some democracies but not in others" (46). Hence, after the first section which details the relationship between sovereignty and capital punishment, the second section explores the facticity of the abolition norm in an international context, and the third section maps some of the discursive backdrop against which Indian policymakers' perceive the validity of the abolition norm in both international and domestic contexts.

2 Assessing the Stakes: Sovereignty and Capital Punishment

The concept of sovereignty is critical to IR, human rights norms and any discussion of capital punishment. Typically, IR theory constructs an 'inside/outside' dichotomy of the human condition (Walker 1993), in which the state is fixed as *the* unit of power and authority in both the domestic and international realm. Accordingly, sovereignty is constructed as a 'property' of states which manifests itself jointly in domestic and

international politics. Domestic 'Hobbesian' sovereignty is understood as the 'empirical fact' of state claims to be the "final and absolute political authority in the political community" (Hinsley 1986: 26). The international dimension of sovereignty refers to the implicit or explicit recognition of state claims to sovereignty by other states in the international system, and any 'rights' that may follow from such recognition (e.g. the legal 'right' to enter international treaties, or the Westphalian 'right' of non-interference in domestic affairs) (Krasner 1999).

Constructivists (and critical theorists), however, refute the tendency to "view sovereignty as an absolute, an empirical or institutional fact", and see state sovereignty as a constructed "social norm" (Reus-Smit 2001: 521), the meaning of which is "negotiated out of interactions within intersubjectively identifiable communities" and a product of "the variety of ways in which practices construct, reproduce, reconstruct, and deconstruct both state and sovereignty" (Biersteker and Weber 1996: 11). Although understanding sovereignty as a "normative product of moral debate and dialogue" (Reus-Smit 2001: 526) is illuminating, this constructivist conceptualisation overlooks that the "ability to kill, punish, and discipline with impunity" is not only an integral part of sovereign power but also critical for the *performance* and *preservation* of sovereignty (Hansen and Stepputat 2006: 296).

Carl Schmitt writes that: "there is no norm applicable to chaos. For a legal order to make sense, a normal situation must exist" (1985: 13), and the sovereign is "he…who definitively decides whether this normal situation exists" and he who "decides on the exception" (5). The 'exception' is the amoral sphere of unlimited sovereign control, where no rules, laws or norms apply and "it is permitted to kill without committing homicide"(Agamben 1998:

83). It is the sovereign's decisions about what constitutes the 'exception', that determines the meaning of "what is included in the juridical order and what is excluded" (1998: 18-19).

Agamben (1998) argues that the core practices of sovereign power in modern states is the exclusion of individuals categorised as enemies or undesirables (e.g. the outlaw, the convict, or the terrorist) from political-cultural life. Citizens have two bodies: "a fully human body included into political-cultural life" which has a variety of rights by virtue of its inclusion; and simultaneously a "biological body, potentially stripped of dignity [and humanity,] and de-symbolized as 'bare life'" by decree (Hansen and Stepputat 2006: 301; Norris 2000). The exclusionary power of the sovereign, therefore, by dint of the 'exception' 'kills' the fully human body and reduces the individual to a sub-human 'right'-less state of 'bare life' to become what Agamben calls *homo sacer* (Hansen 2005). Capital punishment, therefore, is state violence that occurs in a legally defined state of exception.

Benjamin (1978: 22) writes that there is a "duality in the function of [sovereign] violence" (284), "as a means [it] is either lawmaking or law-preserving"(287), or in some cases, like capital punishment, both. Law-making violence, exemplified best by warfare and conquest, is "a mythical violence that founds the law" (Hansen 2006: 282). Law-preserving violence, however, is a violence designed to preserve the legal order, i.e. " the use of violence as a means…[f]or the subordination of citizens to laws" (Benjamin 1978: 284). Capital punishment may appear to be merely law-preserving violence, but Benjamin argues:

> *For if violence is the origin of the law it may be readily supposed that where the highest violence, that over life and death, occurs in the legal system, the origins of law jut manifestly and fearsomely into existence. In agreement with this is the fact that the death penalty in*

> *primitive legal systems is imposed even for such crimes as offenses against property…[because]…Its purpose is not to punish the infringement of law but to establish new law. For in the exercise of violence over life and death more than any other act, law reaffirms itself. (Benjamin 1978: 286)*

More than simply (re)producing sovereignty, law-making violence "happens at the…social frontier where the distinction between citizen and bare life is drawn." (Hansen 2006: 291) In modern states, this law-making violence is typically driven by the "powerful idea of defending, purifying, and protection the new locus of sovereignty – society, the nation, the people, and/or the community" (Hansen and Stepputat 2006: 302). By eliminating the 'rotten parts' of political community, i.e. 'undesirables' or 'criminals' (Vito 2006), capital punishment serves not only to regulate the political community, but also to constitute the political community[8].

Sovereign power, however, is the combination of "king and priest, will and law"; it does not grow out of the 'law-making' violence of the "war function" alone, but also out of the judicious "peace function" that seeks to 'tame' and 'domesticate' such violence (Sahlins 1985: 90). Hence, 'law-making' violence like capital punishment is 'domesticated' as mere 'law-preserving' violence and not what Albert Camus (1968: 138) called "administrative assassination". Capital punishment has to be made to appear distinctly different from the violence that it punishes by appearing rational, predictable, procedural, regulated, fair,

[8] Capital punishment, therefore, could be understood as a form of 'foreign policy', where the latter is defined as "a boundary-producing practice central to the production and reproduction of the identity in whose name it operates" (Campbell 1990: 266).

humane, and visible to the public[9](Hansen 2006; Kaufman-Osborn 2002) Hence, the "dingy interrogation room, the torture chamber and the random arrest have to be supplemented by the courtroom, the hygienic and monitored detention cell, orderly arrests and so on" (Hansen 2006: 282).

Although, sovereignty is fundamentally grounded the ability to wield exclusionary violence it does not follow that capital punishment is *necessarily* intrinsic to sovereignty. Capital punishment is dependent on a *legally defined* 'state of exception'[10] which can be questioned and redefined through 'moral debate and dialogue'. Indeed, Yorke (2011: 247) argues that a "demonstrable shift" has taken place following a "realization that the death penalty is no longer to be viewed as an integral component of sovereign power." In more and more states capital punishment is being de-legitimized as a form of state 'law-preserving' violence, and in some areas abolition has become the norm such an extent that capital punishment has "become, in a way, *outside the law*, out of the reach of law, since it falls under a higher order, that of international treaties" (Derrida and Roudinesco 2004: 137). To understand this phenomenon it is necessary to recognise that understandings of 'rightful state action,' arise, in part, from the norms held by the larger 'society of states' (Reus-Smit 1999).

[9] Similarly, Sarat and Kearns (1995: 212) write: "It is the task of law and of much legal theory to insist, nonetheless, on the difference between the force that law uses and the unruly force beyond its borders. Legal theorists name the superiority of the former by calling it legitimate." Indeed, this evokes Derrida (1992: 11), quoting Blaise Pascal before him, that "laws [are] not in themselves just but rather [are] just only because they [are] laws."

[10] This exception can be legal, ethical, a Hobbesian "State of Warre," or mythical origin of royalty (Hansen and Stepputat 2006)

3 The Abolitionist Age? The 'Facticity' of the Abolition 'Norm' in International Society

Capital punishment has clearly become an international issue: the subject of international treaties and UN resolutions, and a cause of international advocacy NGOs. To appreciate that this 'international' action on capital punishment has some bearing on the policy-makers, it is necessary to recognise that conceptions of appropriate and legitimate state practices are (partly) determined internationally.

3.1 Action, Identity and Norms

Rationalist theories tend to implicitly suggest that to understand the prioritisation of once course of action over another; theorists need to adopt the position of the rational decision-maker. To explain foreign policy, for example, Morgethau (1967: 5) suggests that we look over the shoulder of the statesman and ask "what are the rational alternatives from which a state may choose" and, "which of these rational alternatives this particular statesman is likely to choose" to best pursue the (apparently self-evident) 'national interest' in the current political environments. Constructivists, however, argue that although "interested action is universal", "all interests are particular historical construction" (Hopf 2002: 21). Indeed, people "act in terms of their interpretations of, and intentions towards, their external conditions, rather than being governed directly by them" (Fay 1975: 85). This means, therefore, that to understand a state practice like capital punishment it is necessary to focus on interpretations of policymakers. Above all, it is an interpretation of state's identity that is critical to explanation, because it is "commonsense…that what groups want depends on who they think they are" (Abdelal et al. 2009: 22).

States, like all human actors (individual and collective), have identities which can roughly be understood to constitute a set of meanings that answer the following implicitly posed questions: "Who are we as a collectivity? What are we for one another? Where and in what are we? What do we want; what do we desire; what are we lacking?"(Castoriadis 1987: 146-147) State identities are critical to explaining state behaviour. Firstly, and identity is akin to an "axis of interpretation", which makes the unfamiliar phenomena of the world make sense in terms of the identity of the state Self (Moscovici 1988; Hopf 2002: 5-6). Secondly, an identity defines an states nature and purpose while informing its goals, strategies to meet these goals, and the raison d'être by which to rationalise action (McCall and Simmons 1966; Reus-Smit 1999). States can have multiple identities with their origins grounded in the sets of inter-subjective and institutionalised meanings of a variety of communities.

As is clear from Jepperson et al.'s (1996: 54) definition of norms as "collective expectations about proper behaviour for a given identity", identity is inextricably linked to norms. Norms specify the constitutive rules and the intelligible collection of practices (e.g. 'language', gestures, customs and/or habit) that regulate the 'appropriate' or 'expected' behaviour and the 'obligations' of 'members'[11], and define the boundaries that lead others to recognise an actor as having a particular identity (Abdelal et al. 2009; Hopf 2002). International norms, specifically, "are the normative products of moral debate and dialogue between states (and increasingly non-state actors) about legitimate statehood

[11] "When practices that lead to recognition are also understood as obligations" writes Abdelal et al. (2009: 20) "they may be valorized by the group as ethical".

and rightful domestic and international conduct, products that are reproduced through routinized communication and social practice." (Reus-Smit 2001: 526)

3.2 The 'Standards' of International Society

One of the most important state identities comes from potential 'membership' in international society whose membership is regulated by a inter-subjective normative understanding of legitimate statehood and rightful state action. Drawing on the "English School' scholarship of Bull (1977) and Wight (1977), Reus-Smit (1999: 30) understands international society to be a 'community of recognition' in which the constitutive and purposive content 'member' state identities is grounded in a "coherent ensembles of intersubjective beliefs, principles, and norms that…define [both] what constitutes a legitimate actor, entitled to all the rights and privileges of statehood; and…the basic parameters of rightful state action." This 'complex of values,' he argues, is best understood as a 'constitutional structure' that incorporates "a hegemonic conception of the moral purpose of the state, an organizing principle of sovereignty, and a norm of pure procedural justice" (156). This constitutional structure produces the prevailing historically contingent "ideal of the 'civilized' state" and the "norms of procedural justice" which together license "some practices over others, making some appear mandatory for 'civilized' states and others beyond the pale." (156) The norms emerging from this constitutional structure are, thus, boundary-marking discourses regulating and constituting the identity of the 'civilized state' in international society. Those states understood to fulfil the requirements "are brought inside [the] circle of "civilized" members, while those who do not…are left outside as "not civilized" or possibly "uncivilized" (Gong 2002: 79).

The contemporary norms constituting the 'civilized' state have their origins in the discourse of rapidly changing and colonially expanding 19th Century Europe,[12] but despite this temporal specificity and Euro-centricity they are now "broadly accepted as universal" (Gong 2002: 81)[13]. Since the end of the 19th Century, the discourse on 'civilized' states has understood 'rightful' sovereignty to reside in 'the nation', thus making "the state's raison d'être…tied to the augmentation of individuals' purposes and potentialities" (Reus-Smit 1999: 129). Consequently, 'rightful' law is understood as a legislative justice which stipulates, "that only those subject to the rules have the right to define them and…the rules of society must apply equally to all citizens, in all like cases" (ibid.: 129). The 'civilized' state, therefore, has been constructed as one that guarantees basic rights to life, dignity, property, freedom of movement, commerce and religion; and maintains a domestic system of courts and codified laws which guarantees justice for all (Gong 1984, 2002). Additionally, these 'domestic' values have become externalised such that a 'civilized' state is constructed as one that is willing to be bound by international law (Reus-Smit 1999) and have governing institutional representation[14] (Reus-Smit 1999). Initially, these changes were more the result of domestic political processes, rather than the outcome of international norms but now the filtering of these norms has taken on a

[12] See Reus-Smit (1999) and Gong (1984, 2002) for detailed discussions of origins.

[13] Indeed, as Bull and Watson (1984: 433) write:

"*[a] striking feature of the global international society of today is the extent to which the states of Asia and Africa have embraced such basic elements of European international society as the sovereign state, the rules of international law, the procedures and conventions of diplomacy and international organization.*"

[14] Indeed, The UN is the most obvious contemporary form of this, and throughout its statutes and documents there is a language of 'civilization' and the 'rule' of law to serve as an overarching framework of reference for the practice of global politics (Wiener 2008). For example, Article 38 (1.c) of the International Court of Justice, (to which "All Members of the United Nations are *ipso facto* parties" under Article 93 of the UN Charter), stipulates that all member states subject to the framework of law are "civilized nations" (International Court of Justice 1945).

prescriptive role internationally (Reus-Smit 2001). Indeed, a 'civilized' state is now one that follows the normative prescriptions for internal relations between government and citizens and, more generally, conforms "to the accepted norms and practices of the 'civilized' international society" (Gong 2002: 81)

Although the terminology may have changed[15], since the end of the Second World War new norms have been added to this standard of 'civilization' demarcating "what constitutes a legitimate state, entitled to all the rights and privileges of sovereignty" (ibid.: 37). Chief among them[16] are human rights norms. Although the international society of states has moved to protect individual rights previously, it was only after the Second World War that "an extensive body of international human rights law" captured the "morally appealing idea of adherence to shared standards of justice as a condition for full membership in international society." (Donnelly 1998: 13) Similarly, Risse (2000: 28) writes that "human rights issues are identity related and constitutive in the sense of defining membership in the community of civilized nations". Human rights principles have become deeply embedded in the UN; articulated in the 1948 Universal Declaration of Human Rights and given legal status by the International Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights signed in 1966 and brought into force ten years later (Reus-Smit 2001). Human rights, therefore, has become part of the discourse on the modern ideal of 'civilized' and 'legitimate' statehood, and these norms have become "formally enshrined…in the normative fabric of international society", thus

[15] After all, "the concept of a standard of "civilization" *per se* carries a unique nineteenth-century derivative implication of a smugly asserted "superior" European or Western civilization" (Gong 2002: 94).

[16] Price and Tannenweld (1996), Price (1998b), and Tannenweld (1999), for example, have found similar civilization discourses in regards to the state use of chemical weapons, antipersonnel landmines, and nuclear weapons respectively.

"extending the influence of such values from the constitution of basic institutional practices to the prescription of state- society relations" (ibid.: 531).

3.3 Abolition as 'Civilized' standard of civilisation

"Most commentators" writes Hammel (2011: 194), "approach changing attitudes toward capital punishment as an issue of principle – as a step forward in the march of civilization."Reiman (1985: 142), for instance, argues that: "refusing to execute murderers though they deserve it both reflects and continues the taming of the human species that we call civilization." Indeed, for Reiman, abolition "is part of the civilizing mission of modern states" (ibid.). The use of capital punishment in academic and philosophical discourse is typically a "touchstone to distinguish "civilized" from the "barbaric" – both in individuals and in society" (Hammel 2011: 198). Increasingly, it appears that the same is also true in international discourse. That is to say, a state's use of capital punishment is increasingly being understood as a constitutive norm of 'civilized' states positioning abolitionists inside the club and retentionists "as 'not civilized' or possibly 'uncivilized'" (Gong 2002: 79).

The normative representations (re)produced by actors typically tend to associate, or 'articulate', the key discursive element (e.g. 'rights for women') with other discursive elements (e.g. 'human rights') that already feature in the dominant normative discourses. Heller (1987: 239) observes that "[c]ontestants enter the discourse with different values, and they all try to justify their values (as right and true). They do so by resorting to values higher than those which they want to justify, by proving that the latter are but an interpretation of higher values, or that they can be related to these higher values without logical contradiction." This process which Price (1998b)refers to as "grafting", is evident

in abolitionist discourse which articulates 'abolition' with 'the right to life' in a representation that positions abolition as part of the standard of 'civilization'.

The articulation of abolition with the 'human rights' and particularly 'the right to life' is most explicit in UN documents through the invocation of existing codified norms. *The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty* (1989), for instance, recalls article 3[17] of the *Universal Declaration of Human Rights* (1948) and article 6[18] of the *International Covenant on Civil and Political Rights* (1966), in its statement that: "abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights…[and] that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life." Similar invocation of codified norms is evident in *Human Rights Resolution 2005/59* (2005), *Resolution 62/149 Moratorium on the use of the death penalty* (2007) and *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances* (2002).

This articulation of 'abolition' with the 'right to life' is a common occurrence in abolitionist discursive practices. Amnesty International (2007), for instance, state that: "The death penalty is the ultimate denial of human rights. It is the premeditated and cold-blooded killing of a human being by the state in the name of justice. It violates the right to life as proclaimed in the Universal Declaration of Human Rights" Indeed, Mexican delegate representing the co-sponsors of Resolution 62/149 Moratorium on the use of the

[17] Article 3 states: "Everyone has the right to life, liberty and security of person."

[18] Article 6.1 states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

death penalty (2007) states that capital punishment is a "matter of fundamental importance in the prolonged efforts towards the improvement and progressive development of human rights." (U.N. General Assembly 2007: 15) Abolitionist discourse that articulates abolition with the preservation of the right to life, therefore, also serves to articulate abolition with the identity discourse of 'civilized' states. This association is even more explicit in European abolitionist discourse.

More so than anywhere else, European abolitionists produce a representation of capital punishment and abolition grounded in the categories of 'civilized' and 'uncivilized' states. Article 1 of *Resolution 1253* (2001)of the Parliamentary Assembly of the Council of Europe (PACE) states that: "the death penalty has no legitimate place in the penal systems of modern civilised societies". Indeed, in the past decade CoE representatives have (re)produced this articulation of 'abolition' with 'civilized' state. The CoE (re)produces a representation in which capital punishment is "barbaric and uncivilised" (Council of Europe Press Division 2007b), "a pathetic attempt to satisfy a primitive craving for spectacle and revenge" (2006b), that "has no legitimate place in the legal system of a civilised modern society," (2007a), "no matter what its motives are" (2004). Retentionists, particularly Japan and the United States, are positioned as "out of step with rest of the democratic and civilised world" (2008a), and "should be seriously worried about the company they keep on this issue" (2008b). Abolition, meanwhile, is understood as a "victory for civilisation" (2009) which makes 'Europe' "happy that an ever-growing circle of civilised nations feel the same way on this fundamental human rights issue." (2006c) Hence, Sarat and Boulanger's (2005: 32) conclusion that "[p]articularly in European

abolitionist discourse, the binary opposition between 'civilized' and 'uncivilized' criminal justice systems is conjured up all too often and all too easily" is well founded[19].

Abolitionist discourse clearly (re)produces abolition as a norm constituting 'civilized' states, a norm which like "the abolition of slavery will eventually become a universally accepted value and norm." (Council of Europe Press Division 2007c) Additionally, it interpellates those states that have abolished the death penalty into the subject-positions of 'civilized' states, while interpellating retentionist states into subject positions of 'uncivilized' states. It thereby produces the former, particularly Europe, as 'moral' authorities "a step ahead of the United States…along with the rest of the world" (Sarat and Boulanger 2005: 3), setting the example that "other parts of the world…should follow" (Council of Europe Press Division 2007a).

If capital punishment is increasingly being defined as the mark of 'uncivilized' states, and if, as Gong (2002: 81) states, "[e]very state seeks to avoid the opprobrium of being labelled 'uncivilized' by the international community"; then why might some states continue to retain the death penalty? The remainder of the paper is devoted to attempting to understand this situation, specifically in the case of India.

4 Understanding Retention in an Abolitionist Age: The Discursive Construction of Indian Retention

[19] The (re)production of this abolition-'civilized' representation, however, is not confined to the CoE or Europe. Kim Dae Jung (2009: ix), the former president of South Korea, for instance writes that "whether the death penalty is retained in law or practice is one of the prime indicators of the level of democratization and civilization of a country…The decision to eliminate death sentences will open a road leading to a truly democratic and civilized community."

The death penalty is a possible sentence for nine offences in the Indian Penal Code, and at least 14 other 'special' laws, the most recent of which is the Unlawful Activities (Prevention) Ordinance 2004. Securing reliable data detailing the number of people executed in India is difficult, but Johnson and Zimring (2009) tentatively estimate a total of about 3,500 executions since Independence (see Table 1 in Appendix). As of 2005, the last official statistics, the number of prisoners on 'death row' was 273 (Batra 2008).

The retention of capital punishment in independent India has occurred despite abolitionist sentiment, not in its absence. For example, the issue of capital punishment arose in the Constituent Assembly debates of 1947-1949. In a debate on the necessity of mandatory appeal to the Supreme Court. Dr. Ambedkar , stated that he, "would much rather support the abolition of the death sentence itself…[because] [a]fter all, this country by and large believes in the principle of non-violence. It has been its ancient tradition, …[and] the proper thing for this country to do is to abolish the death sentence altogether." However, no provisions for abolition ended up in the constitution. Unsuccessful attempts were then made to abolish the death penalty in 1956, 1958, 1961 and 1962 through the introduction of private members to in either the Lok Sabha or Rajya Sabha.

The legality of capital punishment has been challenged a number of times in the Supreme Court. Each time the Supreme Court upheld the constitutionality of capital punishment, but the judgment in the *Bachan Singh v. State of Punjab* in 1980 was particularly significant as it called for the necessity of aggravating and mitigating circumstances to award the death sentence and for its use to restricted to the 'rarest of the rare' cases (Batra 2008).

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In the following section I explore the Constructivist literature on human rights norm formation and socialization. Constructivists emphasise a number of pathways to the 'internalization of norms.' For example, some emphasize the social learning and argumentative persuasion of state elites in interacting internationally in particular institutional contexts (e.g. Finnemore 1993; Checkel 2001), while others place great emphasis on the role of transnational advocacy (e.g. Keck and Sikkink 1998; Finnemore and Sikkink 1998; Price 1998a; Risse et al. 1999). I will focus on the latter because this scholarship emerged to explain human rights 'norms' in particular. From this scholarship, three suggestions for 'failure' of the abolition norm to lead to policy change in a state like India can be determined: the lack of a transnational advocacy network (TAN); the lack of intrinsic appeal to the capital punishment norm; and the lack of 'fit'.

4.1 Transnational Advocacy Networks

Finnemore and Sikkink's (1998) model of a norm's 'life cycle' complemented by Risse and Sikkink's (1999) 'spiral model' of human rights norm socialisation provide one way to understand the spread of international norms. Finnemore and Sikkink (1998) explain the influence of global norms in terms of a three stage 'life cycle' of norm emergence, norm cascade and norm internalization. The first stage is 'norm' emergence, in which, 'norm entrepreneurs', typically NGOs, identify or 'create' a norm crisis to attract attention and attempt to "convince a critical mass of states (norm leaders) to embrace new norms" (895). The second stage, norm cascade, is characterised by "dynamic imitation" in which "norm leaders" (complying states) attempt to socialise other states to become "norm followers" (895) through "diplomatic praise or censure, either bilateral or multilateral… reinforced by material sanctions and incentives." (902) Risse and Sikkink's (1999) 'spiral model'

conceptualises that these socialisation attempts on 'violating' states will be met first by a denial of the validity of the human rights norms, justified by sovereignty claims. With continued pressure the 'violating' state will then make a 'tactical concession' in which human rights concessions are made in return for material benefits. Following the tactical concession, a space is opened up for genuine internalisation of the norm through persuasive arguing, which over times leads to 'compliance' being seen as consistent with the states identity (ibid). The final stage of both models, is 'norm internalization' in which "norms take on a taken-for-granted quality and are no longer a matter of broad public debate" (Finnemore and Sikkink 1998: 895).

In both Finnemore and Sikkink's (1998) model and Risse and Sikkink's (1999) model, the role of transnational advocacy networks is critical. A TAN "includes those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services" (Risse and Sikkink 1999: 18). By uniting domestic and transnational NGOs together with International Organisations, Western public opinion and Western governments, TANs gain the capacity to wield "information politics"[20], "symbolic politics"[21], "leverage politics"[22] and "accountability politics"[23] which can be used to get issues on the international agenda and persuade/compel states to comply with human rights norms (Keck and Sikkink 1999: 95).

[20]Information politics: "the ability to move politically usable information quickly and credibly to where it will have the most impact" (Keck and Sikkink 1999: 95).

[21] Symbolic politics: "the ability to call upon symbols, actions or stories that make sense of a situation or claim for an audience that is frequently far away" (Keck and Sikkink 1999: 95).

[22] Leverage politics: "the ability to call upon powerful actors to affect a situation where weaker members of a network are unlikely to have influence" (Keck and Sikkink 1999: 95).

[23] Accountability politics: "the effort to oblige more powerful actors to act on vaguer policies" (Keck and Sikkink 1999: 95).

In a more concrete example, Price (1998b) details four specific pedagogical processes by which NGOs helped to establish the landmines ban norm. Firstly, NGOs disseminated information about landmine victims and engaged in 'crisis framing' to attract public attention. Secondly they formed proselytizing networks within, across and outside of government channels to reframe the landmine issue not just a security issue, but a political issue. Thirdly, they 'grafted' the new norm against landmines onto existing norms of prohibited forms of warfare. Finally, through their demands on 'violating' states to justify their actions they reversed the burden of proof involved in contesting norms.

Without the existence of an effective abolition TAN, therefore, one might expect capital punishment to remain prevalent. However, similar transnational advocacy to the landmine case is present in the landmine case without the same level of success. The abolitionist TAN comprises Amnesty International,[24] the CoE,[25] Human Rights Watch, the Catholic Church, regional groups like the Asian Human Rights Commission, and domestic groups like India's People's Union for Civil Liberties. This network has been an effective 'norm entrepreneur' 'crisis framing' by producing yearly reports on death penalty statistics, highlighting execution heavy states, the discrepancy in sentencing across ethnic and socio-economic groups, and violations of due process[26]. Furthermore this network has undermined the deterrence argument and reframed the issue from a security/criminology/penology issue to a political issue 'grafted' onto human rights

[24] Amnesty amended its mandate to include opposition to the death penalty in 1973 and they have continued to maintain an active campaign since 1977 (Rabben 2002; Amnesty International 2010).

[25] Indeed, the CoE has been, "considered to be the oldest, most effective, and most robust international human rights organization in operation today." (Bae 2007: 24)

[26] Indeed, between 1994 and 2004 20 percent of Amnesty's background reports and 11 percent of their press releases on China concerned the death penalty and executions (Rodio and Schmitz 2010)

(Katzenstein 2006). Finally, as demonstrated in the General Assembly debates regarding the UN moratorium on capital punishment, the burden of justification is increasingly falling on retentionist states.

Equally, although Johnson and Zimring (2009: 434) claim that the Indian abolitionist movement is "as weak, unorganized, and underfunded as many other progressive movements in the country", and Eckert (2005: 196) argues that activists "stand largely alone in their opposition to capital punishment" India is neither isolated from international abolitionist discourse nor characterised by domestic abolitionist inactivity. Indian capital punishment practices have been the subjected to international pressure from Amnesty International (e.g. Guesdon 1997; Amnesty International 1999) and the subject of an EU demarche (Hindustan Times 2004b). Abolitionist discourse is not uncommon to Indian journals and newspapers, with domestic human rights groups making statements (e.g. All India Committee Against Death Penalty 2006), a number abolitionist editorials and articles (e.g. Gupta 2003; Iyer 2007; EPW 2010). There have been a variety of campaigns, demonstrations, and protests (The Hindu 2004, 2005), and capital punishment has also been the subject of abolitionist films (Hindustan Times 2004a) and plays (The Hindu 2006a). Indeed, all this abolitionist sentiment has (re)produced the same abolitionist discourse as found at the international level i.e. capital punishment is represented as 'barbaric' and having "no place in a civilised society" (EPW 2010: 8). It seems, therefore, that it is not the absence of a TAN that explains continuing retention.

4.2 'Difficult Norms'

A Constructivist may argue that an ineffective campaign could be the absence of two critical elements that enable TANs to bring about policy change. Firstly, it could be the

norm itself. Keck and Sikkink (1998: 99) argue that "issues involving harm to populations perceived as vulnerable or innocent are more likely to lead to effective transnational campaigns than other kinds of issues." The flipside, therefore, is that because capital punishment tends to be quite popular and condemned criminals, having often committed violence crimes, are rarely perceived as 'innocent', it is possible that the abolition norm is too much of a 'hard sell' for advocacy networks. However, this neither accounts for why some states *do* abolish, nor why some changes in capital punishment practices among retentionists *have* changed globally, e.g. the move away from executing minors (Katzenstein 2006). Secondly, Price (2003: 592) suggests that: "[T]ransnational activism may be insufficient to produce change without the opportunity provided by government leaders who are sensitive to their state's reputations." Although, an observation of value it does not suggest what make might a state leader unresponsive.

4.3 'Fit'

An alternative group of Constructivist scholars proposes that the domestic nature of the state matters for 'diffusion'. Specifically, they emphasises the role of domestic political, organizational, and cultural variables in shaping how global norms are received by states (Acharya 2004). That is to say the 'adoption' of 'norms' can be explained by the degree to which they, "'fit' well with existing ideas and ideologies in a particular historical setting."(Sikkink 1991: 26) Similar to this notion of 'fit' is Acharya's (2004: 243) concept of 'congruence', "the degree of fit between international norms and domestic norms" and Checkel's (1999: 87) concept of 'cultural match', the degree to which "prescriptions embodied in an international norm are convergent with domestic norms, as reflected in discourse, the legal system…and bureaucratic agencies". Emerging from this concern for

'fit', therefore, is the understanding that some "norms… are deeply rooted in…regional, national, and subnational groups" (Legro 1997: 32) and that the 'diffusion' of norms will be more 'successful' when a global norm 'resonates' with these historically constructed domestic norms (Checkel 1999; Price 1998b). Could the abolition of capital punishment, therefore, simply be incongruent and irreconcilable with domestic norms?

Cultural specificity is often invoked to explain both non-compliance with human rights norms and the use of capital punishment. The international human rights regime is typically understood as a characteristically Western project, which in turn appears to explain why 'developing' states have consistently "met efforts to hold them to minimum standards of humane behaviour towards their own citizens with charges of neo-colonialism"(Donnelly 1998: 13). Similarly, the use of capital punishment, in Asia in particular, is often justified in terms of a traditional Asian value system which places the interests of the community over and above the individual (Johnson and Zimring 2009). In India's case, however, 'culture' is invoked to support abolition i.e. India is the "country where Buddha, Gandhi and Vallalar were born and whose ideals were still in practice" (The Hindu 2008). More important, however, is the recognition that "'fit' does not just happen; rather, it is made…actively constructed rather than simply 'there'" (Laffey and Weldes 1997: 203)[27]. Indeed, although a concern for 'fit' raises the important issue of domestic context in which norms are embedded, all of this 'normative constructivist' scholarship tends to understand 'norms' problematically (Hopf 2002)

[27] Acharya (2004) recognises this too, if perhaps more weakly, with his understanding of norm 'compliance' as a process of 'matchmaking' which could result in the acceptance, rejection or *localization* of a global norm by policymaking elites.

Laffey and Weldes (1997) argue that much IR scholarship, including that of Constructivists, on the importance of ideas and their associated phenomena (e.g. norms) in international politics, tends to implicitly treats them 'commodities'. That is to say, although they are typically defined as 'beliefs' they are implicitly conceptualised as commodities that, for example, require "political entrepreneurs" (Keck and Sikkink 1999: 91) to "sell", "peddle" (Checkel 1993: 279, 289) or 'diffuse' them to other international actors for them to be causally effective. Most importantly, they argue that such a conceptualisation obscures "the constitutive role of 'ideas' in generating or constructing interests, in defining the problems to which policies are the response, and in general in making possible the apprehension of the world" (208).

Hence, following Laffey and Weldes (1997) I think it is important to explicitly recognise that norms are less like objects and more like a language. They are discourses[28]: "intersubjective systems of representations and representation-producing practices"; "intersubjectively constituted forms of social action" (209). Norm discourses have emerged "in specific spatio-temporal and cultural circumstances" (209), and represent "shared forms of practice, sets of capacities with which people can construct meaning about themselves, their world and their activities" which make "certain kinds of action, and ways of being in the world possible insofar as they are mechanisms by which meaning is produced" (210) In particular, to understand whether a norm discourse is likely to be seen as valid, it is critical to derive "a picture of the discursive terrain of a society, its identities and practices, such that adoption and rejection of norms are implied

[28] Laffey and Weldes (1997: n. 31, 227) prefer the term 'symbolic technologies' to discourse, but they accept that 'symbolic technologies' are "analogous to discourses".

by the discursive formations that have been empirically identified." (Hopf 2002: 281) In the following section I attempt to provide such a picture by analysing Indian retentionist discourse contextualised in international and domestic settings. Through such analysis the configurations of meanings that make abolition appear 'unthinkable' for Indian policymakers.

5 Mapping the Discursive Terrain of Capital Punishment Retention

5.1 Re-articulating 'Civilization'?

In the Summary Report of a meeting of the U.N. General Assembly's Third Committee, in which a moratorium on the death penalty was discussed, the beginning of the Indian delegate's statement is summarized as follows: "Mr. Malhotra (India) said that each State had the right to determine its own legal system and that capital punishment was not prohibited by the International Covenant on Civil and Political Rights" (U.N. General Assembly 2008: 9). As discourses are intrinsically intersubjective and contextualised this Indian 'text' needs to be understood in relation to the prevailing retentionist discourse (re)produced by other actors in the international context.

The discursive elements of the retentionists ('articulated') representation of capital punishment becomes clear from the text(s) of the UN General Assembly debate on what was to become *Resolution 62/149 Moratorium on the use of the death penalty* (2007). According to this discourse capital punishment is "criminal justice issue and not a purely human rights issue"; (U.N. General Assembly 2007: 15) and "[e]very state has the right to choose its own political, economic, social, cultural and legal justice system, including the use of

the death penalty, as suitable for its own society and national context, without interference in any form by another State." (24). To be clear, this discourse understands the call for states to abolish the death penalty to be "an infringement upon the sovereignty of States" and the "attempt by a country or group of countries to impose its values on other member countries by calling on" (14) the latter to change the "judicial systems, which are the culmination of their political, historical, religious and cultural specificities" (25). Abolitionist discourse, therefore, articulates capital punishment with 'law and order', the 'rights of the sovereignty' and 'culture'; and articulates 'abolition' with 'cultural imperialism'

At first glance, this may seem to perfectly fit the 'denial' phase of Risse and Sikkink's (1999) 'spiral model', but that would be too simplistic an interpretation. Reus-Smit (1999: 30) writes that "when states are forced internationally to justify their actions, there comes a point when they must reach beyond mere assertions of sovereignty to more primary and substantive values that warrant their status as centralized, autonomous political organizations." This same thing is identifiable in this case. Retentionists, like India, are "resorting to values higher than those which they want to justify" (Heller 1987: 239)in order to contest the abolitionist discourse which (re)articulates abolition with 'civilized' state identity.

The Indian delegate in Third Committee, mentioned above, continued his statement thusly:

> *In India, it [capital punishment] was imposed only in exceptional cases, when the crime committed was so heinous as to shock the conscience of society. The right to due process was guaranteed by law. Death sentences handed down could not be applied to pregnant women;*

> *juvenile offenders could not be sentenced to death under any circumstance. Any death sentence must be confirmed by a superior court and the accused had a right of appeal to the High Court, or to the Supreme Court, and was entitled to file a mercy petition before the governor of the State concerned or the President (U.N. General Assembly 2008: 9)*

Similarly, Bangladesh stresses the "very selectively restricted" application of capital punishment, (U.N. General Assembly 2007: 25), while Antigua and Barbuda deny the implication that it is used "arbitrarily…without regard for the human rights of the prosecuted" (13). Nigeria and Bangladesh stress their "exhaustive", "elaborate", and "transparent legal procedure" which only proceeds to execution with "extreme cautions… at every stage" (15, 25). Meanwhile, Antigua and Barbuda holds that there can be "no true development of our peoples without an environment conducive to the full enjoyment of their human rights", and that their "sacred legal principle [is] that no citizen, including those accused of capital offences, can be deprived of their human rights, except through due process of law" (13); and Barbados explain their pride in their human rights record that has includes, "the provision of free health care to all, free education…gender equality and the empowerment of women, a commitment to civil and political liberties and development with a human face." (14)

What are we to make of this justificatory 'talk'? I would contend that the above statements are part of a discursive process in which retentionists constructing a representation of the world and determining the place of capital punishment within this world (Weldes 1999). Not only does this representation contest the articulation of abolition as a constitutive norm of 'civilized' states, but it articulates an alternative understanding of the 'civilized' state. The discursive elements, the constitutive parts, of

this alternative are drawn from the same "coherent ensembles of intersubjective beliefs, principles, and norms" used in the abolitionist discourse to constitute abolition as rightful state action (Reus-Smit 1999: 30). That is to say, capital punishment is articulated with the legal principles and *even human rights* to present the *'civilized use of capital punishment'* as 'rightful', or at least not 'un-rightful', action for a 'civilized' state. An example from the Indian domestic context makes this clearer.

In domestic Indian retentionist discourse, the rarity of India's executions is placed in opposition to the use of other retentionist states. For example, state officials have stated that, "India's record in awarding capital punishment is much better compared to, say, China, ASEAN or the Arab world where it is routine" (Shukla 2003); while retentionist politicians like K.S Rao make a clear distinction between India's use "and what is happening in Saudi Arabia…[where]…For every small thing…they are giving the capital punishment". The use of 'capital punishment', therefore, is articulated with 'restraint' to produce the possibility for a "very very careful" (Government of India 2006a), and perhaps *civilized*, use of capital punishment, which stands in contrast to a 'arbitrary' capital use of capital punishment. Indeed, this representation interpellates India into a subject-position of a 'civilized' state on the basis of its restraint in the use of capital punishment, while interpellating other 'arbitrary' users of capital punishment into the category of 'uncivilized'.

This, therefore, seems to confirm Wiener's (2008) proposition that agreement on the content of a 'constitutional structure' does not imply that all 'members' of the community – state policymakers – to which it applies interpret the *meaning* of this content in the same way. Their "normative baggage" influences their interpretation. In the case of India,

it is possible to speculate that the normative baggage involved in 'postcolonial' or 'non-aligned' constructions of the national Self would make the possibility of abolition, something that in 1989 Egypt declared as "a racist, imperialist idea" (Wyman 1996: 549), close to unthinkable.

Although the above insights may reveal how the discursive background may have made abolition a (more) unthinkable policy for Indian policymakers, it does not provide a clear discursive background for why continued retention is possible. In the next section I turn to the domestic discursive context and locate the discursive structures which could be contributing to embedding the practice of capital punishment. The first is the apparent articulation of capital punishment with postcolonial elite worldview; while the second is the clear and ubiquitous articulation of 'capital punishment' with 'terrorism'.

5.2 Elitism

In their report on capital punishment, the Law Commission concluded thusly:

> *Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment. (Law Commission of India 1967: 354)*

This statement resonates with Supreme Court Lawyer VK Ohri's comments that, "We [Indians] have not matured enough as responsible citizens" to abolish capital punishment. (Hindustan Times 2005). Similarly, there is a resemblance K.S Rao's comments:

> *"I wish that the conditions in this country would come to a stage where Mr. Chandrappan's desire [the abolition of capital punishment] would be fulfilled. If all the citizens in the country were of the same calibre and kind of Mr. Chandrappan, there would not have been any problem at all…But unfortunately there are people who are committing crimes not for the sake of achieving independence or serving the community or helping others. There are a lot of people who have made committing crimes as a profession" (Government of India 2006a)*

The Indian elites making these statements appear to be articulating capital punishment as appropriate and/or necessary for a backward, uneducated, and immoral mass society of criminals. Unlike elites in Europe where abolitionism became a mark of identity constituting distinction from the uncivilized lower classes (Hammel 2011), in India the identity discourse of civilized and uncivilized legitimates the (governing) elite's use of capital punishment against the non-elites. This would appear to be most likely a remnant of colonial discourses.

Hansen (2005: 173) writes that under colonialism, "India became in many respects the laboratory for the development of technologies and ideologies of modern colonial rule." For instance, it was understood that colonial policing had to use more determined and excessive violence than in Europe because of the religious 'passions' of the Indian masses and the 'tradition' of strong authority in the Orient (Chandavarkar 1998; Hansen 2005). This world view relied upon, "civilisational categories for understanding global differences" (Abraham 2008: 200) which constructed the Indian as undisciplined and in a "state of weak and profligate barbarism" (Mill 1848: 492). Whereas several British colonies were "composed of people of similar civilization to the ruling country; capable of, and ripe for, representative government…Others, like India, are still at a great distance from

that state." (Mill 1975: 402) Having "long been steeped in the knowledge-systems of Europe" (Abraham 2008: 202), the new elite at Independence had internalized these colonial assumptions regarding the "constitutive differences between the educated who were fit for responsible citizenship, and the uneducated who should be dealt with as communities" (Hansen 2005: 179). Capital punishment remains thinkable and appropriate state practice, therefore, because of its articulation into an elite discourse that positions the 'uneducated' Indian masses as somehow less than human and in need of discipline. That is to say, a discourse that interpellates them as akin to *homo sacer*.

5.3 Terrorism

Retentionist representations often articulate 'capital punishment' with 'deterrence' and 'justice'. In Indian, however, these are jointly articulated not simply with the 'criminal', but the 'terrorist'. Capital punishment is articulated as a necessity to control "what is uncontrollable like terrorism" (Olivera 2005), and deter the "[t]errorists who kill innocent people". The "dreaded terrorist" (The Hindu 2006b) does "not deserve to exist in this earth," (Government of India 2006a) and neither does "[a]ny person, who has directly or indirectly, but purposely helped and harboured a terrorist(Government of India 2006b). Indeed, "not awarding the death penalty to terrorists guilty of killing innocent people, it only paves way for the blackmail of the state." (Shukla 2003)

This abolitionist discourse is constructing a representation which not only makes capital punishment appropriate state action, but also necessary state action. Capital punishment is being articulated into a discourse not just concerned with law and order, but national security. Indeed, contextualised in a global discourse of the 'War on Terror' capital punishment is being positioned more as a weapon of war, rather than a tool of law and

order. The state of war is a state of exception, i.e. soldiers are not murderers, hence by articulating capital punishment in this discourse it becomes less morally contentious by association. Indeed, drawing on Taussig (1984) Shah (2010: 234) suggests that "the terrorist other can become as contemporary savage…if those labelled as terrorists are described as less than human, then it becomes permissible to use against them every form of terrorism attributed to them." Of these forms of violence, capital punishment is one.

6 Conclusion

I have suggested that the most profitable way to understand the continuing use of capital punishment in India is to analyse the discourse that enables particular practices to become possible. I have shown that at the international level the representation of the 'civilized state' that abolitionists construct is contested. Indeed, it appears that an alternative representation of a 'civilized' state that *uses* capital punishment *with restraint* is being (re)produced. This re-articulation serves to de-delegitimize capital punishment as 'rightful state action'. It was only in the domestic context, however, that the discourses making capital punishment appear *appropriate* state action could be identified. This demonstrates how in understanding international phenomena, it is important to recognise that, to paraphrase Hopf (2002), constructivism begins at home.

Word Count: 9997

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8 Appendix

Table 1: Estimated judicial executions in independent India1953-2010

Years	Executions
1953	21
1954	108
1955	150
1956	151
1957	153
1958	144
1959	181
1960	174
1961	150
1962	107
1963	73
1953–1963	14,221
1974–1978	682
1979–1983	45
1982–1985	353
1995–1998	244
1996–2000	55
1998	0
1999	0
2000	0
2001	0
2002	0
2003	0
2004	1
2005	0
2006	0
2007	0
2008	0
2009	0
2010	0

Source: Johnson and Zimring (2009: 430); Amnesty International (2011a)