



**GOVERNMENT OF INDIA**

**LAW COMMISSION OF INDIA**

**Report No.262**

**The Death Penalty**

**August 2015**

न्यायमूर्ति अजित प्रकाश शहा  
भूतपूर्व मुख्य न्यायाधीश, दिल्ली उच्च न्यायालय  
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D.O. No.6(3)263/2014-LC(LS)

31 August 2015

**Dear Mr. Sadananda Gowda ji,**

The Law Commission of India received a reference from the Supreme Court in *Santosh Kumar Satishbhushan Bariyar v. Maharashtra* [(2009) 6 SCC 498] and *Shankar Kisanrao Khade v. Maharashtra* [(2013) 5 SCC 546], to study the issue of the death penalty in India to “allow for an up-to-date and informed discussion and debate on the subject.”

This is not the first time that the Commission has been asked to look into the death penalty – the 35<sup>th</sup> Report (“Capital Punishment”, 1967), notably, is a key report in this regard. That Report recommended the retention of the death penalty in India. The Supreme Court has also, in *Bachan Singh v. UOI* [AIR 1980 SC 898], upheld the constitutionality of the death penalty, but confined its application to the ‘rarest of rare cases’, to reduce the arbitrariness of the penalty. However, the social, economic and cultural contexts of the country have changed drastically since the 35<sup>th</sup> report. Further, arbitrariness has remained a major concern in the adjudication of death penalty cases in the 35 years since the foremost precedent on the issue was laid down.

Accordingly, and in recognition of the fact that the death penalty is an issue of a very sensitive nature, the Commission decided to undertake an extensive study on the issue. In May 2014, the Commission invited public comments on the subject by issuing a consultation paper. Towards the same goal, the Commission also held a one-day Consultation on “The Death Penalty in India” on 11 July 2015 in New Delhi. Thereafter, upon extensive deliberations, discussions and in-depth study, the Commission has given shape to the present Report. The recommendation of the Commission in the matter is sent herewith in the form of the Commission’s **Report No.262** titled “**The Death Penalty**”, for consideration by the Government.

Certain concerns were raised by Part Time Member Prof (Dr) Yogesh Tyagi, which have been addressed to the best possible extent in the present Report; however, his signature could not be obtained as he was out of the country. Justice (retd.) Ms Usha Mehra, Member; Mr PK Malhotra, Law Secretary and Dr. Sanjay Singh, Secretary, Legislative Department, Ex-Officio Members, chose not to sign the Report and have submitted notes on the issue, which are attached to the Report as appendices.

*With warm regards,*

*Yours sincerely,*

Sd/-

**[Ajit Prakash Shah]**

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## CHAPTER - I

### INTRODUCTION

#### A. References from the Supreme Court

1.1.1 In *Shankar Kisanrao Khade v. State of Maharashtra* ('Khade'),<sup>1</sup> the Supreme Court of India, while dealing with an appeal on the issue of death sentence, expressed its concern with the lack of a coherent and consistent purpose and basis for awarding death and granting clemency. The Court specifically called for the intervention of the Law Commission of India ('the Commission') on these two issues, noting that:

*It seems to me that though the courts have been applying the rarest of rare principle, the executive has taken into consideration some factors not known to the courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape-murder victim) that the courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. **Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal.**<sup>2</sup> (Emphasis supplied)*

*It does prima facie appear that two important organs of the State, that is, the judiciary and the executive are treating the life of convicts convicted of an offence punishable with death with different*

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<sup>1</sup> (2013) 5 SCC 546.

<sup>2</sup> *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546, at para 148.

*standards. While the standard applied by the judiciary is that of the rarest of rare principle (however subjective or Judge-centric it may be in its application), the standard applied by the executive in granting commutation is not known. Therefore, it could happen (and might well have happened) that in a given case the Sessions Judge, the High Court and the Supreme Court are unanimous in their view in awarding the death penalty to a convict, any other option being unquestionably foreclosed, but the executive has taken a diametrically opposite opinion and has commuted the death penalty. This may also need to be considered by the Law Commission of India.*<sup>3</sup> (Emphasis supplied)

1.1.2 *Khade* was not the first recent instance of the Supreme Court referring a question concerning the death penalty to the Commission. In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra ('Bariyar')*,<sup>4</sup> lamenting the lack of empirical research on this issue, the Court observed:

*We are also aware that on 18-12-2007, the United Nations General Assembly adopted Resolution 62/149 calling upon countries that retain the death penalty to establish a worldwide moratorium on executions with a view to abolishing the death penalty. India is, however, one of the 59 nations that retain the death penalty. Credible research, perhaps by the Law Commission of India or the National Human Rights Commission may allow for an up-to-date and informed discussion and debate on the subject.*<sup>5</sup> (Emphasis supplied)

1.1.3 The present Report is thus largely driven by these references of the Supreme Court and the need for re-examination of the Commission's own

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<sup>3</sup> *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546, at para 149.

<sup>4</sup> (2009) 6 SCC 498.

<sup>5</sup> *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 112.

recommendations on the death penalty in the light of changed circumstances.

## **B. Previous Reports of the Law Commission**

### **(i) The 35<sup>th</sup> Report on Capital Punishment (1967)**

1.2.1 The Commission began work on its 35<sup>th</sup> Report on “**Capital Punishment**” in December 1962, which it presented in December 1967. The Report was the consequence of a reference by the Parliament, when the third Lok Sabha debated on the resolution moved by Shri Raghunath Singh, Member, Lok Sabha for the abolition of capital punishment.<sup>6</sup> The Commission undertook an extensive exercise to consider the issue of abolition of capital punishment from the statute books. Based on its analysis of the existing socio-economic-cultural structures (including education levels and crime rates) and the absence of any Indian empirical research to the contrary, it concluded that the death penalty should be retained.

1.2.2 Its recommendations said:

*It is difficult to rule out the validity of, or the strength behind, many of the arguments for abolition. Nor does the Commission treat lightly the argument of irrevocability of the sentence of death, the need for a modern approach, the severity of capital punishment, and the strong feeling shown by certain sections of public opinion, in stressing deeper questions of human values.*

*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*

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<sup>6</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> and <http://lawcommissionofindia.nic.in/1-50/Report35Vol2.pdf> (last visited on 25.08.2015).

*risk the experiment of abolition of capital punishment.*

*Arguments which would be valid in respect of one area of the world may not hold good in respect of another area in this context. Similarly, even if abolition in some parts of India may not make a material difference, it may be fraught with serious consequences in other parts.*

*On a consideration of all the issues involved, the Commission is of the opinion that capital punishment should be retained in the present state of the country.<sup>7</sup>*

### **(ii) The 187<sup>th</sup> Report on the Mode of Execution (2003)**

1.2.3 The Commission dealt with the issue of death penalty once more – in its 187<sup>th</sup> Report on the “**Mode of Execution of Death Sentence and Incidental Matters**” in 2003.<sup>8</sup> This was a *suo motu* issue taken up by the Commission “*technological advances in the field of science, technology, medicine, anaesthetics*”.<sup>9</sup> It was concerned only with a limited question on the mode of execution and did not engage with the substantial question of the constitutionality and desirability of death penalty as a punishment.

### **C. Need for re-examining the 35<sup>th</sup> Report**

1.3.1 The Commission’s conclusion in the 35<sup>th</sup> Report that “*at the present juncture, India cannot risk the experiment of abolition of capital punishment,*”<sup>10</sup> and its recommendation that “*capital punishment should be*

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<sup>7</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at para 1 (Summary of Main Conclusions and Recommendations), available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 7.08.2015).

<sup>8</sup> Law Commission of India, 187<sup>th</sup> Report, 2003, available at [lawcommissionofindia.nic.in/reports/187th report.pdf](http://lawcommissionofindia.nic.in/reports/187th%20report.pdf) (last viewed on 25.08.2015).

<sup>9</sup> Law Commission of India, 187<sup>th</sup> Report, 2003, at page 5, available at <http://lawcommissionofindia.nic.in/reports/187th%20report.pdf> (last viewed at 26.08.2015).

<sup>10</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at para 1 (Summary of Main Conclusions and Recommendations), available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 7.08.2015).

*retained in the present state of the country,*<sup>11</sup> were clearly dependent on, and qualified by, the conditions that prevailed in India at that point in time. A great deal has changed in India, and indeed around the world, since December 1967, so much so that a fresh look at the issue in the contemporary context has become desirable. Six factors require special mention.

### ***(i) Development in India***

1.3.2 The Commission's conclusions in the 35<sup>th</sup> Report rejecting the abolition of capital punishment were linked 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.*"<sup>12</sup>

1.3.3 Nevertheless, education, general well-being, and social and economic conditions are vastly different today from those prevailing at the time of writing the 35<sup>th</sup> Report. For example, per capita Net National Income at constant prices, based on the 2004-2005 series was Rs. 1838.5 in 2011 - 2012, while it was Rs. 191.9 in 1967-1968.<sup>13</sup> Similarly, adult literacy was 24.02% in 1961<sup>14</sup> and 74.0% in 2011,<sup>15</sup> and life expectancy (a product of nutrition, health care, etc.) was 47.1 years in 1965-1970<sup>16</sup> and 64.9 years in 2010-

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<sup>11</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at para 1 (Summary of Main Conclusions and Recommendations), available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 7.08.2015).

<sup>12</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at para 1 (Summary of Main Conclusions and Recommendations), available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 7.08.2015).

<sup>13</sup> See Table 1.1, The Statistical Appendix to the Economic Survey 2014-2015, available at: <http://indiabudget.nic.in/es2014-15/estat1.pdf> (last viewed on 6.08.2015).

<sup>14</sup> "State of Literacy", Census of India, available at Census of India 1961, [http://censusindia.gov.in/Data\\_Products/Library/Provisional\\_Population\\_Total\\_link/PDF\\_Links/chapter7.pdf](http://censusindia.gov.in/Data_Products/Library/Provisional_Population_Total_link/PDF_Links/chapter7.pdf) (last viewed on 19.08.2015).

<sup>15</sup> "Status of Literacy", Census of India 2011, available at [http://censusindia.gov.in/2011-prov-results/data\\_files/mp/07Literacy.pdf](http://censusindia.gov.in/2011-prov-results/data_files/mp/07Literacy.pdf) (last viewed on 19.08.2015).

<sup>16</sup> Life Expectancy at Birth- Both Sexes Combined, 1965-70, UN Data, available at <http://data.un.org/Data.aspx?q=india+life+expectancy+1965&d=PopDiv&f=variableID%3a68%3bcrID%3a356%3btimelD%3a103%2c104> (last viewed on 19.08.2015).

2015.<sup>17</sup> The state of the country and its inhabitants has thus changed significantly.

1.3.4 Further, the 35<sup>th</sup> Report justified its hesitation in “*risk[ing] the experiment of abolition,*” “*at the present juncture,*” on the prevailing (high) crime rate. It expressed its concern in the following manner:

*The figures of homicide in India during the several years have not shown any marked decline. The rate of homicide per million of the population is considerably higher in India than in many of the countries where capital punishment has been abolished.* <sup>18</sup>

1.3.5 However, according to the *Crime in India*<sup>19</sup> reports, published by the National Crime Records Bureau (‘NCRB’) under the aegis of the Ministry of Home Affairs, the murder rate has been in continuous and uninterrupted decline since 1992, when it was 4.6 per lakh of population.<sup>20</sup> As per the latest figures for 2013, the murder rate is 2.7 per lakh of population, after having fallen further from 2012, when it was 2.8.<sup>21</sup> This decline in the murder rate has coincided with a corresponding decline in the rate of executions, thus raising questions about whether the death penalty has any greater deterrent effect than life imprisonment.<sup>22</sup>

1.3.6 It is evident that the socio-economic and cultural conditions in India, which had influenced the

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<sup>17</sup> Life Expectancy at Birth- Both Sexes Combined, 2010-2015, UN Data, available at <http://data.un.org/Data.aspx?q=india+life+expectancy+2010&d=PopDiv&f=variableID%3a68%3bcrid%3a356%3btimed%3a112%2c113> (last viewed on 19.08.2015).

<sup>18</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at paras 262, 263, available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 7.08.2015).

<sup>19</sup> See *Crime in India*, National Crime Records Bureau, available at <http://ncrb.gov.in/CD-CII2013/Home.asp> (last viewed on 2.08.2015).

<sup>20</sup> *Crime in India*, 2013, National Crime Records Bureau, available at <http://ncrb.nic.in/ciiprevious/Data/CII1992/CII-1992/table-2.pdf> (last viewed at 8.08.2015).

<sup>21</sup> *Crime in India*, 2013, National Crime Records Bureau, available at <http://ncrb.gov.in/CD-CII2013/figure%20at%20a%20glance.pdf> (last viewed on 8.08.2015).

<sup>22</sup> See Yug Mohit Chaudhry, *Hanging on Theories*, Frontline, 7 September 2012, 29-32.

Commission in formulating its conclusions in the 35<sup>th</sup> Report, have changed considerably since 1967.

**(ii) The new Code of Criminal Procedure in 1973**

1.3.7 The Commission's recommendations in the 35<sup>th</sup> Report predate the current Code of Criminal Procedure ('CrPC'), which was enacted in 1973. This resulted in an amendment to Section 354(3), requiring "*special reasons*" to be given when the death sentence was imposed for an offence where the punishment could be life imprisonment or death. The Supreme Court, in *Bachan Singh v. State of Punjab*<sup>23</sup> ('*Bachan Singh*') has interpreted this to mean that the normal sentence for murder should be imprisonment for life, and that only in the rarest of rare cases should the death penalty be imposed.

1.3.8 Section 354(3) went contrary to the Recommendations of the 35<sup>th</sup> Report, which stated that, "*The Commission does not recommend any provision (a) that the normal sentence for murder should be imprisonment for life but in aggravating circumstances the court may award the sentence of death.*"<sup>24</sup>

1.3.9 Pertinently, the Report also recommended that Section 303 of the Indian Penal Code, remain unchanged<sup>25</sup> (subsequently held unconstitutional in *Mithu v. State of Punjab*),<sup>26</sup> and that there was no requirement for a minimum interval between the death sentence and the actual execution<sup>27</sup> (subsequently made 14 days in *Shatrughan Chauhan v. Union of*

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<sup>23</sup> (1980) 2 SCC 684.

<sup>24</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at para 7 (Summary of Main Conclusions and Recommendations), available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 7.08.2015).

<sup>25</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at para 4 (Summary of Main Conclusions and Recommendations), available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 7.08.2015).

<sup>26</sup> (1983) 2 SCC 277.

<sup>27</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at para 1161-1162, available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 7.08.2015).

India).<sup>28</sup> Such developments emphasise the importance of relooking at the Report.

**(iii) The emergence of constitutional due-process standards**

1.3.10 Post-1967, India has witnessed an expansion of the interpretation of Article 21 of the Constitution of India, reading into the right to dignity and substantive and due process. Most famously, *Maneka Gandhi v Union of India*,<sup>29</sup> held that the procedure prescribed by law has to be “*fair, just and reasonable, not fanciful, oppressive or arbitrary.*”<sup>30</sup>

1.3.11 Subsequently, in *Bachan Singh*, the Court observed that Section 354(3) of the CrPC, 1973, is part of the due process framework on the death penalty. In this regard, the Court held the following:

*There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society. **Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty.** Hanging of murderers has never been too good for them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. **It is, therefore, imperative***

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<sup>28</sup> (2014) 3 SCC 1.

<sup>29</sup> (1978) 1 SCC 248.

<sup>30</sup> *Maneka Gandhi v. UOI*, (1978) 1 SCC 248, at para 48.

**to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.<sup>31</sup> (Emphasis supplied)**

1.3.12 The 'rarest of rare' standard has at its core the conception of the death penalty as a sentence that is unique in its absolute denunciation of life. As part of its concerns for human life and human dignity, and its recognition of the complete irrevocability of this punishment, the Court devised one of the most demanding and compelling standards in the law of crimes. The emergence of the 'rarest of rare' dictum when the "*alternative option [is] unquestionably foreclosed*"<sup>32</sup> was very much the beginning of constitutional regulation of death penalty in India.

1.3.13 However, it is important to consider the NCRB data on the number of death sentences awarded annually. On average, NCRB records that 129 persons are sentenced to death row every year, or roughly one person every third day. In *Khade*, the Supreme Court, took note of these figures and stated that this number was "*rather high*"<sup>33</sup> and appeared to suggest that the death penalty is being applied much more widely than was envisaged by *Bachan Singh*. In fact, as subsequent pages suggest, the Supreme Court itself has come to

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<sup>31</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 209.

<sup>32</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 209.

<sup>33</sup> *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546, at para 145 - "[T]he number of death sentences awarded ... is rather high, making it unclear whether death penalty is really being awarded only in the rarest of rare cases".

doubt the possibility of a principled and consistent implementation of the 'rarest of rare' test.

**(iv) Judicial developments on the arbitrary and subjective application of the death penalty**

1.3.14 Despite the Court's optimism in *Bachan Singh* that its guidelines will minimise the risk of arbitrary imposition of the death penalty, there remain concerns that capital punishment is "*arbitrarily or freakishly imposed*".<sup>34</sup> In *Bariyar*, the Court held that "*there is no uniformity of precedents, to say the least. In most cases, the death penalty has been affirmed or refused to be affirmed by us, without laying down any legal principle.*"<sup>35</sup>

1.3.15 Such concerns have been reiterated on multiple occasions, where the Court has pointed that the rarest of rare dictum propounded in *Bachan Singh* has been inconsistently applied. In this context, it is instructive to examine the observations of the Supreme Court in *Aloke Nath Dutta v. State of West Bengal*,<sup>36</sup> *Swamy Shraddhananda v. State of Karnataka ('Swamy Shraddhananda')*,<sup>37</sup> *Farooq Abdul Gafur v. State of Maharashtra ('Gafur')*,<sup>38</sup> *Sangeet v. State of Haryana ('Sangeet')*,<sup>39</sup> and *Khade*.<sup>40</sup> In these cases, the Court has acknowledged that the subjective and arbitrary application of the death penalty has led "*principled sentencing*" to become "*judge-centric sentencing*",<sup>41</sup> based on the "*personal predilection of the judges constituting the Bench.*"<sup>42</sup>

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<sup>34</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 15.

<sup>35</sup> *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 104.

<sup>36</sup> (2007) 12 SCC 230.

<sup>37</sup> (2008) 13 SCC 767.

<sup>38</sup> (2010) 14 SCC 641.

<sup>39</sup> (2013) 2 SCC 452.

<sup>40</sup> (2013) 5 SCC 546.

<sup>41</sup> *Sangeet v. State of Haryana*, (2013) 2 SCC 452.

<sup>42</sup> *Swamy Shraddhananda v. State of Karnataka*, (2008) 13 SCC 767.

1.3.16 Notably, the Supreme Court has itself admitted errors in the application of the death penalty in various cases.<sup>43</sup>

### ***(v) Recent Political Developments***

1.3.17 Some recent developments indicate an increase in political opinion in favour of abolition. Most recently, in August 2015, the Tripura Assembly voted in favour of a resolution seeking the abolition of the death penalty.<sup>44</sup>

1.3.18 Demands for the abolition of the death penalty have been made by the Communist Party of India (CPI), the Communist Party of India (Marxist) [CPI (M)], the Communist Party of India (Marxist – Leninist Liberation) [CPI (M-L)] the Viduthalai Chiruthaigal Katchi (VCK), the Manithaneya Makkal Katchi (MMK), the Gandhiya Makkal Iyakkam (GMI), the Marumalarchi Dravida Munnetra Kazhagam (MDMK), and the Dravida Munnetra Kazhagam (DMK).<sup>45</sup>

1.3.19 On 31<sup>st</sup> July, 2015, D. Raja of the CPI introduced a Private Member's Bill asking the Government to declare a moratorium on death sentences pending the abolition of the death penalty.<sup>46</sup> In August 2015, DMK Member of Parliament Kanimozhi introduced a private member's bill in the Rajya Sabha seeking abolition of capital punishment.<sup>47</sup>

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<sup>43</sup> See Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498, Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546 and Sangeet v. State of Haryana, (2013) 2 SCC 452.

<sup>44</sup> Syed Sajjad Ali, *Tripura passes Resolution against Death Penalty*, The Hindu, 7 August 2015.

<sup>45</sup> See PTI, *Left joint movement asks Centre to not hang Yakub Memon*, Economic Times, 27 July, 2015; IANS, *Death penalty: CPI leader D Raja moves private member's resolution*, Economic Times, 31 July, 2015.; ET Bureau, *Seeking end to death penalty, DMK's Kanimozhi set to move private member's bill*, Economic Times, 7 August, 2015; See also: *Repeal Death Penalty*, CPI M-L, 30 June, 2015, available at <http://cpiml.in/cms/editorials/item/150-repeal-death-penalty> (last viewed on 20.08.2015).

<sup>46</sup> IANS, *Death penalty: CPI leader D Raja moves private member's resolution*, Economic Times, 31 July, 2015.

<sup>47</sup> ET Bureau, *Seeking end to death penalty, DMK's Kanimozhi set to move private member's bill*, Economic Times 7 August, 2015.

## ***(vi) International Developments***

1.3.20 In 1967, when the 35<sup>th</sup> Report was presented, only 12 countries had abolished capital punishment for all crimes in all circumstances.<sup>48</sup> Today, 140 countries have abolished the death penalty in law or in practice. Further, the number of countries that have remained “active retentionists”, namely they have executed at least one person in the last ten years, has fallen from 51 in 2007 to 39 (as of April 2014).<sup>49</sup> A category of countries have also abolished death penalty for ordinary crimes such as murder and retained it for exceptional crimes such as crimes under military law or under exceptional circumstances.<sup>50</sup> The death penalty is most prominently used in Iran, China, Pakistan, Saudi Arabia and the United States of America.

1.3.21 The issues relating to capital sentencing and the move towards the abolition of the death penalty internationally subsequent to the publication of the 35<sup>th</sup> Report deserve detailed consideration.

### **D. The Consultation Process Adopted by the Commission**

1.4.1 In order to understand the views of all the stakeholders, the 20<sup>th</sup> Law Commission released a Consultation Paper in May 2014. The Commission invited responses from those who desired to express their views on various aspects of death penalty.

1.4.2 The Commission received over 350 responses, with varied views on the subject. Of those supporting the death penalty, the primary considerations were the deterrent effect of the death

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<sup>48</sup> Columbia (1910), Costa Rica (1877), Dominican Republic (1966), Ecuador (1906), Federal Republic of Germany (1949), Honduras (1956), Iceland (1928), Monaco (1962), Panama (1922), San Marino (1865), Uruguay (1907), Venezuela (1863). See Law Commission of India, 35<sup>th</sup> Report, 1967, available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 24.08.2015)..

<sup>49</sup> ROGER HOOD AND CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 5 (5<sup>th</sup> ed. 2015).

<sup>50</sup> ROGER HOOD AND CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 5 (5<sup>th</sup> ed. 2015).

penalty; demands for retribution and justice in society; the demands of the victims' family; demands that the punishment be proportional to the crime; and the view that certain "heinous" criminals were not deserving of an opportunity for reform. Of those advocating abolition, the primary concerns were the fallibility of the Courts and possibility of erroneous convictions; the absence of any penological purpose and the discriminatory and arbitrary implementation of the death penalty. Notably, late former President of India, Dr. APJ Abdul Kalam also sent a response to the consultation paper, highlighting the discriminatory impact of the death penalty.

1.4.3 To solicit further responses on the subject, the Commission also organized a day-long Consultation on 11<sup>th</sup> July, 2015 inviting eminent lawyers, distinguished judges, political leaders, academics, police officers, and representatives of civil society. A detailed list of participants to the day-long Consultation has been provided in an Annexure to this Report.<sup>51</sup> The discussion traversed issues such as India's constitutional obligations, arbitrariness and discrimination in the application of the death penalty, the quality of the criminal justice system and the failure of the rehabilitation framework.

## **E. The Present Report**

1.5.1 In order to undertake a comprehensive study on the issue of the abolition of the death penalty, the Commission formed a Sub-Committee headed by the Chairman and comprising two Part Time members – Mr. Venkataramani and Professor (Dr.) Yogesh Tyagi, and also included Justice K. Chandru (retd.), Professor (Dr.) C. Raj Kumar, Mr. Dilip D'Souza, Dr. Mrinal Satish, Dr. Aparna Chandra, Ms. Sumathi Chandrashekar, Ms. Vrinda Bhandari and Ms. Ragini Ahuja. Ms. Sanya Kumar and Ms. Sanya Sud, both law students from National Law University, Delhi provided extensive research support to the team. The assistance provided

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<sup>51</sup> See Annexure I

by Mr. Pranay Nath Lekhi, Ms. Jyotsna Swamy, Mr. Arvind Chari, Mr. Hasrat Mehta and Ms. Diksha Agarwal, interns of Law Commission of India, and Ms. Kritika Padode was also commendable.

1.5.2 The different members of the Sub-Committee prepared concept papers on various facets of the death penalty. In preparing the drafts, and in light of the call for data-driven research and deliberations by the Supreme Court of India in *Khade* and *Bariyar*, the members relied on various research projects and empirical studies relating to the death penalty. These drafts were further discussed and revised in the course of the deliberations of the Sub-Committee. The drafts were also shared with the Full-Time Members of the Commission, viz., Justice S. N. Kapoor, Justice Usha Mehra and Prof. (Dr.) Mool Chand Sharma, as well as Part Time Members, Dr. B. N. Mani and Prof. (Dr.) Gurjeet Singh. Based on the suggestions of the Sub-Committee, further revisions were made and its final report was placed before the entire Commission. Mr. Venkataramani and Professor (Dr.) Yogesh Tyagi made several valuable suggestions that were taken into consideration. Concerns expressed by Dr Sanjay Singh, Secretary, Legislative Department and ex-officio Member of the Commission, were also considered.

1.5.3 Thereafter, upon extensive deliberations, discussions and in-depth study, the Commission has given shape to the present Report.

## CHAPTER - II

### **HISTORY OF THE DEATH PENALTY IN INDIA**

#### **A. Pre-Constitutional History and Constituent Assembly Debates**

2.1.1 An early attempt at abolition of the death penalty took place in pre-independent India, when Shri Gaya Prasad Singh attempted to introduce a Bill abolishing the death penalty for IPC offences in 1931. However, this was defeated.<sup>52</sup> Around the same time, in March 1931, following the execution of Bhagat Singh, Sukhdev and Rajguru by the British government, the Congress moved a resolution in its Karachi session, which included a demand for the abolition of the death penalty.<sup>53</sup>

2.1.2 India's Constituent Assembly Debates between 1947 and 1949 also raised questions around the judge-centric nature of the death penalty, arbitrariness in imposition, its discriminatory impact on people living in poverty, and the possibility of error.<sup>54</sup>

2.1.3 For example, on the possibility of error, Pandit Thakur Das Bhargava said:

*It is quite true that a person does not get justice in the original court. I am not complaining of district courts. In very many cases of riots in which more than five persons are involved, a number of innocent persons are implicated. I can speak with authority on this point. I am a legal*

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<sup>52</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at para 12, available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 24.08.2015).

<sup>53</sup> Special Correspondent, *It's time death penalty is abolished: Aiyar*, The Hindu, 7 August 2015, available at <http://www.thehindu.com/news/national/its-time-death-penalty-is-abolished-aiyar/article7509444.ece> (last viewed on 24.08.2015).

<sup>54</sup> See Constituent Assembly Debates on 3 June, 1949, Part II available at <http://parliamentofindia.nic.in/ls/debates/vol8p15b.htm> (last viewed on 24.08.2015).

*practitioner and have been having criminal practice for a large number of years.*<sup>55</sup>

2.1.4 An issue of much debate had to do with the right to appeal a death sentence. In this context, Prof. Shibban Lal Saksena said:

*I do feel that the people who are condemned to death should have the inherent right of appeal to the Supreme Court and must have the satisfaction that their cases have been heard by the highest tribunal in the country. I have seen people who are very poor not being able to appeal as they cannot afford to pay the counsel. I see that article 112 says that the Supreme Court may grant special leave to appeal from any judgment, but it will be open to people who are wealthy, who can move heaven and earth, but the common people who have no money and who are poor will not be able to avail themselves of the benefits of this section.*<sup>56</sup>

2.1.5 Dr. Ambedkar was personally in favour of abolition saying:

*My other view is that rather than have a provision for conferring appellate power upon the Supreme Court to whom appeals in cases of death sentence can be made, I would much rather than have a provision for conferring appellate power upon the Supreme Court to whom appeals in cases of death sentence can be made, I would much rather support the abolition of the death sentence itself. That, I think, is the proper course to follow, so that it will end this controversy. After all, this country by and large believe in the principle of non-violence. It has been its ancient tradition, and although people may not be following it in actual practice, they*

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<sup>55</sup> Constituent Assembly Debates on 3 June, 1949 Part II, available at <http://parliamentofindia.nic.in/ls/debates/vol8p15b.htm> (last viewed on 24.08.2015).

<sup>56</sup> Constituent Assembly Debates on 3 June, 1949 Part II, available at <http://parliamentofindia.nic.in/ls/debates/vol8p15b.htm> (last viewed on 24.08.2015).

*certainly adhere to the principle of non-violence as a moral mandate which they ought to observe as far as they possibly can and I think that having regard to this fact, the proper thing for this country to do is to abolish the death sentence altogether.*<sup>57</sup>

2.1.6 However, he suggested that the issue of the desirability of the death penalty be left to the Parliament to legislate on. This suggestion was eventually followed.

## **B. Legislative Backdrop**

2.2.1 At independence, India retained several laws put in place by the British colonial government, which included the Code of Criminal Procedure, 1898 ('Cr.P.C. 1898'), and the Indian Penal Code, 1860 ('IPC'). The IPC prescribed six punishments that could be imposed under the law, including death.

2.2.2 For offences where the death penalty was an option, Section 367(5) of the CrPC 1898 required courts to record reasons where the court decided not to impose a sentence of death:

*If the accused is convicted of an offence punishable with death, and the court sentences him to any punishment other than death, the court shall in its judgment state the reason why sentence of death was not passed.*

2.2.3 In 1955, the Parliament repealed Section 367(5), CrPC 1898, significantly altering the position of the death sentence. The death penalty was no longer the norm, and courts did not need special reasons for why they were not imposing the death penalty in cases where it was a prescribed punishment.

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<sup>57</sup> Constituent Assembly Debates on 3 June, 1949 Part II, available at <http://parliamentofindia.nic.in/ls/debates/vol8p15b.htm> (last viewed on 26.08.2015).

2.2.4 The Code of Criminal Procedure was re-enacted in 1973 ('CrPC'), and several changes were made, notably to Section 354(3):

*When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.*

2.2.5 This was a significant modification from the situation following the 1955 amendment (where terms of imprisonment and the death penalty were equal possibilities in a capital case), and a reversal of the position under the 1898 law (where death sentence was the norm and reasons had to be recorded if any other punishment was imposed). Now, judges needed to provide special reasons for why they imposed the death sentence.

2.2.6 These amendments also introduced the possibility of a post-conviction hearing on sentence, including the death sentence, in Section 235(2), which states:

*If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.*

## **C. Previous Law Commission Reports**

### **(i) The 35<sup>th</sup> Report of the Law Commission**

2.3.1 The Law Commission released its 35<sup>th</sup> Report on "**Capital Punishment**" in 1967, recommending that the death penalty be retained. After considering the arguments of the abolitionists and retentionists, the state of the death penalty in various countries and objectives of capital punishment, the Commission

recommended that the death penalty be retained in India, saying:

*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.*<sup>58</sup>

2.3.2 The Commission added that the deterrent object of capital punishment was its “most important object”, saying it constituted “its strongest justification”.<sup>59</sup> The Commission also commented on the discretion courts had in terms of imposing the death penalty or life imprisonment, finding that “the vesting of such discretion is necessary and the provisions conferring such discretion are working satisfactorily”.<sup>60</sup> It also said that “in the present state of the country,” India could not risk an experiment with abolition that would put the lives of citizens in danger.<sup>61</sup> The Commission also observed “that persons who have no sufficient financial means or who for some other reason cannot fight the cause to the last, suffer, and that the law proves to be unjust to them, is an argument which

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<sup>58</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at para 293, available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 26.08.2015).

<sup>59</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at para 295, available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 26.08.2015).

<sup>60</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at para 580, available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 26.08.2015).

<sup>61</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at para 265, available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 26.08.2015).

*concerns the subject of legal aid rather than the substantive penal law.*<sup>62</sup>

2.3.3 Considering if a court should give reasons when it made its decision on whether or not to impose the death penalty, the Commission recommended that the law should be changed to “*require the court to state its reasons whenever it avoids either of the two sentences in a capital case*”.<sup>63</sup> The 41st Report of the Commission on revising and re-enacting the Code of Criminal Procedure 1898 reiterated this recommendation.<sup>64</sup>

2.3.4 In the 35<sup>th</sup> Report, the Commission also made recommendations on some ancillary issues. For example, it considered the question of a right to appeal to the Supreme Court in cases where the death sentence was either confirmed or imposed by a High Court, finding that this was not necessary.<sup>65</sup> The 187<sup>th</sup> Report of the Commission made a different recommendation.<sup>66</sup>

2.3.5 Similarly, while the 35<sup>th</sup> Report found the breadth of judicial discretion in capital sentencing acceptable, later Supreme Court cases have noted why this is problematic.<sup>67</sup> The 35<sup>th</sup> Report also recommended

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<sup>62</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at para 265, available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 26.08.2015).

<sup>63</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at para 8, (Summary of Main Conclusions and Recommendations), available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 26.08.2015).

<sup>64</sup> Law Commission of India, 41<sup>st</sup> Report, 1969, at para 26.9, available at <http://lawcommissionofindia.nic.in/1-50/Report41.pdf> (last viewed on 26.08.2015).

<sup>65</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at para 982, available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 26.08.2015).

<sup>66</sup> Law Commission of India, 187<sup>th</sup> Report, 2003, at page 2- “*Further, at present, there is no statutory right of appeal to the Supreme Court in cases where High Court confirms the death sentence passed by a Session Judge or where the High Court enhances the sentence passed by the Session Judge and awards sentence of death. The Commission, on a consideration of the various responses and views, recommends for providing a statutory right of appeal against the judgment of the High Court confirming or awarding the death sentence*” available at <http://lawcommissionofindia.nic.in/reports/187th%20report.pdf> (last viewed on 26.08.2015)

<sup>67</sup> See *Aloke Nath Dutta v. State of West Bengal*, (2007) 12 SCC 230; *Swamy Shraddhananda v. State of Karnataka*, (2008) 13 SCC 767; *Santosh Bariyar v. State*

retaining of section 303 of the Indian Penal Code, which provides for mandatory death penalty. However, the Supreme Court held this to be unconstitutional in 1987 in *Mithu v. State of Punjab*.<sup>68</sup>

### **(ii) The 187<sup>th</sup> Report of the Law Commission**

2.3.6 In 2003, the Commission released its 187<sup>th</sup> Report on the “**Mode of Execution of Death and Incidental Matters**”.<sup>69</sup> The Commission had taken up this matter *suo motu* because of the “*technological advances in the field of science, technology, medicine, anaesthetics*”<sup>70</sup> since its 35<sup>th</sup> Report. This Report did not address the question of whether the death penalty was desirable. Instead, it restricted itself to three issues: (a) the method of execution of death sentence, (b) the process of eliminating differences in judicial opinions among Judges of the apex Court in passing sentence of death penalty, and (c) the need to provide a right of appeal to the accused to the Supreme Court in death sentence matters.<sup>71</sup>

2.3.7 After soliciting public opinion and studying the practice on these issues in India and in other countries, the Law Commission recommended that Section 354(5) of the CrPC be amended to allow for the lethal injection as a method of execution, in addition to hanging. The Commission also recommended that there should be a statutory right of appeal to the Supreme Court where a High Court confirms a death sentence, or enhances the sentence to capital punishment. Furthermore, it suggested that all death sentence cases

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of Maharashtra, (2009) 6 SCC 498; *Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641.

<sup>68</sup> (1983) 2 SCC 277.

<sup>69</sup> Law Commission of India, 187<sup>th</sup> Report, 2003, available at <http://lawcommissionofindia.nic.in/reports/187th%20report.pdf> (last viewed on 26.08.2015).

<sup>70</sup> Law Commission of India, 187<sup>th</sup> Report, 2003, at page 5, available at <http://lawcommissionofindia.nic.in/reports/187th%20report.pdf> (last viewed on 26.08.2015).

<sup>71</sup> Law Commission of India, 187<sup>th</sup> Report, 2003, at page 7, available at <http://lawcommissionofindia.nic.in/reports/187th%20report.pdf> (last viewed on 26.08.2015).

be heard by at least a 5-judge Bench of the Supreme Court.<sup>72</sup>

## **D. Constitutionality of the Death Penalty in India**

### **(i) From Jagmohan to Bachan Singh**

2.4.1 The first challenge to the constitutionality of the death penalty in India came in the 1973 case of *Jagmohan Singh v. State of U. P.* ('*Jagmohan*').<sup>73</sup> The petitioners argued that the death penalty violated Articles 14, 19 and 21 of the Constitution of India. It was argued that since the death sentence extinguishes, along with life, all the freedoms guaranteed under Article 19(1) (a) to (g), it was an unreasonable denial of these freedoms and not in the interests of the public. Further, the petitioners argued that the discretion vested in judges in deciding to impose death sentence was uncontrolled and unguided and violated Article 14. Finally, it was contended because the provisions of the law did not provide a procedure for the consideration of circumstances crucial for making the choice between capital punishment and imprisonment for life, it violated Article 21. The decision of the US Supreme Court in *Furman v. Georgia* in which the death penalty was declared to be unconstitutional as being cruel and unusual punishment was also placed before the Constitution Bench.

2.4.2 This case was decided before the CrPC was re-enacted in 1973, making the death penalty an exceptional sentence.

2.4.3 In *Jagmohan*, the Supreme Court found that the death penalty was a permissible punishment, and did not violate the Constitution. The Court held that:

*The impossibility of laying down standards is at the very core of the criminal law as administered*

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<sup>72</sup> Law Commission of India, 187<sup>th</sup> Report, 2003, at page 3, available at <http://lawcommissionofindia.nic.in/reports/187th%20report.pdf> (last viewed on 26.08.2015).

<sup>73</sup> (1973) 1 SCC 20.

*in India, which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment. That discretion in the matter of sentences as already pointed out, is liable to be corrected by superior courts... The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused.*<sup>74</sup>

2.4.4 The Court also held that:

*If the law has given to the judge a wide discretion in the matter of sentence to be exercised by him after balancing all the aggravating and mitigating circumstances of the crime, it will be impossible to say that there would be at all any discrimination, since facts and circumstances of one case can hardly be the same as the facts and circumstances of another.*<sup>75</sup>

2.4.5 Around the same time, just before the CrPC of 1973 became law, the Supreme Court also commented on the wisdom of the introduction of the post-conviction hearing on sentence in the case of *Ediga Anamma v. State of Andhra Pradesh*.<sup>76</sup> In commuting the death sentence to life imprisonment, the Court observed the following:

*In any scientific system which turns the focus, at the sentencing stage, not only on the crime but also the criminal, and seeks to personalise the punishment so that the reformatory component is as much operative as the deterrent element, it is essential that facts of a social and personal nature, sometimes altogether irrelevant if not injurious at the stage of fixing the guilt, may have to be*

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<sup>74</sup> Jagmohan Singh v. State of U. P., (1973) 1 SCC 20, at para 26.

<sup>75</sup> Jagmohan Singh v. State of U. P., (1973) 1 SCC 20, at para 27.

<sup>76</sup> (1974) 4 SCC 443.

*brought to the notice of the Court when the actual sentence is determined.*<sup>77</sup>

2.4.6 The law's changes were, in the view of the court, expressive of a tendency "*towards cautious, partial abolition and a retreat from total retention.*"<sup>78</sup> In a statement that reflects concerns that has acquired a resonance, the court said, "*a legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accenting the trend against the extreme and irrevocable penalty of putting out life.*"<sup>79</sup>

2.4.7 In 1979, the case of *Rajendra Prasad v. State of Uttar Pradesh* ('*Rajendra Prasad*')<sup>80</sup> discussed what the "special reasons" in imposing the death sentence could be. The Court found itself confronting, not the constitutionality of the death sentence, but that of sentencing discretion. The Court per majority (of two judges) said, "*special reasons necessary for imposing death penalty must relate, not to the crime as such but to the criminal.*"<sup>81</sup> They drew the focus in sentencing to reformation, even as they held that it was not the nature of the crime alone that would be relevant in deciding the sentence. The Court said, "*the retributive theory has had its day and is no longer valid. Deterrence and reformation are the primary social goals which make deprivation of life and liberty reasonable as penal panacea.*"<sup>82</sup> Significantly, voicing concerns that have begun to re-emerge, the court asked: "*Who, by and large, are the men whom the gallows swallow?*"<sup>83</sup> and found that, with a few exceptions, it was "*the feuding villager ... the striking workers ... the political dissenter ... the waifs and strays whom society has hardened by neglect into street toughs, or the poor householder-husband or wife*

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<sup>77</sup> Ediga Anamma v. State of Andhra Pradesh, (1974) 4 SCC 443, at para 14.

<sup>78</sup> Ediga Anamma v. State of Andhra Pradesh, (1974) 4 SCC 443, at para 21.

<sup>79</sup> Ediga Anamma v. State of Andhra Pradesh, (1974) 4 SCC 443, at para 26.

<sup>80</sup> (1979) 3 SCC 646.

<sup>81</sup> Rajendra Prasad v. State of Uttar Pradesh, (1979) 3 SCC 646, at para 88.

<sup>82</sup> Rajendra Prasad v. State of Uttar Pradesh, (1979) 3 SCC 646, at para 88.

<sup>83</sup> Rajendra Prasad v. State of Uttar Pradesh, (1979) 3 SCC 646, at para 77.

*driven by necessity of burst of tantrums*<sup>84</sup> who were visited with the extreme penalty.

2.4.8 In 1979, different Benches of the Supreme Court heard the cases of *Dalbir Singh v. State of Punjab*,<sup>85</sup> and *Bachan Singh v. State of Punjab*.<sup>86</sup> While *Dalbir Singh* relied on *Rajendra Prasad* to arrive at a decision, the Bench in *Bachan Singh* noted that the judgment in *Rajendra Prasad* was contrary to the decision in *Jagmohan*, and referred it to a Constitutional Bench. This culminated in the landmark decision of the Constitution Bench in *Bachan Singh v. State of Punjab* ('*Bachan Singh*').<sup>87</sup>

2.4.9 The challenge to the death penalty in *Bachan Singh* was premised, among other things, on irreversibility, fallibility, and that the punishment is necessarily cruel, inhuman and degrading. It was also contended that the penological purpose of deterrence remained unproven, retribution was not an acceptable basis of punishment, and that it was reformation and rehabilitation which were the purposes of punishment.

2.4.10 Four of the five judges hearing this case did not accept the contention that the death penalty was unconstitutional. They overruled *Rajendra Prasad*, and affirmed *Jagmohan*, when they held that the death penalty could not be restricted to cases where the security of the state and society, public order and the interests of the general public were threatened. Errors, they held, could be set right by superior courts, and pre-sentence hearing and the procedure that required confirmation by the High Court would correct errors.

2.4.11 In *Bachan Singh*, the Court adopted the 'rarest of rare' guideline for the imposition of the death penalty, saying that reasons to impose or not impose the death penalty must include the circumstances of the crime and the criminal. This was also the case where

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<sup>84</sup> *Rajendra Prasad v. State of Uttar Pradesh*, (1979) 3 SCC 646, at para 77.

<sup>85</sup> (1979) 3 SCC 745.

<sup>86</sup> (1980) 2 SCC 684.

<sup>87</sup> (1980) 2 SCC 684.

the court made a definitive shift in its approach to sentencing. The Court held:

*The expression 'special reasons' in the context of this provision, obviously means 'exceptional reasons' founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal.*<sup>88</sup>

2.4.12 It added:

*It cannot be overemphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in section 354 (3). Judges should never be blood-thirsty ... It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in section 354 (3), viz, that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. **A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.***<sup>89</sup> (Emphasis supplied)

2.4.13 Justice Bhagwati in his dissenting opinion found the death penalty necessarily arbitrary, discriminatory and capricious. He reasoned that “*the death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape, from its clutches. This circumstance also adds to*

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<sup>88</sup> Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 161.

<sup>89</sup> Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 209.

*the arbitrary and capricious nature of the death penalty and renders it unconstitutional as being violative of Articles 14 and 21.*<sup>90</sup>

2.4.14 In 1991, *Shashi Nayar v. Union of India*,<sup>91</sup> the death sentence was once again challenged, among other reasons, for the reliance placed in *Bachan Singh* on the 35<sup>th</sup> Report of the Commission. The Court turned down the petition, citing the deteriorating law and order in the country, with the observation that the time was not right for reconsidering the law on the subject. The plea that the execution of capital punishment by hanging was barbaric and dehumanizing, and it should be substituted by some other decent and less painful method in executing the sentence, was also rejected.<sup>92</sup>

2.4.15 In the past few years, attention has also been drawn to the arbitrary application of the *Bachan Singh* framework by courts as also to the possibility of judicial error in cases where the death sentence has been imposed. The Supreme Court in *Aloke Nath Dutta v. State of West Bengal*,<sup>93</sup> *Swamy Shraddhananda v. State of Karnataka*,<sup>94</sup> *Santosh Bariyar v. State of Maharashtra*,<sup>95</sup> and *Farooq Abdul Gafur v. State of Maharashtra*,<sup>96</sup> amongst other cases, has noticed that sentencing in capital cases has become arbitrary and that the sentencing law of *Bachan Singh* has been interpreted in varied ways by different Benches of the Court.

## **(ii) Mandatory Death Sentences**

2.4.16 Even as the law changed to make the death sentence the exception, and judges were expected to exercise their discretion to adjudge whether or not the death sentence needed to be imposed, in 1983, the

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<sup>90</sup> *Bachan Singh v. State of Punjab*, 1982 3 SCC 24 (J. Bhagwati, dissenting), at para 81.

<sup>91</sup> (1992) 1 SCC 96.

<sup>92</sup> (1992) 1 SCC 96, at para 7.

<sup>93</sup> (2007) 12 SCC 230.

<sup>94</sup> (2008) 13 SCC 767.

<sup>95</sup> (2009) 6 SCC 498.

<sup>96</sup> (2010) 14 SCC 641.

Court had to step in to hold that mandatory death sentences were contrary to the rights guaranteed in Article 14 and Article 21.

2.4.17 In the case of *Mithu v. State of Punjab*,<sup>97</sup> the Supreme Court was confronted with the mandatory sentence of death enacted in Section 303 of the IPC. The Court held that the mandatory death sentence was unconstitutional, stating:

*A standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case.*<sup>98</sup>

2.4.18 The Court noted that:

*It is because the death sentence has been made mandatory by section 303 in regard to a particular class of persons that, as a necessary consequence, they are deprived of the opportunity under section 235(2) of the Criminal Procedure Code to show cause why they should not be sentenced to death and the Court is relieved from its obligation under section 354(3) of that Code to state the special reasons for imposing the sentence of death. The deprivation of these rights and safeguards which is bound to result in injustice is harsh, arbitrary and unjust.*<sup>99</sup>

### **(iii) Method of Execution**

2.4.19 In 1983, the Supreme Court in *Deena v. Union of India* ('Deena'),<sup>100</sup> rejecting a constitutional challenge to execution by hanging, held that while a

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<sup>97</sup> (1983) 2 SCC 277.

<sup>98</sup> *Mithu v. State of Punjab*, (1983) 2 SCC 277, at para 16.

<sup>99</sup> *Mithu v. State of Punjab*, (1983) 2 SCC 277, at para 18.

<sup>100</sup> (1983) 4 SCC 645.

prisoner cannot be subjected to barbarity, humiliation, torture or degradation before the execution of the sentence, hanging did not involve these either directly or indirectly. In *Deena*, too, there was an attempt to revisit the constitutionality of the death sentence, but the court did not reopen the question.

2.4.20 In a later decision of *Parmanand Katara v. Union of India*,<sup>101</sup> the Court accepted that allowing the body to remain hanging beyond the point of death – the Punjab Jail Manual instructing that the body be kept hanging for half an hour after death – was a violation of the dignity of the person and hence unconstitutional.

**(iv) Delay and the death penalty**

2.4.21 Delay has been a matter of concern in the criminal justice system, with the adage ‘justice delayed is justice denied’ being attributed to the plight of both victims of crime as well as the accused. Long terms of incarceration, periods of which are on death row and in solitary confinement, have been the concerns of courts through the years. In the case of *T.V. Vatheeswaran v. State of Tamil Nadu (‘Vatheeswaran’)*,<sup>102</sup> the Court held that a delay in execution of sentence that exceeded two years would be a violation of procedure guaranteed by Article 21. However, in *Sher Singh v. State of Punjab*,<sup>103</sup> it was held that delay could be a ground for invoking Article 21, but that no hard and fast rule could be laid down that delay would entitle a prisoner to quashing the sentence of death.

2.4.22 A Constitution Bench of the Supreme Court in the case of *Triveniben v. State of Gujarat*<sup>104</sup> considered the question, and held that only executive delay, and not judicial delay, may be considered as relevant in an Article 21 challenge. The Court said, “*the only delay*

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<sup>101</sup> (1995) 3 SCC 248.

<sup>102</sup> (1983) 2 SCC 68.

<sup>103</sup> (1983) 2 SCC 344.

<sup>104</sup> (1989) 1 SCC 678.

*which would be material for consideration will be the delays in disposal of the mercy petitions or delay occurring at the instance of the Executive.”*<sup>105</sup>

2.4.23 If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether, it is just and fair to allow the sentence of death to be executed.

2.4.24 The Court also held:

*Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to re-open the conclusions reached by the Court while finally maintaining the sentence of death... No fixed period of delay could be held to make the sentence of death inexecutable.*<sup>106</sup>

2.4.25 This was reaffirmed in the case of *Shatrughan Chauhan v Union of India*.<sup>107</sup> This case also laid down guidelines for “safeguarding the interest of the death row convicts”,<sup>108</sup> which included reaffirming the unconstitutionality of solitary or single cell confinement prior to rejection of the mercy petition by the President, necessity of providing legal aid, and the need for a 14-day period between the rejection of the mercy petition and execution.

2.4.26 Recently, the Supreme Court also upheld the constitutionality of Section 364A, IPC, which allows for the imposition of the death sentence in cases of kidnapping with ransom. In the case of *Vikram Singh v. Union of India*,<sup>109</sup> it had been argued that Section 364A

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<sup>105</sup> *Triveniben v. State of Gujarat*, (1989) 1 SCC 678, at para 17.

<sup>106</sup> *Triveniben v. State of Gujarat*, (1989) 1 SCC 678, at para 23.

<sup>107</sup> (2014) 3 SCC 1.

<sup>108</sup> *Shatrughan Chauhan v. UOI*, (2014) 3 SCC 1, at para 241.

<sup>109</sup> *Vikram Singh @ Vicky & Anr. v. Union of India & Ors*, Criminal Appeal No. 824 of 2013, Supreme Court of India, decided on August 21, 2015.

was unconstitutional, among other things, because it denied courts the discretion of awarding a punishment that was not life imprisonment or the death sentence especially in cases of kidnapping which may not warrant such a high punishment. The Supreme Court acknowledged that “*punishments must be proportionate to the nature and gravity of the offences for which the same are prescribed*”.<sup>110</sup> However, it held that “*Section 364A cannot be dubbed as so outrageously disproportionate to the nature of the offence as to call for the same being declared unconstitutional*”,<sup>111</sup> saying death sentences would only be awarded in the rarest of rare cases. The Court did not address the question of whether the death sentence was an appropriate punishment for a non-homicide offence, or applicable international law standards on this issue.

### **E. Laws on the death penalty in India**

2.5.1 Under the IPC, the death sentence may be imposed for several offences, including:

**Table 2.1: Capital Offences in IPC**

<b>S. No</b>	<b>Section Number</b>	<b>Description</b>
1.	Section 121	Treason, for waging war against the Government of India
2.	Section 132	Abetment of mutiny actually committed
3.	Section 194	Perjury resulting in the conviction and death of an innocent person
4.	Section 195A	Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person
5.	Section 302	Murder
6.	Section 305	Abetment of a suicide by a minor, insane person or intoxicated person
7.	Section 307 (2)	Attempted murder by a serving life convict
8.	Section 364A	Kidnapping for ransom
9.	Section 376A	Rape and injury which causes death or leaves the woman in a persistent vegetative state
10.	Section 376E	Certain repeat offenders in the context of rape
11.	Section 396	Dacoity with murder

<sup>110</sup> Vikram Singh @ Vicky & Anr. v. Union of India & Ors, Criminal Appeal No. 824 of 2013, Supreme Court of India, decided on August 21, 2015, at para 49.

<sup>111</sup> Vikram Singh @ Vicky & Anr. v. Union of India & Ors, Criminal Appeal No. 824 of 2013, Supreme Court of India, decided on August 21, 2015, at para 50.

2.5.2 The death penalty may also be imposed if someone is found guilty of a criminal conspiracy to commit any of these offences.<sup>112</sup>

2.5.3 Besides the IPC, several laws prescribe the death penalty as a possible punishment in India. These include:

**Table 2.2: Capital Offences in other laws**

<b>S. No</b>	<b>Section Number</b>	<b>Act</b>
1.	Sections 34, 37, and 38(1)	The Air Force Act, 1950
2.	Section 3(1)(i)	The Andhra Pradesh Control of Organised Crime Act, 2001
3.	Section 27(3)	The Arms Act, 1959 (repealed)
4.	Sections 34, 37, and 38(1)	The Army Act, 1950
5.	Sections 21, 24, 25(1)(a), and 55	The Assam Rifles Act, 2006
6.	Section 65A(2)	The Bombay Prohibition (Gujarat Amendment) Act, 2009
7.	Sections 14, 17, 18(1)(a), and 46	The Border Security Force Act, 1968
8.	Sections 17 and 49	The Coast Guard Act, 1978
9.	Section 4(1)	The Commission of Sati (Prevention) Act, 1987
10.	Section 5	The Defence of India Act, 1971
11.	Section 3	The Geneva Conventions Act, 1960
12.	Section 3 (b)	The Explosive Substances Act, 1908
13.	Sections 16, 19, 20(1)(a), and 49	The Indo-Tibetan Border Police Force Act, 1992
14.	Section 3(1)(i)	The Karnataka Control of Organised Crime Act, 2000
15.	Section 3(1)(i)	The Maharashtra Control of Organised Crime Act, 1999
16.	Section 31A(1)	The Narcotics Drugs and Psychotropic Substances Act, 1985
17.	Sections 34, 35, 36, 37, 38, 39, 43, 44, 49(2)(a), 56(2), and 59	The Navy Act, 1957
18.	Section 15(4)	The Petroleum and Minerals Pipelines (Acquisition of rights of user in land) Act, 1962
19.	Sections 16, 19, 20(1)(a), and 49	The Sashastra Seema Bal Act, 2007
20.	Section 3(2)(i)	The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989
21.	Section 3(1)(i)	The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002;
22.	Sections 10(b)(i) and Section 16(1)(a)	The Unlawful Activities Prevention Act, 1967

<sup>112</sup> Section 120B, Indian Penal Code, 1860.

**(i) Recent expansions of the scope of the death penalty**

2.5.4 Several of these enactments have been passed relatively recently. For example, passed in 2013, the Criminal Law (Amendment) Act introduced several new provisions into the IPC, including Section 376A, which allowed for the death penalty to be imposed in cases where rape led to the death of the victim, or left her in a persistent vegetative state; and 376E which allowed for the imposition of the death penalty for certain repeat offenders. These amendments were passed in the wake of the recommendations of the Verma Committee.<sup>113</sup> Pertinently, while the Verma Committee was in favour of enhanced punishment for certain forms of sexual assault and rape, it noted that *“in the larger interests of society, and having regard to the current thinking in favour of abolition of the death penalty, and also to avoid the argument of any sentencing arbitrariness, we are not inclined to recommend the death penalty.”*<sup>114</sup> The Criminal Law (Amendment) Act, 2013, nevertheless expanded the scope of the death penalty.

2.5.5 There is currently a Bill pending in Parliament, the Anti-Hijacking (Amendment) Bill 2014, which also prescribes the death penalty.<sup>115</sup>

**(ii) The Death Penalty and Non-Homicide offences**

2.5.6 Several offences for which the death penalty is prescribed include non-homicide offences, and do not

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<sup>113</sup> See Verma Committee Report, 2013, available at <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf> (last viewed on 26.08.2015).

<sup>114</sup> See Verma Committee Report, 2013, at page 246, available at <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf> (last viewed on 26.08.2015).

<sup>115</sup> See PRS India, Anti-Hijacking Bill, 2014, available at <http://www.prsindia.org/billtrack/the-anti-hijacking-amendment-bill-2014-3500/> (last viewed on 15.08.2015).

meet the threshold of “most serious crimes” as required by international law.<sup>116</sup> These include:

**Table 2.3: Non-Homicide Capital Offences**

<b>S. No</b>	<b>Section Number</b>	<b>Act</b>
1.	Section 34, Section 37 and Section 38)	The Air Force Act, 1950
2.	Section 34, Section 37 and Section 38	The Army Act, 1950
3.	Section 21, Section 24 and Section 25	The Assam Rifles Act, 2006
4.	Section 14, Section 17 and Section 18	The Border Security Force Act, 1968
5.	Section 17, Section 49	The Coast Guard Act, 1978
6.	Section 3	The Explosive Substances Act, 1908
7.	Section 120B, Section 121 (waging war), Section 132, Section 194, Section 195A, Section 364A (added by Criminal Law (Amendment) Act, 1993, Section 376E (added by Criminal Law (Amendment) Act, 2013)	The Indian Penal Code, 1860
8.	Section 16, Section 19 and Section 20	Indo-Tibetan Border Police Force Act, 1992
9.	Section 31	The Narcotic Drugs and Psychotropic Substances Act, 1985
10.	Section 34, Section 35, Section 26, Section 37, Section 38, Section 39, Section 43, Section 44, Section 49, Section 56, Section 59	The Navy Act, 1957
11.	Section 15	The Petroleum and Mineral Pipelines (Acquisition of Right of User in Land) Act, 1962
12.	Section 16, Section 19 and Section 20	The Sashastra Seema Bal Act, 2007
13.	Section 3	The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

<sup>116</sup> Article 6(2), ICCPR, “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.”

***(iii) Continued existence of the mandatory death penalty***

2.5.7 Despite the fact that the Supreme Court found the mandatory death penalty to be unconstitutional and arbitrary, the Parliament has since enacted laws that continue to prescribe the mandatory death penalty. The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002, in Section 3(g)(i), the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, in Section 3(2)(i) and Section 27(3) of the Arms Act continue to prescribe a mandatory death sentence. The mandatory death sentence was also introduced into the Narcotics and Psychotropic Substances Act 1985 by amendment in 1989. The Bombay High Court declared it to be unconstitutional in 2010,<sup>117</sup> and the Act was finally amended to remove it only in 2014.

**(iv) Death penalty and anti-terror laws**

2.5.8 Many laws under which the death penalty continues to be imposed have to do with terrorist offences. For example, death sentences under the Terrorist and Disruptive Activities Act, 1987 ('TADA'), Prevention of Terrorism Act, 2002 ('POTA'), and Unlawful Activities Prevention Act, 1967 ('UAPA'), continue to be imposed and upheld. For one thing, these death sentences are implemented even when the underlying law in some of these cases has either been repealed (TADA) or has lapsed (POTA). TADA in particular was repealed in the face of criticism for not respecting fair trial guarantees and amidst widespread allegations of abuse. Provisions in the TADA, POTA and now UAPA did not provide for the full range of fair trial guarantees: they defined offences vaguely, thus compromising the principle of legality; reversed the presumption of innocence in certain instances; allowed for long periods of pre-charge detention; made certain

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<sup>117</sup> Indian Harm Reduction Network v. The Union of India, Criminal Appeal No. 1784/2010, Bombay High Court.

confessions to specific police officials admissible as evidence; and limited the right to appeal by only allowing appeals to the Supreme Court.

#### **(v) Bills proposing abolition of the death penalty**

2.5.9 Before independence, Shri Gaya Prasad Singh attempted to introduce a Bill abolishing the death penalty for IPC offences in 1931, which was defeated.<sup>118</sup> Since independence, M.A. Cazmi's Bill to amend Section 302 IPC in 1952 and 1954, Mukund Lal Agrawal's Bill in 1956, Prithviraj Kapoor's resolution in the Rajya Sabha in 1958 and Savitri Devi Nigam's 1961 resolution had all sought to abolish the death penalty.<sup>119</sup> In 1962, Shri Raghunath Singh's resolution for abolition of the death penalty was discussed in the Lok Sabha, and following this the matter was referred to the Law Commission, resulting in the 35<sup>th</sup> Commission Report.<sup>120</sup>

2.5.10 At present, two bills moved by Rajya Sabha Members of Parliament are relevant to the issue. Kanimozhi has moved a Private Member's Bill demanding the abolition of the death penalty,<sup>121</sup> and D. Raja has moved a Private Member's Bill asking the Government to declare a moratorium on death sentences pending the abolition of the death penalty.<sup>122</sup>

#### **F. Recent Executions in India**

2.6.1 A study conducted by Amnesty International-PUCL (studying all death penalty cases from 1950-2006 in India) has noted the lack of clarity and official

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<sup>118</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, at para 12, available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 26.08.2015).

<sup>119</sup> See Law Commission of India, 35<sup>th</sup> Report, 1967, at para 15-18, available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 26.08.2015).

<sup>120</sup> See Law Commission of India, 35<sup>th</sup> Report, 1967, at para 1, available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed on 26.08.2015).

<sup>121</sup> Special Correspondent, *Kanimozhi to move Bill to abolish death penalty*, The Hindu, July 31 2015.

<sup>122</sup> IANS, *Death penalty: CPI leader D Raja moves private member's resolution*, Economic Times, 31 July, 2015.

information available on the numbers of people who have been executed in India, but suspected that the number of executions during this period probably ran into thousands.<sup>123</sup> There has, however, been a reduction in the number of people being executed over time.

2.6.2 Dhananjay Chatterjee was executed in 2004, after a period of about 7 years since the last execution. The previous recorded execution had been in 1997.<sup>124</sup> After 2004, India had an unofficial moratorium in executions for eight years, until Ajmal Kasab was executed in November 2012. Two executions have happened since: Afzal Guru was executed in February 2013, and Yakub Memon was executed in July 2015.

2.6.3 Having examined the history of the death penalty in India, and the recent expansion of its scope, it is instructive to next consider world-wide trends and international law provisions on the issue.

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<sup>123</sup> Amnesty International, *Lethal Lottery: The Death Penalty in India*, ASA 20/07/2008, at page 24, available at <https://www.amnesty.org/en/documents/ASA20/007/2008/en/> (last viewed on 26.08.2015).

<sup>124</sup> Amnesty International, *Lethal Lottery: The Death Penalty in India*, ASA 20/07/2008, at page 24, available at <https://www.amnesty.org/en/documents/ASA20/007/2008/en/> (last viewed on 26.08.2015).

## **CHAPTER - III**

### **INTERNATIONAL TRENDS**

3.1 The international landscape regarding the death penalty – both in terms of international law and state practice – has evolved in the past decades. As compared to 1967, when the 35<sup>th</sup> Report of the Commission was issued, and 1980, when the *Bachan Singh*<sup>125</sup> judgement was delivered, today a majority of the countries in the world have abolished the death penalty in law or practice. Even those who retain it, carry out far fewer executions than was the case some decades ago.

3.2 This chapter describes the transformation in the international landscape over the past decades, and the marked trend towards abolition in both international as well as domestic laws, through a study of applicable international law, political commitments and state practice.

3.3. The aim of this chapter is not to highlight international law norms applicable to the Indian state. Several treaties and instruments mentioned here have either not been signed or ratified by the Indian government, or are inapplicable to India for other reasons. Instead, this chapter provides an overview of the international landscape pertinent to the legal regulation of the death penalty, and the changes in it over time.

3.4 Internationally, countries are classified on their death penalty status, based on the following categories:<sup>126</sup>

- Abolitionist for all crimes

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<sup>125</sup> (1980) 2 SCC 684.

<sup>126</sup> This system is followed by the United Nations and by non-governmental organizations like Amnesty International. See for example, “Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty” Report of the Secretary-General, E/2015/49 [advance, unedited version] at page 4; See Annex II, Amnesty International, Death Sentences and Executions in 2014, ACT 50/001/2015.

- Abolitionist for ordinary crimes<sup>127</sup>
- Abolitionist *de facto*<sup>128</sup>
- Retentionist

3.5 At the end of 2014, 98 countries were abolitionist for all crimes, seven countries were abolitionist for ordinary crimes only, and 35 were abolitionist in practice, making 140 countries in the world abolitionist in law or practice. The list of 140 countries includes three that formally abolished the death penalty in 2015, i.e., Suriname, Madagascar and Fiji.<sup>129</sup> 58 countries are regarded as retentionist, who still have the death penalty on their statute book, and have used it in the recent past.<sup>130</sup>

3.6 While only a minority of countries retain and use the death penalty, this list includes some of the most populous nations in the world, including India, China, Indonesia and the United States, making a majority of people in the world potentially subject to this punishment.

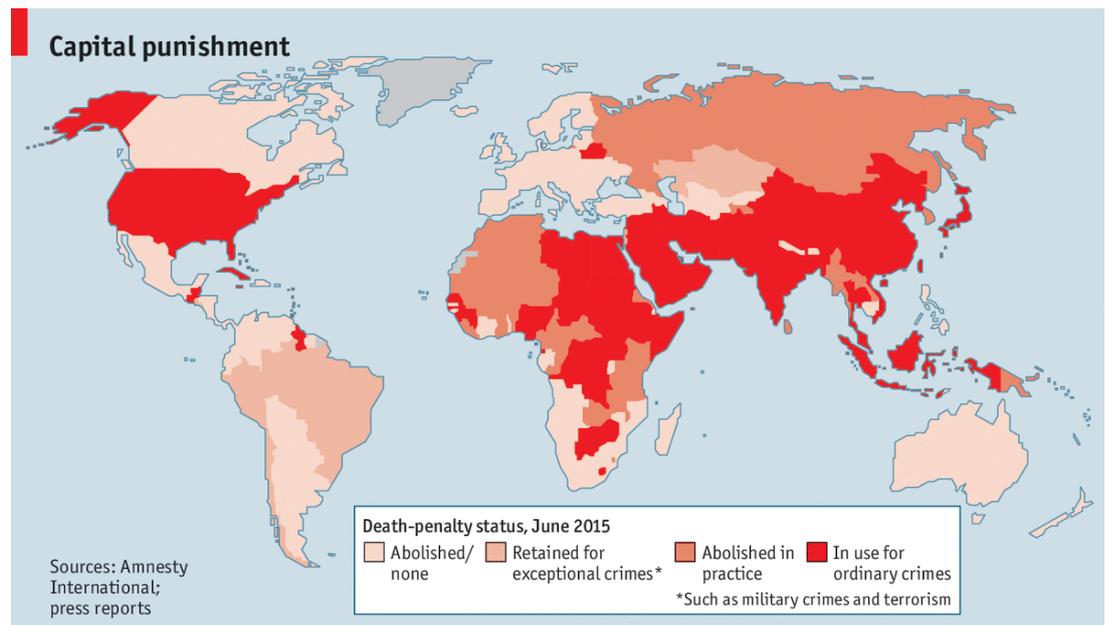
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<sup>127</sup> This means that “*the death penalty has been abolished for all ordinary offences committed in peacetime, such as those contained in the criminal code or those recognized in common law (for example, murder, rape and robbery with violence). The death penalty is retained only for exceptional circumstances, such as military offences in time of war, or crimes against the State, such as treason, terrorism or armed insurrection*”- Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary-General, E/2015/49 [advance, unedited version] at page 4.

<sup>128</sup> This refers to states where “*the death penalty remains lawful and where death sentences may still be pronounced but where executions have not taken place for 10 years*”, or states “*that have carried out executions within the previous 10 years but that have made an international commitment through the establishment of an official moratorium*”, Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary-General, E/2015/49 [advance, unedited version] at page 4. Amnesty International follows a slightly different definition: Countries which retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the last 10 years and are believed to have a policy or established practice of not carrying out executions. Annex II, Amnesty International, Death Sentences and Executions in 2014, ACT 50/001/2015.

<sup>129</sup> See *On the way out—with grisly exceptions*, The Economist, 4 July 2015, available at <http://www.economist.com/news/international/21656666-few-countries-are-applying-death-penalty-more-freely-global-trend-towards> (last viewed on 20.08.2015).

<sup>130</sup> Annex II, Amnesty International, Death Sentences and Executions in 2014, ACT 50/001/2015.



Sourced from The Economist: “On the way out—with grisly exceptions” The Economist, 4 July 2015, available at <http://www.economist.com/news/international/21656666-few-countries-are-applying-death-penalty-more-freely-global-trend-towards>

3.7 This map shows four types of regions: the regions in red are retentionist, and use the death penalty for ordinary crimes; regions in orange-pink have abolished the death penalty in practice, and are abolitionist *de facto*; regions in dark pink have only retained the death penalty for exceptional crimes, and are abolitionist for ordinary crimes; and regions in light pink/white do not retain the death penalty and have abolished it for all crimes.

## A. Developments in the International Human Rights Law Framework

### (i) Capital Punishment in International Human Rights Treaties

3.8.1 Capital punishment has been regulated in international human rights treaties as one aspect of the right to life, as contained in the International Covenant on Civil and Political Rights (‘ICCPR’). With time, some aspects of the imposition and implementation of capital punishment have also been found to violate the prohibition against cruel, inhuman, and degrading

treatment and punishment. With the coming into force of the Second Optional Protocol to the ICCPR, the international community saw the first global, international legal instrument that aimed at abolishing the death penalty.

a. The International Covenant on Civil and Political Rights

3.8.2 The International Covenant on Civil and Political Rights (‘ICCPR’) is one of the key documents discussing the imposition of death penalty in international human rights law. The ICCPR does not abolish the use of the death penalty, but Article 6 contains guarantees regarding the right to life, and contains important safeguards to be followed by signatories who retain the death penalty.

3.8.3 Article 6(2) states:

*In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.*

3.8.4 Article 6(4) requires states to ensure that “*Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases*”, and Article 6(5) mandates that a “*Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.*”

3.8.5 The UN Human Rights Committee (the UN body whose interpretations of the ICCPR are considered authoritative) discussed Article 6 of the ICCPR in detail in its General Comment in 1982. The Committee clarified that while the ICCPR did not explicitly require

the abolition of the death penalty, abolition was desirable, and the Committee would consider any move towards abolition as “*progress in the enjoyment of the right to life.*”<sup>131</sup> The Committee also said that death penalty should be an “*exceptional measure*”. It reiterated important procedural safeguards including that the death penalty can only be imposed in accordance with the law in force at the time of the commission of the crime, and that the right to a fair hearing by an independent tribunal, the presumption of innocence, minimum guarantees for the defence, and the right to review by a higher tribunal must all be strictly observed.<sup>132</sup>

3.8.6 The Committee also reviews periodic reports of state-parties to the ICCPR, and has often referred to abolition of the death penalty in its observations on reports of retentionist states.<sup>133</sup> In other cases, the Committee has also reiterated the importance of following the safeguards listed in Article 6 and other provisions of the ICCPR, and provided a roadmap to abolition.<sup>134</sup>

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<sup>131</sup> Human Rights Committee, General Comment No 6 (1982) at para 6, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 6 (1994)-“*The article also refers generally to abolition in terms which strongly suggest (paras. 2 (2) and (6)) that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life within the meaning of article 40, and should as such be reported to the Committee*”.

<sup>132</sup> Human Rights Committee, General Comment No 6 (1982) at Para 7, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 6 (1994).

<sup>133</sup> For example, in 2014, it recommended that Sierra Leone “*should expedite its efforts to abolish the death penalty and to ratify the Second Optional Protocol to the Covenant*”, in para 18, UN Human Rights Committee, Concluding observations on the initial report of Sierra Leone, 25 March 2014, CCPR/C/SLE/CO/1. In 2009, it noted that while Russia had a de facto moratorium on executions since 1996, it “*should take the necessary measures to abolish the death penalty de jure at the earliest possible moment, and consider acceding to the Second Optional Protocol to the Covenant*”, in para 12, UN Human Rights Committee, Concluding observations of the Human Rights Committee: Russian Federation, 24 November 2009, CCPR/C/RUS/CO/6.

<sup>134</sup> For example, in its 2008 review of Japan, the Committee recommended, “*Regardless of opinion polls, the State party should favourably consider abolishing the death penalty and inform the public, as necessary, about the desirability of abolition*” in para 16, UN Human Rights Committee, Concluding observations of the Human Rights Committee: Japan, 18 December 2008, CCPR/C/JPN/CO/5. Similarly, in 2006 the Committee asked the United States to “*review federal and state legislation with a view to restricting the number of offences carrying the death penalty ... the State party should place a moratorium on capital sentences, bearing in mind the desirability of*

3.8.7 At present, 168 states, including India, are parties to the ICCPR. The Committee reviewed India's report in 1996 and recommended that India "*abolish by law the imposition of the death penalty on minors and limit the number of offences carrying the death penalty to the most serious crimes, with a view to its ultimate abolition.*"<sup>135</sup>

b. The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty

3.8.8 The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty is the only treaty directly concerned with abolishing the death penalty, which is open to signatures from all countries in the world. It came into force in 1991, and has 81 states parties and 3 signatories. India has not signed this treaty.

3.8.9 Article 1 of the Second Optional Protocol states that "*No one within the jurisdiction of a State Party to the present Protocol shall be executed*", and that "*Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.*" No reservations are permitted to the Second Optional Protocol, "*except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.*"<sup>136</sup> Some state parties have made such reservations.

c. The Convention on the Rights of the Child

3.8.10 Similar to the ICCPR, Article 37(a) of the Convention on the Rights of the Child ('CRC') explicitly prohibits the use of the death penalty against persons

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*abolishing death penalty*" in para 29, UN Human Rights Committee, Concluding observations of the Human Rights Committee: United States of America, 15 September 2006, CCPR/C/USA/CO/3.

<sup>135</sup> UN Human Rights Committee, Concluding observations of the Human Rights Committee: India, 4 August 1997, CCPR/C/79/Add.81 at para 20.

<sup>136</sup> Article 2 (1), Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty.

under the age of 18. As of July 2015, 195 countries had ratified the CRC. Article 37(a) states:

*States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.*

3.8.11 The Committee on the Rights of the Child has clarified that while some presumed the rule only prohibited the execution of persons below the age of 18, “*death penalty may not be imposed for a crime committed by a person under 18 regardless of his/her age at the time of the trial or sentencing or of the execution of the sanction.*”<sup>137</sup>

d. The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment

3.8.12 Increasingly, there is an analysis of the death penalty as violating norms against torture and cruel, inhuman, and degrading treatment or punishment.<sup>138</sup> In this context, the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (‘the Torture Convention’) and the UN Committee against Torture have been sources of jurisprudence for limitations on the death penalty as well as necessary safeguards.

3.8.13 The Torture Convention does not regard the imposition of death penalty *per se* as a form of torture or cruel, inhuman or degrading treatment or punishment (‘CIDT’). However, some methods of

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<sup>137</sup> Committee on the Rights of the Child, General Comment 10: Children’s rights in juvenile justice, 25 April 2007, CRC/C/GC/10, at para 75, available at <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf> (last viewed on 25.08.2015).

<sup>138</sup> See, for example, Office of the High Commissioner for Human Rights, Death penalty increasingly viewed as torture, UN Special Rapporteur finds, 23 October 2012, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12685&LangID=E#sthash.Gu6NTA2d.dpuf> (last viewed on 25.08.2015).

execution<sup>139</sup> and the phenomenon of death row<sup>140</sup> have been seen as forms of CIDT by UN bodies. While India has signed the Torture Convention, it has yet not ratified it.

#### e. International Criminal Law

3.8.14 The international trend towards abolition of the death penalty is also visible in the evolution of international criminal law. The death penalty was a permissible punishment in the Nuremberg<sup>141</sup> and Tokyo<sup>142</sup> tribunals, both of which were established following World War II. Since then, however, international criminal courts - including the Statute of the International Criminal Tribunal for the former Yugoslavia,<sup>143</sup> the Statute of the International Criminal Tribunal for Rwanda,<sup>144</sup> the Statute of the Special Court

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<sup>139</sup> The Committee against Torture was “*specially troubled by the recent cases of botched executions in Arizona, Oklahoma, and Ohio*” and asked the US to “*review its execution methods in order to prevent pain and prolonged suffering*”, in para 25, Concluding observations on the combined third to fifth periodic reports of the United States of America, 19 December 2014, CAT/C/USA/CO/3-5.

<sup>140</sup> In its Concluding Observations on Kenya’s report, the Committee against Torture said that it remained concerned about the “*uncertainty of those who serve on death row, which could amount to ill-treatment*”, and urged Kenya to “*take the necessary steps to establish an official and publicly known moratorium of the death penalty with a view of eventually abolishing the practice*”, in para 29, UN Committee Against Torture, Concluding observations of the Committee against Torture: Kenya, 19 January 2009, CAT/C/KEN/CO/1.

While reviewing China’s periodic report, the Committee against Torture expressed concern “*at the conditions of detention of convicted prisoners on death row, in particular the use of shackles for 24 hours a day, amounting to cruel, inhuman or degrading treatment*”, in para 34, UN Committee Against Torture, Concluding observations of the Committee against Torture: China, 12 December 2008, CAT/C/CHN/CO/4.

In the context of Japan, the Committee found that “*unnecessary secrecy and arbitrariness surrounding the time of execution*” and “*principle of solitary confinement after the final sentence is handed down*” could amount to CIDT, in para 19, UN Committee Against Torture, Conclusions and Recommendations of the Committee against Torture: Japan, 3 August 2007, CAT/C/JPN/CO/1.

<sup>141</sup> United States Holocaust Memorial Museum, International Military Tribunal at Nuremberg, Last updated 18 August 2015, available at: <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007069> (last viewed on 25.08.2015).

<sup>142</sup> University of Virginia, *The Tokyo War Crimes Trial: A digital exhibition*, available at: <http://lib.law.virginia.edu/imtfe/tribunal> (last viewed on 20.08.2015).

<sup>143</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, available at: [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf) (last viewed on 15.08.2015).

<sup>144</sup> Statute of the International Criminal Tribunal for Rwanda, available at: [http://legal.un.org/avl/pdf/ha/ictr\\_EF.pdf](http://legal.un.org/avl/pdf/ha/ictr_EF.pdf) (last viewed on 15.08.2015).

for Sierra Leone<sup>145</sup> and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia<sup>146</sup> – exclude the death penalty as a permissible punishment. The same is true for the Rome Statute of the International Criminal Court,<sup>147</sup> where judges may only impose terms of imprisonment. It must be noted that these tribunals do not use the death penalty, despite routinely dealing with the most serious crimes under international law, including genocide, war crimes, and crimes against humanity. It is relevant to that India is not signatory to the Rome Statute.

f. International Treaty Obligations in Indian Law

3.8.15 Of the treaties mentioned above, India has ratified the ICCPR and the CRC, and is signatory to the Torture Convention but has not ratified it. Under international law, treaty obligations are binding on states once they have ratified the treaty.<sup>148</sup> Even where a treaty has been signed but not ratified, the state is bound to “*refrain from acts which would defeat the object and purpose of a treaty*”.<sup>149</sup>

3.8.16 In India, domestic legislation is required to make international treaties enforceable in Indian law.<sup>150</sup> The Protection of Human Rights Act, 1994, incorporates the ICCPR into India law through section 2(d) and 2(f). Section 2 (d) states that, “*human rights*” means the rights relating to life, liberty equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India. Section 2(f) states that, “*International Covenants*” means the International Covenant on Civil and Political

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<sup>145</sup> Statute of the Special Court for Sierra Leone, available at: <http://www.rscsl.org/Documents/scsl-statute.pdf> (last viewed on 15.08.2015).

<sup>146</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, available at: [http://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf) (last viewed on 15.08.2015).

<sup>147</sup>Rome Statute of the International Criminal Court, available at: [http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) (last viewed on 15.08.2015).

<sup>148</sup> See Article 26, Vienna Convention on the Law of Treaties (VCLT): “*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*”

<sup>149</sup> Article 18, Vienna Convention on the Law of Treaties (VCLT).

<sup>150</sup> Jolly George Verghese & Anr vs The Bank Of Cochin, 1980 AIR 470

*Rights and the International Covenant on Economic, Social and Cultural rights adopted by the General Assembly of the United Nations on the 16th December, 1966.*

3.8.17 Further, according to Article 51(c) of the Indian Constitution, the state shall endeavor to “*foster respect for international law and treaty obligations in the dealings of organised peoples with one another.*” While this does not make all of India’s treaty obligations automatically binding on India, courts have respected rules of international law where there is no contradictory legislation in India.<sup>151</sup>

**(ii) Safeguards regarding capital punishment in international law**

3.8.18 Resolutions by bodies of the United Nations, as well as comments and reports by UN special procedures, have also contributed to international law standards regarding the death penalty and essential safeguards where it is being used. The trend in most of these instruments is towards limiting the scope of the death penalty globally, and encouraging abolition where possible.

a. The ECOSOC Safeguards

3.8.19 The UN Economic and Social Council (ECOSOC) has issued several resolutions prescribing safeguards regarding how the death penalty should be imposed in countries where it is retained. These safeguards comprise important limitations to the scope and application of the death penalty in international law.

3.8.20 The first ECOSOC resolution titled “*Safeguards guaranteeing protection of the rights of*

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<sup>151</sup> In *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, for example, the Supreme Court of India said: “*Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions, e.g., Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee.*”

those facing the death penalty” was adopted in 1984,<sup>152</sup> and contained the following nine safeguards:

1. *In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.*

2. *Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.*

3. *Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.*

4. *Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.*

5. *Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.*

6. *Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps*

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<sup>152</sup> Safeguards guaranteeing protection of the rights of those facing the death penalty, Approved by Economic and Social Council resolution 1984/50 of 25 May 1984, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/DeathPenalty.aspx> (last viewed on 3.08.2015).

*should be taken to ensure that such appeals shall become mandatory.*

*7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.*

*8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.*

*9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.*

3.8.21 Two subsequent resolutions introduced additional safeguards.

3.8.22 A 1989 ECOSOC resolution added more safeguards, including encouraging transparency in the imposition of the death penalty (including publishing information and statistics on the issue); the establishment of a maximum age beyond which a person cannot be executed; and abolishing the death penalty *“for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution.”*<sup>153</sup>

3.8.23 In 1996, a third ECOSOC resolution<sup>154</sup> encouraged states to ensure that each defendant facing a death sentence is given all guarantees to ensure a fair trial. It specifically urged states to ensure that that defendants who do not sufficiently understand the language used in court are fully informed of the charges against them and the relevant evidence, and that they had enough time to appeal their sentence and ask for

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<sup>153</sup> Implementation of safeguards guaranteeing protection of the rights of those facing the death penalty, ECOSOC Resolution 1989/64, available at: [https://www.unodc.org/documents/commissions/CCPCJ/Crime\\_Resolutions/1980-1989/1989/ECOSOC/Resolution\\_1989-64.pdf](https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/1980-1989/1989/ECOSOC/Resolution_1989-64.pdf) (last viewed on 3.08.2015).

<sup>154</sup> Safeguards guaranteeing protection of the rights of those facing the death penalty, ECOSOC Resolution 1996/15, at para 6, available at: <http://www.un.org/documents/ecosoc/res/1996/eres1996-15.htm> (last viewed on 3.08.2015).

clemency. It also asked states to ensure that officials involved in decisions to carry out an execution are fully informed of the status of appeals and petitions for clemency.

b. Reports by the Special Rapporteur on extrajudicial, summary or arbitrary executions

3.8.24 Where the imposition and execution of a death sentence does not follow norms of international law, it can be considered an extrajudicial execution by the state, and the Special Rapporteur on extrajudicial, summary or arbitrary executions ('SR on EJE's) has, over time, commented on several aspects of the capital punishment debate.

3.8.25 For example, in 2006, the SR on EJE released a report on transparency in the use of the death penalty.<sup>155</sup> In 2007, the SR on EJE's, in a survey of existing treaty obligations, jurisprudence, and statements by UN treaty bodies, said "*the death penalty can only be imposed in such a way that it complies with the stricture that it must be limited to the most serious crimes, in cases where it can be shown that there was an intention to kill which resulted in the loss of life.*"<sup>156</sup>

c. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

3.8.26 The Special Rapporteur on torture has specifically discussed whether capital punishment can be considered cruel, inhuman or degrading punishment. In his report on the issue, the Special Rapporteur noted the developments in jurisprudence by international bodies, which had found that corporal punishment often amounted to CIDT, because of its impact on human dignity. While the Special Rapporteur

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<sup>155</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Transparency and the Imposition of the Death Penalty, E/CN.4/2006/53/Add.3 24 March 2006, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/120/57/PDF/G0612057.pdf?OpenElement> (last viewed on 3.08.2015).

<sup>156</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/4/20, 29 January 2007, at para 53, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/105/00/PDF/G0710500.pdf?OpenElement> (last viewed on 3.08.2015).

did not go so far as to say that death penalty – probably the most extreme form of corporal punishment – always amounted to CIDT, he noted that the permissibility of the death penalty “*is increasingly being challenged by obvious inconsistencies deriving from the distinction between corporal and capital punishment and by the universal trend towards the abolition of capital punishment.*”<sup>157</sup>

3.8.27 The Special Rapporteur has also urged certain states to impose moratoriums on death sentences.<sup>158</sup>

### **(iii) Political commitments regarding the Death Penalty globally**

3.8.28 The trend towards abolition is also evident in a series of political commitments made at the UN, through resolutions at bodies such as the General Assembly and the UN Human Rights Council.

#### **a. General Assembly Resolutions**

3.8.29 Several resolutions of the UN General Assembly (UNGA) have called for a moratorium on the use of the death penalty. In 2007, the UNGA called on states to “*progressively restrict the use of the death penalty, reduce the number of offences for which it may be imposed*” and “*establish a moratorium on executions with a view to abolishing the death penalty.*”<sup>159</sup> In 2008, the GA reaffirmed this resolution,<sup>160</sup> which was

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<sup>157</sup> Para 47, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/10/44, 14 January 2009, at para 47, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/103/12/PDF/G0910312.pdf?OpenElement> (last viewed on 3.08.2015).

<sup>158</sup> See UNHCHR, *UN experts urge Pakistan not to execute juveniles*, 20 March 2015, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15729&LangID=E> (last viewed on 3.08.2015); and *US/Death penalty: UN experts call for federal moratorium as Boston bomber gets death sentence* 26 June 2015, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16160&LangID=E> (last viewed on 3.08.2015).

<sup>159</sup> Resolution adopted by the General Assembly “Moratorium on the use of the death penalty” A/RES/62/149, 26 February 2008.

<sup>160</sup> Resolution adopted by the General Assembly “Moratorium on the use of the death penalty” A/RES/63/168, 13 February 2009.

reinforced in subsequent resolutions in 2010,<sup>161</sup> 2012,<sup>162</sup> and 2014.<sup>163</sup> Many of these resolutions noted that, “*a moratorium on the use of the death penalty contributes to respect for human dignity and to the enhancement and progressive development of human rights.*”

3.8.30 These resolutions have been gaining increasing support from countries over time: 117 states voted in favour of the most recent resolution in 2014, as compared to 104 in 2007. India has not voted in favour of these resolutions

b. UN Human Rights Council

3.8.31 The UN Human Rights Council recently began a new enquiry on the death penalty, using the human rights of children of parents sentenced to the death penalty or executed as a starting point. In a 2013 resolution, the Human Rights Council acknowledged “*the negative impact of a parent’s death sentence and his or her execution on his or her children,*” urged “*States to provide those children with the protection and assistance they may require,*” and mandated a study on this specific issue.<sup>164</sup> It also called on states “*to provide those children or, where appropriate, giving due consideration to the best interests of the child, another member of the family, with access to their parents and to all relevant information about the situation of their parents.*”<sup>165</sup> A 2014 Human Rights Council resolution noted that “*States with different legal systems, traditions, cultures and religious backgrounds have abolished the death penalty or are applying a moratorium on its use*” and deplored the fact that “*the use of the death penalty leads to violations of the human rights of those facing the death*

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<sup>161</sup> Resolution adopted by the General Assembly “Moratorium on the use of the death penalty” A/RES/65/206, 28 March 2011.

<sup>162</sup> Resolution adopted by the General Assembly “Moratorium on the use of the death penalty” A/RES/67/176, 20 March 2013.

<sup>163</sup> Resolution adopted by the General Assembly “Moratorium on the use of the death penalty” A/RES/69/186, 4 February 2015.

<sup>164</sup> Human Rights Council, *Panel on the human rights of children of parents sentenced to the death penalty or executed*, 15 March 2013, A/HRC/22/L.18.

<sup>165</sup> Human Rights Council, *Panel on the human rights of children of parents sentenced to the death penalty or executed*, 15 March 2013, A/HRC/22/L.18.

*penalty and of other affected persons.”* The Human Rights Council urged states to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights.<sup>166</sup>

#### **(iv) Death penalty and the law of extradition**

3.8.32 The law of extradition has been another tool for countries pushing for the abolition of the death penalty.<sup>167</sup> Several abolitionist countries either require assurances that retentionist-extraditing countries not impose the death penalty, or have included such a clause in bilateral extradition treaties.<sup>168</sup> Abolitionist countries are often bound to ensure this. For example, Article 19(2) of the Charter of Fundamental Rights of the European Union states:

*No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.*

3.8.33 Several courts have made seminal pronouncements on the issue. For example, in the case of *Soering v. UK*,<sup>169</sup> the European Court of Human Rights held that the extradition of a person from the UK to Virginia, a state in USA which imposed the death penalty, would violate the European Convention of Human Rights because:

*The very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of*

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<sup>166</sup> Human Rights Council, *Question of the Death Penalty*, 25 June 2014, A/HRC/26/L.8/Rev.1.

<sup>167</sup> For example, abolitionist countries put pressure on those who retain the death penalty by refusing extradition requests for persons wanted for offences carrying the penalty. See ROGER HOOD, CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE*, at page 35, (5<sup>th</sup> ed. 2015).

<sup>168</sup> For example, China has signed extradition treaties with Spain, France and Australia, saying it will not impose the death penalty on individuals extradited from these countries. See ROGER HOOD, CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE*, at page 38, (5<sup>th</sup> ed. 2015).

<sup>169</sup> Application no. 14038/88, available at: <http://hudoc.echr.coe.int/eng?i=001-57619> (last viewed on 20.08.2015)

*the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the [US] would expose him to a real risk of treatment going beyond the threshold set by Article 3 [Prohibition of Torture].*

3.8.34 In the case of *US v. Burns*,<sup>170</sup> the Supreme Court of Canada held that in cases of extradition to a retentionist country, assurances “*that the death penalty would not be imposed, or, if imposed, would not be carried out*” were essential in all but “*exceptional*” cases. Similarly, in the case of *Mohamed and Another v. President of the Republic of South Africa*,<sup>171</sup> the South African constitutional court held that “*a ‘deportation’ or ‘extradition’ of Mohamed without first securing an assurance that he would not be sentenced to death or, if so sentenced, would not be executed would be unconstitutional,*” adding that such an extradition violated his “*right to life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment.*”

3.8.35 Similar jurisprudence can also be found in international law. In *Judge v. Canada*,<sup>172</sup> the UN Human Rights Committee, dealing with a man deported from Canada to the US, held that “*Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet ratified the Second Optional Protocol to the [ICCPR], violated the author's right to life under article 6, paragraph 1, by deporting him to the [US], where he is under sentence of death, without ensuring that the death penalty would not be carried out.*”<sup>173</sup>

3.8.36 India's Extradition Act, 1962, reflects this principle in Section 34C: “*Notwithstanding anything contained in any other law for the time being in force, where a fugitive criminal, who has committed an extradition offence punishable with death in India, is*

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<sup>170</sup> *US v. Burns*, [2001] 1 SCR 283.

<sup>171</sup> 2001 (3) SA 893 (CC).

<sup>172</sup> *Roger Judge v. Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003)

<sup>173</sup> *Roger Judge v. Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003), at para 10.6.

*surrendered or returned by a foreign State on the request of the Central Government and the laws of that foreign State do not provide for a death penalty for such an offence, such fugitive criminal shall be liable for punishment of imprisonment for life only for that offence.”*

## **B. International Trends on the Death Penalty**

3.9.1 The status and use of the death penalty today suggests an unmistakable trend towards abolition. When the UN was formed in 1945, only seven countries in the world had abolished the death penalty.<sup>174</sup> In contrast, as of 31 December 2014, 140 countries in the world had abolished the death penalty in law or practice.<sup>175</sup>

3.9.2 The UN Secretary General publishes a periodic report on the status of the death penalty globally; the latest of these reports surveyed the global situation between 2009 and 2013.<sup>176</sup> In this period, the number of fully abolitionist states increased by six, and almost all retentionist countries reported reductions in the number of executions and the number of crimes subject to the death penalty. Amongst retentionist countries, only 32 carried out judicial executions. This report confirmed “*the continuation of a very marked trend towards abolition and restriction of the use of capital punishment in most countries*”.<sup>177</sup>

3.9.3 The trend is also evident from the signatories to the ICCPR’s Second Optional Protocol, aiming at

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<sup>174</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/10/44, 14 January 2009, at para 31, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/103/12/PDF/G0910312.pdf?OpenElement> (last viewed on 5.08.2015).

<sup>175</sup> See Annex II, Amnesty International, Death Sentences and Executions in 2014, ACT 50/001/2015.

<sup>176</sup> *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, Report of the Secretary-General, E/2015/49, 13 April 2015, available at <http://www.ohchr.org/Documents/Issues/DeathPenalty/E-2015-49.pdf> (last viewed on 5.08.2015).

<sup>177</sup> *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, Report of the Secretary-General, E/2015/49, 13 April 2015, at para 26, available at <http://www.ohchr.org/Documents/Issues/DeathPenalty/E-2015-49.pdf> (last viewed on 5.08.2015).

abolishing the death penalty, to which 81 states have signed or acceded.

**(i) Regional Trends regarding the Death Penalty**

a. The Americas

3.9.4 The American Convention on Human Rights 1969 significantly restricts the application of the death penalty. Article 4 of this convention states that it can only be imposed for serious crimes following a fair trial, it cannot be inflicted for political offences or related common crimes, it cannot be re-established in states that have abolished it, and it cannot be imposed on persons under the age of 18, over 70 or pregnant women.

3.9.5 The Americas also have a specific convention abolishing the death penalty. Under Article 1 of the Protocol to the American Convention on Human Rights to Abolish the Death Penalty (ratified by 13 countries), *“The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.”*

3.9.6 Despite some still keeping it in law, most countries in the Americas have abolished the death penalty in law or practice.

3.9.7 For example, like many of its South American neighbours,<sup>178</sup> **Brazil** abolished the death penalty for ordinary crimes many decades ago, in 1882. The abolition only applies to the death penalty for ordinary crimes, and the death penalty for crimes in extraordinary times of war still remains. The Brazilian Constitution provides that there shall be no punishment by death, except in the case of war (Article 5.XLVII).<sup>179</sup> The same Article also provides that there shall be no life

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<sup>178</sup> These include Argentina, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Nicaragua, Paraguay, Venezuela, and Uruguay.

<sup>179</sup> An English version of the Brazilian Constitution, as amended in 2010, is available at:

[http://www.stf.jus.br/repositorio/cms/portalsfinternacional/portalsf sobrecorte\\_en\\_us/anexo/constituicao\\_ingles\\_3ed2010.pdf](http://www.stf.jus.br/repositorio/cms/portalsfinternacional/portalsf sobrecorte_en_us/anexo/constituicao_ingles_3ed2010.pdf) (last viewed on 10.08.2015).

imprisonment, making Brazil one of the few countries in the world where both capital punishment and life imprisonment do not exist. In the twentieth century, in the face of political instability and military rule, Brazil reintroduced the death penalty twice: in the years 1939-45 (for politically motivated crimes of violence) and 1969-79 (for political crimes against national security), but no death penalties were imposed on any person during these years.<sup>180</sup>

3.9.8 The **United States** is a notable exception in the Americas in terms of its approach to the death penalty. In 2014, the United States was the only country in its region to carry out executions. Even within the US, for a period of time following the case of *Furman v. Georgia*,<sup>181</sup> there was a *de facto* moratorium on the death penalty for about four years, between 1972 and 1976. While the death penalty has since been reinstated, court decisions have narrowed down its scope and introduced safe guards. For example, in *Roper v. Simmons*,<sup>182</sup> the Supreme Court held it was unconstitutional to impose the death penalty for crimes committed when the individual was below 18 years of age. Further, in *Atkins v. Virginia*,<sup>183</sup> the Supreme Court held that executing persons with intellectual disabilities amounted to cruel and unusual punishment, and was thus unconstitutional. An increasing number of states in the US have been officially or un-officially imposing moratoriums. Nineteen states in the US have abolished it, the most recent among them have been Connecticut in 2012, Maryland in 2013, and Nebraska in 2015.<sup>184</sup> In 2014, 35 people were executed in the US, which was the lowest number since 1995.

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<sup>180</sup> ROGER HOOD, CAROLYN HOYLE, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE, at page 70-71, (5<sup>th</sup> ed. 2015).

<sup>181</sup> *Furman v. Georgia*, 408 U.S. 238.

<sup>182</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>183</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>184</sup> Based on data from the Death Penalty Information Center, available at: <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last viewed on 20.08.2015).

## b. Europe

3.9.9 All European countries, with the exception of Belarus, have either formally abolished the death penalty or maintain moratoriums.<sup>185</sup>

3.9.10 The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (‘the European Convention’) originally stated, “*No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*”<sup>186</sup> In 1983, Protocol No. 6 to the European Convention concerning the abolition of the death penalty said, “*The death penalty shall be abolished. No-one shall be condemned to such penalty or executed*”, except “*in respect of acts committed in time of war or of imminent threat of war.*”<sup>187</sup> Finally, in 2002, Protocol No. 13 to the European Convention abolished the death penalty in *all* circumstances. 44 countries have acceded to this protocol, including all member states of the European Union.

3.9.11 The European Court of Human Rights (‘ECHR’) has evolved rich jurisprudence for countries that have not yet ratified the two optional protocols. On many occasions, the court has held that extradition to a country that had the death penalty could violate the right to life and prohibition against torture.<sup>188</sup> In 2010, the ECHR noted the high number of signatories of the European Convention who had abolished the death penalty. It said “*These figures, together with consistent State practice in observing the moratorium on capital*

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<sup>185</sup> Amnesty International, Death Sentences and Executions in 2014, ACT 50/001/2015, at page 41.

<sup>186</sup> Article 2(1), Convention for the Protection of Human Rights and Fundamental Freedoms, available at: <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (last viewed on 20.08.2015).

<sup>187</sup> Articles 1 and 2, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, available at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/114.htm> (last viewed on 20.08.2015).

<sup>188</sup> Bader and Kanbor v. Sweden, Application No. 13284/04; Jabari v. Turkey, Application No. 40035/98.

*punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances.” It held that “the words ‘inhuman or degrading treatment or punishment’ in Article 3 could include the death penalty.”*<sup>189</sup>

3.9.12 Like the rest of Europe, **France** abolished the death penalty despite public opinion to the contrary. The death penalty in France was abolished on 9 October 1981, after a vote in the National Assembly decided in favour of abolition.<sup>190</sup> It marked the end of two centuries of debate in the National Assembly on the issue, the first motion having been presented as far back as in 1791.<sup>191</sup> The abolition was incorporated into the French Constitution in 2007, Article 66-1 of which reads that “*no one shall be sentenced to death*”.<sup>192</sup> Public opinion supported the death penalty for many years after it was abolished (a 2006 poll showed that 52% of the population were against it).<sup>193</sup> Robert Badinter, the minister for Justice in France in 1981, who led the legislative amendment, has suggested that “*it usually takes about 10 to 15 years following abolition for the public to stop thinking of it as useful and to realise that it makes no difference to the level of homicide*”, which prediction has found support in many countries.<sup>194</sup>

3.9.13 The history of capital punishment in the **United Kingdom** is also relevant to the Indian context. The abolitionist-leaning Labour government that was elected in post-war Britain considered the issue of capital punishment at least six times before setting it

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<sup>189</sup> Al-Saadoon and Mufdhi v the United Kingdom, 61498/08 [2010] ECHR 282, at para 120.

<sup>190</sup> France and Death Penalty, Abolition in France, available at <http://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/death-penalty/france-and-death-penalty/> (last viewed on 20.08.2015).

<sup>191</sup> Law of 9th October 1981: Abolition of the Death Penalty in France, available at <http://www.france.fr/en/institutions-and-values/law-9th-october-1981-abolition-death-penalty-france.html> (last viewed on 20.08.2015).

<sup>192</sup> France and Death Penalty, Abolition in France, available at <http://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/death-penalty/france-and-death-penalty/> (last viewed on 20.08.2015).

<sup>193</sup> EVAN J. MANDERY, CAPITAL PUNISHMENT: A BALANCED EXAMINATION, at page 640 (1<sup>st</sup> ed. 2005).

<sup>194</sup> ROGER HOOD, CAROLYN HOYLE, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE, at page 464, (5<sup>th</sup> ed. 2015).

aside when tabling its Criminal Justice Bill in 1947, deciding that abolishing the death penalty was not its key priority; and by the 1950s, however, a series of poorly handled cases and executions had led to the creation of a strong public movement in favour of abolition.<sup>195</sup> The last execution in the United Kingdom took place in 1964.<sup>196</sup> In 1965, the House of Commons in Great Britain voted to impose a moratorium on and suspend the death penalty for murder for a period of 5 years by law.<sup>197</sup>

3.9.14 The death penalty for murder was formally abolished in 1969, when the UK Parliament decided that the 1965 Act should not expire,<sup>198</sup> despite recent opinion polls showing that about 80% of the population was in favour of retaining the penalty.<sup>199</sup> (Northern Ireland passed a similar law in 1973.<sup>200</sup>) After the death penalty for murder was abolished, the House of Commons held a vote during each parliament (until 1997) to restore the penalty, but the motion was never passed.<sup>201</sup> The death penalty was finally removed for all crimes in the UK only in 1999, further to the UK's ratifications of and obligations under the European Convention on Human Rights and the Second Optional Protocol to the ICCPR.<sup>202</sup>

3.9.15 Despite the penalty no longer being a part of UK law, the UK Privy Council has discussed the death penalty in various decisions pertaining to cases in the

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<sup>195</sup> ROGER HOOD, CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE*, at page 51-56, (5<sup>th</sup> ed. 2015).

<sup>196</sup> British Military & Criminal History: 1900 to 1999, Last executions in the UK, available at [http://www.stephen-stratford.co.uk/last\\_ones.htm](http://www.stephen-stratford.co.uk/last_ones.htm) (last viewed on 20.08.2015).

<sup>197</sup> See section 4 of the Murder (Abolition of Death Penalty) Act 1965, as originally enacted, available at [http://www.legislation.gov.uk/ukpga/1965/71/pdfs/ukpga\\_19650071\\_en.pdf](http://www.legislation.gov.uk/ukpga/1965/71/pdfs/ukpga_19650071_en.pdf) (last viewed on 20.08.2015).

<sup>198</sup> Murder (Abolition of Death Penalty) Act 1965, as amended, available at <http://www.legislation.gov.uk/ukpga/1965/71> (last viewed on 20.08.2015).

<sup>199</sup> ROGER HOOD, CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE*, at page 55, (5<sup>th</sup> ed. 2015).

<sup>200</sup> Section 1, Northern Ireland (Emergency Provisions) Act 1973, available at <http://www.legislation.gov.uk/ukpga/1973/53/section/1> (last viewed on 20.08.2015).

<sup>201</sup> Charles Hanson, *The death penalty issue*, TIME, 1 September, 2011, available at: <http://insidetime.org/the-death-penalty-issue/> (last viewed on 20.08.2015).

<sup>202</sup> ROGER HOOD, CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE*, at page 56, (5<sup>th</sup> ed. 2015)

Caribbean countries, where the death penalty remains standing. The most notable of these was the 1993 case of *Pratt & Morgan v. The Attorney-General for Jamaica*.<sup>203</sup> In this case, the UK Privy Council held that that it was unconstitutional in Jamaica to execute a prisoner who had been on death row for 14 years. According to the Privy Council, the Jamaican Constitution prohibits “*inhuman or degrading punishment*”, as a result of which excessive delays cannot occur between sentencing and execution of the punishment. Specifically, it held that a delay of more than five years between sentencing and execution was *prima facie* evidence of inhuman or degrading punishment. In cases of such excessive delay, it said that the death sentence should be commuted to life imprisonment.

3.9.16 The *Pratt & Morgan* case had a “*ripple effect*”<sup>204</sup> on similar cases from other Caribbean countries, where the sentence for convicts on death row was commuted to life imprisonment. This has led to a separate and long-enduring debate about the appellate powers of the Privy Council on countries other than the UK.<sup>205</sup>

c. Africa

3.9.17 As of October 2014, 17 African countries had formally abolished the death penalty, and 25 others had not conducted an execution in over ten years.<sup>206</sup> Countries continuing to impose the death penalty include Egypt, Equatorial Guinea, Sudan, and Somalia. Several African countries (e.g., Angola, Namibia) have abolished the death penalty through the Constitution,

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<sup>203</sup> [1993] UKPC 1, Privy Council Appeal No. 10 of 1993, available at: <http://www.bailii.org/uk/cases/UKPC/1993/1.html> (last viewed on 20.08.2015). .

<sup>204</sup> Therese Mills (2005), *Letter: Colonial power over death penalty*, BBC, 19 January, 2005, available at: <http://news.bbc.co.uk/2/hi/americas/4185745.stm> (last viewed on 20.08.2015). .

<sup>205</sup> See, for example, Owen Bowcott and Maya Wolfe-Robinson, *British court to rule on death sentences for two Trinidad murderers*, The Guardian, 4 February, 2014, available at <http://www.theguardian.com/law/2015/feb/04/british-court-to-rule-on-death-sentences-for-two-trinidad-murderers> (last viewed on 20.08.2015). .

<sup>206</sup> Statement by the Chairperson of the Working Group on Death penalty of the African Commission on Human and Peoples’ Rights on World Day against the Death Penalty, available at: <http://www.achpr.org/press/2014/10/d227/> (last viewed on 20.08.2015). .

while in others, notably South Africa, the courts have taken the lead.

3.9.18 Article 5(3) of the African Charter on the Rights and Welfare of the Child states, “*Death sentence shall not be pronounced for crimes committed by children*”. In 2008, in its ‘Resolution calling on State Parties to observe the moratorium on the death penalty’, the African Commission on Human and Peoples’ Rights urged “*State Parties that still retain the death penalty to observe a moratorium on the execution of death sentences with a view to abolishing the death penalty.*”<sup>207</sup> The 2014 Declaration of the Continental Conference on the Abolition of the Death Penalty in Africa recognized the trend towards abolition,<sup>208</sup> and asked countries to support the Additional Protocol to the African Charter on Human and Peoples’ Rights on the Abolition of the Death Penalty in Africa.

3.9.19 For example, **Kenya** retains the death penalty for multiple offences, including murder, armed robbery and treason. The last known execution in Kenya, however, took place in 1987, and the country is regarded as abolitionist de facto. In the case of *Mutiso v. Republic* (2010), the Court of Appeal at Mombasa struck down the mandatory death penalty for murder, holding that the penalty was in violation of the right to life, and amounts to inhuman treatment; and that keeping a person on death row for more than three years would be unconstitutional. It also suggested that its reasoning would apply to other offences having a mandatory death sentence.<sup>209</sup> However, in the case of *Joseph Njuguna Mwaura v Republic* (2013), the Court of Appeal at Nairobi upheld the death penalty for armed robbery. It

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<sup>207</sup> Resolution calling on State Parties to observe the moratorium on the death penalty, ACHPR/Res.136(XXXVIII).08, available at [http://old.achpr.org/english/resolutions/resolution136\\_en.htm](http://old.achpr.org/english/resolutions/resolution136_en.htm) (last viewed on 20.08.2015).

<sup>208</sup> Para 4, for example, states: “*Deeply appreciates the growing number of African States that have abolished the Death Penalty*”; Declaration of the Continental Conference on the Abolition of the Death Penalty in Africa, available at <http://www.achpr.org/news/2014/07/d150> (last viewed on 20.08.2015).

<sup>209</sup> See The Death Penalty Project, Kenya, available at: <http://www.deathpenaltyproject.org/where-we-operate/africa/kenya/> (last viewed on 20.08.2015).

said that the legislature had to decide whether the mandatory death penalty should be retained or not. The conflict between these two decisions is expected to be resolved by the Supreme Court.<sup>210</sup>

3.9.20 In **South Africa**, the death penalty was abolished through a decision of the Constitutional Court, shortly after the end of the apartheid regime.<sup>211</sup> In an early ruling in 1995, in *State v. Makwanyane*,<sup>212</sup>, the South African Constitutional Court held that the death penalty was unconstitutional. In doing so, the Court said:

*The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.*

And that:

*Retribution cannot be accorded the same weight under our Constitution as the rights to life and dignity, which are the most important of all the rights in Chapter Three. It has not been shown that the death sentence would be materially more effective to deter or prevent murder than the alternative sentence of life imprisonment would be. Taking these factors*

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<sup>210</sup> See Death Penalty Worldwide, Kenya, available at: <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Kenya> (last viewed on 20.08.2015).

<sup>211</sup> See Howard French, *South Africa's Supreme Court Abolishes Death Penalty*, The New York Times, 7 June, 1995, available at: <http://www.nytimes.com/1995/06/07/world/south-africa-s-supreme-court-abolishes-death-penalty.html> (last viewed on 20.08.2015).

<sup>212</sup> 1995 (6) BCLR 665.

*into account, as well as the elements of arbitrariness and the possibility of error in enforcing the death penalty, the clear and convincing case that is required to justify the death sentence as a penalty for murder, has not been made out.*

3.9.21 At the time of this decision, public opinion in South Africa on the death penalty was very divided, with a lot of support for retaining death penalty. Crime was a huge problem, and during the apartheid regime, there had been extensive use of the death penalty.<sup>213</sup> The last execution was just four years before its abolition. In 1997, the South African Parliament reaffirmed the Court's decision through law.<sup>214</sup>

3.9.22 In **Nigeria**, the death penalty is mainly a state issue, as the country has a federal system, where criminal laws vary across its 36 states. Each state specifies crimes and punishments within its territory, and have laws based on both Shariah and common law systems. A mandatory death penalty is prescribed for a wide range of offences in various Nigerian states.<sup>215</sup>

3.9.23 In 2012, the High Court of Lagos State declared that the mandatory death penalty was unconstitutional in *James Ajulu & Others v. Attorney General of Lagos*.<sup>216</sup> The Court held that "*the prescription of mandatory death penalty for offences such as armed robbery and murder contravenes the right of the applicants to dignity of human person and their right not to be subjected to inhuman or degrading punishment under S.34 of the constitution of the Federal Republic of Nigeria, 1999.*"<sup>217</sup> As a result of this ruling,

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<sup>213</sup> ROGER HOOD, CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE*, at page 89 (5<sup>th</sup> ed. 2015).

<sup>214</sup> Roger Hood and Carolyn Hoyle, *Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic"*, *Crime and Justice*, Vol. 38, No. 1 (2009) at page 1-63.

<sup>215</sup> Country profile: Nigeria, as of 19 June 2014, available at: <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Nigeria> (last viewed on 20.08.2015).

<sup>216</sup> Suit No. ID/76M/2008, October 2012.

<sup>217</sup> Question of the death penalty, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Human Rights Council, Twenty-fourth session, UN General Assembly, A/HRC/24/18, 1 July 2013.

the mandatory imposition of the death penalty is now prohibited in the state of Lagos, and the death penalty is now the maximum, but not the only, penalty possible. This holding is only enforceable in the state of Lagos.

3.9.24 Four prisoners were executed in 2013 in Nigeria, which had otherwise not carried out an execution since 2006.<sup>218</sup> As of September 2013, the number of death row inmates stood at 1,233, with many prisoners having remained on death row for over 10 years (according to a report by a UN Special Rapporteur, the average in 2006 was already 20 years).<sup>219</sup>

d. Asia and the Pacific

3.9.25 About 40% of the countries in the Asia-Pacific are retentionists, and maintain and use the death penalty. China, Iran, Iraq and Saudi Arabia remain amongst the highest executors globally, and the past few years have also seen Pakistan and Indonesia breaking their *de facto* moratoriums to return to executions.

3.9.26 A 2015 OHCHR publication analyzing trends in the death penalty in Southeast Asia, found that “*The Global movement towards abolition of the death penalty has also been reflected in South-East Asia*”.<sup>220</sup> At the time of the report, Brunei Darussalam, Indonesia, Laos, Malaysia, Myanmar, Singapore, Thailand and Viet Nam had not abolished the death penalty, while Cambodia, Timor-Leste and the Philippines had done so.

3.9.27 **Indonesia**, for example, is a retentionist country that uses the death penalty for several crimes,

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<sup>218</sup> Country profile: Nigeria, as of 19 June 2014, available at: <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Nigeria> (last viewed on 20.08.2015).

<sup>219</sup> ROGER HOOD, CAROLYN HOYLE, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE, at page 204 (5<sup>th</sup> ed. 2015).

<sup>220</sup> Office of the High Commissioner for Human Rights Regional Office for South-East Asia “*Moving Away from the Death Penalty: Lessons in South-East Asia*”, at page 19, available at: <http://bangkok.ohchr.org/files/Moving%20away%20from%20the%20Death%20Penalty-English%20for%20Website.pdf> (last viewed on 20.08.2015).

including drug-related offences. Earlier in 2015, Indonesia executed eight people by firing squad, including foreign nationals, for drug-related offences. Indonesian president Joko Widodo has defended the death penalty, saying “*We want to send a strong message to drug smugglers that Indonesia is firm and serious in tackling the drug problem, and one of the consequences is execution if the court sentences them to death*”<sup>221</sup> Indonesia had a brief unofficial moratorium on executions between 2008 and 2012, but has since resumed executions.<sup>222</sup>

3.9.28 **China** is one of the largest executing countries in the world. There is very limited information of even how many executions take place in China, as they are all carried out in secret. However, estimates suggest that 90% of the world’s executions occur in Asia, and most of them occur in China,<sup>223</sup> and that China executes more people than all other countries combined.<sup>224</sup> In 2010, 68 crimes were punishable by the death penalty in China. A 2011 amendment reduced this number to 55. Hong Kong and Macau, both Special Administrative Regions of China, have abolished the death penalty. Similarly, **Japan** also retains the death penalty,<sup>225</sup> and conducts executions in secret. Families are usually notified after it has taken place.<sup>226</sup>

3.9.29 The **Philippines** was one of the first countries in Asia to abolish capital punishment. Its 1987

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<sup>221</sup> Talk to Al Jazeera, *Joko Widodo: “A strong message to drug smugglers”*, Al Jazeera, 7 Mar, 2015, available at <http://www.aljazeera.com/programmes/talktojazeera/2015/03/joko-widodo-strong-message-drug-smugglers-150305131413414.html> (last viewed on 20.08.2015).

<sup>222</sup> ROGER HOOD, CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE*, at page 104 (5<sup>th</sup> ed. 2015).

<sup>223</sup> ROGER HOOD, CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE*, at page 98 (5<sup>th</sup> ed. 2015).

<sup>224</sup> Congressional-Executive Commission on China, *Chinese Government Considers Reducing Number of Crimes Punishable by Death*, February 23, 2011, available at <http://www.cecc.gov/publications/commission-analysis/chinese-government-considers-reducing-number-of-crimes-punishable> (last viewed on 20.08.2015).

<sup>225</sup> <http://www.economist.com/blogs/banyan/2014/09/death-penalty-japan> (last viewed on 20.08.2015).

<sup>226</sup> Amnesty International, *Japan: Authorities Deceiving the Public by Resuming Executions*, 25 June, 2015, available at <https://www.amnesty.org/en/latest/news/2015/06/japan-authorities-deceiving-the-public-by-resuming-executions/> (last viewed on 20.08.2015).

Constitution, promulgated after President Marcos was overthrown,<sup>227</sup> stated:

*Article III, Section 19(1): Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua [emphasis supplied].*<sup>228</sup>

3.9.30 By 1994, the mood in some quarters of the nation had changed, and Republic Act No. 7659, also called ‘An Act to Impose the Death Penalty on Certain Heinous Crimes’, was passed. The preamble of this law said that *“the Congress, in the justice, public order and the rule of law, and the need to rationalize and harmonize the penal sanctions for heinous crimes, finds compelling reasons to impose the death penalty for said crimes.”*<sup>229</sup> This act reintroduced the death penalty for a range of offences including for murder, treason, and certain forms of rape. Death sentences were imposed, and executions were resumed.

3.9.31 The Philippines saw intense public debate on the death penalty in this period. In 2000 President Estrada announced a moratorium on executions, which President Arroyo continued.<sup>230</sup> In April 2006, President Arroyo decided to commute all death sentences and block executions.<sup>231</sup> Later that year, a Bill abolishing the

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<sup>227</sup> ROGER HOOD, CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE*, at page 100 (5<sup>th</sup> ed. 2015).

<sup>228</sup> The Constitution of the Republic of the Philippines, available at: <http://www.gov.ph/constitutions/1987-constitution/>

<sup>229</sup> A copy of the act is available here: [http://www.lawphil.net/statutes/repacts/ra1993/ra\\_7659\\_1993.html](http://www.lawphil.net/statutes/repacts/ra1993/ra_7659_1993.html) (last viewed on 20.08.2015).

<sup>230</sup> See Amnesty International, *Philippines abolish death penalty*, 7 July, 2006, available at: <http://www.amnesty.org.au/news/comments/2412/> (last viewed on 20.08.2015).

<sup>231</sup> ROGER HOOD, CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE*, at page 101 (5<sup>th</sup> ed. 2015).

death penalty completely was passed.<sup>232</sup> In 2007, the Philippines ratified the Second Optional Protocol to the ICCPR.

3.9.32 **Saudi Arabia** also retains the death penalty, using it against foreign nationals and persons convicted for offences that do not meet the international law threshold of “*most serious crimes*”. Recently there has been an increase in the rate and number of executions, with over 102 persons being executed in 2015 alone.<sup>233</sup>

3.9.33 Since its formation in 1948, **Israel** has been abolitionist for ordinary crimes. The death penalty has only been imposed and implemented once, in 1962, when Adolph Eichmann was executed. Currently, the following crimes can carry a death sentence: genocide; murder of persecuted persons committed during the Nazi regime; acts of treason under the military law and under the penal law committed in time of hostilities and the illegal use and carrying of arms. Further, Israeli law requires that the death penalty can only be imposed with judicial consensus, not judicial majority. In 2015, there were attempts to introduce a Bill that would make it easier to impose the death penalty on terrorists, by requiring only a majority and not consensus amongst judges in such cases. The Bill was rejected in its first reading.<sup>234</sup>

### 1. South Asia

3.9.34 In South Asia, India, Pakistan, and Bangladesh retain the death penalty. In December 2014, Pakistan lifted its moratorium on executions, in response to a terrorist attack on a school in Peshawar.

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<sup>232</sup> See Sarah Toms, *Philippines stops death penalty*, BBC News, 24 June, 2006, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/5112696.stm> (last viewed on 20.08.2015).

<sup>233</sup> BBC News: Middle East, *Saudi Arabia executes 175 people in a year – Amnesty*, available at <http://www.bbc.co.uk/news/world-middle-east-34050853> (last viewed on 20.08.2015); Adam Withnall, *Saudi Arabia executes 'a person every two days' as rate of beheadings soars under King Salman*, The Independent, 28 August, 2015, available at <http://www.independent.co.uk/news/world/middle-east/saudi-arabia-executions-amnesty-international-beheadings-death-sentences-rate-under-king-salman-10470456.html> (last viewed on 20.08.2015)

<sup>234</sup> See The Times of Israel, “Knesset rejects bill on death penalty for terrorists”, 15 July 2015, available at: <http://www.timesofisrael.com/knesset-rejects-bill-on-death-penalty-for-terrorists/> (last viewed on 20.08.2015).

Since then, around 200 people have been executed, and around 8000 people on death row remain at risk of execution.<sup>235</sup>

3.9.35 Maldives and Sri Lanka maintain the penalty in law, but are abolitionist in practice. The last Sri Lankan execution was in 1976; and in the Maldives in the 1950s. Capital punishment was introduced in **Sri Lanka** during colonial times. Sri Lanka still retains it in law, and sentences people to death. Death row is a controversial phenomenon in Sri Lanka. In 2014 alone, Sri Lankan courts sentenced over 61 people to death, including juveniles.<sup>236</sup> Sri Lanka also retains the death penalty for drug-related crimes, which do not meet the threshold of “*most serious crimes*” in international law. But Sri Lanka has not carried out an execution since 1976, and is considered abolitionist in practice. Death sentences are converted to terms of imprisonment. It is noteworthy that Sri Lanka’s moratorium has remained in place despite insurgency and civil war between the 1980s and late 2000s.

3.9.36 Bhutan and Nepal have abolished the death penalty. Bhutan abolished it in 2004, and it is also prohibited in its 2008 Constitution. The last execution in **Nepal** was in 1979. Nepal officially abolished the death penalty in 1990, with its government saying “*the punishment was considered inconsistent with its new multi-party political system.*”<sup>237</sup> Since then, Nepal has seen a 10 year-long civil war, lasting from 1996 to 2006. Both sides of the civil war committing a range of human rights abuses, and accountability remains a central concern in Nepal today.

3.9.37 This violence and conflict ended with the signing of the 2006 Comprehensive Peace Accord between the Government of Nepal and the Communist Party of Nepal (Maoist). Despite the scale of the violence

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<sup>235</sup> See BBC News: Asia, Pakistan executes Shafqat Hussain despite appeals, BBC News, 4 August, 2015, available at <http://www.bbc.com/news/world-asia-33767835> (last viewed on 20.08.2015).

<sup>236</sup> Amnesty International, Death Sentences and Executions in 2014, ACT 50/001/2015

<sup>237</sup> LA Times, “Nepal’s New Leaders Abolish Death Penalty”, 10 July 1990, available at: [http://articles.latimes.com/1990-07-30/news/mn-790\\_1\\_death-sentence](http://articles.latimes.com/1990-07-30/news/mn-790_1_death-sentence)

and atrocities, clause 7.2.1 of the Accord clearly said that, “Both sides respect and protect the fundamental right to life of any individual. No individual shall be deprived of this fundamental right and no law that provides capital punishment shall be enacted.”<sup>238</sup> Article 12 of Nepal’s Interim Constitution, which came into force after the Comprehensive Peace Accord was signed, states:<sup>239</sup>

*Every person shall have the right to live with dignity, and no law shall be made which provides for capital punishment.*

3.9.38 The prohibition against capital punishment has also been retained in Nepal’s current draft constitution, which is being debated in the Constituent Assembly.

### **C. Conclusion**

3.10.1 One hundred and forty countries today have abolished the death penalty in law or practice. This trend towards abolition is evident in the developments in international law, which have limited the scope of the death penalty by restricting the nature of crimes for which it can be implemented, limiting the manner in which it can be carried out, and introducing procedural safe guards. Recent political commitments on the international stage, such as growing support for the UN General Assembly resolutions on a moratorium on executions, reaffirm this trend.

3.10.2 This chapter demonstrates that there is no evidence of a link between fighting insurgency, terror or violent crime, and the need for the death penalty. Several countries have abolished the death penalty, or maintained moratoriums on executions, despite facing

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<sup>238</sup> Unofficial Translation of the Comprehensive Peace Agreement concluded between the Government of Nepal and the Communist Party of Nepal (Maoist), 21 November 2006, available at: [http://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/nepal\\_cpa\\_20061121\\_en.pdf](http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/nepal_cpa_20061121_en.pdf) (last viewed on 20.08.2015).

<sup>239</sup> See Interim Constitution of Nepal, 2007, available at [http://www.worldstatesmen.org/Nepal\\_Interim\\_Constitution2007.pdf](http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf) (last viewed on 20.08.2015).

civil wars, threats of insurgency or terrorist attacks. For example, Nepal officially abolished the death penalty in 1990 and did not re-introduce it even in the aftermath of the civil war; Sri Lanka, despite a long civil war, has maintained a moratorium on the penalty; and Israel has only executed once since its formation. Most European countries remain abolitionist despite facing terrorism within their national boundaries, e.g., the UK, France, and Spain. In fact, it is relevant to note that the UK abolished the death penalty at a time when the Irish Republican Army, a revolutionary military organisation, was particularly active in the country. The same can be seen for fighting crime. The Philippines faces a severe problem of drug trafficking, but has abolished the death penalty. South Africa abolished the death penalty at a time when crime rates in the country were very high.

3.10.3 A country's decision to abolish or retain the death penalty is not necessarily linked to its socio-economic or development profile; rather, political will and leadership are key. Several developing countries do not use the death penalty. Nepal, Rwanda, Senegal, Solomon Islands, Djibouti, Togo, Haiti, and Guinea-Bissau are all examples of countries ranked under "*Low Human Development*" in the UNDP Human Development Index (that is, considered less developed than India), which have abolished the death penalty.<sup>240</sup>

3.10.4 State practice regarding the death penalty also demonstrates that the road to abolition is not always a function of public opinion. Political leadership has been key to this process. Many states have abolished the death penalty at a time when public opinion may not have necessarily supported this position. Indeed, public opinion in many countries has only gradually reversed over time, changing with subsequent generations, suggesting that it takes time for populations to stop thinking of the penalty as "*useful*," or realise that it has no linkages with levels of homicide. For example, in France, public opinion

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<sup>240</sup> See Human Development Index and its components, available at: <http://hdr.undp.org/en/content/table-1-human-development-index-and-its-components> (last viewed on 20.08.2015).

continued to support the death penalty for several years after it was abolished, and it was about two decades after the abolition of the law that opinion began to change. Similarly, in South Africa, a Constitutional Court decision found the death penalty to be unconstitutional at a time when the public supported it, and the decision of the Court was supported by the legislature. The passage of time has proven these to be wise courses of action. These countries remain abolitionist even today, and have not felt the need to doubt or question their decisions. They have relied on different methods to control crime and sanction individuals. In the UK and France, the political parties who abolished the death penalty in the face of contrary public opinion were in fact re-elected.<sup>241</sup>

3.10.5 The situation today can be contrasted with the global status of the death penalty in 1979 - 1980, at the time of the Supreme Court's decision in *Bachan Singh*. The Court had noted that only 18 states had abolished the death penalty for all offences, and 8 more had only retained it for "*specific offences committed in time of war.*" The Court cited Saudi Arabia, the United States, Israel, China, Argentina, Belgium, France, Japan, Greece, Turkey, Malaysia, Singapore and the USSR (Russia) as examples.<sup>242</sup> Several of these countries are abolitionist in law or practice today, including Belgium, France, Greece, and Turkey. Others only retain it for exceptional crimes, such as Argentina and Israel.

3.10.6 There is a clear trend towards abolition in international law and state practice across the globe. International legal norms have evolved to restrict the lawful use of capital punishment in a very narrow variety of cases, and a very limited manner. India

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<sup>241</sup> In their article, Hood and Hoyle refer to a study on death penalty and public opinion, which found that each year of abolition "*lowered the odds that an individual would support the death penalty by 46 per cent*", indicating that abolition led by strong political leadership could itself lead to a change in public opinion. Hoyle and Hood, *Deterrence and Public Opinion*, in *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (United Nations, 2014), available at <http://www.ohchr.org/Lists/MeetingsNY/Attachments/52/Moving-Away-from-the-Death-Penalty.pdf> (last viewed on 20.08.2015).

<sup>242</sup> *Bachan Singh vs State of Punjab*, (1982) 3 SCC 24 at para 128 and 129.

continues to sentence individuals to death and execute them, and has also opposed all five General Assembly resolutions on a moratorium. In doing so, India keeps company with a minority of countries who retain the death penalty, and an even smaller number who actually carry out executions, a list that includes China, Iran, Iraq and Saudi Arabia.

## CHAPTER IV

### **PENOLOGICAL JUSTIFICATIONS FOR THE DEATH PENALTY**

#### **A. Scope of Consideration**

4.1.1 The Supreme Court of India in *Shankar Kisanrao Khade v. State of Maharashtra*,<sup>243</sup> ('Khade') ruled that "[i]t is imperative...that courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed."<sup>244</sup> In this context, the Court asked the Law Commission to "resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal."<sup>245</sup> In this Chapter, the Report examines whether there are any penological purposes for imposing the death penalty. The report analyses the theories of deterrence, incapacitation and retribution. Proportionality and rehabilitation as theories of punishment are also briefly examined, since these theories have been used by the Supreme Court in its death penalty adjudication.

4.1.2 At this juncture, it is incumbent on this Commission to emphasize that the abolition of the death penalty does not entail the *release* of the offender into society without any punishment whatsoever. It must also be noted that the alternative to the death penalty is life imprisonment, and this is often missed in debates surrounding the death penalty.<sup>246</sup> What must be shown to merit the retention of the death penalty, is that the *marginal* benefits offered by the death penalty i.e. benefits not offered by life imprisonment, are high enough to merit the taking of a life.<sup>247</sup> This principle was

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<sup>243</sup> (2013) 5 SCC 546.

<sup>244</sup> *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546, at para 148.

<sup>245</sup> (2013) 5 SCC 546, at page 614.

<sup>246</sup> See H.A. Bedau, *Deterrence and the Death Penalty: A Reconsideration*, 61 *Journal of Criminal Law, Criminology, and Police Science* 539, 542 (1970); Richard Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 *Michigan Law Review* 1177, 1192 (1981).

<sup>247</sup> See H.A. Bedau, *Deterrence and the Death Penalty: A Reconsideration*, 61 *Journal of Criminal Law, Criminology, and Police Science* 539, 542 (1970); Richard Lempert,

laid down by the Supreme Court in *Santosh Kumar Bariyar v. State of Maharashtra*,<sup>248</sup> (*Bariyar*) where the Court stated:

*During the sentencing process, the sentencing court or the appellate court for that matter, has to reach to a finding of a rational and objective connection between capital punishment and the purpose for which it is prescribed. In sentencing terms ‘special reasons’ as envisaged under Section 354(3) Code of Criminal Procedure have to satisfy the comparative utility which capital sentence would serve over life imprisonment in the particular case. The question whether the punishment granted impairs the right to life under Article 21 as little as possible.*<sup>249</sup>

## **B. Approach of the 35<sup>th</sup> Report of Law Commission**

4.2.1 In recommending that the death penalty be retained, the 35<sup>th</sup> Report of the Law Commission opined that the following purposes were served by the death penalty:

- (a) Deterrence- The 35<sup>th</sup> Report stated that deterrence is the most important object not only of capital punishment, but of punishment in general.<sup>250</sup>
- (b) Retribution- Retribution was also seen as an important justification for capital punishment by the 35<sup>th</sup> Report. It was stated that retribution should not be understood as an “eye for an eye,” but in its refined form as public denunciation of crime.<sup>251</sup>
- (c) Incapacitation- The 35<sup>th</sup> Report stated that there are a category of individuals who are “*cruel and wicked*,” and are not capable of reform. Citing Sir James Fitzjames Stephen, the Report said that

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*Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 Michigan Law Review 1177, 1192 (1981).

<sup>248</sup> (2009) 6 SCC 498.

<sup>249</sup> *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 145.

<sup>250</sup> *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498.

<sup>251</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, Ministry of Law, Government of India, at para 297.

“[t]o allow such persons to live would be like leaving wolves alive in a civilized country.”<sup>252</sup> It further stated that if there is a danger that such a person might reoffend, it might be reasonable to terminate his life.<sup>253</sup>

4.2.2 A major reason stated in the 35<sup>th</sup> Report for the retention of capital punishment was the unique condition of India, and that in light of circumstances of society *then* prevalent, it would not be prudent to abolish the death penalty.<sup>254</sup>

4.2.3 Each of the justifications stated by the 35<sup>th</sup> Report are dealt with in detail below.

### **C. Deterrence**

4.3.1 Deterrence aims to prevent individuals from offending by using the fear or threat of punishment.<sup>255</sup> The assumption behind deterrence theory is that all persons are rational individuals, and will commit a crime only if they perceive that the gain they will derive from the criminal act will be greater than the pain they will suffer from its penal consequences.<sup>256</sup> The belief is that the operation of deterrence is strengthened when the punishment is made as severe as death itself; no person in his/her right mind would commit an act which may result in the loss of one's life, the instinct of self-preservation being intrinsic, biological and insurmountable under ordinary circumstances.<sup>257</sup> Often quoted in this regard is a statement of Sir James Fitzjames Stephen that:

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<sup>252</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, Ministry of Law, Government of India, at para 300.

<sup>253</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, Ministry of Law, Government of India, at para 301.

<sup>254</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, (Summary of Main Conclusions and Recommendations), available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> (last viewed at 26.08.2015).

<sup>255</sup> ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 75 (4<sup>th</sup> ed. 2005); Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 *Journal of Criminal Law and Criminology* 765, 766 (2010).

<sup>256</sup> ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 71 (4<sup>th</sup> ed. 2005).

<sup>257</sup> Ernest Haag, *The Ultimate Punishment- a Defense*, 99 *Harvard Law Review* 1662, 1666 (1986).

*Some men, probably, abstain from murder because they fear that if they committed murder they would be hanged. Hundreds of thousands abstain from it because they regard it with horror. One great reason why they regard it with horror is that murderers are hanged.*<sup>258</sup>

4.3.2 The 35<sup>th</sup> Report cited the following (amongst other) reasons in favour of the proposition that the death penalty serves a deterrent value:<sup>259</sup>

1. Every human being dreads death.<sup>260</sup>
2. The death penalty stands on a different footing from imprisonment. The difference is one of quality, and not merely of degree.
3. Experts consulted by the Commission, including state governments, judges, Members of Parliament, Members of State Legislatures, police officers, and advocates were of the view that “*the deterrent object of capital punishment is achieved in a fair measure in India.*”<sup>261</sup>
4. Whether other forms of punishment possess the advantages of capital punishment is a matter of doubt.
5. “*Statistics of other countries are inconclusive on the subject. If they are not regarded as proving the deterrent effect, neither can they be regarded as conclusively disproving it.*”<sup>262</sup>

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<sup>258</sup>Ernest Haag, *The Ultimate Punishment: A Defense*, 99 Harvard Law Review 1662, 1666 (1986)

<sup>259</sup>Law Commission of India, 35<sup>th</sup> Report, 1967, Ministry of Law, Government of India, at para 370.

<sup>260</sup> Hood & Hoyle argue that although it is possible that some people refrained from committing murder because of fear of execution, this is an insufficient basis to conclude that existence of the death penalty deters people from committing murders. See: Roger Hood & Carolyn Hoyle, *Myth of Deterrence*, in MOVING AWAY FROM THE DEATH PENALTY: ARGUMENTS, TRENDS AND PERSPECTIVES 67 (United Nations Commission on Human Rights, 2014).

<sup>261</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, Ministry of Law, Government of India, at para 370.

<sup>262</sup> Law Commission of India, 35<sup>th</sup> Report, 1967, Ministry of Law, Government of India, at para 370.

6. There is a “*considerable body of opinion*” to state that death penalty acts as a deterrent.<sup>263</sup>

4.3.3 In *Bachan Singh v. State of Punjab*,<sup>264</sup> the Supreme Court observed that in most countries of the world, including in India, a “*large segment of the population, including notable penologists, judges, jurists, legislators, and other enlightened people*” still believe that the death penalty serves as a greater deterrent than life imprisonment.<sup>265</sup> The Court noted various cases where it had recognized the deterrent value of the death penalty.<sup>266</sup>

4.3.4 Post-*Bachan Singh*, the Supreme Court has often used deterrence as a justification for imposing the death penalty. For instance, while imposing the death sentence in *Mahesh v. State of Madhya Pradesh*,<sup>267</sup> the Court noted that “[*the common man*] *understands and appreciates the language of deterrence more than the reformatory jargon.*”<sup>268</sup> In *Jashuba Bharatsinh Gohil v. State of Gujarat*,<sup>269</sup> the Court held that “*protection of society and deterring the criminal is the avowed object of law.*”<sup>270</sup> There are however other cases where the Court has held that deterrence is not the primary justification for imposition of the death penalty,<sup>271</sup> or doubted the efficacy of deterrence itself.<sup>272</sup>

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<sup>263</sup> For this proposition, the Commission cites replies received to its questionnaire, as well as a statement made by Sir Patrick Spens in the House of Commons, based on his experience in India.

<sup>264</sup> (1980) 2 SCC 684.

<sup>265</sup> (1980) 2 SCC 684, 713.

<sup>266</sup> The Court refers to *Paras Ram v. State of Punjab*, (1981) 2 SCC 508, *Jagmohan v. State*, AIR 1973 SC 947, *Ediga Annamma v. State of Andhra Pradesh* AIR 1974 SC 799, *Shiv Mohan Singh v. State* AIR 1977 SC 949, *Charles Sobhraj v. Superintendent, Central Jail, Tihar, New Delhi*, 1978 AIR 1514.

<sup>267</sup> (1987) 3 SCC 80.

<sup>268</sup> *Mahesh v. State of MP*, (1987) 3 SCC 80, 82. See also: *Sevaka Perumal v. State of Tamil Nadu*, (1991) 3 SCC 471, 480, *Ankush Maruti Shinde v. State of Maharashtra*, (2009) 6 SCC 667, 675, *Mohan Anna Chavan v. State of Maharashtra*, (2008) 7 SCC 561, 574.

<sup>269</sup> (1994) 4 SCC 353.

<sup>270</sup> *Jashuba Bharatsinh Gohil v. State of Gujarat*, (1994) 4 SCC 353, 360. See also: *Paniben v. State of Gujarat*, (1992) 2 SCC 474, 483, *B. Kumar v. Inspector of Police*, (2015) 2 SCC 346, 354, *Gyasuddin Khan v. State of Bihar*, (2003) 12 SCC 516, 525, *Paras Ram v. State of Punjab*, (1981) 2 SCC 508, 508.

<sup>271</sup> See: *Sushil Murmu v. State of Jharkhand*, (2004) 2 SCC 338, 343.

<sup>272</sup> *Ravindra Trimbak Chouthmal v. State of Maharashtra*, (1996) 4 SCC 148, 151.

**(i) Empirical Evidence on Deterrent Value of the Death Penalty**

4.3.5 One of the methods by which the efficacy of the deterrence rationale is tested, is by empirically establishing that the death penalty has a deterrent effect. After many years of research and debate among statisticians, practitioners, and theorists, a worldwide consensus has now emerged that there is no evidence to suggest that the death penalty has a deterrent effect over and above its alternative – life imprisonment.

4.3.6 The debate on the efficacy of deterrence gained momentum with a study by Isaac Ehrlich, which was published in 1975, in which Ehrlich found a “*unique deterrent effect*” of executions on murders.<sup>273</sup> The study claimed that each execution saved up to “*eight innocent lives*”.<sup>274</sup> The Supreme Court of India in *Bachan Singh* cited Ehrlich’s research and gave it extensive value.<sup>275</sup> However, many flaws were subsequently discovered in Ehrlich’s methodology and assumptions. For instance, one powerful critique of Ehrlich’s study revealed that if data from just six years, namely 1963-69 was removed from the larger data set comprising 43 years (1920-1963), the evidence of deterrence disappeared completely.<sup>276</sup>

4.3.7 To review Ehrlich’s study and other studies which linked deterrence with the death penalty, a Panel was set up by the National Academy of Sciences in the United States, chaired by (Nobel Laureate) Lawrence Klien. In its Report, submitted in 1978, the Panel concluded that “*the available studies provide no useful evidence on the deterrent effect of capital punishment*” and “*research on the deterrent effects of capital*

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<sup>273</sup> Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975).

<sup>274</sup> Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975).

<sup>275</sup> *Bachan Singh v State of Punjab* (1980) 2 SCC 684, 717-718.

<sup>276</sup> Peter Passell & John Taylor, *The Deterrent Effect of Capital Punishment: Another View*, 67 AM. ECON. REV. 445 (1977).

*sanctions is not likely to provide results that will or should have much influence on policy makers.”*<sup>277</sup>

4.3.8 Donohue and Wolfers provided a compelling critique of studies that claim that capital punishment has a deterrent effect.<sup>278</sup> They reported that the homicide rates in the US and Canada (culturally and socio-economically similar areas), had moved in “*virtual lockstep...while approaches to the death penalty [had] diverged sharply since 1950.*” Similarly, the movement in homicide rates of all the death penalty and non-death penalty states within the United States (between 1960 and 2000) was also found to be virtually the same.<sup>279</sup> Thus, they concluded that it is very difficult to find evidence of deterrence in pure homicide comparisons over time and place.

4.3.9 Donohue and Wolfers also found that “*the existing evidence for deterrence is surprisingly fragile, and even small changes in specifications yield dramatically different results...Our estimates suggest not just “reasonable doubt” about whether there is any deterrent effect of the death penalty, but profound uncertainty...[W]e are pessimistic that existing data can resolve this uncertainty.*”<sup>280</sup> (Emphasis supplied)

4.3.10 In a similar, extensive review of existing literature, the National Research Council in the United

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<sup>277</sup>Lawrence R. Klein, Brian Forst & Victor Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, in Alfred Blumstein, Jacqueline Cohen and Daniel Nagin (eds.), *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES*, National Academy of the Sciences, Washington D.C. (1978). See also: I S. NAGIN AND JOHN V. PEPPER (EDS.), *DETERRENCE AND THE DEATH PENALTY*, COMMITTEE ON DETERRENCE AND THE DEATH PENALTY (COMMITTEE ON LAW AND JUSTICE), NATIONAL RESEARCH COUNCIL (2012).

<sup>278</sup> John Donohue and Justin Wolfers, *USES AND ABUSES OF EMPIRICAL EVIDENCE IN THE DEATH PENALTY DEBATE*, 58 *STAN. L. REV.* 791 (2005); See also Daniel S. Nagin and John V. Pepper (eds.), *DETERRENCE AND THE DEATH PENALTY*, Committee on Deterrence and the Death Penalty (Committee on Law and Justice), National Research Council (2012).

<sup>279</sup>John Donohue and Justin Wolfers, *USES AND ABUSES OF EMPIRICAL EVIDENCE IN THE DEATH PENALTY DEBATE*, 58 *STAN. L. REV.* 791; See also Daniel S. Nagin and John V. Pepper (eds.), *DETERRENCE AND THE DEATH PENALTY*, Committee on Deterrence and the Death Penalty (Committee on Law and Justice), National Research Council (2012).

<sup>280</sup> John Donohue and Justin Wolfers, *USES AND ABUSES OF EMPIRICAL EVIDENCE IN THE DEATH PENALTY DEBATE*, 58 *STAN. L. REV.* 791, 794.

States concluded in a Report published in 2012 that “research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the **committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide.**”<sup>281</sup> (Emphasis supplied)

4.3.11 The debate has thus come a full circle, with the conclusions reached in the first decade of the 21<sup>st</sup> century being the same as the those reached by the UK Royal Commission on the Death Penalty in 1953, when it said:

***The general conclusion which we have reached is that there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase in the homicide rate, or that its reintroduction has led to a fall.***<sup>282</sup> (Emphasis supplied)

4.3.12 This view is also supported by the United Nations (‘UN’), which has consistently held that there is no conclusive evidence on deterrence and the death penalty, in Resolutions on the Moratorium on the Use of the Death Penalty of 2008, 2010, 2013 and 2015.<sup>283</sup> Further, the UN, in Reports published as recently as 2014 has noted that no evidence of deterrence can be presumed to exist.<sup>284</sup> The UN has also noted that deterrence is nothing more than a “myth.”<sup>285</sup>

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<sup>281</sup> NAT’L ACADEMY OF SCIENCES, DETERRENCE AND DEATH PENALTY 102 (Daniel S. Nagin, 2012).

<sup>282</sup> See Report of UK Royal Commission on the Death Penalty, 1953.

<sup>283</sup> See Resolutions on the Moratorium on the Use of the Death Penalty: Resolution 62/149 (2008), Resolution 65/206 (2010) and Resolution 67/176 (2013) and Resolution /69/186, (2015). It is important to note that India is not a signatory to these Resolutions.

<sup>284</sup> Moving away from the Death Penalty: Lessons from South-East Asia, United Nations Human Rights Commission10 (2014).

<sup>285</sup> Carolyn Hoyle and Roger Hood, *The Myth of Deterrence* in MOVING AWAY FROM THE DEATH PENALTY: ARGUMENTS, TRENDS AND PERSPECTIVES, United Nations Human Rights Office of the High Commissioner, 74-83 (2014).

4.3.13 Further, the Constitutional Court of South Africa ruling on the deterrence argument, *The State v. Makwanyane and Machunu*,<sup>286</sup> ruled:

*It was accepted by the Attorney General that [deterrence] is a much disputed issue in the literature on the death sentence. He contended that it is common sense that the most feared penalty will provide the greatest deterrent, but accepted that there is no proof that the death sentence is in fact a greater deterrent than life imprisonment for a long period...“A punishment as extreme and as irrevocable as death cannot be predicated upon speculation as to what the deterrent effect might be.”*<sup>287</sup>

4.3.14 The Supreme Court of India in *Bachan Singh*, taking note of the statistical studies on deterrence and the death penalty noted: “*We may add that whether or not death penalty in actual practice acts as a deterrent, cannot be statistically proved, either way, because statistics as to how many potential murderers were deterred from committing murders, but for the existence of capital punishment for murder, are difficult, if not altogether impossible, to collect. Such statistics of deterred potential murderers are difficult to unravel as they remain hidden in the innermost recesses of their mind.*”<sup>288</sup> Thus, it is important to emphasize, as stated by the Supreme Court in *Bachan Singh*, that sentencing policy should not be influenced and decided solely on the basis of empirical analysis, one way or the other, of the perceived deterrent effect of the death penalty.

#### **(ii) Assumptions of Deterrence**

4.3.15 For deterrence to work, it is necessary that certain pre-requisites be met. If any one of these pre-requisites do not exist, or if any of them are weakened,

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<sup>286</sup> Case No. CCT/3/94, Constitutional Court of The Republic Of South Africa.

<sup>287</sup> *The State v Makwanyane and Machunu*, Case No. CCT/3/94, Constitutional Court of The Republic Of South Africa.

<sup>288</sup> *Bachan Singh v. State of Punjab*. (1980) 2 SCC 684, at para 101.

then the overall idea of deterrence fails. These prerequisites can be broadly articulated as follows:<sup>289</sup>

- (a) That potential offenders know which offences merit the death penalty
- (b) That potential offenders conduct an analysis of the costs and benefits before or while committing the crime and weigh the death penalty as a serious and important cost
- (c) That potential offenders view it a probable consequence that they will be subjected to the death penalty if they commit the crime
- (d) That potential offenders are risk-averse and not risk-seeking
- (e) That potential offenders give more weight to the costs than the benefits, and choose to not perform the act.

4.3.16 If all the above mentioned prerequisites are met, then it is assumed that the potential offender will be deterred from offending.

4.3.17 However, experts noticed two major fallacies in these assumptions - Knowledge Fallacies and Rationality Fallacies.<sup>290</sup>

a. Knowledge Fallacies

4.3.18 Knowledge fallacies refer to the idea that offenders *do not know* the penalties applicable to the crimes that they plan on committing. Hence, they do not feel deterred by a severe penalty. However, deterrence assumes that every individual knows the legal penalties applicable to him/her in case s/he commits a crime. There is ample evidence to show that both the general public and potential offenders have little or no knowledge of the penalties which they can be subjected to.<sup>291</sup> The idea of the knowledge fallacy is

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<sup>289</sup> Paul Robinson and John Darley, *Does Criminal Law Deter*, 24 Oxford Journal of Legal Studies 173, 175 (2004).

<sup>290</sup> Paul Robinson and John Darley, *Does Criminal Law Deter*, 24 Oxford Journal of Legal Studies 173 (2004).

<sup>291</sup> David Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pick-Pockets Hanging*, Amer. Law & Econ. Rev. 295 (2002).

aptly summed up by King, when he says: As put aptly by King, “*About-to-be lawbreakers don’t look up penalties in the law books; they plan, if at all on how to avoid being caught.*”<sup>292</sup>

#### b. Rationality Fallacies

4.3.19 A major assumption of deterrence theory is that potential offenders are rational decision makers. However, a large number of crimes are committed in a fit of rage or anger, or when the offender is clinically depressed, or are motivated out of strong emotions such as revenge or paranoia.<sup>293</sup> In circumstances such as these, deterrence is unlikely to operate since the actor is not likely to give due weight, or even a cursory consideration to what penalties might be imposed on him/her subsequently; the focus being on the emotion driving his/her state of mind.<sup>294</sup>

4.3.20 The discussion above does not imply that deterrence is a myth and the criminal justice system could do away with all punishments entirely, without impacting deterrence. Indeed, as has been expressed by scholars, the fact that there *exists* a criminal justice system which punishes criminal conduct is by itself a deterrent.<sup>295</sup> Consequently, it is not necessary that punishments by themselves be harsh or excessive. Theorists argue that the assumption in criminal law that the harsher the punishment, the less likely it is to be committed is not true.<sup>296</sup>

#### **(iii) The Case of Terrorism**

4.3.21 An important question faced by this Commission was whether the death penalty should be

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<sup>292</sup> David Anderson, The Deterrence Hypothesis and Picking Pockets at the Pick-Pockets Hanging, *Amer. Law & Econ. Rev.* 295, 306 (2002).

<sup>293</sup> Paul Robinson and John Darley, *Does Criminal Law Deter*, 24 *Oxford Journal of Legal Studies* 173, 174 (2004).

<sup>294</sup> Paul Robinson and John Darley, *Does Criminal Law Deter*, 24 *Oxford Journal of Legal Studies* 173, 174 (2004).

<sup>295</sup> Paul Robinson and John Darley, *Does Criminal Law Deter*, 24 *Oxford Journal of Legal Studies* 173 (2004).

<sup>296</sup> Paul Robinson and John Darley, *Does Criminal Law Deter*, 24 *Oxford Journal of Legal Studies* 173, 174 (2004).

retained in the context of terrorism-related crimes, even if it abolished for all other offences. One of the major reasons for this proposition is that the death penalty acts as an important tool for maintaining the security of citizens and the integrity of the nation, by deterring similar future crimes. Since terrorist crimes are very different from ordinary crimes in terms of the motives applicable, deterrence assumptions need a re-look to ascertain whether it is desirable to perhaps retain the death penalty for terrorism related crimes.

4.3.22 A view is taken by many that the death penalty is unlikely to deter terrorists, since many are on suicide missions (they are prepared to give up their life for their 'cause'),<sup>297</sup> there are other reasons why the death penalty in fact might *increase* terrorist attacks. The death penalty is often *solicited* by terrorists, since upon execution, their political aims immediately stand vindicated by the theatrics associated with an execution.<sup>298</sup> They not only get public attention, but often even gain the support of organisations and nations which oppose the death penalty. The Indonesian Bali Bomber's reaction to news of his conviction and execution was beaming and with a "thumbs-up" as if he had just won an award.<sup>299</sup>

4.3.23 Jessica Stern, a pre-eminent expert on the issue of terrorism opines:

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<sup>297</sup> Thomas Michael McDonnell, *The Death Penalty-An Obstacle to the "War against Terrorism?*, 37 VAND. J. TRANSNAT'L L. 353, 390 (2004). See also President George W. Bush's 2002 National Security Strategy, released roughly one year after 9/11, stating that "*Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness...Deterrence-the promise of massive retaliation against nations-means nothing against shadowy terrorist networks with no nation or citizens to defend*"- Commencement Address at the United States Military Academy in West Point, New York, 38 WEEKLY COMP. PRES. DoC. 944, 946 (June 1, 2002); Bush's 2006 address also addressed the same point "*the terrorist enemies we face today hide in caves and shadows and emerge to attack free nations from within. The terrorists have no borders to protect or capital to defend. They cannot be deterred-but they will be defeated*"- See Commencement Address at the United States Military Academy in West Point, New York, 42 WEEKLY COMP. PRES. Doc. 1037, 1039 (May 27, 2006).

<sup>298</sup> Thomas Michael McDonnell, *The Death Penalty-An Obstacle to the "War against Terrorism?*, 37 VAND. J. TRANSNAT'L L. 353 2004, 401.

<sup>299</sup> Jane Perlez, *Court Decides to Sentence Bali Bomber to Death*, N.Y. TIMES, Aug. 8, 2003.

*One can argue about the effectiveness of the death penalty generally. But when it comes to terrorism, national security concerns should be paramount. The execution of terrorists, especially minor operatives, has effects that go beyond retribution or justice. The executions play right into the hands of our adversaries. We turn criminals into martyrs, invite retaliatory strikes and enhance the public relations and fund-raising strategies of our enemies.*<sup>300</sup>

4.3.24 Similarly, while commenting on the specific case of the Boston marathon Bomber, Dzhokhar Tsarnaev, Alan Dershowitz writes:

*Seeking the death penalty against Tsarnaev, and imposing it if he were to be convicted, would turn him into a martyr. His face would appear on recruiting posters for suicide bombers. The countdown toward his execution might well incite other acts of terrorism. Those seeking paradise through martyrdom would see him as a role model...*<sup>301</sup>

4.3.25 It is useful also to refer to Jeremy Bentham, the pioneer of the deterrence theory. In the context of “rebels” or in cases of “rebellion” (which can be roughly equated to anti-nationals or terrorists), Bentham said that executing them would not deter other potential rebels, but in fact make the executed person a martyr, whose death would inspire, and not deter potential followers.<sup>302</sup>

4.3.26 Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism related offences will affect national security. There is a sharp division among law-makers due to this concern. Given these concerns raised by the

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<sup>300</sup> Jessica Stern, *Execute Terrorists at Our Own Risk*, NY Times, 28<sup>th</sup> February, 2001.

<sup>301</sup> Alan Dershowitz, *Dzhokhar Tsarnaev should not face the death penalty, even for a capital crime*, The Guardian, 24<sup>th</sup> April 2013.

<sup>302</sup> HA Bedau, *Bentham's Utilitarian Critique of the Death Penalty*, 74 Journal of Criminal Law and Criminology 1033, 1046 (1983).

law makers, the Commission does not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.

#### **D. Incapacitation**

4.4.1 The theory of incapacitation advocates dealing with offenders in such a way that they are not in a position to re-offend.<sup>303</sup> It is generally used as a justification to impose longer sentences on repeat offenders,<sup>304</sup> “dangerous” criminals and “career criminals.”<sup>305</sup> Capital punishment is the most extreme form of incapacitation, since it implies taking the life of the offender to ensure that he/she does not reoffend. A person is sentenced to death using the incapacitation rationale if it is determined that his/her existence causes an unreasonable threat to society.<sup>306</sup>

4.4.2 To be able to use the incapacitation rationale, it is essential that the sentencing court make an assessment of “dangerousness” of the offender and the possibility that the person is likely to reoffend.

4.4.3 The primary objection to executing a person on grounds of incapacitation is the predictability problem. Theorists have argued that it is virtually impossible to be able to predict if the convicted offender is likely to reoffend.<sup>307</sup> Any exercise to predict recidivism will always be over-inclusive and “identify false positives.”<sup>308</sup> Such act of prediction is itself an arbitrary exercise, which adds to the already existing

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<sup>303</sup> ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE, 80 (4<sup>th</sup> ed. 2005)

<sup>304</sup>See: Christy A. Visher, Incapacitation and Crime Control: Does a “Lock ‘Em Up” Strategy Reduce Crime? 4 JUST. Q. 513, 539 (1987).

<sup>305</sup> Christy A. Visher, Incapacitation and Crime Control: Does a “Lock ‘Em Up” Strategy Reduce Crime? 4 JUST. Q. 513, 539 (1987).

<sup>306</sup> Harvey D. Ellis, Jr., COMMENTARY: Constitutional Law: The Death Penalty: A Critique of the Philosophical Bases Held to Satisfy the Eight Amendment Requirements for Its Justification, 34 OKLA. L. REV. 567, 609.

<sup>307</sup> Sara F. Werboff, Halting the Sudden Descent into Brutality How Kennedy v. Louisiana Presents a More Restrained Death Penalty Jurisprudence, 14 LEWIS & CLARK L. REV. 1601, 1639 (2010).

<sup>308</sup> James R. Acker, New York’s Proposed Death Penalty Legislation: Constitutional and Policy Perspectives, 54 ALB. L. REV. 515, 572 (1989-1990).

arbitrariness in imposition of the death penalty.<sup>309</sup> Further, incapacitation involves punishing a person severely for something that s/he has not done yet – that is, for something that the person may or may not do in the future, an outcome which is not just.<sup>310</sup> Long perfectly sums up the issue of “risk of future dangerousness” by not executing a “dangerous” person when he states – “*such may simply be an inevitable risk of living in a free, albeit imperfect, democratic society.*”<sup>311</sup>

4.4.4 Another argument that can be made against executing an individual on grounds of incapacitation is that it completely negates the possibility of reform, which remains an important penological consideration in India.<sup>312</sup>

4.5.5 In the cases of persons already incarcerated, the possibility of reoffending is confined to situations where convicts kill other convicts, or jail officials when in prison.<sup>313</sup> In the Indian context, the mandatory death penalty that existed for such a situation was held unconstitutional in *Mithu v. State of Punjab*.<sup>314</sup> The sentencing court will have to apply the ‘rarest of rare case’ analysis to determine whether death is the appropriate sentence. A person, even in such a situation, cannot be executed in India on grounds only of incapacitation.

4.4.6 The death penalty is an excessive punishment when used for the purposes of incapacitation,<sup>315</sup> since the incapacitation function can be achieved by life imprisonment, as much as

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<sup>309</sup> Donald L. Beschle, What’s Guilt (or Deterrence) Got To Do With It? The Death Penalty, Ritual, and Mimetic Violence, 38 WM. & MARY L. REV. 487, 502 (1996).

<sup>310</sup> 34 Okla. L. Rev. 567, 610

<sup>311</sup> 62 UMKC. L. Rev. 107, 170 (1993).

<sup>312</sup> See part on Reformation below.

<sup>313</sup> Donald L. Beschle, What’s Guilt (or Deterrence) Got To Do With It? The Death Penalty, Ritual, and Mimetic Violence, 38 WM. & MARY L. REV. 487, 502 (1996).

<sup>314</sup>(1983) 2 SCC 277. The Supreme Court also notes statistics in the United States with respect to convicted murder convicts reoffending. It observed that although there is no study in this regard in India, it is fair to assume that the incidence of murders by people convicted of murder was minimal. See: (1983) 2 SCC 277, 292.

<sup>315</sup> 14 Lewis & Clark L. Rev. 1601, 1639 (2010).

execution.<sup>316</sup> The convicted offender, being in custody, does not get the opportunity to reoffend.<sup>317</sup> Thus, it is clear that incapacitation cannot be used as a justification for the death penalty, but may be a valid justification for life imprisonment.

## **E. Retribution**

4.7.1 The theory of retribution focuses on the offence committed and just treatment of the individual, rather than prevention of crime.<sup>318</sup> It asserts that blame is made effective through punishing persons who *deserve* unpleasant consequences on account of some wrongful act that they intentionally and willingly did.<sup>319</sup>

4.7.2 There are two accounts of retribution – one considers retribution as revenge. The other states that retribution does not demand committing an equivalent act on the offender, as is suggested by the “eye for an eye” philosophy (“mirror punishment”). It rather advocates a measured and appropriate level of punishment for the offender’s conduct.<sup>320</sup>

### **(i) Retribution as Revenge**

4.7.3 The conception of retribution as revenge is based on the understanding that the “undeserved evil” inflicted by the criminal on the victim should be matched by a similar amount of punishment to him/her.<sup>321</sup> As stated earlier, the oft-quoted adage – “an eye for an eye,” is an articulation of this approach.<sup>322</sup>

4.7.4 The Supreme Court has disapproved the revenge based approach of retribution. In *Deena v.*

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<sup>316</sup> 38 WM. & MARY L. REV. 487, 502 (1996). This was also articulated by the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 311 (White, J. concurring).

<sup>317</sup> See: *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>318</sup> R. Wasserstrom, *Some Problems with Theories of Punishment*, in JUSTICE AND PUNISHMENT 189 (J. Cederblom & W. Blizek eds., 1977).

<sup>319</sup> Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. Davis L. Rev. 973, 999-1000 (1985).

<sup>320</sup> SUSAN EASTON AND CHRISTINE PIPER, SENTENCING AND PUNISHMENT: THE QUEST FOR JUSTICE 57 (2012).

<sup>321</sup> IMMANUEL KANT, THE METAPHYSICS OF MORALS 141-42 (M.J. Gregor trans., 1996); JEFFRIE G. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 124 (1994).

<sup>322</sup> SUSAN EASTON AND CHRISTINE PIPER, SENTENCING AND PUNISHMENT: THE QUEST FOR JUSTICE 57 (2012).

*Union of India*,<sup>323</sup> the Court ruled that “[t]he retribution involved in the theory ‘tooth for tooth’ and ‘an eye for an eye’ has no place in the scheme of civilized jurisprudence.”<sup>324</sup> More recently, in *Shatrughan Chauhan v. Union of India*,<sup>325</sup> the Supreme Court ruled that “retribution has no Constitutional value”<sup>326</sup> in India. It held that “an accused has a de-facto protection under the Constitution and it is the Court’s duty to shield and protect the same.”<sup>327</sup> It further held that such protection extends to “every convict including death convicts.”<sup>328</sup> Thus, the Supreme Court has now clearly recognized that retribution in the form of revenge as a justification for punishment does not pass Constitutional muster. The Court has also reiterated that “the retributive theory has had its day and is no longer valid.”<sup>329</sup>

4.7.5 In *Bachan Singh*,<sup>330</sup> the Court observed that “retribution in the sense of society’s reprobation for the worst of crimes is not an altogether outmoded concept.”<sup>331</sup> This understanding views retribution not as “revenge,” but as condemnation of the offender’s actions. Thus, *Bachan Singh* did not advocate the “eye for an eye” approach.

#### **(ii) Retribution as Punishment Deserved by the Offender**

4.7.6 The concept of “desert” provides the modern understanding and the basis of the retributive theory.<sup>332</sup> It prescribes that a wrong action should be met by a sanction appropriate to the action, and deserved by the offender.<sup>333</sup> It states that retribution being equated with

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<sup>323</sup> (1983) 4 SCC 645.

<sup>324</sup> *Deena v. Union of India*, (1983) 4 SCC 645, at para 10.

<sup>325</sup> (2014) 3 SCC 1.

<sup>326</sup> *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, at para 245.

<sup>327</sup> *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, at para 245.

<sup>328</sup> *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, at para 245.

<sup>329</sup> *Rajendra Prasad v. State of U.P.*, (1979) 3 SCC 646, at para 88.

<sup>330</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684.

<sup>331</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 102.

<sup>332</sup> *Mary Ellen Gale, Retribution, Punishment, and Death*, 18 U.C. Davis L. Rev. 973, 1003 (1985).

<sup>333</sup> SUSAN EASTON AND CHRISTINE PIPER, SENTENCING AND PUNISHMENT: THE QUEST FOR JUSTICE 57 (2012).

revenge is a myth,<sup>334</sup> since conflating retribution and revenge does not incorporate “*the complexity of modern criminal law, with its focus on degrees of intent and on matters of mitigation and excuse.*”<sup>335</sup>

4.7.7 In *Dhananjoy Chatterjee v. State of West Bengal*,<sup>336</sup> the Supreme Court ruled that “imposition of appropriate punishment is the manner in which the courts respond to the society’s cry for justice against the criminals.”<sup>337</sup> Subsequently, ‘Society’s cry for justice’ has been regularly used by the Supreme Court as a justification to impose the death sentence.<sup>338</sup>

4.7.8 The justification of punishment using “‘society’s cry for justice’ does not fit into the conception of retribution as punishment deserved by the offender, since it fails to focus on whether the convict *deserves* the punishment, including the death sentence. Most cases that have relied on ‘society’s cry for justice’ as a sentencing justification have generally not analysed aggravating and mitigating factors in each individual case,<sup>339</sup> a step that is required for assessing whether the sentence is deserved.”<sup>340</sup>

4.7.9 Further, retribution does not provide any guidance in relation to the question of “how much” to punish, or how approximate the punishment should be.<sup>341</sup> Retributive justice is said to have *calibration*

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<sup>334</sup> Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 Harv. J.L. & Pub. Pol’y 19, 21 (2003).

<sup>335</sup> H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 164-165 (1968); Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. Davis L. Rev. 973, 1013 (1985).

<sup>336</sup> (1994) 2 SCC 220.

<sup>337</sup> *Dhananjoy Chatterjee v. State of West Bengal*, (1994) 2 SCC 220, at para 15.

<sup>338</sup> *Dhananjoy Chatterjee v. State of West Bengal*, 1994) 2 SCC 220; *Jameel v. State of U.P.*, (2010) 12 SCC 532; *State of M.P. v. Basodi*, (2009) 12 SCC 318; *Bantu v. State of U.P.*, (2008) 11 SCC 113; *Mohan Anna Chavan v. State of Maharashtra*, (2008) 7 SCC 561; *State of Madhya Pradesh v. Saleem*, (2005) 5 SCC 554; *State of U.P. v. Sri Krishan*, (2005) 10 SCC 420; *Jai Kumar v. State of Madhya Pradesh*, (1999) 5 SCC 1; *Ravji v. State of Rajasthan*, (1996) 2 SCC 175; *Bheru Singh v. State of Rajasthan*, (1994) 2 SCC 467; *State of Madhya Pradesh v. Sheikh Shahid*, (2009) 12 SCC 715; *State of U.P. v. Sattan @ Satyendra*, (2009) 4 SCC 736; *State of Madhya Pradesh v. Santosh Kumar*, (2006) 6 SCC 1; *Shailesh Jasvantbhai v. State of Gujarat*, (2006) 2 SCC 359.

<sup>339</sup> *Om Prakash v. State of Haryana*, (1999) 3 SCC 19; *Jameel v. State of U.P.*, (2010) 12 SCC 532; *State of M.P. v. Basodi*, (2009) 12 SCC 318; *Bantu v. State of U.P.*, (2008) 11 SCC 113; *Mohan Anna Chavan v. State of Maharashtra*, (2008) 7 SCC 561.

<sup>340</sup> *Om Prakash v. State of Haryana*, (1999) 3 SCC 19, at para 7.

<sup>341</sup> Claire Finkelstein, *Death and Retribution*, 21 Crim. Just. Ethics 12, 13 (2002)

*problems*, wherein one cannot know where to stop while sliding “a scale of punishments past a scale of crimes”.<sup>342</sup> Theorists say that the use of capital punishment cannot be justified in a retributive system of criminal justice.<sup>343</sup>

## **F. Proportionality**

4.8.1 Censuring the offender and communicating society’s disapproval of his/her actions is a primary goal of the theory of proportionality.<sup>344</sup> The society’s censure of the offender’s actions is communicated to him/her by imposing a proportionate sentence – one that is not greater than what s/he deserves.<sup>345</sup> Proportionality through its communicative function aims to make the offender repent his/her actions.<sup>346</sup> This is done by providing the offender the means to express remorse. Further, a core requirement of the theory of proportionality is that the punishment imposed should not be “*out of proportion to the gravity of the crime involved.*”<sup>347</sup> Section 143(1) of the [U.K.] Criminal Justice Act, 2003 provides an illustration of this principle. It states that “*In considering the seriousness of any offence, the court must consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.*”

4.8.2 The severity of the sentence is an important consideration for the theory of proportionality, since a disproportionate or severe punishment overpowers the element of censure.<sup>348</sup> Consequently, the theory favours

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<sup>342</sup> Andrew Oldenquist, *Retribution and the Death Penalty*, 29 U. Dayton L. Rev. 335, 338 (2003).

<sup>343</sup> MATTHEW H. KRAMER, THE ETHICS OF CAPITAL PUNISHMENT: A PHILOSOPHICAL INVESTIGATION OF EVIL AND ITS CONSEQUENCES DEATH FOR RETRIBUTION 77 (2011).

<sup>344</sup> P.F. STRAWSON, FREEDOM AND RESENTMENT AND OTHER ESSAYS 1 (1974); Andrew von Hirsch, *Proportionality in the Philosophy of Punishment: From “Why Punish?” to “How Much?”*, 25 Isr. L. Rev. 549, 561 (1991),

<sup>345</sup> ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 84 (2005).

<sup>346</sup> ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 84 (2005). See: Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 Crime & Justice 67 (1992); R.A. DUFF, *TRIALS AND PUNISHMENTS* (1986).

<sup>347</sup> ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 84 (2005).

<sup>348</sup> ANDREW VON HIRSCH AND ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 143 (2005).

lower levels of incarceration and a pro rata reduction of existing penalty scales across jurisdictions.<sup>349</sup> Proportionality respects rule of law values, and places limits on the sentencing power.<sup>350</sup>

4.8.3 In some cases, the Supreme Court has used proportionality as a penological goal.<sup>351</sup> Ruling that “[t]he criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct,”<sup>352</sup> the Court has used proportionality as a justification to impose the death penalty.<sup>353</sup> The Court has also read into the principle of proportionality, the requirement of taking societal considerations into account. It observed: “the doctrine of proportionality has a valuable application to the sentencing policy under the Indian criminal jurisprudence...[T]he court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large.”<sup>354</sup> It has also stated that “imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise.”<sup>355</sup>

4.8.4 A three-judge Bench of the Supreme Court has recently provided guidance on how the doctrine of proportionality can be applied in the death penalty context. The Court held:

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<sup>349</sup> SUSAN EASTON AND CHRISTINE PIPER, SENTENCING AND PUNISHMENT: THE QUEST FOR JUSTICE 61 (2012); Malcolm Thorburn, *Proportionate Sentencing and the Rule of Law*, in PRINCIPLES AND VALUES IN CRIMINAL LAW AND CRIMINAL JUSTICE: ESSAYS IN HONOUR OF ANDREW ASHWORTH 269 (Lucia Zedner and Julian V. Roberts eds. 2012); Barry Pollack, *Deserts and Death: Limits on Maximum Punishment*, 44 Rutgers L. Rev. 985 (1991-1992).

<sup>350</sup> ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 84 (2005).

<sup>351</sup> See Shivu v. Registrar General, High Court of Karnataka, (2007) 4 SCC 713; Lehna v. State of Haryana, (2002) 3 SCC 76; State of U.P. v. Satish, (2005) 3 SCC 114; Mohan Anna Chavan v. State of Maharashtra, (2008) 7 SCC 561.

<sup>352</sup> Shivu v. Registrar General, High Court of Karnataka, (2007) 4 SCC 713, at para 25; Lehna v. State of Haryana, (2002) 3 SCC 76, at para 27; State of U.P. v. Satish, (2005) 3 SCC 114, at para 29; Mohan Anna Chavan v. State of Maharashtra, (2008) 7 SCC 561, at para 21; Lehna v. State of Haryana, (2002) 3 SCC 76; State of U.P. v. Satish, (2005) 3 SCC 114; Mohan Anna Chavan v. State of Maharashtra, (2008) 7 SCC 561.

<sup>353</sup> Shivu v. Registrar General, High Court of Karnataka, (2007) 4 SCC 713; Lehna v. State of Haryana, (2002) 3 SCC 76; State of U.P. v. Satish, (2005) 3 SCC 114; Mohan Anna Chavan v. State of Maharashtra, (2008) 7 SCC 561.

<sup>354</sup> Brajendrasingh v. State of Madhya Pradesh, (2012) 4 SCC 289, 305 (citing Ramnaresh and others v. State Of Chhattisgarh, (2012) 4 SCC 257, 287.)

<sup>355</sup> Ankush Maruti Shinde v. State of Maharashtra, (2009) 6 SCC 667, at para 15.

*In dealing with questions of proportionality of sentences, capital punishment is considered to be different in kind and degree from sentence of imprisonment. The result is that while there are several instances when capital punishment has been considered to be disproportionate to the offence committed, there are very few and rare cases of sentence of imprisonment being held disproportionate.*<sup>356</sup>

4.8.5 An accurate understanding and application of the theory of proportionality can be found in *Bariyar*, in which the Court provided a framework within which the sentencing exercise should be undertaken in a death penalty case. It said that the court should first compare the facts of the case before it with a “*pool of equivalently circumstanced capital defendants*.”<sup>357</sup> The gravity and nature of the crime, as well as the motive of the offender may be considered in this analysis. The aggravating and mitigating circumstances should then be identified. These should also be compared with a pool of comparable cases. This would ensure that the court considers similarly placed cases together, and the exercise would inform the court of how a similar case has been dealt with earlier. The Court opined that this exercise may point out excessiveness in sentencing, if any, and at the same time reduce arbitrariness to a certain extent. It also advised that the exercise proposed by it should definitely be undertaken if the sentencing court opts to impose the death penalty on the convicted person. Importantly, the court also held that reasoning is the most important element to ensure “principled sentencing.”<sup>358</sup>

4.8.6 As mentioned earlier, the core focus of proportionality is censure. The communicative aspect of punishment is also an important consideration. The

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<sup>356</sup> *Vikram Singh v. Union of India*, Criminal Appeal No. 824 of 2013 (SC), dated 21 August, 2015, at para 49.

<sup>357</sup> *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 131.

<sup>358</sup> *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498.

censure and communicative aspect are better achieved through life imprisonment, rather than by imposing the death penalty on the offender. Incarceration provides the offender the means to express remorse and communicates the society's disapproval for his/her actions. The death penalty, on the other hand, undermines the communicative aspect of the punishment, since the offender's life is taken away. Hence, from this perspective, life imprisonment serves the proportionality goal more adequately than the death penalty.

4.8.7 The other communicative aspect of proportionality is the communication to society that the offender's actions are not acceptable. In this context, it is pertinent to note the "brutalization effect."<sup>359</sup> Bowers and Pierce argue that when killings are carried out by a state, it undermines the communicative aspect by justifying what it seeks to condemn. It also devalues life in the eyes of the common person which further empowers offenders.<sup>360</sup>

## **G. Reformation**

4.9.1 The theory of reformation strives to transform all offenders into peaceful, productive and capable citizens of society. Reformation assumes that offenders are capable of change, and once the reasons for the commission of the crime are removed, they can lead ordinary and fulfilling lives.<sup>361</sup>

4.9.2 While it is clear that when a person is sentenced to death, the ideal of reformation has clearly lost its priority in sentencing, discussions of reformation have often been (and indeed, are *required* to be) a part of death penalty adjudication. This is because reformation is a central normative commitment

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<sup>359</sup> William J. Bowers & Glenn L. Pierce, *Deterrence or Brutalization: What Is the Effect of Executions?*, 26 *Crime & Delinq.* 453 (1980); Joanna Shepherd, *Capital Punishment's Differing Impacts among States*, 104 *MICHIGAN LAW REVIEW* (2005).

<sup>360</sup> William J. Bowers & Glenn L. Pierce, *Deterrence or Brutalization: What Is the Effect of Executions?* 26 *Crime & Delinq.* 453 (1980). See also: H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY*, 88 (2008).

<sup>361</sup> Andrew Ashworth, *Sentencing and Criminal Justice* 82 (2005).

of our criminal justice system, and because only those offenders who are adjudged beyond reform, and proven to be so, through conclusive evidence adduced by the prosecution, can ever be sentenced to death.

**(i) Supreme Court on Reformation**

4.9.3 Even before the Supreme Court in *Bachan Singh* advocated reformation as a theory to be considered in death sentence adjudication, this penal policy was being consistently articulated by the Court, both in the death penalty and non-death penalty contexts. In *Ediga Annamma v. State of Andhra Pradesh*,<sup>362</sup> the Court emphasized the need to adduce evidence regarding the “*facts of a social and personal nature*” at the sentencing stage. This was to ensure that reformation was given as much importance as deterrence.<sup>363</sup>

4.9.4 Similarly, in *Sunil Batra v. Delhi Administration*<sup>364</sup> the Court held that rehabilitation and reformation are very much a part of sentencing policy in our criminal justice system, and tried to align current prison practices with constitutional norms which demand the rehabilitation of prisoners. It observed that “[a] rehabilitation purpose is or ought to be implicit in every sentence of an offender unless ordered otherwise by the sentencing court.”<sup>365</sup>

4.9.5 The court in *Batra* also referred to *Mohammad Giasuddin v. State of A.P.*,<sup>366</sup> where it had held that the modern community has a primary stake in reformation of the offender, and the focus should be therapeutic rather than an “in terrorem” outlook.<sup>367</sup> The Court observed: “**The whole man is a healthy man and every man is born good. Criminality is a curable deviance.... Our prisons should be correctional houses, not cruel iron aching the soul...We make these**

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<sup>362</sup> (1974) 4 SCC 443

<sup>363</sup> See *Ediga Anamma*, (1974) 4 SCC 443, at para 14.

<sup>364</sup> *Sunil Batra v. Delhi Admn.* (1978) 4 SCC 494.

<sup>365</sup> See *Sunil Batra*, (1978) 4 SCC 494, at para 30.

<sup>366</sup> (1977) 3 SCC 287.

<sup>367</sup> See *Giasuddin*, (1977) 3 SCC 287, at para 8.

***persistent observations only to drive home the imperative of Freedom — that its deprivation, by the State, is validated only by a plan to make the sentences more worthy of that birth right.***<sup>368</sup>  
(Emphasis supplied)

4.9.6 The reformation ideal has similarly been articulated by the Supreme Court in other cases.<sup>369</sup> In this background came *Bachan Singh* which emphatically made this reformatory aspect a part of death penalty adjudication while evolving the ‘rarest of rare case’ test.

4.9.7 In *Bachan Singh v. State of Punjab*,<sup>370</sup> the Supreme Court held that rehabilitation is an express sentencing goal, and must never be ignored especially in the death penalty context. It held that the death penalty should not be imposed “*save in the rarest of rare cases when the alternative option is unquestionably foreclosed.*”<sup>371</sup>(Emphasis supplied)

4.9.8 The Supreme Court has again recently reiterated the need for the production of evidence of ‘beyond reform’ in death penalty cases.<sup>372</sup> Discussing the “rarest of rare” test as laid down in *Bachan Singh*, the court split the test into two parts; the *first* step involves deciding whether the case should belong to the ‘rarest of rare’ category, and the *second* deciding whether the alternative option of life imprisonment will not suffice in the facts of the case. Commenting on the second step, the Court held: *[L]ife imprisonment [is] completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second exception to the rarest of rare doctrine, the court will have to provide clear evidence as to why the convict is not fit for any*

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<sup>368</sup>See Giasuddin,(1977) 3 SCC 287, at paras 24-25.

<sup>369</sup>*Bishnu Deo Shaw v. State of West Bengal*, (1979) 3 S.C.C 714; *Maru Ram v. Union of India*, (1981) 1 SCC 107.

<sup>370</sup> (1980) 2 SCC 684.

<sup>371</sup>*Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 209.

<sup>372</sup> *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498.

**kind of reformatory and rehabilitation scheme.**<sup>373</sup>  
(Emphasis supplied)

4.9.9 Thus, in addition to adjudging a case “rarest of rare,” an equally important part of imposing the death penalty is whether the offender is amenable to reform or not. Various circumstances need to be assessed while determining whether an offender should be sentenced to death. It is important to note that these are circumstances of *both* the criminal and the crime, as has been held by the Supreme Court.<sup>374</sup>

4.9.10 The mandate of the Court in *Bachan Singh*, which requires the court to assess whether the offender is capable of reform and whether life imprisonment is unquestionably foreclosed, has often been ignored in death penalty adjudication.<sup>375</sup> Evidence regarding the offender being ‘beyond reform’ is seldom adduced and considered.<sup>376</sup>

4.9.11 Some critics have opined that if reformation is a principle of sentencing, and evidence of ‘beyond reform’ is to be considered, it is never possible to conclude that an offender is beyond reform, since there are always some extenuating circumstances to be found. In Justice Bhagwati’s words:

*There is no way of accurately predicting or knowing with any degree of moral certainty that murderer will not be reformed or is incapable of reformation. All we know is that there have been many successes even with the most vicious of cases...[M]any...examples clearly show that it is not possible to know beforehand with any degree of certainty that a murderer is beyond reformation.*<sup>377</sup> (Emphasis supplied)

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<sup>373</sup>Santosh Kumar Satishbhusan Bariyar v. State of Maharashtra (2009) 6 SCC 498.

<sup>374</sup>Rajendra Prasad v. State of U.P; see also *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 *Santosh Bariyar*, (2009) 6 SCC 498, *Ediga Anamma*, (1974) 4 SCC 443.

<sup>375</sup> See discussion in Chapter 5 on arbitrariness in death penalty adjudication.

<sup>376</sup>See discussion in Chapter 5. See also: *Aparna Chandra, A Capricious Noose: A Comment on the Trial Court Sentencing Order in the December 16 Gang Rape Case*, 2 J. NLUD 124 (2014).

<sup>377</sup>*Madhu Mehta v. Union of India* (1984) 4 SCC 62.

## **H. Other important issues**

### **(i) Public Opinion**

4.10.1 An important reason often cited by governments for retaining the death penalty is that public opinion demands the same. The 35<sup>th</sup> Report of the Law Commission also considered public opinion as an important factor in the context of the death penalty.<sup>378</sup>

4.10.2 One could argue that public opinion is indeed a factor to be considered while making important decisions which effect the population at large. However, it is not necessary for the government to follow public opinion on every issue. Indeed, the Government has a duty to drive public opinion towards options which support fairness, dignity and justice, which are constitutionally enshrined ideals. It is useful to quote the former UN Human Rights High Commissioner, Navi Pillay, who says:

*Human progress does not stand still. Popular support for the death penalty today does not mean that it will still be there tomorrow. There are undisputed historical precedents where laws, policies and practices that were inconsistent with human rights standards had the support of a majority of the people, but were proven wrong and eventually abolished or banned. **Leaders must show the way how deeply incompatible the death penalty is with human dignity.***<sup>379</sup>  
(Emphasis supplied)

4.10.3 There are multiple instances where governments around the world have abolished the death penalty contrary to current public opinion, both

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<sup>378</sup>The 35<sup>th</sup> Report apprehended that if the law were to go against public opinion, it is possible that the public would indulge in acts of revenge, by killing or injuring offenders themselves. (See Law Commission of India, 35<sup>th</sup> Report, 1967, Ministry of Law, Government of India, at para 265 (22).)

<sup>379</sup> Moving away from the Death Penalty: Lessons from South-East Asia, United Nations Human Rights Commission 9 (2014).

in Asia and in the West.<sup>380</sup> Very few of the current abolitionist countries would have been able to ever abolish the death penalty had they waited for public opinion to change on the issue.<sup>381</sup> Moreover, once the death penalty was abolished, the legal framework caused the public opinion to change radically on the issue, and now the death penalty is thought of as unthinkable.<sup>382</sup> The Indian experience of laws governing social issues, such as *Sati*, dowry prohibition, untouchability, and child marriage is testament to the fact that the government has the *power* to lead public opinion even against deeply entrenched cultural norms and indeed *an obligation* to do so when faced with issues concerning human dignity and equality.

### **I. The Move towards Restorative Justice**

4.11.1 In focusing on death penalty as the ultimate measure of justice to victims, the restorative and rehabilitative aspects of justice are lost sight of. Reliance on the death penalty diverts attention from other problems ailing the criminal justice system such as poor investigation, crime prevention and rights of victims of crime.

4.11.2 A major development in the late-twentieth century was the focus on the rights and needs of victims of crime. Restorative theories of criminal justice also emerged during that time.<sup>383</sup> As Ashworth notes “[t]he fundamental proposition is that justice to victims become a central goal of the criminal justice system and of sentencing.”<sup>384</sup> Ashworth further says that “restorative justice has considerable attractions as a constructive and socially inclusive way of responding to criminal behaviour.”<sup>385</sup>

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<sup>380</sup> Moving away from the Death Penalty: Lessons from South-East Asia, United Nations Human Rights Commission 9 (2014).

<sup>381</sup> Jon Yorke, AGAINST THE DEATH PENALTY 262 (1<sup>st</sup> ed. 2008).

<sup>382</sup> Eg. France and UK; See also Roger Hood Speech at the Law Commission National Consultation on 10 July, 2015.

<sup>383</sup> ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 88 (2005).

<sup>384</sup> ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 88 (2005).

<sup>385</sup> ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 89 (2005).

4.11.3 The need for police reforms for better and more effective investigation and prosecution has also been universally felt for some time now and measures regarding the same need to be taken on a priority basis. The Supreme Court in *Prakash Singh v. Union of India*,<sup>386</sup> held:

*Having regard to (i) the gravity of the problem; (ii) the urgent need for preservation and strengthening of the rule of law; (iii) pendency of even this petition for the last over ten years; (iv) the fact that various commissions and committees have made recommendations on similar lines for introducing reforms in the police set-up in the country; and (v) total uncertainty as to when police reforms would be introduced, we think that there cannot be any further wait, and the stage has come for issuing of appropriate directions for immediate compliance so as to be operative till such time a new model Police Act is prepared by the Central Government and/or the State Governments pass the requisite legislations. It may further be noted that the quality of the criminal justice system in the country, to a large extent, depends upon the working of the police force. Thus, having regard to the larger public interest, it is absolutely necessary to issue the requisite directions. Nearly ten years back, in *Vineet Narain v. Union of India* [(1998) 1 SCC 226 : 1998 SCC (Cri) 307] this Court noticed the urgent need for the State Governments to set up the requisite mechanism and directed the Central Government to pursue the matter of police reforms with the State Governments and ensure the setting up of a mechanism for selection/appointment, tenure, transfer and posting of not merely the Chief of the State Police but also all police officers of the rank of Superintendents of Police and above. The*

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<sup>386</sup> (2006) 8 SCC 1.

*Court expressed its shock that in some States the tenure of a Superintendent of Police is for a few months and transfers are made for whimsical reasons which has not only politicizing effect on the police force but is also alien to the envisaged constitutional machinery. It was observed that apart from politicizing the police force, it has also the adverse effect of politicizing the personnel and, therefore, it is essential that prompt measures are taken by the Central Government.*<sup>387</sup>

4.11.4 Measures should be taken to implement the directions of the Supreme Court in *Prakash Singh*.

4.11.5 The voices of victims and witnesses are often silenced by threats and other coercive techniques employed by powerful accused persons. Hence it is essential that a witness protection scheme also be established.<sup>388</sup>

4.11.6 It is essential that the State establish effective victim compensation schemes to rehabilitate victims of crime. At the same time, it is also important that courts use the power granted to them under the Code of Criminal Procedure, 1973 to grant appropriate compensation to victims in suitable cases.

4.11.7 Compensation for criminal acts is provided in Sections 357 and 357A of the Code of Criminal Procedure, 1973 (“CrPC”). Under Section 357(1), when a fine is imposed on a convict as part of the sentence, the judge can order that whole or part of the fine amount be paid as compensation to the victim (including to beneficiaries under the Fatal Accidents Act, 1855). Under this provision, the compensation amount cannot be greater than the fine imposed upon the convict.

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<sup>387</sup> (2006) 8 SCC 1 at para 26.

<sup>388</sup> Witness protection schemes have been proposed judicially by the Delhi High Court in *Neelam Katara v. Union of India*, ILR (2003) 2 Del 377. A beginning has been made in this regard by the Government of Delhi, which notified a witness protection scheme in July 2015.

4.11.8 Under Section 357(3), when no fine has been imposed as part of the sentence, the judge may order the convict to pay, by way of compensation, such amount to the victim, as the judge may specify. While there is no limit on the amount of compensation that can be awarded under this provision, the Supreme Court has held that in fixing the amount of compensation under Section 357(3), Courts should take into account the facts and circumstances of each case, the nature of the crime, the justness of the claim and the capacity of the accused to pay.<sup>389</sup>

4.11.9 It is pertinent to note that under clauses (1) and (3) of section 357, compensation is recoverable only from the wrongdoer, and only after the guilt of the wrongdoer is established.

4.11.10 In order to deal with cases where the compensation amount under Section 357 is not adequate to rehabilitate the victim,<sup>390</sup> or where no wrongdoer has been identified, traced, or convicted, Section 357A provides that the State shall create a Fund for the compensation and rehabilitation of victims of crime. A scheme under this section is required to be set up by State Governments in consultation with the Centre, and the State has to allocate funds for the scheme. Several state schemes have been established under this provision since its enactment in 2008.<sup>391</sup>

4.11.11 In this context, the Supreme Court in *Suresh v. State of Haryana*,<sup>392</sup> issued directions relating to victim compensation and ruled that:

*We are informed that 25 out of 29 State Governments have notified victim compensation schemes. The schemes specify maximum limit of compensation and subject to maximum limit, the discretion to decide the*

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<sup>389</sup>Ankush Shivaji Gaikwad v. State of Maharashtra, AIR 2013 SC 2454. The Delhi High Court in Vikas Yadav v. State of Uttar Pradesh, (2015) 218 DLT (CN) 1, summarized the law with respect to victim compensation and provided guidelines in this regard.

<sup>390</sup>For the definition of victim for the purposes of the CrPC, see Section 2 (wa), CrPC.

<sup>391</sup>See e.g., Delhi Victims Compensation Scheme, 2011; Odisha Victim Compensation Scheme, 2012; Tamil Nadu Victim Compensation Scheme, 2013.

<sup>392</sup>(2015) 2 SCC 227.

*quantum has been left with the State/District Legal Authorities. It has been brought to our notice that even though almost a period of five years has expired since the enactment of Section 357-A CrPC, the award of compensation has not become a rule and interim compensation, which is very important, is not being granted by the courts. It has also been pointed out that the upper limit of compensation fixed by some of the States is arbitrarily low and is not in keeping with the object of the legislation.*

*We are of the view that it is the duty of the courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being satisfied on an application or on its own motion, the court ought to direct grant of interim compensation, subject to final compensation being determined later. Such duty continues at every stage of a criminal case where compensation ought to be given and has not been given, irrespective of the application by the victim. At the stage of final hearing it is obligatory on the part of the court to advert to the provision and record a finding whether a case for grant of compensation has been made out and, if so, who is entitled to compensation and how much. Award of such compensation can be interim. Gravity of offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the facts and circumstances of an individual case.*

*We are also of the view that there is need to consider upward revision in the scale for compensation and pending such consideration to adopt the scale notified by the State of*

*Kerala in its scheme, unless the scale awarded by any other State or Union Territory is higher. The States of Andhra Pradesh, Madhya Pradesh, Meghalaya and Telangana are directed to notify their schemes within one month from the receipt of a copy of this order.*<sup>393</sup>

4.11.12 Accordingly, the Commission is of the view that the victim compensation scheme as recommended by the Supreme Court in *Suresh* be implemented.

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<sup>393</sup> (2015) 2 SCC 227, para 15-17.

## CHAPTER - V

### SENTENCING IN CAPITAL OFFENCES

#### **A. The *Bachan Singh* Framework: Guided Discretion and Individualized Sentencing**

5.1.1 In *Bachan Singh v. State of Punjab*,<sup>394</sup> (*Bachan Singh*) the Court had to address the following challenges to the death penalty:

*(I) Whether death penalty provided for the offence of murder in Section 302, Indian Penal Code is unconstitutional.*

*(II) If the answer to the foregoing question be in the negative, whether the sentencing procedure provided in Section 354(3) of the CrPC, 1973 (Act 2 of 1974) is unconstitutional on the ground that it invests the Court with unguided and untrammelled discretion and allows death sentence to be arbitrarily or freakishly imposed on a person found guilty of murder or any other capital offence punishable under the Indian Penal Code with death or, in the alternative, with imprisonment for life.*<sup>395</sup>

5.1.2 The Court rejected the first contention, finding instead that the death penalty met the requirement of reasonableness in Article 19 and 21, primarily since a sizable body of opinion holds the view that the death penalty is a rational punishment. As for the second, it dealt with the concern that the Cr.P.C. “invests the Court with unguided and untrammelled discretion and allows death sentence to be arbitrarily or freakishly imposed”<sup>396</sup> by deriving principles from legislative policy as well as judicial precedent, to guide the court in deciding whether to impose the death penalty in a given case.

5.1.3 To save the death penalty from the vice of arbitrariness, the Court sought to walk a tightrope

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<sup>394</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684.

<sup>395</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 15.

<sup>396</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 15.

between too much judicial discretion and too little, both of which could result in arbitrary and unfair sentencing. On the one hand, the Court held that it was “neither practicable nor desirable”<sup>397</sup> to lay down a rigid or straight-jacket formula or categories for the application of the death penalty. No two cases are exactly identical, and there are “*infinite, unpredictable and unforeseeable variations ... (and) countless permutations and combinations*”<sup>398</sup> even with a single category of offences. A mechanical, formulaic approach, not calibrated to the “variations in culpability”<sup>399</sup> even within a single type or category of offence, would cease to be *judicial* in nature. Rather, such standardization would “sacrifice justice at the altar of blind uniformity”<sup>400</sup> and may end up “degenerating into a bed of procrustean cruelty.”<sup>401</sup>

5.1.4 At the same time, the Court held that the legislative policy indicated that the following principles should guide judicial discretion in determining the appropriate sentence for murder:

1. For the offence of murder, ***life imprisonment is the rule and death sentence an exception.***
2. This exceptional penalty can be imposed “***only in gravest cases of extreme culpability***” taking into account the ***aggravating and mitigating*** circumstances in a case, paying due regard to the “***circumstances of the offence,***” as well as the “***circumstances of the offender.***”
3. To prevent sentencing from becoming arbitrary, the Court endorsed the view that the determination of aggravating and mitigating circumstances should be based on “well-recognised principles... crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases.”<sup>402</sup> The Court thus prescribed a process

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<sup>397</sup> Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 195.

<sup>398</sup> Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 172.

<sup>399</sup> Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 173.

<sup>400</sup> Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 173.

<sup>401</sup> Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 173.

<sup>402</sup> Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 165.

of **principled sentencing**, and held that the determination of aggravating and mitigating factors would be based on a determinate set of standards created through the evolutionary process of judicial precedents.

4. Only if the analysis of aggravating and mitigating circumstances, as indicated above, provided “**exceptional reasons**” for death, would capital punishment be justified, because “[a] real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the **rarest of rare cases when the alternative option is unquestionably foreclosed.**”<sup>403</sup>

5.1.5 According to the Court therefore, the principles indicated above provided sufficient guidance for the exercise of judicial discretion in sentencing for murder, and saved the death penalty from the charge of arbitrariness.

## **B. Implementation of the *Bachan Singh* Framework**

5.2.1 Despite the Court's optimism in *Bachan Singh* that its guidelines will minimise the risk of arbitrary imposition of the death penalty, concerns that capital punishment is “arbitrarily or freakishly imposed”<sup>404</sup> continue to haunt death penalty jurisprudence in India. In the last decade itself, in cases like *Aloke Nath Dutta v. State of West Bengal*,<sup>405</sup> *Swamy Shraddhananda v. State of Karnataka*,<sup>406</sup> *Santosh Bariyar v. State of Maharashtra*,<sup>407</sup> *Mohd. Farooq Abdul Gafur v. State of Maharashtra*,<sup>408</sup> *Sangeet v. State of Haryana*,<sup>409</sup> *Shankar Khade v. State of Maharashtra*,<sup>410</sup>

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<sup>403</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 209.

<sup>404</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 15.

<sup>405</sup> *Aloke Nath Dutta v. State of West Bengal*, (2007) 12 SCC 230.

<sup>406</sup> *Swamy Shraddhananda (2) v. State of Karnataka*, (2008) 13 SCC 767.

<sup>407</sup> *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498.

<sup>408</sup> *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641.

<sup>409</sup> *Sangeet v. State of Haryana*, (2013) 2 SCC 452.

<sup>410</sup> *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546.

and *Ashok Debbarma v. State of Tripura*,<sup>411</sup> the Supreme Court has acknowledged that the application of the death penalty is subjective and arbitrary and that “*even though Bachan Singh intended “principled sentencing”, sentencing has now really become judge- centric...*”<sup>412</sup> Thus, “*the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the judges constituting the Bench.*”<sup>413</sup> Recognizing this to be a “serious admission”<sup>414</sup> on its part, the Court in *Santosh Bariyar* admitted that “*there is inconsistency in how Bachan Singh has been implemented, as Bachan Singh mandated principled sentencing and not judge centric sentencing.*”<sup>415</sup>

5.2.2 Noting that “*the Bachan Singh threshold of “the rarest of rare cases” has been most variedly and inconsistently applied,*”<sup>416</sup> the Supreme Court has recognized that “*the balance sheet of aggravating and mitigating circumstances approach invoked on a case-by-case basis has not worked sufficiently well so as to remove the vice of arbitrariness from our capital sentencing system.*”<sup>417</sup> Where *Bachan Singh* held that well recognized principles evolved through judicial precedent would guide courts in capital sentencing, in *Mohd. Farooq*, the Supreme Court admitted that “*the precedent on death penalty ... is [itself] crumbling down under the weight of disparate interpretations.*”<sup>418</sup>

5.2.3 Enumerating cases where different Benches have reached diametrically opposite results in cases which have similar facts and circumstances,<sup>419</sup> the Supreme Court has called the “lack of consistency”<sup>420</sup>

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<sup>411</sup> *Ashok Debbarma v. State of Tripura*, (2014) 4 SCC 747 (“Arbitrariness, discrimination and inconsistency often loom large, when we analyze some of judicial pronouncements awarding sentence”).

<sup>412</sup> *Sangeet v. State of Haryana*, (2013) 2 SCC 452, at para 33.

<sup>413</sup> *Swamy Shraddananda (2) v. State of Karnataka*, (2008) 13 SCC 767, at para 51.

<sup>414</sup> *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 54.

<sup>415</sup> *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 54.

<sup>416</sup> *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 109.

<sup>417</sup> *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 109.

<sup>418</sup> *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641, at para 165.

<sup>419</sup> See below.

<sup>420</sup> *Swamy Shraddananda (2) v. State of Karnataka*, (2008) 13 SCC 767, at para 52.

and “want of uniformity”<sup>421</sup> in capital sentencing, “a poor reflection of the system of criminal administration of justice.”<sup>422</sup> The Court has expressed concern that the “extremely uneven application of *Bachan Singh* has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle.”<sup>423</sup>

5.2.4 In *Bachan Singh*, the Supreme Court had called upon judges to “discharge the onerous function (of deciding whether or not to impose the death penalty) with evermore scrupulous care and humane concern.”<sup>424</sup> Echoing a similar sentiment, in *Bariyar*, the Court noted that “the conclusion that the case belongs to rarest of rare category must conform to highest standards of judicial rigor and thoroughness.”<sup>425</sup> However, as the Court has itself recognized over and over again, there exist multiple layers of inconsistencies in India’s death penalty jurisprudence, which make it difficult to achieve rigor in sentencing decisions in capital offences. At the most basic level, the death penalty jurisprudence displays varied and often competing understandings of the penological purposes of the death penalty itself. Since this aspect has been covered in the previous chapter, it will not be dealt with here.<sup>426</sup>

5.2.5 In what follows, this Report examines the concerns regarding arbitrariness in India’s capital sentencing regime, as highlighted by the Supreme Court itself, supplemented by scholarly interventions, empirical data, and comparative insights.

### **(i) Doctrinal Frameworks**

5.2.6 In *Bachan Singh*, the Court had emphasized the importance of individualized yet principled sentencing. Holding that there are infinite permutations and combinations even in single category offences, the

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<sup>421</sup> *Swamy Shraddananda (2) v. State of Karnataka*, (2008) 13 SCC 767, at para 52.

<sup>422</sup> *Swamy Shraddananda (2) v. State of Karnataka*, (2008) 13 SCC 767, at para 52.

<sup>423</sup> *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 110.

<sup>424</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 209.

<sup>425</sup> *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 61.

<sup>426</sup> See Chapter IV above.

Court had refused to create categories of offences for which the death penalty would be applicable. Instead, the Court required judges to take into account, in each individual case, the aggravating and mitigating circumstances of both the crime as well as the criminal, in determining the sentence. Recognizing that circumstances relating to the crime and the criminal are often “*so intertwined that it is difficult to give a separate treatment to each of them,*”<sup>427</sup> the Court held that it was “not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments.”<sup>428</sup> However, in subsequent cases, the Court has given varying interpretations to the *Bachan Singh* requirements and different judges have understood the mandate of *Bachan Singh* differently.

a. *Machhi Singh*

5.2.7 Three years after *Bachan Singh*, a 3 judge Bench of the Supreme Court in *Machhi Singh v. State of Punjab*,<sup>429</sup> (*Machi Singh*) listed out five categories of cases for which the death penalty was a suitable option. The Court held that the death penalty may be imposed where the “collective conscience”<sup>430</sup> of society is so shocked that “it will expect the holders of the judicial power centre to inflict death penalty.”<sup>431</sup> According to the Court, “[t]he community may entrain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime.”<sup>432</sup>

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<sup>427</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 201.

<sup>428</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 201.

<sup>429</sup> *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470.

<sup>430</sup> *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470, at para 32.

<sup>431</sup> *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470 at para 32.

<sup>432</sup> *Machhi Singh v. State of Punjab* (1983) 3 SCC 470, at paras 33-37, explained these categories in detail as follows: I Manner of Commission of Murder: When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance, (i) When the house of the victim is set aflame with the end in view to roast him alive in the house. (ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death. (iii) When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II Motive for Commission of murder: When the murder is committed for a motive which evince total depravity and meanness. For instance when (a) a hired assassin commits

5.2.8 *Machhi Singh* thus crystallized the applicability of the rarest of rare principle into five distinct categories which *Bachan Singh* had expressly refrained from doing. As the Supreme Court noted in *Swamy Shradhhananda*, the *Machhi Singh* categories “considerably enlarged the scope for imposing death penalty”<sup>433</sup> beyond what was envisaged in *Bachan Singh*.

b. Crime Centric Focus

5.2.9 The *Machhi Singh* categories relate only to the circumstances of the crime. While the Court did state that the sentencing judge should accord full weightage to mitigating circumstances as well, in subsequent cases, many judges have invoked the categories in *Machhi Singh* in a manner that suggest that once a case falls within any of the 5 categories it becomes a rarest of rare case deserving the death penalty.<sup>434</sup> An example

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murder for the sake of money or reward (2) a cold blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust. (c) a murder is committed in the course for betrayal of the motherland.

III Anti Social or Socially abhorrent nature of the crime: (a) When murder of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV Magnitude of Crime: When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V Personality of Victim of murder: When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder. (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

<sup>433</sup> *Swamy Shraddananda (2) v. State of Karnataka*, (2008) 13 SCC 767.

<sup>434</sup> See example, *Prajeet Kumar Singh v. State of Bihar*, (2008) 4 SCC 434, where the Court cited the *Machhi Singh* factors and then held that in the present case “[t]he enormity of the crime is writ large. The accused-appellant caused multiple murders and attacked three witnesses. ... The brutality of the act is amplified by the manner in which the attacks have been made on all the inmates of the house in which the helpless victims have been murdered, which is indicative of the fact that the act was diabolic of the superlative degree in conception and cruel in execution and does not fall within any comprehension of the basic humanness which indicates the mindset which cannot be

is *Devender Pal Singh v. National Capital Territory*,<sup>435</sup> where the majority opinion cited the *Machhi Singh* categories and held that the circumstances of the crime (without any discussion regarding the circumstances of the criminal) were such as to require imposing the death penalty. Pertinently, the dissenting judge in this case had acquitted the accused, but this factor was not considered by the majority in deciding whether the case was one of “rarest of rare.”

5.2.10 *Machhi Singh* and a subsequent line of cases have focused only on the circumstances, nature, manner and motive of the crime, without taking into account the circumstances of criminal or the possibility of reform as required under the *Bachan Singh* doctrine. *Machhi Singh*'s progeny include a large number of cases in which the Court has decided whether or not to award the death penalty by only examining whether the crime is so brutal, depraved or diabolic as to “shock the collective conscience of the community.”<sup>436</sup> As the Court recognized in *Bariyar*, judges engage in “*very little objective discussion on aggravating and mitigating circumstances. In most such cases, courts have only been considering the brutality of crime index.*”<sup>437</sup> Similarly, in *Sangeet* the Court recognized that “[d]espite *Bachan Singh*, primacy still seems to be given to the nature of the crime. The circumstances of the criminal, referred to in *Bachan Singh* appear to have taken a bit of a back seat in the sentencing process.”<sup>438</sup>

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said to be amenable for any reformation.” The nature of the crime is itself held to be an indication that the person is beyond reformation.

<sup>435</sup> *Devender Pal Singh v. National Capital Territory*, (2002) 5 SCC 234.

<sup>436</sup> An example is *Sudam @ Rahul Kaniram Jadhav v. State Of Maharashtra*, (2011) 7 SCC 125, at para 22, where the accused was convicted for killing a woman and four children. The Court noted that the crime was pre-meditated and held that the facts show that “the crime has been committed in a beastly, extremely brutal, barbaric and grotesque manner. It has resulted into intense and extreme indignation of the community and shocked the collective conscience of the society. We are of the opinion that the appellant is a menace to the society who cannot be reformed. Lesser punishment in our opinion shall be fraught with danger as it may expose the society to peril once again at the hands of the appellant.” The Court did not mention or discuss any mitigating circumstances.

<sup>437</sup> *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 71.

<sup>438</sup> *Sangeet v. State of Haryana*, (2013) 2 SCC 452, at para 34.

5.2.11 In *Bariyar*, the Court examined the decision in *Ravji alias Ram Chandra v. State of Rajasthan*,<sup>439</sup> where it was held that

*“It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. ... The punishment to be awarded for a crime ... should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should “respond to the society's cry for justice against the criminal.”*<sup>440</sup>

5.2.12 *Bariyar* held that the exclusive focus in *Ravji* on the crime, rendered this decision *per incuriam Bachan Singh*. The Court listed a further 6 cases where *Ravji* had been followed, and which had therefore relied on incorrect precedent.

5.2.13 Similarly, the Supreme Court in *Khade* doubted the correctness of the imposition of the death penalty in *Dhananjoy Chatterjee v. State of West Bengal*,<sup>441</sup> where the Court had held that “*the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society’s cry for justice against the criminals.*”<sup>442</sup> In *Khade* the Court opined that *prima facie* the judgment had not accounted for mitigating circumstances relating to the offender. *Dhananjoy Chatterjee* was executed in 2004.

5.2.14 So also, in *Sangeet*, the Court noted an additional three cases where *Bachan Singh’s* direction

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<sup>439</sup> *Ravji alias Ram Chandra v. State of Rajasthan*, (1996) 2 SCC 175.

<sup>440</sup> *Ravji alias Ram Chandra v. State of Rajasthan*, (1996) 2 SCC 175., at para 124. Held *per incuriam Bachan Singh* in *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 63.

<sup>441</sup> *Dhananjoy Chatterjee v. State of West Bengal* (1994) 2 SCC 220.

<sup>442</sup> *Dhananjoy Chatterjee v. State of West Bengal* (1994) 2 SCC 220, at para 15. The exclusive focus of this decision on the crime and not the criminal was questioned in *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546.

to consider both aggravating and mitigating circumstances had not been followed.<sup>443</sup>

5.2.15 Despite this recognition by the Supreme Court that it has erred in cases where only the circumstances of the crime, but not of the criminal have been taken into account, judges continue to impose the death penalty based on the former set of considerations alone.<sup>444</sup>

c. Shock to the Collective Conscience and Society's Cry for Justice

5.2.16 *Machhi Singh* also introduced into the vocabulary of India's death penalty jurisprudence, the notion of 'shock to the "collective conscience"<sup>445</sup> of the community' as the touchstone for deciding whether to impose the death penalty or not. Similar notions like "society's cry for justice"<sup>446</sup> and "public abhorrence of the crime"<sup>447</sup> have also been invoked by the Court in subsequent cases. *Bachan Singh* had expressly warned that:

*Judges should not take upon themselves the responsibility of becoming oracles or spokesmen of public opinion.... When Judges...take upon*

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<sup>443</sup> *Shivu v. Registrar General, High Court of Karnataka*, (2007) 4 SCC 713; *Rajendra Pralhadrao Wasnik v. State of Maharashtra*, (2012) 4 SCC 37; *Mohd. Mannan v. State of Bihar*, (2011) 5 SCC 317.

<sup>444</sup> See e.g., *Sandeep v. State of Uttar Pradesh*, (2012) 6 SCC 107; *Ajitsingh Harnamsingh Gujral v. State of Maharashtra*, (2011) 14 SCC 401.

<sup>445</sup> *Machhi Singh v. State of Punjab* (1983) 3 SCC 470, at para 32.

<sup>446</sup> *Dhananjay Chatterjee*, (1994) 2 SCC 220. *Jameel v. State of U.P.*, (2010) 12 SCC 532, *State of M.P. v. Basodi*, (2009) 12 SCC 318; *Bantu v. State of U.P.*, (2008) 11 SCC 113; *Mohan Anna Chavan v. State of Maharashtra*, (2008) 7 SCC 561; *State of Madhya Pradesh v. Saleem*, (2005) 5 SCC 554; *State of U.P. v. Sri Krishan*, (2005) 10 SCC 420; *Jai Kumar v. State of Madhya Pradesh*, (1999) 5 SCC 1; *Ravji v. State of Rajasthan*, (1996) 2 SCC 175; *Bheru Singh v. State of Rajasthan*, (1994) 2 SCC 467; *State of Madhya Pradesh v. Sheikh Shahid*, (2009) 12 SCC 715; *State of U.P. v. Sattan @ Satyendra*, (2009) 4 SCC 736; *State of Madhya Pradesh v. Santosh Kumar*, (2006) 6 SCC 1; *ShaileshJasvantbhai v. State of Gujarat*, (2006) 2 SCC 359

<sup>447</sup> *Dhananjay Chatterjee*, (1994) 2 SCC 220. *Jameel v. State of U.P.*, (2010) 12 SCC 532, *State of M.P. v. Basodi*, (2009) 12 SCC 318; *Bantu v. State of U.P.*, (2008) 11 SCC 113; *Mohan Anna Chavan v. State of Maharashtra*, (2008) 7 SCC 561; *State of Madhya Pradesh v. Saleem*, (2005) 5 SCC 554; *State of U.P. v. Sri Krishan*, (2005) 10 SCC 420; *Jai Kumar v. State of Madhya Pradesh*, (1999) 5 SCC 1; *Ravji v. State of Rajasthan*, (1996) 2 SCC 175; *Bheru Singh v. State of Rajasthan*, (1994) 2 SCC 467; *State of Madhya Pradesh v. Sheikh Shahid*, (2009) 12 SCC 715; *State of U.P. v. Sattan @ Satyendra*, (2009) 4 SCC 736; *State of Madhya Pradesh v. Santosh Kumar*, (2006) 6 SCC 1; *ShaileshJasvantbhai v. State of Gujarat*, (2006) 2 SCC 359

*themselves the responsibility of setting down social norms of conduct, there is every danger, despite their effort to make a rational guess of the notions of right and wrong prevailing in the community at large ... that they might write their own peculiar view or personal predilection into the law, sincerely mistaking that changeling for what they perceive to be the Community ethic. The perception of 'community' standards or ethics may vary from Judge to Judge....Judges have no divining rod to divine accurately the will of the people.*<sup>448</sup>

5.2.17 However, in *Machhi Singh* as well as subsequent cases, public opinion, through the articulation of these amorphous standards of “collective conscience”, “society’s cry”, and “public abhorrence”, have been given an important role to play in sentencing jurisprudence.

5.2.18 In *Bariyar*, the Supreme Court has questioned the relevance and desirability of factoring in such “public opinion” into the rarest of rare analysis, since firstly, it is difficult to precisely define what “public opinion” on a given matter actually is. Further, people’s perception of crime is “*neither an objective circumstance relating to crime nor to the criminal.*”<sup>449</sup> As such, this factor is irrelevant to the rarest of rare analysis mandated by *Bachan Singh*.<sup>450</sup> Third, as *Bariyar* has also pointed out, the courts are governed by the constitutional safeguards which “*introduce values of institutional propriety, in terms of fairness, reasonableness and equal treatment challenge with respect to procedure to be invoked by the state in its dealings with people in various capacities, including as a convict.*”<sup>451</sup> For example, the Court plays a counter majoritarian role in protecting individual rights against majoritarian impulses. Public opinion in a given case may go against the values of rule of law and

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<sup>448</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 126.

<sup>449</sup> *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 80.

<sup>450</sup> Reiterated in *Mohinder Singh v. State of Punjab*, (2013) 3 SCC 294.

<sup>451</sup> *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 82.

constitutionalism by which the Court is nonetheless bound.<sup>452</sup>

5.2.19 A sentencing court does not have the means to rigorously examine public opinion in a given matter. Also, a cohesive, coherent and consistent “public opinion” is a fiction. The opinion of members of the public can be capricious, and dependent upon the (mis)information that the “public” is provided not only of the facts of an individual case, but of the criminal justice process itself. Focusing on public opinion therefore carries the danger of “capital sentencing becoming a spectacle in media. If media trial is a possibility, sentencing by media cannot be ruled out.”<sup>453</sup> In such situations, invoking public opinion instead of focusing on constitutional standards and safeguards would defeat the entire framework elaborated in *Bachan Singh*.<sup>454</sup> As one of the opinion in *Rameshbhai Rathod v. State of Gujarat*<sup>455</sup> recognized,

*[The Court] cannot afford to prioritise the sentiments of outrage about the nature of the crimes committed over the requirement to carefully consider whether the person committing the crime is a threat to the society. The Court must consider whether there is a possibility of reform or rehabilitation of the man committing the crime and which must be at the heart of the sentencing process. It is only this approach that can keep imposition of death sentence within the ‘rarest of the rare cases’.*<sup>456</sup>

5.2.20 In *Haresh Mohandas Rajput v. State of Maharashtra*,<sup>457</sup> the Supreme Court recognized that

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<sup>452</sup> Santosh Bariyar v. State of Maharashtra, (2009) 6 SCC 498.

<sup>453</sup> Santosh Bariyar v. State of Maharashtra, (2009) 6 SCC 498, at para 87.

<sup>454</sup> See also Aparna Chandra, *A Capricious Noose*, 2 JOURNAL OF NATIONAL LAW UNIVERSITY DELHI 124 (2014) (“A court is a court of law not a court of public opinion. Of course judges are creatures of society and will be influenced by it, but the encoding of public opinion into the formal framework of capital sentencing gives it a prescriptive weight that is problematic. If the opinion of the public matters to questions of sentencing, then courts are the wrong institutions to be determining sentence. Parliament or lynch mobs are more apposite”).

<sup>455</sup> Rameshbhai Rathod v. State of Gujarat, (2009) 5 SCC 740 (per Ganguly J).

<sup>456</sup> Rameshbhai Rathod v. State of Gujarat, (2009) 5 SCC 740, at para 108.

<sup>457</sup> Haresh Mohandas Rajput v. State of Maharashtra, (2011) 12 SCC 56.

*Machhi Singh's* invocation of “shock to the collective conscience of the community”<sup>458</sup> as a standard for evaluating whether a case deserved death, had expanded the rarest of rare formulation beyond what was envisaged in *Bachan Singh*. However, as discussed below, despite this acknowledgment, the Court has continued to invoke community reactions and public opinion as a ground for awarding the death penalty.<sup>459</sup>

d. The Crime Test, the Criminal Test and the Rarest of Rare Test

5.2.21 In a recent line of cases, the Supreme Court has responded to the concern that capital sentencing is “judge centric,” by articulating another formulation of the *Bachan Singh* doctrine. The Court has held in cases like *Gurvail Singh @ Gala v. State of Punjab*,<sup>460</sup> that three tests have to be satisfied before awarding the death penalty: the crime test, meaning the aggravating circumstances of the case; the criminal test, meaning that there should be no mitigating circumstance favouring the accused; and if both tests are satisfied, then the rarest of rare cases test, “*which depends on the perception of the society and not “judge-centric”, that is whether the society will approve the awarding of death sentence to certain types of crime or not. While applying this test, the Court has to look into variety of factors like society’s abhorrence, extreme indignation and antipathy to certain types of crimes...*”<sup>461</sup> Explaining this test, the Court in *Mofil Khan v. State of Jharkhand*,<sup>462</sup> stated that the test is to “basically examine whether the society abhors such crimes and whether such crimes shock the

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<sup>458</sup> *Haresh Mohandas Rajput v. State of Maharashtra*, (2011) 12 SCC 56, at para 20.

<sup>459</sup> See also, *Vasanta Sampat Dupare v. State of Maharashtra*, (2015) 1 SCC 253 (quoting *Haresh Rajput* on the point that *Machhi Singh* had expanded the rarest of rare doctrine beyond the *Bachan Singh* formulation by introducing the concept of “collective conscience”, but invoking shock to the collective conscience in imposing the death sentence in the present case nonetheless).

<sup>460</sup> *Gurvail Singh @ Gala v. State of Punjab*, (2013) 2 SCC 713. See also *Birju v. State Of M.P.*, (2014) 3 SCC 421; *Ashok Debbarma @ Achak Debbarma v. State Of Tripura*, (2014) 4 SCC 747; *Santosh Kumar Singh v. State Of M.P.*, (2014) 12 SCC 650; *Dharam Deo Yadav v. State Of U.P.*, (2014) 5 SCC 509; *Anil @ Anthony Arikswamy Joseph v. State Of Maharashtra*, (2014) 4 SCC 69. One of the opinions in *Shankar Khade* also used the triple test.

<sup>461</sup> *Gurvail Singh @ Gala v. State of Punjab*, (2013) 2 SCC 713, at para 19.

<sup>462</sup> *Mofil Khan v. Jharkhand*, (2015) 1 SCC 67.

conscience of the society and attract intense and extreme indignation of the community.”<sup>463</sup>

5.2.22 The triple test limits the possibility of the imposition of the death penalty to that very narrow category of cases in which there are no mitigating circumstances whatsoever. In this, the test is in keeping with the spirit of *Bachan Singh* that the death penalty should be imposed only in the most exceptional of circumstances.

5.2.23 However, in the triple test analysis, the “judge centric” nature of the death penalty can be prevented by focusing on the societal response to the crime. This is of concern because, as *Bachan Singh* itself acknowledged, and *Bariyar* reiterated, judges are likely to substitute their own assumptions, values and predilections in place of the perceptions of society, because even if one were to assume that society has determinate, stable and wide shared preferences on these matters, judges have no means of determining these preferences.

5.2.24 Further, as mentioned above, *Bachan Singh* rejected the notion of categorization of types of crime which are fit for the death penalty. However, this triple test formulation seeks to do just that in its “Rarest of Rare Test” which is predicated on “society’s abhorrence, extreme indignation and antipathy to certain *types of crimes*.”<sup>464</sup>

5.2.25 The dissociation of the aggravating and mitigating circumstances from the rarest of rare analysis also moves away from the *Bachan Singh* framework. In addition, the triple test formula seeks to create distinct lists of the circumstances relating to the crime and the circumstances relating to the criminal, and evaluate them separately. This goes against the *Bachan Singh* injunction that circumstances relating to the crime and to the criminal cannot be treated as

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<sup>463</sup> Mofil Khan v. Jharkhand, (2015) 1 SCC 67, at para 46.

<sup>464</sup> Gurvail Singh @ Gala v. State of Punjab, (2013) 2 SCC 713, at para 19.

distinct water-tight compartments.<sup>465</sup> In fact, the Supreme Court itself noted this concern with the triple test in the three judge Bench decision in *Mahesh Dhanaji Shinde v. State of Maharashtra*,<sup>466</sup> and cautioned that this triple test “*may create situations which may well go beyond what was laid down in Bachan Singh.*”<sup>467</sup> The triple test however continues to be followed and applied by the Supreme Court itself despite the decision in *Mahesh Shinde*.<sup>468</sup>

5.2.26 In departing from *Bachan Singh* both in terms of the framework of analysis, and the relevant factors to be considered (especially the consideration of public opinion), this three pronged test appears to have further added to the conceptual confusion around the rarest of rare analysis.

5.2.27 The discussion above indicates that different judges have understood the requirements of the rarest of rare standard differently, resulting in a disparate and “judge-centric” determination of whether or not a case falls within the rarest of rare category. As the Court put it in *Sangeet*, the *Bachan Singh* dictum appears to have been “lost in translation.”<sup>469</sup> The Supreme Court in *Mohd. Farooq* acknowledged the “*disparity in sentencing by [the] court flowing out of varied interpretations to the rarest of rare expression,*”<sup>470</sup> and was concerned that “*the precedent on death penalty ... is crumbling down under the weight of disparate interpretations.*”<sup>471</sup> The Court cautioned that without a consistent interpretation to the test, Article 14 would stand violated.<sup>472</sup>

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<sup>465</sup> For a critique of this test, see generally, Aparna Chandra, *A Capricious Noose*, 2 JOURNAL OF NATIONAL LAW UNIVERSITY DELHI 124 (2014).

<sup>466</sup> *Mahesh Dhanaji Shinde v. State Of Maharashtra*, (2014) 4 SCC 292.

<sup>467</sup> *Mahesh Dhanaji Shinde v. State Of Maharashtra*, (2014) 4 SCC 292, at para. 24.

<sup>468</sup> See *Ashok Debbarma @ Achak Debbarma v. State Of Tripura*, (2014) 4 SCC 747; *Dharam Deo Yadav v. State Of U.P.*, (2014) 5 SCC 509; *Lalit Kumar Yadav @ Kuri v. State Of U.P.*, (2014) 11 SCC 129.

<sup>469</sup> *Sangeet v. State of Haryana*, (2013) 2 SCC 452, at para 33.

<sup>470</sup> *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641, at para 165.

<sup>471</sup> *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641, at para 165.

<sup>472</sup> *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641.

**(ii) Factors considered Aggravating and Mitigating**

5.2.28 In *Bachan Singh*, the Court recognized and emphasized that each case is unique and has to be decided on its own facts and circumstances. For this reason, the Court refused to provide any standardization or categorization of offences for which the death penalty would be applicable. At the same time however, the Court held that sentencing discretion was not untrammelled. Rather, it endorsed the holding in *Jagmohan* that “*sentencing discretion is to be exercised judicially on well-recognised principles... crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases.*”<sup>473</sup> *Bachan Singh* therefore directed courts to determine whether a case is rarest of rare keeping in mind judicial principles derived from a study of precedents as to the kinds of factors that are aggravating and those that are mitigating. *Bachan Singh* thus endorsed the twin elements of individualized yet principled sentencing. However, as the Supreme Court has since recognized and the cases below demonstrate, “*although the court ordinarily would look to the precedents, but, this becomes extremely difficult, if not impossible, .... [since] [t]here is no uniformity of precedents, to say the least.*”<sup>474</sup>

a. Non-Consideration of Aggravating and Mitigating Circumstances

5.2.29 In *State of U.P. v. Satish*,<sup>475</sup> the accused was convicted for committing the rape and murder of a minor. On the question of sentence, the Court, after surveying decisions which have laid down principles regarding the imposition of the death penalty, stated that it had “*no hesitation in holding that the case at hand falls in rarest of rare category and death sentence awarded by the trial Court was appropriate.*”<sup>476</sup> The

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<sup>473</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 197.

<sup>474</sup> *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 104.

<sup>475</sup> *State of U.P. v. Satish*, (2005) 3 SCC 114.

<sup>476</sup> *State of U.P. v. Satish*, (2005) 3 SCC 114.

judgment is completely silent on the aggravating and mitigating circumstances of the case, contains no discussion whatsoever on why the case at hand deserved the imposition of death.

5.2.30 This is not an isolated instance. Many cases subsequent to *Bachan Singh*, for example, *Lok Pal Singh v. State of MP*,<sup>477</sup> *Darshan Singh v. State of Punjab*,<sup>478</sup> and *Ranjeet Singh v. State of Rajasthan*,<sup>479</sup> have upheld the death sentence without referring to the “rarest of rare” formulation at all. In some other cases, such as *Mukund v. State of MP*,<sup>480</sup> *Ashok Kumar Pandey v. State of Delhi*,<sup>481</sup> *Farooq v. State of Kerala*,<sup>482</sup> and *Acharaparambath Pradeepan v. State of Kerala*,<sup>483</sup> to name a few, the Court referred to the “rarest of rare” dicta, but did not apply it in imposing/commuting the death sentence, thereby paying mere lip service to the “rarest of the rare” test.

#### b. Age as a Mitigating Factor

5.2.31 *Bachan Singh* had recognized that the young age of the offender is a relevant mitigating circumstance which should be given great weightage in the determination of sentence. The Court has repeatedly held that if the offender committed the crime at a young age, the possibility of reforming the offender cannot be ruled out. For example, in *Ramnaresh v. State of Chhattisgarh*,<sup>484</sup> involving a gang rape and murder, the Court imposed a life sentence taking into account the young age of the convicts (all between 21-30 years of age), which pointed to the possibility of reform. Similarly, in *Ramesh v. State of Rajasthan*,<sup>485</sup> a case involving a double murder for gain, the Court imposed a life sentence by holding that the young age of the convict was a mitigating factor since he could be

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<sup>477</sup> Lok Pal Singh v. State of M.P., A.I.R. 1985 SC 891.

<sup>478</sup> Darshan Singh v. State of Punjab, (1988) 1 SCC 618.

<sup>479</sup> Ranjeet Singh v. State of Rajasthan, (1980) 1 SCC 683.

<sup>480</sup> Mukund v. State of M.P., (1997) 10 SCC 130.

<sup>481</sup> Ashok Kumar Pandey v. State of Delhi, (2002) 4 SCC 76.

<sup>482</sup> Farooq v. State of Kerala, (2002) 4 SCC 697.

<sup>483</sup> Acharaparambath Pradeepan v. State of Kerala, (2006) 13 SCC 643.

<sup>484</sup> Ramnaresh and Ors. v. State of Chhattisgarh, (2012) 4 SCC 257.

<sup>485</sup> Ramesh v. State of Rajasthan, (2011) 3 SCC 685.

reformed. In *Surendra Mahto v. State of Bihar*,<sup>486</sup> the primary mitigating factor considered by the Court in imposing the life sentence was that the offender was only 30 years old and hence could be reformed.

5.2.32 However, age as a mitigating factor has been used very inconsistently. In the dissent in *Bachan Singh* itself, Justice Bhagwati had cited multiple examples of otherwise similar cases where the young age of the offender was or was not considered the basis for imposing a life sentence instead of death. This trend of inconsistency in considering the age of the accused as a mitigating factor continues post-*Bachan Singh*.

5.2.33 To take one example, in *Dhananjay Chatterjee v. State of West Bengal*,<sup>487</sup> the Supreme Court had imposed the death sentence on the offender for committing the rape and murder of an 18 year old woman who lived in a building where he was a security guard. This case was noticed in *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat*,<sup>488</sup> which according to the Court's own assessment involved similar facts except that the rape and murder in this case was that of a child. On reference to a larger Bench because the two judge Bench could not agree on the sentence, the three-judge Bench of the Court noted the similarity of the facts to *Dhananjay Chatterjee's* case, but held that offender's age was only 28 years which left open the possibility of reform, and hence imposed the life sentence. Therefore in an admittedly similar fact situation *Rameshbhai Rathod* was given the life imprisonment because he was 28 years old. *Dhananjay Chatterjee* was given the death sentence and was executed in 2004. He was 27 years old.

5.2.34 *Purushottam Dashrath Borate v. State of Maharashtra*,<sup>489</sup> a very recent case decided by the Supreme Court in May this year, involved a similar fact situation of rape and murder. The Court again pointed

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<sup>486</sup> *Surendra Mahto v. State of Bihar*, Criminal Appeal No. 211/2009.

<sup>487</sup> *Dhananjay Chatterjee v. State of West Bengal*, (1994) 2 SCC 220.

<sup>488</sup> *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat*, (2011) 2 SCC 764.

<sup>489</sup> *Purushottam Dashrath Borate v. State of Maharashtra*, A.I.R. 2015 SC 2170.

to the similarity of the case to that of *Dhananjoy Chatterjee*, and following *Dhananjoy Chatterjee*, it imposed the death penalty on both the offenders. The Court did not refer to the decision in *Rameshbhai Rathod*; nor to the decision in *Shankar Khade* which had doubted the imposition of the death penalty in *Dhananjoy Chatterjee* on the ground that the Court had not accounted for mitigating factors. The age of the offenders in *Purushottam Dashrath Borate* was 26 years and 20 years respectively.<sup>490</sup>

5.2.35 The Supreme Court in *Shankar Khade* pointed to the inconsistent use of age as a mitigating factor in otherwise similar cases of rape and murder. On the one hand the offenders in *Amit v. State of Maharashtra*,<sup>491</sup> (aged about 20 years), *Rahul v. State of Maharashtra*,<sup>492</sup> (aged 24 years), *Santosh Kumar Singh v. State*,<sup>493</sup> (aged 24 years), *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat*,<sup>494</sup> (aged 28 years), and *Amit v. State of Uttar Pradesh*,<sup>495</sup> (aged 28 years), were not given the death sentence since their age was considered a mitigating factor, on the other in *Dhananjoy Chatterjee*,<sup>496</sup> (aged 27 years), *Jai Kumar v. State of Madhya Pradesh*,<sup>497</sup> (aged 22 years), and *Shivu & Anr. v. Registrar General, High Court of Karnataka*,<sup>498</sup> (aged about 20 and 22 years), the young age of the accused was either not considered or was deemed irrelevant.

### c. Nature of offence as an Aggravating Factor

5.2.36 Since the death penalty is to be awarded only in the rarest of rare cases, *Bariyar* required judges to

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<sup>490</sup> The age of the accused is taken from the High Court judgment in this case. See *State of Maharashtra v. Purushottam Dashrath Borate*, Criminal Appeal No. 632/2012(Bom), 25.09.2012.

<sup>491</sup> *Amit v. State of Maharashtra*, (2003) 8 SCC 93.

<sup>492</sup> *Rahul v. State of Maharashtra*, (2005) 10 SCC 322.

<sup>493</sup> *Santosh Kumar Singh v. State*, (2010) 9 SCC 747.

<sup>494</sup> *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat*, (2011) 2 SCC 764.

<sup>495</sup> *Amit v. State of Uttar Pradesh*, (2012) 4 SCC 107.

<sup>496</sup> *Dhananjoy Chatterjee v. State of West Bengal*, (1994) 2 SCC 220.

<sup>497</sup> *Jai Kumar v. State of Madhya Pradesh*, (1999) 5 SCC 1.

<sup>498</sup> *Shivu v. Registrar General, High Court of Karnataka*, (2007) 4 SCC 713.

survey a pool of similar cases to determine whether the case before them was rarest of rare or not.

5.2.37 Recently, in *Shankar Khade*, the Supreme Court again alluded to the need for evidence based death sentencing, and was concerned that the rarest of rare formulation is unworkable unless empirical evidence is made available which allows the Court to evaluate whether that a particular case is “rarer” than a comparative pool of rare cases. In the absence of this data, the Court felt that the application of the rarest of rare formulation becomes “extremely delicate” and “subjective.”<sup>499</sup> However, as the Court realised in this case, while surveying a pool of cases relating to rape and murder, the rape and murder of a young child shocks the judicial conscience in some cases, not in others.

5.2.38 So, for example, on the one hand the Court has held that the rape and murder of a one and half year old child in one case,<sup>500</sup> of a 6 year old child in another,<sup>501</sup> and 10 year old child in a third,<sup>502</sup> would not attract the death penalty because though these crimes were heinous, the offenders were not a danger to society, and the possibility of reform was not closed. On the other hand, in another series of cases, the Court has held that the rape and murder of a 5 year old,<sup>503</sup> a 6 year old,<sup>504</sup> or a 7 year old,<sup>505</sup> or a 9 year old,<sup>506</sup> were by their very nature extremely brutal, depraved, heinous and gruesome, and were thus deserving of the ultimate penalty. So for example, in *Jumman Khan v. State of UP*,<sup>507</sup> involving the rape and murder of a 6 year old, the Court held that “[t]he only punishment which the appellant deserves for having committed the reprehensible and gruesome murder of the innocent child to satisfy his lust, is nothing but death as a measure of

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<sup>499</sup> *Shivu v. Registrar General, High Court of Karnataka*, (2007) 4 SCC 713, at paras 2-3.

<sup>500</sup> *Mohd. Chaman v. State (NCT of Delhi)*, (2001) 2 SCC 28.

<sup>501</sup> *Bantu v. State of M.P.*, (2001) 9 SCC 615.

<sup>502</sup> *Haresh Mohandas Rajput v. State of Maharashtra*, (2011) 12 SCC 56.

<sup>503</sup> *Bantu v. State of U.P.*, (2008) 11 SCC 113.

<sup>504</sup> *Jumman Khan v. State of U.P.*, (1991) 1 SCC 752.

<sup>505</sup> *Kamta Tiwari v. State of M.P.*, (1996) 6 SCC 250.

<sup>506</sup> *Shivaji @Dadya Shankar Alhat v. The State of Maharashtra*, (2008) 15 SCC 269.

<sup>507</sup> *Jumman Khan v. State of U.P.*, (1991) 1 SCC 752.

*social necessity and also as a means of deterring other potential offenders.*<sup>508</sup>

5.2.39 Similarly, in *Md. Mannan @ Abdul Mannan v. State of Bihar*,<sup>509</sup> the convict had kidnapped, raped and murdered a seven year old. The Court awarded the death penalty since the victim was an “innocent, helpless and defenceless child.”<sup>510</sup> The Court held that the crime “*had invited extreme indignation of the community and shocked the collective conscience of the society. Their expectation from the authority conferred with the power to adjudicate, is to inflict the death sentence which is natural and logical.*”<sup>511</sup> With respect, given the contrary line of cases above, it is not clear from this judgment why in this case, but not in the ones mentioned above, the collective conscience of the society had been so shocked as to invite the punishment of death. The inconsistencies highlighted here, and noticed by the Court itself in *Khade*, make the infliction of the death penalty in this case anything but “natural and logical.”<sup>512</sup>

5.2.40 These inconsistencies have moved the Supreme Court to itself acknowledge that “*there is a very thin line on facts which separates the award of a capital sentence from a life sentence in the case of rape and murder of a young child by a young man and the subjective opinion of individual Judges as to the morality, efficacy or otherwise of a death sentence cannot entirely be ruled out.*”<sup>513</sup>

5.2.41 Similarly, compare the cases of *State of Maharashtra v. Damu*<sup>514</sup> against *Sushil Murmu v. State of Jharkhand*.<sup>515</sup> In the former, the accused were convicted of murdering three children as human sacrifice for recovering hidden treasure. The Court did not impose the death penalty on them even though it

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<sup>508</sup> *Jumman Khan v. State of U.P.*, (1991) 1 SCC 752, at para 4.

<sup>509</sup> *Md. Mannan v. State of Bihar*, (2011) 8 S.C.C 65.

<sup>510</sup> *Md. Mannan v. State of Bihar*, (2011) 8 S.C.C 65, at para 18.

<sup>511</sup> *Md. Mannan v. State of Bihar*, (2011) 8 S.C.C 65, at para 18.

<sup>512</sup> *Md. Mannan v. State of Bihar*, (2011) 8 S.C.C 65, at para 18.

<sup>513</sup> *Rameshbhai Rathod (2) v. State of Gujarat*, (2011) 2 SCC 764, at para 8.

<sup>514</sup> *State of Maharashtra v. Damu*, (2000) 6 SCC 269.

<sup>515</sup> *Sushil Murmu v. State of Jharkhand*, (2004) 2 SCC 338.

held that “the horrendous acts” made it “an extremely rare case.”<sup>516</sup> Nevertheless, the Court imposed life imprisonment on the reasoning that the crime was motivated by ignorance and superstition, which were considered to be mitigating circumstances. As against this, in *Sushil Murmu*, where the accused was convicted for murdering one child as human sacrifice, the Court held that given the nature of the crime, the accused “*was not possessed of the basic humanness and he completely lacks the psyche or mind set which can be amenable for any reformation to be beyond reform.*”<sup>517</sup> Stating that the crime “*borders on a crime against humanity indicative of greatest depravity shocking the conscience of not only any right thinking person but of the Courts of law, as well,*”<sup>518</sup> the Court refused to consider the superstitious motivation as a mitigating factor. Instead it held that “*[n]o amount of superstitious colour can wash away the sin and offence of an unprovoked killing, more so in the case of an innocent and defenceless child.*”<sup>519</sup> For the Court, a case of this sort “*is an illustrative and most exemplary case to be treated as the ‘rarest of rare cases’ in which **death sentence is and should be the rule, with no exception whatsoever.***”<sup>520</sup> Therefore, in similar circumstances, while in one case the Court found the murder of three children for human sacrifice to not call for the imposition of the death penalty, in another case it found the murder of one child for similar reasons to require the imposition of the death penalty *as a rule*.

d. Prior Criminal Record of the Offender as an Aggravating Factor

5.2.42 While the Court has often taken into account the prior criminal record of the offender in determining whether the person is capable of reform, the Supreme Court in *Sangeet* and *Shankar Khade* pointed to instances where the Court had taken into account cases

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<sup>516</sup> *State of Maharashtra v. Damu*, (2000) 6 SCC 269, at para 47.

<sup>517</sup> *Sushil Murmu v. State of Jharkhand*, (2004) 2 SCC 338, at para 22.

<sup>518</sup> *Sushil Murmu v. State of Jharkhand*, (2004) 2 SCC 338, at para 22.

<sup>519</sup> *Sushil Murmu v. State of Jharkhand*, (2004) 2 SCC 338, at para 22.

<sup>520</sup> *Sushil Murmu v. State of Jharkhand*, (2004) 2 SCC 338, at para 23.

that were merely pending before the courts, and had not been finally decided.<sup>521</sup> Holding that basing the decision to impose the death penalty on such pending cases would amount to a negation of the principle of presumption of innocence, the Supreme Court admitted that these decisions were erroneous.<sup>522</sup>

5.2.43 One such case was *Sushil Murmu v. State of Jharkhand*,<sup>523</sup> where the offence involved murder for the purposes of human sacrifice. In imposing the death sentence, the Court took into account the “[c]riminal propensities of the accused [which] are clearly spelt out from the fact that similar accusations involving human sacrifice existed at the time of trial.”<sup>524</sup> Though the Court recognized that the result of the accusations against him were not brought on record, and therefore it was not clear whether the accusations resulted in a conviction, the Court held that “*the fact that similar accusation was made against the accused-appellant for which he was facing trial cannot also be lost sight of.*”<sup>525</sup> On this basis, the Court imposed the death sentence on the accused.

5.2.44 Similarly, in *B.A. Umesh v. Registrar General, High Court of Karnataka*,<sup>526</sup> where the accused was convicted for rape, murder and robbery, the Supreme Court imposed the death sentence on him, *inter alia*, on the ground that he had engaged in similar conduct previously, and had been caught two days after the present incident, trying to commit a similar crime. The Court held that “the antecedents of the appellant and his subsequent conduct indicates that he is a menace to society and is incapable of rehabilitation.”<sup>527</sup> As noted by the Supreme Court itself in *Sangeet*, the

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<sup>521</sup> *B.A. Umesh v. Registrar General, High Court of Karnataka*, (2011) 3 SCC 85; *Sushil Murmu v. State of Jharkhand*, (2004) 2 SCC 338; *Shivu v. Registrar General, High Court of Karnataka*, (2007) 4 SCC 713. See also, *Gurmukh Singh v. State of Haryana*, (2009) 15 SCC 635.

<sup>522</sup> *Sangeet v. State of Haryana*, (2013) 2 SCC 452.

<sup>523</sup> *Sushil Murmu v. State of Jharkhand*, (2004) 2 SCC 338.

<sup>524</sup> *Sushil Murmu v. State of Jharkhand*, (2004) 2 SCC 338, at para 23.

<sup>525</sup> *Sushil Murmu v. State of Jharkhand*, (2004) 2 SCC 338, at para 23.

<sup>526</sup> *B.A. Umesh v. Registrar General, High Court of Karnataka*, (2011) 3 SCC 85.

<sup>527</sup> *B.A. Umesh v. Registrar General, High Court of Karnataka*, (2011) 3 SCC 85, at para 84.

allegations against Umesh of having committed other offences was never proved or brought on record.<sup>528</sup> Despite this, a review petition against this decision was dismissed by the Court, again referencing the allegation that “*far from showing any remorse, he was caught within two days of the incident by the local public while committing an offence of a similar type in the house of one Seeba.*”<sup>529</sup>

5.2.45 So while on the one hand, in one line of cases the court has taken into account cases pending (but not decided) against the accused, in another line of cases, which includes *Sangeet*, as well as *Mohd. Farooq Abdul Gafur v. State of Maharashtra*,<sup>530</sup> the Court has held that unless a person is proven guilty in a case, it should not be counted as an aggravating factor against him.

e. The Possibility of Reform

5.2.46 In *Bachan Singh* the Supreme Court required that the death penalty should be imposed only in those exceptional, rarest of rare cases where the “alternative option is unquestionably foreclosed.”<sup>531</sup> The Supreme Court recognized in *Bariyar*, that under the *Bachan Singh* framework, the option of life is “unquestionably foreclosed” and “completely futile, only when the sentencing aim of reformation can be said to be unachievable.”<sup>532</sup>

5.2.47 *Bachan Singh* relied on the pre-sentence hearing requirement in Section 235(2), Cr. P. C. to provide the information necessary for courts to determine what mitigating circumstances, if any, were present in the case, and what, therefore, the appropriate punishment in the case would be. According to the Court,

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<sup>528</sup> *Sangeet v. State of Haryana*, (2013) 2 SCC 452.

<sup>529</sup> *B.A. Umesh v. Registrar General, High Court of Karnataka*, Review Petition (Crl.) No (S).135-136 of 2011 in Crl. Appeal Nos.285-286 of 2011.

<sup>530</sup> *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641.

<sup>531</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 209.

<sup>532</sup> *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 66; *Mohinder Singh v. State of Punjab*, (2013) 3 SCC 294, at para 23.

*Section 235(2) provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354(3), a bearing on the choice of sentence. The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302, Penal Code, the Court should not confine its consideration principally or merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal.*<sup>533</sup>

5.2.48 Thus, in *Bachan Singh*, central to the rarest of rare formulation is the assessment of the offender's possibility of reform, which is to be determined through a distinct pre-sentence proceeding where evidence is to be led on the issue.

5.2.49 Drawing upon the *Bachan Singh* endorsed standard that the state has to lead evidence to show that the convict cannot be reformed or rehabilitated and thus constitutes a continuing threat to society,<sup>534</sup> *Bariyar* held that, "the court will have to provide clear evidence as to why the convict is not fit for any kind of

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<sup>533</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 209. See also *Allauddin Mian v. State of Bihar*, (1989) 3 SCC 5, ("All trial courts, after pronouncing an accused guilty, must adjourn the hearing on quantum of sentence to another day to enable both the convict and the prosecution to present material in support of the quantum of sentence").

<sup>534</sup> In *Bachan Singh*, the Court endorsed the following standards:

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

*reformatory and rehabilitation scheme.*<sup>535</sup> Such an evidence based account of the possibility of reform was deemed essential by the Court for introducing an element of objectivity into the sentencing process.<sup>536</sup>

5.2.50 The requirement that the state should justify, not only through arguments, but through evidence, that the exceptional penalty of death is the only option in the case, has been reiterated by the Court in *Shankar Khade*. However, *Bariyar* has rarely been followed, which is itself a testament to the capricious nature of the death penalty jurisprudence in India.<sup>537</sup> Recently, in *Shankar Khade, Anil @ Anthony Arikswamy Joseph v. State of Maharashtra*,<sup>538</sup> and *Birju v. State of M.P.*,<sup>539</sup> amongst others, the Court has again reiterated the need for evidence based assessment of the possibility of reformation of the offender. However, as these cases have also noted, “[m]any-a-times, while determining the sentence, the Courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation...”<sup>540</sup>

5.2.51 An example is *Mohd. Mannan v. State*,<sup>541</sup> where the accused was convicted for rape and murder. The Court in this case opined that the accused is “a menace to the society and shall continue to be so and he cannot be reformed.”<sup>542</sup> Noticing this case in *Sangeet*, the Supreme Court noted that the judgment did not indicate any material on the basis of which the Court concluded that the criminal was a menace to society and “shall continue to be so and he cannot be reformed.”<sup>543</sup> It appeared that the only factor upon

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<sup>535</sup> Santosh Bariyar v. State of Maharashtra, (2009) 6 SCC 498, at para 66.

<sup>536</sup> Santosh Bariyar v. State of Maharashtra, (2009) 6 SCC 498.

<sup>537</sup> See *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546 at para 46 (listing out cases where no evidence was led on whether the possibility of reformation was “unquestionably foreclosed”).

<sup>538</sup> *Anil @ Anthony Arikswamy Joseph v. State Of Maharashtra*, (2014) 4 SCC 69

<sup>539</sup> *Birju v. State Of M.P.*, (2014) 3 SCC 421.

<sup>540</sup> *Anil @ Anthony Arikswamy Joseph v. State Of Maharashtra*, (2014) 4 SCC 69, at para 33; *Birju v. State Of M.P.*, (2014) 3 SCC 421.

<sup>541</sup> *Md. Mannan v. State of Bihar*, (2011) 8 S.C.C 65.

<sup>542</sup> *Md. Mannan v. State of Bihar*, (2011) 8 S.C.C 65, at para 18.

<sup>543</sup> *Sangeet v. State of Haryana*, (2013) 2 SCC 452, at para 38.

which the Court had based this conclusion was the nature of the crime. However, as noted in *Shankar Khade*, in otherwise similar facts, the Court has come to differing conclusions on whether the accused was capable of reform. Therefore, while on the one hand the possibility of reformation or rehabilitation was ruled out, without any expert evidence, in *Jai Kumar v. State of Madhya Pradesh*,<sup>544</sup> *B.A. Umesh v. Registrar General, High Court of Karnataka*<sup>545</sup> and *Mohd. Mannan v. State of Bihar*,<sup>546</sup> on the other hand, again without any expert evidence, the benefit of this possibility was given in *Nirmal Singh v. State of Haryana*,<sup>547</sup> *Mohd. Chaman v. State (NCT of Delhi)*,<sup>548</sup> *Raju v. State of Haryana*,<sup>549</sup> *Bantu v. State of Madhya Pradesh*,<sup>550</sup> *Surendra Pal Shivbalakpal v. State Gujarat*,<sup>551</sup> *Rahul v. State of Maharashtra*,<sup>552</sup> and *Amit v. State of Uttar Pradesh*.<sup>553</sup>

### **(iii) Rules of Prudence**

5.2.52 The Supreme Court, in *Mohd. Farooq v. State of Maharashtra*,<sup>554</sup> discussed certain “rules of prudence” to be followed in death penalty adjudication, to address the concern of the potential fallibility of the system. The Court held that:

*In this particular punishment, there is heavy burden on court to meet the procedural justice requirements, both emerging from the black letter law as also conventions. In terms of rule of prudence and from the point of view of principle, a court may choose to give primacy to life imprisonment over death penalty in cases which are solely based on circumstantial*

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<sup>544</sup> *Jai Kumar v. State of Madhya Pradesh*, (1999) 5 SCC 1.

<sup>545</sup> *B.A. Umesh v. Registrar General, High Court of Karnataka.*, (2011) 3 SCC 85.

<sup>546</sup> *Mohd. Mannan v. State of Bihar*, (2011) 5 SCC 317.

<sup>547</sup> *Nirmal Singh v. State of Haryana*, (1999) 3 SCC 670.

<sup>548</sup> *Mohd. Chaman v. State (NCT of Delhi)*, (2001) 2 SCC 28.

<sup>549</sup> *Raju v. State of Haryana*, (2001) 9 SCC 50.

<sup>550</sup> *Bantu v. State of M.P.*, (2001) 9 SCC 615.

<sup>551</sup> *Surendra Pal Shivbalakpal v. State Gujarat*, (2005) 3 SCC 127.

<sup>552</sup> *Rahul v. State of Maharashtra*, (2005) 10 SCC 322.

<sup>553</sup> *Amit v. State of Uttar Pradesh*, (2012) 4 SCC 107.

<sup>554</sup> *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641.

*evidence or where high court has given a life imprisonment or acquittal.*<sup>555</sup>

5.2.53 Keeping in mind the distinct nature of the death penalty the Court therefore cautioned that it would be prudent to avoid imposing the death penalty in cases based on circumstantial evidence on the one hand, and those where lower courts have imposed a life imprisonment or have acquitted on the other. However, similar to the cases discussed above, there is little consistency in following these rules of prudence.

a. Circumstantial evidence

5.2.54 Concerned with the potential fallibility of convictions based only upon circumstantial evidence, and cognizant of the fact that the death penalty is irreversible, the Court has, in various cases cautioned that the death penalty should ordinarily be avoided when the conviction is based solely upon circumstantial evidence. Citing the principle that “more serious the offence, stricter the degree of proof,”<sup>556</sup> the Court has held that cases based on circumstantial evidence

*have far greater chances of turning out to be wrongful convictions, later on, in comparison to ones which are based on fitter sources of proof. [C]onvictions based on ‘seemingly conclusive circumstantial evidence’ should not be presumed as foolproof incidences and the fact that the same are based on circumstantial evidence must be a definite factor at the sentencing stage deliberations, considering that capital punishment is unique in its total irrevocability. [A]ny characteristic of trial, such as conviction solely resting on circumstantial evidence, which contributes to the uncertainty in the “culpability calculus”, must attract*

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<sup>555</sup> Mohd. Farooq Abdul Gafur v. State of Maharashtra, (2010) 14 SCC 641, at para 164.

<sup>556</sup> Mousam Singha Roy v. State of West Bengal, (2003) 12 SCC 377; Sharad Bhiridichand Sarda v. State of Maharashtra, (1984) 4 SCC 116; Kashmira Singh v. State of M.P., AIR 1952 SC 159.

*negative attention while deciding maximum penalty for murder.*<sup>557</sup>

5.2.55 Therefore, in cases like *Sahdeo v. State of U.P.*,<sup>558</sup> *Sheikh Ishaq v. State of Bihar*,<sup>559</sup> *Aloke Nath Dutta v. State of West Bengal*,<sup>560</sup> *Swamy Shraddananda (2)*,<sup>561</sup> and *Bishnu Prasad Sinha v. State of Assam*,<sup>562</sup> the Court did not impose the death penalty, *inter alia*, on the consideration that the conviction was based on circumstantial evidence.

5.2.56 However, despite this caution, in a contrary line of cases the Court has expressly refused to consider circumstantial evidence as a ground for not imposing the death penalty. As noticed by the Supreme Court in *Shankar Khade*, in cases like *Shivaji v. State of Maharashtra*,<sup>563</sup> *Kamta Tewari v. State of M.P.*,<sup>564</sup> and *Molai v. State of M.P.*<sup>565</sup> this Court categorically rejected the view that death sentence cannot be awarded in a case where the evidence is circumstantial and has held that “[i]n the balance sheet of [aggravating and mitigating] circumstances, the fact that the case rests on circumstantial evidence has no role to play.”<sup>566</sup>

b. Disagreement on guilt or sentence between judges

5.2.57 The rarest of rare doctrine provides a very narrow margin for the imposition of the death penalty, limited only to the most exceptional of cases. Given this extremely narrow exception, it would be expected that the judges of the various courts who have heard the case, would show a degree of unanimity regarding whether or not the case belongs to the rarest of rare

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<sup>557</sup> Kalu Khan v. State of Rajasthan, Criminal Appeal 1891-1892/2014 dated 10.03.2015.

<sup>558</sup> Sahdeo v. State of U.P., (2004) 10 SCC 682.

<sup>559</sup> Sheikh Ishaq v. State of Bihar, (1995) 3 SCC 392.

<sup>560</sup> Aloke Nath Dutta v. State of West Bengal, (2007) 12 SCC 230.

<sup>561</sup> Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767.

<sup>562</sup> Bishnu Prasad Sinha v. State of Assam, (2007) 11 SCC 467.

<sup>563</sup> Shivaji v. State of Maharashtra, (2008) 15 SCC 269.

<sup>564</sup> Kamta Tiwari v. State of M.P., (1996) 6 SCC 250

<sup>565</sup> Molai v. State of M.P., (1999) 9 SCC 581.

<sup>566</sup> Shivaji v. State of Maharashtra, (2008) 15 SCC 269, at para 27.

category.<sup>567</sup> Further, given the irreversible nature of the death penalty, if a judge has doubts about the very guilt of the accused, this by itself should be a ground for not imposing the death penalty.<sup>568</sup>

5.2.58 The Supreme Court endorsed this view in *Mohd. Farooq* and held that in order to remove disparity and bring about a degree of uniformity in the application of the death penalty, the “consensus approach”<sup>569</sup> should be adopted, whereby the death penalty should be imposed only if there is unanimity vertically across the various tiers of the court system, as well as horizontally across Benches.

5.2.59 However, as in the cases mentioned in the previous sections, on this point too, there exists a considerable diversity of precedent. Take for instance the cases of *State of Uttar Pradesh v. Satish*,<sup>570</sup> on the one hand, and *State of Maharashtra v. Suresh*,<sup>571</sup> on the other. In the former, the accused was charged with the rape and murder of a six year old, and was convicted and sentenced to death by the Trial Court but acquitted by the High Court. The Supreme Court restored the order of the Trial Court and imposed the death sentence on the basis of the brutal and depraved nature of the crime, without taking into account the doubt regarding the guilt of the accused by the High Court. *Suresh* on the other hand, also involved the rape and murder of a four year old. Here too, the Trial Court had imposed the death penalty but the High Court had acquitted. The Supreme Court restored the order of conviction of the

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<sup>567</sup> This view was espoused by Justice Thomas in his minority opinion in *Suthendraraja alias Suthenthira Raja alias Santhan v. State*, (1999) 9 SCC 323 (“In my opinion, it would be a sound proposition to make a precedent that when one of the three Judges refrains from awarding death penalty to an accused on stated reasons in preference to the sentence of life imprisonment that fact can be regarded sufficient to treat the case as not falling within the narrowed ambit of “rarest of rare cases when the alternative option is unquestionably foreclosed.”)

<sup>568</sup> This view has been endorsed, though less categorically in *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641, and *Lichhamadevi v. State of Rajasthan*, (1988) 4 SCC 456 (“Where there are two opinions as to the guilt of the accused, by the two courts, ordinarily the proper sentence would be not death but imprisonment for life”).

<sup>569</sup> *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641, at para 165.

<sup>570</sup> *State of U.P. v. Satish*, (2005) 3 SCC 114.

<sup>571</sup> *State of Maharashtra v. Suresh*, (2000) 1 SCC 471.

Trial Court, and was inclined to impose the death penalty, but held that “as the accused was once acquitted by the High Court we refrain from imposing that extreme penalty in spite of the fact that this case is perilously near the region of ‘rarest of rare’ cases.”<sup>572</sup>

5.2.60 Similarly, while in *Licchamadevi v. State of Rajasthan*,<sup>573</sup> *State of U.P. v. Babu Ram*,<sup>574</sup> *State of Maharashtra v. Damu*,<sup>575</sup> *State of Maharashtra v. Bharat Fakira Dhiwar*,<sup>576</sup> *State of Tamil Nadu v. Suresh*,<sup>577</sup> and *Santosh Kumar Singh v. State*,<sup>578</sup> the Supreme Court refused to impose the death penalty since a lower court had acquitted the accused; on the other hand, in *State of Rajasthan v. Kheraj Ram*,<sup>579</sup> *Devender Pal Singh v. State, N.C.T. of Delhi*,<sup>580</sup> and *Krishna Mochi v. State of Bihar*,<sup>581</sup> despite judges having disagreed on the guilt of the accused, the death penalty was awarded. In *Devender Pal Singh v. State, N.C.T. of Delhi*,<sup>582</sup> and *Krishna Mochi v. State of Bihar*,<sup>583</sup> the dissent on the question of guilt was by the senior most judge of the Supreme Court itself.

5.2.61 Similar concerns arise in cases like *B.A. Umesh v. Registrar General, High Court of Karnataka*,<sup>584</sup> *Ankush Maruti Shinde v. State of Maharashtra*,<sup>585</sup> *Ram Deo Chauhan @ Raj Nath Chauhan v. State of Assam*,<sup>586</sup> and of three appellants in *Krishna Mochi v. State of Bihar*,<sup>587</sup> where judges across the tiers and Benches had agreed on the guilt of the offenders, but not on whether the case belonged to the rarest of rare category. Despite this disagreement, the Supreme Court imposed the

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<sup>572</sup> *State of Maharashtra v. Suresh*, (2000) 1 SCC 471, at para 29.

<sup>573</sup> *Licchamadevi v. State of Rajasthan*, (1988) 4 SCC 456

<sup>574</sup> *State of U.P. v. Babu Ram*, (2000) 4 SCC 515.

<sup>575</sup> *State of Maharashtra v. Damu*, (2000) 6 SCC 269.

<sup>576</sup> *State of Maharashtra v. Bharat Fakira Dhiwar*, (2002) 1 SCC 622.

<sup>577</sup> *State of Tamil Nadu v. Suresh*, (1998) 2 SCC 372.

<sup>578</sup> *Santosh Kumar Singh v. State*, (2010) 9 SCC 747.

<sup>579</sup> *State of Rajasthan v. Kheraj Ram*, (2003) 8 SCC 224.

<sup>580</sup> *Devender Pal Singh v. National Capital Territory*, (2002) 5 SCC 234.

<sup>581</sup> *Krishna Mochi v. State of Bihar*, (2002) 6 SCC 81.

<sup>582</sup> *Devender Pal Singh v. National Capital Territory*, (2002) 5 SCC 234.

<sup>583</sup> *Krishna Mochi v. State of Bihar*, (2002) 6 SCC 81.

<sup>584</sup> *B.A. Umesh v. Registrar General, High Court of Karnataka*, (2011) 3 SCC 85.

<sup>585</sup> *Ankush Maruti Shinde v. State of Maharashtra*, (2009) 6 SCC 667.

<sup>586</sup> *Ram Deo Chauhan @ Raj Nath Chauhan v. State of Assam*, (2000) 7 SCC 455.

<sup>587</sup> *Krishna Mochi v. State of Bihar*, (2002) 6 SCC 81.

death penalty. In *Ram Deo Chauhan*, where one Supreme Court judge had himself imposed life imprisonment on the ground of the extreme young age of the accused, a judge in the majority held that this may be a ground for the offender to seek commutation from the executive, but would not affect the imposition of the death penalty by the Court. Similarly, in *Krishna Mochi*, where the senior most judge on the Bench had acquitted on appellant and imposed life imprisonment on three, all four were given the death sentence by majority. Contrast these cases with *Mayakaur Baldevsingh Sardar v. State of Maharashtra*,<sup>588</sup> where, while the Court found that the case met the rarest of rare standard, it refused to impose the death penalty only because the High Court had imposed life imprisonment on the accused.

5.2.62 Additional concerns arise in those cases where the Supreme Court is the first court to impose the death sentence. In 1984, the United Nations Economic and Social Council adopted certain Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,<sup>589</sup> which was endorsed by consensus by the UN General Assembly. According to these Safeguards “[a]nyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.”<sup>590</sup>

5.2.63 Under India’s international obligations, therefore a person sentenced to death has a right to appeal the imposition of the death sentence, and the state has an obligation to provide such an appellate forum. However, where the death penalty is imposed for the first time at the level of the Supreme Court, this right is negated. Take for example, the case of *Simon v. State of Karnataka*.<sup>591</sup> In this case, 4 persons were convicted for capital offences. The case was tried by the TADA court, and the first and only appeal lay before the

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<sup>588</sup> (2007) 12 SCC 654.

<sup>589</sup> Resolution 1984/50 of 25 May 1984.

<sup>590</sup> Resolution 1984/50 of 25 May 1984.

<sup>591</sup> *Simon v. State of Karnataka*, (2004) 1 SCC 74.

Supreme Court. The TADA Court convicted the accused and sentenced them to life imprisonment. The convicts appealed the decision to the Supreme Court. No appeal was filed either by the State or the victims for the enhancement of sentence. However, the Supreme Court *suo motu* enhanced the sentence of the 4 appellants to death. The Supreme Court was therefore the first and only court to impose the death penalty. The offenders had no forum available to them for appealing the decision. It is noted in this regard that the Commission, in its 187<sup>th</sup> Report, had recommended that, “*where in case the Supreme Court thinks that the acquittal is wrong and the accused should be convicted and sentence to death; or it thinks that the sentence for a term or life sentence is to be enhanced to a death sentence, then the Supreme Court may direct the case to be placed before the Hon’ble Chief Justice of India for being heard by a Bench of at least five judges. This also requires the Supreme Court’s rules to be amended.*”<sup>592</sup> However, this recommendation has not been implemented.

5.2.64 Another concern regarding disparate treatment in similar fact situations arises in cases where co-accused, who are accused of having played the same role in the offence, are given differing treatment. For example, the same FIR that was the basis of the conviction and death sentence to the accused in *Krishna Mochi*, also named Vyas Ram and ascribed the same role to him.<sup>593</sup> His case was tried separately. Before the Supreme Court, the judges relied on facts from the *Krishna Mochi* judgment to convict the accused. However, noting that in *Krishna Mochi* there had been a dissent on the question of the guilt of one accused, and the appropriateness of awarding the death sentence for the other three accused, the Court in Vyas Ram refused to impose the death penalty. Therefore though *Krishna Mochi* and two of his co-accused were given the death sentence despite a dissenting judgment in their favour,

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<sup>592</sup> Law Commission of India, 187<sup>th</sup> Report, 2013, Ministry of Law, Government of India, at page 62, available at <http://lawcommissionofindia.nic.in/reports/187th%20report.pdf>, visited on 25.8.2015.

<sup>593</sup> Vyas Ram v. State of Bihar, 2013 (12) SCC 349.

Vyas Ram was given a life imprisonment on the basis of that very judgment.

5.2.65 These cases echo another case highlighted by Justice Bhagwati in his dissent in *Bachan Singh* as an “example of freakishness in imposition of death penalty.”<sup>594</sup> In *Harbans Singh v. State of U.P.*,<sup>595</sup> involved three accused - Jeeta Singh, Kashmira Singh and Harbans Singh. All three were sentenced to death by the Allahabad High Court for playing an equal part in the murder of a family of four. Each person preferred a separate appeal to the Supreme Court. The special leave petition of Jeeta Singh came up before one Bench and it was dismissed. He was executed. Kashmira Singh’s special leave petition was placed before a different Bench. He was granted leave, and subsequently his sentence was commuted to one for life. Harbans Singh’s special leave petition came up before yet another Bench. Leave was rejected and a review petition was also dismissed. Harbans Singh was to be executed along with Jeeta Singh. However, he filed a writ petition before the Supreme Court and a stay on his execution was ordered. When the writ petition was heard, the Bench came to know about Kahsmira Singh’s commutation. According to Justice Bhagwati in *Bachan Singh*,

*[t]his is a classic case which illustrates the judicial vagaries in the imposition of death penalty and demonstrates vividly, in all its cruel and stark reality, how the infliction of death penalty is influenced by the composition of the Bench. ... The question may well be asked by the accused: Am I to live or die depending upon the way in which the Benches are constituted from time to time? Is that not clearly violative of the fundamental guarantees enshrined in Articles 14 and 21?*<sup>596</sup>

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<sup>594</sup> *Bachan Singh v. State of Punjab*, (1982) 3 SCC 24, at para 71.

<sup>595</sup> *Harbans Singh v. State of U.P.*, (1982) 2 SCC 101.

<sup>596</sup> *Bachan Singh v. State of Punjab*, (1982) 3 SCC 24, at para 71.

**(iv) Empirical Data on the Imposition of the Death Penalty**

a. Rates of Imposition of the Death Penalty

5.2.66 Data presented at the National Consultation and submitted to the Law Commission in response to the public consultation, substantiate the picture of inconsistent, arbitrary and judge centric application of the death penalty.

5.2.67 Data gathered by the National Crimes Record Bureau on death sentences indicates that in the period between 2000 and 2012, 1677 death sentences were imposed by Indian courts. As was mentioned in the National Consultation by some participants this implies that India sends on average 129 persons to death row every year, or roughly one person every third day. In *Khade*, the Supreme Court, took note of these figures and stated that this number was alarmingly high and appeared to suggest that the death penalty is being applied much more widely than was envisaged by *Bachan Singh*.<sup>597</sup>

5.2.68 Juxtaposing the NCRB data on death sentences imposed against the overall convictions for murder in the same time period provides another useful, albeit approximate, insight.<sup>598</sup> This data shows that during the period 2004-2012, convictions were recorded by courts in 180439 cases involving murder. In the same time period, the death sentence was imposed in 1178 cases, that is, in 0.65% of the cases involving murder convictions. In absolute numbers this is a large figure, as recognized by the Supreme Court in *Khade*. In addition, given the arbitrariness and inconsistency in

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<sup>597</sup> [T]he number of death sentences awarded ... is rather high, making it unclear whether death penalty is really being awarded only in the rarest of rare cases. – *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546.

<sup>598</sup> *Aparna Chandra, Mrinal Satish, Vrinda Bhandari and Radhika Chitkara, Hanging in the Balance: Arbitrariness in Death Penalty Adjudication in India (1950-2013) [forthcoming 2015] (on file)*. The numbers only provide an approximate insight because while the conviction rates are for murder, the death sentence figures may take into account sentences imposed for non-murder capital offences. Since, there are very few capital sentences imposed in offences that do not involve murder as well, the variation, if any, between this approximation and the actual number of murder related death sentences will be negligible.

the imposition of the death penalty, the question posed by the Supreme Court in *Shraddananda (2)*,<sup>599</sup> bears repeating:

*[I]f in similar cases or in cases of murder of a far more revolting nature the culprits escaped the death sentence or in some cases were even able to escape the criminal justice system altogether it would be highly unreasonable and unjust to pick on the condemned person and confirm the death penalty awarded to him/her by the courts below simply because he/she happens to be before the Court. But to look at a case in this perspective this Court has hardly any field of comparison. The court is in a position to judge 'the rarest of rare cases' or an 'exceptional case' or an 'extreme case' only among those cases that come to it with the sentence of death awarded by the trial court and confirmed by the High Court. All those cases that may qualify as the rarest of rare cases and which may warrant death sentence but in which death penalty is actually not given due to an error of judgment by the trial court or the High Court automatically fall out of the field of comparison. More important are the cases of murder of the worst kind, and their number is by no means small, in which the culprits, though identifiable, manage to escape any punishment or are let off very lightly. Those cases never come up for comparison with the cases this Court might be dealing with for confirmation of death sentence. To say this is because our Criminal justice System, of which the court is only a part, does not work with a hundred percent efficiency or anywhere near it, is not to say something remarkably new or original. But the point is, this Court, being the highest court of the Land, presiding over a Criminal Justice System that allows culprits of the most dangerous and revolting kinds of*

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<sup>599</sup> Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767.

*murders to slip away should be extremely wary  
in dealing with death sentence*<sup>600</sup>

5.2.69 In other words, how can any court in the country determine whether the cases before them are the rarest of rare? Each judge can only limit her analysis to the cases s/he has presided over or read about. In light of the large volumes of cases, the determination that one or the other case is a “rarest of rare case” would remain nothing but a legal fiction. Whether a law that permits the taking of life on the basis of a legal fiction, is in consonance with the text and spirit of the Constitution, bears investigation.

5.2.70 The excessive use of the death penalty is evidenced by another figure. Data supplied by the Supreme Court to the Death Penalty Litigation Clinic, National Law University, Delhi, and presented at the National Consultation indicates that between 2000-2015, trial courts imposed the death sentence on 1790 persons.<sup>601</sup> Of these, 1512 cases were decided by the High Court. The remaining are either still pending, or their judgments have not been located. In 62.8% of these 1512 cases, the appellate courts commuted the sentence. That is, though the appellate courts agreed with the trial court on conviction, they rejected the court’s sentencing determination. In another 28.9 % of the cases where the trial court awarded the death sentence, or roughly a third, ended in acquittal, pointing to an even deeper systemic problem relating to the quality of adjudication in the lower courts. In all, the death sentence was confirmed only in 4.3% of the cases. The Supreme Court’s data thus shows that trial courts erroneously impose the death penalty in 95.7% cases.

b. “Judge Centric” Death Penalty Jurisprudence

5.2.71 An empirical examination of the death penalty carried out in the 1970s by Professor Blackshield highlighted the judge-centric nature of application of the death penalty in those days. This

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<sup>600</sup> Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767, at para 45.

<sup>601</sup> This figure excludes TADA cases.

study analysed over 70 decisions of the Supreme Court between 1972-1976, where the Court had to decide between life imprisonment or death penalty. The author found evidence of judge-centric sentencing when he noted that a large number of death sentences were given/confirmed by Benches consisting of Justices Vaidialingam, Dua, and Alagiriswami.<sup>602</sup> Further, Blackshield also analysed the various aggravating and mitigating factors employed by the Supreme Court and found no coherence in the Court's approach in applying the same. While delay after sentence was given importance in five cases, it was discounted in another five. Similarly, the (young) age of the accused was given due consideration in two cases but discounted in another case. The "immoral" relationship of the accused-Appellant was treated as a mitigating factor in two cases and an aggravating factor in one case.<sup>603</sup> The similarities between Justice Bhagwati's dissent referenced above, Professor Blackshield's research, and the present state of the death penalty are striking.

5.2.72 Justice Bhagwati's concern that the death penalty depends not on the facts of the case, but on the composition of the Bench echo in recent admissions by the Supreme Court that the imposition of the death penalty is "judge centric."<sup>604</sup> This concern is further substantiated by research presented at the National Consultation examining the impact of judicial conscience on the outcome of death penalty cases. Post-2000, one judge of the Supreme Court imposed the death sentence in 14 out of 30 cases (of which two involved acquittal by the High Court, two involved turning life sentences into death, and in two the death sentence was imposed despite acquittal by another Supreme Court judge). Pertinently, five of these 15 cases imposing death, have now been declared *per incuriam* by the Supreme Court itself. A second judge imposed the death sentence in 8 out of 18 cases, whereas two

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<sup>602</sup> A.R. Blackshield, Capital Punishment in India, 21(2) Journal of the Indian Law Institute, 156-158 (April-June 1979).

<sup>603</sup> A.R. Blackshield, Capital Punishment in India, 21(2) Journal of the Indian Law Institute, 162. (April-June 1979).

<sup>604</sup> Sangeet v. State of Haryana, (2013) 2 SCC 452, at para 33.

other judges imposed no death penalties in adjudicating 10 and 16 cases respectively.<sup>605</sup>

5.2.73 These studies and examples illustrate the limited possibility of “principled sentencing” in India, which is the underlying assumption for the constitutionality of the death penalty in India.

c. Geographical Variations

5.2.74 The NCRB data cited above also points to another axis of disparity in death penalty jurisprudence. When broken down by state, the rate of imposition of death sentences as a percentage of the rate of convictions for murder for the period 2004-12, shows significant disparity by state. For example, a murder convict in Kerala is about twice as likely to get the death sentence as a murder convict in the rest of the country put together; a murder convict in Jharkhand is 2.4 times as likely to get the death sentence compared to the rest of the country, Gujarat 2.5 times, West Bengal 3 times, Karnataka 3.2 times, Delhi 6 times, and Jammu and Kashmir 6.8 times. A murder convict in Karnataka is 5.8 times as likely to get the death sentence compared to Tamil Nadu. A murder convict in Gujarat is again 5.8 times more likely to get the death sentence than one in Rajasthan. Maharashtra sends murder convicts to death row 2.9 times more frequently than Madhya Pradesh. Uttar Pradesh sends the most number of persons to the death row, but as a proportion of the conviction rate for murder, it is about par with the national average. Karnataka was the second largest contributor to the death row in this period, and its death sentence rate was 3.2 times the national average.<sup>606</sup>

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<sup>605</sup> Presentation made by Dr. Yug Mohit Chaudhry at the National Consultation (on file).

<sup>606</sup> See Aparna Chandra, Mrinal Satish, Vrinda Bhandari and Radhika Chitkara, *Hanging in the Balance: Arbitrariness in Death Penalty Adjudication in India (1950-2013)* [forthcoming 2015] (on file).

## **C. Systemic and Structural Concerns with the Criminal Justice Process: Implications for the Death Penalty**

5.3.1 Apart from concerns regarding the excessive and arbitrary use of the death penalty, data indicates that there exists disparity in the imposition of the death penalty, reflecting systemic and structural disadvantages, particularly of the socially and economically marginalized.

### ***(i) Assessing Capacity to Reform***

5.3.2 The *Bachan Singh* formulation requires judges to impose the death penalty only when the alternative of life is “unquestionably foreclosed.”<sup>607</sup> To make this determination, judges are required to consider whether the offender is capable of reform. Crucially, *Bachan Singh* endorsed the standard that the prosecution should prove *by leading evidence* that the offender cannot be reformed.<sup>608</sup>

5.3.3 As the Supreme Court has subsequently noticed, this injunction to determine the possibility of reformation through leading evidence rather than hunches, has rarely been followed.<sup>609</sup> More often than not, judges state, rather than evaluate, whether a person is likely to be a continuing menace to society; whether he is capable of reform and therefore, whether sparing his life is “unquestionably foreclosed.”<sup>610</sup> How do judges predict the offender’s future predilections, especially (though not only) when they find in otherwise similar fact situations that in the one case the offender was not likely to be a menace to society, and in another, that he was? Comparative experiences, and crucially our own history cautions us about making such assessments.

5.3.4 A number of studies, now severely discredited, have attempted determined whether certain

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<sup>607</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 209.

<sup>608</sup> See discussion above.

<sup>609</sup> *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498.

<sup>610</sup> See discussion above.

people or groups can be characterized and categorized according to their criminal propensities or other tendencies. Studies of this sort tried to show, for example, that whites had larger brains than “inferior” races, like blacks, and thus were more intelligent. However, Stephen Jay Gould, who studied a host of “scientific” efforts to relate intelligence to brain size over the last 150 years, has proved these attempts false.<sup>611</sup> In some of the works he studied, the methods used were seriously flawed. In others, existing prejudices of these “scientists” influenced how they chose and analysed their data. But crucially, Gould found a tendency in these studies to convert abstract prejudices — here, that blacks are inferior — into “facts”, just so one can “make the divisions and distinctions among people that our cultural and political systems dictate.”<sup>612</sup>

5.3.5 Indian history echoes similar problematic attempts at classifying people. In 1871, for example, the British passed the “Criminal Tribes Act”. The motivating notion behind the Act “*was to regard all members of these tribes as potentially criminal.*”<sup>613</sup> The Act listed about 150 tribes by name.<sup>614</sup> If a person was born into one of these tribes, that person would by birth and by definition be criminal. While introducing the Bill that became the 1871 Act, T. V. Stephens, a Member of Britain’s Law and Order Commission, observed that such tribes “*were criminals from times immemorial ... [They are] destined by the usages of caste to commit crime and [their] descendants will be offenders against law until the whole tribe is exterminated or accounted for in the manner of the Thugs...I may almost say his religion [is] to commit crime.*”<sup>615</sup> Such persons were thus

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<sup>611</sup> STEPHEN JAY GOULD, *THE MISMEASURE OF MAN*, 56 (1996).

<sup>612</sup> STEPHEN JAY GOULD, *THE MISMEASURE OF MAN*, 56 (1996).

<sup>613</sup> Ministry of Education and Social Welfare, *Gazetteer of India*, (4)1978, New Delhi.

<sup>614</sup> The Resist Initiative International, *Branded ‘Born’ Criminals: Racial Abuses against Detained and Nomadic Tribes in India*, Information for the consideration of the Committee on Elimination of Racial Discrimination in Reviewing India’s Fifteenth to Nineteenth Periodic Reports, 3 (Feb 2007), available at <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/resist.pdf>, visited on 23.08.2015.

<sup>615</sup> Dilip D’Souza, *Declared Criminals at Birth. India’s “Denotified Tribes”*, (2001), available at [http://www.manushi-india.org/pdfs\\_issues/PDF%20file%20123/4.%20Declared%20Criminal%20at%20Birth.pdf](http://www.manushi-india.org/pdfs_issues/PDF%20file%20123/4.%20Declared%20Criminal%20at%20Birth.pdf), visited on 23.08.2015.

assumed to be prone to committing crimes by habit, addiction, or even religious diktats.<sup>616</sup>

5.3.6 Assuming criminality based on one's inherent, genetic or congenital attributes often find their way into law and the process of justice, including the death penalty. So much so, that in 1996, Texas had to amend its Code of Criminal Procedure to state that the Prosecution in capital punishment cases may not offer evidence "*to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct.*"<sup>617</sup> That is, as late as 1996, the law in Texas had to expressly prohibit the tendency to assume that some people have an inherent, genetic predisposition to crime because of their race or ethnicity. The American Bar Association has also urged that the law do away with the very notion of "future dangerousness".<sup>618</sup> They noted that this idea "often turns on unreliable scientific evidence."<sup>619</sup> Put another way, the American Bar Association recognized that there is no scientific evidence for such a thing as an inherently criminal bent of mind.

5.3.7 Similar concerns with assuming dangerousness arise in India as well. To again take the example of the Criminal Tribes Act, though this law was repealed in 1952 (and the tribes were "de-notified") it was however replaced by Habitual Offenders Acts in several states. Persons belonging to de-notified tribes continue to be presumed (in practice, if not in law) to be

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<sup>616</sup> Dilip D'Souza, *Declared Criminals at Birth. India's "Denotified Tribes"*, (2001), available at: [http://www.manushi-india.org/pdfs\\_issues/PDF%20file%20123/4.%20Declared%20Criminal%20at%20Birth.pdf](http://www.manushi-india.org/pdfs_issues/PDF%20file%20123/4.%20Declared%20Criminal%20at%20Birth.pdf), visited on 23.08.2015.

<sup>617</sup> ROGER HOOD AND CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE*, 361 (2015).

<sup>618</sup> ROGER HOOD AND CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE*, 361 (2015); American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report* (September 2013), available at [http://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_moratorium/tx\\_complete\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf), visited on 23.08.2015.

<sup>619</sup> ROGER HOOD AND CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE*, 361 (2015).

criminal, and genetically predisposed to crime.<sup>620</sup> The attitude of the Criminal Justice functionaries regarding de-notified tribes can be summed up from this, amongst many other similar, news reports:

*According to Ashti's police chief, S.S. Gaikawad, a quarter of local thefts are carried out by Pardhis. His deputy reckons half of Pardhi men are criminal. Mr Gaikawad attributes high rates of criminality to poverty, but believes culture also plays a part: 'The more criminal cases against a Pardhi man, the higher his status, and therefore the better his marriage prospects are.'*<sup>621</sup>

5.3.8 Assumptions like these rest on no scientific evidence of any kind. And yet Habitual Offenders Acts remain in place across India. Further, police manuals till date mandate the opening of history sheets for registered ex-notified tribe members, "on account of their active criminality."<sup>622</sup> The "taint of inherent criminality" continues to shape the interaction of members of de-notified tribes with the state apparatus, including the police. Infact, the Delhi High Court in *Naz Foundation v. State (N.C.T of Delhi)*<sup>623</sup> also noted how the taint of criminality still continues for communities such as the *Hijra* community.<sup>624</sup>

5.3.9 The issue to consider is how members of such tribes, who are often viewed in such a prejudicial manner, will be treated within the criminal justice system, especially when the question of their "future dangerousness" or "possibility of reform" is in issue. To what extent, if any, do socially constructed and imbibed prejudices against the person's identity play a role in

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<sup>620</sup> International Convention on the Elimination of all forms of Racial Discrimination, CERD/C/IND/CO/19, 3 (Seventieth Session, March 2007).

<sup>621</sup> The Economist, *If they were crooks, wouldn't they be richer?*, April 22 2010.

<sup>622</sup> Mrinal Satish, "Bad Characters, History Sheeters, Budding Goondas and Rowdies": Police Surveillance Files and Intelligence Databases in India," 23 NAT'L. L. SCH. INDIA REV. 133, 138 (2011-12).

<sup>623</sup> *Naz Foundation v. State (N.C.T. of Delhi)*, 2010 Cri.L.J. 94 (Del).

<sup>624</sup> *Naz Foundation v. State (N.C.T. of Delhi)*, 2010 Cri.L.J. 94 (Del), at para 50.

such assessment? While it is difficult to be sure of this, the larger context of adjudication, where individual judges often make legal assessments based on such social constructs is indicative of an answer. Assumptions relating to caste have often been made, and used during trials for various offences in different ways, which keeps alive the concern that otherwise irrelevant factors such as a person's class or caste may impact the person's interaction with the criminal justice system.<sup>625</sup> It is in this larger context of persistent social prejudice against certain groups, that so final and irrevocable a punishment as the death penalty operates, which may influence not only the police apparatus, the prosecution machinery, witnesses and the public, but also the judges themselves.

5.3.10 These are not merely theoretical suppositions. The reality of the discriminatory impact of caste, class, and religion is exhibited by data presented by the Death Penalty Research Project of National Law University, Delhi at the Commission's National Consultation. The data indicates that out of 373 prisoners on death row in the country, over 75% belong to backward classes and religious minorities. 93.5% of those sentenced to death for terror offences are religious minorities or Dalits.<sup>626</sup> Hence, it appears that there are plenty of reasons, as well as empirical evidence to fear the disparate and maybe even discriminatory impact of the death penalty.

### ***(ii) Economic and Educational Vulnerability***

5.3.11 Shibbanlal Saxena, a member of India's Constituent Assembly, had spent over two years on death row before Independence. In that time, he saw several other prisoners executed, among whom were seven he believed were innocent. During a debate in the Constituent Assembly, Saxena said:

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<sup>625</sup> See e.g., Vellapandi v. State, 2001 Cri. L.J. 2772 (Mad), at para15; Dayaram v. State of M.P., 1992 Cri. L.J. 3154 (M.P.).

<sup>626</sup> Presentation made by the Death Penalty Research Project at the National Consultation on July 11, 2015.

*I have seen people who are very poor not being able to appeal [their convictions] as they cannot afford to pay the counsel. [T]he Supreme Court may grant special leave to appeal from any judgement, but it will be open to people who are wealthy, who can move heaven and earth, but the common people who have no money and who are poor will not be able to [appeal in this way].<sup>627</sup>*

5.3.12 The implication of Saxena's statement was that it is much harder for an accused with limited economic means to defend himself than it is for richer prisoners to do so. If that is an obvious observation that holds across the board, it is also indicative of the possibility that a capital punishment trial, by its very nature, disadvantages the economically vulnerable, especially in an adversarial system. It is also a reminder of a serious conundrum every death penalty trial is faced with: how do we ensure that the accused has reasonable legal representation throughout the lengthy process? Often he is too poor to afford a lawyer. In such cases, the government is obliged to appoint lawyers for the defence. However, lawyers so appointed are paid absurdly low amounts for their work. Legal aid lawyers are generally paid in the range of Rs. 500 – Rs. 1500 per trial, and Rs. 1000 – Rs. 3000 per appeal. Delhi is an exception where legal aid lawyers are paid Rs. 12,000 for a Sessions trial where the death penalty is a possible sentencing option.<sup>628</sup> And yet even this number remains significantly lower than the fees a private advocate would generally charge.

5.3.13 Empirical evidence also suggests that the majority of death row convicts in India are from economically vulnerable sections of society. Data presented by NLU Delhi's Death Penalty Research Project shows that nearly 74% of convicts were economically vulnerable (vulnerability judged in large

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<sup>627</sup> Constituent Assembly of India, Vol. 8, 3rd June 1949, available at <http://parliamentofindia.nic.in/ls/debates/vol8p15b.htm>, visited on 25.08.2015

<sup>628</sup> Data provided to the Commission by Dr. Yug Chaudhry, as obtained from the respective State Legal Services Authorities (on file).

part by their occupations and landholdings). In terms of being sole-bread winners, the Clinic could not find information for 25% of the convicts. Of the remaining 75% of the convicts, 63% were sole breadwinners,<sup>629</sup> which would certainly have an impact on whether their families could afford retaining competent counsel through the legal process. The competence of counsel would also impact the entire trial and appellate process.

5.3.14 The issue of ineffective legal aid, especially in death penalty cases has been debated across the world. It has been argued that “*whether one ends up in death row is usually determined not by the heinousness of the crime but by the quality of trial counsel.*”<sup>630</sup> Ineffective assistance of counsel has a higher tendency to lead to wrongful convictions.<sup>631</sup> Take for example, the case of *Mohd. Hussain @ Julfikar Ali v. State*,<sup>632</sup> where the accused was convicted and sentenced to death by the trial court and high court for a blast that killed 4 persons. The Supreme Court remanded the matter back for a fresh trial, noting that the accused had been denied fair trial because of the denial of effective legal representation. At this fresh trial Mohd. Hussain was found innocent of all charges and was acquitted. He was in prison for 15, out of which he was on death row for 7 years and 2 months.

5.3.15 Interestingly, in the recent case of *Surendra Koli v. State of UP*,<sup>633</sup> where the convicted person filed a review petition against his conviction and sentence by the Supreme Court on the ground that he had lacked effective legal representation before the trial court, the Supreme Court rejected the petitioner’s contention because “*at this belated stage of review in the present proceedings, this argument would not come to the respite*

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<sup>629</sup> Data presented by the Death Penalty Research Project at the National Consultation organized by the Law Commission on July 11, 2015.

<sup>630</sup> Kenneth Williams, Most Deserving of Death? An Analysis of the Supreme Court’s Death Penalty Jurisprudence 17 (2012).

<sup>631</sup> Kenneth Williams, Most Deserving of Death? An Analysis of the Supreme Court’s Death Penalty Jurisprudence 18 (2012).

<sup>632</sup> *Mohd. Hussain @ Julfikar Ali v. State*, 2012 (8) SCALE 308.

<sup>633</sup> *Surendra Koli v. State of UP*, Review Petition (Crl.) No. 395 of 2014 dated October 28, 2014.

of the petitioner,” but observed that “the learned District Judges while assigning the defence counsel, especially in cases where legal aid is sought for by the accused person, must preferably entrust the matter to a counsel who has an expertise in conducting the Sessions Trial. Such assignment of cases would not only better preserve the right to legal representation of the accused persons but also serve in the ends of ensuring efficient trial proceedings.”<sup>634</sup>

5.3.16 The empirical data on error further substantiates the discriminatory impact that poverty, and consequently, possible ineffective assistance of counsel has on people charged for a capital offence. The Supreme Court in *Bariyar, Sanjeet, and Khade*, acknowledged error in 16 cases, involving death sentences imposed on 20 individuals. Disturbingly, in over half these cases in which the Court later found error, the accused were represented by amicus curie. Data from a study titled *Hanging in the Balance: Arbitrariness in Death Penalty Adjudication in India (1950-2013)* shows that out of the 281 persons who were awarded the death sentence by at least one level of court between 2000 and 2013, and whose cases went up through all the tiers of the judicial system, 128 persons were given the death sentence only by the Trial Court.<sup>635</sup> Both the High Court and the Supreme Court either commuted the sentence or acquitted the person in these cases. 7.03% of such accused were represented by Amicus Curie. In the same time period, 79 persons were given the death sentence by both the Trial Court and the High Court but were either acquitted or had their sentences commuted by the Supreme Court. The Amicus Curie representation of this group was 22.8%. And finally, of the 69 persons who were given the death

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<sup>634</sup> Surendra Koli v. State of UP, Review Petition (Crl.) No. 395 of 2014 dated October 28, 2014.

<sup>635</sup> Aparna Chandra, Mrinal Satish, Vrinda Bhandari and Radhika Chitkara, *Hanging in the Balance: Arbitrariness in Death Penalty Adjudication in India (1950-2013)* [forthcoming 2015] (on file).

sentence by the Supreme Court itself, 36.2% has amicus representation.<sup>636</sup>

5.3.17 The over-representation of amicus curie in cases relating to error and to the imposition of the death penalty is a cause for caution, not least because it may signal the impact of structural and systemic biases on the imposition of the death penalty. Merely because a person is represented by amicus before the Supreme Court of course does not imply that the person did not get good legal representation before the Supreme Court. However, the fact that an accused is represented by amicus does indicate the person's economic circumstances. The ability to hire quality legal representation before trial courts, and to ensure that a robust record is created at the trial court level, is likely to be compromised in such instances. The impact of the lack of access to quality legal representation, particularly at the trial stage is also likely to be compounded by the existence of inconsistencies in the death penalty jurisprudence, which result in ill-trained lawyers having to argue before inadequately guided judges on an incoherent area of law.

5.3.18 This may be partially responsible for the higher presence of amicus representation in cases in which the death penalty is upheld by the Supreme Court. Be that as it may, this data indicates that of the persons who are given the death sentence at the trial court level, those who cannot afford to hire their own legal representation are more likely to have their death sentences confirmed by the high court, and/or the Supreme Court. This was in fact acknowledged by the Supreme Court in *Mohd. Farooq Abdul Gafur v. State of Maharashtra*,<sup>637</sup> where the Court observed that the inherent imperfections of the criminal justice system lead to “*swinging fortunes of the accused on the issue of determination of guilt and sentence.*”<sup>638</sup> It noted that

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<sup>636</sup> Aparna Chandra, Mrinal Satish, Vrinda Bhandari and Radhika Chitkara, *Hanging in the Balance: Arbitrariness in Death Penalty Adjudication in India (1950-2013)* [forthcoming 2015] (on file).

<sup>637</sup> *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641.

<sup>638</sup> *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641, at para 169.

*“leading commentators on the death penalty hold the view that it invariably the marginalized and destitute who suffer the extreme penalty.”*<sup>639</sup>

5.3.19 Echoing a similar sentiment, though in the context of the US, public interest lawyer Bryan Stevenson, Executive Director of Equal Justice Initiative,<sup>640</sup> once said “the reality is that capital punishment in America is a lottery. It is a punishment that is shaped by the constraints of poverty, race, geography and local politics.”<sup>641</sup>

5.3.20 Similarly, in his dissenting judgement in the *Bachan Singh* case, Justice P.N. Bhagwati wrote:

*[The] death sentence has a certain class complexion or class bias [because] it is largely the poor and the downtrodden who are the victims of this extreme penalty. We would hardly find a rich or affluent person going to the gallows. Capital punishment, as pointed out by [San Quentin State Prison] Warden [Clinton Truman] Duffy, is a “privilege of the poor.”*<sup>642</sup>

5.3.21 He then summed up his argument with the following and forthright denunciation of the penalty:

*There can be no doubt that death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived sections of the community, and the rich and the affluent usually escape from its clutches. This circumstance also adds to the arbitrary and capricious nature of the death penalty and renders it unconstitutional as being violative of Articles 14 and 21.*<sup>643</sup>

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<sup>639</sup> Mohd. Farooq Abdul Gafur v. State of Maharashtra, (2010) 14 SCC 641, at para 169.

<sup>640</sup> Equal Justice Initiative, available at [www.eji.org](http://www.eji.org).

<sup>641</sup> HUGO ADAM BEDAU AND PAUL G. CASSELL, DEBATING THE DEATH PENALTY : SHOULD AMERICA HAVE CAPITAL PUNISHMENT?, 78 (2004).

<sup>642</sup> Bachan Singh v. State of Punjab, (1982) 3 SCC 24, at para 81.

<sup>643</sup> Bachan Singh v. State of Punjab, (1982) 3 SCC 24, at para 81.

5.3.22 This pronouncement of unconstitutionality found favour with South African Constitutional Court in 1995, when all eleven judges on the Bench agreed that race and poverty were factors in the outcomes of death penalty cases, as was “*the personality and particular attitude to capital punishment of the trial judge.*”<sup>644</sup> On these and other grounds, they pronounced that capital punishment violated the Interim Constitution of South Africa. It has since been abolished in South Africa.<sup>645</sup>

5.3.23 These concerns regarding the excessive, uncertain, and disparate application of the death penalty are compounded by the fallibility of the system as a whole, especially for an irreversible punishment. This issue is discussed next.

#### **D. Fallibility of the Criminal Justice System and the Death Penalty**

*[The] death penalty is irrevocable; it cannot be recalled. It extinguishes the flame of life forever ...It is by reason of its cold and cruel finality that death penalty is qualitatively different from all other forms of punishment.*

*Bachan Singh v. State of Punjab* (Bhagwati J., dissenting)<sup>646</sup>

*From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored--indeed, I have struggled--along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that*

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<sup>644</sup> State v. Makwanyane and Another, Constitutional Court of South Africa, CCT/3/94, June 6 1995, at para 48.

<sup>645</sup> State v. Makwanyane and Another, Constitutional Court of South Africa, CCT/3/94, June 6 1995.

<sup>646</sup> Bachan Singh v. State of Punjab, (1982) 3 SCC 24, 751, at para 23.

*the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question--does the system accurately and consistently determine which defendants "deserve" to die?--cannot be answered in the affirmative. It is not simply that this Court has allowed vague aggravating circumstances to be employed, relevant mitigating evidence to be disregarded, and vital judicial review to be blocked. The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.*

- Callins v. Collins (Blackmun, J.,  
*dissenting*)<sup>647</sup>

**(i) Guilt Determination**

5.4.1 Justice Bhagwati's reminder about the finality of capital punishment, and Justice Blackmun's conviction regarding its fallibility should add caution to any debate on the death penalty. The desirability of retaining such an irreversible punishment has to be appreciated in this context of a criminal justice system that is both fallible and open to manipulation. A recent egregious example highlights this concern. In the Akshardham Temple Blasts of 2002, 33 people were killed and about 85 injured. Adambhai Sulemanbhai Ajmeri and 5 others were arrested for this attack. They were tried for various offences, including under the Prevention of Terrorism Act. Three of the accused were given the death sentence by the trial court. The High Court upheld their conviction and sentence. On appeal before the Supreme Court, the Court not only found all

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<sup>647</sup> Callins v. Collins, 510 US 1141 (1994).

the accused innocent and acquitted them, but also expressed “*anguish about the incompetence with which the investigating agencies conducted the investigation of the case of such a grievous nature, involving the integrity and security of the Nation. **Instead of booking the real culprits responsible for taking so many precious lives, the police caught innocent people and got imposed the grievous charges against them which resulted in their conviction and subsequent sentencing.***”<sup>648</sup>

5.4.2 This was therefore not a case of a mistake in investigation, but of a complete fabrication by the police. Despite this, two tiers of courts were convinced beyond reasonable doubt that all the accused were guilty. Unfortunately, this is not a one-off case. In multiple cases, the Supreme Court has found that accused persons were not only convicted, but also sentenced to death on the basis of false and fabricated evidence generated through manipulated investigations, or through the negligence and callousness by various actors in the criminal justice system, including the police, prosecution and lower courts. A report by the Jamia Teachers’ Solidarity Union lists 16 cases of serious allegations, all of them involving terror charges, which were found to be completely false and fabricated by the courts. All of these 16 cases were investigated by one police cell. Again, however, the problem is more widespread. As the Supreme Court itself recognized, “[i]t is well known fact that in our country very often the prosecution implicates not only real assailants but also implicates innocent persons so as to spread the net wide.”<sup>649</sup>

5.4.3 In multiple cases, the Court has noted that the conviction of the accused (and consequent death sentence) by lower courts was based on concocted evidence. An example is *Ashish Batham v. State of Madhya Pradesh*,<sup>650</sup> where the Supreme Court observed

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<sup>648</sup> Adambhai Sulemanbhai Ajmeri & Ors v. State of Gujarat, (2014) 7 SCC 716, at para 225.

<sup>649</sup> Major Singh v. State of Punjab, (2006) 10 SCC 499, at para 15..

<sup>650</sup> Ashish Batham v. State of Madhya Pradesh, (2002) 7 SCC 317.

that, “*we could not resist but place on record that the appellant seems to have been roped in merely on suspicion and the story of the prosecution built on the materials placed seems to be neither the truth nor wholly the truth and the findings of the courts below, though seem to be concurrent, do not deserve the merit of acceptance or approval in our hands having regard to the glaring infirmities and illegalities vitiating them and patent errors on the face of the record, resulting in serious and grave miscarriage of justice to the appellant.*”<sup>651</sup>

5.4.4 Similarly, in *Rampal Pithwa Rahidas v. State of Maharashtra*,<sup>652</sup> where the trial court sentenced 8 persons to death and the high court confirmed the death sentence against 5 of them, the Supreme Court acquitted all the accused, on the ground that the main evidence against them – that of an approver – was not reliable. The Court not only found the evidence unconvincing, it also concluded that the witness was pressured by the police to turn approver because “*the investigation had drawn a blank and admittedly the District Police of Chandrapur was under constant attack from the media and the public.*”<sup>653</sup>

5.4.5 So also, in *Subash Chander etc. v. Krishan Lal and ors.*,<sup>654</sup> where the trial court convicted the four accused and sentenced three of them to death, and the High Court upheld the conviction, but commuted the sentence of all to life, the Supreme Court acquitted all the accused, observing that, “[*w*]e have noticed with pain that the aforesaid four accused persons were implicated not only to mislead the court but also to provide protection to the real persons, being sure that ultimately no court could convict and sentence any of the aforesaid accused persons.”<sup>655</sup> Despite the Court’s opinion that “*no court could convict and sentence any of the aforesaid accused*

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<sup>651</sup> Ashish Batham v. State of Madhya Pradesh, , (2002) 7 SCC 317, at para 15.

<sup>652</sup> Rampal Pithwa Rahidas v. State of Maharashtra, (1994) 2 SCC 685.

<sup>653</sup> Rampal Pithwa Rahidas v. State of Maharashtra, (1994) 2 SCC 685, at para 27.

<sup>654</sup> Subash Chander v. Krishan Lal and Ors, (2001) 4 SCC 458.

<sup>655</sup> Subash Chander v. Krishan Lal and Ors, (2001) 4 SCC 458, at para 12.

persons,”<sup>656</sup> 3 of them spent nearly six years on death row.

5.4.6 Again, in *Parmananda Pegu v. State of Assam*,<sup>657</sup> the Supreme Court noted that the confessions were involuntary and that the medical evidence and cause of death did not match the confessions made. The accused had retracted their confessions and informed the trial court of the torture that they suffered when they made their statements in the court under Section 313 CrPC. The Supreme Court acquitted the accused, and found that the facts suggested that the police had extracted an involuntary confession. Notably, both the lower courts had imposed the death sentence on the accused.

5.4.7 Other factors like the denial of effective legal representation may send innocent persons to the death row. An example is *Mohd. Hussain @ Julfikar Ali v. State*,<sup>658</sup> where the accused was convicted and sentenced to death for a blast in a bus in Delhi which killed 4 persons. His conviction and sentence was upheld by the High Court.<sup>659</sup> Before the Supreme Court, a division Bench noted that the accused had been denied fair trial because of the denial of legal representation.<sup>660</sup> Castigating the trial court for its “casual manner” in conducting a capital punishment case, the division Bench split over whether to acquit the accused or to send the case for retrial.<sup>661</sup> The matter was referred to a three judge Bench which sent the case for retrial. In January 2013, Mohd. Hussain was found innocent and acquitted of all charges. He was in prison for 15, out of which he was on death row for 7 years and 2 months.<sup>662</sup>

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<sup>656</sup> Subash Chander etc. v. Krishan Lal and Ors, (2001) 4 SCC 458, at para 12.

<sup>657</sup> Parmananda Pegu v. State of Assam, (2004) 7 SCC 779.

<sup>658</sup> Mohd. Hussain @ Julfikar Ali v. State, 2012 (8) SCALE 308.

<sup>659</sup> State v. Mohd. Hussain @ Julfikar Ali, 140 (2007) DLT 428.

<sup>660</sup> Mohd. Hussain @ Julfikar Ali v. State, 2012 (1) SCALE 145.

<sup>661</sup> Mohd. Hussain @ Julfikar Ali v. State, 2012 (8) SCALE 308.

<sup>662</sup> State v. Mohd. Hussain @ Julfikar Ali, Sessions Case No. 79/2012, dated 04.01.2013 (Del).

5.4.8 Another example is the case of *Ram Deo Chauhan v. State of Assam*.<sup>663</sup> Ram Deo Chauhan was arrested for an offence that took place in 1992. He was convicted and sentenced to death by the trial court, and the high court. His plea of juvenility was rejected. A two judge Bench of the Supreme Court upheld his death sentence in 2000.<sup>664</sup> On review, one judge recorded the fact that though Ram Deo was not juvenile at the time of commission of the offence, he was close to 16 years, and his young age was a mitigating factor. For this reason, he refused to impose the death penalty. However, per majority, Ram Deo Chauhan's death sentence was upheld.<sup>665</sup> In 2002, the Governor of Assam, on the intervention of the National Human Rights Commission, commuted his death sentence. However, in 2009 in a writ filed by the family of the deceased person, the Supreme Court set aside the commutation order, and restored the death sentence.<sup>666</sup> In a review of *this* decision, the Supreme Court asked Ram Deo Chauhan to approach the appropriate forum for determination of his age at the time of committing the offence.<sup>667</sup> In 2010, the Gauhati High Court finally determined the Ram Deo was in fact a juvenile at the time of commission of the offence. By this time he had spent about 18 years in prison, of which about 6 years were on death row. In that time, *three* different Benches of the Supreme Court had imposed the death penalty on him.

5.4.9 *Ankush Maruti Shinde v. State of Maharashtra*<sup>668</sup> is a similar example. In 2006, Ankush Shinde and 5 others were given the death penalty by the trial court for rape and murder of a minor. The High Court upheld the death sentences of three and

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<sup>663</sup> Ramdeo Chauhan @ Rajnath Chauhan v. Bani Kant Das, Review Petition (C) 1378/2009.

<sup>664</sup> Ramdeo Chauhan @ Rajnath Chauhan v. State of Assam, (2007) 7 SCC 455.

<sup>665</sup> Ramdeo Chauhan @ Rajnath Chauhan v. State, Review Petition (crl.) 1105/2000., 10.05.2001 (SC).

<sup>666</sup> Bani Kanta Das and Anr. v. State of Assam, Writ Petition (Civil) 457/2005., 8.05.2009 (SC).

<sup>667</sup> Ramdeo Chauhan @ Rajnath Chauhan v. Bani Kant Das, Review Petition (Civil) 1378/2009., 19.11.2010 (SC).

<sup>668</sup> Ankush Maruti Shinde v. State of Maharashtra, (2009) 6 SCC 667.

commuted the others to life. On appeal, the Supreme Court imposed the death sentence on all six (relying on the *per incuriam* decision in *Ravji* for its determination that the case fell into the rarest of rare category). In 2012, about 3 years after the Supreme Court decision, a trial court determined that Ankush Shinde was a juvenile at the time of commission of the offence.<sup>669</sup> By this time, he had spent 6 years on death row, out of a total of 9 years in prison.

5.4.10 The study *Hanging in the Balance* referenced above indicates that the cases mentioned above are not isolated instances. In the period 2000-2013, 18 persons who were awarded the death penalty by *both* the lower courts were finally acquitted by the Supreme Court. An additional 67 persons had been given the death penalty by at least one court and acquitted by another. Of these, the Supreme Court itself imposed the death penalty itself on 2 persons who were acquitted by the High Court, and on 2 other persons who were acquitted by one judge of the Supreme Court. This data, and the instances mentioned above raise serious questions regarding the robustness of the criminal justice process, which provides the context and structure for the operation of the irrevocable punishment of death. The operation of the criminal justice system raises serious concerns if such a large number of people who are given the death sentence by one court but are ultimately found to be innocent. The very existence of an irreversible punishment like death in such a system is must be considered in any discussion about the abolition of the death penalty.

**(ii) Admitted Error in Imposing the Death Sentence**

5.4.11 Compounding the concerns regarding a high reversal rate in cases of capital offences, as well as the inconsistencies in the application of the rarest of rare doctrine, is the high rate of error acknowledged by the Supreme Court itself in its own decisions. In just

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<sup>669</sup> Ankush Maruti Shinde v. State of Maharashtra, Criminal Application 05/2012., 6.07.2012 (Sessions Court, Nashik).

three cases: *Bariyar*, *Sangeet*, and *Khade*, the Court acknowledged error in 16 cases, involving death sentence to 20 persons. 16 of these persons were sentenced to death in the period between 2000-2013, which implies that the Supreme Court has admitted error in imposing the death penalty on 16 persons out of the total of 69 who were given the death penalty by the Court in this time period. This is an error rate of 23.2%. The Supreme Court therefore has acknowledged that in close to a quarter of the cases in which it has given the death penalty in the recent past, the death penalty was imposed erroneously.

5.4.12 In *Bariyar*, the Court examined the decision in *Ravji alias Ram Chandra v. State of Rajasthan*,<sup>670</sup> where it was held that

*It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. ... The punishment to be awarded for a crime ... should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal."*<sup>671</sup>

5.4.13 *Bariyar* held that the exclusive focus in *Ravji* on the crime, rendered this decision *per incuriam Bachan Singh*. The Court listed a further 6 cases where *Ravji* had been followed, and which had therefore relied on incorrect precedent. Two of the 11 persons given the death sentence in this manner, including *Ravji* himself, were executed, and of the remaining, 3 are still on death row, with their mercy petitions having been

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<sup>670</sup> *Ravji alias Ram Chandra v. State of Rajasthan*, (1996) 2 SCC 175.

<sup>671</sup> *Ravji alias Ram Chandra v. State of Rajasthan*, (1996) 2 SCC 175, at para 124. Held *per incuriam Bachan Singh* in *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at para 63.

subsequently rejected, despite the Court having acknowledged its error 6 years ago.<sup>672</sup>

5.4.14 *Ankush Maruti Shinde v. State of Maharashtra*,<sup>673</sup> which was delivered about two weeks before *Bariyar*, and which imposed the death sentence on 6 persons relying on *Ravji*, was not noticed by the Court in *Bariyar*. Surprisingly, even after *Bariyar* expressly held that *Ravji* was decided *per incuriam*, the decision in that case has been followed by the Supreme Court in at least three other cases. Though these cases have not been noticed by the Supreme Court so far, in all, an additional 9 people have been given the death sentence relying on *Ravji*.<sup>674</sup>

5.4.15 Similarly, the Supreme Court in *Shankar Khade* doubted the correctness of the imposition of the death penalty in *Dhananjay Chatterjee v. State of West Bengal*,<sup>675</sup> where the Court had held that “*the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals.*”<sup>676</sup> In *Khade* the Court opined that *prima facie* the judgment had not accounted for mitigating circumstances relating to the offender. *Dhananjay Chatterjee* was executed in 2004.

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<sup>672</sup> The mercy petitions of Saibanna and Shivaji Alhat have been rejected. News reports indicate that the Ministry of Home Affairs has recommended the rejection of the mercy petition presented by Mohan Anna Chavan. See, *Reject Mercy Pleas of 2 Convicts, Pranab Told*, THE HINDU, August 18, 2015, <http://www.thehindu.com/news/national/reject-mercy-pleas-of-2-convicts-pranab-told/article7551067.ece>

<sup>673</sup> *Ankush Maruti Shinde & Ors. v. State of Maharashtra*, (2009) 6 SCC 667.

<sup>674</sup> *Ajitsingh Harnamsingh Gujral v. State of Maharashtra*, (2011) 14 SCC 401; *Sunder Singh v. Uttaranchal*, (2010) 10 SCC 611; *Jagdish v. State of M.P.*, 2009 (12) SCALE 580. In these cases, the Court relied on *Ravji* as a comparator case, to state that in the facts of this case, the death penalty had been imposed (and using this fact to appreciate whether the death penalty should be imposed in their own fact situations). The Court did not note that the imposition of the death penalty in *Ravji* was based on a wrong application of the law.

<sup>675</sup> *Dhananjay Chatterjee v. State of West Bengal* (1994) 2 SCC 220.

<sup>676</sup> *Dhananjay Chatterjee v. State of West Bengal* (1994) 2 SCC 220, at para 15. The exclusive focus of this decision on the crime and not the criminal was questioned in *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546.

5.4.16 Similarly, in *Sangeet*, the court noted an additional 3 cases where *Bachan Singh*'s direction to consider both aggravating and mitigating circumstances had not been followed.<sup>677</sup>

**Table 5.1: List of Cases Doubted in *Bariyar*, *Sangeet*, *Khade***

<b>Sl. No.</b>	<b>Case</b>	<b>No. of persons given the death sentence</b>	<b>Imposition of Death Penalty expressly<sup>678</sup> held erroneous in</b>
1.	Ravji alias Ram Chandra v. State of Rajasthan, (1996) 2 SCC 175	1	<i>Bariyar</i>
2.	Shivaji v. State of Maharashtra, AIR 2009 SC 56	1	<i>Bariyar</i>
3.	Mohan Anna Chavan v. State of Maharashtra, (2008) 11 SCC 113	1	<i>Bariyar</i>
4.	Bantu v. State of UP, (2008) 11 SCC 113	1	<i>Bariyar</i>
5.	Dayanidhi Bisoi v. State of Orissa, (2003) 9 SCC 310	1	<i>Bariyar</i>
6.	Surja Ram v. State of Rajasthan, (1996) 6 SCC 271	1	<i>Bariyar</i>
7.	State of UP v. Sattan, (2009) 4 SCC 736	4	<i>Bariyar</i>
8.	Saibanna v. State of Karnataka, (2005) 4 SCC 165	1	<i>Bariyar</i>
9.	Shivu v. Registrar General, High Court of Karnataka, (2007) 4 SCC 713	2	<i>Sangeet</i>
10.	Rajendra Pralhadrao Wasnik v. State of Maharashtra, (2012) 4 SCC 37	1	<i>Sangeet</i>
11.	Mohd. Mannan v. State of Bihar, (2011) 5 SCC 317	1	<i>Sangeet</i>
12.	B.A. Umesh v. Registrar General, High Court of Karnataka, (2011) 3 SCC 85	1	<i>Sangeet</i>
13.	Sushil Murmu v. State of Jharkhand, (2004) 2 SCC 338	1	<i>Sangeet</i>
14.	Gurmukh Singh v. State of Haryana, (2009) 15 SCC 635	1	<i>Shankar Khade</i>
15.	Dhananjoy Chatterjee v. State of West Bengal, (1994) 2 SCC 220	1	<i>Shankar Khade</i>
16.	Kamta Tiwari v. State of M.P., (1996) 6 SCC 250	1	<i>Shankar Khade</i>

<sup>677</sup> Shivu v. Registrar General, High Court of Karnataka, (2007) 4 SCC 713; Rajendra Pralhadrao Wasnik v. State of Maharashtra, (2012) 4 SCC 37; Mohd. Mannan v. State of Bihar, (2011) 5 SCC 317.

<sup>678</sup> In many of these cases the Court has pointed out inconsistencies in the application of aggravating and mitigating circumstances. In a judicial system premised on stare decisis, especially in the context of the Court in *Bachan Singh* clearly mandating that sentencing discretion has to be exercised in light of precedent, these inconsistencies render many such cases per incuriam as well. However, since the Supreme Court has not expressly acknowledged that these cases are per incuriam, they have not been added to the list. See especially, *Sangeet* and *Khade*.

5.4.17 Disturbingly, in over half these cases in which the Court later found error, the accused were represented by amicus curie. The over-representation of amicus curie in cases relating to error is a cause for caution, not least because it may signal the impact of structural and systemic disadvantages on the imposition of the death penalty, as discussed above.

**(iii) Variations in Application of the Rarest of Rare framework in the same case**

5.4.18 In *Mohd. Farooq* the Supreme Court had stated that in order to bring about some objectivity and uniformity in the application of the death penalty, the “consensus approach” should be adopted, whereby the death penalty should be imposed only if there is unanimity vertically across the various tiers of the court system, as well as horizontally across Benches.<sup>679</sup>

5.4.19 However, the study *Hanging in the Balance* indicates repeated departures from this “consensus approach.” This data shows that in the period 2000-13, the cases of 281 persons came up before the Supreme Court where at least one court had imposed the death sentence. Of these, for 205 persons, the imposition of the death sentence was in issue before the Court. Out of these 205, the Supreme Court imposed the death penalty on 69 (33.7%) people. Of this set, 5.8 % (n=4) had been acquitted by one court/ SC judge. Another 23.2% (n= 16) had been given life by at least one court/SC judge. Thus overall in 29% of cases where the Supreme Court upheld or imposed the death penalty, there was no unanimity between the judges themselves on whether the accused was in fact guilty, and/or whether his case belonged to the rarest of rare category, calling for the death sentence.

5.4.20 Of the 281 cases where at least one court had imposed the death sentence, the Supreme Court acquitted the accused in 60 (21.4%), commuted or

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<sup>679</sup> *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641, at para 165.

imposed life imprisonment in 142 (50.5%), and remanded the matter back to the High Court or Trial Court in 8 (2.8%) cases. Of the 60 acquitted, 18 had been awarded the death penalty by all the lower courts. Of the 142 who were ultimately given life imprisonment, 61 had been given the death sentence by all the lower courts.

5.4.21 Therefore, in 79 (28.1%) of the 281 cases the Supreme Court found that on the *same* facts, *both* the lower courts had erroneously imposed the death sentence.

5.4.22 Further, the Supreme Court itself imposed the death penalty on 12 persons who were given life imprisonment by at least one lower court, and a further 4 persons who were given life imprisonment by a judge of the Supreme Court itself.

5.4.23 It is important to note that merely because the imposition of the death penalty is finally overturned in such a large number of cases, does not mean that the system is functioning well. In most of the instances mentioned above, *both* the lower courts have been in error. Such errors have been corrected only after long durations in prison, including extended periods on death row. The trauma of being under a sentence of death, called the “death row phenomenon” exacts its own mental and physical punishment, even if the person is subsequently not executed.<sup>680</sup> Therefore, it is no answer to the charge against excessive imposition of the death penalty, that most of these cases are overturned or commuted by the appellate courts anyway. If two courts, staffed by experienced judges can commit errors in the determination of guilt or sentence, there is nothing to suggest that the same mistake cannot be made by the judge of the third tier as well. In other countries, most notably the United States, efforts to correct wrongful convictions, through the use of scientific evidence such as DNA, has led to the identification of hundreds of cases where a person was wrongfully convicted and sentenced, even to death,

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<sup>680</sup> Discussed in the next chapter.

despite multiple layers of appeals and review up to the highest levels of the judiciary.<sup>681</sup> In the absence of such studies in India, it is not possible to determine whether, and if so how many such cases exist in India. However, the examples given above, and the data presented here, caution us that an irreversible punishment like the death sentence exists in a fallible system.

5.4.24 Furthermore, since 2000 the Supreme Court has dismissed *in limine* at least 9 special leave petitions ('SLP') against the imposition of the death penalty.<sup>682</sup> In a system with such a high reversal rate, the Supreme Court which is the final appellate court has, as the Court itself acknowledged "*a far more serious and intensive duty to discharge. The court not only has to ensure that award of death penalty does not become a perfunctory exercise of discretion under section 302 after an ostensible consideration of Rarest of Rare doctrine, but also that the decision making process survives the special rigors of procedural justice applicable in this regard.*"<sup>683</sup> In light of this principle, the practice of dismissing SLPs against the death penalty *in limine* should therefore be done away with, as was also recommended by the Commission in its 187<sup>th</sup> Report.

5.4.25 In sum, the death penalty operates in a system that is highly fragile, open to manipulation and mistake, and evidently fallible. However objective the system becomes, since it is staffed by humans, and thus limited by human capacities and tendencies, the possibility of error always remains open, as has been

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<sup>681</sup> See Brandon L. Garrett, *The Banality of Wrongful Executions*, MICH. L. REV. (2014) (listing 18 death row exonerations, amongst more than 250 other exonerations by DNA). In all, so far about 155 death row inmates have been exonerated in the US using DNA and non-DNA evidence. See The Innocence List, Death Penalty Information Centre, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>. See generally *The Inevitability of Error*, THE DEATH PENALTY PROJECT (2014) (for examples of erroneous death sentences in various countries).

<sup>682</sup> Lal Chand @ Laliya v. State of Rajasthan (on 20.02.2004); Jafar Ali v. State of Uttar Pradesh (05.04.2004), Tote Dewan @ Man Bahadur Dewan v. State of Assam (08.08.2005), Sanjay v. State of Uttar Pradesh (03.07.2006), Bandu v. State of Karnataka (10.07.2006), Dnyaneshwar Borkar v. State of Maharashtra (21.07.2006), Magan Lal v. State of Madhya Pradesh (09.01.2012), Jitendra @ Jeetu & Ors. v. State of Madhya Pradesh (06.01.2015), Babasaheb Maruti Kamble v. State of Maharashtra (06.01.2015).

<sup>683</sup> Mohd. Farooq Abdul Gafur v. State of Maharashtra, (2010) 14 SCC 641, at para 155.

acknowledged the world over, including by the most highly resourced legal systems.

5.4.26 As the instances cited above indicate, while the existence of appellate procedures may reduce the chances of error, these cannot be eliminated altogether. Given the irreversibility of the death penalty, this punishment can only be justified where the entire system works in a fool proof manner, having regard to the highest standards of due process, the fairest of investigation and prosecution, the most robust defence, and the most impartial and astute judges. However, experiences the world over, including in India suggest, that “*all it takes is one dishonest police officer, one incompetent lawyer, one over-zealous prosecutor or one mistaken witness and the system fails.*”<sup>684</sup> In a perfect criminal justice system, the death penalty may be imposed error free. However, no such system has been devised so far. The death penalty therefore remains an irreversible punishment in an imperfect, fragile and fallible system.

5.4.27 The constitutionality of the death penalty has to be evaluated in light of the foregoing discussions on its stated justifications, as well as the concerns raised above. As the Supreme Court cautioned in *Bariyar*,

*[The] right to life is the most fundamental of all rights. Consequently a punishment which aims at taking away life is the gravest punishment. Capital punishment imposes a limitation on the essential content of the fundamental right to life, eliminating it irretrievably. We realize the absolute nature of this right, in the sense that it is a source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the right to life. Right to life is the essential content of all rights under*

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<sup>684</sup> *The Inevitability of Error*, THE DEATH PENALTY PROJECT (2014) (for examples of erroneous death sentences in various countries).

*the Constitution. If life is taken away all, other rights cease to exist.*

5.4.28 Similarly, in *Shankarlal Gyarasilal Dixit v. State of Maharashtra*<sup>685</sup> the Court held: “*The passing of the sentence of death must elicit the greatest concern and solicitude of the Judge because, that is one sentence which cannot be recalled.*”

5.4.29 In light of the degree of intrusion of capital punishment into the right to life, and the irrevocability of the punishment, the Supreme Court has rightly emphasized that:

*[I]n the context of punishments, the protections emanating from Article 14 and Article 21 have to be applied in the strictest possible terms. ... In every capital sentence case, it must be borne in mind that the threshold of rarest of rare cases is informed by Article 14 and 21, owing to the inherent nature of death penalty. Post Bachan Singh (supra), capital sentencing has come into the folds of constitutional adjudication. This is by virtue of the safeguards entrenched in Article 14 and 21 of our constitution.*<sup>686</sup>

5.4.30 It is true that *Bachan Singh* in 1980 held that the death penalty does not violate the Article 21 requirement on this score.

5.4.31 The Court held that:

*by no stretch of imagination can it be said that death penalty under Section 302 of the Penal Code, either per se or because of its execution by hanging, constitutes an unreasonable, cruel or unusual punishment. By reason of the same constitutional postulates, it cannot be said that the framers of the Constitution considered death sentence for murder or the prescribed traditional mode of its execution as a degrading punishment*

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<sup>685</sup> (1981) 2 SCC 35.

<sup>686</sup> Bariyar.

*which would defile “the dignity of the individual” within the contemplation of the preamble to the Constitution. On parity of reasoning, it cannot be said that death penalty for the offence of murder violates the basic structure of the Constitution.”*

5.4.32 However, the passage of thirty five years since that decision, and the considerably altered global and constitutional landscape in that time, are factors to be considered in any re-evaluation of the constitutionality of the death penalty.

5.4.33 The options for reforming the present system to remove the concern regarding arbitrariness and disparate application of the death penalty, are limited. On the one hand, as *Bachan Singh*, and subsequently *Mithu v. State of Punjab*<sup>687</sup> have held, judicial discretion cannot be taken out of the sentencing process. A sentencing process without discretion may be more consistent, but will also be equally arbitrary for ignoring relevant differences between cases. In such a system sentencing is likely to be severely unfair and would definitely not remain a *judicial* function.

5.4.34 Comparative experiences also warn against an approach that focuses on standardization and categorization. An instructive example is the U.K. As far back as 1953, the British Royal Commission examined the death penalty and concluded, “*No formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder.*”<sup>688</sup> The Royal Commission was unanimous in its recommendation against the adoption of any form of grades or degrees of murder, especially given the wide variance of the moral incidence of the crime, making it almost impossible to determine in advance a category of murder that would constitute the worst of the worst. This was the basis of the Commission’s recommendation for the abolition of the death penalty in Great Britain. In 1957, the UK

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<sup>687</sup> *Mithu v. State of Punjab*, (1980) 2 SCC 684.

<sup>688</sup> Report of the Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, at 595, quoted in *McGautha v. California*, 402 U.S. 183, 205 (1971).

government introduced the Homicide Act which tried to distinguish between different categories of murders and restricted death penalty to six classes of murder.<sup>689</sup> These included murder committed in the course or furtherance of theft; by shooting or causing explosions; in the course of or for the purpose of resisting, avoiding or preventing lawful arrest or effecting or assisting an escape from lawful custody; murder of a police officer in the execution of his duty or of a person assisting him; and by a prisoner of a prison officer in the execution of his duty or of a person assisting him. Along with this, the death penalty could be imposed on a person committing a second separate murder.<sup>690</sup> The Act also introduced the partial defence of “diminished responsibility” and of killing in the course of a suicide pact.<sup>691</sup>

5.4.35 A major criticism of the Act was this random basis on which death would be awarded (despite trying to introduce more principled and exceptional sentencing) – for instance, plotting a premeditated cold-blooded murder by poison would not constitute a capital offence, but accidentally killing someone in the course of a theft would be punishable with the death sentence. Similarly, if a person were to kill another using a hatchet, it would not be capital murder; but *ceteris paribus* if the weapon was a gun, it would be.<sup>692</sup> This made the law devoid of any moral or principled basis and it became unworkable in practice.

5.4.36 This led to the Murder (Abolition of Death Penalty) Act of 1965, which imposed a five-year legislative moratorium on the death penalty for murder,

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<sup>689</sup>Graham Hughes, *The English Homicide Act of 1957: The Capital Punishment Issue, and Various Reforms in the Law of Murder and Manslaughter*, 49(6) *Journal of Criminal Law and Criminology* 521 (1959), available at: <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=4773&context=jclc>, visited on 25.08.2015.

<sup>690</sup> The abolition of hanging in Britain, available at: <http://www.capitalpunishmentuk.org/abolish.html>, visited on 25.08.2015.

<sup>691</sup> The Law Commission Consultation Paper 177, *A New Homicide Act for England and Wales*, available at: <https://www.law.upenn.edu/cf/faculty/cfinkels/workingpapers/Report%20for%20British%20Law%20Commission%20cp177.pdf>, at page 18, visited on 25.08.2015.

<sup>692</sup> Gerald Gardiner QC, “Criminal Law: Capital Punishment in Britain”, 45 *ABA Journal* 259, 260-261 (March 1959).

which was reaffirmed in December 1969 to formally abolish death penalty for murder in Britain. A further vote in 1994 to reinstate capital punishment was defeated in the House of Commons in 1994. Subsequently, the death penalty was abolished for arson in the Royal Dockyards in 1971 and for treason and piracy with violence in 1998, thus ending it for all crimes.<sup>693</sup>

5.4.37 India's own jurisprudence, as well as the experiences of other countries therefore warns against standardization and categorization as a response to the arbitrariness of the death penalty.

5.4.38 The other option is to put in place guidelines that are less rigid, and allow for flexibility, but nonetheless limit the scope of application of the death penalty. But this is precisely the route taken by *Bachan Singh*. In that case, the Court sought to carve out a very narrow exceptional category. However, with the accretion of precedent the *Bachan Singh* guidelines have become more a legitimation for imposing the death sentence, than any meaningful restriction. In comparable contexts, when faced with the arbitrariness and disparity in death sentencing, other countries have moved towards abolition of the death penalty. In South Africa for example, death penalty came to a judicial end. The South African Constitutional Court in *Makwanyane*,<sup>694</sup> struck down the constitutional validity of capital punishment, relying on the arbitrariness and inequality inherent in the punishment, holding that:

*It cannot be gainsaid that poverty, race and chance play roles in the outcome of capital cases and in the final decision as to who should live and who should die. It is sometimes said that this is understood by the judges, and as far as possible, taken into account by them. But in itself this is no*

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<sup>693</sup> The abolition of hanging in Britain, available at : <http://www.capitalpunishmentuk.org/timeline.html>

<sup>694</sup> State v. Makwanyane and Another, Constitutional Court of South Africa, CCT/3/94, June 6 1995.

*answer to the complaint of arbitrariness; on the contrary, it may introduce an additional factor of arbitrariness that would also have to be taken into account. Some, but not all accused persons may be acquitted because such allowances are made, and others who are convicted, but not all, may for the same reason escape the death sentence.*<sup>695</sup>

5.4.39 In light of the Court's own acknowledgment that the death penalty system operates in an arbitrary manner the current method of application of the death penalty has to end. Comparative experience tells us that the concerns highlighted by Justice Bhagwati in *Bachan Singh*, and echoed in Supreme Court judgments recently, are likely to persist, despite attempts at reforming the apparatus of the death penalty.

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<sup>695</sup> State v. Makwanyane, Constitutional Court of South Africa, CCT/3/94, June 6 1995, at para 51.

## CHAPTER - VI

### **CLEMENCY POWERS AND DUE PROCESS ISSUES PERTAINING TO THE EXECUTION OF DEATH SENTENCE**

#### **A. Introduction**

6.1 The Supreme Court in *Shankar Kisanrao Khade v. State of Maharashtra*<sup>696</sup> ('*Khade*') also referred the administration of clemency powers by the executive under Articles 72 and 161 of the Constitution of India in death cases to the Commission for its consideration. This chapter delineates the nature, purpose and scope of the power of the executive to commute a death sentence. This chapter also analyses the application of the mercy jurisdiction in individual cases besides examining decisions of courts where the outcome of the exercise of these powers has been challenged in writ proceedings.

#### **B. Nature, Purpose and Scope of Clemency Powers**

6.2.1 The State and Central Governments have powers to commute death sentences after their final judicial confirmation. This power, unlike judicial power, is of the widest amplitude and not circumscribed, except that its exercise must be *bona fide*. Issues often alien and irrelevant to legal adjudication – morality, ethics, public good, and policy considerations – are intrinsically germane to the exercise of clemency powers. These powers exist because in appropriate cases the strict requirements of law need to be tempered and departed from to reach a truly just outcome in its widest sense. The executive's powers to commute a death sentence, in other words, exist to remedy deficiencies in the strict application of the law. Therefore, in jurisdictions retaining capital punishment, the proper exercise of mercy powers is of the utmost importance given that

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<sup>696</sup> *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546, at paras 147-150.

human lives depend on it. Every citizen has a right to petition the government to commute any death sentence, since the state's power to take life emanates from the people, and executions are carried out in their name.

6.2.2 Clemency powers of either pardoning an offender or reducing or altering the punishment awarded,<sup>697</sup> have their provenance in similar powers, which, since time immemorial, have vested in the sovereign. However, their exercise today, in modern democratic states, is not, as it was of yore, a private act of grace, but one of solemn constitutional responsibility.<sup>698</sup>

6.2.3 Clemency powers in India are enshrined in the Constitution. Article 72 vests these powers in the President, and Article 161 vests similar powers in the Governors of the States. Article 72 states:

*Article 72. Power of President to grant pardons, etc. and to suspend, remit or commute sentences in certain cases – (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence –*

*(a) in all cases where the punishment or sentence is by a Court Martial;*

*(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;*

*(c) in all cases where the sentence is a sentence of death.*

*(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the*

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<sup>697</sup> For the meaning of pardon, reprieve, respite, etc, see *State (Govt. of NCT of Delhi) v. Prem Raj*, (2003) 7 SCC 121, at para 10.

<sup>698</sup> *Epuru Sudhakar v. Govt. of A.P.*, (2006) 8 SCC 161, at paras 16-17.

*Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court martial.*

*(3) Nothing in sub-clause of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State, under any law for the time being in force.*

6.2.4 Article 161 states:

*Article 161. Power of Governor to grant pardons, etc. and to suspend, remit or commute sentences in certain cases – The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.*

6.2.5 Neither of these powers are personal to the holders of the office, but are to be exercised (under Articles 74<sup>699</sup> and 163<sup>700</sup>, respectively) on the aid and advice of the Council of Ministers.

6.2.6 Clemency powers usually come into play after a judicial conviction and sentencing of an offender. In exercise of these clemency powers, the President and Governor are empowered to scrutinize the record of the case and differ with the judicial verdict on the point of

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<sup>699</sup> Article 74. (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice:

Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.

<sup>700</sup> Article 163. (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court.

guilt or sentence. Even when they do not so differ, they are empowered to exercise their clemency powers to ameliorate hardship, correct error, or to do complete justice in a case by taking into account factors that are outside and beyond the judicial ken. They are also empowered to look at fresh evidence, which was not placed before the courts. In *Kehar Singh v. Union of India* ('*Kehar Singh*'),<sup>701</sup> a Constitution Bench (five judges) held as follows:

*7. ...To any civilized society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ. But, the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State... The power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of*

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<sup>701</sup> (1989) 1 SCC 204.

*great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context...*

*...10. We are of the view that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. and this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him...*

*...It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court.*

*...16. ...Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines, for we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of*

*great significance that the function itself enjoys high status in the constitutional scheme.*<sup>702</sup>

6.2.7 Thus, it will be seen that clemency powers, while exercisable for a wide range of considerations and on protean occasions, also function as the final safeguard against possibility of judicial error or miscarriage of justice. This casts a heavy responsibility on those wielding this power and necessitates a full application of mind, scrutiny of judicial records, and wide ranging inquiries in adjudicating a clemency petition, especially one from a prisoner under a judicially confirmed death sentence who is on the very verge of execution.

6.2.8 The Ministry of Home Affairs, Government of India, has drafted the “*Procedure Regarding Petitions for Mercy in Death Sentence Cases*” to guide State Governments and the prison authorities in dealing with mercy petitions submitted by death sentence prisoners. These rules were summarized by the Supreme Court in *Shatrughan Chauhan v. Union of India*<sup>703</sup> (‘*Shatrughan Chauhan*’):

*98. The Ministry of Home Affairs, Government of India has detailed procedure regarding handling of petitions for mercy in death sentence cases:*

*98.1. As per the said procedure, Rule I enables a convict under sentence of death to submit a petition for mercy within seven days after and exclusive of the day on which the Superintendent of Jail informs him of the dismissal by the Supreme Court of his appeal or of his application for special leave to appeal to the Supreme Court.*

*98.2. Rule II prescribes procedure for submission of petitions. As per this Rule, such petitions shall be addressed to, in the case of the States, to the Governor of the State at the first instance and*

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<sup>702</sup> *Kehar Singh v. Union of India*, (1989) 1 SCC 204, at paras 7, 10 and 16.

<sup>703</sup> (2014) 3 SCC 1.

*thereafter to the President of India and in the case of the Union Territories directly to the President of India. As soon as the mercy petition is received, the execution of sentence shall in all cases be postponed pending receipt of orders on the same.*

*98.3. Rule III states that the petition shall in the first instance, in the case of the States, be sent to the State concerned for consideration and orders of the Governor. If after consideration it is rejected, it shall be forwarded to the Secretary to the Government of India, Ministry of Home Affairs. If it is decided to commute the sentence of death, the petition addressed to the President of India shall be withheld and intimation to that effect shall be sent to the petitioner.*

*98.4. Rule V states that in all cases in which a petition for mercy from a convict under sentence of death is to be forwarded to the Secretary to the Government of India, Ministry of Home Affairs, the Lt. Governor/Chief Commissioner/Administrator or the Government of the State concerned, as the case may be, shall forward such petition, as expeditiously as possible, along with the records of the case and his or its observations in respect of any of the grounds urged in the petition.*

*98.5. Rule VI mandates that upon receipt of the orders of the President, an acknowledgment shall be sent to the Secretary to the Government of India, Ministry of Home Affairs, immediately in the manner prescribed. In the case of Assam and Andaman and Nicobar Islands, all orders will be communicated by telegraph and the receipt thereof shall be acknowledged by telegraph. In the case of other States and Union Territories, if the petition is rejected, the orders will be communicated by express letter and receipt thereof shall be acknowledged by express letter. Orders commuting the death sentence will be communicated by express letters, in the case of Delhi and by telegraph*

*in all other cases and receipt thereof shall be acknowledged by express letter or telegraph, as the case may be.*

*98.6. Rule VIII (a) enables the convict that if there is a change of circumstance or if any new material is available in respect of rejection of his earlier mercy petition, he is free to make fresh application to the President for reconsideration of the earlier order.*

*99. Specific instructions relating to the duties of Superintendents of Jail in connection with the petitions for mercy for or on behalf of the convicts under sentence of death have been issued:*

*99.1. Rule I mandates that immediately on receipt of warrant of execution, consequent on the confirmation by the High Court of the sentence of death, the Jail Superintendent shall inform the convict concerned that if he wishes to appeal to the Supreme Court or to make an application for special leave to appeal to the Supreme Court under any of the relevant provisions of the Constitution of India, he/she should do so within the period prescribed in the Supreme Court Rules.*

*99.2. Rule II makes it clear that, on receipt of the intimation of the dismissal by the Supreme Court of the appeal or the application for special leave to appeal filed by or on behalf of the convict, in case the convict concerned has made no previous petition for mercy, the Jail Superintendent shall forthwith inform him that if he desires to submit a petition for mercy, it should be submitted in writing within seven days of the date of such intimation.*

*99.3. Rule III says that if the convict submits a petition within the period of seven days prescribed by Rule II, it should be addressed, in the case of the States, to the Governor of the State at the first instance and, thereafter, to the President of India and in the case of the Union Territories, to the President of India. The Superintendent of Jail shall*

*forthwith dispatch it to the Secretary to the State Government in the Department concerned or the Lt. Governor/Chief Commissioner/Administrator, as the case may be, together with a covering letter reporting the date fixed for execution and shall certify that the execution has been stayed pending receipt of the orders of the Government on the petition.*

*99.4. Rule IV mandates that if the convict submits petition after the period prescribed by Rule II, the Superintendent of Jail shall, at once, forward it to the State Government and at the same time telegraph the substance of it requesting orders whether execution should be postponed stating that pending reply sentence will not be carried out.*

*100. The above Rules make it clear that at every stage the matter has to be expedited and there cannot be any delay at the instance of the officers, particularly, the Superintendent of Jail, in view of the language used therein as "at once.*

*101. Apart from the above Rules regarding presentation of mercy petitions and disposal thereof, necessary instructions have been issued for preparation of note to be approved by the Home Minister and for passing appropriate orders by the President of India.*

*102. The extracts from the Prison Manuals of various States applicable for the disposal of mercy petitions have been placed before us. Every State has a separate Prison Manual which speaks about detailed procedure, receipt placing required materials for approval of the Home Minister and the President for taking decision expeditiously. The Rules also provide steps to be taken by the Superintendent of Jail after the receipt of mercy petition and subsequent action after disposal of the same by the President of India. Almost all the Rules prescribe how the death convicts are to be treated till final decision is taken by the President of India.*

103. The elaborate procedure clearly shows that even death convicts have to be treated fairly in the light of Article 21 of the Constitution of India. Nevertheless, it is the claim of all the petitioners herein that all these rules were not adhered to strictly and that is the primary reason for the inordinate delay in disposal of mercy petitions. For illustration, on receipt of mercy petition, the Department concerned has to call for all the records/materials connected with the conviction. Calling for piecemeal records instead of all the materials connected with the conviction should be deprecated. When the matter is placed before the President, it is incumbent on the part of the Home Ministry to place all the materials such as judgment of the trial court, High Court and the final court viz. Supreme Court as well as any other relevant material connected with the conviction at once and not call for the documents in piecemeal.<sup>704</sup>

### **C. Standard of Judicial Review for Examining Exercise of Mercy Powers**

6.3.1 The Supreme Court has characterized the nature of mercy provisions (Articles 72 and 161) as constitutional duty rather than privilege or a matter of grace. The Supreme Court observed the following in *Shatrughan Chauhan*:

*In concise, the power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is a constitutional duty. As a result, it is neither a matter of grace nor a matter of privilege but is an important constitutional responsibility reposed by the People in the highest authority. The power of pardon is essentially an executive action, which needs to be exercised in the aid of justice and not in defiance of it. Further, it is well settled that the power under Articles 72/ 161 of the Constitution*

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<sup>704</sup> *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, at paras 98-103.

*of India is to be exercised on the aid and advice of the Council of Ministers.*<sup>705</sup>

6.3.2 The Supreme Court has further held in *Epuru Sudhakar v. Govt. of A.P.*<sup>706</sup> that the exercise of power under Article 72 by the President and Article 161 by the Governor is subject to limited form of judicial review.<sup>707</sup> The Supreme Court has also held that the mercy prerogative under Articles 72 and 161 should be discharged in line with the principle of rule of law, of which fairness and legal certainty are essential elements.<sup>708</sup> Further, various decisions of the Supreme Court have provided the following grounds for a challenge to the exercise of these clemency powers:<sup>709</sup>

- (a) Power has been exercised by the Governor/President himself without being advised by the Government,
- (b) In the exercise of the power, the Governor/President has transgressed his jurisdiction,
- (c) If the order passed in pursuance to Articles 72 or 161 betrays non-application of mind or *mala fide* basis
- (d) Power has been exercised on the basis of political considerations
- (e) That the order suffers from arbitrariness
- (f) That the manner of exercise of power suffers from the following defects:

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<sup>705</sup> Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1, at para 19.

<sup>706</sup> *Epuru Sudhakar v. Govt. of A.P.*, (2006) 8 SCC 161.

<sup>707</sup> See also *Narayan Dutt v. State of Punjab*, (2011) 4 SCC 353, at paras 14-31; *B.P. Singhal v. Union of India*, (2010) 6 SCC 331, at para 76; *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, at para 22.

<sup>708</sup> *Epuru Sudhakar v. Govt. of A.P.*, (2006) 8 SCC 161, at paras 65-67

<sup>709</sup> See *Maru Ram v. Union of India*, (1981) 1 SCC 107, at paras 62-65; *Epuru Sudhakar v. Govt. of A.P.*, (2006) 8 SCC 161, at paras 34-38; *Narayan Dutt v. State of Punjab*, (2011) 4 SCC 353, at para 24; *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, at paras 23-24.

- extraneous or wholly irrelevant consideration have been taken into account;
- that relevant materials have been kept out of consideration

#### **D. Duty of Writ Courts Carrying Out Judicial Review of Exercise of Mercy Powers**

6.4 The Supreme Court has enjoined a critical role in examining the discharge of mercy jurisdiction by the executive authorities in death sentence matters. The Court has termed this body of jurisprudence as "mercy jurisprudence"<sup>710</sup> and has linked it to the "*evolving standard of decency, which is the hallmark of the society.*"<sup>711</sup> In fact, the Court in *Shatrughan Chauhan* observed that "*judicial interference is the command of the Constitution*" when the exercise of mercy power by the executive is lacking in due care and diligence and has become whimsical.<sup>712</sup> The Court has held the following in *Shatrughan Chauhan* in this behalf:

*242. In the aforesaid batch of cases, we are called upon to decide on an evolving jurisprudence, which India has to its credit for being at the forefront of the global legal arena. **Mercy jurisprudence is a part of evolving standard of decency, which is the hallmark of the society.***

*243. Certainly, a series of the Constitution Benches of this Court have upheld the constitutional validity of the death sentence in India over the span of decades but these judgments in no way take away the duty to follow the due procedure established by law in the execution of sentence. Like the death sentence is passed lawfully, the execution of the sentence must also be in consonance with the constitutional mandate and not in violation of the constitutional principles.*

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<sup>710</sup> *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, at para 242.

<sup>711</sup> *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, at para 242.

<sup>712</sup> *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, at para 244.

244. *It is well established that exercising of power under Articles 72/161 by the President or the Governor is a constitutional obligation and not a mere prerogative. Considering the high status of office, the Constitution Framers did not stipulate any outer time-limit for disposing of the mercy petitions under the said Articles, which means it should be decided within reasonable time. However, when the delay caused in disposing of the mercy petitions is seen to be unreasonable, unexplained and exorbitant, it is the duty of this Court to step in and consider this aspect. Right to seek for mercy under Articles 72/161 of the Constitution is a constitutional right and not at the discretion or whims of the executive. Every constitutional duty must be fulfilled with due care and diligence, otherwise judicial interference is the command of the Constitution for upholding its values.*

**245. Remember, retribution has no constitutional value in our largest democratic country. In India, even an accused has a de facto protection under the Constitution and it is the Court's duty to shield and protect the same. Therefore, we make it clear that when the judiciary interferes in such matters, it does not really interfere with the power exercised under Articles 72/161 but only to uphold the de facto protection provided by the Constitution to every convict including death convicts.**<sup>713</sup> (Emphasis supplied)

### **E. Subjectivity in Exercise of Power under Article 72 by the President**

6.5.1 It is to be noted that in exercise of power under Articles 72 and 161, the President or the Governor, as the case may be, is to be guided and directed by the “*aid and advice*” rendered by the Council of Ministers under Articles 74 and 163. The Supreme

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<sup>713</sup> Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1, at paras 242-245.

Court has said so in categorical terms in *Maru Ram v. Union of India*<sup>714</sup> in the following paragraph:

***Because the President is symbolic, the Central Government is the reality even as the Governor is the formal head and sole repository of the executive power but is incapable of acting except on, and according to, the advice of his Council of Ministers. The upshot is that the State Government, whether the Governor likes it or not, can advice and act under Article 161, the Governor being bound by that advice. The action of commutation and release can thus be pursuant to a governmental decision and the order may issue even without the Governor's approval although, under the Rules of Business and as a matter of constitutional courtesy, it is obligatory that the signature of the Governor should authorise the pardon, commutation or release. The position is substantially the same regarding the President. It is not open either to the President or the Governor to take independent decision or direct release or refuse release of anyone of their own choice. It is fundamental to the Westminster system that the Cabinet rules and the Queen reigns being too deeply rooted as foundational to our system no serious encounter was met from the learned Solicitor-General whose sure grasp of fundamentals did not permit him to controvert the proposition, that the President and the Governor, be they ever so high in textual terminology, are but functional euphemisms promptly acting on and only on the advice of the Council of Ministers have in a narrow area of power. The subject is now beyond controversy, this Court having authoritatively laid down the law in Shamsher Singh case [Shamsher Singh v. State of Punjab, (1975) 1 SCR 814 : (1974) 2 SCC 831 : 1974 SCC (L&S) 550]. So, we agree, even without reference to Article 367(1) and Sections 3(8)(b) and 3(60)(b) of the General***

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<sup>714</sup> Maru Ram v. Union of India, (1981) 1 SCC 107.

***Clauses Act, 1897, that, in the matter of exercise of the powers under Articles 72 and 161, the two highest dignitaries in our constitutional scheme act and must act not on their own judgment but in accordance with the aid and advice of the ministers. Article 74, after the 42nd Amendment silences speculation and obligates compliance. The Governor vis-à-vis his Cabinet is no higher than the President save in a narrow area which does not include Article 161. The constitutional conclusion is that the Governor is but a shorthand expression for the State Government and the President is an abbreviation for the Central Government.***<sup>715</sup>  
 (Emphasis supplied)

6.5.2 While the President of India in considering a mercy petition is constitutionally obligated to not deviate from the *advice* rendered by the Council of Ministers, there have been occasions where the President has refrained from taking any decision altogether on the said mercy petition, thus, keeping the matter pending. In the table below, the record of mercy petitions disposed by various Presidents till date is discussed:<sup>716</sup>

**Table 6.1. Details of Mercy Petitions Decided by the President**

<b>S. No.</b>	<b>Name of the President</b>	<b>Tenure</b>	<b>Number of Mercy Petitions Accepted</b>	<b>Number of Mercy Petitions Rejected</b>	<b>Total</b>
1	Rajendra Prasad	26.1.1950 – 3.5.1962	180	1	181
2	SarvapalliRadhakrishnan	13.5.1962 - 13.5.1967	57	0	57
3	ZakirHussain	13.5.1967 – 3.5.1969	22	0	22

<sup>715</sup> Maru Ram v. Union of India, (1981) 1 SCC 107, at para 61.

<sup>716</sup> This table is based on archival research and RTI data collected by Bikram Jeet Batra and others. Official figures of mercy petitions disposed of by the Presidents at serial nos. 1-9 are not available, and the figures in the table are based on empirical verification from the archives which may not be complete.

4	V.V. Giri	3.5.1969 – 20.7.1969; 24.8.1969 – 24.8.1974	3	0	3
5	Fakrudhin Ali Ahmed	24.8.1974 – 11.2.1977	NA	NA	0
6	N Sanjeeva Reddy	25.7.1977 – 5.7.1982	NA	NA	0
7	Zail Singh	25.7.1982 – 25.7.1987	2	30	32
8	R. Venkatraman	25.7.1987 – 25.7.1992	5	45	50
9	S.D. Sharma	25.7.1992 – 25.7.1997	0	18	18
10	K.R. Narayanan	25.7.1997 – 25.7.2002	0	0	0
11	A.P.J Kalam	25.7.2002 – 25.7.2007	1	1	2
12	PratibhaPatil	25.7.2007 – 25.7.2012	34	5	39
13	Pranab Mukherjee	25.7.2012 --	2	31	33
	<b>Total</b>		<b>306</b>	<b>131</b>	<b>437</b>

6.5.3 During the period 1950-1982, which saw six Presidents, only one mercy petition was rejected as against 262 commutations of death sentence to life imprisonment. As per available records, President Rajendra Prasad commuted the death sentences in 180 out of the 181 mercy petitions he decided, rejecting only one. President Radhakrishnan commuted the death sentences in all the 57 mercy petitions decided by him. President Hussain and President Giri commuted the death sentence in all the petitions decided by them, while President Ahmed and President Reddy did not get to deal with any mercy petitions in their tenure.

6.5.4 In contrast to the first phase (1950-1982), between 1982 and 1997, three Presidents rejected, between then, 93 mercy petitions and commuted seven death sentences. President Zail Singh rejected 30 of the 32 mercy petitions he decided, and President

Venkatraman rejected 45 of the 50 mercy petitions decided by him. Subsequently, President Sharma rejected all the 18 mercy petitions put up before him.

6.5.5 In what can be called the third phase i.e. 1997-2007, the two Presidents kept almost all the mercy petitions received by them from the government of the day pending, and only two mercy petitions were decided during this period. While President Narayanan did not take any decision on any mercy petition before him, President Abdul Kalam acted only twice during his tenure resulting in one rejection and another commutation. During their combined tenure of ten years, they put the brakes on the disposal of mercy petitions.

6.5.6 Later, President Pratibha Patil during her Presidency rejected five mercy petitions, and commuted 34 death sentences. The current President of India, Shri Pranab Mukherjee has thus far rejected 31 of the 33 mercy petitions decided by him.

6.5.7 A perusal of the chart of mercy petitions disposed by Presidents suggests that a death-row convict's fate in matters of life and death may not only depend on the ideology and views of the government of the day but also on the personal views and belief systems of the President.

## **F. Judicial Review of Exercise of Mercy Powers**

6.6.1 The Supreme Court in *Shatrughan Chauhan* has recorded that the Home Ministry considers the following factors while deciding mercy petitions:

- (a) *Personality of the accused (such as age, sex or mental deficiency) or circumstances of the case (such as provocation or similar justification);*
- (b) *Cases in which the appellate Court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction;*

- (c) *Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified;*
- (d) *Where the High Court on appeal reversed acquittal or on an appeal enhanced the sentence;*
- (e) *Is there any difference of opinion in the Bench of High Court Judges necessitating reference to a larger Bench;*
- (f) *Consideration of evidence in fixation of responsibility in gang murder case;*
- (g) *Long delays in investigation and trial etc.*<sup>717</sup>

6.6.2 However, when the actual exercise of the Ministry of Home Affairs (on whose recommendations mercy petitions are decided) is analysed, it is seen that many times these guidelines have not been adhered to. Writ Courts in numerous cases have examined the manner in which the executive has considered mercy petitions. In fact, the Supreme Court as part of the batch matter *Shatrughan Chauhan* case heard 11 writ petitions challenging the rejection of the mercy petition by the executive. Some of these decisions are analysed in the following pages.

**(i) *Chronic Mental Illness Ignored: The Case of Sunder Singh***<sup>718</sup>

6.6.3 Sunder Singh was sentenced to death for having burnt five of his relatives alive. His mercy petition was dismissed by the Governor on 21.1.2011, and then by the President on 31.3.2013, even though he had stated in his mercy petition that he had committed the offences under the influence of mental illness. This claim was corroborated by the jail records, which showed that due to his abnormal behavior he had been presented before numerous medical boards

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<sup>717</sup>Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1, at paras 55-56.

<sup>718</sup> Sunder Singh's Writ [Writ Petition (Crl.) No. 192/2013] was considered in the batch matter Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1. See paras 79-87 for discussion on law, and paras 178-195 for the outcome in Writ Petition (Crl.) No. 192/2013.

consisting of government psychiatrists who had opined that he was suffering from chronic schizophrenia and required long term treatment. This information had been periodically communicated to the State Government and the Ministry of Home Affairs, Government of India, who nevertheless chose to reject his mercy petitions. He was eventually found to be “*not mentally fit to be awarded the death penalty*”<sup>719</sup> by a team of psychiatrists appointed by the State Government and his death sentence was commuted by the Supreme Court.

**(ii) Cases involving Long delays in Investigation and Trial**

a. The Case of Gurmeet Singh<sup>720</sup>

6.6.4 When a convict on death row has already spent a considerable period of time in prison, before the mercy plea is decided by the President, it becomes a strong factor in deciding whether or not such a prisoner still deserves the additional punishment of execution.

6.6.5 Gurmeet was arrested on 16.10.1986, convicted and sentenced to death by the trial court on 20.7.1992. The High Court confirmed his death sentence (per majority) on 8.3.1996, and the Supreme Court upheld the conviction and death sentence on 28.9.2005. The convict’s mercy petition was decided on 1.3.2013, by which time he had spent 27 years in custody, of which about 21 years were under a death sentence. These factors were ignored and his mercy petition was rejected. The Supreme Court in *Shatrughan Chauhan* commuted the death sentence of Gurmeet Singh on account of inordinate time taken by the executive in disposal of his mercy petition.

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<sup>719</sup> *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, at para 190.

<sup>720</sup> *Gurmeet Singh’s Writ [Writ Petition (Crl.) No. 193/2013]* was considered in the batch matter *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1. See paras 148-16 for the outcome in *Writ Petition (Crl.) No. 193/2013*. See also *Gurmeet Singh v. State of U.P.*, (2005) 12 SCC 107.

b. The Cases of Simon and Others<sup>721</sup>

6.6.6 Simon, Bilavendran, Gnanprakasam and Madiah were arrested on 14.7.1993, and convicted by the trial court under the Terrorist and Disruptive Activities (Prevention) Act on 29.9.2001. They were sentenced to life imprisonment. The state appealed to the Supreme Court for enhancement of sentence, but its special leave petition was dismissed due to delay. When the criminal appeal filed by the convicts was being heard, the Supreme Court, *suo motu*, issued notice for enhancement of sentence, and then sentenced the convicts to death on 29.1.2004. This was the first time the convicts had been sentenced to death, and since it had been done by the Supreme Court there was no appeal possible after this. When the convict's mercy pleas were decided 9 years later, they had already spent 19 years and 7 months in custody in prison. Simon, Bilavendran, Gnanprakasam and Madiah were aged 50, 55, 60 and 64 years when their mercy petitions were rejected by the President on 8.2.2013 after a delay of about 9 years. Their petitions were finally allowed by the Supreme Court.

**(iii) Partial and Incomplete Summary Prepared for President: The Case of Mahendra Nath Das**<sup>722</sup>

6.6.7 When Mahendra Nath Das challenged the rejection of his mercy petition by the President, the Supreme Court summoned the records relating to the mercy petition and discovered that the recommendation for clemency made by a former President in this very case was not put before or communicated to the President Pratibha Patil when she was asked to reject the mercy petition. The Supreme Court held it to be a very serious lapse, and, combined with the 11 years delay taken in the disposal of the mercy petition, was

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<sup>721</sup> Writ preferred by Simon and others [(Writ Petition (Crl.) No. 34/2013] was considered in the batch matter Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1. See paras 120-137 for the outcome in the said Writ Petition (Crl.) No. 34/2013. See also Simon v. State of Karnataka, (2004) 2 SCC 694.

<sup>722</sup> Mahendra Nath Das v. Union of India, (2013) 6 SCC 253.

good enough reason to quash the rejection of the mercy petition and commute the death sentence.

**(iv) Non-Application of Mind**

a. The Case of *Dhananjoy Chatterjee*<sup>723</sup>

6.6.8 In the case of *Dhananjoy Chatterjee*, when the Governor was advised to reject the mercy petition, he was not informed about the mitigating circumstances of the case. The Supreme Court held the same to be a serious error, which had prejudiced the convict, and consequently quashed the rejection of the mercy petition. However, the mercy petition preferred by *Dhananjoy Chatterjee* was subsequently rejected by the executive and he was executed.

b. The Case of *Bandu Baburao Tidke*<sup>724</sup>

6.6.9 Tidke's mercy petition was received in the Ministry of Home Affairs in 2007. On 2.6.2012, it was decided to commute his death sentence. However, unknown to the President, the Ministry of Home Affairs and the State Government, Tidke had expired in prison about five years earlier on 18.10.2007 while awaiting a verdict on his mercy plea. His mercy petition had been decided without obtaining updated information from the prison authorities or the State Government, raising questions about the diligence exercised and procedures in adjudicating mercy petitions.

**(v) Mercy Petition Rejected Without Access to Relevant Records of the Case: The Case of *Praveen Kumar***<sup>725</sup>

6.6.10 Even though Rule V of the Mercy Petition Rules specifically requires that the entire record be sent to the Central Government when it is deciding the mercy

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<sup>723</sup> *Dhananjoy Chatterjee v. State of W.B.*, (2004) 9 SCC 751.

<sup>724</sup> *Bandu Baburao Tidke v. State of Karnataka* (Unreported Order in SLP CrI. 3048 of 2006) dated 10.7.2006.

<sup>725</sup> *Praveen Kumar's Writ [Writ Petition (CrI.) No. 187/2013]* was considered in the batch matter *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1. See paras 139-141 for the outcome in the Writ Petition (CrI.) No. 187/2013.

petition, and even though the Guidelines used by the Ministry of Home Affairs clearly requires the close scrutiny of the record, in many cases it has been found that the Central Government has rejected a convict's mercy petition without reading or obtaining the trial court record.

6.6.11 For example, in Praveen Kumar's case, the Supreme Court found that his mercy petition had been rejected by the Central Government and the President without reading or obtaining the record of the trial court. Consequently, no attention at all was paid to the mitigating circumstances in this case or the circumstances relating to the convict which are necessary for adjudication of mercy petitions as per the Ministry of Home Affairs' guidelines.

#### **(vi) Wrongful Executions and Failure of the Clemency Process**

##### **(a) The Case of Jeeta Singh<sup>726</sup>**

6.6.12 The case of Jeeta Singh has been discussed in the previous chapter, but is of relevance here as well. Jeeta Singh, Harbans Singh and Kashmira Singh were sentenced to death by the trial court for equal roles in an offence of murder. The High Court confirmed their death sentences. Each of them filed separate appeals to the Supreme Court which came up for hearing before different Benches. Jeeta's special leave petition ('SLP') was dismissed on 15.4.1976. Kashmira's SLP was admitted on the question of sentence, and on 10.4.1977 his appeal was allowed and the death sentence was commuted by the Supreme Court. Harbans Singh's SLP was dismissed on 16.10.1978. His review petition was dismissed on 9.5.1980, and his mercy petition was rejected by the President on 22.8.1981. While rejecting Harbans and Jeeta's mercy petitions, the executive did not note that the Supreme Court had allowed the appeal and had commuted the death sentence of an identically placed co-accused (Kashmira Singh) more than 4 years

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<sup>726</sup> Harbans Singh v. State of U.P., (1982) 2 SCC 101.

earlier. Harbans Singh and Jeeta Singh were scheduled for execution on 6.10.1981. Harbans Singh once again appealed to the Supreme Court by way of an Article 32 petition, and was saved. Jeeta did not, and was hanged.<sup>727</sup>

(b) The Cases of *Ravji Rao*<sup>728</sup> and *Surja Ram*<sup>729</sup>

6.6.13 Cases of *Ravji Rao* and *Surja Ram* have been discussed in the previous chapter. Here, the focus is how their mercy petitions were dealt with by the executive.

6.6.14 In *Ravji @ Ram Chandra v. State of Rajasthan* ('*Ravji*'),<sup>730</sup> a case which was decided by a Bench of two judges, the Supreme Court explicitly held:

*It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial.*<sup>731</sup>

6.6.15 Thus, the Court while confirming the death sentence in *Ravji's* case held that the circumstances relating to the criminal are irrelevant and focused exclusively on the circumstances relating to the crime. This aspect of the decision in the *Ravji's* case is in direct conflict with the *Bachan Singh* ruling where the Court held that which held that in all cases, including the most brutal and heinous crimes, circumstances pertaining to the criminal should be given full weight.<sup>732</sup> As noted in the previous chapter, the Court in *Santosh Kumar Bariyar v. State of Maharashtra* ('*Bariyar*') noticed the conflict between *Ravji's* case and *Bachan Singh* and noted the *Ravji* decision as a *per incuriam* judgment.

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<sup>727</sup> Harbans Singh v. State of U.P., (1982) 2 SCC 101. See also *Bachan Singh v. State of Punjab*, (Justice Bhagwati's *dissent*), (1982) 3 SCC 24, at para 71, where he termed Harbans Singh's case as "the most striking example of freakishness in imposition of death penalty".

<sup>728</sup> *Ravji alias Ram Chandra v. State of Rajasthan*, (1996) 2 SCC 175.

<sup>729</sup> *Surja Ram v. State of Rajasthan*, (1996) 6 SCC 271.

<sup>730</sup> (1996) 2 SCC 175.

<sup>731</sup> *Ravji alias Ram Chandra v. State of Rajasthan*, (1996) 2 SCC 175, at para 24.

<sup>732</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 161.

6.6.16 Though Ravji was sentenced to death on the basis of a *per incuriam* judgment, his mercy petition was rejected in a mere 8 days on 19.3.1996 and he was executed on 4.5.1996. Similarly, the mercy petition of Surja Ram, who was also wrongly sentenced to death on the same reasoning, was executed on 7.4.1997. His mercy petition was rejected in 14 days on 7.3.1997.

**(vii) Cases of Other Prisoners Sentenced to Death under Judgments Subsequently Declared to be Per Incuriam**

6.6.17 The Supreme Court in the recent years has found a number of decisions, which have resulted in death sentences to be *per incuriam*. This aspect has also been dealt with in the previous chapter.<sup>733</sup>

(a) Cases which have placed reliance on the Per Incuriam Decision of Ravji

6.6.18 In *Bariyar*, the Supreme Court, after pointing out the error in *Ravji*'s case, also noted 6 other cases where *Ravji*'s case was followed and held that these decisions were also wrongly decided:

*Shivaji v. State of Maharashtra, Mohan Anna Chavan v. State of Maharashtra, Bantu v. State of U.P., Surja Ram v. State of Rajasthan, Dayanidhi Bisoi v. State of Orissa and State of U.P. v. Sattan* are the decisions where *Ravji* has been followed. It does not appear that this Court has considered any mitigating circumstance or a circumstance relating to criminal at the sentencing phase in most of these cases. It is apparent that *Ravji* has not only been considered but also relied upon as an authority on the point that in heinous crimes, circumstances relating to criminal are not pertinent.<sup>734</sup>

6.6.19 The Court, in *Bariyar*, observed that it is clear that none of the circumstances relating to the 13

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<sup>733</sup> Refer to Table 5.1 for an exhaustive list of prisoners from all such cases which have been rendered per incuriam.

<sup>734</sup> Santosh Kumar Bariyar v. State of Maharashtra, (2009) 6 SCC 498, at para 63.

convicts in these six cases have been brought on record and considered by the Supreme Court during the sentencing deliberations. The cases mentioned above have been declared to be *per incuriam* in *Bariyar* by the Supreme Court for having followed *Ravji*. Another case, *Ankush Maruti Shinde and Ors v. State of Maharashtra*,<sup>735</sup> where six prisoners were sentenced to death by explicitly following *Ravji*'s wrong reasoning like the cases mentioned above, was decided just a few days before *Bariyar* and was therefore not noticed in that decision.

6.6.20 Subsequent to *Bariyar*, the Supreme Court again in *Dilip Tiwari v. State of Maharashtra*<sup>736</sup> raised the issue of error committed in *Ravji*'s case and other cases in which *Ravji* was followed. The Supreme Court in *Rajesh Kumar v. State*<sup>737</sup> once again emphasized the miscarriage of justice caused in the *Ravji Rao* case, and other cases, which followed the *Ravji*'s precedent. Thereafter, the Supreme Court in *Mohinder Singh v. State of Punjab*,<sup>738</sup> has held that *Ravji*'s case and those following it have been wrongly decided.

(b) The Case of Saibanna<sup>739</sup>

6.6.21 The Supreme Court in *Aloke Nath and Bariyar* has doubted the award of death sentence in *Saibanna v. State of Karnataka* ('*Saibanna*'). The facts of the case bear out that Saibanna had killed his first wife as he suspected that she was unfaithful to him. He was convicted and sentenced to life imprisonment on 2.2.1993. He re-married whilst he was out of the prison on parole. Later, on 13.9.1994 when he was again released on parole, he killed his second wife as well suspecting that she too was unfaithful to him. In 1995 he was charged under Section 303 IPC, which prescribed the mandatory death sentence, even though the Section had already been struck down by the

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<sup>735</sup> (2009) 6 SCC 667 at para 28.

<sup>736</sup> *Dilip Tiwari v. State of Maharashtra*, (2010) 1 SCC 775, at para 68.

<sup>737</sup> *Rajesh Kumar v. State*, (2011) 13 SCC 706, at paras 66-70.

<sup>738</sup> *Mohinder Singh v. State of Punjab*, (2013) 3 SCC 294, at para 37.

<sup>739</sup> *Saibanna v. State of Karnataka*, (2005) 4 SCC 165.

Supreme Court in *Mithu v. State of Punjab* ('Mithu').<sup>740</sup> The High Court proceeded to confirm the death sentence under Section 303 IPC. The Supreme Court in appeal upheld the judgment.<sup>741</sup> The Court held that Saibanna, already undergoing a life sentence, could not be sentenced to life imprisonment again, and therefore the death sentence was the only available punishment.

6.6.22 Subsequently, the Supreme Court in *Aloke Nath Dutta v. State of West Bengal*<sup>742</sup> held that the view taken in the petitioner's case by the Supreme Court was "doubtful". Thereafter, in *Bariyar*, the Court held that its judgment in *Saibanna* was "inconsistent with *Mithu* and *Bachan Singh*,"<sup>743</sup> both of which are judgments by Constitution Benches. This admission of error in *Saibanna's* case by the Supreme Court was also brought to the notice of the President by 14 retired judges (including one former Supreme Court judge, five former Chief Justices of different High Courts, and eight former High Court judges). The President rejected Saibanna's mercy petition on 4.1.2013.

(c) Decisions held to be *Per Incuriam* by *Sangeet and Khade*

6.6.23 Similarly, the Supreme Court in *Shankar Khade* doubted the correctness of the imposition of the death penalty in *Dhananjay Chatterjee v. State of West Bengal*,<sup>744</sup> where the Court had held that "*the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals.*"<sup>745</sup> In *Khade*, the Court opined that *prima facie* the judgment had not accounted for

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<sup>740</sup> *Mithu v. State of Punjab*, (1983) 2 SCC 277.

<sup>741</sup> *Saibanna v. State of Karnataka*, (2005) 4 SCC 165.

<sup>742</sup> *Aloke Nath Dutta v. State of West Bengal*, (2007) 12 SCC 230, at paras 149-50.

<sup>743</sup> *Santosh Kumar Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, at paras 49-52.

<sup>744</sup> (1994) 2 SCC 220.

<sup>745</sup> *Dhananjay Chatterjee v. State of West Bengal* (1994) 2 SCC 220, at para 15. The exclusive focus of this decision on the crime and not the aspects pertaining to the convict was questioned in *Khade*.

mitigating circumstances relating to the offender. Dhananjoy Chatterjee was executed in 2004.

6.6.24 Similarly, in *Sangeet*, the Court noted an additional three cases where *Bachan Singh's* direction to consider both aggravating and mitigating circumstances had not been followed.<sup>746</sup>

### **G. Constitutional Implications of Pain and Suffering Imposed on Convicts on Death Row in the Pre-Execution Phase**

6.7.1 In India, death row convicts typically spend many years by the time they exhaust their criminal appeals. Once the death sentence is finally confirmed by the Supreme Court, a convict further waits for years on end waiting to hear from the Governor and the President of India on the mercy petition preferred by him. More often than not, death row convicts are shifted to solitary confinement as soon as the trial court awards them death sentence and are also exposed to multiple execution warrants.

6.7.2 A prisoner under a sentence of death ekes out an existence under the hangman's noose and suffers from extreme agony, anxiety and debilitating fear of an impending execution and uncertainty regarding the same. The amalgam of such unique circumstances produces physical and psychological conditions of near-torture for the death row convict.<sup>747</sup> This experience thus endured by a prisoner on the death row is also termed as 'death row phenomena'.

6.7.3 One of the main components of the death row phenomena pertain to the unique stresses of living under a sentence of death which includes the convict's mental anguish of anticipating the impending execution. The passage of every moment also presents the convict with a prospect of hope, which in turn

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<sup>746</sup> *Shivu v. Registrar General, High Court of Karnataka*, (2007) 4 SCC 713; *Rajendra Pralhadrao Wasnik v. State of Maharashtra*, (2012) 4 SCC 37; *Mohd. Mannan v. State of Bihar*, (2011) 5 SCC 317.

<sup>747</sup> *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, at para 61.

produces constant mental struggle as to whether he will eventually live or not.

6.7.4 Further, the death row phenomenon is compounded by the degrading effects of conditions of imprisonment imposed on the convict, including solitary confinement, and the prevailing harsh prison conditions.

6.7.5 Constitutionally, the question relate to implications flowing from a scenario where a death row convict prior to execution of his death sentence is subjected to a prolonged period of imprisonment where he suffers from anguish, rising levels of agony and stress arising out of living in the ever-present shadow of the noose. The question is whether this dehumanizing and degrading experience borne by the convict constitutes a legal condition which can have the effect of rendering the subsequent execution of death sentence impermissible.

6.7.6 The Supreme Court in *T.V. Vatheeswaran v. State of Tamil Nadu*<sup>748</sup> and thereafter in *Sher Singh v. State of Punjab*<sup>749</sup> (*Sher Singh*) and *Triveniben v. State of Gujarat*<sup>750</sup> (*Triveniben*) has recognized the degrading and dehumanizing nature of the suffering endured by a death row convict on account of prolonged delay in the execution of his death sentence. The Court has treated prolonged delay as a “*supervening circumstance*” which has the effect of rendering the sentence of death inexecutable.

6.7.7 Over the years, an international consensus has emerged around the fact that execution after avoidable delay under the harsh conditions of death row constitutes cruel and excessive punishment.<sup>751</sup>

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<sup>748</sup> (1983) 2 SCC 68.

<sup>749</sup> (1983) 2 SCC 344.

<sup>750</sup> (1989) 1 SCC 678.

<sup>751</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H.R. at 154 (1989); *Francis v. Jamaica* (No. 606/1994). UN Doc. CCPR/C/54/D/606/1995 (1995); *Pratt v. The Attorney General for Jamaica*, Privy Council Appeal No. 10, 22 (1993). The Privy Council in *Pratt* [1994] 2 A.C. 33 held that "it was torture, far more cruel than death itself, for a person

### (i) Enduring Long Years on Death Row

6.7.8 The Supreme Court in *T.V. Vatheeswaran v. State of Tamil Nadu* ('*Vatheeswaran*'),<sup>752</sup> sets the due process bar very high for an execution to be allowed to be carried out after imposition of an otherwise valid death sentence. The Court in *Vatheeswaran* for the first time recognized the constitutional implications flowing from the unique nature of suffering and pain implicit in pre-execution imprisonment of a convict on death row waiting for the hanging to take place. The Supreme Court in *Vatheeswaran* based its analysis on the fact that Article 21 inheres in the prisoner till his last breath and even while the noose is being fastened around his neck. The Court also observed that other than the mass of suffering a prisoner has to endure on account of living for years in the shadow of death sentence, avoidable delay also makes the process of execution of death sentence unfair, unreasonable, arbitrary and capricious and thereby, violative of procedural due process guarantees enshrined under Articles 21, 14 and 19.<sup>753</sup> The Court in *Vatheeswaran* captures the injury done to Article 21 rights of the convict in following terms:

***11. While we entirely agree with Lord Scarman and Lord Brightman about the dehumanising effect of prolonged delay after the sentence of death, we enter a little caveat, but only that we may go further. We think that the cause of the delay is immaterial when the sentence is death. Be the cause for the delay, the time necessary for appeal and consideration of reprieve or some other cause for which the accused himself may be responsible, it would not alter the dehumanising character of the delay.***

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to be kept on death row in a state of suspended animation, knowing that on any day the authorities could carry out their announced intention to deliberately extinguish life."

<sup>752</sup> (1983) 2 SCC 68.

<sup>753</sup> *T.V. Vatheeswaran v. State of T.N.*, (1983) 2 SCC 68, at para 20; *Sher Singh v. State of Punjab*, (1983) 2 SCC 344, at para 23; *Jagdish v. State of M.P.*, (2009) 9 SCC 495, at paras 48-49.

12. *What are the constitutional implications of the dehumanising factor of prolonged delay in the execution of a sentence of death? Let us turn at once to Article 21 of the Constitution, for, it is to that Article that we must first look for protection whenever life or liberty is threatened. Article 21 says: "No person shall be deprived of his life or personal liberty except according to procedure established by law." The dimensions of Article 21 which at one time appeared to be constricted by A.K. Gopalan v. State of Madras [AIR 1950 SC 27] have been truly expanded by Maneka Gandhi v. Union of India [(1978) 1 SCC 248] and Sunil Batra v. Delhi Administration [(1978) 4 SCC 494].<sup>754</sup> (Emphasis supplied)*

6.7.9 The Court while siding with the dissenting opinion of Lord Scarman and Lord Brightman in the Privy Council decision in *Noel Riley v. Attorney-General*,<sup>755</sup> held that prolonged delay in the execution of a death sentence contravenes Article 21 rights of the convict regardless of the cause and nature of delay. The Court held that "*delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death.*"<sup>756</sup> In other words, the *Vatheeswaran* limit of two years did not treat judicial delay differently from clemency delay i.e. the Court in *Vatheeswaran* extended this protection also to delays caused during trial and appeal. This aspect of *Vatheeswaran* came to be doubted by a three judge Bench of *Sher Singh*.<sup>757</sup> The Court observed in *Sher Singh* that the appellate courts in normal course take upto four or five years to process appeals apart from the time spent by the Constitutional authorities under Articles 72 and 161 in considering the mercy petitions. The Court in *Sher Singh* therefore, departed from the rule of thumb approach (of 2 years)

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<sup>754</sup> T.V. Vatheeswaran v. State of T.N., (1983) 2 SCC 68, at paras 11-12.

<sup>755</sup> 1982 Criminal Law Review 679.

<sup>756</sup> T.V. Vatheeswaran v. State of T.N., (1983) 2 SCC 68, at para 21.

<sup>757</sup> *Sher Singh v. State of Punjab*, (1983) 2 SCC 344.

propounded by the *Vatheeswaran* Court and held that no pre-determined period of delay can be held to guarantee frustration of death sentence.

6.7.10 A Constitution Bench of the Supreme Court in *Triveniben*,<sup>758</sup> also found favour with the conclusions arrived at by the Court in *Sher Singh*. The Court in *Triveniben* held that a death row convict while waiting for his appeal to be taken up in the appellate life cycle still has a “ray of hope” of getting a favourable judicial order. The Court held that in such circumstances where appeal is still pending, the convict does not suffer from mental torture of waiting for an eventual execution as the sentence of death has not yet become a sure certainty. The *Triveniben* Court in certain terms held that the *delay* for the purpose of an Article 21 claim made by the convict could only be said to kick in once the judicial process has come to an end after the Supreme Court has dismissed the appeal.<sup>759</sup>

6.7.11 The Supreme Court in *Sher Singh* also held that in such Article 32 petitions a death row convict cannot be allowed to take advantage of delay which is caused on account of proceedings filed by him to delay the execution. The Court held that the equitable basis of a prisoner's plea for commutation in such a case is compromised if he has in any way contributed to the delay caused in disposal of his mercy petition.<sup>760</sup>

a. Revised Standard of Delay in *Pratt*

6.7.12 The Supreme Court in *Sher Singh* and thereafter in *Triveniben* purportedly rationalized the law on degrading punishment on account of avoidable delay in execution by pushing time taken in the appellate proceedings out of the delay calculation. It also forbids the convict to claim benefit for delay caused on account

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<sup>758</sup> *Triveniben v. State of Gujarat*, (1989) 1 SCC 678.

<sup>759</sup> *Sher Singh v. State of Punjab*, (1983) 2 SCC 344, at paras 18-19; *Triveniben v. State of Gujarat*, (1989) 1 SCC 678, at para 16; *Triveniben v. State of Gujarat*, (1988) 4 SCC 574, at para 2.

<sup>760</sup> *Triveniben v. State of Gujarat*, (1989) 1 SCC 678, at paras 17, 23; *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, at para 48.

of proceedings preferred by him. It is to be noted that the Supreme Court in *Sher Singh* cited the common experience of disposal of appeals before the High Court and the Supreme Court to be four or five years on this count. However, the international norms on this count have since undergone change.

6.7.13 A decade after the decision in *Noel Riley v. Attorney-General*<sup>761</sup> came out, the Privy Council reversed itself in *Pratt and Others v. AG of Jamaica* ('*Pratt*')<sup>762</sup>, citing the Indian Supreme Court decisions in *Vatheeswaran*, *Sher Singh* and *Triveniben*, and recognized that prolonged delay renders the death sentence too inhuman and degrading to be executed. But in doing so, the Privy Council presented a wholesome understanding of delay. The Privy Council today does not make a distinction on the basis of nature of delay and causes of delay while considering the oppressive effect of long years of wait on the death row prisoner. The focus of the Privy Council is only on the human rights implications flowing from the delayed execution. The Privy Council in *Pratt* noticed the shift in Indian law from *Vatheeswaran* to *Triveniben* on the aspect of definition of delay constituting degrading punishment and sided with the former. The Privy Council held:

*In India, where the death penalty is not mandatory, the appellate court takes into account delay when deciding whether the death sentence should be imposed. In Vatheeswaran v. State of Tamil Nadu Chinnappa Reddy J. said at page 353:-*

*....The court held that delay exceeding two years in the execution of a sentence of death should be sufficient to entitle a person under sentence of death to demand the quashing of his sentence on the ground that it offended against Article 21 of the Indian Constitution which provides "No person shall be deprived*

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<sup>761</sup> Noel Riley v. Attorney-General, 1982 Criminal Law Review 679.

<sup>762</sup> [1994] 2 AC 1.

*of his life or personal liberty except according to procedure established by law.”*

*In Sher Singh and Others v. The State of Punjab the court held:*

*“Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed. But no hard and fast rule that ‘delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death’ can be laid down as has been in Vatheeswaran.”*

*The court pointed out that to impose a strict time limit of two years would enable a prisoner to defeat the ends of justice by pursuing a series of frivolous and untenable proceedings.*

*In Smt. Treveniben v. State of Gujarat(1989) 1 S.C.J. 383 the Supreme Court of India approved the judgment in Sher Singh v. The State of Punjab and held that a sentence of death imposed by the “Apex Court”, which will itself have taken into account delay when imposing the death sentence, can only be set aside thereafter upon petition to the Supreme Court upon grounds of delay occurring after that date. Oza J. said, at page 410:-*

*“If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether, it is just and fair to allow the sentence of death to be executed.”*

***In their Lordships’ view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after***

**sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.**  
(Emphasis supplied)

6.7.14 The two-year standard set out by the Supreme Court in *Vatheeswaran* was neither sensitive to the distinction between executive delay in consideration of mercy petitions and judicial delays nor to the delay caused on account of litigation efforts of the prisoner. The Supreme Court in *Vatheeswaran*, like the Privy Council now in *Pratt*, took a principled position on the consequences and the effect of avoidable delay on a death row convict. However, the *Vatheeswaran* decision, which served as a positive precedent for the Privy Council decision in *Pratt*, stands overruled today. The law as crystallized in *Triveniben* does not recognize pending appeals as actionable delay in terms of the death row phenomenon.

(b) Delayed Execution serves No Penological Purpose and is, therefore, Excessive

6.7.15 The Supreme Court has also held that delayed execution of the death sentence does not serve any of the penal purposes originally expected of it at the time the court confirmed the same on the convict. A delayed death sentence to that extent only embodies mindless and medieval retributive quality which offends the present civilizational norms of punishment. The

Supreme Court in *Jagdish v. State of M.P.*,<sup>763</sup> invoked the embargo against cruel and unusual punishment in Eighth Amendment to the US Constitution to rule that delayed executions fail to serve both the retributive and deterrence rationales of death penalty. The Court observed:

*43. ...Penologists and medical experts agreed that the process of carrying out a verdict of death is often so degrading and brutalising to the human spirit as to constitute psychological torture. Relying on Coleman v. Balkcom [68 L Ed 2d 334 : 451 US 949 (1981)] , US at p. 952 the Court observed that “the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself” and when the death penalty “ceases realistically to further these purposes, ... its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.” The Courts have, however, drawn a distinction whereby the accused himself has been responsible for the delay by misuse of the judicial process but the time taken by the accused in pursuing legal and constitutional remedies cannot be taken against him.*

*44. It has been repeatedly emphasised that the death sentence has two underlying philosophies:*

*(1) that it should be retributive, and*

*(2) it should act as a deterrent*

***and as the delay has the effect of obliterating both the above factors, there can be no justification for the execution of a prisoner after much delay. Some extremely relevant***

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<sup>763</sup> (2009) 9 SCC 495.

observations have been quoted above from *Coleman v. Balkcom* [68 L Ed 2d 334 : 451 US 949 (1981)] , US at p. 952.

45. While examining the matter in the background of the Eighth Amendment to the US Constitution which provides that:

“excessive bail should not be required, nor excessive fine imposed, nor cruel and unusual punishment inflicted”

it has been observed that though the death penalty was permissible, its effect was lost in case of delay (*Gregg v. Georgia* [49 L Ed 2d 859 : 428 US 153 (1976)] )<sup>764</sup>

### **(ii) Illegal Solitary Conditions of Detention**

6.7.16 The Supreme Court outlawed the practice of solitary confinement in 1978 in *Sunil Batra v. Delhi Administration* ('*Sunil Batra*').<sup>765</sup> Solitary confinement was defined by the Supreme Court as confinement of a prisoner in a single cell apart from other prisoners.<sup>766</sup> The Supreme Court in *Sunil Batra* observed that solitary confinement, absent a specific judicial order, may only be imposed when a prisoner is under an executable sentence of death, i.e. after his mercy petition has been rejected by the President, and even then under severe restrictions and modifications. The Court held:

118. It follows that during the pendency of a petition for mercy before the State Governor or the President of India the death sentence shall not be executed. Thus, until rejection of the clemency motion by these two high dignitaries it is not possible to predicate that there is a self-executory death sentence. Therefore, a prisoner becomes legally subject to a self-working sentence of death only when the clemency application by the

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<sup>764</sup> Jagdish v. State of M.P., (2009) 9 SCC 495, at paras 43-45.

<sup>765</sup> (1978) 4 SCC 494.

<sup>766</sup> *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494, at paras 91-92.

*prisoner stands rejected. Of course, thereafter Section 30(2) [of Prison Act] is attracted. A second or a third, a fourth or further application for mercy does not take him out of that category unless there is a specific order by the competent authority staying the execution of the death sentence.*<sup>767</sup>

6.7.17 While the illegality of solitary confinement has been made amply clear by the Supreme Court in more than one decision, the practice is still rampant especially for prisoners on the death row. In *Shatrughan Chauhan*, relying upon the *Sunil Batra* decision, the Supreme Court lamented about the existence of widespread use of solitary confinement for prisoners on death row and urged the prison authorities to implement the *Sunil Batra* decision in spirit. The Supreme Court observed:

*91. Even in Triveniben [Triveniben v. State of Gujarat, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] , this Court observed that keeping a prisoner in solitary confinement is contrary to the ruling in Sunil Batra [Sunil Batra v. Delhi Admn., (1978) 4 SCC 494 : 1979 SCC (Cri) 155] and would amount to inflicting “additional and separate” punishment not authorised by law. **It is completely unfortunate that despite enduring pronouncement on judicial side, the actual implementation of the provisions is far from reality. We take this occasion to urge to the Jail Authorities to comprehend and implement the actual intent of the verdict in Sunil Batra [Sunil Batra v. Delhi Admn., (1978) 4 SCC 494 : 1979 SCC (Cri) 155].***<sup>768</sup> (Emphasis supplied)

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<sup>767</sup> Sunil Batra v. Delhi Administration, (1978) 4 SCC 494, at para 118.

<sup>768</sup> Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1, at para 91.

6.7.18 The Supreme Court in *Ajay Kumar Pal v. Union of India*,<sup>769</sup> noticed that the convict was subjected to solitary confinement while he was on death row. The Court on account of delay in disposal of mercy petition by the executive authorities and imposition of solitary confinement, commuted the death sentence to life imprisonment.

6.7.19 Likewise, solitary confinement was also considered as a relevant supervening circumstance in the case of *Peoples' Union of Democratic Rights v. Union of India & Others*,<sup>770</sup> where the death sentence of prisoner was commuted.

## **H. Conclusion**

6.8.1 The executive's mercy powers cure defects of arbitrary and erroneous death sentences, and provide an additional bulwark against miscarriages of justice. Therefore, cases found unfit for mercy merit capital punishment. Mercy powers are thus a safeguard and necessary precondition for the death penalty.

6.8.2 When the writ courts in pursuance of judicial review powers, on a relative routine basis, find decisions of the executive to reject mercy petitions to be vitiated by procedural violations, arbitrariness and non-application of mind, the safeguard of mercy powers appears to not be working very well.

6.8.3 It is also distressing to note that the death row prisoners are routinely subjected to an extraordinary amalgam of excruciating psychological and physical suffering arising out of oppressive conditions of incarceration and long delays in trial, appeal and thereafter executive clemency. Despite repeated attempts by death row prisoners to invoke judicial review remedies to secure commutations on account of penal transgressions by the executive authorities, the practice of solitary confinement and

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<sup>769</sup> (2014) 13 SCALE 762.

<sup>770</sup> 2015 (2) ADJ 398.

long delays seem to continue unabated. It is the view of the Commission that the death row phenomenon has become an unfortunate and distinctive feature of the death penalty apparatus in India.

6.8.4 Further, infliction of additional, unwarranted and judicially unsanctioned suffering on death sentence prisoners, breaches the Article 21 barrier against degrading and excessive punishment. The lingering nature of this suffering is triggered as soon as any court sentences a prisoner to death, and therefore extends beyond the limited number of prisoners who come close to an execution after having lost in the Supreme Court and in the mercy petition phase as well.

6.8.5 The capital punishment enterprise as it operates in India, therefore perpetrates otherwise outlawed punitive practices that inflict pain, agony and torture which is often far beyond the maximum suffering permitted by Article 21. The debilitating effects of this complex phenomenon imposed on prisoners what can only be called a living death.

6.8.6 While the illegalities pertaining to death row phenomenon in a particular case may be addressed by the writ courts commuting the death sentence, the illegal suffering which the convicts have been subjected to while *existing* on death row casts a long shadow on the administration of penal justice in the country.

## CHAPTER – VII

### **CONCLUSIONS AND RECOMMENDATION**

#### **A. Conclusions**

7.1.1 The death penalty does not serve the penological goal of deterrence any more than life imprisonment. Further, life imprisonment under Indian law means imprisonment for the whole of life subject to just remissions which, in many states in cases of serious crimes, are granted only after many years of imprisonment which range from 30-60 years.<sup>771</sup>

7.1.2 Retribution has an important role to play in punishment. However, it cannot be reduced to vengeance. The notion of “an eye for an eye, tooth for a tooth” has no place in our constitutionally mediated criminal justice system. Capital punishment fails to achieve any constitutionally valid penological goals.

7.1.3 In focusing on death penalty as the ultimate measure of justice to victims, the restorative and rehabilitative aspects of justice are lost sight of. Reliance on the death penalty diverts attention from other problems ailing the criminal justice system such as poor investigation, crime prevention and rights of victims of crime. It is essential that the State establish effective victim compensation schemes to rehabilitate victims of crime. At the same time, it is also essential that courts use the power granted to them under the Code of Criminal Procedure, 1973 to grant appropriate compensation to victims in suitable cases. The voices of victims and witnesses are often silenced by threats and other coercive techniques employed by powerful accused persons. Hence it is essential that a witness protection scheme also be established. The need for police reforms for better and

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<sup>771</sup>Gopal Vinayak Godse v. State of Maharashtra, AIR 1961 SC. 600; Maru Ram v. Union of India, (1981) 1 SCC 107. For remission rules, see for example, Category 6 in Maharashtra’s “Guidelines for Premature Release” dated 15.3.2010.

more effective investigation and prosecution has also been universally felt for some time now and measures regarding the same need to be taken on a priority basis.

7.1.4 In the last decade, the Supreme Court has on numerous occasions expressed concern about arbitrary sentencing in death penalty cases. The Court has noted that it is difficult to distinguish cases where death penalty has been imposed from those where the alternative of life imprisonment has been applied. In the Court's own words "*extremely uneven application of Bachan Singh has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle*". The Court has also acknowledged erroneous imposition of the death sentence in contravention of *Bachan Singh* guidelines. Therefore, the constitutional regulation of capital punishment attempted in *Bachan Singh* has failed to prevent death sentences from being "*arbitrarily and freakishly imposed*".

7.1.5 There exists no principled method to remove such arbitrariness from capital sentencing. A rigid, standardization or categorization of offences which does not take into account the difference between cases is arbitrary in that it treats different cases on the same footing. Anything less categorical, like the *Bachan Singh* framework itself, has demonstrably and admittedly failed.

7.1.6 Numerous committee reports as well as judgments of the Supreme Court have recognized that the administration of criminal justice in the country is in deep crisis. Lack of resources, outdated modes of investigation, over-stretched police force, ineffective prosecution, and poor legal aid are some of the problems besetting the system. Death penalty operates within this context and therefore suffers from the same structural and systemic impediments. The administration of capital punishment thus remains

fallible and vulnerable to misapplication. The vagaries of the system also operate disproportionately against the socially and economically marginalized who may lack the resources to effectively advocate their rights within an adversarial criminal justice system.

7.1.7 Clemency powers usually come into play after a judicial conviction and sentencing of an offender. In exercise of these clemency powers, the President and Governor are empowered to scrutinize the record of the case and differ with the judicial verdict on the point of guilt or sentence. Even when they do not so differ, they are empowered to exercise their clemency powers to ameliorate hardship, correct error, or to do complete justice in a case by taking into account factors that are outside and beyond the judicial ken. They are also empowered to look at fresh evidence which was not placed before the courts.<sup>772</sup> Clemency powers, while exercisable for a wide range of considerations and on protean occasions, also function as the final safeguard against possibility of judicial error or miscarriage of justice. This casts a heavy responsibility on those wielding this power and necessitates a full application of mind, scrutiny of judicial records, and wide ranging inquiries in adjudicating a clemency petition, especially one from a prisoner under a judicially confirmed death sentence who is on the very verge of execution. Further, the Supreme Court in *Shatrughan Chauhan*<sup>773</sup> has recorded various relevant considerations which are gone into by the Home Ministry while deciding mercy petitions.

7.1.8 The exercise of mercy powers under Article 72 and 161 have failed in acting as the final safeguard against miscarriage of justice in the imposition of the death sentence. The Supreme Court has repeatedly pointed out gaps and illegalities in how the executive

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<sup>772</sup>Kehar Singh v. Union of India, (1989) 1 SCC 204 paras 7, 10 and 16

<sup>773</sup>Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1, at paras 55-56.

has discharged its mercy powers. When even exercise of mercy powers is sometimes vitiated by gross procedural violations and non-application of mind, capital punishment becomes indefensible.

7.1.9 Safeguards in the law have failed in providing a constitutionally secure environment for administration of this irrevocable punishment. The Courts' attempts to constitutionally discipline the execution of the death sentence has not always borne fruit.

7.1.10 Death row prisoners continue to face long delays in trials, appeals and thereafter in executive clemency. During this time, the prisoner on death row suffers from extreme agony, anxiety and debilitating fear arising out of an imminent yet uncertain execution. The Supreme Court has acknowledged that an amalgam of such unique circumstances produces physical and psychological conditions of near-torture for the death row convict.<sup>774</sup> Further, the death row phenomenon is compounded by the degrading and oppressive effects of conditions of imprisonment imposed on the convict, including solitary confinement, and the prevailing harsh prison conditions. The death row phenomenon has become an unfortunate and distinctive feature of the death penalty apparatus in India. Further, infliction of additional, unwarranted and judicially unsanctioned suffering on death sentence prisoners, breaches the Article 21 barrier against degrading and excessive punishment.

7.1.11 In retaining and practicing the death penalty, India forms part of a small and ever dwindling group of nations. That 140 countries are now abolitionist in law or in practice, demonstrates that evolving standards of human dignity and decency do not support the death penalty. The international trend towards successful and sustained abolition also

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<sup>774</sup>Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1, at para 61.

confirms that retaining the death penalty is not a requirement for effectively responding to insurgency, terror or violent crime.

## **B. Recommendation**

7.2.1 The Commission recommends that measures suggested in para 7.1.3 above, which include provisions for police reforms, witness protection scheme and victim compensation scheme should be taken up expeditiously by the government.

7.2.2 The march of our own jurisprudence -- from removing the requirement of giving special reasons for imposing life imprisonment instead of death in 1955; to requiring special reasons for imposing the death penalty in 1973; to 1980 when the death penalty was restricted by the Supreme Court to *the rarest of rare cases* – shows the direction in which we have to head. Informed also by the expanded and deepened contents and horizons of the right to life and strengthened due process requirements in the interactions between the state and the individual, prevailing standards of constitutional morality and human dignity, the Commission feels that time has come for India to move towards abolition of the death penalty.

7.2.3 Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism related offences and waging war, will affect national security. However, given the concerns raised by the law makers, the commission does not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.

7.2.4 The Commission accordingly recommends that the death penalty be abolished for all crimes other than terrorism related offences and waging war.

7.2.5 The Commission trusts that this Report will contribute to a more rational, principled and informed debate on the abolition of the death penalty for *all* crimes.

7.2.6 Further, the Commission sincerely hopes that the movement towards absolute abolition will be swift and irreversible.

Sd/-  
**[Justice A.P. Shah]**  
**Chairman**

Sd/- <b>[Justice S.N. Kapoor]</b> <b>Member</b>	Sd/- <b>[Prof. (Dr.) Mool Chand Sharma]</b> <b>Member</b>	-- <b>[Justice Usha Mehra]</b> <b>Member</b>
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**[P.K. Malhotra]**  
**Ex-officio Member**

--  
**[Dr. Sanjay Singh]**  
**Ex-officio Member**

Sd/-  
**[Dr. G. Narayana Raju]**  
**Member-Secretary**

Sd/-  
**[R. Venkataramani]**  
**Member (Part-Time)**

Sd/-  
**[Prof. (Dr.) Gurjeet Singh]**  
**Member (Part-Time)**

Sd/-  
**[Dr. B. N. Mani]**  
**Member (Part-Time)**

List of Participants

**I. Law Commission of India**

1. Justice A P Shah  
Chairman
2. Justice S N Kapoor  
Member
3. Justice Usha Mehra  
Member
4. Prof. (Dr.) Mool Chand Sharma  
Member
5. Dr. G Narayana Raju  
Member-Secretary
6. P.K. Malhotra  
Law Secretary (Ex-Officio Member)
7. Prof. (Dr.) Yogesh Tyagi  
Member (PT)
8. R Venkataramani  
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9. Dr. (Smt.) Pawan Sharma  
Joint Secretary & Law Officer
10. A.K. Upadhyay,  
Additional Law Officer
11. Dr. V.K. Singh  
Deputy Law Officer

**II. Chief Guest**

1. Gopal Krishan Gandhi  
Former Governor, West Bengal

**III. Other Speakers**

1. Justice Prabha Sridevan, Retired Judge, Madras High Court
2. Justice Hosbet Suresh, Retired Judge, Bombay High Court
3. Manish Tewari, Former Minister, Information & Broadcasting
4. Justice Bilal Nazki, Chairman, B.H.R.C.
5. Yug Chaudhry, Advocate, Mumbai
6. Ashish Khetan, Spokes Person, AAP
7. Prof. Dr. C Rajkumar, Vice Chancellor, O.P. Jindal Global University, Sonapat, Haryana
8. Prof. Ranbir Singh, Vice Chancellor, NLU, Delhi
9. Julio Ribeiro, Retired Sr. Police Officer

10. Majeed Memon, M.P. & Sr. Advocate
11. Brinda Karat, General Secretary, CPI(M)
12. Sankar Sen, Former D.G., Delhi Police/NHRC
13. Justice K. Chandru, Former Judge, Madras High Court
14. Prof NR Madhava Menon, Former Vice Chancellor, National Juridical School, Kolkata
15. Justice Rajinder Sachar, Former Judge, Delhi High Court
16. Shashi Tharoor, Former Union Minister
17. Kanimozhi, M.P. DMK
18. Prof Roger Hood, Centre of Criminology, University of Oxford
19. Dushyant Dave, Sr. Advocate
20. TR Andhyarujina, Sr. Advocate
21. Prof Mohan Gopal, Chairman, National Court Management system, Supreme Court
22. Anand Grover, Sr. Advocate
23. Wajahat Habibullah, Former, Chief Information Commissioner, Govt. Of India
24. D R Kaarthikeyan, Former Director General, National Human Rights Commission
25. Varun Gandhi, M.P. Lok Sabha
26. Sanjay Hegde, Advocate
27. Chaman Lal, Retired Sr. Police Officer

#### **IV. Other Invitees/Participants**

1. Kusumjeet Sidhu, Secretary, Deptt. Of Justice, Ministry of Law & Justice, GOI
2. Navaz Kotwal, Consultant, Department of Justice
3. G. S. Bajpai, Registrar, NLU, Delhi
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5. Nitya Ramakrishnan, Sr. Advocate
6. Jawahar Raja, Advocate
7. Rani Shankardass, PRAJA
8. Aman Lekhi, Sr. Advocate
9. Dr YSR Murthy, President, O.P. Jindal Global University, Haryana
10. Justice S. B. Sinha, Retired Judge, Delhi High Court
11. D Nagasaila, PUCL
12. Vrinda Grover, Sr. Advocate
13. Sanhita Ambast, Advocate
14. Arghya Sengupta, Vidhi Centre of Legal Policy, New Delhi
15. PM Nair, Retired Sr. Police Officer

16. Meeran C Borwankar, Additional Director General  
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17. Trideep Pais, Advocate
18. Shalini Gera, Jag Lag
19. Ravi Nair, SAHRDC
20. Vrinda Bhandari, Advocate
21. Suhas Chakma, ACHR
22. Usha Ramanathan, Social Activist
23. Sharib Ali, The Quill Foundation
24. Anil Gulati, Joint Secretary, Deptt. Of Justice,  
Ministry of Law & Justice, GOI
25. Nimesh Desai, Director, IHBAS
26. Dr. Anup Surendranath, Director, Death Penalty  
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27. Venkatesh, CHRI
28. Manoj Mitta, Sr. Correspondent
29. V Venkatesan, Sr. Correspondent
30. Praveen Swami, Sr. Correspondent
31. Dr. Aparna Chandra, Asstt. Professor, NLU, Delhi
32. Dr. Mrinal Satish, Associate Professor, NLU, Delhi

## APPENDIX A

To

The Chairman,  
Law Commission of India,  
New Delhi.

Sir,

With due respect I humbly state that I do not subscribe to the recommendations made by you with regard to the abolition of death sentence. I, therefore, pin down few of my thoughts for retention of death sentence;

1. Death sentence appears in various provisions of Indian Penal Code for example Section 376E, 364A, 302 etc. beside others. These provisions provide for imposition of death sentence or life imprisonment. Whether life or death would be the proper sentence is in the discretion of court which the courts are expected to exercise wisely having regard to the facts of case and the gravity of offence and its severity or barbarity.
2. To say that while deciding the case and imposing death sentence there is error in the judgment or it is discriminatory, to my mind, is very general statement. Moreover to err is human. *Almighty alone is the dispenser of absolute justice. Judges of the highest court do their best, subject of course to the limitation of human fallibility.* But that does not mean that the provision of death penalty should be abolished in all cases irrespective of their gravity and heinousness. Even otherwise by the time case reaches Supreme Court it passes the scrutiny

by High Court which confirms death on reference being made by Session Courts.

3. Kidnapping by terrorists for ransom, for creating panic amongst the people and for securing release of their associates and cadres assumed serious dimensions. Menace of kidnapping and abduction for ransom is on increase. Therefore, in its wisdom punishment of death sentence has to be there on the statute book.
4. To say that innate disposition of human minds that control, manage and administer such punishments, thereby making them inevitably arbitrary, is not correct. Can we loose sight of the cases like 'Kasab' and "Afzal Guru'. They posed threat to security, safety and peace of the society. So many innocents lost their lives. In such cases extreme punishment awarded on the doctrine of 'rarest of the rare' case cannot be called arbitrary or discriminatory. In fact in the report too much emphasis has been given on human right principle of persons subjected to the death penalty, at the same time forgetting the human rights of innocent victims.
5. As already pointed out by me above, possibility of error should not be the reason to abolish death penalty. Supreme Court in Bachan Singh's case expounded the doctrine of "rarest of rare" which principle has with stood the test of time. It has neither failed nor faltered. What other sentence could have been given to "Nithari" . In such cases of heinous crime extreme measures

are required by giving them harsh punishment keeping in mind the safety and security of the society.

6. Recently Supreme Court in the case of **Vikram Singh@Vicky & Anr. Vs. Union of India & Ors.** decided on 25.08.2015 observed that " *In a parliamentary democracy like ours, laws are enacted by parliament or the State Legislature within their respective legislative fields specified under the Constitution. The presumption attached to these laws is that they are meant to cater to the societal demands and meet the challenge of the time, for the legislature is presumed to be supremely wise and aware of such needs and challenges*". Even the Supreme Court of U.S.A. in recent case **Ronald Allan Harmelin vs. Michigan 501 US 957** based on a conspectus of the decisions, formulated some common principle applicable in situation that required examination of limits of proportionality. The first principle culled out from the decision earlier pronounced by the court was the prescribed punishment for crimes rest with the legislature and not courts and that the courts ought to show deference to the wisdom of the legislature.
  
7. In **Manu Ram vs Union of India (1981) 1 SCC 107** court observed that " *on consideration of circumstances mentioned above, the conclusion is inescapable that parliament by enacting Section 433A has rejected the reformatory character of punishment, in respect of offences contemplated by it, for the time being in view of the prevailing conditions in our*

country. It is well settled that the legislature understands the needs and requirements of its people much better than the courts". Government of India voted against the United Nations General Assembly resolution calling for the moratorium on death penalty. In November 2012, India again upheld its stance on capital punishment by voting against the United Nations General Assembly draft resolution seeking to ban the death penalty. This reflect the legislature understanding of the needs and requirements of its people beside the conditions prevailing in our country.

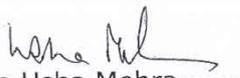
8. In the case of **State of M.P. vs. Bala alias Bularam (2005) 8 SCC 1** court said *"the punishment prescribed by the penal code reflect the legislative recognition of the social needs, the gravity of the offence concerned, its impact on the society and what the legislature considers as a punishment suitable for the particular offence. It is necessary for the courts to imbibe that legislative wisdom and to respect it."*
9. In the case of **Vikram Singh(supra)** appellant challenged the validity of Section 364A of IPC, while upholding the constitutional validity of Section 364A of IPC court observed that Section 364A came on the statue book initially in the year 1993 not only because kidnapping and abduction for ransom were becoming rampant and the Law Commission had recommended that a separate provision making the same punishable be incorporated but also because activities of

terrorist organizations had acquired menacing dimensions that called for an effective legal frame work to prevent such ransom situations and punish these responsible for the same.

10. Court further observed that *"the statistics further observed that kidnapping for ransom has become a lucrative and thriving industry all over the country which must be dealt with in the harshest possible manner and an obligation rests on the courts as well. The courts to lend a helping hand in that directions"*.
11. We must appreciate that when the offence of kidnapping for ransom, abduction and murder take place then such offence has to be treated as heinous crime and contemplating death penalty is not disproportionate. How can "terrorist" be reformed, whose main aim is to destroy the peace of the society, if not the society as such.
12. Supreme court in **Vikram Singh's** case concluded by saying "*The gradual growth of the challenges posed by kidnapping and abductions for ransom, not only by ordinary criminals for monetary gain or as an organized activity for economic gains but by terrorist organizations is what necessitated the incorporation of Section 364A of the IPC and a stringent punishment for those indulging in such activities. Given the background in which the law was enacted and the concern shown by the Parliament for the safety and security of the citizens and the unity, sovereignty and integrity of the country, the punishment prescribed for those committing any act*

*contrary to Section 364A cannot be dubbed as so outrageously disproportionate to the nature of the offence as call for the same being declared unconstitutional ..... Just because the sentence of death is a possible punishment that may be awarded in appropriate cases cannot make it per se inhuman or barbaric. In the ordinary course and in cases which qualify to be called rarest of the rare, death may be awarded only where kidnapping or abduction has resulted in the death either of the victim or anyone else in the course of the commission of offence. Fact situations where the act which the accused is charged with is proved to be an act of terrorism threatening the very essence of our federal, secular and democratic structure may possible by the only other situations where Courts may consider awarding the extreme penalty”.*

13. In my earlier note also I had mentioned that recommending blanket abolition of death sentence or moratorium on death penalty in heinous crimes is not an appropriate course particularly keeping in view the circumstances prevailing in our country.

  
Justice Usha Mehra

### Note on Death Penalty

At the outset, I would like to point out that the Government of India voted against the United Nations General Assembly resolution calling for the moratorium on death penalty. In November 2012, India again upheld its stance on capital punishment by voting against the United Nations General Assembly draft resolution seeking to ban the death penalty.

In fact, no system of justice can produce results which are 100% certain all the time. Mistakes will be made in any system which relies upon human testimony for proof. We should be vigilant to uncover and avoid such mistakes. Our system of justice rightfully demands a higher standard for death penalty cases. The risk of making a mistake with the extraordinary due process applied in death penalty cases is very small. There is no credible evidence to show that innocent persons have been executed.

Amnesty International figures of death sentence though are available but no official statistics have been released so far. As against conviction of death sentence awarded to 1617 prisoners by trial court, capital punishment was confirmed in only 71 cases. Even out of 71 cases, in the span of last 40 years only 4 Hangings have taken place. Two were terrorists i.e. Kasab and Afjal Guru and the other two do not belong to minority or dalit. So it would not be correct to say that our system has discriminated in any manner on account of poverty, minority, caste or being dalit. Yakub Memon was not a poor person and should have afforded

the best of legal assistance. In fact blanket abolition of death sentence will not be conducive to the circumstances in which India is placed.

**Steven O. Stewart, JD**, Presenting Attorney for Clark County said “ *The inevitability of a mistake should not more than the risk of having a fatal wreck should make automobile illegal*”.

Death penalty abolition may increase in threats from International terror organizations and also internal disturbance like insurgency etc. to the sovereignty and the territorial integrity of modern state abolition of death penalty may affects the security of the country.

There should not be blanket abolition of death penalty and that to make this system work properly we should strengthen the legal aid services to be made available to the accused. Death penalty is given only in rarest of rare cases after fair and proper trial hence to be awarded only in deserved cases.

डा० संजय सिंह  
सचिव  
Dr. Sanjay Singh  
Secretary



## APPENDIX B

भारत सरकार  
Government of India  
विधि और न्याय मंत्रालय  
Ministry of Law & Justice  
विधायी विभाग  
Legislative Department

Dated the 28th August, 2015

Hon'ble Chairman Sir,

May kindly refer to the draft report relating to "Death Penalty" that requires further deliberations. In this regard, it may be mentioned that death penalty has been a mode of punishment since time immemorial and the arguments for and against have not changed much over the years. With the march of civilization, the modes of death punishment have witnessed significant changes on humanitarian grounds.

2. In India, much has been debated on the issue as to whether to retain or abolish death sentence. In our country, the Indian Penal Code (45 of 1860) contains a number of provisions where punishment of death penalty exists, namely, section 121 (Waging war, etc. against the Government of India), section 132 (Abetment of mutiny by a member of the armed forces), section 194 (False evidence leading to conviction of innocent person and his execution), section 302 (Murder), section 303 (Murder by a person under sentence of imprisonment for life), section 305 (Abetment of suicide of child or insane person), section 307 (Attempt to murder by life convict, if hurt is caused), section 364A (Kidnapping for ransom, etc.) and section 396 (Dacoity with murder). Certain other laws like the Narcotic Drugs and Psychotropic Substances Act, 1985 (section 31A), the Unlawful Activities Prevention Act, 1967 (sections 10 and 16), the Navy Act, 1957, etc. also contain provisions for awarding death sentence.

3. The subject of capital punishment attracted the attention of the United Nations towards the end of 1957, when the Third Committee of the Twelfth U.N. General Assembly opened discussion on Article 6 of the draft Covenant on Civil and Political Rights, and adopted the same with modifications. In 1979, India acceded to the International Covenant on Civil and Political Rights (ICCPR). Article 6(2) of the ICCPR states that "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes..."

4. International laws and standards pertaining to the death penalty are clear on this issue and state that death penalty can only be imposed after exacting legal standards. Safeguard 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council in 1984 (ECOSOC Resolution 50/1984), states that "Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings."
5. Further precision is provided in Safeguard 1 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council in 1984, which states that "In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences."
6. The Law Commission of India examined the issue in-depth and submitted its 35<sup>th</sup> Report concluding that "*The suggestion that death penalty may be abolished as an experiment (so that it can be re-introduced after abolition) is an argument to which we have given our thoughtful attention; but we have to take note of certain possibilities. Between abolition and re-introduction may intervene an era of violence – we do not say that this is a certain consequence – but it is possibility which cannot be ignored. Irreparable harm would then have been done not only to the victims of such violence, but to the general cause of security of the society. Once the forces of lawless-ness are let loose re-introduction of capital punishment may not have the desired effect of restoring law and order immediately. Further, Parliament may not be sitting all the time and the interval that might elapse before the law is again actually amended would prove disastrous. On a consideration of all the issues involved, we are of the opinion that capital punishment should be retained in the present state of the country.*"
7. In 1973, the Supreme Court upheld the constitutionality of the death penalty for the first time in the case of *Jagmohan Singh vs. State of U.P.* (AIR 1973 SC 947). In the same year, the Code of Criminal Procedure, 1973 (1 of 1974) was enacted. The Code required judges to note special reasons when imposing death sentences and required a mandatory pre-sentencing hearing to be held in the trial court. The requirement of such a hearing was obvious, as it would assist the judge in concluding whether the facts indicated any special reasons for imposing death penalty.

8. In 1980, the Supreme Court again upheld the constitutionality of the death penalty in the landmark case of *Bachan Singh vs. State of Punjab* (AIR 1980 SC 898). It was observed therein that a real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

9. In 1991, the Constitution Bench of the Supreme Court once again upheld the constitutionality of the death penalty in *Smt. Shashi Nayar v. Union of India and others* (AIR 1992 SC 395). The Court, citing earlier rulings on the issue and arguing that the law and order situation in the country had worsened and now was, therefore, not an opportune time to abolish the death penalty, held that the method of execution of death penalty in India being scientific and least painful mode under the medical jurisprudence, is not violative of article 21 of the Constitution.

10. The capital punishment acts as a deterrent. If death sentence is abolished, the fear that comes in the way of people committing heinous crimes will be removed, which would result in more brutal crimes. All sentences are awarded for the security and protection of society and peaceful living of the people. Whoever, committing a pre-meditated heinous crime in an extremely diabolical manner, should not be allowed to go with life imprisonment or a lesser punishment on humanitarian grounds, as they do not deserve for the same.

11. However, in view of the UN resolution calling for moratorium on death penalty, as adopted by the Third Committee of the United Nations General Assembly, and as adopted by various European nations, though India has voted against the said Resolution, at this juncture, as a reformative measure, it may be appropriate to frame guidelines on par with the various rulings of the Hon'ble Supreme Court, as to what would constitute the "rarest of rare case", which warrants death penalty under the Indian laws.

12. In view of the position explained above, it would be just and appropriate to get the matter examined further as to what would constitute the "rarest of rare case" for award of death penalty in case of conviction of offences punishable with death sentence. In view of above, the report may not recommend something which has the effect of preventing the State from making any law in the interest of the sovereignty and integrity of India. In other words, the interest of the State is of paramount importance and any recommendation made in this regard may be considered as imposition of restriction on the powers of the State necessary to protect the interest of the country.

13. The Commission may, if considered appropriate, include the above views in its report on Death Penalty.

With highest regards,

Yours sincerely,

*Sanjay Singh.*

(Dr. Sanjay Singh)

Hon'ble Mr. Justice A.P. Shah,  
Chairman,  
Law Commission of India,  
New Delhi.

प्रेम कुमार मल्होत्रा  
सचिव

**P. K. Malhotra**  
Secretary

Ex officio Member,  
Law Commission of India



**Appendix - C**

भारत सरकार  
विधि और न्याय मंत्रालय  
विधि कार्य विभाग  
GOVERNMENT OF INDIA  
MINISTRY OF LAW & JUSTICE  
DEPARTMENT OF LEGAL AFFAIRS

August 31, 2015

**D.O. No.31/08/2015-LS**

**Hon'ble Chairman,**

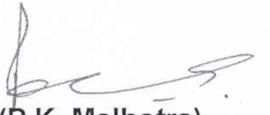
This is in furtherance to the discussions I had on the evening of 27<sup>th</sup> August, 2015 on the draft report on 'death penalty'. The final version was received by me on the evening of 29<sup>th</sup> August, 2015.

As I strongly feel that the time is not ripe in our country for abolition of the death penalty, I am enclosing a note containing my views on the subject with the request that the same may be appended to the report of the Commission.

With kind regards,

Yours sincerely,

Encl.: As above.



(P.K. Malhotra)

**Justice Shri A.P. Shah,**  
Chairman,  
Law Commission of India,  
H.T. Building,  
**New Delhi**

I have the benefit of going through the draft report on the "Death penalty" which was made available to me on 23<sup>rd</sup> August, 2015. The meeting notice appended to the Report says that that Report will be discussed in the Commission on 26<sup>th</sup> and 27<sup>th</sup> August, 2015. I could not attend the meeting of the Commission on 26<sup>th</sup> August, 2015 due to my pre-occupation in other time-bound assignments in the Ministry. I was told that there is no meeting of Law Commission on 27<sup>th</sup> August, 2015. However, I got an opportunity to discuss the draft Report with the Hon'ble Chairman of the Law Commission of India on 27<sup>th</sup>.

With due respect, I say that I am unable to agree with the recommendation that the death penalty be immediately abolished in all crimes other than terror. However, I agree with the view that abolition of death penalty is an eventual goal. I am of the considered view that the time is not ripe for its abolition in our country. Although, I wanted to give my detailed views on the issue, it may not be possible to do so as the term of the present Law Commission is coming to an end on 31<sup>st</sup> August, 2015. Final conclusions and recommendations were made available on 29<sup>th</sup> August, 2015 in the evening and the Commission desires to submit its Report before 31<sup>st</sup> August, 2015. There is hardly any time to deal with all the points raised in the report. I will give brief reasons in support of my opinion on the subject.

There are certain implications of a crime and any person who commits a crime should think about its consequences before taking



any wrong step. If the implications keep getting waived off, a time will come when law will cease to exist. A convict is to be punished so that it becomes an example for rest of humanity and deters perverted minds from committing such crimes. Therefore, if a crime, as heinous as taking another person's life is committed, the punishment has to be severe. There may be instances where life sentence may not serve the desired purpose. There are instances where convicts serving a life sentence are granted parole and soon return to their old ways, harming the society. While there cannot be two opinions that rights of the accused are to be respected, it is the victims and the society whose rights should get precedence over the rights of the accused. Thinking of rights of accused person committing heinous crime at the cost of violation of rights of victims and safety of society will amount to misplaced sympathy with the accused. Former American President Shri Geroge W. Bush has mentioned in one of his Presidential debates that the reason to support the death penalty is that it saves other people life. Sir James F. Steffen, an eminent Jurist has said that no other punishment deters men so effectively from committing crimes as the punishment of death. According to him, this is one of those propositions which are difficult to prove simply because they are in themselves more obvious than any proof can make them. In any secondary punishment, however, terrible, there is hope. But death is death, its territories cannot be described more forcefully.

The Parliament which reflects the will of the people passed law with death penalty for certain offences against women as late



as in 2013. Recently Government has introduced anti Hijacking Bill in the Parliament wherein it has proposed death penalty relating to certain offences of hijacking. Interestingly, the law is being amended based on Beijing Protocol dealing with anti-hijacking law. Even the Parliamentary Standing Committee, in its Report on the Anti Hijacking Bill, has observed that a comprehensive and strong anti hijacking law is need of the hour. Referring to the provisions of the Bill which prescribes punishment in the event of death of a hostage or a security personnel, the Committee observed that in case of armed intervention, death of personnel may also occur either due to cross fire or throwing of explosive or crashing of aircraft on ground or water. The Committee felt that in case of any such event, the maximum penalty should be imposed on the offender, which results in death of any person as a direct consequence of the offence of hijacking. Therefore, it suggested further amendment to the proposed Bill to make provision for punishment of death where such offence results in the death of any person including hostage or security personnel as a direct consequence of the offence of hijacking. The will of the Parliament shows that looking into the prevalent situation in the country, the Indian society has not matured for total abolition of death penalty.

The 35<sup>th</sup> Report of the Law Commission on Capital Punishment specifically stated that based on the past analysis of the existing socio-economic cultural structure (including education level and crime rates) and the absence of any empirical research to the contrary, the death penalty should be retained in the present state of the country. The appropriate course for us would have



been to analyze the existing socio-economic cultural structure and conduct empirical research to see whether the environment as prevalent in 1967 when the 35<sup>th</sup> Report of the Law Commission gave its report has changed and if it has changed whether it is for better or the worse?

Section 364A of the Indian Penal Code was incorporated in 1993 because of the increasing incidence of kidnapping and abduction for ransom. Shortly thereafter this provision had to be amended because India acceded to the International Convention Against the Taking of Hostages which was adopted by the General Assembly of the United Nations in the background of Iranian hostage crisis. Since India had decided to accede to the said Convention, Section 364A of the Indian Penal Code was amended widening its scope covering situations where the offence is committed with a view to compelling foreign State or international inter-governmental organization or to abstain from doing any Act or to pay ransom. The validity of this provision was upheld by the Supreme Court. It was observed by the Apex Court in the case of Vikram Singh Vs. UoI (DoJ 21.8.2015) that the punishment must be proportionate to the offence is recognized as a fundamental principle of criminal jurisprudence around the world. According to the Apex Court, the punishment prescribed by the Penal Code reflect the legislative recognition of the social needs, the gravity of the offence concerned, its impact on the society and what the legislature considers as a punishment suitable for the particular offence. It is necessary for the courts to imbibe that legislative



wisdom and to respect it. While upholding the Constitutionality of 364A of the IPC, the court held as under:-

“We find that the need to bring in Section 364A of the IPC arose initially because of the increasing incidence of kidnapping and abduction for ransom. This is evident from the recommendations made by the Law Commission to which we have made reference in the earlier part of this judgement. While those recommendations were pending with the Government, the specter of terrorism started raising its head threatening not only the security and safety of the citizens but the very sovereignty and integrity of the country, calling for adequate measures to curb what has the potential of destabilizing any country. With terrorism assuming international dimensions, the need to further amend the law arose, resulting in the amendment to Section 364A, in the year 1994. The gradual growth of the challenges posed by kidnapping and abductions for ransom, not only by ordinary criminals for monetary gain or as an organized activity for economic gains but by terrorist organizations is what necessitated the incorporation of Section 364A of the IPC and a stringent punishment for those indulging in such activities. Given the background in which the law was enacted and the concern shown by the Parliament for the safety and security of the citizens and the unity, sovereignty and integrity of the country, the punishment prescribed for those committing any act contrary to Section 364A cannot be dubbed as so outrageously disproportionate to the nature of the offence as to call for the same being declared unconstitutional. Judicial discretion available to the Courts to choose one of the two sentences prescribed for those falling foul of Section 364A will doubtless be exercised by the Courts along judicially recognized lines and death sentences awarded only in the rarest of rare cases. But just because the sentence of death is a possible punishment that may be awarded in appropriate cases cannot make it per se inhuman or barbaric (emphasis supplied). In the ordinary course and in cases which qualify to be called rarest of the rare, death may be awarded only where kidnapping or abduction has resulted in the death either of the victim or anyone else in the course of the commission of the offence. Fact situations where the act which the accused is charged with is proved to be an act of terrorism threatening the very essence

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of our federal, secular and democratic structure may possibly be the only other situations where Courts may consider awarding the extreme penalty. But short of death in such extreme and rarest of rare cases, imprisonment for life for a proved case of kidnapping or abduction will not qualify for being described as barbaric or inhuman so as to infringe the right to life guaranteed under Article 21 of the Constitution”

I am of the view that in spite of economic development, improvement in the education levels, there is increase in the crime rates and overall cultural deterioration. I am of the view that threat of terrorism is much more as on today than it was in 1967 when the Law Commission gave its 35<sup>th</sup> Report on capital punishment. Cases of kidnapping and abduction for ransom are on the increase for monetary gain or as an organized activity for economic gains. Safety and security of the citizens and unity, sovereignty and integrity of the country are of paramount important. It is perhaps for these reasons that the Parliament in its wisdom, in many laws passed in the recent past has provided for death penalty instead of restraining itself to life imprisonment or lesser punishment.

It is incorrect to say that prescription of death penalty is indulging in revenge killing or primitive or barbaric. When a death penalty is awarded following due process of law, there are proper checks and balances. This is sufficiently in-built in the legal system. When the death penalty is imposed by the trial court, it is subject to confirmation by the High Court where the accused person gets opportunity to present his defence. The accused person gets another opportunity by way of Appeal before the Supreme Court. Decisions / Judgements with regard to death penalty are never confirmed by a non-speaking order. Going by the prevalent

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practice, the accused person generally prefer a review petition and than a curative petition before the Apex Court. It will thus be seen that after conviction by the trial court, accused person gets as many as four opportunities before the higher Judicial Forum arguing his case against the death penalty. If the apex judiciary in its wisdom does not find merit in reversing the verdict of death penalty, such case will obviously falls in the rarest of rare category as per the principles which have been discussed in various cases and discussed in the Report of this Commission. The remedy with the accused does not end here. He gets an opportunity to file mercy petition before President and also Governor of the State. It cannot be said that all these authorities, working at the apex level and discharging constitutional function, are oblivious of the rights enjoyed by the accused person. If all such authorities come to conclusion that the accused person must be penalized with capital punishment, it can, by no stretch of imagination be called 'revenge killing' by the State.

It is incorrect to say that judicial discretion provided by the legislature is unguided or unbridled. The Supreme Court itself, while exercising this discretion in Bachon Singh's case (1980) require a mandatory pre-sentence hearing stage in cases where the death penalty might be given. The 'rarest of rare' classification evolved in Bachon Singh's case was intended to restrict the case of death penalty. In Bariyar case (2009), the court further came out with a solution to the problem of arbitrariness. The Judges have to keep in mind and consider the possibility of reformation of the convict. Unless the prosecution is able to establish that the convict

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is beyond reform, the courts cannot, as a matter of fact, award the death penalty.

The Parliament in its wisdom has prescribed death penalty only in heinous crimes. The need of the hour is to retain it but to exercise power of awarding death penalty in rarest of rare cases. We have a vibrant judiciary which is respected world over. We should have faith in the wisdom of our judges that they will exercise this power only in deserving cases for which law is well laid down in various judgements discussed in this Report.

For the reasons discussed in the main Report while I agree that abolition of the death penalty is an eventual goal, I am of the considered view that the time is not yet ripe in our country to abolish it at this juncture.



**(P.K. Malhotra)**  
Ex officio Member,  
Law Commission of India