

REVIEW OF CONSULTATION PAPERS ISSUED BY THE LAW COMMISSION ON INDIA ON DEATH PENALTY*

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Abstract

In May 2014, the Law Commission of India sought comments/suggestions on two consultation papers on the topic of death penalty. These were the Consultation Paper on Capital Punishment and Consultation Paper on Mode of Execution of Death Sentence and Other Incidental Matters, of which the second also contained a questionnaire. In pursuance of this, a Review Committee was constituted by the Society for Advancement of Criminal Justice, comprising of students of NUJS, Kolkata. This Committee drafted a review to the consultation papers and prepared a response to the questionnaire prepared by the Law Commission. The collaborative paper was thereafter submitted in response to the Law Commission of India's notice, inviting recommendations from the stakeholders. This paper is a compilation of the cumulative response submitted by the NUJS Review Committee. The paper proceeds in the order of the issues as dealt with by the Law Commission. It follows the pattern of describing the relevant situation, followed by recommendations. The paper focuses on two major aspects—the first is the scope and extent of death penalty and the second is the present day judicial administration of death sentence. Since the response was drafted with respect to the law as existing in 2014, this paper is restricted to discussing the legal position till 2014.

I. SCOPE AND EXTENT OF DEATH SENTENCE

1.1. Statutory Provisions*

The Indian Penal Code, 1860 prescribes death penalty as a possible punishment for a number of offences. Some of the offences which are punishable by a sentence of death under the Indian Penal Code are treason (section 121), abetment of mutiny (section 132), perjury resulting in the conviction and death of an innocent person (section 194), threatening or

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inducing any person to give false evidence resulting in the conviction and death of an innocent person (section 195A), murder (section 302), kidnapping for ransom (section 364A) and dacoity with murder (section 396). Amongst these offences, death penalty continues to be used most commonly in cases involving Section 302.

Additionally, other special legislations such as the Air Force Act, 1950, the Army Act, 1950, the Navy Act, 1950, Commission of Sati (Prevention) Act, 1987 [section 4(1)], Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 [section 3(2)(i)], Explosive Substances Act, 1908 [section 3(b)], Unlawful Activities (Prevention) Amendment Act, 2012 [section 16(1)] also provide for death penalty.

1.2. Extending Death Penalty To Sexual Assault*

The recent debate on the extension of death penalty to rape has resulted in the laying down of Section 376E of the Criminal Law (Amendment) Act, 2013¹ that has introduced capital punishment for the repeat offence of rape. The stated increase in offences punishable with Capital Punishment is with the objective of making Anti-Rape Laws more stringent. Notably, a death sentence has already been awarded in accordance with this section to the Shakti Mills Gang Rape convicts.

However this type of extension of death penalty to sexual assault is problematic. This is because the degree of punishment is excessive in relation to the offence, and though it is widely believed that a more stringent punishment will help to combat the increasing instances of the crime, a closer study of the phenomenon reveals that it will in fact only feed the problem of the instances of sexual assault. The presence of a punishment that equates the actual crime with one of greater degree, in this case that of sexual assault with homicide will in all possibility lead to a situation wherein perpetrators would be encouraged to commit even homicide in combination with sexual assault for the simple purpose of conveniently wiping out evidence and having a

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¹ Section 376E reads as follows – “Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death”.

better chance of acquittal. Further, equating the crime of rape with homicide will intensify the adverse social perception of rape.

1.2.1. Possibility of Giving Rise to a Higher Degree of Violence

Before prescribing a form of punishment that is harsher than the actual offence committed, the dangers associated with it must be taken into consideration. The punishment of death penalty is prescribed on the assertion that every human being dreads death. However, the validity of this presumption cannot override the premise that every criminal firstly fears detection. If the punishment prescribed for both sexual assault and homicide is the same, it is logical to consider the possibility of the assailant being encouraged to kill the victim, in an attempt to wipe out the evidence against him.²

1.2.2. Objective of Extending Death Penalty to Cases of Sexual Assault

The Supreme Court laid down the reasoning behind awarding death penalty in a case of sexual assault in the case of ***Dhananjay Chatterjee v. State of West Bengal***³ as that of it being an effective deterrent against the commission of the offence. The honourable Court also stressed on the essentiality of ensuring that heinous instances of sexual assault do not go unpunished.

However, it is important to take note of the possibility of the failure of this well intended and certainly essential objective when it is sought to be achieved through the means of awarding death penalty to convicts.

²Human Rights Law Network (India), Can Society Escape the Noose: Death Penalty in India 164 (2005).

³*Dhananjay Chatterjee v. State of West Bengal*, (1994) 2 SCC 220,

“...shockingly large number of criminals go unpunished thereby increasingly encouraging the criminals and in the ultimate, making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the court responds to the society's cry for justice against the criminal. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment”.

1.2.3. Examining the Social Perception of Sexual Assault—Attitude of the Society towards the Victim and Attached Stigma

An act of sexual assault against a victim entails an effort by the perpetrator to establish a power equation.⁴ It is an offence against the body and mind of an individual, perhaps of the most invasive kind. However, the societal perspective of a victim of sexual assault is in vast contrast to the perception of other kinds of offences against the mind and body of an individual. In the case of sexual assault, an entirely new dimension of a permanently crippling attack over the so called honour and bodily integrity of the victims, specifically women comes into the picture. The general perception is that once a victim of sexual assault, a woman is permanently defiled, and consequently she is subjected to a lot of discrimination, harassment resulting in mental trauma stemming from this belief and ‘damaged-goods’ treatment.

This extreme form of victimization operates in the place of a support system that should help the victim overcome the trauma and move on to lead a normal life, and only promotes the crime in place of helping to combat it. This is because this social perception that labels the offence as offensive and shameful for the victim leads to a situation wherein victims are encouraged to hush up the crime and not report it in the first place. According to the National Crime Records Bureau, in India, a woman is raped every 20 minutes, but over 90% of these crimes go unreported. Such a shocking statistic only highlights the gravity of the matter at hand. It is possibly the most extreme form of injustice wherein victims find themselves unable to even report the crime committed against them. Therefore, it is of utmost importance to address this issue and provide a good solution for it. Feeding social stigma only perpetuates this prejudiced mindset, thus leading to the establishment of a vicious circle of crime and injustice.

The awarding of capital punishment has traditionally been upheld for cases of homicide and that too only in the rarest of rare cases. This concept and test of whether an offence conforms to the ‘rarest of rare’ standard has been laid down to only encompass the most

⁴Scully and Marolla (1993), identified a range of motivations for rape from a sample of convicted rapists, with the responses being a desire to ‘put them (women) in their place’ and that ‘I felt like I had conquered something...’; Sandra Walkgate, *Gender Crime and Criminal Justice* 109 (2003).

gruesome, abhorrent and irreversible of crimes.⁵ As mentioned previously, by equating sexual assault to death, the state would indirectly feed existing adverse societal perceptions.

1.3. Suggestion

The authors suggest that death penalty must not be extended to rape. Instead, a punishment of life imprisonment for the remaining term of the convict's lifetime must be prescribed.

II. PRESENT DAY ADMINISTRATION OF DEATH SENTENCE

2.1. Arbitrariness*

In the landmark judgment, *Bachan Singh v. State of Punjab*⁶ (hereinafter "Bachan"), the Constitutional Bench of the Supreme Court laid down that death sentence was only to be awarded "in the rarest of rare cases when the alternative option is unquestionably foreclosed"⁷, thus marking the beginning of the 'rarest of rare doctrine'. Further, in J. Bhagwati's dissenting opinion, he stated that death sentencing is not free from the element of subjectivity and even arbitrariness, and that is something that the state cannot afford in a sentence as harsh and final as capital punishment.

"It is, therefore, obvious that when a judge is called upon to exercise his discretion as to whether the accused shall be killed or shall be permitted to live, his conclusion would depend to a large extent on his approach and attitude, his predilections and preconceptions, his value system and social philosophy and his response to the evolving norms of decency and newly developing concepts and ideas in penological jurisprudence."⁸

⁵Bachan Singh v. State of Punjab, (1980) SCC 684; Macchi Singh v. State, (1983) 3 SCC 470; Mulla v. State of U.P., (2010) 3 SCC 470.

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⁶1980 2 SCC 684.

⁷Ibid.

⁸Ibid.

Subsequently, the court in *Machhi Singh v. State of Punjab*⁹(hereinafter “Macchi”) laid down five instances of crime which should attract death penalty. It advocated that the circumstances of the crime (aggravating factors) and the criminal (mitigating factors) need to be balanced against each other to determine whether death penalty should be awarded.

Despite the universal acceptance of the doctrine laid down in Bachan’s case, subsequent judgements¹⁰ thereon have consistently ignored the “rarest of rare” doctrine. In 2008, these deficiencies became an issue of international concern when an Amnesty International Report¹¹ was published, discussing the failure of the Indian Judiciary in following the precedent set in the Bachan Singh case by a Constitutional Bench¹².

In 2009, it was pointed out in *Santosh Kumar Bariyar v. State of Maharashtra*¹³(hereinafter, “Bariyar”), that the application of ‘rarest of rare’ to inculcate principled sentencing has not been taken seriously by the judiciary. It discussed how the sentencing policy in India with respect to death penalty suffers deeply from the vice of arbitrariness and is not void of the personal predilections of the judges.

In 2013, in *Sangeet v. State of Haryana*¹⁴(“Sangeet”), the court once again recognised that the principled sentencing approach has been consistently ignored and that sentencing has become “judge centric”¹⁵. The Court took support of cases such as *Swamy Shraddananda v. State of Karnataka*¹⁶ and *Aloke Nath Dutta v. State of West Bengal*¹⁷ where the lack of a

⁹1983 3 SCC 470.

¹⁰See generally Jill Cottrell, ‘Wrestling with the Death Penalty in India’ [1991] 7 S. Afr. J. on Hum. Rts. 185; ‘Lethal Lottery: The Death Penalty in India, A study of Supreme Court judgments in death penalty cases 1950-2006’ Amnesty International-India and the People’s Union for Civil Liberties (2008) <<http://www.amnesty.org/en/library/asset/ASA20/006/2008/en/67dcf08a-15fb-11dd-8586-f5a00c540031/asa200062008eng.pdf>> accessed 31 July 2014.

¹¹Ibid.

¹²Ibid.

¹³2009 6 SCC 498.

¹⁴2013 2 SCC 452.

¹⁵I.e., that it relies on the subjectivity and predilections of the judge.

¹⁶2008 13 SCC 767.

¹⁷2007 12 SCC 230.

uniform sentencing policy was discussed and deficiencies in the Indian Criminal Justice System in this respect were recognised. In Swamy's case, it was argued:

“The inability of the Criminal Justice System to deal with all major crimes effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments.”¹⁸

Further, both cases provided a long list of cases with similar fact situations, in which, one judge had awarded death sentence, while the other had awarded life imprisonment.

Considering the concerns raised in Sangeet, coupled with the restrictive application of ‘rarest of rare’ as laid down in Santosh, and keeping in mind the fact that there have rarely been any cases of death sentence in the past few decades, the viability of the retentionist regime in India must be seriously reconsidered.

2.2. Suggestion

In order to streamline the rarest of rare principle and rid the death sentencing policy from arbitrariness, the Courts must take into consideration the emphasis laid on reformation in Bariyar along with the more recent case of *Shankar Kisanrao Khade v. State of Maharashtra*.¹⁹

¹⁸Swamy Shraddananda v. State of Karnataka, 2008 13 SCC 767.

¹⁹As proposed by this author in Ayani Sirvastava and Paavni Anand, ‘Death Penalty and the Implementation of Rarest of Rare’ in Dr. Paramjit Jaswal, Dr. GIS Sandhu, Dr. S Ravichandran, Ivneet Walia (eds), *Selected Essays on Contemporary Issues of Death Penalty* (RGNUL, 2013)

In Bariyar, the court explained that along with the application of ‘rarest of rare’ principle, the court must also arrive at the conclusion that the alternative of life imprisonment will not suffice²⁰, i.e., that the accused is incapable of reformation. In the said case, commutation of death sentence to life imprisonment was awarded on the ground that Bariyar was capable of reformation.

The significance of this judgment stems from its progressive inclusion of the ‘reformatory theory’ of punishment. Inclusion of the reformatory theory would not only aid in at least the partial exclusion of subjectivity of judges with respect to sentencing, but would also further ‘principled sentencing’. Without providing extensive requirements, the court developed a niche definition of ‘rarest of rare’, keeping in mind the international shift towards the reformatory theory of criminology. More importantly, it also significantly limits the scope of application of death sentence.

In this manner, the court has indirectly stepped towards abolition of death sentence.²¹ Without intruding into the realm of the executive, the Court has also suggested that it may be time to consider abolition of death sentencing.

Further, in *Shankar Kisanrao Khade v. State of Maharashtra*²², the court proposed a threefold test, i.e., “crime test”, “criminal test” and the “R-R test”. After the court considers the circumstances of the crime, i.e., the aggravating circumstances, and circumstances of the criminal, i.e., the mitigating circumstances, the court must arrive at the conclusion that there are no mitigating circumstances in favour of the accused. The ‘R-R’ test, or ‘rarest of rare’ test must be applied in light of factors such as “society’s abhorrence, extreme indignation and antipathy to certain types of crimes” to exclude the ‘judge-centric’ views of the Court.

²⁰Supra note 18.

²¹Autri Saha, Pritikar Advani, ‘The Death Penalty: A New Perspective in Light of Santosh Bariyar Case’ [2009] 2 NUJS L. REV 669 (2009).

²²2013 5 SCC 546.

The combination of the tests laid down in the above cases has been applied in subsequent judgments.²³

III. CONSTITUTIONAL VALIDITY

Paragraphs 117 and 118 of *Bariyar* express serious concern over the viability of the 'rarest of rare' doctrine and question the very existence of death penalty in India.

"It is now clear that even 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. It can be safely said that the *Bachan Singh* threshold of "rarest of rare cases" has been most variedly and inconsistently applied by the various High Courts as also this Court. At this point we also wish to point out that the uncertainty in the law of capital sentencing has special consequence as the matter relates to death penalty - the gravest penalty arriving out of the exercise of extraordinarily wide sentencing discretion, which is irrevocable in nature. This extremely uneven application of *Bachan Singh* (supra) has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle. The situation is unviable as legal discretion which is conferred on the executive or the judiciary is only sustainable in law if there is any indication, either through law or precedent, as to the scope of the discretion and the manner of its exercise. There should also be sufficient clarity having regard to the legitimate aim of the measure in question. Constitution of India provides for safeguards to give the individual adequate protection against arbitrary imposition of criminal punishment.

118. Although these questions are not under consideration and cannot be addressed here and now, we cannot help but observe the global move away from the death penalty. Latest statistics show that 138 nations have now abolished the death penalty in either law or practice (no executions for 10 years). Our own neighbours, Nepal and Bhutan are part of these abolitionist nations while others

²³Anil @ Anthony Arikswamy Joseph v. State of Maharashtra, 2014 4 SCC 69; Mahesh Dhanaji Shinde v. State of Maharashtra, 2014 4 SCC 292.

including Philippines and South Korea have also recently joined the abolitionist group, in law and in practice respectively. We are also aware that on 18 December 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.”²⁴

Further, in both *Bachan* and *Bariyar*, while the Court was wary of the shaky grounds on which death sentencing in India lies, the judges stated that their hands are tied as they await instructions from the Law Commission of India and the Legislature.²⁵

In *Bariyar*, the Court relied on *Furman v Georgia*²⁶ (hereinafter “*Furman*”), to explain that the arbitrariness in sentencing is violative of Article 14 and 21. In *Furman*, it was stated that a law with minimal instructions to the judiciary to choose between life imprisonment and death suffers from unconstitutionality. In *Bachan Singh*, the Court observed that this case does not apply in India due to differing social conditions and due to the lack of a provision of the nature of the 8th Amendment in India, which gives specific emphasis on ‘cruel and unusual punishment’. However, this is no longer true. In recent judgments, the form of punishments, and the cruelty of various modes of punishment have been addressed in depth.

In *Bariyar*, the Court explained:

“Equal protection clause ingrained under Article 14 applies to the judicial process at the sentencing stage. We share the court's unease and sense of disquiet in *Swamy Shraddananda* case and agree that a capital sentencing system which results in differential treatment of similarly situated capital convicts effectively classify similar convict differently with respect to their right to life under Article 21. Therefore, an equal protection analysis of this problem is appropriate.

In the ultimate analysis, it serves as an alarm bell because if capital sentences cannot be rationally distinguished from a significant number of cases where the result was a life sentence, it is more than an acknowledgement of an imperfect

²⁴*Santosh Kumar Bariyar v State of Maharashtra*, 2009 6 SCC 498.

²⁵*Ibid.* *Bachan Singh v State of Punjab*, 1980 2 SCC 684.

²⁶408 U.S. 238 (1972).

sentencing system. In a capital sentencing system if this happens with some frequency there is a lurking conclusion as regards the capital sentencing system becoming constitutionally arbitrary.”²⁷

3.1. Suggestion

In *Bachan Singh*, death penalty was held to be constitutional on two counts. Firstly, due to the fact that it is mentioned in the Constitution under Article 72 and Article 161, and secondly, due to the aforementioned fact that no direction has been given by the Law Commission or the Legislature to do so, and the Court did not wish to overstep the boundaries of separation of powers.

The authors would like to point out that at the time of framing of the Constitution, though objections were raised by members of the Constituent Assembly over inclusion of death sentencing, it was ultimately included, as perhaps the Constituent Assembly could not envisage the extent of deterioration of the death sentencing policy in India.

Further, as the Court in *Bachan* was acting directly after the 35th Law Commission Report was published, the authors urge the Law Commission to provide its findings with respect to the unconstitutionality of the arbitrariness in death sentencing, so the Courts may follow accordingly.

While it is encouraged that a judge apply his judicial mind, and while diverse views of the judiciary are encouraged for a holistic interpretation of law, ultimately, the Legislature is required to question itself as to whether it is reasonable to expect the personal ideologies and predilections of judges unfiltered from their judicial view to be left out in a sentence as grave and conclusive as that of capital punishment.

²⁷Supra note 24.

IV. MISCARRIAGE OF JUSTICE IN DEATH PENALTY AND SENTENCING BIAS IN BRUTAL CRIMES*

In *Bachan Singh v State of Punjab*²⁸, the Supreme Court held that the death penalty is an exception and not the rule. It set out the ‘rarest of rare’ principle and decided that while making a decision as to the sentencing in capital offences, it is pertinent to give importance both to the aggravating and the mitigating circumstances relating to the crime as well as the criminal.

However, in *Ravji v State of Rajasthan*²⁹, it was decided by the Supreme Court that while sentencing in a criminal trial, only characteristics relating to the crime should be emphasised and the ones related to the criminals should be excluded. The punishment awarded should be in consonance with the magnitude and the enormity of the crime and the atrociousness involved in the crime.

In *Santosh Kumar Shantibhushan Bariyar v State of Maharashtra*³⁰, it was declared that the decision rendered in *Ravji* was *per incuriam* to the test stipulated in *Bachan Singh*. The Court accepted that following the *Ravji* decision and placing reliance on it, 13 other convicts had been wrongly awarded death penalties out of which two were already executed. The court stated that such decisions were flawed since they only acknowledged the aggravating circumstances of the case without given any importance to the mitigating circumstances. The court said that exceptional reasons relating to both the crime and the criminal should be considered before giving any death sentence. It further held the execution of those two persons to be among the gravest known cases of miscarriage of justice in India.

There is a natural human impulse to punish those committing serious and grave offences severely. Capital punishment has continued to attract a lot of attention from the media³¹. Media

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²⁸ *Bachan Singh v State of Punjab* 1980(2) SCC 684.

²⁹ *Ravji alias Ram Chandra v State of Rajasthan* AIR 1996 SC 787.

³⁰ *Santosh Kumar Shantibhushan Bariyar v State of Maharashtra* (2009) 6 SCC 498.

³¹ Samuel R Gross, *Lost Lives: Miscarriage of Justice In Capital Cases*, *Law & Contemp. Probs.* 61, no. 4 (1998): 125-52.

reports on heinous crimes tend to evoke deep and often severe emotions in the mind of the general public. Generally there is a public demand for the culprits of such crimes to be caught immediately and punished stringently. This creates huge pressure on the investigators and makes them anxious to resolve the cases. Sometimes when the police are not able to solve the case and find the offender, they resort to using unscrupulous methods, in some instances even going to the extent of manufacturing evidence.³² Police officers may also be tempted to use manipulative and coercive methods to obtain confessions in such cases. In such case the police intimidate, torture and torment the persons they find to be suspicious and leave them with no option but to confess (falsely at times) in such circumstances³³.

The media broadcasts cases which are of grave nature and might attract capital punishments extensively.³⁴ Those under suspicion are brought into the limelight immediately and often provocative, inflammatory and imprecise things are shown.³⁵ Even judges get to hear about such cases before it appears in the courts. They repeatedly hear political officials and police officers declaring the accused as actually having committed the crime. All this makes it possible for the judges to have a predetermined notion of the culprits being actually guilty.³⁶ This often results in the judges determining cases with a biased view, favouring conviction of the accused.

Hence, there is a greater risk of miscarriage of justice in such ‘capital punishment cases’ because of the increase in the risk of errors committed both in the investigation stage by the police and at the trial stage by the judiciary.

In *Munkiappan v Tamil Nadu*³⁷, the Supreme Court observed that in lower courts death sentences are given by emphasising only on the brutal conduct of the accused and that

³² Ibid.

³³ Ibid.

³⁴ Hugo Adam Bedau and Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, *Stanford Law Review*, Vol. 40, No. 1 (Nov., 1987), pp. 21-179.

³⁵ Samuel R Gross, Lost Lives: Miscarriage of Justice In Capital Cases, *Law & Contemp. Probs.* 61, no. 4 (1998): 125-52.

³⁶ Ibid.

³⁷ *Muniappan v State of Tamil Nadu*, AIR 2010 SC 3718.

capital punishment is meted out without any providing special reasons as envisaged under Section 354(3) of the Code of Criminal Procedure.

In *Bachan Singh*, Justice Bhagwati observed that a punishment of death penalty has to be unanimously agreed upon to overcome the vice of arbitrariness. However it is seen that the judiciary does not usually follow this approach. In several cases, the sentence of capital punishment has been awarded and upheld, despite of a judge not approving it³⁸. In *Gurmeet Singh v Uttar Pradesh*³⁹, one of the two judges felt that the evidence was insufficient to hold the accused guilty and favoured acquittal of the accused. However in spite of this, the conviction and death sentence of the accused was upheld. Similarly, the Supreme Court upheld the death sentence awarded to *Dewender Singh Bhullar*⁴⁰ even though a judge found him to not be guilty of the offence. The authors argue that this amounts to miscarriage of justice because despite of there being an ambiguity of conviction, the capital punishment in these cases were upheld.

In certain brutal crimes it is observed that the courts justify capital punishments only on the basis of the atrocious manner in which the crime was committed.⁴¹ The requirement of considering aggravating and mitigating circumstances laid down in *Bachan Singh* are often overlooked due to the hue and cries of the society.⁴² The societal pressure and the sentiments of the public tend to take precedence in such cases.

In cases involving brutal crimes, as soon as the incident occurs, it is extensively followed by the media houses which often focus on one side of the story, holding the accused guilty.⁴³ The question of suitability or the efficacy of the death penalty is rarely focused on by the media. In an attempt to sensationalise their news, the media prefers a selective depiction of the incidents, showing feelings of sympathy and pity for the victim and declaring the accused as guilty prior to

³⁸ Amnesty India, World Day against Death Penalty: India Must Commute Death Sentences Of All Prisoners at Risk of Execution, ASA 20/055/2013, 9 October 2013.

³⁹ *Gurmeet Singh v Uttar Pradesh*, 2005(3) ACR 3075 (SC).

⁴⁰ *Devender Pal Singh Bhullar v State*, AIR 2003 SC 886.

⁴¹ *Ibid.*

⁴² *Santosh Kumar Shantibhushan Bariyar v State of Maharashtra*, (2009) 6 SCC 498.

⁴³ Christian Pfeiffer, Media Use and its Impacts on Crime Perception, Sentencing Attitudes and Crime Policy, *European Journal of Criminology* 2005 2: 259.

trial.⁴⁴ People draw their own opinions and conclusions on the basis of what they get to see and hear from the media.⁴⁵ The media influences the public to such an extent that in a case where stringent punishment is not awarded candle lit processions and rallies are organised against the verdict of the court which further pressurises the appellate courts and results in sentencing bias.

One of the cases, in which the influence of media in the decision rendered by the court is visible, is *Santosh Singh v State*.⁴⁶ In this case, the acquittal of the accused led to a massive public outcry and the acquittal was subsequently overturned by the High Court holding the trial daily and deciding the case within 42 days. The case was decided solely on circumstantial evidence and there were certain doubts over the validity of the DNA reports. However, the intense public scrutiny and the mounting pressure on the judiciary played a significant role and death penalty was awarded.

In another case, Afzal Guru was given a death sentence which was upheld by the Supreme Court.⁴⁷ The Supreme Court admitted that there was no evidence of him being linked with any militant group and that the whole evidence was circumstantial. But he was awarded the capital punishment because of the gravity of the incident which killed many people and shook the entire nation. It has been said that Afzal was made a scapegoat to satisfy the nation's collective conscience. It appears that the principle of 'innocent until proven guilty' is an unrealistic notion which takes a backseat when the society yearns for the death of an individual as retribution for a brutal crime. Thus, it is established that in case of heinous crimes, righteousness and fair play⁴⁸ to the accused is ignored to conform to the demands of the society.

Given the shortcomings and the unreliability of the law, miscarriage of justice in capital punishments is quite possible. This results in the killing of possibly innocent people in the name of justice, which in itself is a reason, strong enough to abolish the death penalty.

⁴⁴ *Id.*

⁴⁵ Judith Dubois, Media Coverage of Organized Crime: Impact on Public Opinion, www.rcmp-grc.gc.ca.

⁴⁶ Santosh Singh v State, 2010 (58) BLJR 1385.

⁴⁷ State v Afsan Guru, 2005(3) ACR 2332 (SC).

⁴⁸ James C. Goodale, Impact of the Media on Fair Trial Rights: Panel on Media Access, Fordham Intellectual Property, Media and Entertainment Law Journal, Volume 3 Book 2.

V. SENTENCING BIAS AND EMERGENCE OF ALTERNATE PUNISHMENT*

5.1. On the matter of Sentencing-Bias in Brutal Crimes

As previously mentioned, the Consultation Paper illustrated some decisions which recognised the subjectivity of judges in deciding the ‘aggravating and mitigating circumstances’ (as per Bachan Singh) from case to case. It was seen that judges were often emotionally influenced by the brutality of the crime. They were also unsure about the extent of the relevance of ‘social necessity’, i.e., the public outcry which itself was often directly proportional to the brutality of a crime. The issue of whether ‘social necessity’ and ‘brutality of the offence’ are intrinsic to identifying ‘aggravating circumstances’ was highlighted.

5.2. On the Emergence of Alternate Punishment to Capital Sentencing

The Law Commission here noted that extended imprisonment, i.e. for the full duration of life, or for a determinate number of years, has emerged as a response to the problem of wrongful capital convictions. They cited the *Swamy Shraddhanand v State of Karnataka*⁴⁹ case (hereinafter “Shraddhanand”), which laid the foundation for this penal option. This case reasoned that, in sentencing criminals, judges were often faced with the dilemma of choosing between an excessively harsh punishment and one that was disproportionately inadequate for the offence. In an attempt to not appear too lenient, there was a marked tendency to over-punish rather than under-punish. Hence, to provide justice for cases deserving punishments of an intermediate nature, the notion of sentencing for a flexible number of years, even till life, was suggested. It was also hoped that the opportunity to sentence criminals to ‘full life’ imprisonment would prevent excessive reliance of capital punishment. Such harsh punishment would therefore truly be invoked only in the ‘rarest of rare’ offences, as suggested in the Bachan Singh case.

5.3. Critique of these Positions

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⁴⁹ (2008) 13 SCC 767.

From an abolitionist point of view, the improvisations in the Shraddhanand case are commendable, in that they attempt to deter judges from routinely imposing the death-penalty. Such a system may also introduce better proportionality in punishment vis-à-vis the offence; i.e., a murder that is not especially rare might not incur the death-penalty. This in turn reinforces the ratio of the Bachan Singh case. Hence, the authors support the Shraddhanand position *prima facie*, and hope that this precedent is used to establish a healthy judicial culture that minimally employs capital punishment.

At the same time, certain issues need to be addressed to ensure that better justice is provided.

Firstly, it is questionable whether death penalty needs to be retained at all, even for the ‘rarest of rare’ crimes. Using death as a penal option is premised upon a utilitarian logic that ignores the inherent value of life, as the authors will demonstrate in this piece. The various justifications favouring capital-punishment are found to be indefensible and based upon a retributive logic that discredits its veracity.

So also, the notion of rarity as a standard for deciding the nature of punishment implies that the severity of the crime is irrelevant in the consideration. How does one penalise, for instance, a murder and a terrorist-attack, if both are fairly of a common and not strictly ‘rarest of rare’ nature? One might make the argument that severity is indeed considered when judges are emotionally influenced by brutal crimes. However, it is worth noting that severity is considered here only in a subjective sense, and there is no objective standard for the analysis of severity when considering ‘aggravating and mitigating circumstances’.

Further, the standard of choosing sentences had not been clarified. It has been stated that pre Shraddhanand, judges faced uncertainty in dealing with crimes that merited more than 14 years imprisonment but did not merit death. Even with extended-sentencing, what is the basis on which the choice between, say, a sentence of 14 years and one of 50 years, is to be made? Is the adequacy of punishment decided on the basis of the judges’ own opinions or is there a

standard format to be followed? This issue becomes self-evident, especially on realising the problem of bias in brutal crimes.

Finally, it cannot be guaranteed that the introduction of extended-sentencing will ensure that the judiciary steadily leans away from capital punishment. If the goal is for capital punishment to be avoided as far as possible, there has to be judicial consistency in following this approach. Even with more options available for sentencing, some judges might continue to impose the death-penalty, depending upon their subjective opinions. The question of emotional bias and unequal application of capital punishment against accused persons from the marginalised sections of society also remains unanswered.

5.4. Answers to the Questionnaire

With these uncertainties in mind, the authors will try to answer the relevant questions from the Questionnaire while critiquing the segment on ‘Emergence of Alternate Punishment to Capital Punishment’.

- 1) Whether or not to retain death penalty in the first place; along with reasons.
- 2) In our opinion, can the sentence of life imprisonment as an alternate to capital punishment achieve the arguments mentioned in Q2 (if there is a stringent and periodic system of review of all prisoners before granting remission/reprieve/commutation)? Please indicate why.
- 3) Do we subscribe to the view that under normal circumstances the punishment of life imprisonment is adequate for murder but under aggravating circumstances, the Court may award death penalty?
- 4) Is it possible to divide murders into different categories for the purpose of sentencing, such that -
 - a) Murders punishable with death
 - b) Murders punishable with life imprisonmentIf so, what murders would we include in category a)?
- 5) Do we thus believe that capital sentencing carries the risk of being judge centric?

5.4.1. *The Demerits of Retaining Death Penalty*

The majority of justifications in favour of capital-sentencing advocate a form of extreme utilitarianism. Such a model is inevitably based on the primacy of the ‘greatest good for the greatest number’, over individual good. Hence, capital punishment is justified on the basis of the evaluation that multiple lives are more valuable than one. To illustrate, we cite a H. J. McCloskey, who provided that:

“Suppose that a sheriff were faced with the choice either of framing a Negro for a rape that had aroused hostility to the Negroes (a particular Negro generally being believed to be guilty but whom the sheriff knows not to be guilty)-and thus preventing serious anti-Negro riots which would probably lead to some loss of life and increased hatred of each other by whites and Negroes- or of hunting for the guilty person and thereby allowing the anti-Negro riots to occur, while doing the best he can to combat them. In such a case the sheriff, if he were an extreme utilitarian, would appear to be committed to framing the Negro.”⁵⁰

Such a brand of utilitarianism thus fails to take into account the intrinsic value of an individual’s life, the extinction of which ought not to be equated at par with other punishments. This is because the entity of the individual as opposed to the society also needs to be respected, as advocated by thinkers such as John Rawls.⁵¹

5.4.2. *Refutation of Grounds Mentioned in Question 2*

The authors do not think that the grounds stated in Question 2⁵² need to be satisfied to establish life-sentences as an alternate to capital punishment. In fact, the authors will now proceed to oppose the contentions raised in Question 2.

⁵⁰See McCloskey, H.J. (1957), *An Examination of Restricted Utilitarianism*, The Philosophical Review, Vol. 66, No. 4 (Oct., 1957), pp. 466-485; available at: <http://www.jstor.org/discover/10.2307/2182745?uid=3738256&uid=2134&uid=2&uid=70&uid=4&sid=21104493103097> (last accessed on 08/08/2014)

⁵¹Rawls, John (March 22, 2005). *A Theory of Justice*. harvard university press; reissue edition., p. 27.

⁵²Question 2 is elaborated here:

“If you are in favour of retention of capital punishment, please indicate your reasons for the same -
a) Capital Punishment acts as a deterrent for future crimes

In refutation of the Question 2 grounds, the authors make the following proposals:

a. It is often argued that capital punishment acts as a deterrent for future crimes. Empirical data is often cited to show how the death-penalty prevents murders.⁵³ Now, the veracity of the link sought to be established between capital-punishment and low murder rates is itself highly questionable and hence unreliable.⁵⁴

b. The retributive model is not conscionable because the principles of the criminal justice system should be based on reformative values and not retribution. Moreover, retributive models are not effective at preventing crime.⁵⁵ In fact, reformative models have significant benefits over retributive ones.⁵⁶

c. The mere potential for future threat is not a justification to take a life. As demonstrated above, the value of 'life' is inviolable and has a certain sanctity which lends a new importance to

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- b) Retribution through death penalty is the most effective means of achieving justice for the victim and provide closure to the victim/victim's family and society
 - c) Capital Punishment ensures that the convicts are never released back into society as they may pose a threat in future
 - d) Capital punishment reduces the chances of convicts escaping from prison
 - e) Those accused of capital crimes do not deserve an opportunity for reformation
 - f) The severity of a crime should mandate an equally severe punishment
 - g) Capital Punishment ensures jails are not overpopulated/overcrowded as the current prison infrastructure is inadequate to accommodate too many prisoners for life
 - h) Capital Punishment may impose less financial burden on the State as the cost of imprisoning someone for life may be higher
 - i) Any other reason.”

⁵³For eg.

(1) See, Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 A.M.L. & ECON. REV. 344 (2003); available at: <http://www.cjlf.org/deathpenalty/DezRubShepDeterFinal.pdf> (last accessed on 10/08/2014).

(2) See also, Chapter 'Evidence', Cass R. Sunstein and Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, And Life Trade-offs*, 58 Stan. L. Rev. 703 2005-2006.

⁵⁴William J. Bowers and Glenn L. Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 Yale. L.J. 187 1975-1976, last accessed on : 09/08/2014.

⁵⁵See Aisha K. Gill and Karen Harrison, *Sentencing Sex Offenders in India: Retributive Justice versus Sex-Offender Treatment Programmes and Restorative Justice Approaches*, International Journal of Criminal Justice Sciences (IJCJS) – Official Journal of the South Asian Society of Criminology and Victimology (SASCV), July – December 2013. Vol. 8 (2): 166–181; available at: <http://www.sascv.org/ijcjs/pdfs/gillharrisonijcjs2013vol8issue2.pdf> (last accessed on 11/08/2014).

⁵⁶Haveripeth. Prakash D., *Restorative Justice and Victims: Right to Compensation*, International Research Journal of Social Sciences, Vol. 2(2), 43-47, February (2013); available at: <http://www.isca.in/IJSS/Archive/v2i2/7.ISCA-IRJSS-2012-18.pdf> (last accessed on 10/08/2014).

it. Eliminating an individual on the basis that they ‘may’ pose a threat in future is against such a natural right. Also, if this is argued, then the question arises as to why should death be reserved for only ‘rarest of rare’ offences; since it is not only these individuals who pose a threat to society. Therefore if the proposed line of argumentation were to be accepted then death should be used as a punishment for all crimes, since all crimes, by definition, are a threat to society.

d. Death cannot be a solution to simply reduce the chances of convicts escaping from prisons. Similarly the argument that jails are overcrowded and that expanding prison infrastructure is expensive cannot be maintained. As argued previously in this piece, any advocated need must demonstrate that it is more valuable than the rights of the individuals. Given the inherent invaluable nature of life, it is doubtful that reducing risks or expenses merit the extermination of an individual. Also, this argument suffers from the slippery-slope fallacy since it considers that the risk of escape exists with all convicts. If the utilitarian argument is retained, then the conclusion would be that there should be no prisons in the first place, and all convicts should be killed to eliminate all risk and cost.

e. It cannot be maintained that those accused of capital crimes do not deserve an opportunity for reformation because everyone deserves a chance of improvement. To cite Justice Bhagwati’s dissent in the Bachan Singh case⁵⁷, if capital punishment is imposed only upon exceptionally bad criminals seen to be beyond reformative hope, it becomes impossible to determine this objectively, and hence capital punishment is practically inapplicable.⁵⁸

To suggest that capital punishment be retained for heinous offences is to suggest that certain crimes merit the death sentence. Firstly, this presumes that the death sentence is a punishment more severe than others. The idea of ‘differing preferences’ is unaccounted for, as required by John Stuart Mill’s brand of utilitarian philosophy.⁵⁹ For instance, some people may find a life devoid of liberties to be infinitely worse than no life at all. For them, it would be

⁵⁷*Bachan Singh v. State of Punjab*(1982) 3 SCC 25.

⁵⁸*Ibid.*, at ¶ 82.

⁵⁹ See Chapter 2: ‘What Utilitarianism Is.’, JOHN STUART MILL, UTILITARIANISM(1863); available at : <http://www.utilitarianism.com/mill2.htm> (last accessed on 09/08/2014).

debatable whether capital punishment is actually worse than life imprisonment. The example of Japanese ‘hara-kiri’ bombers of the Second World War illustrates such a preference to losing life rather than being taken prisoner by the enemy.

a. Further, how should what one ‘deserves’ be determined? How does one determine who is beyond reformative hope? To reiterate Justice Bhagwati’s dissent in the Bachan Singh case⁶⁰, it becomes impossible to determine this objectively, and hence capital punishment is practically inapplicable.⁶¹

b. The severity of a crime should not mandate an equally severe punishment because this perpetuates a regressive model of justice based on an eye-for-an-eye formula. It contains the same problems of retributive models enumerated above. Moreover, there is a distinction between proportionality and equality. Proportionality is inherent in punishment, but nowhere is equality in severity a factor.⁶²

5.4.3. *Determining ‘Aggravating Circumstances’ is Judge-Centric*

In *Shraddananda*,⁶³ the Court noted that the awarding of capital punishment “depends a good deal on the personal predilection of the Judges constituting the Bench”. Now, *Bachan Singh* suggested the ‘rarest of rare’ doctrine, but did not provide specific guidelines on how this was to be determined, except to ask judges to consider ‘aggravating and mitigating circumstances’. Even though the thrust seems to be toward principled sentencing, it is clear that the decision is ultimately judge-centric.

5.4.4. *Unequal Classification of Murders*

In attempting to ensure that capital punishment is resorted to less often, the Bachan Singh case created the legal category such that only the ‘rarest of rare offences’ would merit such

⁶⁰Bachan Singh v. State of Punjab(1982) 3 SCC 25.

⁶¹ *Id.* at ¶ 82.

⁶² J. Bhawati’s dissent, Bachan Singh Case, at ¶ 36-37.

⁶³ (2008) 13 SCC 767.

a punishment. However, this created a classification on the basis of which certain crimes were punished; the testing ground being ‘rarity’.

The authors shall now demarcate the problems with such classification. Since capital sentencing is highly judge-centric, there is scope for bias and arbitrariness in classifying similar convicts in such a manner. It is argued that classifying murders in this manner is unconscionable because it goes against the equal protection analysis imported from Article 14 of the Constitution by the Bariyar case.⁶⁴ The analysis is relevant for addressing the problem of differential treatment of similarly situated capital convicts sentenced by different judges.⁶⁵ The case recognised that if some of these similarly situated convicts are sentenced to life imprisonment while others are sentenced to death, there is direct bearing upon their right to be subjected to equal procedure when life is being taken away under Article 21. The highly subjective scope of judicial discretion can hardly be deemed to be ‘procedure established by law’ as per this provision.

The specific question of classifying murders brings to light another ignored issue already discussed, which is the value of life. Even retaining death penalty specifically for heinous offences introduces another utilitarian logic, i.e., the notion that the social costs of certain crimes outweigh the benefits of retaining a life, and so the latter must suffer in this calculation. Accordingly, this creates the impression that the value of a life is determinable and quantifiable. However, such a perspective is countered by the emerging understanding that human life has an unquantifiable value since it imbibes ‘dignity’.⁶⁶ This puts life above and beyond cost evaluations, making it ‘priceless’.⁶⁷ One may thus simplistically infer that there is no supervening circumstance which justifies taking of a life through capital punishment.

5.4.5. *Human Rights Justification and International Obligations*

Most importantly, it is indisputable that capital punishment is fundamentally inhumane. The guarantees ensuring basic human rights can be traced to the Universal Declaration of

⁶⁴Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra (2009) 6 SCC 498.

⁶⁵Bachan Singh v. State of Punjab (1982) 3 SCC 25, at ¶ 130.

⁶⁶See James Rachels, *Kantian Theory: The Idea of Human Dignity*, an excerpt from James Rachels, *The Elements of Moral Philosophy*, pp. 114-17, 122-23, Random House, Inc. 1986.; available at: http://public.callutheran.edu/~chenxi/phil345_022.pdf (last accessed on 08/08/2014).

⁶⁷ Ibid.

Human Rights,⁶⁸ the International Covenant on Civil and Political Rights⁶⁹ and other international covenants. This is enough reason to refute the argument that any human ‘deserves’ death.

It is interesting to note that many executions are carried out by a group of executioners, and technological tricks are used to disguise the true executioner, such as using dummy switches in electrocutions and gas chambers. However, these are only cosmetic means of diluting liability for the murder of the offender; the State remains vicariously liable for the same. Despite such international attempts at ‘humanising’ the process of meting out capital punishment, even relatively milder forms of capital punishment like hanging impose prolonged pain and humiliation upon the offender.⁷⁰ Taking this analogy to its logical conclusion, why must a punishment that is inherently inhumane and universally undesirable be allowed to be imposed at all?

5.4.6. *Conclusion to Part V*

In conclusion, the authors submit that the sentence of life imprisonment as an alternate to capital punishment is sustainable because of reasons mentioned below.

Capital punishment could be completely eliminated for all offences given the intrinsic value of life and the uncertainties inherent in the justifications for retaining capital punishment. The justifications for this conclusion are based on the reasoning that the purpose of punishment is not to penalise or invoke retribution but rather to reform. Moreover, as also established in the case of *Coker v. Georgia*⁷¹, capital punishment has little deterrent value and is considered barbaric and highly disproportionate. Further, life imprisonment keeps the system of pardon

⁶⁸ See ‘Chapter: The Universal Declaration of Human Rights and recognition of the right to life’, WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW*, 3rdEdn, Cambridge University Press, 2002; available at: <http://ebooks.cambridge.org.ezproxy.nujs.ac.in/ebook.jsf?bid=CBO9780511494109> (last accessed on 10/08/2014).

⁶⁹See, ‘Chapter: Interpretation of the *International Covenant on Civil and Political Rights*’, *Ibid.*

⁷⁰ Justice Bhagwati’s dissenting opinion, in *Bachan Singh v. State of Punjab*(1982) 3 SCC 25, at ¶ 29..

⁷¹ 433 US 584.

alive and allows scope for review whereas capital punishment does not. It is to be noted that the Court admitted to grave error and the miscarriage of justice in the Ravji⁷² case.

Next, it is important to look at a model where the punishment for a crime is determined on the basis of severity rather than rarity. If this is not feasible, the 'rarest of rare' offences could be instead punished with a term of life-imprisonment. The logical deduction would then be to punish 'lesser' crimes with successively lesser terms.

Finally, regarding the matter of judicial discretion, a certain degree of subjectivity needs to be retained with judges when it comes to sentencing. This is because it is they who will decide upon the facts of the case, on when the burden of proof shifts, and upon the preponderance of evidence. In fact clause 2 of section 235 of the Criminal Procedure Code(hereinafter, "Code") even allows for a mini trial where the criminal opines upon his sentence and informs the judge about related circumstances that should mitigate his sentence; such as being the sole breadwinner of his family, or having a psychological illness. The intent is not to challenge the power of the judge to decide upon the sentence since he will be closely associated with and in the best position to understand the nature of the case. In fact this fits in perfectly within the legitimate idea of considering 'aggravating and mitigating circumstances' in sentencing the criminal.

However, the problem emerges when judges have full liberty to choose the criminals' sentences. Arbitrariness and bias inevitably have a bearing upon the decision. The gap between 14 years and life being a vast one, it is appropriate that choosing the duration of punishment needs to be done in a systematic and uniform manner. Therefore, there needs to be a general threshold with reference to the determination of the duration of sentence for each offence, beyond which a judge may not venture. For instance, a crime of theft may be punished with a sentence anywhere between a fixed period of 1-2 years only. This is a justifiable categorisation of offences and punishments, operating much like a taxation bracket; classified, as it is, on similarly situated classes of offenders. Hence, it is the duty of the legislature to introduce accountability into the manner of sentencing. This may be done in the manner of making a proposal to amend

⁷²Ravji alias Ram Chandra v. State of Rajasthan, AIR 1996 SC 787.

the Code and to bring in a system of grading punishment in proportion to the atrocity of the offence.

This Legislative Review is continued in the Second Part.