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

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This is in Continuation of the First Part of the Legislative Review

VI. MARGINALIZATION OF POOR IN THE CONTEXT OF DEATH SENTENCING*

A comparative study of social and political backgrounds of the persons who have been awarded the death sentence or executed so far shows inequality in its award. It is observed that convicts belonging to the lower socio-economic strata, the illiterate and the so-called less powerful and ignorant people are generally subjected to capital punishment.[1] This analysis makes an attempt to bring into focus the vulnerability of the accused persons belonging to the lower socio-economic strata of the society with reference to death penalty.

Studies have shown that the persons belonging to poor families face the fear of the noose much more than accused persons coming from relatively well-off backgrounds. It will not be too much of an exaggeration to say that people from economically marginalised sections of the society are almost singled out for execution.

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[1]Can Society Escape the Noose? 101 (Arunjeev Singh Walia et al. eds.,2005).

This fact has been reiterated by many a judges in various cases which debated on the subject of awarding death penalty to a particular accused. Justice Bhagwati, in his dissent in the case of Bachan Singh represented this fact in a very succinct manner-

"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 the clutches".[2]

This phenomenon of poor and marginalised people being more vulnerable to capital punishment is a worldwide phenomenon, and is not unique to India. A few American scholars have employed the strategy referred to as an "argument from contigent realities" in this respect.[3] These American scholars have suggested that some practice might be sanctioned by the moral, legal or constitutional rules in a utopian world (just, fair, equitable etc.); but the practice might not be permissible in the contingent existent realities. These scholars have suggested that death penalty is one such practice which may be permissible in a perfect world but the arbitrary manner in which it is awarded makes it directly averse the Equal Rights Clause of the American Constitution in reality. We believe that such an argument can also be employed in the Indian context as there have been numerous instances where equally brutal murders have been treated differently by the courts; and the socio-economic conditions of the accused has always acted as an undercurrent in such decisions. We believe that such discrimination is against the Right to Equality given by the Constitution of India.

In the case of **Dr N.S Jain**,[4] a prominent ophthalmologist who was convicted of conspiring to kill his wife by hiring assassins so that he could marry his mistress, those who killed his wife—Ujagar Singh, Kartar Singh and Daya Singh— were eventually executed, but the doctor was not hanged (he was sentenced instead to life imprisonment).

[2]1983 SCR (1) 145.
[3]Jeffery L. Johnson, Poverty and the Death Penalty, Journal of Economic Issues, June 2001.
[4] N S Jain vs Union of India, 1978 RLR 442.

One reason for the discrimination against the poor and the marginalised in being awarded the death sentence is the unavailability or lack of easy access to adequate legal assistance. Even when free legal aid is available, the quality of legal aid rarely matches that obtained through private legal assistance.[5] Legal Aid fees are very low, in fact much lower than the minimum usually charged by a private lawyer. The low level of legal aid fees also means that legal aid lawyers can only spend a limited amount of time to prepare a defence. In some cases, legal aid lawyers are only assigned to defendants in murder cases on very short notice, often leading to irreversible consequences. If defence lawyers do not produce vital evidence during the trial, or if other mistakes are made during trial proceedings, it is often impossible to correct the mistake as the appellate court will usually not hear fresh evidence and limit itself to hearing arguments on the questions of law. Thus, there are serious risks that miscarriage of justice occurring.

6.1. Suggestion

There are a lot of factors which play a role in the discrimination in dispensation of capital punishment. We can feel confident that the ones being executed are truly guilty, only once we know that a similar quality and quantity of legal service is available to every accused. The authors understand that the difficulties that poor and desolate people face in accessing justice and therefore are of the opinion that death penalty should not be awarded, at least till the time we live in a slightly better world which is closer to perfection than now, and contingencies based on caste, class and race do not exist.

VII. ARBITRARY EXERCISE OF MERCY POWERS LEADING TO VIOLATION OF FUNDAMENTAL RIGHTS OF DEATH ROW PRISONERS*

The next question required to be considered is whether mandatory guidelines should be laid down for the Governor and President of India to exercise their powers of granting mercy under the Constitution of India in death penalty cases.

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Exercising of power under Article 72/161 of the Constitution to consider and dispose of mercy petitions of convicts by the President or the Governor is a constitutional obligation and not a mere prerogative and such a decision would be subject to judicial review, as per the Supreme Court in ***Shatrughan Chauhan v. Union of India***.[6]

Delay in execution of death sentence amounts to mental torture thereby violating Article 21 of the Indian Constitution. We are of the opinion that the guidelines, as laid down by the three judge bench in ***Shatrughan Chauhan v Union of India*** should be made mandatory.

The Supreme Court's latest verdict on death row convicts is a thoughtful exposition of the law in this regard. Commuting the death sentences of 15 convicts to life sentences, a three-judge Bench, headed by Chief Justice P. Sathasivam, has significantly expanded the scope for judicial intervention to save the lives of convicts after the rejection of their mercy petitions. As the scope for judicial review in such cases is limited, the court has sought to protect the rights of condemned prisoners arising from supervening circumstances after their cases have attained judicial finality. The court has laid down fresh rules to humanise the treatment of those facing the gallows, right up to the moment of their execution and even after that. The breadth of this ruling is impressive since it removes all lingering doubts about the rule against undue delay, overturns the exception carved out in ***Devendar Pal Singh Bhullar*** (2013) for offences involving terrorism, reminds jail authorities of the bar on keeping death row convicts in solitary confinement before the rejection of their mercy pleas and lists mental illnesses and solitary confinement as new grounds for commutation. It further mandates legal aid for convicts in drafting mercy petitions and exploring judicial remedies.

The Bench stated: "As and when any such mercy petition is received or communicated by the State government after the rejection by the Governor, necessary materials such as police records, judgment of the trial court, the High Court and the Supreme Court and all other

[6]Shatrughan Chauhan v Union of India AIR 2014 SC0043.

connected documents should be called at one stroke, fixing a time limit for the authorities to forward the same to the Ministry of Home Affairs. Even after sending the necessary particulars, if there is no response from the office of the President, it is the responsibility of the Ministry of Home Affairs to send periodical reminders and to provide required materials for early decision."

This judgement has created duties that the state machineries have to adhere to in order to ensure that the fundamental rights of death row victims are not violated. Such mandatory guidelines will make the executive more responsible and careful while dealing with mercy petitions, and will ensure that the death row prisoners have their dignity intact, even if they are to be finally executed.

VIII. INTERNATIONAL OBLIGATIONS

The authors also suggest that the international pressure placed on India, which has not been mentioned in the Consultation Paper be taken into consideration.

The Universal Declaration of Human Rights[7], adopted by the UN General Assembly in 1948 states that everyone shall have the 'right to life' and that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment . This marked the beginning of the death penalty discussion under international law.

Further, the International Covenant on Civil and Political Rights[8] (ICCPR), acceded by India in 1979, in Article 6 states that "no one shall be arbitrarily deprived of his right to life". Subsequent paragraphs mention death penalty as an exception to this rule along with the test of 'most serious crimes'.[9] In the Indian context, 'most serious crimes' was translated in 1980 to 'rarest of rare' in Bachan Singh.

Subsequently, in 1989, the 2nd Optional Protocol to the ICCPR went a step further to

[7]Universal Declaration of Human Rights, G.A. Res. 217A (III), UN Doc. A/810 (December 12, 1948).
[8]International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, S. Exec.Doc. E, 95-2 (1978), 999 U.N.T.S. 171, 175 (March 23, 1976).
[9]William A. Schabas, 'The Abolition of the Death Penalty in International Law' [2002] 3 CUP 45-77.

seek total abolition of death penalty.

Keeping in mind that India has neither ratified the ICCPR, nor has it signed the 2nd Optional Protocol, the authors seek to lay emphasis on the argument provided by the Court in ***Aloke Nath Dutta*** that India must strive to meet its international obligations. It must be realised that the obligations of India flow further than merely meeting basic requirements.[10]

IX. RESPONSE TO THE QUESTIONNAIRE ACCOMPANYING THE 'MODE OF EXECUTION OF DEATH SENTENCE AND INCIDENTAL MATTERS'

9.1. Question-I*

This part of the Review Paper addresses Question 1 of the Questionnaire.

Section 354 (5) of CrPC of 1973 provides as follows:

"When any person is sentenced to death, the sentence shall direct that he may be hanged by the neck till he is dead."

a. Does this section be required to be amended?

(i) Yes (ii) No.

b. And if so, what other modes of execution do you suggest? (Refer to Discussion Paper Chapter 4 &Chapter 5).

Answer:

[10]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).

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a. Yes, this section requires amendment.

b. The Consultation Paper has enlisted the pros and cons of various modes of execution of death sentence such as lethal injection, shooting and electrocution, and also hanging in detail.[11] In India, however, hanging and shooting are the accepted modes of execution of death penalty.[12]

The issue being addressed in this segment is not based on the idea of abolitionism or retentionism of death sentences in India. The sole question being considered here is whether amendments must be made to Section 354(5) (hereinafter, "the provision") of the CrPC in order to bring reforms needed in the present system of execution of death sentence in India. While a thorough reading of the Consultation Paper indicates that the comparative analysis of lethal injection, shooting and electrocution has been done in a comprehensive manner, what seems amiss in the Paper is a concluding remark as to how the provision must be amended in order to develop a final policy regarding execution of death sentences. Such a concrete suggestion will not only ensure precise and pointed discussions by the Legislature but will also help in implementing the recommendation with more clarity and speediness.

The arguments that the authors would like to propose are mentioned pointwise in the subsequent paragraphs and have been substantiated with the help of Supreme Court cases, reports, published articles and contemporary developments.

1. **Elimination of Electrocution as a Mode of Execution**–While it is argued that electrocution is a method being adopted by many countries as a mode of execution because it is considered to be less offensive and more humane, it must be completely ruled out as an option for execution in India. The general procedure in this method

[11] Consultation Paper on Capital Punishment (187th Report) by the Law Commission of India .
[12]Section 354(5) of the Code of Criminal Procedure 1973 - hanging by neck till death. It is also provided under The Air Force Act, 1950, The Army Act 1950 and The Navy Act 19572 that the execution has to be carried out either by hanging by neck till death or by being shot to death.

involves a prisoner being strapped to a specially built chair with their head and body shaved to provide better contact with the moistened copper electrodes that the executioner attaches. After performance, electrocution produces visibly destructive effects on the body, as the internal organs are burned. The prisoner usually leaps forward against the restraints when the switch is turned on. The body changes colour, swells, and may even catch fire. The prisoner may also defecate, urinate, and vomit blood.[13] The Nebraska Supreme Court declared the electric chair unconstitutional in 2008, terming it as a method comparable to archaic forms of torture. The Court's reasoning was also based on the grounds that it unquestionably inflicted a substantial risk of a prisoner suffering unnecessary and wanton pain in an execution, violated the evolving standards of decency that mark a mature society, and dishonoured standards of physical violence and mutilation on the prisoner's body.[14]

In ***Deena v Union of India***[15], it was laid down by the court that the act of execution should be quick, simple and decent. Without involving mutilation to the prisoner's body, it must lead to immediate unconsciousness and eventually, death. The method of electrocution, however, has resulted in charring and flaming of inmates' bodies on multiple occasions. Another shortcoming highlighted in the same case was – "failure of electrical energy supplied by commercial undertakings has been considered in America as an impediment in the use of the electric chair. With frequent failures of electric power in India, the electric chair will become an instrument of torture."[16]

Hence, electrocution as a method is not only less desirable than lethal injection, shooting or hanging, but must be entirely eliminated as an option due to its sheer barbarity.

2. **Incorporating Shooting as a valid Mode of Execution in the Penal Code**- The Air Force Act, 1950, The Army Act, 1950 and The Navy Act, 1957 warrant that the

[13]Consultation Paper on Capital Punishment (187th Report) by the Law Commission of India.
[14]'Cases determined in the Supreme Court of Nebraska', http://hosted.ap.org/specials/interactives/_documents/ne_sc_deathpenalty.pdf, accessed 14 August 2014.
[15]1983 (4) S.C.C. 645.
[16] Deena v Union of India, 1983 (4) S.C.C. 645.

execution in India has to be carried out either by hanging by neck till death or by being shot to death.[17]

In ***Deena v Union of India***[18], the following was held with regard to shooting: "It is the favourite past-time of military regimes which trample upon human rights with impunity. They shoot their citizens for sport. Shooting is an uncivilised method of extinguishing life and it is enough to say in order to reject in that the particular method is most recklessly and want only used for liquidating opposition and smothering dissent in countries which do not respect the rule of law. Lastly, murders by shooting are becoming a serious menace to law and order in our country and such a practice by the State will unwittingly confer respectability on the shoot to kill, tactics which are alarmingly growing in proportion."[19]

In the opinion of the authors, the paragraph quoted above is in direct contradiction to what was held in another paragraph of the same case. Shooting, as a mode, is simple to execute, takes not more than a few minutes, involves less pain, is comparatively swift and causes instant death.[20] These characteristics associated with shooting meet the requirements prescribed in ***Deena v Union of India***. The contention that it is an uncivilised manner of extinguishing life can be refuted on the ground that it is opted by some prisoners as they consider it to be an honourable death or a soldier's death as compared to hanging which they term as being disgraceful or degrading.[21]

In the opinion of the authors, the option of shooting as a mode of execution must be incorporated within Section 354(5) of the CrPC for two primary reasons. It is the least disgraceful form of killing a person and also the swiftest. The implementation of this method in India has been very sparse. Acknowledgment of the same in the penal

[17]Consultation Paper on Capital Punishment (187th Report) by the Law Commission of India.
[18]1983 (4) S.C.C. 645.
[19]Ibid.
[20]Consultation Paper on Capital Punishment (187th Report) by the Law Commission of India.
[21]Ibid.

statute, coupled with proper judicial decisions with regard to death sentences can help in achieving the goal of bringing significant humanised changes to this issue.

3. **Incorporating Lethal Injection as a valid Mode of Execution in the Penal Code–**It is recommended in the Paper that one of the present modes of execution of death sentence in Section 354(5), i.e. 'hanging by neck', should be replaced by 'administering lethal injection until accused is dead'.[22]

The authors would like to concur with this stance taken by the Law Commission and suggest inclusion of lethal injection as a mode of execution of death sentence in India. Lethal injection is a modern form of execution which found no mention in ***Bachan Singh v State of Punjab***[23], a landmark judgment passed by the Supreme Court of India. The implementation of the same is subject to medical advancement and progress made in the science of anaesthetics in India and hence the issue must be examined periodically.

In the United States of America, lethal injection is the most commonly practiced form of execution. It is more scientific, civilised and humane. It causes no mutilation and results in unconsciousness almost immediately. It is less painful, less derogatory and the best controlled method of execution.[24] With the advancement of medical sciences in India, we can now expect use of lethal injection to bring about death quickly, swiftly, painlessly and with dignity in all cases. Hence, in the opinion of the authors, it must be incorporated as a mode of execution in the penal statutes in India.

9.2. Question-II*

This part of the Review Paper addresses Question 2 of the Questionnaire.

[22]Ibid.
[23]AIR 1980 SC 898.
[24]Consultation Paper on Capital Punishment (187th Report) by the Law Commission of India.
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Some states in the U.S.A. give the convict the choice ofwhether he wants to die by lethal injection or shooting. On the other hand in India, the Court Martial Tribunal, under the Army Act of 1950, Air Force Act of 1950 and Navy Act of 1957, has discretion to give death punishment either by hanging to death or by shooting to death.

Should discretion be given to the Judges?

(i) Yes (ii) No

Or

Should discretion be given to the Convict?

(i) Yes (ii) No

Answer:

Discretion should not be given to Judges, but may be given to the convicts depending upon the Government taking up newer modes of execution towards which it is currently indifferent.

The Law Commission in its report has suggested that the Judges should be given a choice to decide the mode of execution and the convict should be given an opportunity to be heard while the Judges decide. The authors suggest that discretion should be given to neither the convict nor the judge. Alternatively, discretion should be given to the convict.

Although giving discretion to decide the mode of execution can be an attractive option, it needs to be remembered that it has to be made operational in a country like India, where the criminal justice system is not so robust. It is filled with delays at every step, from the time of conviction till the time at which the death sentence is actually executed. In such a situation, adding another part to this process by asking the convicts to decide the mode of execution will make the process only cumbersome.[25] Moreover, the Parliament has better resources and

[25] Justice Durga Khaitan, Additional District Judge, Faculty Seminar on Death Penalty at National University of Juridical Sciences, Calcutta (August 13, 2014).

expertise to decide the best method to execute convicts, depending on factors like pain involved in the process, cost of the method, level of mutilation in the body and certainty among other factors. Once the best mode of execution is decided, the method should be uniformly applied for all the convicts. This will avoid the expansion in the process and will save it from getting complicated. More particularly, since one process will be better than the other processes, choosing the best will save the State from extra expenditure and from keeping arrangements for two or more modes of executions.

In case the State decides upon two or more modes of execution towards which it is indifferent, the State can provide an option between these methods. However the discretion to choose between these methods should be given to the convict and not the judge. There are various arguments which supporting the giving of discretion to the convict. One of them is the supremacy of the convict's right to choose at least his/her mode of execution. Although asking the convict to decide the mode of his/her execution can be unkind in so much as he/she will be given the cruel task of deciding how he/she himself/herself has to die. However this is very subjective. If we glance at the bigger picture, once a death sentence has been finalised, the convict loses control of his/her life. Many restrictions like living in seclusion are imposed on him. It is then seen that he/she seeks small victories for himself/herself.[26] The right to choose then gives a convict the opportunity to choose the final experiences of his/her life. This can be a mode for him/her to express his/her values and preferences and a mode to give him/her the satisfaction that he/she made a choice at least on some issue pertaining to his/her life. Although this proposition may be juxtaposed to a situation where a convict is not given the right to die by suicide[27], when suicide can be regarded more dignified than being executed by the state; yet choosing the method of execution is also about deciding how one will be spending the final moment of one's life. This right can therefore be given to the convict.

We also have similar arrangements in The Army Act, 1950, The Navy Act, 1957 and The Air Force Act, 1950. Section 163 of the Air Force Act, 1950 gives the discretion to the court

[26] Shlomit Harrosh, Choosing how to live: death row inmates and terminally ill patients, June 23, 2010 available at http://blog.practicalethics.ox.ac.uk/2010/06/choosing-how-to-live-death-row-inmates-and-terminally-ill-patients/ (Last visited on August 11, 2014).
[27] The reasons for the same are beyond the scope of this essay.

martial to decide on the mode of execution between death by hanging and death by being shot to death. The rationale provided for such an arrangement is the ease involved as a result of the easy availability of weapons to shoot within these organisations.[28] However, there is no set standard to be followed in choosing between these modes of execution. An analogy can be drawn from the Nuremberg trials, where the officers from the German High Command sentenced to death, wanted a martyr's death and hence chose being shot against being hung to death.[29] Similar considerations can arise for general public also, which should be respected even in case of hardened criminals.

On the other hand, it can be argued that since the convict never gave a choice to the victims, why should he/she be given the choice to choose the way he/she should die? This argument however fails to meet the very parameters which are used in deciding an ideal mode of execution. It cannot exist in a civilised society since it is based on "the theory of retribution or retaliation and at the bottom of it lies the desire of the society to avenge itself against the wrongdoer. That is not a permissible penalogical. goal."[30] The mode should be humane, which is very subjective and in this case, should depend on the person being executed.

However, this should be seen in the light of the situation of countries where the choice is given presently. It has been noticed that even when choice is given in states like U.S.A, one method is generally preferred over the others in more than a majority of cases.[31] However the exceptions of such a trend cannot be overlooked. In one of the few exceptions, the firing squad was chosen over lethal injection for religious reasons. The convict belonged to the Mormon community and believed in offering a blood payment for his crimes. Similarly, there can be situations where a person believes in repentance by means a particular mode and not via the other. This 'other' could very well be based on logic or superstition or religion; however, in any of such cases, the right to choice should be given. Although a bit farfetched, this can also be equated to a right to carry on religious practices. For the State it is merely a matter of convenience, however, for the individual, it can be a way to experience a sense of controlling

[28] See The Law Commission of India, Consultation Paper On Mode Of Execution Of Death Sentence And Incidental Matters, 30 (2014) ("a method which is certain, humane, quick and decent" should be the best one).
[29] Ibid.
[30] The Law Commission of India, 187th Report On Mode Of Execution Of Death Sentence And Incidental Matters, 39 (2014).
[31] The New York Times, 'The Firing Squad, Please,' Says Prisoner, April 23, 2010, available at http://www.nytimes.com/2010/04/24/us/24death.html?_r=0 (Last visited on August 11, 2014).

his/her own life, even when this control is for such a minimal period of time. It should be the prerogative of a welfare state then to take note of the factors like religious beliefs. On the contrary, this should not make much of a difference for the State because the same end is achieved by different means.

On the other hand, the judge should not have a right to decide on the method, since one cannot possibly think of a logic which can be used by the judge to decide upon the fact. The Air Force Act gives the discretion to the court martial, which is again arbitrary and not based on a set of established criteria. To avoid the already existing arbitrariness in the case of death penalties, the judge cannot be given the discretion, the exercise of discretion being very subjective. This is because there are no criteria laid down which can be used to decide on the mode. Considering the stake of the individual in this regard, he/she should be given the first choice rather than the judge.

One problem which can arise in case of giving the convict a choice is that of indecision. This has been solved in countries like U.S.A by giving the convict a specific period to decide, in case there remains indecision, the convict is executed via the primary method. The primary method can be the one, which is the best method according to the State. The convict can then be given a choice to deviate. This method also takes care of the indecision which Indian convicts might face.

However, the question which now arises is that of deciding on the pool of alternatives amongst which choice will be given. This can but be a limited pool depending on the technical expertise and resources available. The way out of this impasse is to decide on methods which are relatively similar when tested on the criteria of certainty, humaneness, quickness, cost and decency. Choice can be given amongst such set of modes to the prisoner. Considering that the State should be indifferent to such methods, it should not hinder the State's objectives behind death penalty. Moreover, there is public consensus on the point of giving such discretion to the convict. 70% people agree on this point along with 45% judges, according to a survey done by

the Law Commission.[32] This choice however has drawbacks. It is based on the assumption that there exist certain modes of execution which the State can be indifferent towards. The suggestion should thus be seen in this light and should be worked upon accordingly.

9.2.1. Suggestion

Discretion should be given to neither the Judge, nor the Convict. Alternatively, discretion as to the decision of mode of execution to be employed can be given to the convict. This discretion should not be given to judges.

9.3. Question-III*

This part of the Review Paper addresses Question 3 of the Questionnaire.

9.3.1. Availability of the Right of Appeal to the Supreme Court when the High Court has confirmed the Trial Court's death penalty sentence

It is not impossible for an accused sent to death row by a High Court to appeal to the Apex Court. The High Court could choose to exercise its power to grant leave to appeal to the Supreme Court under Article 134(1) (c) of the Indian Constitution, or the Supreme Court may grant special leave under its Article 136(1) to an appeal being preferred. However, these are discretionary powers which rest with the higher judiciary—and the higher judiciary alone—and this substantiates the non-availability of this provision as a matter of right. With respect to approaching the High Court, it is not available as a right to the accused either. However, this is because of a completely different reason which does not risk the accused in any way, which is that the trial court is mandated to submit the proceedings to its parent High Court.[33]

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[32] The Law Commission of India, 187th Report On Mode of Execution of Death Sentence and Incidental Matters, 68, 76 (2014).

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[33] Section 366, Code of Criminal Procedure, 1973.

Several reasons may be cited in support of this existing legal position, among which the complete reappraisal of facts as well as law by the High Court, the supposed sufficiency of wide judicial safeguards, and the availability of mercy petitions feature prominently. Yet, a closer look reveals that these arguments are indefensible, and the balance tilts as the counter-arguments are not.

(a) The adequacy of safeguards on paper and the efficacy of these mechanisms in practice have long been advocated by highlighting how the vast majority of cases pertaining to the death penalty come up before the Supreme Court. However, given the standard one-line dismissals of Special Leave Petitions (hereinafter "SLPs"), we know little about those that slip through the meshes of the legal system. Even though these dismissals remain largely unreported, there is enough evidence on record to show how rejections made *in limine* in matters of life and death are—wish as we would that they were—no myth. The case of ***Sheikh Meeran, Selvam and Radhakrishnan***, where special leave was not granted after nothing more than a preliminary hearing by a vacation bench of the Apex Court in June 1999, affords a case in point. Another such dismissal was reasoned on the grounds that no statutory or precedential fault could be found in the procedure adopted by the High Court.[34] Yet another case spoke about the need to "administer shock therapy…by inflicting condign punishment on dangerous deviants"[35] while summarily rejecting the SLP.

Yet, given the exceptionality of circumstances in which SLPs are generally invoked, the acceptance of every single one of these petitions—morally justifiable as it might be—is perhaps not the advisable legal recourse.[36] Another solution would need to be brought into effect, and mandatory appeals offer one.

(b) The vagaries of intrinsic judicial arbitrariness have been pointed out repeatedly, going as far back as the Constituent Assembly debates, by the opponents of the death penalty. Justice Bhagwati, a lifelong loyalist of this school of thought, has in his dissenting judgment in Bachan Singh suggested several ways to curtail such infirmities in this 'lethal

[34]Joseph Peter v. State of Goa, Daman and Diu, (1977) 3 SCC 280.

[35]Paras Ram v. State of Punjab, (1981) 2 SCC 508.
[36]Ujagar Singh v. State (Delhi Administration), (1979) 4 SCC 530.

lottery', one of which reads thus: "by the law providing that in every case where the death sentence is confirmed by the High Court there shall be an automatic review of the death sentence by the Supreme Court".[37] While this opens the gates for deliberate delays on the path to justice, this position is still preferable to the very real risk of not reaching the said destination at all.

(c) The High Court is required to reappraise, reassess and reconsider the entire facts and points of law and arrive at its own conclusions through the material on record (and additional evidence, if necessary) with regard to both the conviction of the accused and the sentence independent of the stance taken by the lower court. Thus, a close scrutiny of the entire evidentiary material by a superior court is theoretically necessitated. However, in practice, this need not always be satisfactorily carried out. In ***State of Madhya Pradesh v. Ram Gopal,*** for example, the respective High Court invited blame and shame in equal measure for disposing the appeal in a "manner exhibiting complete non-application of mind" with "absolutely no consideration of the evidence adduced by the parties" in a "cryptic judgment."[38]

(d) There have also been a handful of cases where laxity on part of the officers belonging to the judiciary or the executive, or both, has stalled the process for years. In ***Gurmeet Singh v. State of Uttar Pradesh***[39], for instance, it was the negligence of the High Court officers alone which delayed the exercise of the special leave safeguard available to the prisoner; whereas, in ***Dhananjoy Chatterjee v. State of West Bengal,*** a similar delay of nearly a decade was said to have been singularly caused by officials of the Executive. Considering the rarity of corresponding punishment, the frequency of such neglect is unlikely to lessen. However, if the duty itself was taken away from such laidback, uninterested officials and placed with prisoners facing life or death in the shape of a right to appeal, such dereliction of duty and the prolongation that ensues could be averted.

[37]Bachan Singh v. State of Punjab, (1982) 3 SCC 24.
[38]Appeal (crl.) 1355 of 2005.
[39] AIR 2005 SC 3611.

(e) The Consultation Paper points out how the statutory right of appeal to the Supreme Court is available against judgment of the High Court in election matters, against the orders of the Bar Council of India, and orders of the Commission under MRTP Act, 1969. While the need (or otherwise) of the right of appeal in these matters is not in debate here, its mere availability in corruption cases against election candidates, disciplinary actions against advocates, and the like brings out how mandatory appeal, limited as it should be, is certainly not to be considered as sacrosanct.

(f) If it is feared that the floodgates to appeal will congest the higher echelons of the Indian judiciary in terms of sheer number, opening (and often, closing) the doors by way of discretion and not obligation in certain matters where both the causes and consequences are less serious would fulfill the same objective in a far less riskier manner.

(g) This is because some of the cases that fall under the other matters mentioned in point (e) are reversible in nature. Some others where the decisions are impossible or difficult to reverse seldom cause irreparable damage. This requires contemplation on the question as to how a fallible mechanism well capable of damage that is unexceptionally irreversible and exceptionally irreparable can be overlooked in the scheme of this additional safeguard.

9.3.2. Suggestion

For the reasons stated above, the authors endorse the view that the Supreme Court (Enlargement of Criminal Jurisdiction) Act, 1970 be suitably amended to the effect that convicts on death row be provided the opportunity to appeal to the Supreme Court as a matter of right. Moreover, in the wake of the close of the country's nine-year long *de facto* moratorium on capital punishment with the hanging of Ajmal Kasab and Afzal Guru as well as the rejection of several mercy petitions by the incumbent President in glowing contrast to his predecessors,[40] an overwhelming air of urgency in effecting the amendment is necessitated.

[40] *President Pranab Mukherjee Rejects nine mercy pleas in nine months,* Himanshi Dhawan and Vishwa Mohani, The Times of India (April 13, 2013), http://timesofindia.indiatimes.com/india/President-Pranab-Mukherjee-rejects-nine-mercy-pleas-in-nine-months/articleshow/19521095.cms

9.4. QUESTION-IV*

This part of the Review Paper addresses Question 4 of the Questionnaire.

9.4.1. Bench Strength and Unanimity among Judges: Necessary for Death Penalty

The issue of death penalty has been debated, discussed, deliberated and argued worldwide many times but never has this issue been able to reach a certain conclusion or solution. Many concerns have been attached with this issue ranging from arbitrariness in the justice delivery system, inadequate investigation procedures, instances of innocents being locked behind bars to unbound discretion given to the executive and judiciary. Indian jurisprudence is also not unaware of these issues.[41]

India is one of the 78 retentionist countries which have retained death penalty on the ground that it will be awarded only in the 'rarest of rare cases' and for 'special reasons'[42]. Though what constitutes a 'rarest of rare case' or 'special reasons' has not been answered either by the legislature or by the Supreme Court. Instead the same has been left to the discretion of judges hearing the case, even while knowing that it would lead to different set of results, inconsistencies, unequal treatment and thereby resulting in violation of Article 14 of the Constitution.[43]

Thus, if a case comes before one bench consisting of judges who believe in the social efficacy of capital punishment, the death sentence would in all probability be confirmed but if the same case comes before another bench consisting of judges who are morally and ethically against the death penalty, the death sentence would most likely be commuted to life imprisonment.

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41 Sarat Austin, The Killing State: Capital Punishment in Law, Politics and Culture 1 (Oxford University Press, New York 1999).

42 Bachan Singh v. State of Punjab, AIR 1982 SC 1325.

43 Rajendra Prasad v. State of UP, AIR 1979 SC 916. (Krishna Iyer, J. empathetically stressed that death penalty is violative of articles 14, 19 and 21 of the Constitution of India). *See also* Jagmohan Singh v. State of U.P., AIR 1973 SC 947. (Court held that death penalty cannot be regarded unreasonable *per se* in the public interest and therefore could not be said to be violative of Article 19 of the Constitution).

This issue can be resolved if we increase the strength of the bench presiding over the death penalty cases to five. Constituting a five-judge bench will lead to greater objectivity and clarity in the statement of the law declared. Since, smaller benches are more likely to express minority positions that may not be as well thought through as if a larger bench heard the case.

Chief Justice Subba Rao when he retired claimed that the best way to get around this challenge is to have the whole Court sit together (eleven judges at the time) so that "people can no longer have any apprehension, whether justified or not, that the decision is arbitrary." It is certainly unrealistic for the entire court to sit together, but a bench of five is still better than two or three to get around this perceived problem of judicial arbitrariness.

Section 354(3) of the Code for the first time required the judges to note 'special reasons' when awarding sentences of death. Importantly the new CrPC also required a mandatory pre-sentencing hearing in the trial court under section 235(2) making life imprisonment a rule and designating death penalty as an exception.[44] Moreover, Section 392 of the Code provided that the rule of majority should be followed if judges of a criminal court are equally divided in their opinion. Then the case is to be laid before another judge of the same court with the decision of this judge becoming the judicial decision of the court.

Section 392 raises a question as to how justifiable it is to pronounce death penalty and to hang a person on the basis of majority opinion when criminal justice system stands on the principle of proving guilt beyond any reasonable doubt. Is it justified to arrive at a verdict as to whether an accused has a right to live or not on the basis of majority judges' interpretation of what constitutes 'special reasons' or 'rarest of rare case'? In a system where we know that investigation procedures are not fool proof, witnesses can be easily created and destroyed, where poor persons do not have adequate representation in courts, where decisions depend upon the unguided discretion of judges based on their personal perceptions of what is right or wrong, the answer should be in the negative.

[44] Asgar v. State of U.P., AIR 1977 SC 2000.

Justice P.N. Bhagwati in his dissenting opinion in ***Bachan Singh Case***[45] had also warned as to the difficulty involved in the expression 'special reasons' by stating that it is possible that different judges may react differently to these situations and moreover, some judges may not regard one factor as having any relevance as to the imposition of death penalty and may therefore decline to accord to it the status of 'special reasons'. Under such circumstances, the imposition of capital punishment becomes tantamount to a kind of cruel judicial lottery.

Generally, the courts have followed the common law custom of not imposing the death penalty when appellate judges agree on the question of guilt but differ on that of sentence, unless there are compelling reasons. The rationale being the final and irreversible nature of the death penalty, especially since reasonable doubt can be said to have been established when despite the evidence put forward, one or more members of the bench is not convinced of either the guilt of the accused or the necessity of the death sentence in that particular case.[46] The Supreme Court relied on the same common law custom in ***Aftab Ahmed Khan v. State of Hyderabad***[47] and ***Pandurang & Ors. v. State of Hyderabad.***[48]

On the other hand, there are cases like ***State of Uttar Pradesh v. Deoman Upadhyay***[49] and ***Tarachand Damu Sutar v. State of Maharashtra***[50] where the Court restored the death sentence awarded to the accused after the High Court had acquitted him and when one Supreme Court judge was dissenting on the question of guilt itself.

In ***Devender Pal Singh Bhullar Case***[51], the Supreme Court continued to ignore the concerns of the minority opinion, not paying any heed as to the danger of upholding the death penalty on the basis majority judgment and thus, dismissed the review petition and confirmed death sentence even though one of the judges was not in favour of death penalty. Justice M.B. Shah in his dissenting opinion noted the suspicion of the investigating authorities and the confession but the other judges did not pay any heed to them.

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[45] Supra note 32.
[46] Amnesty International India, *Lethal Lottery: Death Penalty in India.*
[47] AIR 1954 SC 436.
[48] AIR 1955 SC 216.
[49] AIR 1960 SC 1125.
[50] AIR 1962 SC 130.
[51] AIR 2003 SC 866.

Similarly, in the case of ***V. Mohini Giri v. Union of India***,[52] in response to a writ petition filed in the public interest, a bench of the Supreme Court of Justices Pattanaik and Balakrishnan refused to lay down any guidelines with respect to the non awarding of death sentences in the event of non unanimous judgments, observing that judicial discretion could be curtailed in such a manner.

The continuation of the granting of death penalty on the basis of majority opinion, ignoring minority concerns regarding inadequacy of evidence, improper investigation procedure amidst growing international concerns regarding the abolition of death penalty clearly demonstrates disregard of the principle of 'right to life' enunciated under Article 21 of the Constitution of India. It is significant to note that military courts in India have higher safeguards in this respect. While the Army's general court-martials do not go as far as requiring unanimity, they require a two-thirds majority for the award of a death sentence (S.132 of the Army Act, 1950. A similar provision is found under S. 131 of the Air Force Act, 1950). In other forms of court martial (summary court-martial etc), an absolute concurrence of members trying the case is required in order to pass the death sentence. The 1950 Navy Act (Section 124) requires four of a five member panel to concur for a death sentence to be passed. Where the panel exceeds five members, at least two thirds must concur.[53]

Therefore, when any disagreement among the lower courts as to the imposition of the death sentence is adequate enough for Supreme Court to not to impose death penalty; then why should not the same principle is applicable when there is a disagreement among judges of the Supreme Court as to the death sentence? Thus, if one judge acquits the accused, the case for commutation should be stronger than imposing death penalty, as the death sentence is certainly not 'unquestionably foreclosed' when a judge questions the conviction itself and not merely the sentence.

[52] AIR 2002 SC 642.
[53] Devender Pal Singh v. State, AIR 2003 SC 886.

Moreover, as per Justice Thomas opinion in ***Nalini's Case***,[54] in cases where a bench of three judges delivers a judgment in which the opinion of at least one judge is in favour of preferring imprisonment for life to the death penalty, the same should be considered. The authors think it would be proper for the bench to review the order of sentence of death in respect of that accused.

Further, such an approach is consistent with Article 21 of the Constitution of India as it will help in saving a human life from the gallows and at the same time put the guilty accused behind bars for life. In the opinion of the authors, it would be a sound proposition to develop a precedent whereby when one of the 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 as sufficient to treat the case as not falling within the narrowed ambit of "rarest of rare cases when the alternative option is unquestionably foreclosed".[55]

In ***Laxman Kumar's Case***[56]**,** ***Suresh's Case***, ***Bharat Fakira Dhhiwar's Case***[57] **and** ***Lichhamma Devi's Case***[58], the Apex Court held that "when there is a difference of opinion as to the guilt of the accused by the courts the proper sentence would be not death but imprisonment for life".

Thus, it is not a sustainable answer to say that the will of the majority of judges on the bench must prevail. This rule applicable to all cases does not take into consideration the irreversibility of the death sentence. There are numerous cases where even Supreme Court judgments have been overruled by larger benches. Thus errors, even glaring errors by Apex Court benches, are not uncommon.[59] In death penalty cases however, realising that a mistake has

[54] Sutherdraraja alias Santhan & ors. v. State, (1999) 9 SC 323.
[55] Ibid.
[56] 1985 (4) SCC 476.
[57] 2002 (1) SCC 622.
[58] 1988 (4) SCC 456.
[59] Infra note 51.

been made, as in ***Harban's Singh*** case[60], is no consolation because the execution will have been carried out.

Recently, a study conducted by Washington based Death Penalty Information Centre shows that since 1973, over 130 people have been released from death row with evidence of their innocence.[61]

Thus, if a judge dissents either on sentence or on conviction it must be taken that the alternative option isn't unquestionably foreclosed. Majoritarianism therefore cannot be allowed to prevail.

There is another side to this approach as well, if we go by this approach then minority decision will prevail over and obstruct the majority decision, but, in the opinion of the authors here the issue is not of majority or minority rather the issue is one for the court as a whole and for the enunciation of a new legal principle on the basis of which the courts ensure certainty in the imposition of the death penalty.

If we look it at from this angle the minority decision commuting the sentence of death to life imprisonment can be seen to be playing a vital role for the court as a whole, cautioning the court of the lack of uncertainty; satisfying an essential requirement for the imposition of the death penalty. In other words, the evolution of this principle is necessary so that, as stated by this court in Harban's Singh,[62] the courts are not involved "in the violation of the rudimentary norms governing the administration of justice and that the 'moral' we learn are not 'posthumous'".

9.4.2 International Obligations

[60] Harbans Singh v. State of Uttar Pradesh, 1982 (2) SCC 101. (This case is impliedly on the proposition that majoritarianism is not a proper principle to rely upon in the imposition of death sentence).

[61] Staff Report, House Judiciary Subcommittee on Civil & Constitutional Rights, Oct. 1993, with updates from DPIC cited in www.Deathpenalty.org.

[62] Ibid.

Even if one looks at the international scenario, the scene is much better than what is in India. In countries of the Commonwealth that retain the jury system—Malta, Ghana, the Anguillas, Guyana and the Bahamas—a unanimous verdict is essential for a death sentence. Even though the United States of America, where death penalty is imposed frequently (more than 900 people have been executed since 1976 and 3500 more await a similar fate), the law is clearly in favour of unanimity.[63]

Furthermore, India by continuing to retain the punishment of death penalty and sentencing on the basis of majority opinion is clearly flouting the international obligation of ensuring adoption of rigorous standards for fair trial in capital cases as laid down in Article 14 of the International Convention on Civil and Political Rights (ICCPR) which sets out a range of human rights relating to the right to fair trial which also includes the right to be presumed innocent until proved guilty in accordance with law.

Therefore, keeping in mind the irreversible nature of death penalty, a single mistake would lead to insurmountable repercussions resulting in failure of fair procedure thereby violating both the international obligations and Article 21 and 14 of the Constitution of India which require a state to follow utmost care and caution while dealing with the life and liberties of the persons.

Hence, what is of utmost need is a complete stop on sentencing accused persons to death penalty on the basis of non-unanimous decisions i.e. when there is no unanimity amongst the judges sitting on a bench giving presumption of reasonable doubt in favour of the accused persons, and secondly laying down certain basic guidelines as to the requirement of 'rarest of rare cases' and 'special reasons' so as to reduce the chances of arbitrariness in judicial process and failure of justice.

9.4.3. Suggestion

[63] Batra Jeet Bikram, Sentenced to die, non-unanimously, http://www.indiatogether.org/2004/jul/law-deathsent.htm.

Justice P.N. Bhagwati in Bachan Singh case has mentioned in his dissenting opinion about the possible constitution of a five-judge bench for death penalty cases, as a measure to correct judicial arbitrariness. Further Justice Subba Rao also observed that the Supreme Court should sit in its entirety so that the issue of judicial arbitrariness can be tackled adequately. However since for the Supreme Court sitting in its entirety is not realistic in the present scenario and therefore it is suggested that a five-judge bench can be constituted for the death penalty matters. This is likely to increase the objectivity and clarity in the judgments of the court.

Further, there should be unanimity among all the judges of the bench presiding in death penalty cases and even one dissenting opinion should be enough to commute the death sentence of the accused, as it raises clear doubts as to the imposition of the death penalty. Thus, on the basis of these reasons a review should be conducted.