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GOVERNMENT OF INDIA  
  
&  
  
LAW COMMISSION OF INDIA  
  
Report No.262  
  
The Death Penalty  
  
August 2015  
  
  
Page 2:  
Justice Ajit Prakash Shah  
Former Chief Justice of Delhi High court  
‘Chairman  
Law Commission of India  
Government of Ingia  
14” Floor, Hindustan Times House  
Kasturba Gandhi Marg  
  
sag fecti—110 001 Now Delhi - 110 001  
D.O. No.6(31263/2014-LCILS) 31 August 2015,  
  
Dear Mr. Sadananda Gowda ji,  
  
‘The Law Commission of India received a reference from the Supreme Court in Santosh Kumar  
Satishbhushan Bariyarv. Maharashtra |(2009) 6 SCC 498) and Shankar Kisayvao Khade v. Maharashtra  
[[2013) 5 SCC 546}, to study the issue of the death penalty in India to “allow for an up-to-date and  
informed discussion and debate on the subject.”  
  
‘This isnot the frst time that the Commission has been asked to look into the death penalty - the  
35% Report (‘Capital Punishment’, 1967), notably, is a key report in this regard. That Report  
‘recommended the retention ofthe death penalty in India. The Supreme Court has also, in Bachan Singh  
©». VOIIAIR 1980 SC #98], upheld the constitution: ty, but confined its application  
to the ‘rarest of rare cases, to reduce the arbitrariness of the penalty. However, the social, economic  
‘and cultural contexts of the country have changed drastically since the 35 report. Further,  
arbitrariness has remained a major concern in the adjudication of death penalty cases in the 35 years  
Since the foremost precedent on the issue was laid down.  
  
Accordingly, and in recognition of the fact that the death penalty is an issue of a very sensitive  
nature, the Commission decided to undertake an extensive study on the issue. In May 2014, the  
‘Commission invited public comments on the subject by issuing a consultation paper. Towards the same  
goal, the Commission also held a one-day Consultation on "The Death Penaity in India” on 11 July  
2015 in New Delhi, Thereafter, upon extensive deliberations, discussions and in-depth study, the  
Commission has given shape to the present Report. The recommendation of the Commission in the  
‘matter is sent herewith in the form of the Commission's Report No.262 titled "The Death Penalty”,  
{or consideration by the Government.  
  
Certain concerns were raised by Part Time Member Prof (Dr) Yogesh Tyagi, which have been  
‘addressed to the best possible extent in the present Report; however, his signature could not be  
obtained as he was out of the country. Justice (etd) Ms Usha Mehra, Member; Mr PK Malhotra, Law  
Secretary and Dr. Sanjay Singh, Secretary, Legislative Department, Ex-Officio Members, chose not to  
Sign the Report and have submitied notes on the issue, which are attached to the Report as appendices.  
  
With warm regards,  
Yours sincerely,  
  
saj-  
  
[Wit Prakash Shab]  
Mr. D.V. Sadananda Gowda  
  
Hon'ble Minister for Law and Justice  
  
Government of India  
  
‘Shastri Bhawan,  
  
New Delht  
  
  
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INTRODUCTION  
A. References from the Supreme Court  
  
1.1.1 In Shankar Kisanrao Khade v. State of  
Maharashtra (‘Khade),’ the Supreme Court of India,  
while dealing with an appeal on the issue of death  
sentence, expressed its concern with the lack of a  
coherent and consistent purpose and basis for awarding  
death and granting clemency. The Court specifically  
called for the intervention of the Law Commission of  
India (‘the Commission} on these two issues, noting  
that:  
  
It seems to me that though the courts have been  
applying the rarest of rare principle, the executive  
has taken into consideration some factors not  
known to the courts for converting a death sentence  
to imprisonment for life. It is imperative, in this  
regard, since we are dealing with the lives of people  
(both the accused and the rape-murder victim) that  
the courts lay down a jurisprudential basis for  
awarding the death penalty and when the  
alternative is unquestionably foreclosed so that the  
prevailing uncertainty is avoided. Death penalty  
and its execution should not become a matter of  
uncertainty nor should converting a death sentence  
into imprisonment for life become a matter of  
chance. Perhaps the Law Commission of India  
can resolve the issue by examining whether  
death penalty is a deterrent punishment or is  
retributive justice or serves an incapacitative  
goal. (Emphasis supplied)  
  
It does prima facie appear that two important  
organs of the State, that is, the judiciary and the  
executive are treating the life of convicts convicted  
of an offence punishable with death with different  
  
(2018) 5 SCC 546.  
2 Shankar Kisanrao Khade v. State of Maharashtra, (2013) 6 SCC 546, at para 148.  
  
1  
  
  
Page 11:  
standards. While the standard applied by the  
judiciary is that of the rarest of rare principle  
(however subjective or Judge-centric it may be  
in its application), the standard applied by the  
executive in granting commutation is not  
known. Therefore, it could happen (and might well  
have happened) that in a given case the Sessions  
Judge, the High Court and the Supreme Court are  
unanimous in their view in awarding the death  
penalty to a convict, any other option being  
unquestionably foreclosed, but the executive has  
taken a diametrically opposite opinion and has  
commuted the death penalty. This may also need  
to be considered by the Law Commission of  
India.’ (Emphasis supplied)  
  
1.1.2 Khade was not the first recent instance of the  
Supreme Court referring a question concerning the  
death penalty to the Commission. In Santosh Kumar  
Satishbhushan Bariyar v. State of Maharashtra  
(‘Bariyar),\* lamenting the lack of empirical research on  
this issue, the Court observed:  
  
We are also aware that on 18-12-2007, the United  
Nations General Assembly adopted Resolution  
62/149 calling upon countries that retain the death  
penalty to establish a worldwide moratorium on  
executions with a view to abolishing the death  
penalty. India is, however, one of the 59 nations  
that retain the death penalty. Credible research,  
perhaps by the Law Commission of India or the  
National Human Rights Commission may  
allow for an up-to-date and informed  
discussion and debate on the subject.°  
(Emphasis supplied)  
  
1.1.3 \_ The present Report is thus largely driven by  
these references of the Supreme Court and the need for  
re-examination of the Commission's own  
  
® Shankar Kisanrao Khade v, State of Maharashtra, (2012) § SCC 546, at para 149.  
+ (2008) 6 SCC 488.  
  
® Santosh Kumar Satshbhushan Bariyar v. State of Maharashtra, (2008) 6 SCC 498,  
atpara 112  
  
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recommendations on the death penalty in the light of  
changed circumstances.  
  
B. Previous Reports of the Law Commission  
(i) The 35 Report on Capital Punishment (1967)  
  
1.2.1 The Commission began work on its 35"  
Report on “Capital Punishment’ in December 1962,  
which it presented in December 1967. The Report was  
the consequence of a reference by the Parliament, when  
the third Lok Sabha debated on the resolution moved by  
Shri Raghunath Singh, Member, Lok Sabha for the  
abolition of capital punishment.s The Commission  
undertook an extensive exercise to consider the issue of  
abolition of capital punishment from the statute books.  
Based on its analysis of the existing socio-economic-  
cultural structures (including education levels and  
crime rates) and the absence of any Indian empirical  
research to the contrary, it concluded that the death  
penalty should be retained.  
  
1.2.2 Its recommendations said:  
  
Itis difficult to rule out the validity of, or the strength  
behind, many of the arguments for abolition. Nor  
does the Commission treat lightly the argument of  
irrevocability of the sentence of death, the need for  
@ modern approach, the severity of capital  
punishment, and the strong feeling shown by  
certain sections of public opinion, in stressing  
deeper questions of human values.  
  
Having regard, however, to the conditions in India,  
to the variety of the social upbringing of its  
inhabitants, to the disparity in the level of morality  
and education in the country, to the vastness of its  
area, to the diversity of its population, and to the  
paramount need for maintaining law and order in  
the country at the present juncture, India cannot  
  
© Law Commission of india, 95" Report, 1967, available at  
nit: laweommissionofindia:nic n/t S0/Repor36Volt and dt and  
hitp-awcommissionofindia nic irit-50/Repoi35Vol2 pal last visited on 25.08.2015)  
  
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risk the experiment of abolition of capital  
punishment.  
  
Arguments which would be valid in respect of one  
area of the world may not hold good in respect of  
another area in this context. Similarly, even if  
abolition in some parts of India may not make a  
material difference, it may be fraught with serious  
consequences in other parts.  
  
On a consideration of all the issues involved, the  
Commission is of the opinion that capital  
punishment should be retained in the present state  
of the country.”  
  
(ii) The 187 Report on the Mode of Execution (2003)  
  
1.2.3 The Commission dealt with the issue of death  
penalty once more ~ in its 187" Report on the “Mode of  
Execution of Death Sentence and Incidental  
Matters’ in 2003. This was a suo motu issue taken up  
by the Commission “technological advances in the field  
of science, technology, medicine, anaesthetics’.® It was  
concerned only with a limited question on the mode of  
execution and did not engage with the substantial  
question of the constitutionality and desirability of  
death penalty as a punishment.  
  
C. Need for re-examining the 35 Report  
  
1.3.1 The Commission’s conclusion in the 35%  
Report that “at the present juncture, India cannot risk the  
experiment of abolition of capital punishment,”:® and its  
recommendation that “capital punishment should be  
  
\* Law Commission of India, 35" Report, 1967, atpara 1 (Summary af Main Conclusions  
land” Recommendations). avaiable at hiplawcommissionofinda nein  
‘50/Report35VoMtand@ pat (last viewed on 7.08.2015).  
  
Slaw Commission of India, 187" Report, 2003, available at  
\avicommissionoinda.nc ivreports/187th report last viewed on 25.08.2018)  
\*"Law Commission of India, 187 Repor, 2003, at page 5, avaiable at  
hitp-lawcommissionofindanicintepots/187th%<20repor.pat (last viewed at  
26082015)  
  
® Law Commission of India, 35" Report. 1967, at para 1 (Summary of Main  
Conclusions and Recommendations), availabe at htp/lawcommissionotindia cit  
‘S0/Report35VoMtand3.pat (last viewed on 7.08.2015).  
  
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retained in the present state of the country," were  
clearly dependent on, and qualified by, the conditions  
that prevailed in India at that point in time. A great deal  
has changed in India, and indeed around the world,  
since December 1967, so much so that a fresh look at  
the issue in the contemporary context has become  
desirable. Six factors require special mention.  
  
(i) Development in India  
  
1.3.2 The Commission's conclusions in the 35%  
Report rejecting the abolition of capital punishment  
were linked to the “conditions in India, to the variety of  
the social upbringing of its inhabitants, to the disparity in  
the level of morality and education in the country.”!?  
  
1.3.3 Nevertheless, education, general well-being,  
and social and economic conditions are vastly different  
today from those prevailing at the time of writing the  
35: Report. For example, per capita Net National  
Income at constant prices, based on the 2004-2005  
series was Rs. 1838.5 in 2011 - 2012, while it was Rs.  
191.9 in 1967-1968.15 Similarly, adult literacy was  
24.02% in 1961! and 74.0% in 2011,'5 and life  
expectancy (a product of nutrition, health care, etc.) was  
47.1 years in 1965-1970" and 64.9 years in 2010-  
  
“ Law Commission of India, 35" Report, 1967, at para 1 (Summary of Main  
Conclusions and Recommendations), availabe at hp/lawcommissionotindia cit  
‘S0/Report35VoMtand®.pat (ast viewed on 7.08.2015).  
  
® Law Commission of India, 35" Report. 1967, at para 1 (Summary of Main  
‘Conclusions and Recommendations), avalabe at htp:/lawcommissionoindia.nicivt  
‘S0/Report35VoMtand3.pat (last viewed on 7.08.2015).  
  
® Seo Table 1.1, The Statistical Appendix to the Economic Survey 2014-2015,  
avaliable at: ntp/indlabuagetnienies2014-Stestatt pa (lat viewed on 608.2015),  
State of Literacy, Census of india. available at Census of India. 1961  
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F Linksichapter pal lat viewed on 19.08.2015).  
  
© "Siatus of Lieracy’, Census of India 2011, available at  
hitps/eensusingia gov i201 -prov-esulsidata flesimpl07Literacy pat (last viewed  
(on 19:08 2015)  
  
® Lite Expectancy at Bith- Both Sexes Combined, 1965.70, UN Data, available at  
hiipidata un org Data aspx 7qsinciaviflevexpectancy' 19658d=PopDWvai-varablelD  
‘ca G8%SberID¥3a956%.Sbtimel0%=2a109%42e106 (last viewed on 19.08.2015).  
  
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2015.17 The state of the country and its inhabitants has  
thus changed significantly.  
  
1.3.4 Further, the 35% Report justified its  
hesitation in “riskfing] the experiment of abolition,” “at  
the present juncture,” on the prevailing (high) crime rate.  
It expressed its concern in the following manner:  
  
The figures of homicide in India during the several  
years have not shown any marked decline. The rate  
of homicide per million of the population is  
considerably higher in India than in many of the  
countries where capital punishment has been  
abolished. \*  
  
1.3.5 However, according to the Crime in India’?  
reports, published by the National Crime Records  
Bureau (‘NCRB}) under the aegis of the Ministry of Home  
Affairs, the murder rate has been in continuous and  
uninterrupted decline since 1992, when it was 4.6 per  
lakh of population. As per the latest figures for 2013,  
the murder rate is 2.7 per lakh of population, after  
having fallen further from 2012, when it was 2.8.2! This  
decline in the murder rate has coincided with a  
corresponding decline in the rate of executions, thus  
raising questions about whether the death penalty has  
any greater deterrent effect than life imprisonment.2?  
  
1.3.6 It is evident that the socio-economic and  
cultural conditions in India, which had influenced the  
  
” Life Expectancy at Birth Both Sexes Combined, 2010-2015, UN Data, avallable at  
hitpdata un.org Data aspx 7q=inciaviflevexpectancy'+20108d-PopDival-varablelD  
‘a6 3berID¥-3a956%. dbtmelD%2ai 124420113 (last viewed on 19.08.2015)  
  
® Law Gommission of india, 35” Report, 1967, at paras 262, 263, available at  
hitp-lawcommissionofindia.ic.init-SO/Repad35VollandSpdt (last viewed on  
7.08,2015),  
  
See Crime in India, National Crime Records Bureau, available at  
hitp/nere govsniCD-C2013/Mome asp (last viewed on 2.08.2015).  
  
2" Grime. in. India, 2013, "National Crime Records Bureau, avaiable at  
hitp/ner. ni in'iprevous/DataCIIT992/CII-1992!able-2 pdt (last viewed at  
2.08,2015},  
  
3 Grime in India, 2013, National Crime Records Bureau, avaiable at  
hitp/ners goviniCD-Cl2013iigure%-20at%203%.20giance pat (last viewed on  
8.08,2015}  
  
2 See Yug Mohit Chaudhry, Hanging on Theories, Frontline, 7 September 2012, 29  
2  
  
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Page 16:  
Commission in formulating its conclusions in the 35%  
Report, have changed considerably since 1967.  
  
(ii) The new Code of Criminal Procedure in 1973  
  
1.3.7. The Commission’s recommendations in the  
35 Report predate the current Code of Criminal  
Procedure (‘CrPC), which was enacted in 1973. This  
resulted in an amendment to Section 354(3), requiring  
“special reasons” to be given when the death sentence  
was imposed for an offence where the punishment could  
be life imprisonment or death. The Supreme Court, in  
Bachan Singh v. State of Punjab\*\* (‘Bachan Singh’) has  
interpreted this to mean that the normal sentence for  
murder should be imprisonment for life, and that only  
in the rarest of rare cases should the death penalty be  
imposed.  
  
1.3.8 Section 354(3) went contrary to the  
Recommendations of the 35 Report, which stated that,  
“The Commission does not recommend any provision (a)  
that the normal sentence for murder should be  
imprisonment for life but in aggravating circumstances  
the court may award the sentence of death.”\*  
  
1.3.9 Pertinently, the Report also recommended  
that Section 303 of the Indian Penal Code, remain  
unchanged?5 (subsequently held unconstitutional in  
Mithu v. State of Punjab),2° and that there was no  
requirement for a minimum interval between the death  
sentence and the actual execution?’ (subsequently  
made 14 days in Shatrughan Chauhan v. Union of  
  
© (1980) 2 Sc 684  
‘Law Commission of India, 25" Report. 1967, at para 7 (Summary of Main  
Conclusions and Recommendations), avalabe at htp:/lawcommissionotindia nicivt  
{0eport35Voltand3.pdt (last viewed on 7-08-2015).  
  
% Law Commission of India, 35” Report. 1967, at para 4 (Summary of Main  
‘Conclusions and Recommendations), availabe at hp /laweommissionotindia nici  
‘S/Raport35VoMtand®.pat (last viewed on 7.08.2015).  
  
(1983) 2 SCC 277.  
  
© Law Commission of India, 35° Report, 1967, at para 1161-1162, available at  
hitp-lawcommissionofindanicinit-SO/Repad35Volland3pdt (last viewed on  
7.08,2015),  
  
7  
  
  
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India).\* Such developments emphasise the importance  
of relooking at the Report.  
  
(iii) The emergence of constitutional due-process  
standards  
  
1.3.10 Post-1967, India has witnessed an expansion  
of the interpretation of Article 21 of the Constitution of  
India, reading into the right to dignity and substantive  
and due process. Most famously, Maneka Gandhi v  
Union of India,2? held that the procedure prescribed by  
law has to be “fair, just and reasonable, not fanciful,  
oppressive or arbitrary.” \*°  
  
1.3.11 Subsequently, in Bachan Singh, the Court  
observed that Section 354(3) of the CrPC, 1973, is part  
of the due process framework on the death penalty. In  
this regard, the Court held the followin;  
  
There are numerous other circumstances justifying  
the passing of the lighter sentence; as there are  
countervailing circumstances of aggravation. We  
cannot obviously feed into a judicial computer all  
such situations since they are astrological  
imponderables in an imperfect and undulating  
society. Nonetheless, it cannot be over-  
emphasised that the scope and concept of  
mitigating factors in the area of death penalty  
must receive a liberal and expansive  
construction by the courts in accord with the  
sentencing policy writ large in Section 354(3).  
Judges should never be bloodthirsty. Hanging of  
murderers has never been too good for them. Facts  
and Figures, albeit incomplete, furnished by the  
Union of India, show that in the past, courts have  
inflicted the extreme penalty with extreme  
infrequency — a fact which attests to the caution  
and compassion which they have always brought  
to bear on the exercise of their sentencing discretion  
in so grave a matter. It is, therefore, imperative  
2 (g014) 9 $00 1  
  
2 (1978) 1 SCO 248,  
% Maneka Gandhi v. UO, (1978) 1 SCC 248, at para 48  
  
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Page 18:  
to voice the concern that courts, aided by the  
broad illustrative guide-lines indicated by us,  
will discharge the onerous function with  
evermore scrupulous care and humane  
concern, directed along the highroad of  
legislative policy outlined in Section 354(3)  
viz. that for persons convicted of murder, life  
imprisonment is the rule and death sentence  
an exception. A real and abiding concern for  
the dignity of human life postulates resistance  
to taking a life through law's instrumentality.  
That ought not to be done save in the rarest of  
rare cases when the alternative option is  
unquestionably —\_foreclosed.\*!\_ (Emphasis  
supplied)  
  
1.3.12 The ‘rarest of rare’ standard has at its core  
the conception of the death penalty as a sentence that  
is unique in its absolute denunciation of life. As part of  
its concerns for human life and human dignity, and its  
recognition of the complete irrevocability of this  
punishment, the Court devised one of the most  
demanding and compelling standards in the law of.  
crimes. The emergence of the ‘rarest of rare’ dictum.  
when the “alternative option [is] unquestionably  
foreclosed”? was very much the beginning of  
constitutional regulation of death penalty in India.  
  
1.3.13 However, it is important to consider the  
NCRB data on the number of death sentences awarded  
annually. On average, NCRB records that 129 persons  
are sentenced to death row every year, or roughly one  
person every third day. In Khade, the Supreme Court,  
took note of these figures and stated that this number  
was “rather high”s and appeared to suggest that the  
death penalty is being applied much more widely than  
was envisaged by Bachan Singh. In fact, as subsequent  
pages suggest, the Supreme Court itself has come to  
  
5 Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 208.  
  
8 Bachan Singh v. State of Punjab. (1980) 2 SCC 68é, at para 209  
  
® Shankar Kisarrao Khagev. Stale of Maharashira, (2012) § SCC 546, al para 145,  
“[Tne numberof deat sentences awarded 1s rather high, making unclear whether  
ath penalty s realy being awarded only ia the rarest of rare cases  
  
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Page 19:  
doubt the possibility of a principled and consistent  
implementation of the ‘rarest of rare’ test.  
  
(iv) Judicial developments on the arbitrary and  
subjective application of the death penalty  
  
1.3.14 Despite the Court’s optimism in Bachan  
Singh that its guidelines will minimise the risk of  
arbitrary imposition of the death penalty, there remain  
concerns that capital punishment is “arbitrarily or  
freakishly imposed”. In Bariyar, the Court held that  
“there is no uniformity of precedents, to say the least. In  
most cases, the death penalty has been affirmed or  
refused to be affirmed by us, without laying down any  
legal principle.”\*5  
  
1.3.15 Such concerns have been reiterated on  
multiple occasions, where the Court has pointed that  
the rarest of rare dictum propounded in Bachan Singh  
has been inconsistently applied. In this context, it is  
instructive to examine the observations of the Supreme  
Court in Aloke Nath Dutta v. State of West  
Bengal,\* Swamy Shraddhananda v. State of Karnataka  
(‘Swamy Shraddhananda’)," Farooq Abdul Gafur v.  
‘State of Maharashtra (‘Gafur’)," Sangeet v. State of  
Haryana (‘Sangeet’), and Khade.\* In these cases, the  
Court has acknowledged that the subjective and  
arbitrary application of the death penalty has led  
“principled sentencing” to become “judge-centric  
sentencing”, based on the “personal predilection of the  
judges constituting the Bench.”\*  
  
Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 15.  
  
%® Santosh Kumar Satshbhushan Bariyar v. State of Maharashra, (2008) 6 SCC 498,  
atpara 104.  
  
© (2007) 12 SCC 230.  
  
(2008) 13 SCC 767  
  
2 2010) 14 SCC Bat  
  
9 2013) 2 SC 452,  
  
‘© por3) 5 SCO 546,  
  
Sangeet v. Slate of Haryana, (2013) 2 SCO 452  
  
‘© Swamy Shraddhananda ¥. Slate of Karnataka, (2008) 13 SCC 767.  
  
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Page 20:  
1.3.16 Notably, the Supreme Court has. itself  
admitted errors in the application of the death penalty  
in various cases.\*8  
  
(v) Recent Political Developments  
  
1.3.17 Some recent developments indicate an  
increase in political opinion in favour of abolition. Most  
recently, in August 2015, the Tripura Assembly voted in  
favour of a resolution seeking the abolition of the death  
penalty."  
  
1.3.18 Demands for the abolition of the death  
penalty have been made by the Communist Party of  
India (CPI), the Communist Party of India (Marxist) [CPI  
(M)], the Communist Party of India (Marxist - Leninist  
Liberation) [CPI (M-L)] the Viduthalai Chiruthaigal  
Katchi (VCK), the Manithaneya Makkal Katchi (MMK),  
the Gandhiya Makkal lyakkam (GMI), the Marumalarchi  
Dravida Munnetra Kazhagam (MDMK), and the Dravida  
Munnetra Kazhagam (DMK).\*°  
  
1.3.19 On 31\* July, 2015, D. Raja of the CPI  
introduced a Private Member's Bill asking the  
Government to declare a moratorium on death  
sentences pending the abolition of the death penalty.\*  
In August 2015, DMK Member of Parliament Kanimozhi  
introduced a private member's bill in the Rajya Sabha  
seeking abolition of capital punishment.\*”  
  
‘© See Santosh Kumar Satishbhushan Baryarv. State of Maharashtra, (2008) 6 SCC  
498, Shankar Kisanrao Khade v. Stale of Maharashtra (2012) SCC S46 and Sangeet  
¥. Slate of Haryana, (2013) 2 SCC 452  
  
Syed Sajjad Al, Trpura passes Resolution against Death Penalty, The Hindu, 7  
‘August 2015.  
  
‘© See PTI, Lett joint movement asks Centre fo not hang Yakub Memon, Economic  
‘Times, 27 July, 2015; IANS, Death penalty: CP leader D Raja moves private member's  
resolution, Economic Times, 31 July, 2015.;ET Bureau, Seeking nd fo death penal  
DMIs Kanimozhi set to move private membor's il, Economic Times, 7 August, 2015:  
‘See also: Repeal Death Penalty, CPI MA, 30. June, 2015, avaiable at  
hitplépimLinvemsiedioralsiten/150-epeal-death-penally (ast viewed on  
20.08.2015).  
  
IANS, Death penalty: CPI leader D Raja moves private member's resolution,  
Economic Times, 31 July, 2015.  
  
SET Bureau, Seeking end fo death penalty, DMK's Kanimozhi set to move private  
member's bil, Economie Times 7 August, 2015  
  
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(vi) International Developments  
  
1.3.20 In 1967, when the 35" Report was presented,  
only 12 countries had abolished capital punishment for  
all crimes in all circumstances." Today, 140 countries  
have abolished the death penalty in law or in practice.  
Further, the number of countries that have remained  
“active retentionists”, namely they have executed at  
least one person in the last ten years, has fallen from 51  
in 2007 to 39 (as of April 2014).\*° A category of countries  
have also abolished death penalty for ordinary crimes  
such as murder and retained it for exceptional crimes  
such as crimes under military law or under exceptional  
circumstances.‘ The death penalty is most prominently  
used in Iran, China, Pakistan, Saudi Arabia and the  
United States of America.  
  
1.3.21 The issues relating to capital sentencing and  
the move towards the abolition of the death penalty  
internationally subsequent to the publication of the  
35th Report deserve detailed consideration.  
  
D. The Consultation Process Adopted by the  
Commission  
  
1.4.1. In order to understand the views of all the  
stakeholders, the 20% Law Commission released a  
Consultation Paper in May 2014. The Commission  
invited responses from those who desired to express  
their views on various aspects of death penalty.  
  
1.4.2 The Commission received over 350  
responses, with varied views on the subject. Of those  
supporting the death penalty, the — primary  
considerations were the deterrent effect of the death  
  
‘ Columbia (1910), Costa Flea (1877), Dominican Republic (1966), Ecuador (1906)  
Federal Republic of Germany (1949), Honduras (1956), Iceland (1928), Monaco  
(1962), Panama (1822), San Marino (1868), Uruguay (1907), Venezuela (1863). See  
Law" Commission ‘of india, 35" “Report, 1967, avalable at  
hitp-lancommissionofindia nicinit-S0/Repod3sVolland&pdt (last viewed on  
24082018)  
  
‘ROGER HOdD AND CAROLYN HOYLE, THE DEATH PENALTY: A WORLDIDE PERSPECTIVE  
5 (5 ed, 2015)  
  
Rogen HOGD AND CAROLYN HOYLE, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE  
5 (5% ed, 2015),  
  
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penalty; demands for retribution and justice in society;  
the demands of the victims’ family; demands that the  
punishment be proportional to the crime; and the view  
that certain “heinous” criminals were not deserving of  
an opportunity for reform. Of those advocating  
abolition, the primary concerns were the fallibility of the  
Courts and possibility of erroneous convictions; the  
absence of any penological purpose and the  
discriminatory and arbitrary implementation of the  
death penalty. Notably, late former President of India,  
Dr. APJ Abdul Kalam also sent a response to the  
consultation paper, highlighting the discriminatory  
impact of the death penalty.  
  
1.4.3 To solicit further responses on the subject,  
the Commission also organized a day-long Consultation  
on 11 July, 2015 inviting eminent lawyers,  
distinguished judges, political leaders, academics,  
police officers, and representatives of civil society. A  
detailed list of participants to the day-long Consultation  
has been provided in an Annexure to this Report.5! The  
discussion traversed issues such as \_ India’s  
constitutional obligations, arbitrariness and.  
discrimination in the application of the death penalty,  
the quality of the criminal justice system and the failure  
of the rehabilitation framework.  
  
E. The Present Report  
  
1.5.1 Inorder to undertake a comprehensive study  
on the issue of the abolition of the death penalty, the  
Commission formed a Sub-Committee headed by the  
Chairman and comprising two Part Time members - Mr.  
Venkataramani and Professor (Dr.) Yogesh Tyagi, and  
also included Justice K. Chandru (retd.), Professor (Dr.)  
C. Raj Kumar, Mr. Dilip D’Souza, Dr. Mrinal Satish, Dr.  
Aparna Chandra, Ms. Sumathi Chandrashekaran, Ms.  
Vrinda Bhandari and Ms. Ragini Ahuja. Ms. Sanya  
Kumar and Ms. Sanya Sud, both law students from  
National Law University, Delhi provided extensive  
research support to the team. The assistance provided  
  
51 See Annexure |  
B  
  
  
Page 23:  
by Mr. Pranay Nath Lekhi, Ms. Jyotsna Swamy, Mr.  
Arvind Chari, Mr. Hasrat Mehta and Ms. Diksha  
Agarwal, interns of Law Commission of India, and Ms.  
Kritika Padode was also commendable.  
  
1.5.2 The different members of the Sub-Committee  
prepared concept papers on various facets of the death  
penalty. In preparing the drafts, and in light of the call  
for data-driven research and deliberations by the  
Supreme Court of India in Khade and Bariyar, the  
members relied on various research projects and  
empirical studies relating to the death penalty. These  
drafts were further discussed and revised in the course  
of the deliberations of the Sub-Committee. The drafts  
were also shared with the Full-Time Members of the  
Commission, viz., Justice S. N. Kapoor, Justice Usha  
Mehra and Prof. (Dr.) Mool Chand Sharma, as well as  
Part Time Members, Dr. B. N. Mani and Prof. (Dr.)  
Gurjeet Singh. Based on the suggestions of the Sub-  
Committee, further revisions were made and its final  
report was placed before the entire Commission. Mr.  
Venkataramani and Professor (Dr.) Yogesh Tyagi made  
several valuable suggestions that were taken into  
consideration. Concerns expressed by Dr Sanjay Singh,  
Secretary, Legislative Department and ex-officio  
Member of the Commission, were also considered.  
  
1.5.3 Thereafter, upon extensive deliberations,  
discussions and in-depth study, the Commission has  
given shape to the present Report.  
  
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Cuaprer - I  
HISTORY OF THE DEATH PENALTY IN INDIA  
  
A.Pre-Constitutional History and Constituent  
Assembly Debates  
  
2.1.1 An early attempt at abolition of the death  
penalty took place in pre-independent India, when Shri  
Gaya Prasad Singh attempted to introduce a Bill  
abolishing the death penalty for IPC offences in 1931  
However, this was defeated. Around the same time, in  
March 1931, following the execution of Bhagat Singh,  
Sukhdev and Rajguru by the British government, the  
Congress moved a resolution in its Karachi session,  
which included a demand for the abolition of the death  
penalty.5\*  
  
2.1.2 India’s Constituent Assembly Debates  
between 1947 and 1949 also raised questions around  
the judge-centric nature of the death penalty,  
arbitrariness in imposition, its discriminatory impact on  
people living in poverty, and the possibility of error.5+  
  
2.1.3 For example, on the possibility of error,  
Pandit Thakur Das Bhargava said:  
  
It is quite true that a person does not get justice  
in the original court. I am not complaining of  
district courts. In very many cases of riots in  
which more than five persons are involved, a  
number of innocent persons are implicated. I can  
speak with authority on this point. I am a legal  
  
Law Commission of India, 35” Report, 1967, at para 12, avalable at  
hitpslawcommissionofndianicinit-SO/Repor36Volland3.pdt (last viewed on  
240820185)  
  
5 Special Correspondent, i's time death penalty is abolished: Aiyar, The Hindu, 7  
‘August 2015, avalable at itp:/ww.thehindu cominewsinationalitsime-deaih  
penalty i-abolished-aiyariartcle7509444ece (last viewed on 24.08.2015),  
  
E'See Constituent Assembly Debates on 3 June, 1949, Part ll available at  
hitp:/parlamentoindia nic insdebatesvolgp 5b htm (last viewed on 24.08.2018).  
  
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practitioner and have been having criminal  
practice for a large number of years.5\*  
  
2.1.4 An issue of much debate had to do with the  
right to appeal a death sentence. In this context, Prof.  
Shibban Lal Saksena said:  
  
I do feel that the people who are condemned to  
death should have the inherent right of appeal to  
the Supreme Court and must have the  
satisfaction that their cases have been heard by  
the highest tribunal in the country. I have seen  
people who are very poor not being able to appeal  
as they cannot afford to pay the counsel. I see  
that article 112 says that the Supreme Court may  
grant special leave to appeal from any judgment,  
but it will be open to people who are wealthy,  
who can move heaven and earth, but the  
common people who have no money and who are  
poor will not be able to avail themselves of the  
benefits of this section.5¢  
  
2.1.5 Dr. Ambedkar was personally in favour of  
abolition saying:  
  
My other view is that rather than have a  
provision for conferring appellate power upon the  
‘Supreme Court to whom appeals in cases of  
death sentence can be made, I would much  
rather than have a provision for conferring  
appellate power upon the Supreme Court to  
whom appeals in cases of death sentence can be  
made, I would much rather support the abolition  
of the death sentence itself. That, I think, is the  
proper course to follow, so that it will end this  
controversy. After all, this country by and large  
believe in the principle of non-violence. It has  
been its ancient tradition, and although people  
may not be following it in actual practice, they  
  
% Constituent Assembly Debates on 3 June, 1949 Part Il, available at  
hitp:/pariamentofndia nic insidebatesvolgp 5b.him (last viewed on 24.08.2018).  
5" Constituent Assembly Debates on 3 June, 1949 Part ll, avaiable at  
  
hitp:/parlamentofndia ni insidebates/vlgptSb.him (ast viewed on 24.08.2018}.  
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Page 26:  
certainly adhere to the principle of non-violence  
as a moral mandate which they ought to observe  
as far as they possibly can and I think that  
having regard to this fact, the proper thing for this  
country to do is to abolish the death sentence  
altogether.5"  
  
2.1.6 However, he suggested that the issue of the  
desirability of the death penalty be left to the Parliament  
to legislate on. This suggestion was eventually followed.  
  
B. Legislative Backdrop  
  
2.2.1 At independence, India retained several laws  
put in place by the British colonial government, which  
included the Code of Criminal Procedure, 1898 (‘Cr.P.C.  
1898), and the Indian Penal Code, 1860 (IPC). The IPC  
prescribed six punishments that could be imposed  
under the law, including death.  
  
2.2.2 For offences where the death penalty was an  
option, Section 367(5) of the CrPC 1898 required courts  
to record reasons where the court decided not to impose  
a sentence of death:  
  
If the accused is convicted of an offence  
punishable with death, and the court sentences  
him to any punishment other than death, the  
court shall in its judgment state the reason why  
sentence of death was not passed.  
  
2.2.3. In 1955, the Parliament repealed Section  
367(5), CrPC 1898, significantly altering the position of  
the death sentence. The death penalty was no longer the  
norm, and courts did not need special reasons for why  
they were not imposing the death penalty in cases where  
it was a prescribed punishment.  
  
© Constituent Assembly Debates on 3 June, 1949 Part I, available at  
hitp:/pariamentofindia nic insidebatesvolgp 5b.him (last viewed on 26.08.2018}.  
  
”  
  
  
  
Page 27:  
2.2.4 The Code of Criminal Procedure was re-  
enacted in 1973 (‘CrPC}, and several changes were  
made, notably to Section 354(3):  
  
When the conviction is for an offence  
punishable with death or, in the alternative,  
with imprisonment for life or imprisonment for  
@ term of years, the judgment shall state the  
reasons for the sentence awarded, and, in the  
case of sentence of death, the special reasons  
for such sentence.  
  
2.2.5 This was a significant modification from the  
situation following the 1955 amendment (where terms  
of imprisonment and the death penalty were equal  
possibilities in a capital case), and a reversal of the  
position under the 1898 law (where death sentence was  
the norm and reasons had to be recorded if any other  
punishment was imposed). Now, judges needed to  
provide special reasons for why they imposed the death  
sentence.  
  
2.2.6 These amendments also introduced the  
possibility of a post-conviction hearing on sentence,  
including the death sentence, in Section 235(2), which  
states:  
  
If the accused is convicted, the Judge shall,  
unless he proceeds in accordance with the  
provisions of section 360, hear the accused on  
the question of sentence, and then pass sentence  
on him according to law.  
  
©. Previous Law Commission Reports  
(i) The 35 Report of the Law Commission  
  
2.3.1 The Law Commission released its 35" Report  
on “Capital Punishment” in 1967, recommending that  
the death penalty be retained. After considering the  
arguments of the abolitionists and retentionists, the  
state of the death penalty in various countries and  
objectives of capital punishment, the Commission  
  
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Page 28:  
recommended that the death penalty be retained in  
India, saying:  
  
Having regard, however, to the conditions in  
India, to the variety of the social upbringing of  
its inhabitants, to the disparity in the level of  
morality and education in the country, to the  
vastness of its area, to the diversity of its  
population and to the paramount need for  
‘maintaining law and order in the country at  
the present juncture, India cannot risk the  
experiment ~ of abolition of capital  
punishments  
  
2.3.2 The Commission added that the deterrent  
object of capital punishment was its “most important  
object’, saying it constituted “its strongest  
justification” °° The Commission also commented on the  
discretion courts had in terms of imposing the death  
penalty or life imprisonment, finding that “the vesting  
of such discretion is necessary and the provisions  
conferring such discretion are working satisfactorily”.  
It also said that “in the present state of the country,”  
India could not risk an experiment with abolition that  
would put the lives of citizens in danger.\*! The  
Commission also observed “that persons who have no  
sufficient financial means or who for some other reason  
cannot fight the cause to the last, suffer, and that the  
law proves to be unjust to them, is an argument which  
  
© Law Commission of india, 35% Report, 1967, at para 293, available at  
hitpslawcommissionofindanicinit-S0/Repod35Volland3.pdt (last viewed on  
26082018)  
% Law Commission of india, 35° Report, 1967, al para 295, available at  
hitpslawcommissionofndia nic invt-S0/Repor35Volland3.pat (last viewed on  
26082018).  
© Law Commission of india, 35% Ropor, 1967, al para 580, available at  
hitpslawcommissionofindanicinvt-SO/Repot35Volland3.pdt (last viewed on  
26082018)  
5" Law Commission of india, 35° Report, 1967, al para 265, available at  
hitpslawcommissionofndia nic invt-SO/Repor35Volland3.pat (last viewed — on  
26.08.2018),  
  
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concems the subject of legal aid rather than the  
substantive penal law."  
  
2.3.3 Considering if a court should give reasons  
when it made its decision on whether or not to impose  
the death penalty, the Commission recommended that  
the law should be changed to “require the court to state  
its reasons whenever it avoids either of the two  
sentences in a capital case”. The 41st Report of the  
Commission on revising and re-enacting the Code of  
Criminal Procedure 1898 reiterated this  
recommendation.  
  
2.3.4 In the 35% Report, the Commission also  
made recommendations on some ancillary issues. For  
example, it considered the question of a right to appeal  
to the Supreme Court in cases where the death  
sentence was either confirmed or imposed by a High  
Court, finding that this was not necessary. The 187"  
Report of the Commission made a different  
recommendation.  
  
2.3.5 Similarly, while the 35 Report found the  
breadth of judicial discretion in capital sentencing  
acceptable, later Supreme Court cases have noted why  
this is problematic.\*” The 35" Report also recommended  
  
© Law Commission of india, 35% Ropor, 1967, al para 265, available at  
hitpslawcommissionofndia nic invt-S0/Repor35Voltand.pdt (last viewed on  
260082015)  
  
© Law Commission of India, 35 Report, 1967, at para 8, (Summary of Main  
Conclusions and Recommendations), available at hip:/lawcommissionotindia nici  
‘S0/Report35Voltand3 pat (ast viewed on 26.08.20).  
  
Law Commision of India, 41"! Repor, 1969, at para 26.9, availble at  
hitplawcommissionofingianic irvt-50/Reporté tpt (ast viewed on 26.08.2018).  
"Law Commission of nda, 35° Ropor, 1967, al para 962, avaiable at  
hitpslawcommissionofndianicinvt-S0/Repod35Volland3.pdt (last viewed on  
260082018)  
  
Law Commission of india, 187th Report, 2008, at page 2-"Further, at present, there  
Iso statutory ight of appeal tothe Supreme Court cases where High Court confms  
the death sentence passed by a Session Judge or where the High Court enhances the  
senlence passed by the Session Judge and awards sentence of death. The  
Commission, ana consideration of the various responses and views, recommends for  
providing a statutory night of peal agains he judgment a he High Court conteming  
  
or awarding the death sentence’ available at  
hitp-awcommissionofindaicinteports/187th%20reportpat (last viewed on  
26082015)  
  
© Seo Aloke Nath Dutta v. State of West Bengal, (2007) 12 SCO 230: Swamy  
‘Shradchananda v. State of Karnataka, (2008) 13 SCC 767; Santosh Bayar v. Stale  
  
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retaining of section 303 of the Indian Penal Code, which  
provides for mandatory death penalty. However, the  
Supreme Court held this to be unconstitutional in 1987  
in Mithu v. State of Punjab.\*\*  
  
(ii) The 187% Report of the Law Commission  
  
2.3.6 In 2003, the Commission released its 187"  
Report on the “Mode of Execution of Death and  
Incidental Matters”.? The Commission had taken up  
this matter suo motu because of the “technological  
advances in the field of science, technology, medicine,  
anaesthetics” since its 35! Report. This Report did not  
address the question of whether the death penalty was  
desirable. Instead, it restricted itself to three issues: (a)  
the method of execution of death sentence, (b) the  
process of eliminating differences in judicial opinions  
among Judges of the apex Court in passing sentence of  
death penalty, and (c) the need to provide a right of  
appeal to the accused to the Supreme Court in death  
sentence matters.”!  
  
2.3.7 After soliciting public opinion and studying  
the practice on these issues in India and in other  
countries, the Law Commission recommended that  
Section 354(5) of the CrPC be amended to allow for the  
lethal injection as a method of execution, in addition to  
hanging. The Commission also recommended that there  
should be a statutory right of appeal to the Supreme  
Court where a High Court confirms a death sentence, or  
enhances the sentence to capital punishment.  
Furthermore, it suggested that all death sentence cases  
  
(of Maharashtra, (2009) 6 SCC 498; Farooq Abdul Gafurv, State of Maharashira (2010)  
44 SCC 641  
  
(1983) 2 Sco 277,  
  
© Law Commission of India, 187" Report, 2003, available at  
  
hitp-lawcommissionofindaicinteports/187th%.20repor.pat (last viewed on  
26.08.2018)  
  
"Law Commission of India, 187° Report, 2003, at page 5, avaliable at  
hitpslawcommissionofindanicinteports/187th%.20repor.pat (last viewed on  
26082015)  
  
"Law Commission of india, 187° Report, 2003, at page 7, avaliable at  
hitpslawcommissionofndia.nicinteports/187ths.20repor.pat (last viewed on  
  
26.08.2018)  
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be heard by at least a S-judge Bench of the Supreme  
Court.”?  
  
D.Constitutionality of the Death Penalty in India  
(i) From Jagmohan to Bachan Singh  
  
2.4.1 The first challenge to the constitutionality of  
the death penalty in India came in the 1973 case of  
Jagmohan Singh v. State of U. P. (\Jagmohan).”? The  
petitioners argued that the death penalty violated  
Articles 14, 19 and 21 of the Constitution of India. It  
was argued that since the death sentence extinguishes,  
along with life, all the freedoms guaranteed under  
Article 19(1) (a) to (g), it was an unreasonable denial of  
these freedoms and not in the interests of the public  
Further, the petitioners argued that the discretion  
vested in judges in deciding to impose death sentence  
was uncontrolled and unguided and violated Article 14.  
Finally, it was contended because the provisions of the  
law did not provide a procedure for the consideration of  
circumstances crucial for making the choice between  
capital punishment and imprisonment for life, it  
violated Article 21. The decision of the US Supreme  
Court in Furman v. Georgia in which the death penalty  
was declared to be unconstitutional as being cruel and  
unusual punishment was also placed before the  
Constitution Bench.  
  
2.4.2 This case was decided before the CrPC was  
re-enacted in 1973, making the death penalty an  
exceptional sentence.  
  
2.4.3 In Jagmohan, the Supreme Court found that  
the death penalty was a permissible punishment, and  
did not violate the Constitution. The Court held that:  
  
The impossibility of laying down standards is at  
the very core of the criminal law as administered  
  
% Law Commission of India, 187° Report, 2003, at page 3, avaliable at  
hitpslancommissionofindianicinteports/187th%.20repor.pal (last viewed on  
26082015)  
  
(1873) 1 S00 20,  
  
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Page 32:  
in India, which invests the Judges with a very  
wide discretion in the matter of fixing the degree  
of punishment. That discretion in the matter  
sentences as already pointed out, is liable to be  
corrected by superior courts... The exercise of  
judicial discretion on well-recognised principles  
is, in the final analysis, the safest possible  
safequard for the accused.\*  
  
2.4.4 The Court also held that:  
  
If the law has given to the judge a wide discretion  
in the matter of sentence to be exercised by him  
after balancing all the aggravating and  
mitigating circumstances of the crime, it will be  
impossible to say that there would be at all any  
discrimination, since facts and circumstances of  
one case can hardly be the same as the facts and  
circumstances of another.7\*  
  
2.4.5 Around the same time, just before the CrPC  
of 1973 became law, the Supreme Court also  
commented on the wisdom of the introduction of the  
post-conviction hearing on sentence in the case of Ediga  
Anamma v. State of Andhra Pradesh.’© In commuting  
the death sentence to life imprisonment, the Court  
observed the following:  
  
Inany scientific system which turns the focus,  
at the sentencing stage, not only on the crime  
but also the criminal, and seeks to personalise  
the punishment so that the reformatory  
component is as much operative as the  
deterrent element, it is essential that facts of a  
social and personal nature, sometimes  
altogether irrelevant if not injurious at the  
stage of fixing the guilt, may have to be  
  
% Jagmohan Singh v. Stato of U.P., (1973) 1 SCC 20, a para 26.  
7 Jagmohan Singh v. State of U.P. (1973) 1 SCC 20, at para 27.  
ve (1974) 4 800 443,  
  
2B  
  
  
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brought to the notice of the Court when the  
actual sentence is determined.””  
  
2.4.6 The law's changes were, in the view of the  
court, expressive of a tendency “towards cautious,  
partial abolition and a retreat from total retention.””\* In a  
statement that reflects concerns that has acquired a  
resonance, the court said, “a legal policy on life or death  
cannot be left for ad hoc mood or individual predilection  
and so we have sought to objectify to the extent possible,  
abandoning retributive ruthlessness, amending the  
deterrent creed and accenting the trend against the  
extreme and irrevocable penalty of putting out life.””°  
  
2.4.7 In 1979, the case of Rajendra Prasad v. State  
of Uttar Pradesh (‘Rajendra Prasad’ discussed what  
the “special reasons” in imposing the death sentence  
could be. The Court found itself confronting, not the  
constitutionality of the death sentence, but that of  
sentencing discretion. The Court per majority (of two  
judges) said, “special reasons necessary for imposing  
death penalty must relate, not to the crime as such but to  
the criminal.”\*! They drew the focus in sentencing to  
reformation, even as they held that it was not the nature  
of the crime alone that would be relevant in deciding the  
sentence. The Court said, “the retributive theory has had  
its day and is no longer valid. Deterrence and reformation  
are the primary social goals which make deprivation of  
life and liberty reasonable as penal panacea.”\*?  
Significantly, voicing concerns that have begun to re-  
emerge, the court asked: “Who, by and large, are the  
men whom the gallows swallow?”\*s and found that, with  
a few exceptions, it was “the feuding villager ... the  
striking workers ... the political dissenter ... the waifs  
and strays whom society has hardened by neglect into  
street toughs, or the poor householder-husband or wife  
  
 Egiga Anamma v. Sate of Andhra Pradesh, (1974) 4 SOC 449, al para 14  
"™ Eaiga Anamma v. Slate of Andhra Pradesh, (1974) 4 SCC 449, al para 21  
° Ediga Anamma v, State of Andhra Pradesh, (1974) 4 SCC 449, at para 26.  
v0 (1979) 3 SCC 646,  
  
© Rajendra Prasad v. Stato of Utar Pradesh, (1978) 8 SCC 646, at para 88  
© Rajendra Prasad v. Stale of Utar Pradesh, (1979) 8 SCC 646, at para 8,  
© Rajendra Prasad v. Stale of Utar Pradesh, (1978) 3 SCC 646, at para 77  
  
2  
  
  
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driven by necessity of burst of tantrums’s\* who were  
visited with the extreme penalty.  
  
2.4.8 In 1979, different Benches of the Supreme  
Court heard the cases of Dalbir Singh v. State of  
Punjab,85 and Bachan Singh v. State of Punjab. While  
Dalbir Singh relied on Rajendra Prasad to arrive at a  
decision, the Bench in Bachan Singh noted that the  
judgment in Rajendra Prasad was contrary to the  
decision in Jagmohan, and referred it to a  
Constitutional Bench. This culminated in the landmark  
decision of the Constitution Bench in Bachan Singh v.  
‘State of Punjab (‘Bachan Singh)).5?  
  
2.4.9 The challenge to the death penalty in Bachan  
Singh was premised, among other things, on  
irreversibility, fallibility, and that the punishment is  
necessarily cruel, inhuman and degrading. It was also  
contended that the penological purpose of deterrence  
remained unproven, retribution was not an acceptable  
basis of punishment, and that it was reformation and  
rehabilitation which were the purposes of punishment.  
  
2.4.10 Four of the five judges hearing this case did  
not accept the contention that the death penalty was  
unconstitutional. They overruled Rajendra Prasad, and  
affirmed Jagmohan, when they held that the death  
penalty could not be restricted to cases where the  
security of the state and society, public order and the  
interests of the general public were threatened. Errors,  
they held, could be set right by superior courts, and pre-  
sentence hearing and the procedure that required  
confirmation by the High Court would correct errors.  
  
2.4.11 In Bachan Singh, the Court adopted the  
‘rarest of rare’ guideline for the imposition of the death  
penalty, saying that reasons to impose or not impose the  
death penalty must include the circumstances of the  
crime and the criminal. This was also the case where  
  
 Ralendra Prasad. Stato of Uttar Pradesh, (1978) 3 SCC 646, at para 77  
(1979) 3 SCO 745,  
(1980) 2 SCC 68.  
© (1980) 2 SC 684  
  
25  
  
  
Page 35:  
the court made a definitive shift in its approach to  
sentencing. The Court held:  
  
The expression ‘special reasons‘ in the context of  
this provision, obviously means ‘exceptional  
reasons‘ founded on the exceptionally grave  
circumstances of the particular case relating to  
the crime as well as the criminal.\*\*  
  
2.4.12 It added:  
  
It cannot be overemphasised that the scope and  
concept of mitigating factors in the area of death  
penalty must receive a liberal and expansive  
construction by the courts in accord with the  
sentencing policy writ large in section 354 (3).  
Judges should never be blood-thirsty ... It is,  
therefore, imperative to voice the concern that  
courts, aided by the broad illustrative guidelines  
indicated by us, will discharge the onerous  
function with evermore scrupulous care and  
humane concern, directed along the highroad of  
legislative policy outlined insection 354 (3), viz,  
that for persons convicted of murder, life  
imprisonment is the rule and death sentence an  
exception. A real and abiding concern for the  
dignity of human life postulates resistance  
to taking a life through law's  
instrumentality. That ought not to be done  
save in the rarest of rare cases when the  
alternative option is unquestionably  
foreclosed.\*° (Emphasis supplied)  
  
2.4.13 Justice Bhagwati in his dissenting opinion  
found the death penalty necessarily arbitrary,  
discriminatory and capricious. He reasoned that “the  
death penalty in its actual operation is discriminatory, for  
it strikes mostly against the poor and deprived sections of  
the community and the rich and the affluent usually  
escape, from its clutches. This circumstance also adds to  
  
5 Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 161  
© Bachan Singh v. State of Purjab, (1980) 2 SCC 684, at para 209,  
  
6  
  
  
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the arbitrary and capricious nature of the death penalty  
and renders it unconstitutional as being violative of  
Articles 14 and 21.7%  
  
2.4.14 In 1991, Shashi Nayar v. Union of India, the  
death sentence was once again challenged, among other  
reasons, for the reliance placed in Bachan Singh on the  
35% Report of the Commission. The Court turned down  
the petition, citing the deteriorating law and order in the  
country, with the observation that the time was not  
right for reconsidering the law on the subject. The plea  
that the execution of capital punishment by hanging  
was barbaric and dehumanizing, and it should be  
substituted by some other decent and less painful  
method in executing the sentence, was also rejected.%  
  
2.4.15 In the past few years, attention has also been  
drawn to the arbitrary application of the Bachan Singh  
framework by courts as also to the possibility of judicial  
error in cases where the death sentence has been  
imposed. The Supreme Court in Aloke Nath  
Dutta v. State of West Bengal,\*\_ Swamy  
Shraddhananda v. State of Karnataka, Santosh  
Bariyar v. State of Maharashtra,°> and Farooq Abdul  
Gafur v. State of Maharashtra, amongst other cases,  
has noticed that sentencing in capital cases has become  
arbitrary and that the sentencing law of Bachan Singh  
has been interpreted in varied ways by different  
Benches of the Court.  
  
(ii) Mandatory Death Sentences  
  
2.4.16 Even as the law changed to make the death  
sentence the exception, and judges were expected to  
exercise their discretion to adjudge whether or not the  
death sentence needed to be imposed, in 1983, the  
  
5% Bachan Singh v. Sato of Punjab, 1982 3 SCO 24 (J. Bhagwati dissenting) at para  
at  
  
(1992) 1 Soo 96,  
  
2 (1992) 1 SCC 96, at para 7,  
  
»» 2007) 12 Sc 280.  
  
°\* (2008) 13 SCC 767  
  
25 (2008) 6 SCC 498,  
  
© oto) 14 SCC 641  
  
Ey  
  
  
Page 37:  
Court had to step in to hold that mandatory death  
sentences were contrary to the rights guaranteed in  
Article 14 and Article 21.  
  
2.4.17 In the case of Mithu v. State of Punjab,9 the  
Supreme Court was confronted with the mandatory  
sentence of death enacted in Section 303 of the IPC. The  
Court held that the mandatory death sentence was  
unconstitutional, stating:  
  
A standardized mandatory sentence, and that  
too in the form of a sentence of death, fails to take  
into account the facts and circumstances of each  
particular case. It is those facts and  
circumstances which constitute a safe guideline  
for determining the question of sentence in each  
individual case.°\*  
  
2.4.18 The Court noted that:  
  
It is because the death sentence has been made  
mandatory by section 303 in regard to a  
particular class of persons that, as a necessary  
consequence, they are deprived of the  
opportunity under section 235(2) of the Criminal  
Procedure Code to show cause why they should  
not be sentenced to death and the Court is  
relieved from its obligation under section 354(3)  
of that Code to state the special reasons for  
imposing the sentence of death. The deprivation  
of these rights and safeguards which is bound to  
result in injustice is harsh, arbitrary and  
unjust?  
  
(iii) Method of Execution  
  
2.4.19 In 1983, the Supreme Court in Deena v.  
Union of India (‘Deena’),"®° rejecting a constitutional  
challenge to execution by hanging, held that while a  
  
(1989) 2 sco 277.  
°° Mithav. State of Punjab, (1988) 2 SCO 277, at para 16.  
© Mithav. State of Puniab, (1983) 2 SCC 277, al para 18.  
9 (1983) 4 SCC 645,  
  
28  
  
  
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prisoner cannot be subjected to \_barbarity,  
humiliation, torture or degradation before the  
execution of the sentence, hanging did not involve  
these either directly or indirectly. In Deena, too, there  
was an attempt to revisit the constitutionality of the  
death sentence, but the court did not reopen the  
question.  
  
2.4.20 \_ Ina later decision of Parmanand Katara v.  
Union of India, ®} the Court accepted that allowing the  
body to remain hanging beyond the point of death —  
the Punjab Jail Manual instructing that the body be  
kept hanging for half an hour after death - was a  
violation of the dignity of the person and hence  
unconstitutional.  
  
(iv) Delay and the death penalty  
  
2.4.21 Delay has been a matter of concern in the  
criminal justice system, with the adage justice delayed  
is justice denied’ being attributed to the plight of both  
victims of crime as well as the accused. Long terms of  
incarceration, periods of which are on death row and in  
solitary confinement, have been the concerns of courts  
through the years. In the case of T.V. Vatheeswaran v.  
State of Tamil Nadu (‘Vatheeswaran’),} the Court held  
that a delay in execution of sentence that exceeded two  
years would be a violation of procedure guaranteed by  
‘Article 21. However, in Sher Singh v. State of Punjab,1°>  
it was held that delay could be a ground for invoking  
Article 21, but that no hard and fast rule could be laid  
down that delay would entitle a prisoner to quashing the  
sentence of death.  
  
2.4.22 A Constitution Bench of the Supreme Court  
in the case of Triveniben v. State of Gujarat! considered  
the question, and held that only executive delay, and  
not judicial delay, may be considered as relevant in an  
Article 21 challenge. The Court said, “the only delay  
  
w (1995) 3 Soo 248,  
(1988) 2 SCC 68.  
  
«> (1988) 2 SCC 344  
(1988) 1 SCC 678,  
  
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which would be material for consideration will be the  
delays in disposal of the mercy petitions or delay  
occurring at the instance of the Executive.” 105  
  
2.4.23 If, therefore, there is inordinate delay in  
execution, the condemned prisoner is entitled to come  
to the court requesting to examine whether, it is just  
and fair to allow the sentence of death to be executed.  
  
2.4.24 The Court also held:  
  
Undue long delay in execution of the sentence of  
death will entitle the condemned person to  
approach this Court under Article 32 but this  
Court will only examine the nature of delay  
caused and circumstances ensued after sentence  
was finally confirmed by the judicial process and  
will have no jurisdiction to re-open the  
conclusions reached by the Court while finally  
maintaining the sentence of death... No fixed  
period of delay could be held to make the  
sentence of death inexecutable..0°  
  
2.4.25 This was reaffirmed in the case of Shatrughan  
Chauhan v Union of India.°” This case also laid down  
guidelines for “safeguarding the interest of the death row  
convicts”,°® which included reaffirming the  
unconstitutionality of solitary or single cell confinement  
prior to rejection of the mercy petition by the President,  
necessity of providing legal aid, and the need for a 14-  
day period between the rejection of the mercy petition  
and execution.  
  
2.4.26 — Recently, the Supreme Court also upheld the  
constitutionality of Section 364A, IPC, which allows for  
the imposition of the death sentence in cases of  
kidnapping with ransom. In the case of Vikram Singh v.  
Union of India, it had been argued that Section 364A  
  
© Trivenibonv. State of Gujarat (1989) 1 SOC 678, at para 17  
  
©° Trivenbenv. State of Gujarat, (1989) 1 SCC 678, at para 23.  
  
w (20%4) 3 SCC 1  
  
®® Shalrughan Chauhan v. UOI, (2014) 3 SOC 1, at para 241  
  
© Vikram Singh @ Vicky & Ani. v. Union of ngia & Ors, Criminal Appeal No. 824 of  
£2012, Supreme Court of India, decided on August 21,2055.  
  
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was unconstitutional, among other things, because it  
denied courts the discretion of awarding a punishment  
that was not life imprisonment or the death sentence  
especially in cases of kidnapping which may not  
warrant such a high punishment. The Supreme Court  
acknowledged that “punishments must be proportionate  
to the nature and gravity of the offences for which the  
same are prescribed”."9 However, it held that “Section  
364A cannot be dubbed as so outrageously  
disproportionate to the nature of the offence as to call for  
the same being declared unconstitutional’, saying  
death sentences would only be awarded in the rarest of  
rare cases. The Court did not address the question of  
whether the death sentence was an appropriate  
punishment for a non-homicide offence, or applicable  
international law standards on this issue.  
  
E. Laws on the death penalty in India  
  
2.5.1 Under the IPC, the death sentence may be  
imposed for several offences, including:  
  
‘Table 2.1: Capital Offences in IPC  
  
‘S.No | Section Number Description  
  
1 ‘Section 121 ‘Treason, for waging war against the  
Government of India  
  
Z| Seetion 132 Abetment of mutiny actually committed  
  
3] Section 194 Perjury resulting in the conviction and  
death of an innocent person  
  
% | Seetion 195A “Threatening or inducing any person to  
  
five false” evidence resulting in. the  
conviction and death of an’ innocent  
  
person  
  
‘S| Section 302 Murder  
  
©. | Section 305 ‘Abetment af a suicide by a minor, Insane  
person of intoxicated person  
  
7 | Seation 307 Bj ‘Attempted murder by a serving life convict  
  
[Section 3640, ‘Kidnapping for ransom  
  
9. | Section 376 ‘Rape and injury which causes death oF  
  
leaves the woman in a persistent  
  
10, | Section 3765 Certain repeat offenders in the context of  
rape  
r Section 396, Dacoity with murder  
  
"8 Vikram Singh @ Vicky & An. v. Union of India & Ors, Criminal Appeal No. 824 of  
£2019, Supreme Court of India, decided on August 21,2015, at para 43  
5 Vieram Singh @ Vicky & Aa. v. Union of dia & Ors, Criminal Appeal No. 824 of  
£2019, Supreme Court of India, decided on August 21,2016, a para 50.  
  
Bt  
  
  
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2.5.2 The death penalty may also be imposed if  
someone is found guilty of a criminal conspiracy to  
commit any of these offences.1!?  
  
2.5.3 Besides the IPC, several laws prescribe the  
death penalty as a possible punishment in India. These  
include:  
  
‘Table 2.2: Capital Offences in other laws  
  
‘S.No | Section Number ‘et  
1 | Sections 34, 37, and 38) | The Air Force Act, 1950  
2} Seetion 3110) The Andhra Pradesh Control oF  
‘Organised Crime Act, 2001  
Z| Seetion 273) "The Arms Act, 1950 (repealed)  
4. [Sections 34, 37, and 38) | The Army Act, 1950)  
‘5. [Sections 21, 24, 25(i}(a), | The Assam Rifles Aci, 2006  
and 55,  
%. } Section GSA) The Bombay Prohibition (Gujarat  
Amendment] Act, 2009  
7 [Sections 14, 17, Taliiay, | The Border Security Force Act, 1968)  
and 46.  
‘&\_\_| Sections 17 and 49 "The Coast Guard Act, 1978  
‘9. —] Seetion {0 "The Commission of Sati (Prevention)  
‘Act, 1087  
10,\_\_| Seetion 5 ‘The Defence of India Act, 1971  
11, —| Section 3 “The Geneva Conventions Act, 1560  
12. | Seetion 3 (8) The Explosive Substances Act, 1908  
13. | Sections 16, 19, 30(i)(a), |The Indo-Tibetan Border Police Force  
and 49 Act, 1992  
1a. } Seetion 3070) ‘The Karnataka Control of Organised  
Grime Act, 2000  
15. } Seetion 3070) “The Maharashtra Control of Organised  
Grime Act, 1999  
16. | Seetion STA) “The Nareoties Drage and Paychotropic  
  
Substances Act, 1985  
17 | Sections 34, 35, 36,37, 38, |The Navy Act, 1957  
39, 43, 44, 4912}, S612)  
  
‘and 59  
18, ] Seetion 15(@) ‘The Petroleum and Minerals Pipelines  
(Acquisition of rights of user in land}  
Act, 1962,  
19. | Sections 16, 19, 20(iVfaj, |The Sashasiva Seema Bal Act, 2007  
and 49  
20, | Seetion 372107 ‘The Scheduled Castes and Scheduled  
Tribes (Prevention of Atrocities) Act,  
1989,  
i, | Seetion 3007 The Suppression of Unlawful Acis  
‘against Safety of Maritime Navigation  
‘and Fixed Platforms on Continental  
Shelf Act, 2002:  
2B\_| Sections TOI) and | The Unlavsful Activities Prevention Act,  
Section 16(1)a) 1967  
  
"Section 1208, Indian Penal Code, 1860  
2  
  
  
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(i) Recent expansions of the scope of the death  
penalty  
  
2.5.4 Several of these enactments have been  
passed relatively recently. For example, passed in 2013,  
the Criminal Law (Amendment) Act introduced several  
new provisions into the IPC, including Section 376A,  
which allowed for the death penalty to be imposed in  
cases where rape led to the death of the victim, or left  
her in a persistent vegetative state; and 376E which  
allowed for the imposition of the death penalty for  
certain repeat offenders. These amendments were  
passed in the wake of the recommendations of the  
Verma Committee.!'5 Pertinently, while the Verma  
Committee was in favour of enhanced punishment for  
certain forms of sexual assault and rape, it noted that  
“in the larger interests of society, and having regard to  
the current thinking in favour of abolition of the death  
penalty, and also to avoid the argument of any  
sentencing arbitrariness, we are not inclined to  
recommend the death penalty.” The Criminal Law  
(Amendment) Act, 2013, nevertheless expanded the  
scope of the death penalty.  
  
2.5.5 There is currently a Bill pending in  
Parliament, the Anti-Hijacking (Amendment) Bill 2014,  
which also prescribes the death penalty."!5  
  
(ii) The Death Penalty and Non-Homicide offences  
  
2.5.6 \_ Several offences for which the death penalty  
is prescribed include non-homicide offences, and do not  
  
"See Verma Committee Report, 2013, available al  
hip prsindia rgluploads/mediaJustice®<20verma%20committe/s%20verma  
‘5:20commitlo%.20report pal (ast vowed on 26.08.2015}.  
  
"See Verma Committee Repo, 2013, at page 246, available at  
hip prsincia orgluploads media Justice®<20vermas20committe/is%20verma  
‘120cammitl%.20report pa (ast vowed on 26.08.2015}  
  
"See PRS. india, AntiHijacking Bil, 2014, avaiable at  
hitp-aww prsincia ocgilrackthe-ant-jacking-amendment-bil 2014-3600) (last  
viewed on 15.08.2015).  
  
3  
  
  
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meet the threshold of “most serious crimes” as required  
  
by international law."° These includ  
  
Table 2.;  
  
Non-Homicide Capital Offences  
  
‘Section Number | Act  
‘Section 34, Section 37 | The Air Force Act, 1950  
and Section 38)  
2 ‘Section 34, Section 37 | The Army Act, 1950  
and Section 38  
z ‘Section 21, Section 24 | The Assam Rifles Act, 2006  
and Section 25.  
z ‘Section 14, Section I7 | The Border Security Force Act, 1968  
and Section 18  
es ‘Section 17, Section 49 | The Coast Guard Ac, 1978  
6. Section 3 “The Explosive Substances Act, 1908  
7. ‘Section 120B, Section | The Indian Penal Code, 1860  
121 (waging wat),  
Section 132, Section  
194, Section 195A,  
Section 364A (added  
by Criminal Law  
(Amendment) Act,  
1993, Section S76E  
(added “by | Criminal  
Taw (Amendment) Act,  
2013),  
5 Section 16, Section 19 | Tndo-Tibetan Border Police Force Act,  
and Section 20 1992  
3 ‘Section 31 “The Narcotic Drags and Paychotropic  
Substances Act, 198S  
10. Section 34, Section 35, | The Navy Act, 1957  
Section 26, Section 37,  
Section 38, Section 39,  
Section 43, Section 44,  
Section 49, Section 56,  
Section 59  
T ‘Section IS ‘The Petroleum and Mineral Pipelines  
(Acquisition of Right of User in Land)  
Act, 1962  
7. Seciion 16, Section 19 | The Sashasiva Scema Bal A, 2007  
land Section 20  
7 ‘Section 3 "The Scheduled Castes and Scheduled  
‘Tribes. (Prevention of Atrocities) Act,  
1989)  
  
Acie 6), ICCPR, “In countries which have not abolished the death penal  
sentence of death may be imposed only forthe mast serous crimes in accordance with  
the law in force at the time of the commission ofthe crime and not contrary tothe  
provisions of the present Covenant and fo the Convention on the Prevention and  
Punishment of the Crime of Genocide. This penalty can only be caried out pursuant (9  
2 final judgment rendered by a competent cour”  
  
34  
  
  
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(iii) Continued existence of the mandatory death  
penalty  
  
2.5.7 Despite the fact that the Supreme Court  
found the mandatory death penalty to be  
unconstitutional and arbitrary, the Parliament has  
since enacted laws that continue to prescribe the  
mandatory death penalty. The Suppression of Unlawful  
Acts against Safety of Maritime Navigation and Fixed  
Platforms on Continental Shelf Act, 2002, in Section  
3(g)(i), the Scheduled Castes and Scheduled Tribes  
(Prevention of Atrocities) Act, 1989, in Section 3(2)(i) and  
Section 27(3) of the Arms Act continue to prescribe a  
mandatory death sentence. The mandatory death  
sentence was also introduced into the Narcotics and  
Psychotropic Substances Act 1985 by amendment in  
1989. The Bombay High Court declared it to be  
unconstitutional in 2010,"17 and the Act was finally  
amended to remove it only in 2014.  
  
(iv) Death penalty and anti-terror laws  
  
2.5.8 Many laws under which the death penalty  
continues to be imposed have to do with terrorist  
offences. For example, death sentences under the  
Terrorist and Disruptive Activities Act, 1987 (‘TADA),  
Prevention of Terrorism Act, 2002 (POTA), and  
Unlawful Activities Prevention Act, 1967 (UAPA),  
continue to be imposed and upheld. For one thing, these  
death sentences are implemented even when the  
underlying law in some of these cases has either been  
repealed (TADA) or has lapsed (POTA). TADA in  
particular was repealed in the face of criticism for not  
respecting fair trial guarantees and amidst widespread  
allegations of abuse. Provisions in the TADA, POTA and  
now UAPA did not provide for the full range of fair trial  
guarantees: they defined offences vaguely, thus  
compromising the principle of legality; reversed the  
presumption of innocence in certain instances; allowed  
for long periods of pre-charge detention; made certain  
  
"7 Indian Harm Reduction  
1784/2010, Bombay High Cour  
  
work v. The Union of India, Criminal Appeal No.  
  
35  
  
  
Page 45:  
confessions to specific police officials admissible as  
evidence; and limited the right to appeal by only  
allowing appeals to the Supreme Court.  
  
(v) Bills proposing abolition of the death penalty  
  
2.5.9 Before independence, Shri Gaya Prasad  
Singh attempted to introduce a Bill abolishing the death  
penalty for IPC offences in 1931, which was defeated." \*  
Since independence, M.A. Cazmi’s Bill to amend Section  
302 IPC in 1952 and 1954, Mukund Lal Agrawal’s Bill  
in 1956, Prithviraj Kapoor's resolution in the Rajya  
Sabha in 1958 and Savitri Devi Nigam’s 1961 resolution  
had all sought to abolish the death penalty.:!? In 1962,  
Shri Raghunath Singh’s resolution for abolition of the  
death penalty was discussed in the Lok Sabha, and  
following this the matter was referred to the Law  
Commission, resulting in the 35! Commission  
Report.120  
  
2.5.10 At present, two bills moved by Rajya Sabha  
Members of Parliament are relevant to the issue.  
Kanimozhi has moved a Private Member's Bill  
demanding the abolition of the death penalty,!2" and D.  
Raja has moved a Private Member's Bill asking the  
Government to declare a moratorium on death  
sentences pending the abolition of the death penalty.12?  
  
F. Recent Executions in India  
  
2.6.1 Astudy conducted by Amnesty International-  
PUCL (studying all death penalty cases from 1950-2006  
in India) has noted the lack of clarity and official  
  
"® Law Commission of India, 35" Report, 1967. at para 12, available at  
hitplawcommissionofingia.nicinit-S0/Repor38Volland&pdt (last viewed | on  
26.08.2018)  
  
° See Law Commission of India, 35" Report. 1967. at para 15-18, available at  
hitp-lawcommissionofindanicinit-S0/Repot35Volland&pat (last viewed on  
260820185)  
  
® See Law Commission of India, 35 Report, 1967, at para 1, avalable at  
hitp-lawcommissionofndianic.invt-SO/Repor6Voltand3jpdt (last "viewed — on  
25.08.2018)  
  
® Special Correspondent, Kanimazhita move Bill abolish death penal, The Hinds,  
daly 31 2015.  
  
"IANS, Death penalty: CPI leader D Aaja moves private member’ resolution,  
Economic Times, 31 July, 2015,  
  
36  
  
  
Page 46:  
information available on the numbers of people who  
have been executed in India, but suspected that the  
number of executions during this period probably ran  
into thousands. 25 There has, however, been a reduction  
in the number of people being executed over time.  
  
2.6.2 Dhananjoy Chatterjee was executed in 2004,  
after a period of about 7 years since the last execution.  
‘The previous recorded execution had been in 1997.12  
After 2004, India had an unofficial moratorium in  
executions for eight years, until Ajmal Kasab was  
executed in November 2012. Two executions have  
happened since: Afzal Guru was executed in February  
2013, and Yakub Memon was executed in July 2015.  
  
2.6.3 Having examined the history of the death  
penalty in India, and the recent expansion of its scope,  
it is instructive to next consider world-wide trends and  
international law provisions on the issue.  
  
© amnesty International, Lethal Lottery: The Death Penalty in India, ASA 20/07/2008,  
‘at page 24, availabe at htps/iwww amnesty orgendocuments/ASAZ0/007/2008/en/  
(last viewed on 26.08.2015)  
® Amnesty inlrmatonal, Lethal Lottery: The Death Penalty in Inca, ASA 20/07/2008,  
‘at page 24, avalabe a ftps www amnesty orglentdocuments/ASAZ0,007/2008/eni  
(last viewed on 26.08.2015)  
  
37  
  
  
Page 47:  
Cuaprer - IT  
INTERNATIONAL TRENDS  
  
3.1 ‘The international landscape regarding the  
death penalty - both in terms of international law and  
state practice — has evolved in the past decades. As  
compared to 1967, when the 35" Report of the  
Commission was issued, and 1980, when the Bachan  
Singh? judgement was delivered, today a majority of  
the countries in the world have abolished the death  
penalty in law or practice. Even those who retain it,  
carry out far fewer executions than was the case some  
decades ago.  
  
3.2 This chapter describes the transformation in  
the international landscape over the past decades, and  
the marked trend towards abolition in both  
international as well as domestic laws, through a study  
of applicable international law, political commitments  
and state practice.  
  
3.3. ‘The aim of this chapter is not to highlight  
international law norms applicable to the Indian state.  
Several treaties and instruments mentioned here have  
either not been signed or ratified by the Indian  
government, or are inapplicable to India for other  
reasons. Instead, this chapter provides an overview of  
the international landscape pertinent to the legal  
regulation of the death penalty, and the changes in it  
over time.  
  
3.4 Internationally, countries are classified on  
their death penalty status, based on the following  
categories: 12°  
  
\* Abolitionist for all crimes  
  
® (1980) 2 Soo 684,  
This system is folowed by the United Nations and by non-governmental  
‘organizations lke Amnesty Intemational. See for example, “Capital punishment and  
implementation ol the safeguards guaranteeing protection ofthe rights ol those facing  
the death penalty’ Report of the Secretary General, E/2015/49 [advance, unedited  
version} at page 4: See Annex Il, Amnesty Interiatonal, Death Sentences. and  
Executions in 2014, ACT S0/001/2015,  
  
38  
  
  
Page 48:  
\* Abolitionist for ordinary crimes!27  
\* Abolitionist de facto!2s  
+ Retentionist  
  
3.5 At the end of 2014, 98 countries were  
abolitionist for all crimes, seven countries were  
abolitionist for ordinary crimes only, and 35 were  
abolitionist in practice, making 140 countries in the  
world abolitionist in law or practice. The list of 140  
countries includes three that formally abolished the  
death penalty in 2015, ie., Suriname, Madagascar and  
Fiji.2” 58 countries are regarded as retentionist, who  
still have the death penalty on their statute book, and  
have used it in the recent past.'2°  
  
3.6 While only a minority of countries retain and  
use the death penalty, this list includes some of the  
most populous nations in the world, including India,  
China, Indonesia and the United States, making a  
majority of people in the world potentially subject to this  
punishment.  
  
® This moans that “he death penalty has been abolished for all ordinary offences  
committed in peacetime, such as those conlained in the criminal code or those  
recognized in common law (for example, murder rape and rebbery with violence). The  
‘eaih penalty is retained only fr exceptional circumstances, such as miltary offences  
ln time of war, or crimes against the Stale, such as treason, terorism or armed  
lnsurection Capital punishment and implementation of the safeguards guaranteeing  
protection of the rights of those facing the death penalty, Report of the Secretary  
  
‘General, E/2015/49[advance, unedited version] al page 4  
  
@ This relers to slates whero “the death penalty remains lawful and where death  
sentences may sil be pronounced but where executions have not taken pace for 10  
{years or states that have carried out executions within th previous 10 years but that  
hhave made an international commitment through the eslabishment of an official  
‘moratorua. Capital punishment and implementation of the safeguards guarantosing  
protection of the rights of those facing the death penalty, Report of the Secretary  
  
‘General, £/2075!49 (advance, unedited version) at page 4. Amnesty International  
{allows a sighly diferent dafintion: Counties which retain the death penalty for  
‘ordinary crimes such as murder but ean be considered abolitionist in practice in that  
they have not executed anyone during the last 10 years and are beloved to have a  
policy or estabished practice of not carving out executions. Annex Il, Amnesty  
International, Death Sentences and Executions in 2014, ACT 501001/2015,  
  
® See On the way outwith grisly exceptions, The Economist, 4 July 2015, available  
at hit: aww economist com newsinlernaional21656686-tew-counties-are  
\_appving-death-penaity more reel. global-trend towards (last viewed on 20.08.2018).  
  
‘annex Il, Amnesty ineratonal, Death Sentences and Executions in 2014, ACT  
‘50/001/2018.  
  
39  
  
  
Page 49:  
Sourced from The Economist: “On the way out—with grisly exceptions” The  
Economist, 4 ‘July 2015, available at  
bttp:/www.economist.com/news /international/21656666-few-countries  
are-applying-death-penalty-mare-frely-global-trend-towards  
  
3.7 This map shows four types of regions: the  
regions in red are retentionist, and use the death  
penalty for ordinary crimes; regions in orange-pink have  
abolished the death penalty in practice, and are  
abolitionist de facto; regions in dark pink have only  
retained the death penalty for exceptional crimes, and  
are abolitionist for ordinary crimes; and regions in light  
pink/white do not retain ‘the death penalty and have  
abolished it for all crimes.  
  
A. Developments in the International Human  
Rights Law Framework  
  
(i) Capital Punishment in International Human  
Rights Treaties  
  
3.8.1 Capital punishment has been regulated in  
international human rights treaties as one aspect of the  
right to life, as contained in the International Covenant  
on Civil and Political Rights (ICCPR). With time, some  
aspects of the imposition and implementation of capital  
punishment have also been found to violate the  
prohibition against cruel, inhuman, and degrading  
  
40  
  
  
Page 50:  
treatment and punishment. With the coming into force  
of the Second Optional Protocol to the ICCPR, the  
international community saw the first global,  
international legal instrument that aimed at abolishing  
the death penalty.  
  
a. The International Covenant on Civil and Political  
Rights  
  
3.8.2 The International Covenant on Civil and  
Political Rights (ICCPR) is one of the key documents  
discussing the imposition of death penalty in  
international human rights law. The ICCPR does not  
abolish the use of the death penalty, but Article 6  
contains guarantees regarding the right to life, and  
contains important safeguards to be followed by  
signatories who retain the death penalty.  
  
3.8.3 Article 6(2) states:  
  
In countries which have not abolished the death  
penalty, sentence of death may be imposed only for  
the most serious crimes in accordance with the law  
in force at the time of the commission of the crime  
and not contrary to the provisions of the present  
Covenant and to the Convention on the Prevention  
and Punishment of the Crime of Genocide. This  
penalty can only be carried out pursuant to a final  
judgment rendered by a competent court.  
  
3.8.4 Article 6(4) requires states to ensure that  
“Anyone sentenced to death shall have the right to seek  
pardon or commutation of the sentence. Amnesty, pardon  
or commutation of the sentence of death may be granted  
inall cases”, and Article 6(5) mandates that a “Sentence  
of death shall not be imposed for crimes committed by  
persons below eighteen years of age and shall not be  
carried out on pregnant women.”  
  
3.8.5 The UN Human Rights Committee (the UN  
body whose interpretations of the ICCPR are considered  
authoritative) discussed Article 6 of the ICCPR in detail  
in its General Comment in 1982. The Committee  
clarified that while the ICCPR did not explicitly require  
  
a  
  
  
Page 51:  
the abolition of the death penalty, abolition was  
desirable, and the Committee would consider any move  
towards abolition as “progress in the enjoyment of the  
right to life.”\*! The Committee also said that death  
penalty should be an ‘exceptional measure”. It  
reiterated important procedural safeguards including  
that the death penalty can only be imposed in  
accordance with the law in force at the time of the  
commission of the crime, and that the right to a fair  
hearing by an independent tribunal, the presumption of  
innocence, minimum guarantees for the defence, and  
the right to review by a higher tribunal must all be  
strictly observed."  
  
3.8.6 The Committee also reviews periodic reports  
of state-parties to the ICCPR, and has often referred to  
abolition of the death penalty in its observations on  
reports of retentionist states.'3° In other cases, the  
Committee has also reiterated the importance of  
following the safeguards listed in Article 6 and other  
provisions of the ICCPR, and provided a roadmap to  
abolition.15\*  
  
© Human Rights Committee, General Comment No 6 (1982) at para 6, Compilation of  
General Comments and General Recommendations Adopted by Human Rights Trealy  
Bodies. UN. Doc. HAIGEN(\Rey.1 at 6 (1994)"The article also refers generally 10  
‘bolton in terms which strongly suggest (paras. 2 (2) and (6)) that abolton '=  
Gesirable. The Committee concludes tha! al! measures of abolition should be  
‘onsidered as progress inthe enjoyment othe right ole within the meaning of article  
40, and should as such be reported tothe Commitee’  
  
"Human Rights Commitee, General Comment No 6 (1982) at Para 7, Compilation  
‘of General Comments and General Recommendations Adopted by Human Fights  
‘realy Bodies, UN. Doc. HRIGEN\T\Rev1 at 6 (1996).  
  
"For example, in 2014, recommended tat Sierra Leone “should expedite is efforts  
fo abolsh the death penalty and 10 ratly tbe Second Optional Protocol fo the  
Covenant, in para 18, UN Human Rights Committee, Concluding observations onthe  
initial report of Sierra Leone, 25 March 2014, CCPRUG/SLEICOIT. In 2008, noted that  
‘while Russia had a de facto moratorium on executions since 1996, "should take the  
ecessary measures to abolish the death penalty de jure at the earliest possible  
‘moment, and consider acceding tothe Second Optional Protaco fo the Covenant. in  
para 12, UN Human Rights Commitee, Concluding observations ofthe Human Fights  
‘Commitee: Russian Federation, 24 November 2008, CCPRIC/RUSICOS.  
  
"For example, In is 2008 review of Japan, the Committee recommended,  
“Regardless of opinion polls, he State party should favourably consider abolishing the  
death penaty and inform the pubic, as necessary, about the desirabiy of abolition  
para 16, UN Human Rights Committee, Concluding observations a the Human Fights  
Commitee: Japan, 18 December 2008, CCPRICUPNICO'S. Similarly, in 2006 the  
‘Commitee asked the United States 1o “review federal and state legislation witha view  
fo resticing the number of offences carrying the death penalty... the State party  
should place a moratorium on capital sentences, bearing in mind the desirabilty of  
  
a2  
  
  
  
Page 52:  
3.8.7 At present, 168 states, including India, are  
parties to the ICCPR. The Committee reviewed India’s  
report in 1996 and recommended that India “abolish by  
law the imposition of the death penalty on minors and  
limit the number of offences carrying the death penalty to  
the most serious crimes, with a view to its ultimate  
abolition. 35  
  
b. The Second Optional Protocol \_to\_ the ICCPR,  
aiming at the abolition of the death penalty  
  
3.8.8 The Second Optional Protocol to the ICCPR,  
aiming at the abolition of the death penalty is the only  
treaty directly concerned with abolishing the death  
penalty, which is open to signatures from all countries  
in the world. It came into force in 1991, and has 81  
states parties and 3 signatories. India has not signed  
this treaty.  
  
3.8.9 Article 1 of the Second Optional Protocol  
states that “No one within the jurisdiction of a State Party  
to the present Protocol shalll be executed”, and that “Each  
‘State Party shall take all necessary measures to abolish  
the death penalty within its jurisdiction.” No reservations  
are permitted to the Second Optional Protocol, “except  
for a reservation made at the time of ratification or  
‘accession that provides for the application of the death  
penalty in time of war pursuant to a conviction for a most  
serious crime of a military nature committed during  
wartime.” Some state parties have made such  
reservations.  
  
c. The Convention on the Rights of the Child  
  
3.8.10 Similar to the ICCPR, Article 37(a) of the  
Convention on the Rights of the Child (‘(CRC) explicitly  
prohibits the use of the death penalty against persons  
  
abolishing death penal” in para 23, UN Human Righls Commitise, Concluding  
‘observations ofthe Human Fights Commitee: United States of America, 15 September  
2008, CCPAIGIUSAICOVS,  
  
® UN Human Fights Committee, Concluding observations of the Human Fights  
‘Commits: India 4 August 1997, CCPRICITS/Add 81 al para 20  
  
Saree 2 (1), Second Optional Protocolo the ICCPA, aiming at the abolition ofthe  
death penal.  
  
43  
  
  
Page 53:  
under the age of 18. As of July 2015, 195 countries had  
ratified the CRC. Article 37(a) states:  
  
States Parties shall ensure that: (a) No child shall  
be subjected to torture or other cruel, inhuman or  
degrading treatment or punishment. Neither capital  
punishment nor life \_ imprisonment without  
possibility of release shall be imposed for offences  
committed by persons below eighteen years of age.  
  
3.8.11 \_ The Committee on the Rights of the Child  
has clarified that while some presumed the rule only  
prohibited the execution of persons below the age of  
18, “death penalty may not be imposed for a crime  
committed by a person under 18 regardless of his/her  
age at the time of the trial or sentencing or of the  
execution of the sanction.”:37  
  
d. The Convention against\_Torture\_and\_Cruel,  
Inhuman or Degrading Treatment or Punishment  
  
3.8.12 Increasingly, there is an analysis of the death  
penalty as violating norms against torture and cruel,  
inhuman, and degrading treatment or punishment.35  
In this context, the Convention against Torture and  
Cruel, Inhuman or Degrading Treatment or Punishment  
(the Torture Convention) and the UN Committee  
against Torture have been sources of jurisprudence for  
limitations on the death penalty as well as necessary  
safeguards.  
  
3.8.13 The Torture Convention does not regard the  
imposition of death penalty per se as a form of torture  
or cruel, inhuman or degrading treatment or  
punishment (‘CIDT). However, some methods of  
  
® Comite on the Rights ofthe Child, General Comment 10: Chdron's rights in  
jwenile justice, 25 Apri 2007, CRCICIGC!10, at para 75, available al  
hip. ohehrorglenglshibodiescreidecs/CRC.C.GC.10,pdt last viewed on  
251082015),  
  
2 Sea, for example, fe ol the High Commissioner fr Human Rights, Death penalty  
increasingly viewed as torture, UN Special Rapporteur finds. 23 October 2012,  
‘valable at  
hipaa. och: org/EN News vents/Pages/DisplayNews.aspx7NewsID=126858La  
  
sthash GuENTAZ¢ dput (ast viewed on 25.08.20'8).  
  
44  
  
  
  
Page 54:  
execution! and the phenomenon of death row"? have  
been seen as forms of CIDT by UN bodies. While India  
has signed the Torture Convention, it has yet not  
ratified it.  
  
¢. International Criminal Law  
  
3.8.14 The international trend towards abolition of  
the death penalty is also visible in the evolution of  
international criminal law. The death penalty was a  
permissible punishment in the Nuremberg"! and  
Tokyo'? tribunals, both of which were established  
following World War Il. Since then, however,  
international criminal courts - including the Statute of  
the International Criminal Tribunal for the former  
Yugoslavia,'\*\* the Statute of the International Criminal  
Tribunal for Rwanda,'\* the Statute of the Special Court  
  
© The Commitee against Torture was “specially troubled by the recent cases of  
botched executions i Arizona, Oklahoma, and Oho" and asked the US to “review ls  
‘execution methods in order {0 prevent pain and prolonged sullering’, in para 25,  
‘Concluding observations on the combined third to fith penodie reports of the United  
‘States of America, 19 December 2014, CATICIUSA/COR 5,  
  
"© In is Concluding Observations on Kenya's repot, the Commitee against Torture  
  
said that i remained concemad about the “uncerlainty of thase who serve on death  
row, which could amount to ieatment. and urged Kenya to “Take the necessary  
slop to establish an oficial and publicly known meratonum ofthe death penalty with  
§ view of eventualy abolishing the practes™.n para 29, UN Commitee Against Torture,  
Concluding observations of the Commitee against Torture: Kenya, 19 January  
2009, CATICIKENICO/t.  
While reviewing China's poriodic report, the Commitee against Torture expressad  
concer “al he conditions of detention of convicted prisoners on death row, in particular  
the use of shackles for 24 hours a day, amounting fo cruel, inhuman or degrading  
treatment. in para 34, UN Committee Against Torture, Concluding observations of he  
‘Commitee against Torture: China, 12 December 2008, CATICICHNCOI4  
  
In the context of Japan, the Committee found that "unnecessary secrecy and  
{arbirarinss surrounding th lime of execution’ an “principle of soltary confinement  
Sater the final sentence is handed down’ could amount to CIDT, in para 19, UN.  
Commitee Against Torture, Conclusions and Recommendations of the Commitioe  
‘against Torture: Japan, 3 August 2007, CATICIJPNICOt.  
  
“United States Holocaust Memorial Museum, International Miltary Tribunal at  
Nuremberg, Last updated” 18 August 2075, avaliable at  
hips. ushmm orgwleleniarticlephp?Moduleld=10007069 "last viewed on  
281082015)  
  
"© University of Virginia, The Tokyo War Crimes Teal: A clgtal exhibition, avaiable a  
hpi aw-vrgiia edule tebunal (ast viewed on 20.08.2015).  
  
‘2 Stalute othe Intemational Criminal Tribunal or he former Yugoslavia, available at  
hitp-wau iety-orglLegal<20L brary/Slatutelstalute sept0S\_en pat (last viewed  
(00 18.08 2015)  
  
“Statute of the International Criminal Tribunal for Rwanda, available at  
hitpegal un orglvlpdthalc\_EF pal (ast viewed on 15.08.2015),  
  
45  
  
  
  
Page 55:  
for Sierra Leone's and the Law on the Establishment of  
the Extraordinary Chambers in the Courts of  
Cambodia's — exclude the death penalty as a  
permissible punishment. The same is true for the Rome  
Statute of the International Criminal Court,"4” where  
judges may only impose terms of imprisonment. It must  
be noted that these tribunals do not use the death  
penalty, despite routinely dealing with the most serious  
crimes under international law, including genocide, war  
crimes, and crimes against humanity. It is relevant to  
that India is not signatory to the Rome Statute.  
  
f. International Treaty Obligations in Indian Law  
  
3.8.15 Of the treaties mentioned above, India has  
ratified the ICCPR and the CRC, and is signatory to the  
Torture Convention but has not ratified it. Under  
international law, treaty obligations are binding on  
states once they have ratified the treaty.'8 Even where  
a treaty has been signed but not ratified, the state is  
bound to “refrain from acts which would defeat the object  
and purpose of a treaty”.\“°  
  
3.8.16 In India, domestic legislation is required to  
make international treaties enforceable in Indian law.'5°  
‘The Protection of Human Rights Act, 1994, incorporates  
the ICCPR into India law through section 2(d) and 2(f)  
Section 2 (d) states that, “human rights” means the  
rights relating to life, liberty equality and dignity of the  
individual guaranteed by the Constitution or embodied in  
the International Covenants and enforceable by courts in  
India. Section 2() states that, “International Covenants”  
means the International Covenant on Civil and Political  
  
“© Statute of the Special Court for Sierra Leone, available at  
hip rscsorg/Documents'scel- statute pal (ast viewed on 15.08.2015)  
‘© Law on the Establishment of the Extraordinary Chambers in the Courts of  
  
Cambodia, available at hip: eect. gov khistesidetauttlesiegal  
documenisiKR Law as amended 27-Oct 2004 Engpd! (last viewed on  
18.08.2015).  
  
“Rome Statute of the Intemational Criminal Cour, avaiable at: hpsiwwice:  
<plintrtdoniyresieaSact7-5752-4184-be04.  
  
(08655eb30016/0/rome\_statute\_englsh pa last viewed on 15.08.2015).  
  
“8 See Ale 26, Vienna Convention on the Law of Treaties (VCLT): “Every trealy in  
force is binding upon the parties fo it and must be performed by them good faith”  
‘Sale 18, Vienna Convention on the Law of Treaties (VCLT),  
  
' Jolly George Verghase & Ane vs The Bank Of Cochin, 1980 AIR 470  
  
46  
  
  
Page 56:  
Rights and the International Covenant on Economic,  
Social and Cultural rights adopted by the General  
Assembly of the United Nations on the 16th December,  
1966.  
  
3.8.17 \_ Further, according to Article 51(c) of the  
Indian Constitution, the state shall endeavor to “foster  
respect for international law and treaty obligations in the  
dealings of organised peoples with one another.” While  
this does not make all of India’s treaty obligations  
automatically binding on India, courts have respected  
rules of international law where there is no  
contradictory legislation in India.'s1  
  
(ii) Safeguards regarding capital punishment in  
international law  
  
3.8.18 Resolutions by bodies of the United Nations,  
as well as comments and reports by UN special  
procedures, have also contributed to international law  
standards regarding the death penalty and essential  
safeguards where it is being used. The trend in most of  
these instruments is towards limiting the scope of the  
death penalty globally, and encouraging abolition where  
possible.  
  
a. The ECOSOC Safeguards  
  
3.8.19 The UN Economic and Social Council  
(ECOSOC) has issued several resolutions prescribing  
safeguards regarding how the death penalty should be  
imposed in countries where it is retained. These  
safeguards comprise important limitations to the scope  
and application of the death penalty in international  
law.  
  
3.8.20 The first ECOSOC resolution titled  
“Safeguards guaranteeing protection of the rights of  
  
In National Legal Services Authorty v. Union of india, 2014) 5 SCC 438, for  
‘example, the Supreme. Court of India said: “Any Intemational convention” not  
inconsistent with the fundamental rights and in harmony wit ts spr must be read into  
those provisions, eg, Articles 14, 15, 19 and 21 of the Constitution fo enlarge the  
‘meaning and content thereof and to promote the abject of constitutional guarantee.”  
  
a7  
  
  
Page 57:  
those facing the death penalty” was adopted in 1984,152  
and contained the following nine safeguards:  
  
1. In countries which have not abolished the death  
penalty, capital punishment may be imposed only  
{for the most serious crimes, it being understood that  
their scope should not go beyond intentional crimes  
with lethal or other extremely grave consequences.  
  
2. Capital punishment may be imposed only for a  
crime for which the death penalty is prescribed by  
law at the time of its commission, it being  
understood that if, subsequent to the commission of  
the crime, provision is made by law for the  
imposition of a lighter penalty, the offender shall  
benefit thereby.  
  
3. Persons below 18 years of age at the time of the  
commission of the crime shall not be sentenced to  
death, nor shall the death sentence be carried out  
on pregnant women, or on new mothers, or on  
persons who have become insane.  
  
4. Capital punishment may be imposed only when  
the quilt of the person charged is based upon clear  
and convincing evidence leaving no room for an  
alternative explanation of the facts.  
  
5. Capital punishment may only be carried out  
pursuant to a final judgement rendered by a  
competent court after legal process which gives all  
possible safeguards to ensure a fair trial, at least  
equal to those contained in article 14 of the  
International Covenant on Civil and Political Rights,  
including the right of anyone suspected of or  
charged with a crime for which capital punishment  
may be imposed to adequate legal assistance at all  
stages of the proceedings.  
  
6. Anyone sentenced to death shall have the right  
  
to appeal to a court of higher jurisdiction, and steps  
' Safeguards guaranteeing protection ofthe rights of those facing the death penalty,  
‘Approved by Economic. and Social Courel resolution 1984/50 of 25. May 1984,  
  
‘¥allable at: hip: ohh: org/EN/ProfessinallnterestPagesiDeathPenalty aspx  
(last viewed on 3.082018).  
  
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Page 58:  
should be taken to ensure that such appeals shall  
become mandatory.  
  
7. Anyone sentenced to death shall have the right  
to seek pardon, or commutation of sentence; pardon  
or commutation of sentence may be granted in all  
cases of capital punishment.  
  
8. Capital punishment shall not be carried out  
pending any appeal or other recourse procedure or  
other proceeding relating to pardon or commutation  
of the sentence.  
  
9. Where capital punishment occurs, it shall be  
carried out so as to inflict the minimum possible  
suffering.  
  
3.8.21 Two subsequent resolutions introduced  
additional safeguards.  
  
3.8.22 A 1989 ECOSOC resolution added more  
safeguards, including encouraging transparency in the  
imposition of the death penalty (including publishing  
information and statistics on the issue); the  
establishment of a maximum age beyond which a  
person cannot be executed; and abolishing the death  
penalty “for persons suffering from mental retardation or  
extremely limited mental competence, whether at the  
stage of sentence or execution."!55  
  
3.8.23 In 1996, a third ECOSOC resolution’  
encouraged states to ensure that each defendant facing  
a death sentence is given all guarantees to ensure a fair  
trial. It specifically urged states to ensure that that  
defendants who do not sufficiently understand the  
language used in court are fully informed of the charges  
against them and the relevant evidence, and that they  
had enough time to appeal their sentence and ask for  
  
' Implementation of safeguards guaranteeing protection of the rights of those facing  
the death penalty, ECOSOC Resolution 1989/64, available a:  
hips. unode.org Socumentsicommissions/CCPC\ICrime\_Resolutions/1980-  
1989/1989/ECOSOC/Resoluton\_ 1989-64 pl last viewed on 308.205).  
"Safeguards guaranteeing protection ofthe rights of hoe facing the death penalty,  
ECOSOC Resolution 1996/15, at para 6, avaiable. al  
hip. un org documentslecosoctres/1996ieres1996-1S him (ast viewed on  
3.08,2015},  
  
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Page 59:  
clemency. It also asked states to ensure that officials  
involved in decisions to carry out an execution are fully  
informed of the status of appeals and petitions for  
clemency.  
  
b. Reports \_by the \_ Special \_Rapporteur \_on  
extrajudicial, summary or arbitrary executions  
  
3.8.24 Where the imposition and execution of a  
death sentence does not follow norms of international  
law, it can be considered an extrajudicial execution by  
the state, and the Special Rapporteur on extrajudicial,  
summary or arbitrary executions (‘SR on EJEs) has,  
over time, commented on several aspects of the capital  
punishment debate.  
  
3.8.25 For example, in 2006, the SR on EJE released  
a report on transparency in the use of the death  
penalty.!85 In 2007, the SR on EJEs, in a survey of  
existing treaty obligations, jurisprudence, and  
statements by UN treaty bodies, said “the death penalty  
can only be imposed in such a way that it complies with  
the stricture that it must be limited to the most serious  
crimes, in cases where it can be shown that there was an  
intention to kill which resulted in the loss of life.”.5°  
  
c. The Special Rapporteur on torture and other cruel,  
inhuman or degrading treatment or punishment  
  
3.8.26 The Special Rapporteur on torture has  
specifically discussed whether capital punishment can  
be considered cruel, inhuman or degrading  
punishment. In his report on the issue, the Special  
Rapporteur noted the developments in jurisprudence by  
international bodies, which had found that corporal  
punishment often amounted to CIDT, because of its  
impact on human dignity. While the Special Rapporteur  
  
' Report ofthe Special Rapporteur on extrajucal, summary o arbitrary executions,  
‘Transparency and the Impositon of the Death Penalty, E/CN.4/2006/53/Add 3 24  
March 2006, aval ot hitpsidaccess-das  
ny.unorldctUNDOC/GEN'GO6/120157/POFIGOS12057.pd!Opentlement (ast  
Wiewed on 2.08 2075)  
  
8 Fleport ofthe Special Rapporteur on extrajucal, summary o arbitrary executions,  
NHACI420, 23 January 2007, al para. 3. avaiable at: hitpidaccess-dds.  
ny.unorgidoetNDOC:GEN/GO7/105/00;POFIGD710500.pd!7OpenElement (ast  
‘iewed on 3.08 2075)  
  
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Page 60:  
did not go so far as to say that death penalty - probably  
the most extreme form of corporal punishment - always  
amounted to CIDT, he noted that the permissibility of  
the death penalty “is increasingly being challenged by  
obvious inconsistencies deriving from the distinction  
between corporal and capital punishment and by the  
universal trend towards the abolition of capital  
punishment."'57  
  
3.8.27 The Special Rapporteur has also urged  
certain states to impose moratoriums on death  
sentences. !5\*  
  
(iii) Political commitments regarding the Death  
Penalty globally  
  
3.8.28 The trend towards abolition is also evident in  
fa series of political commitments made at the UN,  
through resolutions at bodies such as the General  
Assembly and the UN Human Rights Council.  
  
a. General Assembly Resolutions  
  
3.8.29 Several resolutions of the UN General  
Assembly (UNGA) have called for a moratorium on the  
use of the death penalty. In 2007, the UNGA called on  
states to ‘progressively restrict the use of the death  
penalty, reduce the number of offences for which it may  
be imposed” and “establish a moratorium on executions  
with a view to abolishing the death penalty.” In 2008,  
the GA reaffirmed this resolution,'6 which was  
  
7 Para 47, Repor at the Special Rapporteur on torture and other cruel, inhuman oF  
degrading treatment or punishment, AMRCI0/44, 14 January 2009, at para 47,  
‘alable at hnipzidaccess-das  
ny.unrgldociNDOCIGEN'GO9/10312/POFIGO910312pd!7OpenElement (last  
Viewed on 2.08 205)  
  
'® See UNHCHR, UN experts urge Pakistan noo execute juveniles, 20 March 2015,  
valable| a  
hit aaw. och: org/EN/NewsE vents/Pages/DisplayNews.aspx7NewsID=157298La  
ngID-E (ast viewed on 3.082015) and US’Death penal UN exper call for federal  
‘moratorium as Boston bomber gets death sentence 26 June 2016, avaliable at  
ftom. oe. org EN/NewsEvents/Pages/DieplayNews aspx ?NewsiD-161608La  
nglD=E (last viewed on 3.08.2015).  
  
" Resolution adopted by the General Assembly ‘Moratorium onthe use ofthe death  
penalty’ ARESI62/149, 26 February 2008.  
  
Resolution adopted by the General Assembly ‘Moratorium onthe use ofthe death  
penalty’ ARESI63/168, 13 February 2008,  
  
st  
  
  
  
Page 61:  
reinforced in subsequent resolutions in 2010,16  
2012,'\* and 2014." Many of these resolutions noted  
that, “a moratorium on the use of the death penalty  
contributes to respect for human dignity and to the  
enhancement and progressive development of human  
rights.”  
  
3.8.30 These resolutions have been gaining  
increasing support from countries over time: 117 states  
voted in favour of the most recent resolution in 2014, as  
compared to 104 in 2007. India has not voted in favour  
of these resolutions  
  
b. UN Human Rights Council  
  
3.8.31 ‘The UN Human Rights Council recently  
began a new enquiry on the death penalty, using the  
human rights of children of parents sentenced to the  
death penalty or executed as a starting point. In a 2013  
resolution, the Human Rights Council acknowledged  
“the negative impact of a parent’s death sentence and his  
or her execution on his or her children,” urged “States to  
provide those children with the protection and assistance  
they may require,” and mandated a study on this  
specific issue.' It also called on states “to provide those  
children or, where appropriate, giving due consideration  
to the best interests of the child, another member of the  
family, with access to their parents and to alll relevant  
information about the situation of their parents.”65 A  
2014 Human Rights Council resolution noted that  
“States with different legal systems, traditions, cultures  
and religious backgrounds have abolished the death  
penalty or are applying a moratorium on its use” and  
deplored the fact that “the use of the death penalty leads  
to violations of the human rights of those facing the death  
  
"9 Resolution adopted by the General Assembly ‘Moratorium on the use ofthe death  
penalty’ ARESI65/206, 28 March 2011  
  
"Resolution adopted by the General Assembly ‘Moratorium on the use ofthe death  
penalty’ ARESIG7/176, 20 March 2013,  
  
"© Resolution adopled by the General Assembly “Moratorium on the use ofthe death  
penalty’ ARESI6G/186, 4 February 2015,  
  
"Human Rights Counel, Panel onthe human rights of chitren of parents sentenced  
fo the death penaty or executed, 15 March 2013, AIHRCI221L 18,  
  
"© Human Rights Counel, Panel onthe human rights of chitren of parents sentenced  
to the death penaty or executed, 15 March 2013, AIMRCI221L.18,  
  
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Page 62:  
penalty and of other affected persons.” The Human  
Rights Council urged states to ratify the Second  
Optional Protocol to the International Covenant on Civil  
and Political Rights..°  
  
(iv) Death penalty and the law of extradition  
  
3.8.32 The law of extradition has been another tool  
for countries pushing for the abolition of the death  
penalty.!67 Several abolitionist countries either require  
assurances that retentionist-extraditing countries not  
impose the death penalty, or have included such a  
clause in bilateral extradition treaties.155 Abolitionist  
countries are often bound to ensure this. For example,  
Article 19(2) of the Charter of Fundamental Rights of the  
European Union states:  
  
No one may be removed, expelled or extradited to a  
‘State where there is a serious risk that he or she  
would be subjected to the death penalty, torture or  
other inhuman or degrading treatment or  
punishment.  
  
3.8.33 Several courts have made seminal  
pronouncements on the issue. For example, in the case  
of Soering v. UK, the European Court of Human  
Rights held that the extradition of a person from the UK  
to Virginia, a state in USA which imposed the death  
penalty, would violate the European Convention of  
Human Rights because:  
  
The very long period of time spent on death row in  
such extreme conditions, with the ever present and  
mounting anguish of awaiting execution of the  
death penalty, and to the personal circumstances of  
  
@ Human Rights Council, Question of the Death Penalty, 25 June 2014,  
AHRC26L aiRev.1  
  
"7 For example, abolitionist countries put pressure on those who relain the death  
penalty by refusing extradition requests for persons wanted for offences carrying the  
penalty. See Rock HOOD, CAROLYN HOYLE, THE DEATH PENALTY: A WORLOWIDE  
PensrECTVE, at page 35, (5 ed. 2015)  
  
' For example, China hes signed exraition treaties with Spain, France and Australia,  
saying It wil ot impose the death penalty on individuals extradited trom these  
Countries, See ROGER HOdD, CAROLYN HOYLE, THE DEATH PENALTY” A WORLOWIDE  
PensrEcTVe, at page 38, 5" ed. 2015)  
  
© Application no. 14038188, availabe at hip:Ihudoc.echr coe inleng?-001-57619  
(last viewed on 20.08.2015)  
  
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Page 63:  
the applicant, especially his age and mental state  
at the time of the offence, the applicant's extradition  
to the [US] would expose him to a real risk of  
treatment going beyond the threshold set by Article  
3 [Prohibition of Torture].  
  
3.8.34 In the case of US v. Burns,'7° the Supreme  
Court of Canada held that in cases of extradition to a  
retentionist country, assurances “that the death penalty  
would not be imposed, or, if imposed, would not be  
carried out” were essential in all but “exceptional” cases.  
Similarly, in the case of Mohamed and Another v.  
President of the Republic of South Africa," the South  
African constitutional court held that “a ‘deportation’ or  
‘extradition’ of Mohamed without first securing an  
assurance that he would not be sentenced to death or, if  
so sentenced, would not be executed would be  
unconstitutional,” adding that such an extradition  
violated his “right to life, his right to have his human  
dignity respected and protected and his right not to be  
subjected to cruel, inhuman or degrading punishment.”  
  
3.8.35 Similar jurisprudence can also be found in  
international law. In Judge v. Canada,!7? the UN Human  
Rights Committee, dealing with a man deported from  
Canada to the US, held that “Canada, as a State party  
which has abolished the death penalty, irrespective of  
whether it has not yet ratified the Second Optional  
Protocol to the [ICCPR], violated the author's right to life  
under article 6, paragraph 1, by deporting him to the [US],  
where he is under sentence of death, without ensuring  
that the death penalty would not be carried out.”"79  
  
3.8.36 India’s Extradition Act, 1962, reflects this  
principle in Section 34C: “Notwithstanding anything  
contained in any other law for the time being in force,  
where a fugitive criminal, who has committed an  
extradition’ offence punishable with death in India, is  
  
"= US v. Burns, 2007] 1 SOR 283  
  
©: 200% (3) SA'893 (CO)  
  
ve" Roger Judge. v. Canada, Communication No. 29/1996, UN. Doc.  
‘CCPRICITA/D/829/1998 (2003)  
  
> Roger Judge v. Canada, Communication No. 29/1986, UN. Doe.  
(COPRICITE:D 25/1988 (2003), at para 10.8.  
  
54  
  
  
Page 64:  
surrendered or returned by a foreign State on the request  
of the Central Government and the laws of that foreign  
‘State do not provide for a death penalty for such an  
offence, such fugitive criminal shall be liable for  
punishment of imprisonment for life only for that offence.”  
  
B. International Trends on the Death Penalty  
  
3.9.1 The status and use of the death penalty today  
suggests an unmistakable trend towards abolition.  
When the UN was formed in 1945, only seven countries  
in the world had abolished the death penalty.!7\* In  
contrast, as of 31 December 2014, 140 countries in the  
world had abolished the death penalty in law or  
practice.175  
  
3.9.2 The UN Secretary General publishes a  
periodic report on the status of the death penalty  
globally; the latest of these reports surveyed the global  
situation between 2009 and 2013.17 In this period, the  
number of fully abolitionist states increased by six, and  
almost all retentionist countries reported reductions in  
the number of executions and the number of crimes  
subject to the death penalty. Amongst retentionist  
countries, only 32 carried out judicial executions. This  
report confirmed “the continuation of a very marked  
trend towards abolition and restriction of the use of  
capital punishment in most countries” 177  
  
3.9.3 The trend is also evident from the signatories  
to the ICCPR’s Second Optional Protocol, aiming at  
  
© Report ofthe Special Rapporteur on torture and other cruel, inhuman or degrading  
treatment or punishment, AMIACITOV44, 14 January 2009, at para 31, avaiable at  
hitpsidaccess-das:  
nysunorgidoctUNDOCIGEN'GO9/103/12/POFIGO910312pd!7OpenElement (last  
iewed on 5.08 2075)  
  
"See Annex Amnesty International, Death Sentences and Executions in 2014, ACT  
‘50/001/2018.  
  
\*® Capital punishment and implementation ofthe safeguards guaranteeing protection  
ofthe rights of thse facing the death penalty, Report of the Secretary-General  
Breas 13 “Apt 2or5, ‘valiable at  
hia ohh. org Documentslssues/DeathPenaly/E-2015-49.pd (last viewed on  
$5.08,2016}.  
  
Capital punishment and implementation ofthe safeguards guaranteeing protection  
of the rights of those facing the death penalty, Report of the Sectetary-General  
Ei2a1si«9, 13. Apel 2015, al para 26, avaiable al  
hip oheh. org Decumentslsgues/DeathPenaly/E-2015-49.pd (last viewed on  
'5.08,2015}  
  
55  
  
  
Page 65:  
abolishing the death penalty, to which 81 states have  
signed or acceded.  
  
(i) Regional Trends regarding the Death  
Penalty  
  
a. The Americas  
  
3.9.4 The American Convention on Human Rights  
1969 significantly restricts the application of the death  
penalty. Article 4 of this convention states that it can  
only be imposed for serious crimes following a fair trial,  
it cannot be inflicted for political offences or related  
common crimes, it cannot be re-established in states  
that have abolished it, and it cannot be imposed on  
persons under the age of 18, over 70 or pregnant  
women.  
  
3.9.5 The Americas also have a specific convention  
abolishing the death penalty. Under Article 1 of the  
Protocol to the American Convention on Human Rights  
to Abolish the Death Penalty (ratified by 13 countries),  
“The States Parties to this Protocol shall not apply the  
death penalty in their territory to any person subject to  
their jurisdiction.”  
  
3.9.6 Despite some still keeping it in law, most  
countries in the Americas have abolished the death  
penalty in law or practice.  
  
3.9.7 For example, like many of its South American  
neighbours,” Brazil abolished the death penalty for  
ordinary crimes many decades ago, in 1882. The  
abolition only applies to the death penalty for ordinary  
crimes, and the death penalty for crimes in  
extraordinary times of war still remains. The Brazilian  
Constitution provides that there shall be no punishment  
by death, except in the case of war (Article 5.XLVII).17°  
‘The same Article also provides that there shall be no life  
  
= These incude Argentina, Chile, Colombia, Costa Rica, Ecuador, El Salvador,  
Nicaragua, Paraguay. Venezuela, and Uruguay.  
  
"> An English version ofthe Brazilan Constitution, a amended in 2010, is available  
at  
  
hipaa st jus br tepositorolems/portastintemacional/prtalstsobrecorte\_en\_us!  
‘anexolconstiuicao\_ingles\_3ed2010 pal (ast viewed on 10.08.2015).  
  
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Page 66:  
imprisonment, making Brazil one of the few countries in  
the world where both capital punishment and life  
imprisonment do not exist. In the twentieth century, in  
the face of political instability and military rule, Brazil  
reintroduced the death penalty twice: in the years 1939-  
45 (for politically motivated crimes of violence) and  
1969-79 (for political crimes against national security),  
but no death penalties were imposed on any person  
during these years.'#°  
  
3.9.8 The United States is a notable exception in  
the Americas in terms of its approach to the death  
penalty. In 2014, the United States was the only country  
in its region to carry out executions. Even within the US,  
for a period of time following the case of Furman v.  
Georgia,"\*! there was a de facto moratorium on the  
death penalty for about four years, between 1972 and  
1976. While the death penalty has since been  
reinstated, court decisions have narrowed down its  
scope and introduced safe guards. For example, in  
Roper v. Simmons," the Supreme Court held it was  
unconstitutional to impose the death penalty for crimes.  
committed when the individual was below 18 years of  
age. Further, in Atkins v. Virginia, '\* the Supreme Court  
held that executing persons with intellectual disabilities  
amounted to cruel and unusual punishment, and was  
thus unconstitutional. An increasing number of states  
in the US have been officially or un-officially imposing  
moratoriums. Nineteen states in the US have abolished  
it, the most recent among them have been Connecticut  
in 2012, Maryland in 2013, and Nebraska in 2015.'\* In  
2014, 35 people were executed in the US, which was the  
lowest number since 1995.  
  
© ROGER Hoo, CanoLYN HOYLE, THE DEATH PENALTY: A WORLOWIDE PERSPECTE, at  
page 70-71, 5" ed. 2015).  
  
Furman v Georgia, 408 U.S 238,  
  
«2 Roper v. Simmons, 543 US. 551 (2005)  
  
Ans v- Viginia, 836 ULS. 304 (2002).  
  
"Based on data from the Death Ponally Information Center, availble at  
hip. deathpenaliyinfo.orgistates-and-wihoutdeath-penally (last viewed on  
20.08.2015),  
  
7  
  
  
Page 67:  
b. Europe  
  
3.9.9 All European countries, with the exception of  
Belarus, have either formally abolished the death  
penalty or maintain moratoriums.'\*5  
  
3.9.10 The 1950 European Convention for the  
Protection of Human Rights and Fundamental  
Freedoms (‘the European Convention) originally stated,  
“No one shall be deprived of his life intentionally save in  
the execution of a sentence of a court following his  
conviction of a crime for which this penalty is provided by  
law.”8© In 1983, Protocol No. 6 to the European  
Convention concerning the abolition of the death  
penalty said, “The death penalty shall be abolished. No-  
one shall be condemned to such penalty or executed”,  
except “in respect of acts committed in time of war or of  
imminent threat of war.”7 Finally, in 2002, Protocol No.  
13 to the European Convention abolished the death  
penalty in all circumstances. 44 countries have acceded  
to this protocol, including all member states of the  
European Union.  
  
3.9.11 The European Court of Human Rights  
(ECHR) has evolved rich jurisprudence for countries  
that have not yet ratified the two optional protocols. On  
many occasions, the court has held that extradition to  
a country that had the death penalty could violate the  
right to life and prohibition against torture.'\*\* In 2010,  
the ECHR noted the high number of signatories of the  
European Convention who had abolished the death  
penalty. It said “These figures, together with consistent  
State practice in observing the moratorium on capital  
  
«= Amnesty Intemational, Death Sentences and Executions in2014, ACT 50/00/2015,  
atpage 41  
  
® Aticl 2(1), Convention forthe Protection of Human Rights and Fundamental  
Freedom, avaiable a: hiip:/eonvenions.coeintrealyn Treatie/HimlODS hm (ast  
viewed on 20.08.2015).  
  
‘rieles | and 2, Prlacel No. 6 othe Convention forthe Protection of Human Rights  
‘and Fundamental Freedoms concerning the abolition a the death penalty, avallabl a:  
hitp-leonventions.coe.invTreatyENTreaties/HimUt14.him (ast viewed on  
20.08.2015).  
  
"Bader and Kanbor v. Sweden, Application No, 13284I04; Jabari v. Turkey,  
‘Application No. 40035,88,  
  
58  
  
  
Page 68:  
punishment, are strongly indicative that Article 2 has  
been amended so as to prohibit the death penalty in all  
circumstances.” It held that “the words ‘inhuman or  
degrading treatment or punishment’ in Article 3 could  
include the death penalty.”"\*°  
  
3.9.12 Like the rest of Europe, France abolished the  
death penalty despite public opinion to the contrary.  
‘The death penalty in France was abolished on 9 October  
1981, after a vote in the National Assembly decided in  
favour of abolition.1%° It marked the end of two centuries  
of debate in the National Assembly on the issue, the first  
motion having been presented as far back as in 1791.1!  
The abolition was incorporated into the French  
Constitution in 2007, Article 66-1 of which reads that  
“no one shall be sentenced to death”. 1° Public opinion  
supported the death penalty for many years after it was  
abolished (a 2006 poll showed that 52% of the  
population were against it).!° Robert Badinter, the  
minister for Justice in France in 1981, who led the  
legislative amendment, has suggested that ‘it usually  
takes about 10 to 15 years following abolition for the  
public to stop thinking of it as useful and to realise that it  
makes no difference to the level of homicide”, which  
prediction has found support in many countries.:%  
  
3.9.13 The history of capital punishment in the  
United Kingdom is also relevant to the Indian context.  
‘The abolitionist-leaning Labour government that was  
elected in post-war Britain considered the issue of  
capital punishment at least six times before setting it  
  
"Al Saadoon and Muldhivthe United Kingdom, 61498108 [2010] ECHR 282, at para  
120,  
  
® France and Death Penalty, Aboltion in France, available at  
ripe ciplomatie. got: rfenreneh iorlgn-poleyhhuman-ights\death  
  
penalty rance-and death penalty last viewed on 20.08.2015),  
  
®" Law of Sth October 198": Abolition of te Death Penalty in France, availabe at  
hit rance.réenvnstiutions-and-values!awSth-october-1981-aboltan-death  
penaly-trance hil last viewed on 20.08.2015).  
  
"= France and Death Penalty, Aboition in France, available at  
ripe ciplomatie. got: rfenreneh lorign-poleyhhuman-ights\death  
  
penalty rance-and.death-penaly ast viewed on 20.08.2015)  
  
" EVAN J. MANDERY, CAPITAL PUNSHVENT: A BALANCED EXAMINATION, al page 640 (1  
ed. 2008),  
  
SF ROGER Hoo, CaROLYN HOYLE, THE DEATH PENALTY: A WORLOWIDE PERSPECTE, at  
page 464, 15" ed, 2015),  
  
59  
  
  
Page 69:  
aside when tabling its Criminal Justice Bill in 1947,  
deciding that abolishing the death penalty was not its  
key priority; and by the 1950s, however, a series of  
poorly handled cases and executions had led to the  
creation of a strong public movement in favour of  
abolition.195 The last execution in the United Kingdom  
took place in 1964.16 In 1965, the House of Commons  
in Great Britain voted to impose a moratorium on and  
suspend the death penalty for murder for a period of 5  
years by law.197  
  
3.9.14 The death penalty for murder was formally  
abolished in 1969, when the UK Parliament decided that  
the 1965 Act should not expire, despite recent  
opinion polls showing that about 80% of the population  
was in favour of retaining the penalty.1% (Northern  
Ireland passed a similar law in 1973.2) After the death  
penalty for murder was abolished, the House of  
Commons held a vote during each parliament (until  
1997) to restore the penalty, but the motion was never  
passed.2°! The death penalty was finally removed for all  
crimes in the UK only in 1999, further to the UK's  
ratifications of and obligations under the European  
Convention on Human Rights and the Second Optional  
Protocol to the ICCPR.20?  
  
3.9.15 Despite the penalty no longer being a part of  
UK law, the UK Privy Council has discussed the death  
penalty in various decisions pertaining to cases in the  
  
®5 ROGER Hoo, CAROLYN HOYLE, THE DEATH PENALTY: A WORLOWIDE PERSPECTIVE, at  
  
page 51-56. (5% ed. 2015).  
  
British Miltary & Criminal History: 1900 to 1998, Last executions inthe UK, available  
  
at itp:w-stephen-stratford.co.uclat\_ones.him (last viewed on 20.08.20'5)  
  
® See section 4 of the Murder (Abolition of Death Penalty) Act 1965, as originally  
  
enacted, ‘valable at  
  
itp legislation gov uklukpga/t965/71/pdlslukpga 19650071 enpdt (last  
  
viewed on 20.08.2015).  
  
Murder (Aboltion of Death Penalty) Act 1965, as amended, avaliable at  
jon gov.uWukpga/T955/71 (last viewed on 20.08.2015)  
  
CAROLYN HOWL, THE DEATH PENALTY: A WORLOWIDE PERSPECTHE, at  
  
page 55, (5" ed. 2015).  
  
"Section 1, Northern Ireland (Emergency Provisions) Act 1973, available at  
  
hip: legistation.gov-ukiukpga/1973/53!section/t (last viewed on 20.08.2015).  
  
2" Gharles Hanson, The death ponaly issue, TIME, 1 September, 2011, avalabe a:  
  
hitpinsdetime org the-death-penally- ise! (last viewed on 20.08 2015),  
  
#2 ROGER HooD, CAROLYN HOVLE, THE DEATHPENALTY:A WORLOWIDE PERSPECTVE, at  
  
page 56, (5 ed. 2015)  
  
60  
  
  
Page 70:  
Caribbean countries, where the death penalty remains  
standing. The most notable of these was the 1993 case  
of Pratt & Morgan v. The Attorney-General for Jamaica.0  
In this case, the UK Privy Council held that that it was  
unconstitutional in Jamaica to execute a prisoner who  
had been on death row for 14 years. According to the  
Privy Council, the Jamaican Constitution prohibits  
“inhuman or degrading punishment’, as a result of  
which excessive delays cannot occur between  
sentencing and execution of the punishment.  
Specifically, it held that a delay of more than five years  
between sentencing and execution was prima facie  
evidence of inhuman or degrading punishment. In cases  
of such excessive delay, it said that the death sentence  
should be commuted to life imprisonment.  
  
3.9.16 The Pratt & Morgan case had a ‘ripple  
effect”°\* on similar cases from other Caribbean  
countries, where the sentence for convicts on death row  
was commuted to life imprisonment. This has led to a  
separate and long-enduring debate about the appellate  
powers of the Privy Council on countries other than the  
UK.205  
  
©. Africa  
  
3.9.17 As of October 2014, 17 African countries had  
formally abolished the death penalty, and 25 others had  
not conducted an execution in over ten years.20  
Countries continuing to impose the death penalty  
include Egypt, Equatorial Guinea, Sudan, and Somalia.  
Several African countries (e.g., Angola, Namibia) have  
abolished the death penalty through the Constitution,  
  
S [1993] UKPC 1, Privy Council Appeal No. 10 of 1993, available at:  
  
hij: bali orgukicases/UKPC)199901 himl (last viewed on 20.08.2015).  
  
2 Therese Mls (2005), Letter: Colonial power over death penalty, BBC, 19 January,  
  
£2005, avaiable at: hiip/inewa bbe. co.uk/2Ih/americas/4185748.sim (last viewed on  
20.08 2015)  
  
5 See, for example, Owen Bowcolt and Maya Wolfe-Robinson, British court fo rule on  
death sentences fortwo Trinidad murderers, The Guardsan, 4 February, 2014, avaiable  
a itp: /yawstheguaréian.comiawi2015/eb/04britsh-cour o-ule-on-deat  
  
‘Sentences foro tinidad-murderers (last viewed on 20.08.2015).  
  
£8 Statement by the Chairperson ofthe Working Group on Death penalty of the African  
‘Commission on Human and Peoples’ Rights on World Day against the Death Penalty,  
  
avaiable at: p/www achpr orgpress/2014/101¢227/ (last viewed on 20.08.2015).  
  
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Page 71:  
while in others, notably South Africa, the courts have  
taken the lead.  
  
3.9.18 Article 5(3) of the African Charter on the  
Rights and Welfare of the Child states, “Death sentence  
shall not be pronounced for crimes committed by  
children”. In 2008, in its ‘Resolution calling on State  
Parties to observe the moratorium on the death penalty’,  
the African Commission on Human and Peoples’ Rights  
urged “State Parties that still retain the death penalty to  
observe a moratorium on the execution of death  
sentences with a view to abolishing the death  
penalty.”°" The 2014 Declaration of the Continental  
Conference on the Abolition of the Death Penalty in  
Africa recognized the trend towards abolition,2°\* and  
asked countries to support the Additional Protocol to  
the African Charter on Human and Peoples’ Rights on  
the Abolition of the Death Penalty in Africa,  
  
3.9.19 For example, Kenya retains the death  
penalty for multiple offences, including murder, armed  
robbery and treason. The last known execution in  
Kenya, however, took place in 1987, and the country is  
regarded as abolitionist de facto. In the case of Mutiso v.  
Republic (2010), the Court of Appeal at Mombasa struck  
down the mandatory death penalty for murder, holding  
that the penalty was in violation of the right to life, and  
amounts to inhuman treatment; and that keeping a  
person on death row for more than three years would be  
unconstitutional. It also suggested that its reasoning  
would apply to other offences having a mandatory death  
sentence.\* However, in the case of Joseph Njuguna  
Mwaura v Republic (2013), the Court of Appeal at  
Nairobi upheld the death penalty for armed robbery. It  
  
£7 Resolution caling on State Parties to observe the moratorium on the death penalty,  
ACHPRYRes. 136 008%) 08, ‘avaiable Bi  
hitpzold.achprorglenglshiesoktionsresoluiont36.ensnim (last viewed on  
200082018).  
  
5 Para 4, for example, states: “Deeply appreciates the growing number of African  
States. that have abolished the Death Penalty’, Declaration of the Continental  
Conference on the Aboltion of the Death Penalty in Afica, avaiable at  
hip aehp. org new2014/0714750 (last viewed on 20.08.2015).  
  
ew "See The Death Penalty Project, Kenya, avalable at:  
nip deathpenalyprojectorgiuhere-we-operatelarcalkenya/ (last Vewed on  
20.08.2015),  
  
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Page 72:  
said that the legislature had to decide whether the  
mandatory death penalty should be retained or not. The  
conflict between these two decisions is expected to be  
resolved by the Supreme Court.2!°  
  
3.9.20 In South Africa, the death penalty was  
abolished through a decision of the Constitutional  
Court, shortly after the end of the apartheid regime.2!!  
In an early ruling in 1995, in State v. Makwanyane,?,  
the South African Constitutional Court held that the  
death penalty was unconstitutional. In doing so, the  
Court said:  
  
The rights to life and dignity are the most  
important of all human rights, and the source  
of all other personal rights in Chapter Three. By  
committing ourselves to a society founded on  
the recognition of human rights we are required  
to value these two rights above all others. And  
this must be demonstrated by the State in  
everything that it does, including the way it  
punishes criminals. This is not achieved by  
objectifying murderers and putting them to  
death to serve as an example to others in the  
expectation that they might possibly be  
deterred thereby.  
  
And that:  
  
Retribution cannot be accorded the same  
weight under our Constitution as the rights to  
life and dignity, which are the most important  
of all the rights in Chapter Three. It has not  
been shown that the death sentence would be  
materially more effective to deter or prevent  
murder than the alternative sentence of life  
imprisonment would be. Taking these factors  
  
See Death Penalty Worldwide, Kenya, available at:  
hipaa. deathpenaltywordnide orglcountry-search-post.ctmeauntry=Kenya. (last  
Viewed on 20-08-2015).  
  
21 See Howard French, South Atica's Supreme Court Abalishes Death Penalty, The  
Now York Times, 7 dU 1995, avaiable a:  
hit. nytimes. com) 1998106107) word/southaficas-supreme-cour- abolishes:  
death-penaly hm (last viewed on 20.08.2015),  
  
51995 (6) BCLR 665,  
  
Cy  
  
  
Page 73:  
into account, as well as the elements of  
arbitrariness and the possibility of error in  
enforcing the death penalty, the clear and  
convincing case that is required to justify the  
death sentence as a penalty for murder, has  
not been made out.  
  
3.9.21 At the time of this decision, public opinion in  
South Africa on the death penalty was very divided,  
with a lot of support for retaining death penalty. Crime  
was a huge problem, and during the apartheid regime,  
there had been extensive use of the death penalty.2!5  
‘The last execution was just four years before its  
abolition. In 1997, the South African Parliament  
reaffirmed the Court's decision through law.2!\*  
  
3.9.22 In Nigeria, the death penalty is mainly a  
state issue, as the country has a federal system, where  
criminal laws vary across its 36 states. Each state  
specifies crimes and punishments within its territory,  
and have laws based on both Shariah and common law  
systems. A mandatory death penalty is prescribed for a  
wide range of offences in various Nigerian states.?!5  
  
3.9.23 In 2012, the High Court of Lagos State  
declared that the mandatory death penalty was  
unconstitutional in James Ajulu & Others v. Attorney  
General of Lagos.\*® The Court held that “the  
prescription of mandatory death penalty for offences  
such as armed robbery and murder contravenes the  
right of the applicants to dignity of human person and  
their right not to be subjected to inhuman or degrading  
punishment under S.34 of the constitution of the Federal  
Republic of Nigeria, 1999."2"7 As a result of this ruling,  
  
23 ROGER HoO®, CAROLYN HOYLE, THE DEATHPENALTY:A WORLOWIDE PERSPECTE, at  
page 89 (5 ed. 2015),  
  
EW'Roger Hood and Carolyn Hoyle, Abolishing the Death Penalty Worldwide: The  
Impact of a "Now Dynamic”. Crime and Justice, Vol 38, No. 1 (2008) at page 1-63.  
22°" County profle: Nigeria, as of 19° June 2014, avalable at:  
hitpav. deathpenattyworldwide orgicountry-search-post.ctm2eauntry=Nigeria (last  
viewed on 20.08.2045).  
  
2° Suit No, IDIT6M/2008, October 2012.  
  
217 Question ofthe death penaly, Annual report ofthe United Nations High  
‘Commissioner for Human Rights and reports ofthe Office ofthe High Commissioner  
and the Secretary-General, Human Rights Council, Twenty.fourh session, UN  
General Assembly, AMACI24/8, 1 July 2013,  
  
64  
  
  
Page 74:  
the mandatory imposition of the death penalty is now  
prohibited in the state of Lagos, and the death penalty  
is now the maximum, but not the only, penalty  
possible. This holding is only enforceable in the state of  
  
Lagos.  
  
3.9.24 Four prisoners were executed in 2013 in  
Nigeria, which had otherwise not carried out an  
execution since 2006. 2! As of September 2013, the  
number of death row inmates stood at 1,233, with  
many prisoners having remained on death row for over  
10 years (according to a report by a UN Special  
Rapporteur, the average in 2006 was already 20  
years).219  
  
d. Asia and the Pacific  
  
3.9.25 About 40% of the countries in the Asia-Pacific  
are retentionists, and maintain and use the death  
penalty. China, Iran, Iraq and Saudi Arabia remain  
amongst the highest executors globally, and the past  
few years have also seen Pakistan and Indonesia  
breaking their de facto moratoriums to return to  
executions.  
  
3.9.26 A 2015 OHCHR publication analyzing trends  
in the death penalty in Southeast Asia, found that “The  
Global movement towards abolition of the death penalty  
has also been reflected in South-East Asia’.° At the  
time of the report, Brunei Darussalam, Indonesia, Laos,  
Malaysia, Myanmar, Singapore, Thailand and Viet Nam  
had not abolished the death penalty, while Cambodia,  
‘Timor-Leste and the Philippines had done so.  
  
3.9.27 Indonesia, for example, is a retentionist  
country that uses the death penalty for several crimes,  
  
5° Country profile: Nigeria, as of 19. June 2014, avallable at:  
hipaa. deathpenattyworidwide orgicountry-search-post.ctm2eauntry=Nigeria (last  
Viewed on 20.08.2015).  
  
Roser Hooo, CAROLYN HovLe, THE DEATHPENALTY: A WORLOWIDE PERSPECTHE, at  
page 204 (5% ed. 2015}.  
  
> Office of the High Commissioner for Human Rights Regional Ofice for South-East  
‘Asia “Moving Away trom the Death Penalty: Lessons in South-East Asi’, at page 19,  
‘valable a  
hitp:/bangkok.ohehe. ores: Moving?<20amay/20trom%420thet.20Death%.20Penlt  
y-English®<20for%.20Website.pat last viewed on 20.08.2015),  
  
6s  
  
  
  
Page 75:  
including drug-related offences. Earlier in 2015,  
Indonesia executed eight people by firing squad,  
including foreign nationals, for drug-related offences.  
Indonesian president Joko Widodo has defended the  
death penalty, saying “We want to send a strong  
message to drug smugglers that Indonesia is firm and  
serious in tackling the drug problem, and one of the  
consequences is execution if the court sentences them to  
death™" Indonesia had a brief unofficial moratorium on  
executions between 2008 and 2012, but has since  
resumed executions.”  
  
3.9.28 China is one of the largest executing  
countries in the world. There is very limited information  
of even how many executions take place in China, as  
they are all carried out in secret. However, estimates  
suggest that 90% of the world’s executions occur in  
Asia, and most of them occur in China,” and that  
China executes more people than all other countries  
combined.” In 2010, 68 crimes were punishable by the  
death penalty in China. A 2011 amendment reduced  
this number to 55. Hong Kong and Macau, both Special  
Administrative Regions of China, have abolished the  
death penalty. Similarly, Japan also retains the death  
penalty,” and conducts executions in secret. Families  
are usually notified after it has taken place.”  
  
3.9.29 The Philippines was one of the first countries  
in Asia to abolish capital punishment. Its 1987  
  
Talk to Al Jazeera, Joke Widodo: A strong message o drug smugglers", Al Jazeera,  
7 Mar, 2015, available a  
hp. aazeera.com/programmesitalinjazeeral201S)0joko-widodo-strong  
rmessage-drug-smugglers150905191413414.html (last viewed on 20.08.2015).  
  
22 Roctr Hoo, CAROLYN HOVLE, THE DEATHPENALTY: A WORLOWIDE PERSPECTHE, at  
page 104 (5° ed. 2015}  
  
EE Hocen Hoo, Carolyn HovLe, THE DEATHPENALTY:A WORLOWIDE PERSPECTE, at  
page 98 (5" ed. 2015),  
  
EX Congressional-Executve Commission on China, Chinese Government Considers  
  
Reducing Number of Crimes Punishable by Death, February 23, 2011. available at  
hips. cece. gov publeations|commission-analysis/chinese-government.  
Considers-reducing-number-o-crimes-punishable (last viewed on 20.08.2015).  
= hipiwarw economist com/bogstbanyan2014/0S/death-penaly-japan (ast viewed  
(99 20.08.2015)  
  
2 "Amnesty Intemational, Japan: Authorities Deceiving the Public by Resuming  
Executions, 25 sine, 2015, avaliable Es  
hips: amnesty orgleatetinews/201S106japan-authorties-decewving-  
puble-by-resuming-executions (last viewed on 20.08.2015),  
  
66  
  
  
  
Page 76:  
Constitution, promulgated after President Marcos was  
overthrown,2”” stated:  
  
Article II, Section 19(1): Excessive fines shall  
not be imposed, nor cruel, degrading or  
inhuman punishment inflicted. Neither shall  
death penalty be imposed, unless, for  
compelling reasons involving heinous crimes,  
the Congress hereafter provides for it. Any  
death penalty already imposed shall be  
reduced to reclusion perpetua [emphasis  
supplied}.22\*  
  
3.9.30 By 1994, the mood in some quarters of the  
nation had changed, and Republic Act No. 7659, also  
called ‘An Act to Impose the Death Penalty on Certain  
Heinous Crimes’, was passed. The preambie of this law  
said that “the Congress, in the justice, public order and  
the rule of law, and the need to rationalize and harmonize  
the penal sanctions for heinous crimes, finds compelling  
reasons to impose the death penalty for said crimes.”2°  
This act reintroduced the death penalty for a range of  
offences including for murder, treason, and certain  
forms of rape. Death sentences were imposed, and  
executions were resumed.  
  
3.9.31 \_ The Philippines saw intense public debate on  
the death penalty in this period. In 2000 President  
Estrada announced a moratorium on executions, which  
President Arroyo continued.° In April 2006, President  
Arroyo decided to commute all death sentences and  
block executions.\*' Later that year, a Bill abolishing the  
  
‘27 Roser Hoon, CAROLYN HOVLE, THE DEATHPENALTY: A WORLOWIDE PERSPECTHE, at  
page 100 (5\* ed. 2015}  
  
E="'The Constituion of the Republic of the Philipines, available at:  
hitp-waww.gov-phiconstiutions/1987-constitution’  
  
a NAS copy ofthe act is, available here:  
hipaa lawphine'statutesirepactsirat98ara\_7659\_1999.himi (last viewed on  
201082015)  
  
See Amnesty International, Pilppines abolish death penalty. 7 July, 2006, avalable  
at  
  
hima amnesty-org.aulnewsicomments:2412 last viewed on 20.08.2015).  
  
2" Roser Hooo, CAROLYN HOVLE, THE DEATHPENALTY: A WORLOWIDE PERSPECTHE, at  
page 101 (5\* ed. 2015}  
  
CG]  
  
  
Page 77:  
death penalty completely was passed.?? In 2007, the  
Philippines ratified the Second Optional Protocol to the  
ICCPR.  
  
3.9.32 Saudi Arabia also retains the death penalty,  
using it against foreign nationals and persons convicted  
for offences that do not meet the international law  
threshold of “most serious crimes”. Recently there has  
been an increase in the rate and number of executions,  
with over 102 persons being executed in 2015 alone.2\*  
  
3.9.33 Since its formation in 1948, Israel has been  
abolitionist for ordinary crimes. The death penalty has  
only been imposed and implemented once, in 1962,  
when Adolph Eichmann was executed. Currently, the  
following crimes can carry a death sentence: genocide;  
murder of persecuted persons committed during the  
Nazi regime; acts of treason under the military law and  
under the penal law committed in time of hostilities and  
the illegal use and carrying of arms. Further, Israeli law  
requires that the death penalty can only be imposed  
with judicial consensus, not judicial majority. In 2015,  
there were attempts to introduce a Bill that would make  
it easier to impose the death penalty on terrorists, by  
requiring only a majority and not consensus amongst  
judges in such cases. The Bill was rejected in its first  
reading.2\*\*  
  
1. South Asia  
  
3.9.34 In South Asia, India, Pakistan, and  
Bangladesh retain the death penalty. In December  
2014, Pakistan lifted its moratorium on executions, in  
response to a terrorist attack on a school in Peshawar.  
  
5 See Sarah Toms, Philepines stops death penally, BBC News, 24 June, 2006  
‘avaliable at hiip:/news bbe co.uk worl asia;pacticlS1 12696 stm (ast viewed oo  
20082016),  
  
5 BBC News: Middle East, Saudi Arabia execules 175 peaple ina year — Amnesty,  
‘avaliable at itp/wiw.bbe co-ukinews)woré-middle-east-24050859 (lat viewed on  
20.08.2018); Adam Withnall, Saucl Arabia executes 'a person every two days’ as rate  
lf beheadings soars under King Salman, The Independent, 28 August, 2015, avaiable  
at \_hitpiiwnew independent co.uk newsiworldmiddle-easUsaudl-arabia-executons  
‘amnesty ntemational- beheadings death-sentences-rale-under king-salman  
10470456 html (ast viewed on 20.08.2015),  
  
£2 Soe The Times of Israel, "Knesset rejects bil on death penalty for torrvists". 15 July  
207S,avallable at. itp Amesoferael comknessetrejects-bil-on-death penal  
for-errorsts! last viewed on 20.08.2015),  
  
68  
  
  
  
Page 78:  
Since then, around 200 people have been executed, and  
around 8000 people on death row remain at risk of  
execution  
  
3.9.35 \_ Maldives and Sri Lanka maintain the penalty  
in law, but are abolitionist in practice. The last Sri  
Lankan execution was in 1976; and in the Maldives in  
the 1950s. Capital punishment was introduced in Sri  
Lanka during colonial times. Sri Lanka still retains it in  
law, and sentences people to death. Death row is a  
controversial phenomenon in Sri Lanka. In 2014 alone,  
Sri Lankan courts sentenced over 61 people to death,  
including juveniles.\*°° Sri Lanka also retains the death  
penalty for drug-related crimes, which do not meet the  
threshold of “most serious crimes” in international law.  
But Sri Lanka has not carried out an execution since  
1976, and is considered abolitionist in practice. Death  
sentences are converted to terms of imprisonment. It is  
noteworthy that Sri Lanka’s moratorium has remained  
in place despite insurgency and civil war between the  
1980s and late 2000s.  
  
3.9.36 \_ Bhutan and Nepal have abolished the death  
penalty. Bhutan abolished it in 2004, and it is also  
prohibited in its 2008 Constitution. The last execution  
in Nepal was in 1979. Nepal officially abolished the  
death penalty in 1990, with its government saying “the  
punishment was considered inconsistent with its new  
‘multi-party political system.”" Since then, Nepal has  
seen a 10 year-long civil war, lasting from 1996 to 2006.  
Both sides of the civil war committing a range of human  
rights abuses, and accountability remains a central  
concern in Nepal today.  
  
3.9.37 This violence and conflict ended with the  
signing of the 2006 Comprehensive Peace Accord  
between the Government of Nepal and the Communist  
Party of Nepal (Maoist). Despite the scale of the violence  
  
1° See BBO News: Asia, Pakistan executes Shafgat Hussain despite appeals, BBC  
Nows, 4 August, 2015, avalable at hip www. bbc. cominewsiword-asia-39767835,  
(last viewed on 20.08.2015)  
  
°° Amnesty Intemational, Death Sentences and Executions in 2014, ACT 50/001/2015  
2 LATimes, "Nepars New Leaders Abolish Death Penalty’, 10 July 1990, avaiable  
‘at htplartces latimes.com1990-07-30inewsimn-790\_1\_death-sentence  
  
Cy  
  
  
Page 79:  
and atrocities, clause 7.2.1 of the Accord clearly said  
that, “Both sides respect and protect the fundamental  
right to life of any individual. No individual shall be  
deprived of this fundamental right and no law that  
provides capital punishment shall be enacted.”\* Article  
12 of Nepal’s Interim Constitution, which came into  
force after the Comprehensive Peace Accord was signed,  
states:239  
  
Every person shall have the right to live with  
dignity, and no law shall be made which  
provides for capital punishment.  
  
3.9.38 The prohibition against capital punishment  
has also been retained in Nepal’s current draft  
constitution, which is being debated in the Constituent  
Assembly.  
  
C. Conclusion  
  
3.10.1 One hundred and forty countries today have  
abolished the death penalty in law or practice. This  
trend towards abolition is evident in the developments  
in international law, which have limited the scope of the  
death penalty by restricting the nature of crimes for  
which it can be implemented, limiting the manner in  
which it can be carried out, and introducing procedural  
safe guards. Recent political commitments on the  
international stage, such as growing support for the UN  
General Assembly resolutions on a moratorium on  
executions, reaffirm this trend.  
  
3.10.2 This chapter demonstrates that there is no  
evidence of a link between fighting insurgency, terror or  
violent crime, and the need for the death penalty.  
Several countries have abolished the death penalty, or  
maintained moratoriums on executions, despite facing  
  
3° Unoticial Translation of the Comprehensive Peace Agreement concluded between  
the Government of Nepal and the Communist Party of Nepal (Maoist), 21 Novem  
2006, ‘pvaiable| 2  
hip. usip orpsitesidefaubtlesfile/resourceslcolectonsipeace\_agreementsine  
pal cpa\_20061121\_en pdt (ast viewed on 20.08.2018).  
  
& "See Inlem Constiution of Nepal, 2007, available at  
hip wordstatesmen.orgiNepal Inlerm\_Consttuion2007.pdt (ast viewed on  
20.08.2015),  
  
70  
  
  
Page 80:  
civil wars, threats of insurgency or terrorist attacks. For  
example, Nepal officially abolished the death penalty in  
1990 and did not re-introduce it even in the aftermath  
of the civil war; Sri Lanka, despite a long civil war, has  
maintained a moratorium on the penalty; and Israel has  
only executed once since its formation. Most European  
countries remain abolitionist despite facing terrorism  
within their national boundaries, e.g., the UK, France,  
and Spain. In fact, it is relevant to note that the UK  
abolished the death penalty at a time when the Irish  
Republican Army, a revolutionary military organisation,  
was particularly active in the country. The same can be  
seen for fighting crime. The Philippines faces a severe  
problem of drug trafficking, but has abolished the death  
penalty. South Africa abolished the death penalty at a  
time when crime rates in the country were very high.  
  
3.10.3 A country’s decision to abolish or retain the  
death penalty is not necessarily linked to its socio-  
economic or development profile; rather, political will  
and leadership are key. Several developing countries do  
not use the death penalty. Nepal, Rwanda, Senegal,  
Solomon Islands, Djibouti, Togo, Haiti, and Guinea-  
Bissau are all examples of countries ranked under “Low  
Human Development” in the UNDP Human Development  
Index (that is, considered less developed than India),  
which have abolished the death penalty.  
  
3.10.4 State practice regarding the death penalty  
also demonstrates that the road to abolition is not  
always a function of public opinion. Political leadership  
has been key to this process. Many states have  
abolished the death penalty at a time when public  
opinion may not have necessarily supported this  
position. Indeed, public opinion in many countries has  
only gradually reversed over time, changing with  
subsequent generations, suggesting that it takes time  
for populations to stop thinking of the penalty as  
“useful,” or realise that it has no linkages with levels of  
homicide. For example, in France, public opinion  
  
3 See Human Development Index and its components, avaliable at:  
niipz?nee undp orgenicontenttabe-1-human development index-and-t  
components} (ast viewed on 20.08.2018).  
  
n  
  
  
Page 81:  
continued to support the death penalty for several years  
after it was abolished, and it was about two decades  
after the abolition of the law that opinion began to  
change. Similarly, in South Africa, a Constitutional  
Court decision found the death penalty to be  
unconstitutional at a time when the public supported it,  
and the decision of the Court was supported by the  
legislature. The passage of time has proven these to be  
wise courses of action. These countries remain  
abolitionist even today, and have not felt the need to  
doubt or question their decisions. They have relied on  
different methods to control crime and sanction  
individuals. In the UK and France, the political parties  
who abolished the death penalty in the face of contrary  
public opinion were in fact re-elected.241  
  
3.10.5 ‘The situation today can be contrasted  
with the global status of the death penalty in 1979 -  
1980, at the time of the Supreme Court's decision in  
Bachan Singh. The Court had noted that only 18 states  
had abolished the death penalty for all offences, and 8  
more had only retained it for “specific offences  
committed in time of war.” The Court cited Saudi Arabia,  
the United States, Israel, China, Argentina, Belgium,  
France, Japan, Greece, Turkey, Malaysia, Singapore  
and the USSR (Russia) as examples.?"? Several of these  
countries are abolitionist in law or practice today,  
including Belgium, France, Greece, and Turkey. Others  
only retain it for exceptional crimes, such as Argentina  
and Israel.  
  
3.10.6 There is a clear trend towards abolition in  
international law and state practice across the globe.  
International legal norms have evolved to restrict the  
lawful use of capital punishment in a very narrow  
variety of cases, and a very limited manner. India  
  
jp their article, Hood and Hoyle reer toa study on death penalty and public opinion,  
which found thai each year of abolition "lowered the odds that an inlvidual would  
Suppor the death penal by 46 per cant, inciting that aboltion led by strong politcal  
leadership could sel lead to a change in puble opinion. Hoyle and Hood, Deterrence  
and Puble Opinion in Moving Away trom the Death Penaly: Arguments, Trends and  
Perspectives (United Natone, 2014), avalable at  
hipaa. chor Lists MeetingsNV/Attachments/52/Moving- Away: rom-the  
Death-Penaltypat (ast viewed on 20.08.2015).  
  
Bachan Singh vs late of Punjab, (1982) 8 SCC 26 at para 128 and 129.  
  
n  
  
  
  
Page 82:  
continues to sentence individuals to death and execute  
them, and has also opposed all five General Assembly  
resolutions on a moratorium. In doing so, India keeps  
company with a minority of countries who retain the  
death penalty, and an even smaller number who  
actually carry out executions, a list that includes China,  
Iran, Iraq and Saudi Arabia.  
  
B  
  
  
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Cuaprer IV  
  
PENOLOGICAL JUSTIFICATIONS FOR THE DEATH  
PENALTY  
  
A. Scope of Consideration  
  
4.1.1 The Supreme Court of India in Shankar  
Kisanrao Khade v. State of Maharashtra, (‘Khade’)  
ruled that “[ijt is imperative...that courts lay down a  
Jurisprudential basis for awarding the death penalty and  
when the alternative is unquestionably foreclosed.”\*\*\* In  
this context, the Court asked the Law Commission to  
“resolve the issue by examining whether death penalty  
is @ deterrent punishment or is retributive justice or  
serves an incapacitative goal.”\*\*\* In this Chapter, the  
Report examines whether there are any penological  
purposes for imposing the death penalty. The report  
analyses the theories of deterrence, incapacitation and  
retribution. Proportionality and rehabilitation as  
theories of punishment are also briefly examined, since  
these theories have been used by the Supreme Court in  
its death penalty adjudication.  
  
4.1.2 At this juncture, it is incumbent on this  
Commission to emphasize that the abolition of the  
death penalty does not entail the release of the offender  
into society without any punishment whatsoever. It  
must also be noted that the alternative to the death  
penalty is life imprisonment, and this is often missed in  
debates surrounding the death penalty.2\*° What must  
be shown to merit the retention of the death penalty, is  
that the marginal benefits offered by the death penalty  
i.e. benefits not offered by life imprisonment, are high  
enough to merit the taking of a life.2\*” This principle was  
  
26 (2018) 5 SOC 546.  
24 Shankar Kisanrao Khade v. State of Maharashtra (2012) 5 SCC 546, a para 148,  
3 (2013) 5 SCC 546, al page 614  
  
38 See H.A, Bedau, Deterrence and the Death Penalty: A Reconsideration, 61 Journal  
of Criminal Law, Ciminology, and Potce Science 539, 542 (1970) Fichard Lemper,  
Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital  
Punishment, 79 Michigan Law Review 1177, 1192 (1981).  
  
25°See H.A. Bedau, Deterrence and the Death Penalty: Reconsideration, 61 Journal  
(of Criminal Law, Chminology, and Potce Science 539, 542 (1970); Fichard Lemper,  
  
1”  
  
  
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laid down by the Supreme Court in Santosh Kumar  
Bariyar v. State of Maharashtra,2\*\* (Bariyar) where the  
Court stated:  
  
During the sentencing process, the sentencing court  
or the appellate court for that matter, has to reach  
to a finding of a rational and objective connection  
between capital punishment and the purpose for  
which it is prescribed. In sentencing terms ‘special  
reasons’ as envisaged under Section 354(3) Code of  
Criminal Procedure have to satisfy the comparative  
utility which capital sentence would serve over life  
imprisonment in the particular case. The question  
whether the punishment granted impairs the right  
to life under Article 21 as little as possible.2\*?  
  
B. Approach of the 35% Report of Law  
Commission  
  
4.2.1 In recommending that the death penalty be  
retained, the 35% Report of the Law Commission opined  
that the following purposes were served by the death  
penalty:  
  
(a) Deterrence- The 35t Report stated that deterrence  
is the most important object not only of capital  
punishment, but of punishment in general.  
  
(b)Retribution- Retribution was also seen as an  
important justification for capital punishment by  
the 35" Report. It was stated that retribution  
should not be understood as an “eye for an eye,”  
but in its refined form as public denunciation of  
crime."  
  
()Incapacitation- The 35% Report stated that there  
are a category of individuals who are “cruel and  
wicked,” and are not capable of reform. Citing Sir  
James Fitzjames Stephen, the Report said that  
  
Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital  
Punishment, 79 Michigan Law Review 1177, 1792 (198%).  
  
28 (2008) 6 SCC 498.  
  
2 Sanlosh Bariyar . Stato of Maharashtra, (2009) 6 SCC 498, at para 145,  
  
2 Sanlosh Bariyarv. State of Maharastra, (2009) 6 SCC 498.  
  
25: Law Commission of India, 35 Repor, 1967, Ministry of Law, Government of Inia,  
atpara 297,  
  
8  
  
  
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“|tJo allow such persons to live would be like leaving  
wolves alive in a civilized country.” It further  
stated that if there is a danger that such a person  
might reoffend, it might be reasonable to terminate  
his life2#  
  
4.2.2 A major reason stated in the 35! Report for  
the retention of capital punishment was the unique  
condition of India, and that in light of circumstances of  
society then prevalent, it would not be prudent to  
abolish the death penalty.25+  
  
4.2.3. Each of the justifications stated by the 35t\*  
Report are dealt with in detail below.  
  
C. Deterrence  
  
4.3.1\_\_\_Deterrence aims to prevent individuals from  
offending by using the fear or threat of punishment.?5>  
‘The assumption behind deterrence theory is that all  
persons are rational individuals, and will commit a  
crime only if they perceive that the gain they will derive  
from the criminal act will be greater than the pain they  
will suffer from its penal consequences.?5° The belief is  
that the operation of deterrence is strengthened when  
the punishment is made as severe as death itself; no  
person in his/her right mind would commit an act  
which may result in the loss of one’s life, the instinct of  
self-preservation being intrinsic, biological and  
insurmountable under ordinary circumstances.57  
Often quoted in this regard is a statement of Sir James  
Fitzjames Stephen that:  
  
2 Law Commission of India, 85 Repos, 1967, Ministry of Law, Government of Inia,  
atpara 200,  
  
5: Law Commission o India, 5 Repor, 1967, Ministry of Law, Government of Inia,  
‘atpara 301  
  
£5 Law Commission of India, 35" Report, 1967, (Summary of Main Conclusions and  
Recommendations), avaiable at hitpllawcommissionofinda icin  
‘S0/Report35VoMt and@.pat (ast viewed at 26.08.2015}.  
  
£5 ANDREW ASHVIORTH, SENTENCING ANO CRIMINAL JUSTICE 75 (4 ed. 2005): Raymond  
Paternoster. How Much Do We Really Know Abou! Criminal Deterrence, 100 Journal  
‘of Criminal Law and Criminology 765,765 (2010)  
  
5 ANDREW ASHWORTH, SENTENEING AND CRIMINAL JUSTICE 71 (4% ed. 2005),  
  
257 Ernest Haag, The Uiimate Punishmert-a Defense, 99 Harvard Law Review 1662,  
1666 (1986).  
  
76  
  
  
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‘Some men, probably, abstain from murder because  
they fear that if they committed murder they would  
be hanged. Hundreds of thousands abstain from it  
because they regard it with horror. One great  
reason why they regard it with horror is that  
murderers are hanged.?5\*  
  
4.3.2 The 35" Report cited the following (amongst  
other) reasons in favour of the proposition that the  
death penalty serves a deterrent value:  
  
1. Every human being dreads death.”  
  
2. The death penalty stands on a different footing  
from imprisonment. The difference is one of  
quality, and not merely of degree.  
  
3. Experts consulted by the Commission, including  
state governments, judges, Members of  
Parliament, Members of State Legislatures, police  
officers, and advocates were of the view that “the  
deterrent object of capital punishment is achieved  
ina fair measure in India.”"  
  
4. Whether other forms of punishment possess the  
advantages of capital punishment is a matter of  
doubt.  
  
5. “Statistics of other countries are inconclusive on the  
subject. If they are not regarded as proving the  
deterrent effect, neither can they be regarded as  
conclusively disproving it.”  
  
\*S:Emest Haag, The Ultimate Punishment: A Defense, 98 Harvard Law Review 1662,  
1666 (1986)  
  
Law Commission of india, 35" Report, 1967, Ministry of Law, Government of India,  
atpara 370.  
  
2 Hood & Hoyle argue that although itis possible that some people ratrained trom  
commiting murder because of fear of execution thiss an insufficient bass to conclude  
that existence ofthe death penalty deters people from commiting murders. See: Roger  
Hood & Carolyn Hoyle, Myth of Deterrence in MOVING AWAY FAON THE DEATH PENALTY  
ARGUMENTS, TRENDS AND PEASPECTIES 67 (United Nations Commission on Human  
Fights, 2014).  
  
= Law Commission of India, 35" Repor, 1967, Ministry of Law, Government of India,  
atpara 370,  
  
2='Law Commission o India, 35 Repor, 1967, Ministry of Law, Government of Inia,  
atpara 370,  
  
n  
  
  
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6. There is a “considerable body of opinion” to state  
that death penalty acts as a deterrent.  
  
4.3.3 In Bachan Singh v. State of Punjab,2+ the  
Supreme Court observed that in most countries of the  
world, including in India, a “large segment of the  
population, including notable penologists, judges, jurists,  
legislators, and other enlightened people” still believe  
that the death penalty serves as a greater deterrent than  
life imprisonment.\*\*5 The Court noted various cases  
where it had recognized the deterrent value of the death  
penalty.26¢  
  
4.3.4 Post-Bachan Singh, the Supreme Court has  
often used deterrence as a justification for imposing the  
death penalty. For instance, while imposing the death  
sentence in Mahesh v. State of Madhya Pradesh,2\*" the  
Court noted that “/the common manj understands and  
appreciates the language of deterrence more than the  
reformative jargon.”\*° In Jashuba Bharatsinh Gohil v.  
State of Gujarat, the Court held that “protection of  
society and deterring the criminal is the avowed object of  
law.”270 There are however other cases where the Court  
has held that deterrence is not the primary justification  
for imposition of the death penalty,?”! or doubted the  
efficacy of deterrence itself.27?  
  
559 For this proposition, the Commission cites replies received tots questionnaire, as  
oll as a statement made by Sir Patrick Spens in the House of Commons, based on  
his experience in india  
  
254 (1980) 2 SCC 684  
  
28 (1980) 2 SCC 684, 713.  
  
‘2 The Cour reers to Paras Ram v. State of Punjab, (1981) 2 SCC 508, Jagmahan v  
‘Slate, AIR 1873 SC 947, ExigaAnnamma v. Stale of Andhra Pradesh AIR 1974 SC  
"799, Shiv Mohan Singh v. State AIR 1977 SC 948, Charles Sobhral v. Superintendent,  
Cenial Jai, Thar, New Delhi, 1978 AIR 1514  
  
297 (1987) 3 SCC 80.  
  
288 Mahesh v. State of MP. (1987) 3 SCC 80, 82. See also: Sevaka Perumal v. State  
fof Tamil Nadu, (1981) 3 SCC 471. 480, Ankush Marut Shinde v. State of Maharashtra,  
(2008) 6 SCC 667, 675, Mohan Anna Chavan v. State of Maharashira, (2008) 7 SCC  
‘561, 974  
  
2 (1994) 4 SCC 353.  
  
‘alashuba Bharatsinh Gohl. State of Gujarat, (1994) 4 SCO 353, 360. See also:  
Paniben v. State of Gujarat, (1992) 2 SCO 474, 483, 8. Kumar v. Inspector of Police,  
(2015) 2 SCC 346, 354, Gyasuddin Khan v. State of Bihar, (2003) 12 SCC 516, 525,  
Paras Alam v. Stale of Punjab (1981) 2 SCC 508, 508  
  
2" See: Sushil Murmuv. State of arkhand, (2004) 2 SCC 398, 343.  
  
Ravindra Trimbak Chouthmal v. State of Maharashira, (1996) 4 SCC 148, 151  
  
78  
  
  
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(i) Empirical Evidence on Deterrent Value of the  
Death Penalty  
  
4.3.5 One of the methods by which the efficacy of  
the deterrence rationale is tested, is by empirically  
establishing that the death penalty has a deterrent  
effect. After many years of research and debate among  
statisticians, practitioners, and theorists, a worldwide  
consensus has now emerged that there is no evidence  
to suggest that the death penalty has a deterrent effect  
over and above its alternative — life imprisonment.  
  
4.3.6 The debate on the efficacy of deterrence  
gained momentum with a study by Isaac Ehrlich, which  
was published in 1975, in which Ehrlich found a  
“unique deterrent effect’ of executions on murders.?”  
‘The study claimed that each execution saved up to  
“eight innocent lives’.27\* The Supreme Court of India in  
Bachan Singh cited Ehrlich’s research and gave it  
extensive value.2”> However, many flaws were  
subsequently discovered in Ehrlich’s methodology and  
assumptions. For instance, one powerful critique of  
Ehrlich’s study revealed that if data from just six years,  
namely 1963-69 was removed from the larger data set  
comprising 43 years (1920-1963), the evidence of  
deterrence disappeared completely.275  
  
4.3.7 To review Ehrlich’s study and other studies  
which linked deterrence with the death penalty, a Panel  
was set up by the National Academy of Sciences in the  
United States, chaired by (Nobel Laureate) Lawrence  
Klien. In its Report, submitted in 1978, the Panel  
concluded that “the available studies provide no useful  
evidence on the deterrent effect of capital punishment”  
and “research on the deterrent effects of capital  
  
' Isaac Ehiich, The Deterrent Etlect of Capital Punishment: A Question o Lite and  
Death, 65 Aut ECON. REV. 397 (1975).  
+ Isaac Ehirieh, The Deterrent Ellect of Capital Punishment: A Question o Lite and  
Death, 65 Ant ECON. REV. 397 (1975).  
  
Bachan Singh v Slate of Punjab (1980) 2 SCC 684, 717-718,  
Peter Passel John Taye, The DeterentEifec! of Capital Punishment: Another  
View, 67 AM. ECON. REV. 448 (1977).  
  
i)  
  
  
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sanctions is not likely to provide results that will or  
should have much influence on policy makers.”2"?  
  
4.3.8 Donohue and Wolfers provided a compelling  
critique of studies that claim that capital punishment  
has a deterrent effect.2\* They reported that the  
homicide rates in the US and Canada (culturally and  
socio-economically similar areas), had moved in “virtual  
lockstep...while approaches to the death penalty [had]  
diverged sharply since 1950.” Similarly, the movement  
in homicide rates of all the death penalty and non-death  
penalty states within the United States (between 1960  
and 2000) was also found to be virtually the same.?”?  
‘Thus, they concluded that it is very difficult to find  
evidence of deterrence in pure homicide comparisons  
over time and place.  
  
4.3.9 Donohue and Wolfers also found that “the  
existing evidence for deterrence is surprisingly fragile,  
and even small changes in specifications yield  
dramatically different results...Our estimates suggest  
not just “reasonable doubt” about whether there is  
any deterrent effect of the death penalty, but  
profound uncertainty.../Wje are pessimistic that  
existing data can resolve this uncertainty.”2\* (Emphasis  
supplied)  
  
4.3.10 In a similar, extensive review of existing  
literature, the National Research Council in the United  
  
"Lawrence A. Klein, Bran Forst & Vielor Flat, The Deterrent Etect of Capital  
Punishment: An Assessment of the Estimates, in Alced Blumlein, Jacqueline Cohen  
‘and Daniel Nagin (eds), DETERAENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF  
‘ChinaNAL SaNcTioNS ON CAIME RATES, National Aeademy of the Sciences, Washington  
D.C. (1978). See also: 1S. NAGN AND JOMN V. PEPPER (EDS, DETERRENCE AND THE  
DEATH PENALTY, COMMITTEE ON DETERRENCE AND THE DEATH PENALTY (COMATTEE ON  
Law ano Justice), NATIONAL RESEARCH COUNCIL (2012).  
  
2° John Donohue and Justin Wolfers, USES AN ABUSES Or EMPIRICAL EVIDENCE IN THE  
DEATH PENALTY DeaaTe,58 STAN. L. REV. 791 (2005), Seo also Daniel S. Nagin and  
ohn V. Pepper (eds, DETERRENCE AND TH DEATH PENALTY, Commitee on Deterrence  
‘and the Death Penalty (Commitee on Law and Justice), National Research Council  
ora},  
  
‘Palohn Donohue and Justin Wollers, Uses AND ASUSES OF EMPIRICAL EVIDENCE INTHE  
DEATH PENALTY DEBATE,5@ STAN. L. EV. 791; See also Daniel S. Nagin and John V.  
Pepper (eds). DETERRENCE AND THE DEATH PENALTY, Commitee on Deterrence andthe  
Death Penalty (Committee on Law and Justice), National Research Counc (2012).  
22° John Donahue and Justin Wolers, USES ANO ASUSES OF EMPIRICAL EVIDENCE IN THE  
DEATH PENALTY DEBATE,S@ STAN. L. REV. 797,794  
  
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States concluded in a Report published in 2012 that  
“research to date on the effect of capital punishment on  
homicide is not informative about whether capital  
punishment decreases, increases, or has no effect on  
homicide rates. Therefore, the committee recommends  
that these studies not be used to inform  
deliberations requiring judgments about the effect  
of the death penalty on homicide. \*' (Emphasis  
supplied)  
  
4.3.11 \_ The debate has thus come a full circle, with  
the conclusions reached in the first decade of the 21\*  
century being the same as the those reached by the UK  
Royal Commission on the Death Penalty in 1953, when  
it said:  
  
The general conclusion which we have  
reached is that there is no clear evidence in  
any of the figures we have examined that the  
abolition of capital punishment has led to an  
increase in the homicide rate, or that its  
reintroduction has led to a fall2\*? (Emphasis  
supplied)  
  
4.3.12 This view is also supported by the United  
Nations (‘UN), which has consistently held that there is  
no conclusive evidence on deterrence and the death  
penalty, in Resolutions on the Moratorium on the Use  
of the Death Penalty of 2008, 2010, 2013 and 2015.23  
Further, the UN, in Reports published as recently as  
2014 has noted that no evidence of deterrence can be  
presumed to exist. The UN has also noted that  
deterrence is nothing more than a “myth.”285  
  
38 NATL ACADEMY OF SCIENCES, DETERRENCE ANO DEATH PENALTY 102 (Daniel S.  
Nagin, 2012),  
  
© See Report of UK Royal Commission onthe Death Penalty, 1953  
  
2© See Rezoluians on the Moratorium on the Use ofthe Daath Penalty: Resolution  
62/149 (2008), Resolution 65206 (2010) and Resolution 67/176 (2013) and Resolution  
(69/186, (2036) is important fo noe that India's nat a signatory to these Resoltone  
2 Moving away trom the Death Penalty: Lessons trom South-East Asia, United  
Nations Human Rights Commissiont0 (2014).  
  
£5 Carolyn Hoyle and Roger Hood, The Myth of Deterence in Movi Away FROM THE  
DEATH PENALTY: ARGUMENTS, TRENDS ANO PEASPCCTWES, United Nations. Human  
Rights Otice of the High Commissioner, 74-83 2014}  
  
at  
  
  
  
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4.3.13 Further, the Constitutional Court of South  
Africa ruling on the deterrence argument, The State v.  
Makwanyane and Machunu,?\*6 ruled:  
  
It was accepted by the Attorney General that  
[deterrence] is a much disputed issue in the  
literature on the death sentence. He contended that  
itis common sense that the most feared penalty will  
provide the greatest deterrent, but accepted that  
there is no proof that the death sentence is in fact a  
greater deterrent than life imprisonment for a long  
period..."A punishment as extreme and as  
irrevocable as death cannot be predicated upon  
speculation as to what the deterrent effect might  
e287  
  
4.3.14 The Supreme Court of India in Bachan Singh,  
taking note of the statistical studies on deterrence and  
the death penalty noted: “We may add that whether or  
not death penalty in actual practice acts as a deterrent,  
cannot be statistically proved, either way, because  
statistics as to how many potential murderers were  
deterred from committing murders, but for the existence  
of capital punishment for murder, are difficult, if not  
altogether impossible, to collect. Such statistics of  
deterred potential murderers are difficult to unravel as  
they remain hidden in the innermost recesses of their  
mind.”85 Thus, it is important to emphasize, as stated  
by the Supreme Court in Bachan Singh, that sentencing  
policy should not be influenced and decided solely on  
the basis of empirical analysis, one way or the other, of  
the perceived deterrent effect of the death penalty.  
  
(ii) Assumptions of Deterrence  
  
4.3.15 For deterrence to work, it is necessary that  
certain pre-requisites be met. If any one of these pre-  
requisites do not exist, or if any of them are weakened,  
  
‘8 Gase No. CCT/3/94, Constitutional Court of The Republic Of South Attica  
  
27 The State v Makwanyane and Machunu, Case No. CCT/3I94, Constitutional Court  
cof The Republic Of South Area.  
  
5 Bachan Singh v. Stale of Punjab, (1980) 2 SCC 684, at para 101  
  
2  
  
  
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then the overall idea of deterrence fails. These pre-  
requisites can be broadly articulated as follows:  
  
(a)That potential offenders know which offences  
merit the death penalty  
  
(b)That potential offenders conduct an analysis of the  
costs and benefits before or while committing the  
crime and weigh the death penalty as a serious  
and important cost  
  
(That potential offenders view it a probable  
consequence that they will be subjected to the  
death penalty if they commit the crime  
  
()That potential offenders are risk-averse and not  
risk-seeking  
  
(e)That potential offenders give more weight to the  
costs than the benefits, and choose to not perform  
the act.  
  
4.3.16 If all the above mentioned prerequisites are  
met, then it is assumed that the potential offender will  
be deterred from offending,  
  
4.3.17 However, experts noticed two major fallacies  
in these assumptions - Knowledge Fallacies and  
Rationality Fallacies.2%°  
  
a.\_\_Knowledge Fallacies  
  
4.3.18 Knowledge fallacies refer to the idea  
that offenders do not know the penalties applicable to  
the crimes that they plan on committing. Hence, they  
do not feel deterred by a severe penalty. However,  
deterrence assumes that every individual knows the  
legal penalties applicable to him/her in case s/he  
commits a crime. There is ample evidence to show that  
both the general public and potential offenders have  
little or no knowledge of the penalties which they can be  
subjected to.?°! The idea of the knowledge fallacy is  
  
5° Paul Robinson and John Darley, Does Criminal Law Deter, 24 Oxtord Joumal of  
Legal Sues 173, 175 (2008),  
  
3° Paul Robinson and John Darley, Does Criminal Law Deter, 24 Oxtord Joumal of  
Legal Sues 173 (2004),  
  
3" David Anderson, The Deterrence Hypothesis and Picking Pockets at the Pick-  
Pockets Hanging, Amer. Law & Econ. Rev. 295 (2002)  
  
Ey  
  
  
Page 93:  
aptly summed up by King, when he says: As put aptly  
by King, “About-to-be lawbreakers don’t look up  
penalties in the law books; they plan, if at all on how to  
avoid being caught.”2°  
  
b.\_\_ Rationality Fallacies  
  
4.3.19 A major assumption of deterrence  
theory is that potential offenders are rational decision  
makers. However, a large number of crimes are  
committed in a fit of rage or anger, or when the offender  
is clinically depressed, or are motivated out of strong  
emotions such as revenge or paranoia.®? In  
circumstances such as these, deterrence is unlikely to  
operate since the actor is not likely to give due weight,  
or even a cursory consideration to what penalties might  
be imposed on him/her subsequently; the focus being  
on the emotion driving his/her state of mind.2%  
  
4.3.20 The discussion above does not imply  
that deterrence is a myth and the criminal justice  
system could do away with all punishments entirely,  
without impacting deterrence. Indeed, as has been  
expressed by scholars, the fact that there exists a  
criminal justice system which punishes criminal  
conduct is by itself a deterrent.?”> Consequently, it is  
not necessary that punishments by themselves be  
harsh or excessive. Theorists argue that the assumption  
in criminal law that the harsher the punishment, the  
less likely it is to be committed is not true.2%  
  
(iii) The Case of Terrorism  
  
4.3.21 An important question faced by this  
Commission was whether the death penalty should be  
  
48. David Anderson, The Deterrence Hypothesis and Picking Pockets at the Pick.  
Hanging, Amer. Law & Econ. Rev. 295, 306 (2002).  
  
Robinson and John Darley. Does Criminal Law Deter, 24 Oxtord Joumal of  
Legal Sus 17, 174 (2004),  
  
£31 Paul Robinson and John Darley, Does Criminal Law Deter, 24 Oxtord Joumal of  
Legal Sues 173, 174 (2004),  
  
"Paul Robinson and John Darley, Does Criminal Law Deter, 24 Oxtord Journal of  
Legal Studies 173 (2004)  
  
5° Paul Robinson and John Darley, Does Criminal Law Deter, 24 Oxtord Joumal of  
Legal Sues 173,174 (2004),  
  
Ey  
  
  
Page 94:  
retained in the context of terrorism-related crimes, even  
if it abolished for all other offences. One of the major  
reasons for this proposition is that the death penalty  
acts as an important tool for maintaining the security  
of citizens and the integrity of the nation, by deterring  
similar future crimes. Since terrorist crimes are very  
different from ordinary crimes in terms of the motives  
applicable, deterrence assumptions need a re-look to  
ascertain whether it is desirous to perhaps retain the  
death penalty for terrorism related crimes.  
  
4.3.22 A view is taken by many that the death  
penalty is unlikely to deter terrorists, since many are on  
suicide missions (they are prepared to give up their life  
for their ‘cause),?” there are other reasons why the  
death penalty in fact might increase terrorist attacks.  
‘The death penalty is often solicited by terrorists, since  
upon execution, their political aims immediately stand  
vindicated by the theatrics associated with an  
execution.2% They not only get public attention, but  
often even gain the support of organisations and  
nations which oppose the death penalty. The  
Indonesian Bali Bomber’s reaction to news of his  
conviction and execution was beaming and with a  
“thumbs-up” as if he had just won an award.2%  
  
4.3.23 Jessica Stern, a pre-eminent expert on the  
issue of terrorism opines:  
  
57 Thomas Michael MeDonnel, The Death Penally-An Obstacle to the "War against  
Terrrism?, 37 VaNo. J TRANSNAT' L353, 80 (2004). See also Prestdent George W.  
Bush's 2002 National Securiy Strategy, released roughly one year after 9/11, stating  
that" Tradional concepts of deterrence wil not work against a terrorist enemy whose  
avowed tactics are wanton destuction and the targeting of innacents: whose so-called  
Solders seek martyrdom in dealh and whose most” potent protection is  
Slatelessness...Doterrence-the promise of massive retaliation against nations-means  
hothing against shadowy ferris! networks wifi 0 nation er eizens fo defend  
Commencement Address at the United States Miltary Academy in West Point. New  
York, 38 WeexLy COMP. PRES. DoC. 944, 945 (June 1, 2002), Bush's 2006 address  
‘also addrossed the same point the terrorist enemies we face today hide in caves and  
Shadows and emerge fo allack tree nations fram within. The ferro have no borders  
to protector capita fo defend. They cannot be detered but they willbe defeated’- See  
Commencement Address a the United States Miltary Academy in West Pont, New  
‘York, £2 WeerLy CoM, PRES, Doc. 1037, 1039 (May 27, 2006),  
  
22° Thomas Michael MeDonnel, The Death Penally~An Obstacle to the "War against  
Terrrism?, 37 VAND. J. TRANSNATL L. 353 2004, 40%  
  
2° jane Perle, Court Decides 0 Sentence Bali Bomber to Death, N.Y. TIMES, Aug  
  
8, 2003,  
  
as  
  
  
Page 95:  
One can argue about the effectiveness of the death  
penalty generally. But when it comes to terrorism,  
national security concerns should be paramount.  
The execution of terrorists, especially minor  
operatives, has effects that go beyond retribution or  
Justice. The executions play right into the hands of  
‘our adversaries. We turn criminals into martyrs,  
invite retaliatory strikes and enhance the public  
relations and fund-raising strategies of our  
enemies.30°  
  
4.3.24 Similarly, while commenting on the specific  
case of the Boston marathon Bomber, Dzhokhar  
‘Tsarnaev, Alan Dershowitz writes:  
  
Seeking the death penalty against Tsarnaev, and  
imposing it if he were to be convicted, would turn  
him into a martyr. His face would appear on  
recruiting posters for suicide bombers. The  
countdown toward his execution might well incite  
other acts of terrorism. Those seeking paradise  
through martyrdom would see him as a role  
‘model...39  
  
4.3.25 It is useful also to refer to Jeremy Bentham,  
the pioneer of the deterrence theory. In the context of  
“rebels” or in cases of “rebellion” (which can be roughly  
equated to anti-nationals or terrorists), Bentham said  
that executing them would not deter other potential  
rebels, but in fact make the executed person a martyr,  
whose death would inspire, and not deter potential  
followers.302  
  
4.3.26 Although there is no valid penological  
justification for treating terrorism differently from other  
crimes, concern is often raised that abolition of death  
penalty for terrorism related offences will affect national  
security. There is a sharp division among law-makers  
due to this concern. Given these concerns raised by the  
  
50° Jessica Stem, Execute Terrrits at Our Own Risk, NY Times, 28” February, 2001,  
20: lan Dershowitz, Dzhokhar Tsamaev should not face the deaih penalty, even for a  
capital erine, The Guardian, 24° Apt 2013.  
  
SHA Bedau, Bentham’ Usltaran Critique of the Death Penaly, 74 Joumal of  
(Criminal Law and Criminology 1033, 1046 (1983),  
  
36  
  
  
Page 96:  
law makers, the Commission does not see any reason  
to wait any longer to take the first step towards abolition  
of the death penalty for all offences other than terrorism  
related offences.  
  
D. Incapacitation  
  
4.4.1 The theory of incapacitation advocates  
dealing with offenders in such a way that they are not  
in a position to re-offend.\*0 It is generally used as a  
justification to impose longer sentences on repeat  
offenders,3\* “dangerous” criminals and “career  
criminals.”2°5 Capital punishment is the most extreme  
form of incapacitation, since it implies taking the life of  
the offender to ensure that he/she does not reoffend. A  
person is sentenced to death using the incapacitation  
rationale if it is determined that his/her existence  
causes an unreasonable threat to society.20°  
  
4.4.2 Tobe able to use the incapacitation rationale,  
it is essential that the sentencing court make an  
assessment of “dangerousness” of the offender and the  
possibility that the person is likely to reoffend.  
  
4.4.3. The primary objection to executing a person  
on grounds of incapacitation is the predictability  
problem. Theorists have argued that it is virtually  
impossible to be able to predict if the convicted offender  
is likely to reoffend.\*°” Any exercise to predict recidivism  
will always be over-inclusive and “identify false  
positives."895 Such act of prediction is itself an arbitrary  
exercise, which adds to the already existing  
  
59° ANOREW ASHWORTH, SENTENCING AND CRMINAL JUSTICE 80 (8 ed, 2005)  
  
‘e1See: Christy A. Visher, Incapactation and Crime Controt Does a “Lock Em Up"  
‘Stratagy Reduce Crime? & Just. Q. 513, 539 (1987)  
  
50° Christy A. Visher,Incapacitaton and Crime Contr: Does a "Lock ‘Em Up" Strategy  
Reduce Crime? 4 JUST. 513,529 (1987).  
  
298 Harvey Dll, Jr, COMMENTARY. Constitutional Law: The Death Penally:A Critique  
ofthe Philosophical Bases Held to Saisly the Eight Amendment Flequiremants fr Is  
‘ustticaion, 34 OKcA.L. Rev 557, 603.  
  
567 Sara F. Werbott, Halting the Sudden Descent into Brutally How Kennedy v.  
Louisiana Presents a More Restrained Death Penaly Jursprudonce, 14 Lewis & CLARK  
Lev. 1601, 1639 (2010).  
  
23: James R Acker, Now York's Proposed Death Penalty Legislation: Constitutional  
‘and Policy Perspectives, 54 As. L Rev. 515, 572 (1989-1990),  
  
a  
  
  
Page 97:  
arbitrariness in imposition of the death penalty.s%  
Further, incapacitation involves punishing a person  
severely for something that s/he has not done yet - that  
is, for something that the person may or may not do in  
the future, an outcome which is not just." Long  
perfectly sums up the issue of ‘risk of future  
dangerousness” by not executing a “dangerous” person  
when he states - “such may simply be an inevitable risk  
of living in a free, albeit imperfect, democratic society.”\*"  
  
4.4.4 Another argument that can be made against  
executing an individual on grounds of incapacitation is  
that it completely negates the possibility of reform,  
which remains an important penological consideration  
in India.”  
  
4.5.5 \_ In the cases of persons already incarcerated,  
the possibility of reoffending is confined to situations  
where convicts kill other convicts, or jail officials when  
in prison." In the Indian context, the mandatory death  
penalty that existed for such a situation was held  
unconstitutional in Mithu v. State of Punjab.\*%\* The  
sentencing court will have to apply the ‘rarest of rare  
case’ analysis to determine whether death is the  
appropriate sentence. A person, even in such a  
situation, cannot be executed in India on grounds only  
of incapacitation.  
  
4.4.6 The death penalty is an excessive  
punishment when used for the purposes of  
incapacitation, "5 since the incapacitation function can  
be achieved by life imprisonment, as much as  
  
5° Donald L. Beschle, What's Guit (or Deterrence) Got To Do With t? The Death  
Penalty, Ritual, and Mimatc Violance,a8 WM. & Marv L. REY. 487, 502 (1996)  
  
10094 Okla, Rev. 567, 610  
  
29162 UMKG. L. Rev. 107, 170 (1999)  
  
212 See patton Reformation below.  
  
1 Donald L. Beschle, What's Guit (or Deterrence) Got To Do With t? The Death  
Penalty, Ritual, and Mimetc Violence, 38 Wr. & Mart L. Rev. 487,502 (1996)  
294(1983) 2 SCC 277. The Supreme Cour also notes states in the United States with  
respect fo convicted murder convitsreotfending, It observed hat akhough there f= no  
‘study inthis regard in Inca, tis far fo assume tha he inodence of murders by people  
Convicted of murder was minimal See: (1983) 2 SCC 277, 292,  
  
S14 Lewis & Clark L Rev. 1601, 1699 (2070),  
  
a8  
  
  
  
Page 98:  
execution.s1@ The convicted offender, being in custody,  
does not get the opportunity to reoffend.\*”” Thus, it is  
clear that incapacitation cannot be used as a  
justification for the death penalty, but may be a valid  
justification for life imprisonment.  
  
E. Retribution  
  
4.7.1 The theory of retribution focuses on the  
offence committed and just treatment of the individual,  
rather than prevention of crime.\*'\* It asserts that blame  
is made effective through punishing persons who  
deserve unpleasant consequences on account of some  
wrongful act that they intentionally and willingly did.3'°  
  
4.7.2 There are two accounts of retribution — one  
considers retribution as revenge. The other states that  
retribution does not demand committing an equivalent  
act on the offender, as is suggested by the “eye for an  
eye” philosophy (“mirror punishment’). It rather  
advocates a measured and appropriate level of  
punishment for the offender's conduct.20  
  
(i) Retribution as Revenge  
  
4.7.3. The conception of retribution as revenge is  
based on the understanding that the “undeserved evil”  
inflicted by the criminal on the victim should be  
matched by a similar amount of punishment to  
him/her.%?" As stated earlier, the oft-quoted adage — “an  
eye for an eye,” is an articulation of this approach.”  
  
4.7.4 The Supreme Court has disapproved the  
revenge based approach of retribution. In Deena v.  
  
26 38 Wal & MARY L. REV. 487, 502 (1996). This was also aticulated by the United  
‘States Supreme Court in Furman v. Georgia, 408 U.S. 238, 311 (White, J. concurring).  
87 See: Furman v. Georgia, 408 U.S. 238 (1972).  
  
28 RL Wassrstrom, Some Problems with Theories of Punishment, in JUSTICE AND  
PUNISHMENT 189 (J. Cederblom & W. Blizek eds, 1977)  
  
3? Mary Ellen Gale, Retribution, Punishment, and Death, 18 UC. Davis L Rev. 973,  
999-1000 (1885)  
  
529 SUSAN EASTON AND CHRISTINE PIPER, SENTENCING AND PUNISINENT: THE QUEST FOR  
susmice 57 2012)  
  
520 uataaueL KANT, THE METAPHYSICS OF MonALs 141-42 (MJ. Grogortans., 1986):  
LJEFFRIEG, MURPHY, KANT : THE PHLOSOPHY OF GT 124 (1994),  
  
522 SusaN EASTON AND CHRISTINE PIPER, SENTENCING AND PUNSSHVENT: THE QUEST FOR  
susmice 87 (2012)  
  
a9  
  
  
Page 99:  
Union of India,325 the Court ruled that “[tjhe retribution  
involved in the theory ‘tooth for tooth’ and ‘an eye for an  
eye’ has no place in the scheme of civilized  
Jurisprudence.”\*\*\* More recently, in Shatrughan  
Chauhan v. Union of India,2the Supreme Court ruled  
that “retribution has no Constitutional value”s2sin  
India. It held that “an accused has a de-facto protection  
under the Constitution and it is the Court's duty to shield  
and protect the same.”\*" It further held that such  
protection extends to “every convict including death  
convicts.”\*% Thus, the Supreme Court has now clearly  
recognized that retribution in the form of revenge as a  
justification for punishment does not pass  
Constitutional muster. The Court has also reiterated  
that “the retributive theory has had its day and is no  
longer valid.”:2°  
  
4.7.5 In Bachan Singh,3° the Court observed that  
“retribution in the sense of society’s reprobation for the  
worst of crimes is not an altogether outmoded  
concept.”\*\*! This understanding views retribution not as,  
“revenge,” but as condemnation of the offender's  
actions. Thus, Bachan Singh did not advocate the “eye  
for an eye” approach.  
  
(i) Retribution as Punishment Deserved by the  
Offender  
  
4.7.6 The concept of “desert” provides the modern  
understanding and the basis of the retributive theory.  
It prescribes that a wrong action should be met by a  
sanction appropriate to the action, and deserved by the  
offender.\*\*\* It states that retribution being equated with  
  
5% (1989) 4 SOC 648.  
s2t Deena v. Union af nai, (1983) 4 SCC 645, al para 10.  
  
5 (2014) 9SCC 1  
  
sv» Shatrughan Chauhan v. Union of nda (2014) 3 SCC 1. at para 245.  
  
287 Shatrughan Chauhan v. Union of India 2014) 3 SCC 1. at para 245,  
  
2 Shatrughan Chauhan v. Union of Ida (2048) 3 SCC 1. at para 245,  
  
2 Rajendra Prasad v. Stale of U.P., (1973) 3 SCC 646, at para 88,  
  
1 Bachan Singh v. Stale of Punab, (1980) 2 SCC 6a  
  
2: Bachan Singh v State of Purab, (1980) 2 SCC 684, at para 102.  
  
8 Mary Ellen Gale, Retrbution, Punishment, and Death, 18 UC. Davis L Rev. 973,  
1003 (1985).  
  
59 SUSAN EASTON AND CHRISTINE PIPER, SENTENCING AND PUNISHVENT: THE QUEST FOR  
susmice 87 (2012)  
  
90  
  
  
Page 100:  
revenge is a myth, since conflating retribution and  
revenge does not incorporate “the complexity of modern  
criminal law, with its focus on degrees of intent and on  
matters of mitigation and excuse.”\*°5  
  
4.7.7 In Dhananjoy Chatterjee v. State of West  
Bengal,3°> the Supreme Court ruied that “imposition of  
appropriate punishment is the manner in which the  
courts respond to the society’s cry for justice against the  
criminals.”"° Subsequently, ‘Society’s cry for justice’  
has been regularly used by the Supreme Court as a  
justification to impose the death sentence.\*\*  
  
4.7.8 The justification of punishment using  
‘society’s cry for justice’ does not fit into the conception  
of retribution as punishment deserved by the offender,  
since it fails to focus on whether the convict deserves  
the punishment, including the death sentence. Most  
cases that have relied on ‘society’s cry for justice’ as a  
sentencing justification have generally not analysed  
aggravating and mitigating factors in each individual  
case,38° a step that is required for assessing whether the  
sentence is deserved.5#°  
  
4.7.9 Further, retribution does not provide any  
guidance in relation to the question of “how much” to  
punish, or how approximate the punishment should  
be.\*\*! Retributive justice is said to have calibration  
  
5 Gerard V. Bradley, Retribution: The Central Aim of Punishment, 27 Harv. JL & Pu.  
Pty 19,21 (2003),  
  
°8° HLA, HART, PUNISHMENT AND RESPONSIBILITY 164-165 (1968); Mary Ellen Gale,  
Retnbition, Punishment. and Death, 18 U.C. Davi L. Rev. 973, 1013 (1985),  
  
298 (1994) 2 SCC 220.  
  
+97 Dhananjoy Chatterjee v. State of West Bengal, (1994) 2 SOC 220, at para 15,  
  
5°» Dhananjoy Chatters v. State of West Bengal, 1994) 2 SCC 220: Jamealv. State  
of UP. (2010) 12 SCC 832: Slate of MP. v. Basod, (2009) 12 SCC 318: Bantu v  
‘Slate of UP, (2008) 11 SCC 113; Mohan Anna Chavan v. Slate of Maharashtra,  
(2008) 7 SCC 561; State of Madhya Pradesh v. Saleem, (2005) 5 SCC 554; State of  
UP. v. Se Krishan, (2005) 10 SCC 420; Jai Kumar v. State of Madhya Pradesh, (1999)  
5 'SCC 1; Rav v. Sito of Rajasthan, (1996) 2 SCC 175; Bheru Singh v. Sato of  
Rajasthan, (1994) 2 SCC 467: Stale of Madhya Pradesh v. Sheikh Shahid, (2008) 12  
‘SCC 715; Stale of UP. v. Saitan @ Satyendra, (2008) 4 SCC 736; State of Madhya  
Pradesh v. Santosh Kumar, (2006) 6 SCC 1; Shailesh Jasvantbhal v. State of Gujarat,  
(2006) 2 Sco 358.  
  
29 Om Prakash v. Stato of Haryana, (1999) 3 SCC 19: Jameel . Stato of UP. 2010)  
12SCC 532: State of MP. v.Basod, (2008) 12 SOC 318; Bantu. State of UP. (2008)  
31 SCC.113: Mohan Anna Ghavan v. State of Maharashtra, (2008) 7 SCC 561  
  
3 Om Prakash v. State of Haryana, (1989) SCC 19, a para 7  
  
5 Claie Finkelstein, Death and Renbution, 21 Cri. Just. Ethics 12,19 (2002)  
  
Bt  
  
  
Page 101:  
problems, wherein one cannot know where to stop while  
sliding “a scale of punishments past a scale of  
crimes’.s? Theorists say that the use of capital  
punishment cannot be justified in a retributive system  
of criminal justice.s\*  
  
F. Proportionality  
  
4.8.1 Censuring the offender and communicating  
society’s disapproval of his/her actions is a primary goal  
of the theory of proportionality.\*\*\* The society’s censure  
of the offender's actions is communicated to him/her by  
imposing a proportionate sentence - one that is not  
greater than what s/he deserves.“ Proportionality  
through its communicative function aims to make the  
offender repent his/her actions.“® This is done by  
providing the offender the means to express remorse.  
Further, a core requirement of the theory of  
proportionality is that the punishment imposed should  
not be “out of proportion to the gravity of the crime  
involved.”5\*7 Section 143(1) of the [U.K.] Criminal  
Justice Act, 2003 provides an illustration of this  
principle. It states that “In considering the seriousness  
of any offence, the court must consider the offender's  
culpability in committing the offence and any harm which  
the offence caused, was intended to cause or might  
foreseeably have caused.”  
  
4.8.2 The severity of the sentence is an important  
consideration for the theory of proportionality, since a  
disproportionate or severe punishment overpowers the  
element of censure.s#\* Consequently, the theory favours  
  
3 Andrew Oldenauist, Retibution and the Death Penalty, 29 U. Dayton L. Rev. 295,  
388 2008)  
  
56 MATNEW H. KRAMER, THE ETHICS OF CAPITAL PUNISHMENT: A PHILOSOPHICAL  
INVESTIGATION OF EVIL AND ITS CONSEQUENCES DEATH FOR RETAIBUTION 77 (2011)  
  
1 BF STFAWSON, FREEDOM AND RESENTMENT AND OTHER ESSAYS 1 (1974); Andrew  
von Hirsch, Proportional in the Philosaphy of Punishment: From “Why Punish?” to  
“How Much?” 28 ter L- Rev, $89, 561 (1991),  
  
345 ANOREW ASHWORTH, SENTENCING AND CRIMANAL JUSTICE 8A (2005).  
  
48 ANDREW ASHWORTH, SENTENCING AND CAININAL JUSTICE 84 (2005). See: Andrew von  
Hirsch, Proportional i the Philosophy of Punishment, 16 Crime & Justice 87 (1992):  
RA DUFF. TRIALS AND PUNISHUENTS (1980).  
  
57 ANOREW ASHWORTH, SENTENCING AND CRIANAL JUSTICE A (2005).  
  
se ANDREW YON HIRSCH ANG. ANDREW ASHWORTH, PROPORTIONATE. SENTENCING:  
EXPLOANG THE PRINCIPLES 143 (2005).  
  
2  
  
  
Page 102:  
lower levels of incarceration and a pro rata reduction of  
existing penalty scales across \_ jurisdictions.”  
Proportionality respects rule of law values, and places  
limits on the sentencing power.\*°  
  
4.8.3 In some cases, the Supreme Court has used  
proportionality as a penological goal.s5' Ruling that  
“the criminal law adheres in general to the principle of  
proportionality in prescribing liability according to the  
culpability of each kind of criminal conduct,”\*\*? the Court  
has used proportionality as a justification to impose the  
death penalty.s53 The Court has also read into the  
principle of proportionality, the requirement of taking  
societal considerations into account. It observed: “the  
doctrine of proportionality has a valuable application to  
the sentencing policy under the Indian criminal  
jurisprudence...[Tjhe court will not only have to examine  
what is just but also as to what the accused deserves  
keeping in view the impact on the society at large.” It  
has also stated that “imposition of sentence without  
considering its effect on the social order in many cases  
may be in reality a futile exercise.”355  
  
4.8.4 A three-judge Bench of the Supreme Court  
has recently provided guidance on how the doctrine of  
proportionality can be applied in the death penalty  
context. The Court hel  
  
50 SUSAN EASTON AND CHRISTINE PIPER, SENTENCING AND PUNISINENT: THE QUEST FOR  
\JusTice 6 (2012); Malcolm Thorburn, Proportionate Sentencing and the Rule of Law,  
Jn PrcPLES AND VALUES IN CRIMINAL LAW AND CRANAL JUSTICE: ESSAYS IN HONOUR  
(OF ANDREW AsiavoATH 268 (Lucia Zedner and Juan V- Roberts eds. 2012) Barry  
Pollack, Deserts and Death: Limits an Maximum Punishment, 44 Rutgers L. Rev. 985  
(1991-1982),  
  
5 ANDREW ASHWORTH, SENTENCING AND CRIINAL JUSTICE 84 (2008),  
  
25:Sge Shiva v. Pegistrar General, High Cour of Karnataka, (2007) 4 SCC 713: Lehna  
¥, State of Haryana, (2002) 3 SCC 76; Stale of UP. v. Satish, (2005) 2 SCC 194  
onan Anna Chavan v. State of Maharashtra, (2008) 7 SCC S61  
  
252 Shivu v. Registrar General, High Cour of Karnataka, (2007) 4 SCC 713, at para 25:  
Lena v. Site of Haryana, (2002) 3 SCC 76, at para 27: Stato of U.P. v. Salish, (2005)  
SCC 114, al para 29; Mohan Anna Chavan v. Slate of Maharashia, (2008) 7 SCC  
‘561, at para 21; Lehna v. State of Haryana, (2002) 3 SCO 76; Slate of UP. v. Satish  
(2005) 3 SCC 114; Mohan Anna Cavan v. Stato of Maharashtra, (2008) 7 SCC 561,  
2 Shiv v. Registrar General, igh Court of Kamataka, (2007) 4 SCC 713; Lehna v  
‘State of Haryana, (2002) 3 SCC 76; State of U.P. v. Sash, (2005) 3 SCC 114; Mohan  
‘Anna Chavan v. Slate of Maharashira, (2008) 7 SCC 86%  
  
5 Balondrasingh v. Slate of Machya Pradesh, (2012) 4 SCC 288, 305 (cting  
Ramnatesh and others v. Stale Of Chhatisgarh, (2012) 4 SCO 257,287)  
  
Sankush Maruti Shinde v. Stale of Maharashtra, (2009) 6 SCC 667, at para 16.  
  
3  
  
  
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In dealing with questions of proportionality of  
sentences, capital punishment is considered  
to be different in kind and degree from  
sentence of imprisonment. The result is that  
while there are several instances when capital  
punishment has been considered to be  
disproportionate to the offence committed,  
there are very few and rare cases of sentence  
of imprisonment being held  
disproportionate.556  
  
4.8.5 An accurate understanding and application  
of the theory of proportionality can be found in Bariyar,  
in which the Court provided a framework within which  
the sentencing exercise should be undertaken in a  
death penalty case. It said that the court should first  
compare the facts of the case before it with a “pool of  
equivalently circumstanced capital defendants.”35" The  
gravity and nature of the crime, as well as the motive of  
the offender may be considered in this analysis. The  
aggravating and mitigating circumstances should then  
be identified. These should also be compared with a pool  
of comparable cases. This would ensure that the court  
considers similarly placed cases together, and the  
exercise would inform the court of how a similar case  
has been dealt with earlier. The Court opined that this  
exercise may point out excessiveness in sentencing, if  
any, and at the same time reduce arbitrariness to a  
certain extent. It also advised that the exercise proposed  
by it should definitely be undertaken if the sentencing  
court opts to impose the death penalty on the convicted  
person. Importantly, the court also held that reasoning  
is the most important element to ensure “principled  
sentencing.”55\*  
  
4.8.6 As mentioned earlier, the core focus of  
proportionality is censure. The communicative aspect of  
punishment is also an important consideration. The  
  
5 Vikram Singh v. Union of India, Criminal Appeal No. 824 of 2013 (SC), dated 21  
‘August, 2015, at para 43,  
  
5°” Saniosh Kumar Satishbhushan Baryar v. Stato of Maharashira, (2008) § SCC 498,  
atpara 131  
  
55! Santosh Kumar Satishbhushan Baryar v. Stato of Maharashtra, (2008) § SCC 498,  
  
94  
  
  
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censure and communicative aspect are better achieved  
through life imprisonment, rather than by imposing the  
death penalty on the offender. Incarceration provides  
the offender the means to express remorse and  
communicates the society’s disapproval for his/her  
actions. The death penalty, on the other hand,  
undermines the communicative aspect of the  
punishment, since the offender's life is taken away.  
Hence, from this perspective, life imprisonment serves  
the proportionality goal more adequately than the death  
penalty.  
  
4.8.7 The other communicative aspect of  
proportionality is the communication to society that the  
offender's actions are not acceptable. In this context, it  
is pertinent to note the “brutalization effect.”35 Bowers  
and Pierce argue that when killings are carried out by a  
state, it undermines the communicative aspect by  
justifying what it seeks to condemn. It also devalues life  
in the eyes of the common person which further  
‘empowers offenders.5°  
  
G. Reformation  
  
4.9.1 The theory of reformation strives to  
transform all offenders into peaceful, productive and  
capable citizens of society. Reformation assumes that  
offenders are capable of change, and once the reasons  
for the commission of the crime are removed, they can  
lead ordinary and fulfilling lives.25"  
  
4.9.2 While it is clear that when a person is  
sentenced to death, the ideal of reformation has clearly  
lost its priority in sentencing, discussions of  
reformation have often been (and indeed, are required  
to be) a part of death penalty adjudication. This is  
because reformation is a central normative commitment  
  
9 Wlam J. Bowers & Glenn L Pierce, Deterrence or Brutalization: What isthe Eifect  
of Executions?.25 Crime & Deling. 453 (1980); Joanna Shepherd, Captal  
Punishments Ditering Impacts amang States, 104 MICHIGR LAW REVIEW (2005).  
SeWalam J. Bowers & Glenn L, Plerce, Deterrence or Brutazation: What ls the Eifect  
of Executions? 26 Crime & Delin, 453 (1980). See also: HLA. HART, PUNISHAENT AND  
Resronselury, 88 (2008)  
  
55" Andrew Ashworth, Sentencing and Criminal Justice 82 (2008).  
  
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of our criminal justice system, and because only those  
offenders who are adjudged beyond reform, and proven  
to be so, through conchusive evidence adduced by the  
prosecution, can ever be sentenced to death.  
  
(i) Supreme Court on Reformation  
  
4.9.3. Even before the Supreme Court in Bachan  
Singh advocated reformation as a theory to be  
considered in death sentence adjudication, this penal  
policy was being consistently articulated by the Court,  
both in the death penalty and non-death penalty  
contexts. In Ediga Annamma v. State of Andhra  
Pradesh,3° the Court emphasized the need to adduce  
evidence regarding the “facts of a social and personal  
nature” at the sentencing stage. This was to ensure that,  
reformation was given as much importance as  
deterrence."  
  
4.9.4 Similarly, in Sunil Batra v. Delhi  
Administration\*\* the Court held that rehabilitation and  
reformation are very much a part of sentencing policy  
in our criminal justice system, and tried to align current  
prison practices with constitutional norms which  
demand the rehabilitation of prisoners. It observed that  
“[a] rehabilitation purpose is or ought to be implicit in  
every sentence of an offender unless ordered otherwise  
by the sentencing court."\*°5  
  
4.9.5 The court in Batra also referred to  
Mohammad Giasuddin v. State of A.P,\*° where it had  
held that the modern community has a primary stake  
in reformation of the offender, and the focus should be  
therapeutic rather than an “in terrorem” outlook.%?  
‘The Court observed: “The whole man is a healthy  
man and every man is born good. Criminality is a  
curable deviance... Our prisons should be correctional  
houses, not cruel iron aching the soul...We make these  
  
see (1974) 4 SOC 443  
58 See Ediga Anamma, (1974) 4 SCC 443, at para 14  
su Suni Batra v. Dal Adm, (1978) 4 SCG 494,  
  
2: See Sunil Batra, (1978) 4 SCC 494, at para 30.  
  
see (1977) 3 SCC 287.  
  
207 See Giasuddin, (1977) 3 SCC 287, at para 8  
  
96  
  
  
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persistent observations only to drive home the  
imperative of Freedom — that its deprivation, by  
the State, is validated only by a plan to make the  
sentences more worthy of that birth right.s58  
(Emphasis supplied)  
  
4.9.6 The reformation ideal has similarly been  
articulated by the Supreme Court in other cases.%®? In  
this background came Bachan Singh which  
emphatically made this reformatory aspect a part of  
death penalty adjudication while evolving the ‘rarest of  
rare case’ test.  
  
4.9.7 In Bachan Singh v. State of Punjab,” the  
Supreme Court held that rehabilitation is an express  
sentencing goal, and must never be ignored especially  
in the death penalty context. It held that the death  
penalty should not be imposed “save in the rarest of rare  
cases when the alternative option is unquestionably  
foreclosed.”\*”\(Emphasis supplied)  
  
4.9.8 The Supreme Court has again recently  
reiterated the need for the production of evidence of  
‘beyond reform’ in death penalty cases.”? Discussing  
the “rarest of rare” test as laid down in Bachan Singh,  
the court split the test into two parts; the first step  
involves deciding whether the case should belong to the  
‘rarest of rare’ category, and the second deciding  
whether the alternative option of life imprisonment will  
not suffice in the facts of the case. Commenting on the  
second step, the Court held: [Ljife imprisonment [is]  
completely futile, only when the sentencing aim of  
reformation can be said to be unachievable. Therefore,  
for satisfying the second exception to the rarest of  
rare doctrine, the court will have to provide clear  
evidence as to why the convict is not fit for any  
  
eee Giasuddin (1977) 8 SCC 287, at paras 24-25.  
  
serBishnu Deo Shaw v. State of West Bengal, (1979) 3 S.C.C 714; Maru Ram v. Union  
of india, (1981) 1 SCC 107.  
  
(1980) 2 SCC 684  
  
7achan Singh v. Siato of Punjab, (1980) 2 SCC 684, at para 208.  
  
£2 Sanlosh Kumar Satishohushan ariyarv. State of Maharashtra (2008) 6 SCC 488,  
  
”  
  
  
Page 107:  
kind of reformatory and rehabilitation scheme.37?  
(Emphasis supplied)  
  
4.9.9 Thus, in addition to adjudging a case “rarest  
ofrare,” an equally important part of imposing the death  
penalty is whether the offender is amenable to reform  
or not. Various circumstances need to be assessed while  
determining whether an offender should be sentenced  
to death. It is important to note that these are  
circumstances of both the criminal and the crime, as  
has been held by the Supreme Court.s7+  
  
4.9.10 The mandate of the Court in Bachan Singh,  
which requires the court to assess whether the offender  
is capable of reform and whether life imprisonment is  
unquestionably foreclosed, has often been ignored in  
death penalty adjudication.s’5 Evidence regarding the  
offender being ‘beyond reform’ is seldom adduced and  
considered.37  
  
4.9.11 Some critics have opined that if reformation  
is a principle of sentencing, and evidence of ‘beyond  
reform’ is to be considered, it is never possible to  
conclude that an offender is beyond reform, since there  
are always some extenuating circumstances to be  
found. In Justice Bhagwati’s words:  
  
There is no way of accurately predicting or knowing  
with any degree of moral certainty that murderer  
will not be reformed or is incapable of reformation.  
All we know is that there have been many  
successes even with the most vicious of  
cases...[MJany...examples clearly show that it  
is not possible to know beforehand with any  
degree of certainty that a murderer is beyond  
reformation.\*”’ (Emphasis supplied)  
  
3Santosh Kumar Satishbhushan Bariyarv. State of Maharashra (2008) 6 SCC 488.  
‘Y'Rajendra Prasad v. Slate of UP; gee also Bachan Singh v. State of Puna, (1980)  
2 SCC 684 Santosh Baryar (2008) § SCC 498, Eaiga Anamma, (1974) 4 SCG 443.  
55 See discussion in Chapter 5 on arbitrariness in death penalty adjudication  
  
See discussion in Chapter 5. See also: Aparna Chandra, A Capricious Noose: A  
Comment on the Trial Court Sentencing Order inthe December 18 Gang Rape Case,  
2A.NLUD 124 (2014),  
  
Machu Mehta v. Union of Inia (1984) 4 SC 62.  
  
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H. Other important issues  
(i) Public Opinion  
  
4.10.1. An important reason often cited by  
governments for retaining the death penalty is that  
public opinion demands the same. The 35" Report of  
the Law Commission also considered public opinion as  
an important factor in the context of the death  
penalty.57  
  
4.10.2 One could argue that public opinion is  
indeed a factor to be considered while making important  
decisions which effect the population at large. However,  
it is not necessary for the government to follow public  
opinion on every issue. Indeed, the Government has a  
duty to drive public opinion towards options which  
support fairness, dignity and justice, which are  
constitutionally enshrined ideals. It is useful to quote  
the former UN Human Rights High Commissioner, Navi  
Pillay, who says:  
  
Human progress does not stand still. Popular  
support for the death penalty today does not mean  
that it will still be there tomorrow. There are  
undisputed historical precedents where laws,  
policies and practices that were inconsistent with  
human rights standards had the support of a  
majority of the people, but were proven wrong and  
eventually abolished or banned. Leaders must  
show the way how deeply incompatible the  
death penalty is with human dignity.s”  
(Emphasis supplied)  
  
4.10.3 There are multiple instances where  
governments around the world have abolished the  
death penalty contrary to current public opinion, both  
  
‘VeThe 35 Report apprehended that ifthe law were to go against pubic opinion, tie  
possible thatthe pubic would induige in acts of revenge, by king or injuring ofendors  
ThemeeWves. (See Law Commission of india, 25” Report, 1987, Ministry of Lav,  
Government of India at para 285 (22).)  
  
5"Moving away trom the Death Penalty: Lessons from South-East Asia, United  
Nations Human Rights Commission 9 (2014)  
  
99  
  
  
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in Asia and in the West.38° Very few of the current  
abolitionist countries would have been able to ever  
abolish the death penalty had they waited for public  
opinion to change on the issue.s\*! Moreover, once the  
death penalty was abolished, the legal framework  
caused the public opinion to change radically on the  
issue, and now the death penalty is thought of as  
unthinkable.3\*? The Indian experience of laws governing  
social issues, such as Sati, dowry prohibition,  
untouchability, and child marriage is testament to the  
fact that the government has the power to lead public  
opinion even against deeply entrenched cultural norms  
and indeed an obligation to do so when faced with issues  
concerning human dignity and equality.  
  
I. The Move towards Restorative Justice  
  
4.11.1 In focusing on death penalty as the ultimate  
measure of justice to victims, the restorative and  
rehabilitative aspects of justice are lost sight of.  
Reliance on the death penalty diverts attention from  
other problems ailing the criminal justice system such  
as poor investigation, crime prevention and rights of  
victims of crime.  
  
4.11.2 A major development in the late-twentieth  
century was the focus on the rights and needs of victims  
of crime. Restorative theories of criminal justice also  
emerged during that time. As Ashworth notes “/t/he  
fundamental proposition is that justice to victims become  
@ central goal of the criminal justice system and of  
sentencing.”8\* Ashworth further says that “restorative  
Justice has considerable attractions as a constructive  
‘and socially inclusive way of responding to criminal  
behaviour.”\*85  
  
5° Moving away trom the Death Penalty: Lessons from South-East Asia, United  
Nations Human Rights Commission 9 (2014)  
  
‘8ilon Yorke, AGANST THe DEATH PENALTY 262 (1% ed. 2008),  
  
8g, France and UK; See also Rager Hood Speech al the Law Commission National  
CContiltation on 10 iy. 2015,  
  
399 ANOREW ASHWORTH, SENTENCING ANO CRIANAL JUSTICE BS (2005).  
  
584 ANOREW ASHWORTH, SENTENCING ANO CRIMANAL JUSTICE BS (2005).  
  
585 ANOREW ASHWORTH, SENTENCING AND CRIMANAL JUSTICE 8 (2005).  
  
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4.11.3 The need for police reforms for better and  
more effective investigation and prosecution has also  
been universally felt for some time now and measures  
regarding the same need to be taken on a priority basis.  
‘The Supreme Court in Prakash Singh v. Union of  
India,386 held:  
  
Having regard to (i) the gravity of the problem;  
(ii) the urgent need for preservation and  
strengthening of the rule of law; (iii) pendency  
of even this petition for the last over ten years;  
(iv) the fact that various commissions and  
committees have made recommendations on  
similar lines for introducing reforms in the  
police set-up in the country; and (v) total  
uncertainty as to when police reforms would  
be introduced, we think that there cannot be  
any further wait, and the stage has come for  
issuing of appropriate directions for immediate  
compliance so as to be operative till such time  
@ new model Police Act is prepared by the  
Central Government and/or the State  
Governments pass the requisite legislations. It  
may further be noted that the quality of the  
criminal justice system in the country, to a  
large extent, depends upon the working of the  
police force. Thus, having regard to the larger  
public interest, it is absolutely necessary to  
issue the requisite directions. Nearly ten years  
back, in Vineet Narain v.Union of India [(1998)  
1 SCC 226 : 1998 SCC (Cri) 307] this Court  
noticed the urgent need for the State  
Governments to set up the requisite  
mechanism and directed the Central  
Government to pursue the matter of police  
reforms with the State Governments and  
ensure the setting up of a mechanism for  
selection/appointment, tenure, transfer and  
posting of not merely the Chief of the State  
Police but also all police officers of the rank of  
Superintendents of Police and above. The  
  
28 (2006) 8SCC 1  
101  
  
  
Page 111:  
Court expressed its shock that in some States  
the tenure of a Superintendent of Police is for  
@ few months and transfers are made for  
whimsical reasons which has not only  
102oliticizing effect on the police force but is  
also alien to the envisaged constitutional  
machinery. It was observed that apart from  
102oliticizing the police force, it has also the  
adverse effect of 102oliticizing the personnel  
and, therefore, it is essential that prompt  
measures are taken by the Central  
Government.°\*”  
  
4.11.4 Measures should be taken to implement the  
directions of the Supreme Court in Prakash Singh.  
  
4.11.5 The voices of victims and witnesses are often  
silenced by threats and other coercive techniques  
employed by powerful accused persons. Hence it is  
essential that a witness protection scheme also be  
established. 386  
  
4.11.6 It is essential that the State establish  
effective victim compensation schemes to rehabilitate  
victims of crime. At the same time, it is also important  
that courts use the power granted to them under the  
Code of Criminal Procedure, 1973 to grant appropriate  
compensation to victims in suitable cases.  
  
4.11.7 Compensation for criminal acts is provided in  
Sections 357 and 357A of the Code of Criminal  
Procedure, 1973 (“CrPC”). Under Section 357(1), when  
a fine is imposed on a convict as part of the sentence,  
the judge can order that whole or part of the fine  
amount be paid as compensation to the victim  
(including to beneficiaries under the Fatal Accidents  
Act, 1855). Under this provision, the compensation  
amount cannot be greater than the fine imposed upon  
the convict.  
  
57 (2006) 8 SCC 1 at para 26  
  
20» Witness protection schemes have been proposed judicially by the Delhi High Court,  
in Neelam Katara v. Union of Inia, ILF (2003) 2 Del 377. A beginning has been made  
in ths regard by the Government of Dah, which noted a wness protection scheme  
in July 205.  
  
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Page 112:  
4.11.8 Under Section 357(3), when no fine has been  
imposed as part of the sentence, the judge may order  
the convict to pay, by way of compensation, such  
amount to the victim, as the judge may specify. While  
there is no limit on the amount of compensation that  
can be awarded under this provision, the Supreme  
Court has held that in fixing the amount of  
compensation under Section 357(3), Courts should take  
into account the facts and circumstances of each case,  
the nature of the crime, the justness of the claim and  
the capacity of the accused to pay.°\*\*  
  
4.11.9 \_ It is pertinent to note that under clauses (1)  
and (3) of section 357, compensation is recoverable only  
from the wrongdoer, and only after the guilt of the  
wrongdoer is established.  
  
4.11.10 In order to deal with cases where the  
compensation amount under Section 357 is not  
adequate to rehabilitate the victim, or where no  
wrongdoer has been identified, traced, or convicted,  
Section 357A provides that the State shalll create a Fund  
for the compensation and rehabilitation of victims of  
crime. A scheme under this section is required to be set  
up by State Governments in consultation with the  
Centre, and the State has to allocate funds for the  
scheme. Several state schemes have been established  
under this provision since its enactment in 2008.39  
  
4.11.11 \_ In this context, the Supreme Court in Suresh  
v. State of Haryana, issued directions relating to  
victim compensation and ruled that:  
  
We are informed that 25 out of 29 State  
Governments have notified —\_vietim  
compensation schemes. The schemes specify  
maximum limit of compensation and subject to  
maximum limit, the discretion to decide the  
  
Sankush Shivali Gaikwad v. State of Maharashtra, AIR 2013 SC 2454. The Delhi High  
(Court in Vikas Yadav v. State of Utar Pradesh, (2015) 218 DLT (CN) 1, summarized  
the law with respect to vei compensation and provided guidelines in his ragard  
59%For the denon of victim forthe purposes ofthe CFPC. see Section 2 (wa), CPC.  
21$9e e,., Delhi Vietins Compensation Scheme, 2011; Ouisha Vicim Compensation  
‘Scheme, 2012; Tamil Nadu Vicim Compensation Scheme, 2013,  
  
252 (2015) 2 SCC 227.  
  
103  
  
  
Page 113:  
quantum has been left with the State/District  
Legal Authorities. It has been brought to our  
notice that even though almost a period of five  
years has expired since the enactment of  
Section 357-A CrPC, the award of  
compensation has not become a rule and  
interim compensation, which is very  
important, is not being granted by the courts.  
It has also been pointed out that the upper  
limit of compensation fixed by some of the  
States is arbitrarily low and is not in keeping  
with the object of the legislation.  
  
We are of the view that it is the duty of the  
courts, on taking cognizance of a criminal  
offence, to ascertain whether there is tangible  
material to show commission of crime,  
whether the victim is identifiable and whether  
the victim of crime needs immediate financial  
relief. On being satisfied on an application or  
on its own motion, the court ought to direct  
grant of interim compensation, subject to final  
compensation being determined later. Such  
duty continues at every stage of a criminal  
case where compensation ought to be given  
and has not been given, irrespective of the  
application by the victim. At the stage of final  
hearing it is obligatory on the part of the court  
to advert to the provision and record a finding  
whether a case for grant of compensation has  
been made out and, if so, who is entitled to  
compensation and how much. Award of such  
compensation can be interim. Gravity of  
offence and need of victim are some of the  
guiding factors to be kept in mind, apart from  
such other factors as may be found relevant in  
the facts and circumstances of an individual  
case.  
  
We are also of the view that there is need to  
consider upward revision in the scale for  
compensation and pending such consideration  
to adopt the scale notified by the State of  
  
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Kerala in its scheme, unless the scale  
awarded by any other State or Union Territory  
is higher. The States of Andhra Pradesh,  
Madhya Pradesh, Meghalaya and Telangana  
are directed to notify their schemes within one  
month from the receipt of a copy of this  
order.  
  
4.11.12 Accordingly, the Commission is of the view  
that the victim compensation scheme as recommended  
by the Supreme Court in Suresh be implemented.  
  
999 (2018) 2 SOC 227, para 1517.  
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(CuapTER - V  
SENTENCING IN CAPITAL OFFENCES  
  
A. The Bachan Singh Framework: Guided  
Discretion and Individualized Sentencing  
  
5.1.1 In Bachan Singh v. State of Punjab,3%  
(‘Bachan Singh) the Court had to address the following  
challenges to the death penalty:  
  
()) Whether death penalty provided for the offence  
of murder in Section 302, Indian Penal Code is  
unconstitutional.  
  
(I) If the answer to the foregoing question be in  
the negative, whether the sentencing procedure  
provided in Section 354(3) of the CrPC, 1973 (Act  
2 of 1974) is unconstitutional on the ground that  
it invests the Court with unguided and  
untrammelled discretion and allows death  
sentence to be arbitrarily or freakishly imposed  
on a person found guilty of murder or any other  
capital offence punishable under the Indian  
Penal Code with death or, in the alternative, with  
imprisonment for life.5°°  
  
5.1.2 The Court rejected the first contention,  
finding instead that the death penalty met the  
requirement of reasonableness in Article 19 and 21,  
primarily since a sizable body of opinion holds the view  
that the death penalty is a rational punishment. As for  
the second, it dealt with the concern that the Cr.P.C.  
“invests the Court with unguided and untrammelled  
discretion and allows death sentence to be arbitrarily or  
freakishly imposed’\*° by deriving principles from  
legislative policy as well as judicial precedent, to guide  
the court in deciding whether to impose the death  
penalty in a given case.  
  
5.1.3 To save the death penalty from the vice of  
arbitrariness, the Court sought to walk a tightrope  
  
‘t Bachan Singh v. State of Puniab, (1980) 2 SCC sek,  
29= Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 15.  
29° Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 15.  
  
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between too much judicial discretion and too little, both  
of which could result in arbitrary and unfair sentencing.  
On the one hand, the Court held that it was “neither  
practicable nor desirable”s\*” to lay down a rigid or  
straight-jacket formula or categories for the application  
of the death penalty. No two cases are exactly identical,  
and there are “infinite, unpredictable and unforeseeable  
variations (and) countless permutations and  
combinations”\*\* even with a single category of offences.  
A mechanical, formulaic approach, not calibrated to the  
“variations in culpability’ even within a single type or  
category of offence, would cease to be judicial in nature.  
Rather, such standardization would “sacrifice justice at  
the altar of blind uniformity’? and may end up  
“degenerating into a bed of procrustean cruelty.”\*0!  
  
5.1.4 At the same time, the Court held that the  
legislative policy indicated that the following principles  
should guide judicial discretion in determining the  
appropriate sentence for murder:  
  
1.For the offence of murder, life imprisonment is  
the rule and death sentence an exception.  
  
2.This exceptional penalty can be imposed “only in  
gravest cases of extreme culpability” taking  
into account the aggravating and mitigating  
circumstances in a case, paying due regard to the  
“circumstances of the offence,” as well as the  
“circumstances of the offender.”  
  
3.To prevent sentencing from becoming arbitrary,  
the Court endorsed the view that the  
determination of aggravating and mitigating  
circumstances should be based on “well-  
recognised principles... crystallised by judicial  
decisions illustrating as to what were regarded as  
aggravating or mitigating circumstances in those  
cases.”\*©? The Court thus prescribed a process  
  
{87 Bachan Singh v. Stale of Puniab, (1980) 2 SCC 684, at para 195,  
2 Bachan Singh v. State of Puriab, (1980) 2 SCC 684, at para 172,  
29» Bachan Singh v State of Punab, (1980) 2 SCC. 684, al para 173  
+© Bachan Singh v State of Puriab, (1980) 2 SCC 684, at para 173.  
+0: Bachan Singh v. State of Purab, (1980) 2 SCC 684, at para 173,  
‘42 Bachan Singh v. State of Purab, (1980) 2 SCC 684, at para 165.  
  
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of principled sentencing, and held that the  
determination of aggravating and mitigating  
factors would be based on a determinate set of  
standards created through the evolutionary  
process of judicial precedents.  
  
4.Only if the analysis of aggravating and mitigating  
circumstances, as indicated above, provided  
“exceptional reasons’ for death, would capital  
punishment be justified, because “[a] real and  
abiding concern for the dignity of human life  
postulates resistance to taking a life through law's  
instrumentality. That ought not to be done save in  
the rarest of rare cases when the alternative  
option is unquestionably foreclosed.”  
  
5.1.5 According to the Court therefore, the  
principles indicated above provided sufficient guidance  
for the exercise of judicial discretion in sentencing for  
murder, and saved the death penalty from the charge of  
arbitrariness.  
  
B. Implementation of the Bachan Singh  
Framework  
  
5.2.1 Despite the Court's optimism in Bachan  
Singh that its guidelines will minimise the risk of  
arbitrary imposition of the death penalty, concerns that  
capital punishment is “arbitrarily or freakishly  
imposed” continue to haunt death penalty  
jurisprudence in India. In the last decade itself, in cases  
like Aloke Nath Dutta v. State of West Bengal,\*°> Swamy  
Shraddhananda v. State of Karnataka,\*0 Santosh  
Bariyar v. State of Maharashtra,\*°” Mohd. Farooq Abdul  
Gafur v. State of Maharashtra,\*°\* Sangeet v. State of  
Haryana,\*® Shankar Khade v. State of Maharashtra,"  
  
‘© Bachan Singh v. State of Puniab, (1980) 2 SCC 84, at para 209,  
  
‘®t Bachan Singh v. State of Purab, (1980) 2 SCC 684, at para 15.  
  
‘0: Alowe Nath Duta v. State of West Bengal, (2007) 12 SCC 230.  
  
+: Swamy Shraddananda (2) v. State of Kamataka, (2008) 13 SCC 767.  
‘07 Sanlosh Bariyarv. Sate of Maharastra, (2009) 6 SCC 498,  
  
{© Mohd, Faroog Abdul Gafurv. State of Maharastra, (2010) 14 SCC 661  
+ Sangeet v. State of Haryana, (2013) 2 SCC 452.  
  
‘0 Shankar Kisanrao Khage . State of Maharashtra, (2013) 6 SCC 546.  
  
108  
  
  
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and Ashok Debbarma v. State of Tripura,\*"! the Supreme  
Court has acknowledged that the application of the  
death penalty is subjective and arbitrary and that “even  
though Bachan Singh intended “principled sentencing”,  
sentencing has now really become judge- centric...”  
Thus, “the confirmation of death sentence or its  
commutation by this Court depends a good deal on the  
personal predilection of the judges constituting the  
Bench."\*"3 Recognizing this to be a “serious  
admission”\*"\* on its part, the Court in Santosh Bariyar  
admitted that “there is inconsistency in how Bachan  
Singh has been implemented, as Bachan Singh  
mandated principled sentencing and not judge centric  
sentencing."  
  
5.2.2 Noting that “the Bachan Singh threshold of  
“the rarest of rare cases” has been most variedly and  
inconsistently applied,’#6 the Supreme Court has  
recognized that “the balance sheet of aggravating and  
mitigating circumstances approach invoked on a case-by-  
case basis has not worked sufficiently well so as to  
remove the vice of arbitrariness from our capital  
sentencing system."\*17 Where Bachan Singh held that  
well recognized principles evolved through judicial  
precedent would guide courts in capital sentencing, in  
Mohd. Faroog, the Supreme Court admitted that “the  
precedent on death penalty ... is [itself] crumbling down  
under the weight of disparate interpretations.""\*  
  
5.2.3. Enumerating cases where different Benches  
have reached diametrically opposite results in cases  
which have similar facts and circumstances,\*!? the  
Supreme Court has called the “lack of consistency” #0  
  
© Ashok Debbarama v. State of Tripura, (2014) 4 SOC 747 (‘Arbirarness  
lscrmination and inconsistency offen loom large, when we analyze some of judicial  
pronouncements awarding sentence")  
  
SNe Sangeet v- State of Haryana, 2013) 2 SCC 452, al para 33.  
  
‘2 Swamy Srraddananda (2) v" State of Kamataka, (2008) 19 SCC. 767, at para St  
‘« Sanlosh Bariya Sate of Maharashira, (2003) 6 SCC 498, at para 4.  
  
‘1 Sanlosh Bariyar . State of Maharashtra, (2009) 6 SCC 498, at para 54,  
  
se Sanlosh Bariya v. State of Maharastra, (2009) 6 SCC 498. a para 109,  
  
“7 Sanlosh Bariyar v. State of Maharashira, (2009) 6 SCC 498, at para 109,  
  
‘» Mohd: Faroog Abdul Galurv. State of Maharashtra, (2010) 14 SCC 641, at para  
165.  
  
1 See below,  
  
‘© Swamy Shraddananda (2) v. Stale of Kamataka, (2008) 12 SCC 767, at para 52.  
  
109  
  
  
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and “want of uniformity” +2 in capital sentencing, “a  
poor reflection of the system of criminal administration of  
justice."#22 The Court has expressed concern that the  
“extremely uneven application of Bachan Singh has given  
rise to a state of uncertainty in capital sentencing law  
which clearly fails foul of constitutional due process and  
equality principle.”  
  
5.24 In Bachan Singh, the Supreme Court had  
called upon judges to “discharge the onerous function (of  
deciding whether or not to impose the death penalty) with  
evermore scrupulous care and humane concern."\*\*  
Echoing a similar sentiment, in Bariyar, the Court noted  
that “the conclusion that the case belongs to rarest of rare  
category must conform to highest standards of judicial  
rigor and thoroughness.”\*25 However, as the Court has  
itself recognized over and again, there exist multiple  
layers of inconsistencies in India’s death penalty  
jurisprudence, which make it difficult to achieve rigor in  
sentencing decisions in capital offences. At the most  
basic level, the death penalty jurisprudence displays  
varied and often competing understandings of the  
penological purposes of the death penalty itself. Since  
this aspect has been covered in the previous chapter, it  
will not be dealt with here.426  
  
5.2.5 In what follows, this Report examines the  
concerns regarding arbitrariness in India’s capital  
sentencing regime, as highlighted by the Supreme Court  
itself, supplemented by scholarly interventions,  
empirical data, and comparative insights  
  
() Doctrinal Frameworks  
  
5.2.6 In Bachan Singh, the Court had emphasized  
the importance of individualized yet principled  
sentencing. Holding that there are infinite permutations  
and combinations even in single category offences, the  
  
‘21 Swamy Shraddananda (2) v. State of Kamataka, (2008) 12 SCC 767, at para 52.  
‘82 Swamy Straddananda (2) v. Stale of Kamataka, (2008) 12 SCC 767, at para 52.  
‘©: Sanlosh Bariyarv. State of Maharastra, (2009) 6 SCC 498, a para 110.  
  
‘21 Bachan Singh v. State of Puniab, (1920) 2 SCC 684, at para 209,  
  
‘© Sanlosh Barivar v. Sate of Maharashira, (2009) 6 SCC 498, a para 61  
  
‘8 See Chapter IV above.  
  
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Court had refused to create categories of offences for  
which the death penalty would be applicable. Instead,  
the Court required judges to take into account, in each  
individual case, the aggravating and mitigating  
circumstances of both the crime as well as the criminal,  
in determining the sentence. Recognizing that  
circumstances relating to the crime and the criminal are  
often “so intertwined that it is difficult to give a separate  
treatment to each of them,”\*2” the Court held that it was  
“not desirable to consider the circumstances of the  
crime and the circumstances of the criminal in two  
separate water-tight compartments.”\*2\* However, in  
subsequent cases, the Court has given varying  
interpretations to the Bachan Singh requirements and  
different judges have understood the mandate of  
Bachan Singh differently.  
  
a. Machhi Singh  
  
5.2.7 Three years after Bachan Singh, a 3 judge  
Bench of the Supreme Court in Machhi Singh v. State of  
Punjab, (‘Machi Singh’) listed out five categories of  
cases for which the death penalty was a suitable option.  
‘The Court held that the death penalty may be imposed  
where the “collective conscience”? of society is so  
shocked that “it will expect the holders of the judicial  
power centre to inflict death penalty.”\*"! According to  
the Court, ‘/the community may entrain such a  
sentiment when the crime is viewed from the platform of  
the motive for, or the manner of commission of the crime,  
or the anti-social or abhorrent nature of the crime."#32  
  
“©” Bachan Singh v. State of Punab, (1980) 2 SCC 684, at para 201,  
  
‘©: Bachan Singh v. State of Purab, (1980) 2 SCC 684, at para 201,  
  
‘© Machhi Singh v. Slate of Punjab (1983) 3 SCC 470,  
  
‘©: Machi Singh v. State of Punjab, (1983) 3 SCC 470, at para 32  
  
‘° Machi Singh v. State of Punjab, (1983) 3 SCC 470 al para 92.  
  
‘82 Machhi Singh v. State of Punjab (1983) 3 SCC 470, al paras 33-37. explained those  
Categories in deal as follows: | Manner af Commission of Murder: When the murders  
committed an extremely brutal, grotesque, diabolical revolting, or dastarély manner  
50 as to arouse intense and extreme incignaton of the communiy. For instance, ()  
‘Winer the house ofthe vit fs et aflame with the end in viaw to roast him alive inthe  
house. i) When the Victim is subjected o inhuman acts of torture or ruelty in order to  
‘bing bout his or her death (aijWhan the body ofthe vem feu nto pieces or his  
body is cismembered in a fiendish manner.  
  
Ii Motiv for Commission of murder: When the murders committed fr a motive which  
‘evince total depravity and meanness, For instance when (a) ahied assassin commis  
  
a  
  
  
  
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5.2.8 Machhi Singh thus crystallized the  
applicability of the rarest of rare principle into five  
distinct categories which Bachan Singh had expressly  
refrained from doing. As the Supreme Court noted in  
‘Swamy Shradhhananda, the Machhi Singh categories  
“considerably enlarged the scope for imposing death  
penalty’\*®> beyond what was envisaged in Bachan  
Singh.  
  
b. Crime Centric Focus  
  
5.2.9 The Machhi Singh categories relate only to the  
circumstances of the crime. While the Court did state  
that the sentencing judge should accord full weightage  
to mitigating circumstances as well, in subsequent  
cases, many judges have invoked the categories in  
Machhi Singh in a manner that suggest that once a case  
falls within any of the 5 categories it becomes a rarest  
of rare case deserving the death penalty.#% An example  
  
‘murder for the sake of money or reward (2) a cold blooded murders commited with a  
<elberate design inorder to inhent propery ot gain contrel over propery ofa ward  
fr a person under the control ofthe murderer or vis-avis whom the murderers in a  
‘dominating poston or ina postion of trust. (¢) a murders committed in the course for  
betrayal ofthe motherland,  
  
IILAnt Social or Socially abhorent nature ofthe crime: a) When murder of aScheduled  
Caste or minoity community etc. is commited not for personal reasons but in  
CGreumstancee which arouse social wrath Fr instance when such a ere i committed  
in oder to terrorize such persons and frighten them int ling Irom a pace a in order  
to deprive tham of or make them witha view to reverse past injustices and in order to  
restore the social balance.  
  
{b) In cases o‘ride buring’ and what are known as “dowry deaths’ or when murder  
is committed in order to remarry for the sake of extracting dowry once again oro marry  
‘another woman on account of nfauation,  
  
TV Magnitude of Crime: When the ime is enormous in proportion. Fr instance when  
‘mulipie murders eay of ll r almost al the members ofa family ora large number of  
persons of a particular caste. community, or lcalty, are commit.  
  
{Personality of Viet of murder: When the vieim of murder ls (a) an innocent child  
who could not have or has nol provided even an excuse, much less a provocation for  
murder.) a helpless woman or a person rendered helpless by old age or ifm (¢)  
‘when the victim i @ person vi-a ve whom the murderr isn a postion of domination  
(oF trust (d) when the victim is @ public figure generally oved and respected by the  
Community forthe services rendered by him and the murder is commited for poltical  
‘or similar reasons other than personal reasons.  
  
‘© Swamy Shraddananda (2) v. State ot Kamataka, (2008) 13 SCC 767.  
  
“9+ See axample, Prajet Kuma’ Singh v. State of Bihar, (2008) 4 SCC 434, where the  
CCoutt cited the Machhi Singh factors and then held that in the present caso"the  
‘enormity ofthe crime is wrt large. The accused: appellant caused multiple murders and  
attacked three witnesses... The brutally ofthe acts amplified by the manner in which  
the alacks have been made on all the inmates of the house in which the helpless  
vetims have been murdered, whichis ingicative ofthe fact thatthe act was diabolc of  
the superlative degree in conception and cr! in execution and does not fall within any  
Comprehension of the basic humanness which indicates the mindset which cannot be  
  
12  
  
  
  
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is Devender Pal Singh v. National Capital Territory,\*35  
where the majority opinion cited the Machhi Singh  
categories and held that the circumstances of the crime  
(without any discussion regarding the circumstances of  
the criminal) were such as to require imposing the death  
penalty. Pertinently, the dissenting judge in this case  
had acquitted the accused, but this factor was not  
considered by the majority in deciding whether the case  
was one of “rarest of rare.  
  
5.2.10 Machhi Singh and a subsequent line of cases  
have focused only on the circumstances, nature,  
manner and motive of the crime, without taking into  
account the circumstances of criminal or the possibility  
of reform as required under the Bachan Singh doctrine.  
Machhi Singh's progeny include a large number of cases  
in which the Court has decided whether or not to award  
the death penalty by only examining whether the crime  
is so brutal, depraved or diabolic as to “shock the  
collective conscience of the community.”\*° As the Court  
recognized in Bariyar, judges engage in “very little  
objective discussion on aggravating and mitigating  
circumstances. In most such cases, courts have only been  
considering the brutality of crime index.’\*\*” Similarly, in  
Sangeet the Court recognized that “[dlespite Bachan  
Singh, primacy still seems to be given to the nature of  
the crime. The circumstances of the criminal, referred  
to in Bachan Singh appear to have taken a bit of a back  
seat in the sentencing process.”\*3\*  
  
‘aid to be amenable for any reformation” The nature of the rime is itself held tobe an  
indication that the person is beyond reformation  
  
‘© Devender Pal Singh v. Natonal Capital Teritory, (2002) § SCC 234.  
  
‘82 An example is Sudam @ Rahul Kanram Jadhav v. State Of Maharashtra, (2011) 7  
‘SCC 125, a! para 22, where the accused was conviced forking a woman and four  
children. The Court noted that the chime was pre-meditated and held thatthe facts  
‘show thatthe crime has been committed ina beastly, extremely brutal, barbaric and  
Grotescve manner. It has resuited into inlense and extreme indignation of the  
‘community and shocked the collective conscience ol the sociely. We ate othe opinion  
that the appellant is a menace to the socily who cannol be reformed. Lesser  
punishment in our opinion shall be fraught wih danger as it may expose the society to  
etl once again atthe hands ofthe appellant” The Court dd not meniion or discuss  
any mitigating circumstances.  
  
‘S"'ganlosh Bariya . State of Maharashtra, (2009) 6 SCC 498, at para 71  
  
+8 Sangeet v. State of Haryana, (2013) 2 SCC 452, al para 34  
  
13  
  
  
  
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5.2.11 In Bariyar, the Court examined the decision  
in Ravji alias Ram Chandra v. State of Rajasthan,\*\*  
where it was held that  
  
“It is the nature and gravity of the crime but not  
the criminal, which are germane \_ for  
consideration of appropriate punishment in a  
criminal trial. ... The punishment to be awarded  
for a crime ... should conform to and be  
consistent with the atrocity and brutality with  
which the crime has been perpetrated, the  
enormity of the crime warranting public  
abhorrence and it should “respond to the  
society's cry for justice against the criminal. "#0  
  
5.2.12 Bariyar held that the exclusive focus in Ravji  
on the crime, rendered this decision per incuriam  
Bachan Singh. The Court listed a further 6 cases where  
Ravji had been followed, and which had therefore relied  
on incorrect precedent.  
  
5.2.13 Similarly, the Supreme Court in Khade  
doubted the correctness of the imposition of the death  
penalty in Dhananjoy Chatterjee v. State of West  
Bengal,‘\*: where the Court had held that “the measure  
of punishment in a given case must depend upon the  
atrocity of the crime; the conduct of the criminal and the  
defenceless and unprotected state of the victim.  
Imposition of appropriate punishment is the manner in  
which the courts respond to the society’s cry for justice  
against the criminals.”\*#2 In Khade the Court opined that  
prima facie the judgment had not accounted for  
mitigating circumstances relating to the offender.  
Dhananjoy Chatterjee was executed in 2004.  
  
5.2.14 So also, in Sangeet, the Court noted an  
additional three cases where Bachan Singh’s direction  
  
‘© Rav) alias Ram Chandra v. State of Rajasthan, (1996) 2 SCC 175,  
  
‘© Rav alias Ram Chandra v. Stato of Rajasthan, (1996) 2 SCC 175. at para 124  
Held par incuriam Bachan Singh in Santosh Bayar v. Slate of Maharashtra, (2009) 6  
‘SCC 498, at para 63.  
  
‘© Dhananjoy Chalteroe v. State of West Bengal (1994) 2 SCC 220.  
  
“2 Dhananjoy Chatteriee v. State of West Bengal (1994) 2 SCC 220, at para 15. The  
‘exclusive focus ofthis decision on the erme and not the criminal was questioned in  
‘Shankar Kisanrao Khade v. State of Maharashira, (2013) § SCC 546.  
  
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to consider both aggravating and mitigating  
circumstances had not been followed.\*\*\*  
  
5.2.15 Despite this recognition by the Supreme  
Court that it has erred in cases where only the  
circumstances of the crime, but not of the criminal have  
been taken into account, judges continue to impose the  
death penalty based on the former set of considerations  
alone.###  
  
©. Shock to the Collective Conscience and Society's  
Cry for Justice  
  
5.2.16 Machhi Singh also introduced into the  
vocabulary of India’s death penalty jurisprudence, the  
notion of ‘shock to the “collective conscience”\*\*s of the  
community’ as the touchstone for deciding whether to  
impose the death penalty or not. Similar notions like  
“society's cry for justice”\*\*® and “public abhorrence of,  
the crime”? have also been invoked by the Court in  
subsequent cases. Bachan Singh had expressly warned  
that:  
  
Judges should not take upon themselves the  
responsibility of becoming oracles or spokesmen  
of public opinion... When Judges...take upon  
  
“© Shiva v. Registrar General, High Court of Karnataka, (2007) 4 SCC 713: Rajendra  
Pralhadrao Wasnik v. State of Maharashira, (2012) 4 SGC 37: Mohd. Mannan v. State  
of Bhar, 2011) 5 SCC 317,  
  
Si 'See e.., Sandeep v. Slate of Uttar Pradesh, (2012) 6 SCC 107; Aitsingh  
Hamamsingh Gujalv. Stale of Maharashtra, (2011) 14 SCC 40%,  
  
‘° Machhi Singh v. State of Punjab (1989) 3 SCC 470, al para 92.  
  
‘4s Dhananjoy Chaiterie, (1994) 2 SCC 220.lameelv. State of UP., (2010) 12 SCC  
1582, Stato of MP. v. Basodi, (2009) 12 SCC 318; Bantu v. Slate of UP., (2008) 11  
‘S06 112; Mohan Anna Chavan v. State of Maharashtra, (2008) 7 SCC S61: State of  
Madhya Pradesh v, Saleem, (2005) 5 SCC S54; State of U.P. v. Se Krishan, (2006) 10  
‘SCC 420: Jai Kumar v. State of Madhya Pradesh, (1999) 5 SCC 1; Ravi v. Slate of  
Rajasthan, (1996) 2 SCC 175; Bheru Singh v. Stale of Rajasthan, (1994) 2 SCC  
4467-Sta of Madhya Pradesh v. Sheth Shahid, (2009) 12 SCC 715; State of UP. v.  
Sattan @ Satyendra, 2008) 4 SCC 736; Sate of Madhya Pradesh v. Santosh Kumar,  
(2006) 6 SCC'': ShaleshJasvantoha y, State of Gujarat, (2006) 2 SCC 259  
  
© Dhananjoy Chatter, (1998) 2 SCC 220.lamealv. State of UP., (2010) 12 SCC  
1582, Sito of MP. v. Based, (2009) 12 SCC 318; Bantu v. Slate of UP., (2008) 11  
‘SCG 119; Mohan Anna Chavan v. Stale of Maharashtra, (2008) 7 SCC S61; State of  
Madhya Pradesh v, Saloem. (2005) 5 SCC S54; Sate of UP. v. Se Krishan, (2006) 10  
‘SCC 420: Jai Kumar v. State of Madhya Pradesh, (1999) 5 SCC 1; Rayjv. Slate of  
Rajasthan, (1996) 2 SCC 175; Bheru Singh v. Slate of Rajasthan, (1984) 2 SCC  
467-Siate of Madhya Pradesh v. Sheikh Shahi, (2009) 12 SCC 716; State of UP. v  
‘Sattan @ Satyendra, (2008) 4 SCC 736; Sate ol Madhya Pradesh v. Santosh Kumar,  
(2006) 6 SCC t: ShaleshJasvantbhal y, State of Gujarat, (2006) 2 SCC 259  
  
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themselves the responsibility of setting down  
social norms of conduct, there is every danger,  
despite their effort to make a rational guess of  
the notions of right and wrong prevailing in the  
community at large ... that they might write their  
own peculiar view or personal predilection into  
the law, sincerely mistaking that changeling for  
what they perceive to be the Community ethic.  
The perception of ‘community’ standards or  
ethics may vary from Judge to Judge... Judges  
have no divining rod to divine accurately the will  
of the people.“  
  
5.2.17 However, in Machhi Singh as well as  
subsequent cases, public opinion, through the  
articulation of these amorphous standards of “collective  
conscience”, “society’s cry”, and “public abhorrence”,  
have been given an important role to play in sentencing  
jurisprudence.  
  
5.2.18 In Bariyar, the Supreme Court has  
questioned the relevance and desirability of factoring in  
such “public opinion” into the rarest of rare analysis,  
since firstly, it is difficult to precisely define what “public  
opinion” on a given matter actually is. Further, people’s  
perception of crime is “neither an objective circumstance  
relating to crime nor to the criminal.”\*\*? As such, this  
factor is irrelevant to the rarest of rare analysis  
mandated by Bachan Singh.‘ Third, as Bariyar has  
also pointed out, the courts are governed by the  
constitutional safeguards which “introduce values of  
institutional propriety, in terms of \_\_ fairness,  
reasonableness and equal treatment challenge with  
respect to procedure to be invoked by the state in its  
dealings with people in various capacities, including as a  
convict”\*5! For example, the Court plays a counter  
majoritarian role in protecting individual rights against  
majoritarian impulses. Public opinion in a given case  
may go against the values of rule of law and  
  
‘= Bachan Singh v. Stale of Puniab, (1980) 2 SCC 684, at para 126.  
  
‘9 Santosh Bariya v. State of Maharashira, (2009) 6 SCC 498, at para 80.  
+2 Fterated in Mohinder Singh v. Stale of Punjab, (2013) 3 SCC 294  
  
‘51 Sanlosh Bariya v. Sate o! Maharashira, (2009) 6 SCC 496, at para 82.  
  
116  
  
  
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constitutionalism by which the Court is nonetheless  
bound.\*?  
  
5.2.19 A sentencing court does not have the means  
to rigorously examine public opinion in a given matter.  
Also, a cohesive, coherent and consistent “public  
opinion” is a fiction. The opinion of members of the  
public can be capricious, and dependent upon the  
(misinformation that the “public” is provided not only of  
the facts of an individual case, but of the criminal justice  
process itself. Focusing on public opinion therefore  
carries the danger of “capital sentencing becoming a  
spectacle in media. If media trial is a possibility,  
sentencing by media cannot be ruled out.”#53 In such  
situations, invoking public opinion instead of focusing  
on constitutional standards and safeguards would  
defeat the entire framework elaborated in Bachan  
‘Singh.5\* As one of the opinion in Rameshbhai Rathod v.  
State of Gujarat\*ss recognized,  
  
[The Court] cannot afford to prioritise the  
sentiments of outrage about the nature of the  
crimes committed over the requirement to  
carefully consider whether the person committing  
the crime is a threat to the society. The Court  
must consider whether there is a possibility of  
reform or rehabilitation of the man committing the  
crime and which must be at the heart of the  
sentencing process. It is only this approach that  
can keep imposition of death sentence within the  
‘rarest of the rare cases’.\*5¢  
  
5.2.20 In Haresh Mohandas Rajput v. State of  
Maharashtra,5? the Supreme Court recognized that  
  
‘82 Santosh Bariyr v. Sate of Maharashira, (2009) 6 SCC 498,  
  
‘© Sanlosh Bariyar v. State of Maharashira, (2009) 6 SCC 498, at para 87.  
  
4+ See also Aparna Chandra, A Capricious Noose, 2 JOURNAL OF NATIONAL LAW  
UUnivensiry Deus! 124 (2014) (‘A court isa court of aw nat a cour of public opinion. Of  
Course judges are creatures of society and wil be influenced by I, but the encoding of  
publi opinion into the formal amework of capital sentencing gives ita prescriptive  
‘weight that is problematic. If the opinion of the publ: matters to questions of  
Sentencing, then courts are the wrong instiutions to be determining sentence  
Parliament or lynch mobs are more apposite)  
  
‘8° lameshbhal Rathod v. State of Gujral, 2008) 5 SOC 740 (per Ganguly J).  
  
“© Rlameshbhal Rathod v. State of Gujarat, 2008) 5 SCC 740, al para 108.  
  
“© Haresh Mohandas Rajput v. Stato of Maharashtra, (2011) 12 SCC 86.  
  
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Machhi Singh’s invocation of “shock to the collective  
conscience of the community™S\* as a standard for  
evaluating whether a case deserved death, had  
expanded the rarest of rare formulation beyond what  
was envisaged in Bachan Singh. However, as discussed  
below, despite this acknowledgment, the Court has  
continued to invoke community reactions and public  
opinion as a ground for awarding the death penalty.\*5  
  
d. The Crime Test, the Criminal Test and the Rarest  
of Rare Test  
  
5.2.21 Ina recent line of cases, the Supreme Court  
has responded to the concern that capital sentencing is  
“judge centric,” by articulating another formulation of  
the Bachan Singh doctrine. The Court has held in cases  
like Gurvail Singh @ Gala v. State of Punjab, \* that three  
tests have to be satisfied before awarding the death  
penalty: the crime test, meaning the aggravating  
circumstances of the case; the criminal test, meaning  
that there should be no mitigating circumstance  
favouring the accused; and if both tests are satisfied,  
then the rarest of rare cases test, “which depends on the  
perception of the society and not “judge-centric”, that is  
whether the society will approve the awarding of death  
sentence to certain types of crime or not. While applying  
this test, the Court has to look into variety of factors like  
society’s abhorrence, extreme indignation and antipathy  
to certain types of crimes...”\*°! Explaining this test, the  
Court in Mofil Khan v. State of Jharkhand, \*? stated that  
the test is to “basically examine whether the society  
abhors such crimes and whether such crimes shock the  
  
{S Varesh Mohandas Rajat. Sato of Maharastra, 2011) 12 SCC 6, a para 20.  
‘Soe also, Vasaria Sampai Dupare v. Sate of Maharastra, (2015) 1 SCC 259  
(cust Haro Rapuon To port ta iach Singh had expanded th area are  
{Scie beyond tne Bachan Singh formuaion by ned fe concept of colecive  
oraconee’ bt vexing shock to the slecive conscence imposing te death  
SS etnal Singh @ Gala. Sato Punjab, 2019 2 SCC 719. Se also iy. tate  
COrmP. (2014) 9 SCC 42%: Ashok Dedbarma @ Achak Dedoarma Sete O Tipu  
(2014) 4Sce 747: Santosh Kumar Singh Site MP, (2044) 12 SCC 650: Oneram  
Deo Yadav. Sato Ot UP, 2044) 8 SCC SO9: Al @ Antony Aikewamy Josh  
Site Of Maharastra, 204) 4 SCC 88, One of fe opmane n Shana Kade aioo  
{bed to til st  
  
Gua Singh @ Gav. Sate of Pura, (2019)2 SCC719, para 18  
‘© Mo khan. Jatthand (2015) 1 SCC 6.  
  
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conscience of the society and attract intense and  
extreme indignation of the community.” \*  
  
5.2.22 The triple test limits the possibility of the  
imposition of the death penalty to that very narrow  
category of cases in which there are no mitigating  
circumstances whatsoever. In this, the test is in keeping  
with the spirit of Bachan Singh that the death penalty  
should be imposed only in the most exceptional of  
circumstances.  
  
5.2.23 However, in the triple test analysis, the  
“judge centric” nature of the death penalty can be  
prevented by focusing on the societal response to the  
crime. This is of concern because, as Bachan Singh itself  
acknowledged, and Bariyar reiterated, judges are likely  
to substitute their own assumptions, values and  
predilections in place of the perceptions of society,  
because even if one were to assume that society has  
determinate, stable and wide shared preferences on  
these matters, judges have no means of determining  
these preferences.  
  
5.2.24 Further, as mentioned above, Bachan Singh  
rejected the notion of categorization of types of crime  
which are fit for the death penalty. However, this triple  
test formulation seeks to do just that in its “Rarest of  
Rare Test” which is predicated on “society’s abhorrence,  
extreme indignation and antipathy to certain types of  
crimes.”  
  
5.2.25 The dissociation of the aggravating and  
mitigating circumstances from the rarest of rare  
analysis also moves away from the Bachan Singh  
framework. In addition, the triple test formula seeks to  
create distinct lists of the circumstances relating to the  
crime and the circumstances relating to the criminal,  
and evaluate them separately. This goes against the  
Bachan Singh injunction that circumstances relating to  
the crime and to the criminal cannot be treated as  
  
“2 Mofi Khan v. Jharkhand, 2015) 1 SCC 67, at para 46,  
+ Gurval Singh @ Gala v. Slate of Punjab, (2013) 2 SCC 713, at para 18.  
  
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distinct water-tight compartments.\*5 In fact, the  
Supreme Court itself noted this concern with the triple  
test in the three judge Bench decision in Mahesh  
Dhanaji Shinde v. State of Maharashtra,\*\*° and  
cautioned that this triple test “may create situations  
which may well go beyond what was laid down in  
Bachan Singh."\*\*" The triple test however continues to  
be followed and applied by the Supreme Court itself  
despite the decision in Mahesh Shinde.\*®\*  
  
5.2.26 In departing from Bachan Singh both in  
terms of the framework of analysis, and the relevant  
factors to be considered (especially the consideration of  
public opinion), this three pronged test appears to have  
further added to the conceptual confusion around the  
rarest of rare analysis.  
  
5.2.27 The discussion above indicates that different  
judges have understood the requirements of the rarest  
of rare standard differently, resulting in a disparate and  
“judge-centric” determination of whether or not a case  
falls within the rarest of rare category. As the Court put  
it in Sangeet, the Bachan Singh dictum appears to have  
been “lost in translation.” The Supreme Court in  
Mohd. Farooq acknowledged the “disparity in sentencing  
by [the] court flowing out of varied interpretations to the  
rarest of rare expression,”\*? and was concerned that  
“the precedent on death penalty ... is crumbling down  
under the weight of disparate interpretations.”\*"! The  
Court cautioned that without a consistent  
interpretation to the test, Article 14 would stand  
violated.\*  
  
‘© Fora cilque ofthis test, see generally, Apamna Chandra, A Capricious Noose, 2  
LJOUFWAL OF NATIONAL LAW UnVERstrY DELI 124 (2014).  
  
‘6: Mahesh Onanali Shinde v. State Of Maharastira, (2014) 4 So 292  
  
‘Mahesh Onanal Shinde v. State Of Maharastira, (2014) 4 SCC 292. at para, 26  
4° See Ashok Debbarma @ Achak Debbarma v. State Of Tripura, (2014) 4 SCC 747  
Dharam Deo Yadav v. Stale Of UP, (2014) 5 SCC 509; Lalt Kumar Yadav @ Kur v.  
Slate OF UP, (2014) 11 SCC 128.  
  
© Sangeet v. State of Haryana, (2013) 2 SCC 452, al para 33.  
  
‘© Mohd Farooq Abdul Galurv, State of Maharashtra, (2010) 14 SCC 641, at para  
165.  
  
"Woh. Farooq Abdul Gatur v. State of Maharashtra, (2010) 14 SCC 641, at para  
165.  
  
‘°° Nlohd. Faroog Abdul Gafurv. Stale of Maharashtra, (2010) 14 SOC 641  
  
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(i) Factors considered Aggravating and  
Mitigating  
  
5.2.28 In Bachan Singh, the Court recognized and  
emphasized that each case is unique and has to be  
decided on its own facts and circumstances. For this  
reason, the Court refused to provide any  
standardization or categorization of offences for which  
the death penalty would be applicable. At the same time  
however, the Court held that sentencing discretion was  
not untrammelled. Rather, it endorsed the holding in  
Jagmohan that “sentencing discretion is to be exercised  
judicially on well-recognised principles... crystallised by  
judicial decisions illustrating as to what were regarded  
as aggravating or mitigating circumstances in those  
eases.”#75 Bachan Singh therefore directed courts to  
determine whether a case is rarest of rare keeping in  
mind judicial principles derived from a study of  
precedents as to the kinds of factors that are  
aggravating and those that are mitigating. Bachan Singh  
thus endorsed the twin elements of individualized yet  
principled sentencing. However, as the Supreme Court  
has since recognized and the cases below demonstrate,  
“although the court ordinarily would look to the  
precedents, but, this becomes extremely difficult, if not  
impossible, .... [since] tlhere is no uniformity of  
precedents, to say the least."\*7\*  
  
a. Non-Consideration of Aggravating and Mitigating  
Circumstances  
  
5.2.29 In State of U.P. v. Satish,\*" the accused was  
convicted for committing the rape and murder of a  
minor. On the question of sentence, the Court, after  
surveying decisions which have laid down principles  
regarding the imposition of the death penalty, stated  
that it had “no hesitation in holding that the case at hand  
falls in rarest of rare category and death sentence  
awarded by the trial Court was appropriate.”\*”\* The  
  
‘> Bachan Singh v. State of Punab, (1980) 2 SCC 684, at para 197.  
‘tSanlosh Bariyar . State of Maharashira, (2009) 6 SCC 498, at para 104,  
Slate of UP. v. Satish (2005) 3 SCC 114,  
  
‘Slate of UP. v. Satish (2005) 3 SCC 114,  
  
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judgment is completely silent on the aggravating and  
mitigating circumstances of the case, contains no  
discussion whatsoever on why the case at hand  
deserved the imposition of death.  
  
5.2.30 This is not an isolated instance. Many cases  
subsequent to Bachan Singh, for example, Lok Pal Singh  
v. State of MP,\*”” Darshan Singh v. State of Punjab,\*?\*  
and Ranjeet Singh v. State of Rajasthan,\*7 have upheld  
the death sentence without referring to the “rarest of  
rare” formulation at all. In some other cases, such as  
Mukund v. State of MP,\*\*° Ashok Kumar Pandey v. State  
of Delhi,\*8! Farooq v. State of Kerala,\*? and  
Acharaparambath Pradeepan v. State of Kerala,\*#3 to  
name a few, the Court referred to the “rarest of rare”  
dicta, but did not apply it in imposing/commuting the  
death sentence, thereby paying mere lip service to the  
“rarest of the rare” test.  
  
b. Age as a Mitigating Factor  
  
5.2.31 Bachan Singh had recognized that the young  
age of the offender is a relevant mitigating circumstance  
which should be given great weightage in the  
determination of sentence. The Court has repeatedly  
held that if the offender committed the crime at a young  
age, the possibility of reforming the offender cannot be  
ruled out. For example, in Ramnaresh v. State of  
Chhattisgarh, \*\*\* involving a gang rape and murder, the  
Court imposed a life sentence taking into account the  
young age of the convicts (all between 21-30 years of  
age), which pointed to the possibility of reform.  
Similarly, in Ramesh v. State of Rajasthan,\*5 a case  
involving a double murder for gain, the Court imposed  
a life sentence by holding that the young age of the  
convict was a mitigating factor since he could be  
  
‘7 Lok Pal Singh v. Site of MP.. ALA. 1985 SC 891  
  
‘© Darshan Singh v. Stale of Punjab, (1988) 1 SCC 6i8.  
  
‘© Fanjoe! Singh v. Slat of Rajasthan, (1980) 1 SCC 683,  
  
«2 Mukund v. Sate of MP, (1997) 10 SCC 130.  
  
“#1 Ashok Kumar Pandey v. Slate of Delhi 2002) 4 SCC 76.  
  
‘#2 Faroog v. State of Kerala, (2002) 4 SCC 697.  
  
+ Acharaparambath Pradeepan v. State of Kerala, (2006) 13 SCC 643.  
+t Bamnarash and Ors. v. State of Chhatisgarh, (3012) 4 SCC 257.  
“#5 Flamesh v. State of Rajasthan, (2011) 3 SCC 685,  
  
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reformed. In Surendra Mahto v. State of Bihar,‘ the  
primary mitigating factor considered by the Court in  
imposing the life sentence was that the offender was  
only 30 years old and hence could be reformed.  
  
5.2.32 However, age as a mitigating factor has been  
used very inconsistently. In the dissent in Bachan Singh  
itself, Justice Bhagwati had cited multiple examples of  
otherwise similar cases where the young age of the  
offender was or was not considered the basis for  
imposing a life sentence instead of death. This trend of  
inconsistency in considering the age of the accused as  
a mitigating factor continues post-Bachan Singh.  
  
5.2.33 To take one example, in Dhananjoy  
Chatterjee v. State of West Bengal,\*\*’ the Supreme Court  
had imposed the death sentence on the offender for  
committing the rape and murder of an 18 year old  
woman who lived in a building where he was a security  
guard. This case was noticed in Rameshbhai  
Chandubhai Rathod (2) v. State of Gujarat,8\* which  
according to the Court's own assessment involved  
similar facts except that the rape and murder in this  
case was that of a child. On reference to a larger Bench  
because the two judge Bench could not agree on the  
sentence, the three-judge Bench of the Court noted the  
similarity of the facts to Dhananjoy Chatterjee’s case,  
but held that offender’s age was only 28 years which left  
open the possibility of reform, and hence imposed the  
life sentence. Therefore in an admittedly similar fact  
situation Rameshbhai Rathod was given the life  
imprisonment because he was 28 years old. Dhananjoy  
Chatterjee was given the death sentence and was  
executed in 2004. He was 27 years old.  
  
5.2.34 Purushottam Dashrath Borate v. State of  
Maharashtra,\*° a very recent case decided by the  
Supreme Court in May this year, involved a similar fact  
situation of rape and murder. The Court again pointed  
  
‘® Surendra Mahtov. State of Bihar, Criminal Appeal No. 211/2008.  
«#7 Dhananjoy Chatteroev. State of West Bengal, (1994) 2 SCC 220  
‘ Rameshbhal Chandubhai Rathod (2) v. State of Gujarat, (2011) 2 SCC 764.  
+ Purushottam Dashvath Borat v. Stale of Maharashtra, ALR, 2015 SC 2170.  
  
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to the similarity of the case to that of Dhananjoy  
Chatterjee, and following Dhananjoy Chatterjee, it  
imposed the death penalty on both the offenders. The  
Court did not refer to the decision in Rameshbhai  
Rathod; nor to the decision in Shankar Khade which had  
doubted the imposition of the death penalty in  
Dhananjoy Chatterjee on the ground that the Court had  
not accounted for mitigating factors. The age of the  
offenders in Purushottam Dashrath Borate was 26 years  
and 20 years respectively.\*9°  
  
5.2.35 The Supreme Court in Shankar Khade  
pointed to the inconsistent use of age as a mitigating  
factor in otherwise similar cases of rape and murder. On  
the one hand the offenders in Amit v. State of  
Maharashtra,‘ (aged about 20 years), Rahul v. State of  
Maharashtra,\* (aged 24 years), Santosh Kumar Singh  
v. State,\*°3 (aged 24 years), Rameshbhai Chandubhai  
Rathod (2) v. State of Gujarat, (aged 28 years),  
and Amit v. State of Uttar Pradesh,\*9> (aged 28 years),  
were not given the death sentence since their age was  
considered a mitigating factor, on the other in  
Dhananjoy Chatterjee," (aged 27 years), Jai Kumar v.  
State of Madhya Pradesh,\*\*" (aged 22 years), and Shivu  
& Anr. v. Registrar General, High Court of Karnataka,\*°  
(aged about 20 and 22 years), the young age of the  
accused was either not considered or was deemed  
irrelevant.  
  
c. Nature of offence as an Aggravating Factor  
  
5.2.36 Since the death penalty is to be awarded only  
in the rarest of rare cases, Bariyar required judges to  
  
“© The age ofthe accused is taken trom the High Court judgment inthis case. See  
‘Sale of Maharashtra. v. Purushottam Dashrath Borate, Criminal Appeal No.  
£682/2012(Bom), 25.03.2012  
  
‘81 Amv, State of Maharashra, (2003) & SCC 93.  
  
‘8: lahul . Slate of Maharashtra (2005) 10 SCC 322.  
  
« Sanlosh Kumar Singh v. Stale, (2010) 9 SCC 747.  
  
‘4 Rameshbhai Chandubhai Rathod (2) v. State of Gujarat, (2011) 2 SCC 764.  
  
‘: Amit State of Uttar Pradesh, (2012) 4 SCC 107,  
  
‘© Dhananjoy Chateroev. Slate of West Bengal, (1994) 2 SCC 220.  
  
+7 Jai Kumar v. State of Madhya Pradesh, (1999) 5 SCC 1  
  
+: Shivuv. Registra General, High Court of Karnataka, (2007) 4 SCC 713.  
  
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survey a pool of similar cases to determine whether the  
case before them was rarest of rare or not.  
  
5.2.37 Recently, in Shankar Khade, the Supreme  
Court again alluded to the need for evidence based  
death sentencing, and was concerned that the rarest of  
rare formulation is unworkable unless empirical  
evidence is made available which allows the Court to  
evaluate whether that a particular case is “rarer” than a  
comparative pool of rare cases. In the absence of this  
data, the Court felt that the application of the rarest of  
rare formulation becomes “extremely delicate” and  
“subjective.""°" However, as the Court realised in this  
case, while surveying a pool of cases relating to rape and  
murder, the rape and murder of a young child shocks  
the judicial conscience in some cases, not in others.  
  
5.2.38 So, for example, on the one hand the Court  
has held that the rape and murder of a one and half year  
old child in one case,5 of a 6 year old child in  
another, and 10 year old child in a third,5°? would not  
attract the death penalty because though these crimes  
were heinous, the offenders were not a danger to society,  
and the possibility of reform was not closed. On the  
other hand, in another series of cases, the Court has  
held that the rape and murder of a 5 year old,5° a 6  
year old, or a7 year old,5° or a 9 year old,5°° were  
by their very nature extremely brutal, depraved,  
heinous and gruesome, and were thus deserving of the  
ultimate penalty. So for example, in Jumman Khan v.  
State of UP,\*07 involving the rape and murder of a 6 year  
old, the Court held that “[tjhe only punishment which the  
appellant deserves for having committed the  
reprehensible and gruesome murder of the innocent child  
to satisfy his lust, is nothing but death as a measure of  
  
‘> Shiva v Registrar General, High Court of Karnataka, (2007) 4 SCC 713, at paras 2  
3  
  
5 Mohd. Chaman v. Stale (NCT of Delhi), (2001) 2 SCC 28  
  
5" Bantu v. Stale of MP., (2001) 9 SCC 618.  
  
‘ee Haresh Mohandas Rajput v. Stato of Maharashira, (2011) 12 SCC s6.  
  
5 Bantu v. State of UP., (2008) 11 SCC 113.  
  
‘ot jumman Khan Stale of UP,, (1991) 1 SCC 752.  
  
°° Kamla Tiwatv. Stale of MP., (1996) 6 SCC 250.  
  
‘98 Shivaji @Dadya Shankar Alhatv. The State of Maharashtra (2008) 15 SCC 269,  
7 Jumman Khan v State of UP,, (1991) 1 SCG 752,  
  
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social necessity and also as a means of deterring other  
potential offenders.”5°\*  
  
5.2.39 Similarly, in Md. Mannan @ Abdul Mannan v.  
State of Bihar,5® the convict had kidnapped, raped and  
murdered a seven year old. The Court awarded the  
death penalty since the victim was an “innocent,  
helpless and defenceless child.”5!° The Court held that  
the crime “had invited extreme indignation of the  
community and shocked the collective conscience of the  
society. Their expectation from the authority conferred  
with the power to adjudicate, is to inflict the death  
sentence which is natural and logical.”5'! With respect,  
given the contrary line of cases above, it is not clear from  
this judgment why in this case, but not in the ones  
mentioned above, the collective conscience of the society  
had been so shocked as to invite the punishment of  
death. The inconsistencies highlighted here, and  
noticed by the Court itself in Khade, make the infliction  
of the death penalty in this case anything but “natural  
and logical.”5!2  
  
5.2.40 These inconsistencies have moved the  
Supreme Court to itself acknowledge that “there is a  
very thin line on facts which separates the award of a  
capital sentence from a life sentence in the case of rape  
and murder of a young child by a young man and the  
subjective opinion of individual Judges as to the  
morality, efficacy or otherwise of a death sentence cannot  
entirely be ruled out.”513  
  
5.2.41 Similarly, compare the cases of State of  
Maharashtra v. Damus" against Sushil Murmu v. State  
of Jharkhand.'5 In the former, the accused were  
convicted of murdering three children as human  
sacrifice for recovering hidden treasure. The Court did  
not impose the death penalty on them even though it  
  
5 Jumman Khan v State of UP., (1991) 1 SCC 752, at para 4  
  
Md: Mannan v. State of Biba, (2011) 8 S.C 65.  
  
‘Md Mannan v. State of Bihar, (2011) 8 S.C.C 65, at para 18,  
  
5!'Md. Mannan v. State of Bihar, (2011) 8 S.6.¢ 65, at para 18,  
  
‘ied. Mannan v. State of Bihar, (2011) 8 S.C.C 65, at para 18  
  
1° Ramesh Rathod (2) v. State of Gujarat, (2071) 2 SCC 766, a para 8  
5 Slate of Maharashtra v. Damu, (2000) 6 SCC 268,  
  
8 Sushi Murmu v. State of arkhand, (2008) 2 SCC 298,  
  
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held that “the horrendous acts” made it “an extremely  
rare case.”5!© Nevertheless, the Court imposed life  
imprisonment on the reasoning that the crime was  
motivated by ignorance and superstition, which were  
considered to be mitigating circumstances. As against  
this, in Sushil Murmu, where the accused was convicted  
for murdering one child as human sacrifice, the Court  
held that given the nature of the crime, the accused  
“was not possessed of the basic humanness and he  
completely lacks the psyche or mind set which can be  
amenable for any reformation to be beyond reform."3¥7  
Stating that the crime “borders on a crime against  
humanity indicative of greatest depravity shocking the  
conscience of not only any right thinking person but of the  
Courts of law, as well,”5!8 the Court refused to consider  
the superstitious motivation as a mitigating factor.  
Instead it held that “(njo amount of superstitious colour  
can wash away the sin and offence of an unprovoked  
killing, more so in the case of an innocent and  
defenceless child.” For the Court, a case of this sort  
“is an illustrative and most exemplary case to be treated  
as the ‘rarest of rare cases’ in which death sentence is  
and should be the rule, with no exception  
whatsoever.’\*2° Therefore, in similar circumstances,  
while in one case the Court found the murder of three  
children for human sacrifice to not call for the  
imposition of the death penalty, in another case it found  
the murder of one child for similar reasons to require  
the imposition of the death penalty as a rule.  
  
d. Prior Criminal Record of the Offender \_as\_an  
‘Aggravating Factor  
  
5.2.42 While the Court has often taken into account  
the prior criminal record of the offender in determining  
whether the person is capable of reform, the Supreme  
Court in Sangeet and Shankar Khade pointed to  
instances where the Court had taken into account cases  
  
5 State of Maharashtra v. Damu, (2000) 6 SCC 268, at para 47.  
  
17 Sushi Murmu v. State of Jharkhand, (2008) 2 SCC 338, at para 22.  
5° Sushil Murmu v. State of Jharkhand, (2008) 2 SCC 338, al para 22.  
5 Sushil Murmu v. Stale of Jharkhand, (2008) 2 SCC 338, al para 22.  
5 Sushil Murmu v. State of Jharkhand, (2008) 2 SCC 338, al para 23.  
  
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that were merely pending before the courts, and had not  
been finally decided.’\*! Holding that basing the decision  
to impose the death penalty on such pending cases  
would amount to a negation of the principle of  
presumption of innocence, the Supreme Court admitted  
that these decisions were erroneous.$2?  
  
5.2.43 One such case was Sushil Murmu v. State of  
Jharkhand,525 where the offence involved murder for the  
purposes of human sacrifice. In imposing the death  
sentence, the Court took into account the “(cjriminal  
propensities of the accused [which] are clearly spelt out  
from the fact that similar accusations involving human  
sacrifice existed at the time of trial.”2\* Though the Court  
recognized that the result of the accusations against  
him were not brought on record, and therefore it was  
not clear whether the accusations resulted in a  
conviction, the Court held that “the fact that similar  
accusation was made against the accused-appellant for  
which he was facing trial cannot also be lost sight of °525  
On this basis, the Court imposed the death sentence on  
the accused.  
  
5.2.44 Similarly, in B.A. Umesh v. Registrar  
General, High Court of Karnataka,5\*° where the accused  
was convicted for rape, murder and robbery, the  
Supreme Court imposed the death sentence on him,  
inter alia, on the ground that he had engaged in similar  
conduct previously, and had been caught two days after  
the present incident, trying to commit a similar crime.  
‘The Court held that “the antecedents of the appellant  
and his subsequent conduct indicates that he is a  
menace to society and is incapable of rehabilitation.527  
As noted by the Supreme Court itself in Sangeet, the  
  
50'B.A. Umash v. Registrar General, High Court of Karnataka, (2011) 3 SCC 85: Sushi  
Murmu v. State of Jharkhand, (2004) 2 SCC 338: Shiu v. Registrar General, High  
Court of Kamataka, (2007) 4 SCC 713, See also, Gurmukh Singh v. State of Haryana  
(2003) 15 Sc 635,  
  
52 Sangeet v. State of Haryana, (2013) 2 SCC 452.  
  
‘2 Sushi Murmu ¥. Slate of Uharkhand, (2008) 2 SCC 238,  
  
54 Sushil Murmu v. State of Jharkhand, (2008) 2 SCC 338, at para 23  
  
£2 Sushil Murmu v. Stale of Jharkhand, (2008) 2 SCC 338, al para 23.  
  
S°B.A. Umesh v. Rogistrar General, High Cout of Kamataka, (2011) 3 SOC 85.  
  
5 B.A. Umesh v. Repistar Goneral, High Court of Karnataka, (2011) 3 SCC a5, at  
para 84  
  
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allegations against Umesh of having committed other  
offences was never proved or brought on record.5\*\*  
Despite this, a review petition against this decision was  
dismissed by the Court, again referencing the allegation  
that “far from showing any remorse, he was caught  
within two days of the incident by the local public while  
committing an offence of a similar type in the house of  
one Seeba.”52°  
  
5.2.45 So while on the one hand, in one line of cases  
the court has taken into account cases pending (but not  
decided) against the accused, in another line of cases,  
which includes Sangeet, as well as Mohd. Faroog Abdul  
Gafur v. State of Maharashtra,5®° the Court has held that  
unless a person is proven guilty in a case, it should not  
be counted as an aggravating factor against him.  
  
e. The Possibility of Reform  
  
5.2.46 \_ In Bachan Singh the Supreme Court required  
that the death penalty should be imposed only in those  
exceptional, rarest of rare cases where the “alternative  
option is unquestionably foreclosed.”5s! The Supreme  
Court recognized in Bariyar, that under the Bachan  
Singh framework, the option of life is “unquestionably  
foreclosed” and “completely futile, only when the  
sentencing aim of reformation can be said to be  
unachievable.” 5%  
  
5.2.47 Bachan Singh relied on the pre-sentence  
hearing requirement in Section 235(2), Cr. P. C. to  
provide the information necessary for courts to  
determine what mitigating circumstances, if any, were  
present in the case, and what, therefore, the  
appropriate punishment in the case would be.  
According to the Court,  
  
5% Sangeot v. State of Haryana, (2013) 2 SCC 452.  
  
= BLA. Umech v. Registrar General, High Court of Karnataka, Review Peiition (Ci)  
No(S).135-136 of 2011 in Gr. Appeal Nos 285-286 of 2011  
  
Mohd. Faroog Abdul Gafur Stale of Maharashtra, (2010) 14 SCC 661  
  
©) Bachan Singh v. State of Puniab, (1980) 2 SCC 684, at para 209,  
  
S52 Santosh Banyarv. State of Maharashira, (2008) 6 SCC 498, at para 66: Mohinder  
‘Singh v. State of Punjab, (2013) 3 SCC 294, at para 23.  
  
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Section 235(2) provides for a bifurcated trial and  
specifically gives the accused person a right of  
pre-sentence hearing, at which stage, he can  
bring on record material or evidence, which may,  
not be strictly relevant to or connected with the  
particular crime under — inquiry, but  
nevertheless, have, consistently with the policy  
underlined in Section 354(3), a bearing on the  
choice of sentence. The present legislative policy  
discernible from Section 235(2) read.  
with Section 354(3) is that in fixing the degree  
of punishment or making the choice of sentence  
for various offences, including \_one  
under Section 302, Penal Code, the Court  
should not confine its consideration principally  
or merely to the circumstances connected with  
the particular crime, but also give due  
consideration to the circumstances of the  
criminal.593  
  
5.2.48 Thus, in Bachan Singh, central to the rarest  
of rare formulation is the assessment of the offender's  
possibility of reform, which is to be determined through  
a distinct pre-sentence proceeding where evidence is to  
be led on the issue.  
  
5.2.49 Drawing upon the Bachan Singh endorsed  
standard that the state has to lead evidence to show  
that the convict cannot be reformed or rehabilitated and  
thus constitutes a continuing threat to society,5#  
Bariyar held that, “the court will have to provide clear  
evidence as to why the convict is not fit for any kind of  
  
5 Bachan Singh v. State of Punjab, 1980) 2 SCC 684, al para 209. See also Allaudin  
Mian v. State af Bar, (1989) 3 SCC 5, (All tal courts, after pronouncing an accused  
‘uit, must acfourn the hearing on quantum of sentence to another day 1 enable both  
the convict and the prosecution to present material in suppor of the quantum of  
sentence’)  
"in Bachan Singh, the Court endorsed the folowing standards:  
  
(3) The probability tht the accused would not commit criminal acts of  
  
Yilence 2s would constitute a continuing threat to socity.  
  
(4) The probably that the accused can be reformed and rehabilitated. The State  
shall by ‘evidence prove thatthe accused does not satisly the condone (3)  
and (4) above.  
  
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reformatory and rehabilitation scheme.”s5 Such an  
evidence based account of the possibility of reform was  
deemed essential by the Court for introducing an  
element of objectivity into the sentencing process.‘\*°  
  
5.2.50 The requirement that the state should justify,  
not only through arguments, but through evidence, that  
the exceptional penalty of death is the only option in the  
case, has been reiterated by the Court in Shankar  
Khade. However, Bariyar has rarely been followed,  
which is itself a testament to the capricious nature of  
the death penalty jurisprudence in India.53? Recently, in  
Shankar Khade, Anil @ Anthony Arikswamy Joseph v.  
‘State of Maharashtra,5\* and Birju v. State of M.P5°  
amongst others, the Court has again reiterated the need  
for evidence based assessment of the possibility of  
reformation of the offender. However, as these cases  
have also noted, “/mjany-a-times, while determining the  
sentence, the Courts take it for granted, looking into the  
facts of a particular case, that the accused would be a  
‘menace to the society and there is no possibility of  
reformation and rehabilitation...”  
  
5.2.51 An example is Mohd. Mannan v. State,  
where the accused was convicted for rape and murder:  
‘The Court in this case opined that the accused is “a  
menace to the society and shall continue to be so and he  
cannot be reformed.”\*? Noticing this case in Sangeet,  
the Supreme Court noted that the judgment did not  
indicate any material on the basis of which the Court  
concluded that the criminal was a menace to society  
and “shall continue to be so and he cannot be  
reformed.” It appeared that the only factor upon  
  
'° Santosh Bariyar . State of Maharashra, (2009) 6 SCC 498, at para 66.  
  
8 Sanlosh Bariyarv. State of Maharastira, (2009) 6 SCC 498,  
  
5 See Shankar Kisanrao Khade \. State of Maharashtra, (2072) 6 SCC S46 at para  
46 (sting out cases where no evidence was lad on whether the possibilty of  
‘formation was “unquestionably foreclosed")  
  
anil @ Anthony Arkswamy Joseph v. Stale Of Maharashtra (2014) 4 SCC 63  
  
(9° Bijv. State Of MP. (2014) 3 SCC 421  
  
5 nll @ Anthony Arikswamy Joseph v. Slate Of Maharashira, (2014) 4 SCC 69, at  
para 3% Bu v State OF MP. (2014) 3 SCC 421  
  
SOM Mannan v. State of Bihar, (2011) 8 S.-C 6.  
  
52M. Mannan v. State of Bihar, (2011) 8 S.C.C 65, at para 18,  
  
5© Sangeet v. State of Haryana, (2013) 2 SCC 452, al para 38  
  
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which the Court had based this conclusion was the  
nature of the crime. However, as noted in Shankar  
Khade, in otherwise similar facts, the Court has come  
to differing conclusions on whether the accused was  
capable of reform. Therefore, while on the one hand the  
possibility of reformation or rehabilitation was ruled  
out, without any expert evidence, in Jai Kumar v. State  
of Madhya Pradesh,\*\*+ B.A. Umesh v. Registrar General,  
High Court of Karnataka‘\*5 and Mohd. Mannan v. State  
of Bihar,®\*° on the other hand, again without any expert  
evidence, the benefit of this possibility was given in  
Nirmal Singh v. State of Haryana,5\*? Mohd. Chaman v.  
State (NCT of Delhi),\*\* Raju v. State of Haryana,\*  
Bantu v. State of Madhya Pradesh,\*8° Surendra Pal  
Shivbalakpal v. State Gujarat,55' Rahul v. State of  
Maharashtra,5\* and Amit v. State of Uttar Pradesh.5\*  
  
(iii) Rules of Prudence  
  
5.2.52 The Supreme Court, in Mohd. Farooq v. State  
of Maharashtra,5>\* discussed certain “rules of prudence”  
to be followed in death penalty adjudication, to address  
the concern of the potential fallibility of the system. The  
Court held that:  
  
In this particular punishment, there is heavy  
burden on court to meet the procedural justice  
requirements, both emerging from the black  
letter law as also conventions. In terms of rule  
of prudence and from the point of view of  
principle, a court may choose to give primacy to  
life imprisonment over death penalty in cases  
which are solely based on circumstantial  
  
5 Jai Kumar v. State of Madhya Pradesh, (1998) 5 SOC 1  
  
‘B.A. Umesh v. Registrar General, High Cout of Karnataka. (2011) 3 SCC 88.  
‘8 Mohd. Mannan v State of Bar, (2091) § SCC 317.  
  
52 Nirmal Singh ¥. State of Haryana, (1999) 3 SCC 670.  
  
‘Mohd. Chaman v. Stale (NCT of Delh), (2001) 2 SCC 28,  
  
‘9 Rau v Slate of Haryana, (200%) 9 SCC 50.  
  
‘Bantu v. Stale of MP., (2001) 9 SCC 618.  
  
6) Surendra Pal Shivoalakpal . State Gujarat, (2005) 3 SCC 127.  
  
‘88 Flahul v, State of Maharashtra, (2005) 10 SCC 222.  
  
© Amit v State of Utar Pradesh, (2012) 4 SCC 107,  
  
‘1 ohd. Farooq Abdul Gafurv. Stal of Maharashra, (2010) 14 SCC 661  
  
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evidence or where high court has given a life  
imprisonment or acquittal. 555  
  
5.2.53 Keeping in mind the distinct nature of the  
death penalty the Court therefore cautioned that it  
would be prudent to avoid imposing the death penalty  
in cases based on circumstantial evidence on the one  
hand, and those where lower courts have imposed a life  
imprisonment or have acquitted on the other. However,  
similar to the cases discussed above, there is little  
consistency in following these rules of prudence.  
  
a. Circumstantial evidence  
  
5.2.54 Concerned with the potential fallibility of  
convictions based only upon circumstantial evidence,  
and cognizant of the fact that the death penalty is  
irreversible, the Court has, in various cases cautioned  
that the death penalty should ordinarily be avoided  
when the conviction is based solely upon circumstantial  
evidence. Citing the principle that “more serious the  
offence, stricter the degree of proof,”55\* the Court has  
held that cases based on circumstantial evidence  
  
have far greater chances of turning out to be  
wrongful convictions, later on, in comparison to  
ones which are based on fitter sources of proof.  
[Clonvictions based on ‘seemingly conclusive  
circumstantial evidence’ should not be.  
presumed as foolproof incidences and the fact  
that the same are based on circumstantial  
evidence must be a definite factor at the  
sentencing stage deliberations, considering  
that capital punishment is unique in its total  
irrevocability. [AJny characteristic of trial, such  
as conviction solely resting on circumstantial  
evidence, which contributes to the uncertainty  
in the “culpability calculus”, must attract  
  
5° Mohd, Farooq Abdul Galur v. State of Maharashtra, (2010) 14 SCC 641, at para  
164,  
  
8 HMousam Singha Roy v. State of West Bengal, (2003) 12 SCC 377; Sharad  
Bhirichand Sarda v. State of Maharashira, (1984) 4 SCG 116; Kashmira Singh v. Slate  
Of MP., AIR 1952 SC 158.  
  
133  
  
  
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negative attention while deciding maximum  
penalty for murder. 557  
  
5.2.55 \_ Therefore, in cases like Sahdeo v. State of  
U.P.,S\* Sheikh Ishage v. State of Bihar,5®? Aloke Nath  
Dutta v. State of West Bengal,\* Swamy Shraddananda  
(2),591 and Bishnu Prasad Sinha v. State of Assam,5\* the  
Court did not impose the death penalty, inter alia, on  
the consideration that the conviction was based on  
circumstantial evidence.  
  
5.2.56 However, despite this caution, in a contrary  
line of cases the Court has expressly refused to consider  
circumstantial evidence as a ground for not imposing  
the death penalty. As noticed by the Supreme Court in  
Shankar Khade, in cases like Shivaji v. State of  
Maharashtra, Kamta Tewari v. State of M.P.,°\* and  
Molai v. State of M.P.\*° this Court categorically rejected  
the view that death sentence cannot be awarded in a  
case where the evidence is circumstantial and has held  
that “[ijn the balance sheet of aggravating and  
mitigating] circumstances, the fact that the case rests on  
circumstantial evidence has no role to play.”55°  
  
b. Disagreement on guilt or sentence between judges  
  
5.2.57 The rarest of rare doctrine provides a very  
narrow margin for the imposition of the death penalty,  
limited only to the most exceptional of cases. Given this  
extremely narrow exception, it would be expected that  
the judges of the various courts who have heard the  
case, would show a degree of unanimity regarding  
whether or not the case belongs to the rarest of rare  
  
5 Kalu Khan v. Slate of Rajasthan, Criminal Appeal 1891-1892/2014 dated  
10.03.2016.  
  
58 Sahdeo v. Stale of UP, (2004) 10 SCC 682  
  
5 Sheik Ishage v. Stato of Bihar, (1995) 3 SCC 392.  
  
© Aloke Nath Duta v. State of West Bengal, (2007) 12 SCC 230.  
  
1 Swamy Shraddananda (2) v. State of Kamataka, (2008) 13 SCC 767.  
© Bichnu Prasad Sinha v. State of Assam, (2007) 11 SCC 467.  
  
st Shwvalv. State of Maharashira, (2008) 18 SCC 268,  
  
ot Kamta Tiwatv. Stale of MP., (1996) 6 SCC 250  
  
© Mola. State of M-P.. (1989) 9 SCC 581,  
  
5 Shvalv. Stale of Maharashra, (2008) 15 SCC 269, at para 27  
  
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category.567 Further, given the irreversible nature of the  
death penalty, if a judge has doubts about the very guilt  
of the accused, this by itself should be a ground for not  
imposing the death penalty.5°\*  
  
5.2.58 The Supreme Court endorsed this view in  
Mohd. Farooq and held that in order to remove disparity  
and bring about a degree of uniformity in the application  
of the death penalty, the “consensus approach”s®  
should be adopted, whereby the death penalty should  
be imposed only if there is unanimity vertically across  
the various tiers of the court system, as well as  
horizontally across Benches.  
  
5.2.59 However, as in the cases mentioned in the  
previous sections, on this point too, there exists a  
considerable diversity of precedent. Take for instance  
the cases of State of Uttar Pradesh v. Satish,5” on the  
one hand, and State of Maharashtra v. Suresh,57! on the  
other. In the former, the accused was charged with the  
rape and murder of a six year old, and was convicted  
and sentenced to death by the Trial Court but acquitted  
by the High Court. The Supreme Court restored the  
order of the Trial Court and imposed the death sentence  
on the basis of the brutal and depraved nature of the  
crime, without taking into account the doubt regarding  
the guilt of the accused by the High Court. Suresh on  
the other hand, also involved the rape and murder of a  
four year old. Here too, the Trial Court had imposed the  
death penalty but the High Court had acquitted. The  
Supreme Court restored the order of conviction of the  
  
{5 This view was espoused by Justice Thomas in his minority opinion in Suthencrarsia  
  
‘alas Suhenthira Raja alias Santhan\_. Slat, (1999) 9 SCC 229 (In my opinion, t  
  
‘would be sound propesiton to make a precedent thal when one ofthe tee Jud  
rains trom awarding death penalty an accused on stated reasons in proteence  
  
sentence of ie imprisonment fa fat can be regarded sulin! to eat he ee  
  
4 rot fling within the narrowed ambi of “arest of rare cases when the alenative  
  
‘opto is unquestionaby foreclosed)  
  
5 This wow has been endorsed. though less categorically in Mohd. Farooq Abdul  
  
Gaur. State of Maharashtra (3010) 14 SCC 68%, and Licnhamadeu! v. Sate of  
  
Rajanthan, (1088) 4 SCC 456 (Where there are uo opinions as tothe gult of ho  
  
‘ocused by the two cout, onary the proper sentence would be nol death but  
  
imprisonment or He"  
  
‘Pilon. Faroog Abdul Gar. tao of Maharastra, 2010) 14 SCC 64%, at para  
  
165.  
  
2 State of UP. v. Satish, (2005) 9 SC 114.  
  
© Sate of Maharashta Suresh, (2000) SCC 471  
  
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Trial Court, and was inclined to impose the death  
penalty, but held that “as the accused was once  
acquitted by the High Court we refrain from imposing that  
extreme penalty in spite of the fact that this case is  
perilously near the region of “rarest of rare’ cases.” 572  
  
5.2.60 Similarly, while in Licchamadevi v. State of  
Rajasthan,’ State of U.P. v. Babu Ram,5" State of  
Maharashtra v. Damu,5"5 State of Maharashtra v. Bharat  
Fakira Dhiwar,’?® State of Tamil Nadu v. Suresh,”" and  
Santosh Kumar Singh v. State,” the Supreme Court  
refused to impose the death penalty since a lower court  
had acquitted the accused; on the other hand, in State  
of Rajasthan v. Kheraj Ram,5"° Devender Pal Singh v.  
State, N.C.T. of Delhi,58° and Krishna Mochi v. State of  
Bihar,s\*! despite judges having disagreed on the guilt of  
the accused, the death penalty was awarded. In  
Devender Pal Singh v. State, N.C.T. of Delhi,5\* and  
Krishna Mochi v. State of Bihar,5\*\* the dissent on the  
question of guilt was by the senior most judge of the  
Supreme Court itself.  
  
5.2.61 Similar concerns arise in cases like B.A  
Umesh v. Registrar General, High Court of Karnataka,\*\*\*  
Ankush Maruti Shinde v. State of Maharashtra,585 Ram  
Deo Chauhan @ Raj Nath Chauhan v. State of Assam,3\*\*  
and of three appellants in Krishna Mochi v. State of  
Bihar,5\*7 where judges across the tiers and Benches had  
agreed on the guilt of the offenders, but not on whether  
the case belonged to the rarest of rare category. Despite  
this disagreement, the Supreme Court imposed the  
  
‘State of Maharashtra v. Suresh, (2000) 1 SCC 471, at para 28,  
© Lichhamadev. State of Rajasthan, (1988) 4 SCC 456,  
UP. v. Babu Ram, (2000) 4 SCC 515,  
Maharashtra v. Damu, (2000) 6 SCC 269,  
Maharashtra v. Bharat Fakira Dhar, (2002) 1 SCC 622,  
7 State of Tami Nadu v. Suresh, (1998) 2 SCC 372,  
. Sanlosh Kumar Singh v. Stale, (2010) 8 SCC 747.  
1 State of Rajasthan v. Kheraj Ram, (2003) 8 SCC 224  
5 Devender Pal Singh v. National Capital Terry, (2002) 5 SCO 234,  
 kfishna Mochi v. State of Bihar (2002) 6 SCC 81  
‘82 Devender Pal Singh v. National Capita Terry, (2002) 5 SCO 234,  
© krishna Mochi v. State of Bihar (2002) 6 SCC 81  
58 B.A. Umesh v. Registrar General, High Coutt of Kamataka, 2011) 3 SCC 8s.  
© ankush Maruti Shinde v. Slate of Maharashtra, (2009) 6 SCC 667.  
‘© Flam Deo Chauhan @ Rij Nath Chauhan v. Site of Assam, (2000) 7 SCC 455.  
© Krishna Mochi v. State of Bihar, (2002) 6 SCC 81  
  
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death penalty. In Ram Deo Chauhan, where one  
Supreme Court judge had himself imposed life  
imprisonment on the ground of the extreme young age  
of the accused, a judge in the majority held that this  
may be a ground for the offender to seek commutation  
from the executive, but would not affect the imposition  
of the death penalty by the Court. Similarly, in Krishna  
Mochi, where the senior most judge on the Bench had  
acquitted on appellant and imposed life imprisonment  
on three, all four were given the death sentence by  
majority. Contrast these cases with Mayakaur  
Baldeusingh Sardar v. State of Maharashtra,58\* where,  
while the Court found that the case met the rarest of  
rare standard, it refused to impose the death penalty  
only because the High Court had imposed life  
imprisonment on the accused.  
  
5.2.62 Additional concerns arise in those cases  
where the Supreme Court is the first court to impose the  
death sentence. In 1984, the United Nations Economic  
and Social Council adopted certain Safeguards  
Guaranteeing Protection of the Rights of Those Facing  
the Death Penalty, 58° which was endorsed by consensus  
by the UN General Assembly. According to these  
Safeguards “Jajnyone sentenced to death shall have the  
right to appeal to a court of higher jurisdiction, and steps  
should be taken to ensure that such appeals shall  
become mandatory."3%  
  
5.2.63 Under India’s international obligations,  
therefore a person sentenced to death has a right to  
appeal the imposition of the death sentence, and the  
state has an obligation to provide such an appellate  
forum. However, where the death penalty is imposed for  
the first time at the level of the Supreme Court, this  
right is negated. Take for example, the case of Simon v.  
‘State of Karnataka.% In this case, 4 persons were  
convicted for capital offences. The case was tried by the  
TADA court, and the first and only appeal lay before the  
  
‘= (2007) 12 Sco 654.  
5 Floluton 1984/50 of 25 May 1984  
‘> lsoluton 198450 of 25 May 1984  
© Simon v. State of Karnataka, (2004) 1 SCC 74,  
  
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Supreme Court. The TADA Court convicted the accused  
and sentenced them to life imprisonment. The convicts  
appealed the decision to the Supreme Court. No appeal  
was filed either by the State or the victims for the  
enhancement of sentence. However, the Supreme Court  
suo motu enhanced the sentence of the 4 appellants to  
death. The Supreme Court was therefore the first and  
only court to impose the death penalty. The offenders  
had no forum available to them for appealing the  
decision. It is noted in this regard that the Commission,  
in its 187 Report, had recommended that, “where in  
case the Supreme Court thinks that the acquittal is wrong  
and the accused should be convicted and sentence to  
death; or it thinks that the sentence for a term or life  
sentence is to be enhanced to a death sentence, then the  
‘Supreme Court may direct the case to be placed before  
the Hon'ble Chief Justice of India for being heard by a  
Bench of at least five judges. This also requires the  
‘Supreme Court’s rules to be amended.”s% However, this  
recommendation has not been implemented.  
  
5.2.64 Another concern regarding disparate  
treatment in similar fact situations arises in cases  
where co-accused, who are accused of having played the  
same role in the offence, are given differing treatment.  
For example, the same FIR that was the basis of the  
conviction and death sentence to the accused in Krishna  
Mochi, also named Vyas Ram and ascribed the same role  
to him.5 His case was tried separately. Before the  
Supreme Court, the judges relied on facts from the  
Krishna Mochi judgment to convict the accused.  
However, noting that in Krishna Mochi there had been a  
dissent on the question of the guilt of one accused, and  
the appropriateness of awarding the death sentence for  
the other three accused, the Court in Vyas Ram refused  
to impose the death penalty. Therefore though Krishna  
Mochi and two of his co-accused were given the death  
sentence despite a dissenting judgment in their favour,  
  
‘© Law Commission of india, 187" Report, 2013, Ministry of Law, Government f India,  
‘at page 62, available at hip: ilawcommissionotingia nc.inteports!187In%<20repor.pl  
ited on 35.8.2076,  
  
5 Vyas Ram v. State of Bihar, 2019 (12) SCC 249,  
  
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Vyas Ram was given a life imprisonment on the basis of  
that very judgment.  
  
5.2.65 \_ These cases echo another case highlighted by  
Justice Bhagwati in his dissent in Bachan Singh as an  
“example of freakishness in imposition of death  
penalty."5% In Harbans Singh v. State of U.P.,59%  
involved three accused - Jeeta Singh, Kashmira Singh  
and Harbans Singh. All three were sentenced to death  
by the Allahabad High Court for playing an equal part  
in the murder of a family of four. Each person preferred  
a separate appeal to the Supreme Court. The special  
leave petition of Jeeta Singh came up before one Bench  
and it was dismissed. He was executed. Kashmira  
Singh’s special leave petition was placed before a  
different Bench. He was granted leave, and  
subsequently his sentence was commuted to one for life.  
Harbans Singh’s special leave petition came up before  
yet another Bench. Leave was rejected and a review  
petition was also dismissed. Harbans Singh was to be  
executed along with Jeeta Singh. However, he filed a  
writ petition before the Supreme Court and a stay on his  
execution was ordered. When the writ petition was  
heard, the Bench came to know about Kahsmira Singh’s  
commutation. According to Justice Bhagwati in Bachan  
Singh,  
  
[his is a classic case which illustrates the  
judicial vagaries in the imposition of death  
‘penalty and demonstrates vividly, in all its  
cruel and stark reality, how the infliction of  
death penalty is influenced by the composition  
of the Bench. ... The question may well be  
asked by the accused: Am I to live or die  
depending upon the way in which the Benches  
are constituted from time to time? Is that not  
clearly violative of the fundamental guarantees  
enshrined in Articles 14 and 2125%  
  
5+ Bachan Singh v. State of Punab, (1982) 3 SCC 24, at para 71  
‘95 Harbans Singh v. Sate of UP., (1982) 2 SCC 101  
‘9 Bachan Singh v. State of Punjab, (1982) 3 SCC 24, at para 71  
  
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(iv) Empirical Data on the Imposition of the  
Death Penalty  
  
a. Rates of Imposition of the Death Penalty  
  
5.2.66 Data presented at the National Consultation  
and submitted to the Law Commission in response to  
the public consultation, substantiate the picture of  
inconsistent, arbitrary and judge centric application of  
the death penalty.  
  
5.2.67 Data gathered by the National Crimes Record  
Bureau on death sentences indicates that in the period  
between 2000 and 2012, 1677 death sentences were  
imposed by Indian courts. As was mentioned in the  
National Consultation by some participants this implies  
that India sends on average 129 persons to death row  
every year, or roughly one person every third day. In  
Khade, the Supreme Court, took note of these figures  
and stated that this number was alarmingly high and  
appeared to suggest that the death penalty is being  
applied much more widely than was envisaged by  
Bachan Singh.5%"  
  
5.2.68 Juxtaposing the NCRB data on death  
sentences imposed against the overall convictions for  
murder in the same time period provides another useful,  
albeit approximate, insight.5° This data shows that  
during the period 2004-2012, convictions were recorded  
by courts in 180439 cases involving murder. In the  
same time period, the death sentence was imposed in  
1178 cases, that is, in 0.65% of the cases involving  
murder convictions. In absolute numbers this is a large  
figure, as recognized by the Supreme Court in Khade.  
In addition, given the arbitrariness and inconsistency in  
  
5 [Tihe number of death sentences awarded ... is rather high, making & unclear  
whether death penally = really being awarded only in the rarest of rare cases. —  
‘Shankar Kisanrao Khade v. State of Maharashira, (2013) 5 SCC 546  
  
55° Apama Chandra, Mrinal Satish, Vrinda Bhandan and Radhika Chikara, Hanging in  
the Balance: Arbittariness. in Death Penalty Adjudication in india (1950-2013)  
{forthcoming 2015] on fe). The numbers only provide an approximate insight because  
‘while the conviction rates are for murder, the death sentence figures may take into  
‘Sccount sentences imposed for non‘murder capital tfences. Since, there are very few  
capital sentences imposed in offences that donot involve murder as well, the variation,  
ifany, between this approximation and the actual number of murder related death  
sentences wil be negligible.  
  
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Page 150:  
the imposition of the death penalty, the question posed  
by the Supreme Court in Shraddananda (2), bears  
repeating:  
  
Ilif in similar cases or in cases of murder of a far  
more revolting nature the culprits escaped the  
death sentence or in some cases were even able  
fo escape the criminal justice system altogether  
it would be highly unreasonable and unjust to  
pick on the condemned person and confirm the  
death penalty awarded to him/her by the courts  
below simply because he/she happens to be  
before the Court. But to look at a case in this  
perspective this Court has hardly any field of  
comparison. The court is in a position to judge  
‘the rarest of rare cases’ or an ‘exceptional case’  
or an ‘extreme case’ only among those cases that  
come to it with the sentence of death awarded by  
the trial court and confirmed by the High Court.  
All those cases that may qualify as the rarest of  
rare cases and which may warrant death  
sentence but in which death penalty is actually  
not given due to an error of judgment by the trial  
court or the High Court automatically fall out of  
the field of comparison. More important are the  
cases of murder of the worst kind, and their  
number is by no means small, in which the  
culprits, though identifiable, manage to escape  
any punishment or are let off very lightly. Those  
cases never come up for comparison with the  
cases this Court might be dealing with for  
confirmation of death sentence. To say this is  
because our Criminal justice System, of which  
the court is only a part, does not work with a  
hundred percent efficiency or anywhere near it,  
is not to say something remarkably new or  
original. But the point is, this Court, being the  
highest court of the Land, presiding over a  
Criminal Justice System that allows culprits of  
the most dangerous and revolting kinds of  
  
5 Swamy Shraddananda (2) v. State of Kamataka, (2008) 13 SCC 767.  
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murders to slip away should be extremely wary  
in dealing with death sentence?  
  
5.2.69 In other words, how can any court in the  
country determine whether the cases before them are  
the rarest of rare? Each judge can only limit her analysis  
to the cases s/he has presided over or read about. In  
light of the large volumes of cases, the determination  
that one or the other case is a “rarest of rare case” would  
remain nothing but a legal fiction. Whether a law that  
permits the taking of life on the basis of a legal fiction,  
is in consonance with the text and spirit of the  
Constitution, bears investigation.  
  
5.2.70 The excessive use of the death penalty is  
evidenced by another figure. Data supplied by the  
Supreme Court to the Death Penalty Litigation Clinic,  
National Law University, Delhi, and presented at the  
National Consultation indicates that between 2000-  
2015, trial courts imposed the death sentence on 1790  
persons."! Of these, 1512 cases were decided by the  
High Court. The remaining are either still pending, or  
their judgments have not been located. In 62.8% of  
these 1512 cases, the appellate courts commuted the  
sentence. That is, though the appellate courts agreed  
with the trial court on conviction, they rejected the  
court’s sentencing determination. In another 28.9 % of  
the cases where the trial court awarded the death  
sentence, or roughly a third, ended in acquittal,  
pointing to an even deeper systemic problem relating to  
the quality of adjudication in the lower courts. In all, the  
death sentence was confirmed only in 4.3% of the cases.  
‘The Supreme Court's data thus shows that trial courts  
erroneously impose the death penalty in 95.7% cases.  
  
b. “Judge Centric” Death Penalty Jurisprudence  
  
5.2.71 An empirical examination of the death  
penalty carried out in the 1970s by Professor  
Blackshield highlighted the judge-centric nature of  
application of the death penalty in those days. This  
  
‘22 Swamy Straddananda (2) v. State of Kamataka, (2008) 12 SCC 767, at para 45.  
‘This figure excludes TADA cases.  
  
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Page 152:  
study analysed over 70 decisions of the Supreme Court  
between 1972-1976, where the Court had to decide  
between life imprisonment or death penalty. The author  
found evidence of judge-centric sentencing when he  
noted that a large number of death sentences were  
given/confirmed by Benches consisting of Justices  
Vaidialingam, Dua, and Alagiriswami.% Further,  
Blackshield also analysed the various aggravating and  
mitigating factors employed by the Supreme Court and  
found no coherence in the Court’s approach in applying  
the same. While delay after sentence was given  
importance in five cases, it was discounted in another  
five. Similarly, the (young) age of the accused was given  
due consideration in two cases but discounted in  
another case. The “immoral” relationship of the  
accused-Appellant was treated as a mitigating factor in  
two cases and an aggravating factor in one case. The  
similarities between Justice Bhagwati’s dissent  
referenced above, Professor Blackshield’s research, and  
the present state of the death penalty are striking.  
  
5.2.72 Justice Bhagwati’s concern that the death  
penalty depends not on the facts of the case, but on the  
composition of the Bench echo in recent admissions by  
the Supreme Court that the imposition of the death  
penalty is “judge centric.“ This concern is further  
substantiated by research presented at the National  
Consultation examining the impact of judicial  
conscience on the outcome of death penalty cases. Post-  
2000, one judge of the Supreme Court imposed the  
death sentence in 14 out of 30 cases (of which two  
involved acquittal by the High Court, two involved  
turning life sentences into death, and in two the death  
sentence was imposed despite acquittal by another  
Supreme Court judge). Pertinently, five of these 15 cases  
imposing death, have now been declared per incuriam  
by the Supreme Court itself. A second judge imposed  
the death sentence in 8 out of 18 cases, whereas two  
  
SAR, Blackehield, Capital Punishment in India, 21(2) Journal ofthe Indian Law  
Insitute, 156-158 (Apri-June 1979)  
  
© AR. Blackehield, Capital Punishment in India, 21(2) Journal ofthe indian Law  
Insitute, 162. (April-June 1979).  
  
94 Sangeet v. State of Haryana, (2013) 2 SOC 452, at para 33.  
  
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Page 153:  
other judges imposed no death penalties in adjudicating  
10 and 16 cases respectively.‘°5  
  
5.2.73 These studies and examples illustrate the  
limited possibility of “principled sentencing” in India,  
which is the underlying assumption for the  
constitutionality of the death penalty in India.  
  
c. Geographical Variations  
  
5.2.74 The NCRB data cited above also points to  
another axis of disparity in death penalty jurisprudence.  
When broken down by state, the rate of imposition of  
death sentences as a percentage of the rate of  
convictions for murder for the period 2004-12, shows.  
significant disparity by state. For example, a murder  
convict in Kerala is about twice as likely to get the death  
sentence as a murder convict in the rest of the country  
put together; a murder convict in Jharkhand is 2.4  
times as likely to get the death sentence compared to  
the rest of the country, Gujarat 2.5 times, West Bengal  
3 times, Karnataka 3.2 times, Delhi 6 times, and  
Jammu and Kashmir 6.8 times. A murder convict in  
Karnataka is 5.8 times as likely to get the death  
sentence compared to Tamil Nadu. A murder convict in  
Gujarat is again 5.8 times more likely to get the death  
sentence than one in Rajasthan. Maharashtra sends  
murder convicts to death row 2.9 times more frequently  
than Madhya Pradesh. Uttar Pradesh sends the most  
number of persons to the death row, but as a proportion  
of the conviction rate for murder, it is about par with  
the national average. Karnataka was the second largest  
contributor to the death row in this period, and its death  
sentence rate was 3.2 times the national average.606  
  
‘©: Presentation mage by Dr. Yug Mohit Chaudhry atthe National Consultation (on fe),  
‘9° See Aparna Chandra, Mrinal Satish, Vrinda Bhandari and Radhika. Chikara,  
Hanging in the Balance: Arbivariness in Death Penaly Adjudication in india (1950.  
2013) [lorthcoming 2015] (on te)  
  
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Page 154:  
©. Systemic and Structural Concerns with the  
Criminal Justice Process: Implications for the  
Death Penalty  
  
5.3.1 Apart from concerns regarding the excessive  
and arbitrary use of the death penalty, data indicates  
that there exists disparity in the imposition of the death  
penalty, reflecting systemic and \_\_ structural  
disadvantages, particularly of the socially and  
economically marginalized.  
  
(i) Assessing Capacity to Reform  
  
5.3.2. The Bachan Singh formulation requires  
judges to impose the death penalty only when the  
alternative of life is “unquestionably foreclosed.”67 To  
make this determination, judges are required to  
consider whether the offender is capable of reform.  
Crucially, Bachan Singh endorsed the standard that the  
prosecution should prove by leading evidence that the  
offender cannot be reformed.\*  
  
5.3.3 As the Supreme Court has subsequently  
noticed, this injunction to determine the possibility of  
reformation through leading evidence rather than  
hunches, has rarely been followed. More often than  
not, judges state, rather than evaluate, whether a  
person is likely to be a continuing menace to society;  
whether he is capable of reform and therefore, whether  
sparing his life is “unquestionably foreclosed.”5!° How  
do judges predict the offender's future predilections,  
especially (though not only) when they find in otherwise  
similar fact situations that in the one case the offender  
was not likely to be a menace to society, and in another,  
that he was? Comparative experiences, and crucially  
our own history cautions us about making such  
assessments.  
  
5.3.4 A number of studies, now severely  
discredited, have attempted determined whether certain  
  
‘97 Bachan Singh v. Stale of Puniab, (1980) 2 SCC 684, at para 209,  
(2° See discussion above  
  
‘Santosh Bariyarv. Sate of Maharashtra, (2009) 6 SCC 498,  
  
10 See discussion above  
  
145  
  
  
Page 155:  
people or groups can be characterized and categorized  
according to their criminal propensities or other  
tendencies. Studies of this sort tried to show, for  
example, that whites had larger brains than “inferior”  
races, like blacks, and thus were more intelligent.  
However, Stephen Jay Gould, who studied a host of  
“scientific” efforts to relate intelligence to brain size over  
the last 150 years, has proved these attempts false.61!  
In some of the works he studied, the methods used were  
seriously flawed. In others, existing prejudices of these  
“scientists” influenced how they chose and analysed  
their data. But crucially, Gould found a tendency in  
these studies to convert abstract prejudices — here,  
that blacks are inferior — into “facts”, just so one can  
“make the divisions and distinctions among people that  
our cultural and political systems dictate.”\*!?  
  
5.3.5 Indian history echoes similar problematic  
attempts at classifying people. In 1871, for example, the  
British passed the “Criminal Tribes Act”. The motivating  
notion behind the Act “was to regard all members of  
these tribes as potentially criminal.” The Act listed  
about 150 tribes by name.\*!4 If a person was born into  
one of these tribes, that person would by birth and by  
definition be criminal. While introducing the Bill that  
became the 1871 Act, T. V. Stephens, a Member of  
Britain’s Law and Order Commission, observed that  
such tribes “were criminals from times immemorial ..  
[They are] destined by the usages of caste to commit  
crime and [their] descendants will be offenders against  
law until the whole tribe is exterminated or accounted for  
in the manner of the Thugs... may almost say his religion  
fis] to commit crime."\*5 Such persons were thus  
  
17 STEPHEN Jay GOULD, THE MISMEASURE OF Man, 56 (1996)  
  
12 STEPHEN JAY GOULD, THe MISMEASURE OF MAN, 56 (1996)  
  
‘Ministry of Education and Socal Wellare, Gazetteer of India, (4)1978, Now Dali.  
"The Resist native Intemational, Branded ‘Born Criminals: Racial Abuses against  
Detained and Nomadic’ Tribes in india, inlormation for the consideration of the  
‘Commitee on Elimination of Racial Discrimination in Reviewing India’s Fifteenth to  
Nineteenth Periodic Reports. 3 (Feb 2007), avaliable at  
hips a2 ohetrorglenglsh bodies cer docsingosresstpa, visited on 23.08.2015,  
o Dip D'Souza, Declared Criminals at Birth. India's "Denied Tribes”, (200),  
‘avaliable Ft tpwww. manus  
india org)pats\_issues/PDF "2062012314 20Declared%-20Criminal.20al%<208it  
hp, vised on 23.08.2018.  
  
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Page 156:  
assumed to be prone to committing crimes by habit,  
addiction, or even religious diktats. °°  
  
5.3.6 Assuming criminality based on one’s  
inherent, genetic or congenital attributes often find their  
way into law and the process of justice, including the  
death penalty. So much so, that in 1996, Texas had to  
amend its Code of Criminal Procedure to state that the  
Prosecution in capital punishment cases may not offer  
evidence “to establish that the race or ethnicity of the  
defendant makes it likely that the defendant will engage  
in future criminal conduct.”\*"? That is, as late as 1996,  
the law in Texas had to expressly prohibit the tendency  
to assume that some people have an inherent, genetic  
predisposition to crime because of their race or  
ethnicity. The American Bar Association has also urged  
that the law do away with the very notion of “future  
dangerousness”.°1® They noted that this idea “often  
turns on unreliable scientific evidence.”\*” Put another  
way, the American Bar Association recognized that  
there is no scientific evidence for such a thing as an  
inherently criminal bent of mind.  
  
5.3.7 Similar concerns. with ~—\_assuming  
dangerousness arise in India as well. To again take the  
example of the Criminal Tribes Act, though this law was  
repealed in 1952 (and the tribes were “de-notified”) it  
was however replaced by Habitual Offenders Acts in  
several states. Persons belonging to de-notified tribes  
continue to be presumed (in practice, if not in law) to be  
  
© Diip D'Souza, Declared Criminals at Birth. India's “Denotfied Tribes”, (2001),  
‘avaliable Ft tpwww. manus  
incia org)pats\_issues/PDF%.20le%20123/4 .20Declared%<20Criminal.20al¥<208it  
hp visted on 23.08.2018.  
  
GP RogeR HoOo AND CAROLYN HOYLE, THE DEATH PENALTY: A WontowDe  
PERSPECTIVE, 261 (2015),  
  
SE 'RogeR. Hood AND CAROLYN HOYLE, THE DEATH PENALTY: A WontowDe  
PeRSPEcriVe, 361 (2015); American Bar Association, Evaluating Faimess and  
‘Accuracy in Sate Death Penaly Systems: The Texas Capital Punishment Assessment  
Report (Seplember 2013), avaliable at  
hipaa. americanbar-orglcontenisam/abaladministrativldeath\_penaty\_marators  
smb complate\_repor.authcheckdam pat, vistas on 23.08.2016.  
  
Se Rogen. HOOS AND CAROLYN HOMLE, THE DEATH PENALTY: A WortowDe  
PensrecTiVe, 961 (2015).  
  
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Page 157:  
criminal, and genetically predisposed to crime.? The  
attitude of the Criminal Justice functionaries regarding  
de-notified tribes can be summed up from this, amongst  
many other similar, news reports:  
  
According to Ashti’s police chief, S.S.  
Gaikawad, a quarter of local thefts are  
carried out by Pardhis. His deputy reckons  
half of Pardhi men are criminal. Mr  
Gaikawad attributes high rates of  
criminality to poverty, but believes culture  
also plays a part: ‘The more criminal cases  
against a Pardhi man, the higher his status,  
and therefore the better his marriage  
prospects are.\*?!  
  
5.3.8 Assumptions like these rest on no scientific  
evidence of any kind. And yet Habitual Offenders Acts  
remain in place across India. Further, police manuals  
till date mandate the opening of history sheets for  
registered ex-notified tribe members, “on account of  
their active criminality."®? The “taint of inherent  
criminality” continues to shape the interaction of  
members of de-notified tribes with the state apparatus,  
including the police. Infact, the Delhi High Court in Naz  
Foundation v. State (N.C.T of Delhijs23 also noted how the  
taint of criminality still continues for communities such  
as the Hijra community.5  
  
5.3.9 The issue to consider is how members of such  
tribes, who are often viewed in such a prejudicial  
manner, will be treated within the criminal justice  
system, especially when the question of their “future  
dangerousness” or “possibility of reform” is in issue. To  
what extent, if any, do socially constructed and imbibed  
prejudices against the person’s identity play a role in  
  
Intemational Convention on the Elimination ofall frms of Racial Discrimination,  
(CEADICIIND/CONS, 3 (Seventieth Session, March 2007).  
  
"The Economist, f they were crooks, woultn? they be rcher?, Api 22 2010,  
  
‘2 Menal Sash, "Bad Characters, History Shesters, Budding Goondas and Rowdies  
Police Survellance Fis and Inieiigence Databases in india" 23 NATL. L SCH. INGIA  
Fev. 133, 138 (2011-12).  
  
Naz Foundation v. State (N.C.T. of Delhi, 2010 Gri J. 94 (De).  
  
‘2 Naz Foundation v. Sate (N.C.T.of Deli, 2010 Grid. 94 (Del), at para 50.  
  
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such assessment? While it is difficult to be sure of this,  
the larger context of adjudication, where individual  
judges often make legal assessments based on such  
social constructs is indicative of an answer.  
Assumptions relating to caste have often been made,  
and used during trials for various offences in different  
ways, which keeps alive the concern that otherwise  
irrelevant factors such as a person’s class or caste may  
impact the person’s interaction with the criminal justice  
system.®5 It is in this larger context of persistent social  
prejudice against certain groups, that so final and  
irrevocable a punishment as the death penalty operates,  
which may influence not only the police apparatus, the  
prosecution machinery, witnesses and the public, but  
also the judges themselves.  
  
5.3.10 These are not ‘merely \_ theoretical  
suppositions. The reality of the discriminatory impact of  
caste, class, and religion is exhibited by data presented  
by the Death Penalty Research Project of National Law  
University, Delhi at the Commission’s National  
Consultation. The data indicates that out of 373  
prisoners on death row in the country, over 75% belong  
to backward classes and religious minorities. 93.5% of  
those sentenced to death for terror offences are religious  
minorities or Dalits.®° Hence, it appears that there are  
plenty of reasons, as well as empirical evidence to fear  
the disparate and maybe even discriminatory impact of  
the death penalty.  
  
(i) Economic and Educational Vulnerability  
  
5.3.11 Shibbanlal Saxena, a member of India’s  
Constituent Assembly, had spent over two years on  
death row before Independence. In that time, he saw  
several other prisoners executed, among whom were  
seven he believed were innocent. During a debate in the  
Constituent Assembly, Saxena said:  
  
© See e.g, Vellapandl v. Stata, 2001 Ci, Ld. 2772 (Mad), at paratS; Dayaram v.  
Slate of MP. 1992 Cr. LJ. 3154 (MP.  
  
= "Presentaion made by the Death Penalty Research Project at the National  
‘Consultation on July 14,2015  
  
149  
  
  
Page 159:  
Thave seen people who are very poor not being  
able to appeal [their convictions] as they  
cannot afford to pay the counsel. [Tjhe  
Supreme Court may grant special leave to  
appeal from any judgement, but it will be open.  
to people who are wealthy, who can move  
heaven and earth, but the common people who  
have no money and who are poor will not be  
able to [appeal in this way).°7  
  
5.3.12 The implication of Saxena’s statement was  
that it is much harder for an accused with limited  
economic means to defend himself than it is for richer  
prisoners to do so. If that is an obvious observation that  
holds across the board, it is also indicative of the  
possibility that a capital punishment trial, by its very  
nature, disadvantages the economically vulnerable,  
especially in an adversarial system. It is also a reminder  
of a serious conundrum every death penalty trial is  
faced with: how do we ensure that the accused has  
reasonable legal representation throughout the lengthy  
process? Often he is too poor to afford a lawyer. In such  
cases, the government is obliged to appoint lawyers for  
the defence. However, lawyers so appointed are paid  
absurdly low amounts for their work. Legal aid lawyers  
are generally paid in the range of Rs. 500 - Rs. 1500 per  
trial, and Rs. 1000 — Rs. 3000 per appeal. Delhi is an  
exception where legal aid lawyers are paid Rs. 12,000  
for a Sessions trial where the death penalty is a possible  
sentencing option.’ And yet even this number remains  
significantly lower than the fees a private advocate  
would generally charge.  
  
5.3.13 Empirical evidence also suggests that the  
majority of death row convicts in India are from  
economically vulnerable sections of society. Data  
presented by NLU Delhi’s Death Penalty Research  
Project shows that nearly 74% of convicts were  
economically vulnerable (vulnerability judged in large  
  
© Constiuent Assembly of India, Vol. 8, 3rd June 1949, available at  
hitp:/pariamentoinia nic ivsidebates volgp Sb htm, visited on 25.08.2015  
Data provided to the Commission by Dr. Yug Chaudhy. as obtained from the  
respective Stale Legal Services Authories (on te).  
  
150  
  
  
Page 160:  
part by their occupations and landholdings). In terms of  
being sole-bread winners, the Clinic could not find  
information for 25% of the convicts. Of the remaining  
75% of the convicts, 63% were sole breadwinners,'%  
which would certainly have an impact on whether their  
families could afford retaining competent counsel  
through the legal process. The competence of counsel  
would also impact the entire trial and appellate process.  
  
5.3.14 The issue of ineffective legal aid, especially in  
death penalty cases has been debated across the world.  
It has been argued that “whether one ends up in death  
row is usually determined not by the heinousness of the  
crime but by the quality of trial counsel.”\*° Ineffective  
assistance of counsel has a higher tendency to lead to  
wrongful convictions. Take for example, the case of  
Mohd. Hussain @ Julfikar Ali v. State, where the  
accused was convicted and sentenced to death by the  
trial court and high court for a blast that killed 4  
persons. The Supreme Court remanded the matter back  
for a fresh trial, noting that the accused had been  
denied fair trial because of the denial of effective legal  
representation. At this fresh trial Mohd. Hussain was  
found innocent of all charges and was acquitted. He was  
in prison for 15, out of which he was on death row for 7  
years and 2 months.  
  
5.3.15 Interestingly, in the recent case of Surendra  
Koli v. State of UP, where the convicted person filed a  
review petition against his conviction and sentence by  
the Supreme Court on the ground that he had lacked  
effective legal representation before the trial court, the  
Supreme Court rejected the petitioner's contention  
because “at this belated stage of review in the present  
proceedings, this argument would not come to the respite  
  
‘© Data presented by the Death Penalty Resoarch Project atthe National Consultation  
‘organized by the Law Commission on July 11,2015,  
  
ennath Willams, Most Deserving af Death? An Analysis of the Suprome Courts  
Death Penalty Jurisprudence 17 (2012)  
  
5" Kenneth Willams, Most Deserving of Death? An Analysis ofthe Supreme Courts  
Death Penalty Jurisprudence 18 (2012)  
  
‘Mohd. Hussain @ Jultkar Al v. State, 2012 (8) SCALE 308  
  
6 Surendra Kol v. Slate of UP, Review Pelion (Cr,) No. 395 of 2014 dated October  
28, 2014  
  
asi  
  
  
Page 161:  
of the petitioner,” but observed that “the learned District  
Judges while assigning the defence counsel, especially  
in cases where legal aid is sought for by the accused  
person, must preferably entrust the matter to a counsel  
who has an expertise in conducting the Sessions Trial.  
‘Such assignment of cases would not only better preserve  
the right to legal representation of the accused persons  
but also serve in the ends of ensuring efficient trial  
proceedings.”°%  
  
5.3.16 The empirical data on error further  
substantiates the discriminatory impact that poverty,  
and consequently, possible ineffective assistance of  
counsel has on people charged for a capital offence. The  
Supreme Court in Bariyar, Sangeet, and Khade,  
acknowledged error in 16 cases, involving death  
sentences imposed on 20 individuals. Disturbingly, in  
over half these cases in which the Court later found  
error, the accused were represented by amicus curie.  
Data from a study titled Hanging in the Balance:  
Arbitrariness in Death Penalty Adjudication in India  
(1950-2013) shows that out of the 281 persons who were  
awarded the death sentence by at least one level of court  
between 2000 and 2013, and whose cases went up  
through all the tiers of the judicial system, 128 persons  
were given the death sentence only by the Trial Court.©°5  
Both the High Court and the Supreme Court either  
‘commuted the sentence or acquitted the person in these  
cases. 7.03% of such accused were represented by  
Amicus Curie. In the same time period, 79 persons were  
given the death sentence by both the Trial Court and the  
High Court but were either acquitted or had their  
sentences commuted by the Supreme Court. The  
Amicus Curie representation of this group was 22.8%.  
And finally, of the 69 persons who were given the death  
  
‘9 Surendra Kal v. State of UP, Review Pein (Cr) No. 395 of 2014 dated October  
2a, 2014  
  
© Apama Chandra, Mrinal Satish, Vrinda Bhandari and Radhika Chitkara, Hanging in  
the Balance: Arbitariness. in Death Penalty Adjudication in India (1950-2013)  
{forthcoming 2015] (m tie)  
  
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sentence by the Supreme Court itself, 36.2% has  
amicus representation.  
  
5.3.17 The over-representation of amicus curie in  
cases relating to error and to the imposition of the death  
penalty is a cause for caution, not least because it may  
signal the impact of structural and systemic biases on  
the imposition of the death penalty. Merely because a  
person is represented by amicus before the Supreme  
Court of course does not imply that the person did not  
get good legal representation before the Supreme Court.  
However, the fact that an accused is represented by  
amicus does indicate the person’s economic  
circumstances. The ability to hire quality legal  
representation before trial courts, and to ensure that a  
robust record is created at the trial court level, is likely  
to be compromised in such instances. The impact of the  
lack of access to quality legal representation,  
particularly at the trial stage is also likely to be  
compounded by the existence of inconsistencies in the  
death penalty jurisprudence, which result in ill-trained  
lawyers having to argue before inadequately guided  
judges on an incoherent area of law.  
  
5.3.18 This may be partially responsible for the  
higher presence of amicus representation in cases in  
which the death penalty is upheld by the Supreme  
Court. Be that as it may, this data indicates that of the  
persons who are given the death sentence at the trial  
court level, those who cannot afford to hire their own,  
legal representation are more likely to have their death  
sentences confirmed by the high court, and/or the  
Supreme Court. This was in fact acknowledged by the  
Supreme Court in Mohd. Farooq Abdul Gafur v. State of  
Maharashtra,°s? where the Court observed that the  
inherent imperfections of the criminal justice system  
lead to “swinging fortunes of the accused on the issue of  
determination of guilt and sentence.” It noted that  
  
‘© apama Chandra, Mrinal Satish, Vrinda Bhandari and Radhika Chitkara, Hanging in  
the Balance: Arbitariness. in Death Penalty Adjudication in india (1950-2013)  
{forthcoming 2015] (on il)  
  
Mohd. Farooq Abdul Gaiurv. State of Maharashira, (2010) 14 SCC 641  
  
'° Mohd, Farooq Abdul Gafur. State of Maharashtra, (2010) 14 SCC 641, atparat9,  
  
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Page 163:  
“leading commentators on the death penalty hold the  
view that it invariably the marginalized and destitute  
who suffer the extreme penalty."°59  
  
5.3.19 Echoing a similar sentiment, though in the  
context of the US, public interest lawyer Bryan  
Stevenson, Executive Director of Equal Justice  
Initiative,“ once said “the reality is that capital  
punishment in America is a lottery. It is a punishment  
that is shaped by the constraints of poverty, race,  
geography and local politics.”  
  
5.3.20 \_ Similarly, in his dissenting judgement in the  
Bachan Singh case, Justice P.N. Bhagwati wrote:  
  
[The] death sentence has a certain class  
complexion or class bias [because] it is largely  
the poor and the downtrodden who are the  
victims of this extreme penalty. We would  
hardly find a rich or affluent person going to  
the gallows. Capital punishment, as pointed  
out by [San Quentin State Prison) Warden  
[Clinton Truman] Duffy, is a “privilege of the  
poor. #2  
  
5.3.21 He then summed up his argument with the  
following and forthright denunciation of the penalty:  
  
There can be no doubt that death penalty in  
its actual operation is discriminatory, for it  
strikes mostly against the poor and deprived  
sections of the community, and the rich and  
the affluent usually escape from its clutches.  
This circumstance also adds to the arbitrary  
and capricious nature of the death penalty  
and renders it unconstitutional as being  
violative of Articles 14 and 21.6?  
  
‘Mohd, Farooq Abdul Gafurv. State of Maharashtra (2010) 14 SCC 641, atparat69.  
© Equal Justice inatve, available at wwrw’ej.or  
  
‘1 HUGO ADA BEDAY AN PAUL G. CASSELL, DEBATING THE DEATH PENALTY : SHOULD  
AJERICA WAVE CAPITAL PUNISHBENT?, 78 (2004)  
  
= Bachan Singh v. State of Punjab, (1982) 3 SCC 26, at para 81  
  
‘Bachan Singh v. State of Punjab, (1982) 8 SCC 24, at para 81.  
  
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Page 164:  
5.3.22 This pronouncement of unconstitutionality  
found favour with South African Constitutional Court in  
1995, when all eleven judges on the Bench agreed that  
race and poverty were factors in the outcomes of death  
penalty cases, as was “the personality and particular  
attitude to capital punishment of the trial judge.”° On  
these and other grounds, they pronounced that capital  
punishment violated the Interim Constitution of South  
Africa. It has since been abolished in South Africa.  
  
5.3.23 These concerns regarding the excessive,  
uncertain, and disparate application of the death  
penalty are compounded by the fallibility of the system  
as a whole, especially for an irreversible punishment.  
This issue is discussed next.  
  
D. Fallibility of the Criminal Justice System and  
the Death Penalty  
  
[The] death penalty is irrevocable; it cannot be  
recalled. It extinguishes the flame of life forever  
It is by reason of its cold and cruel finality  
that death penalty is qualitatively different  
from alll other forms of punishment.  
  
Bachan Singh v. State of Punjab (Bhagwati J.,  
dissenting)\*®  
  
From this day forward, I no longer shall tinker,  
with the machinery of death. For more than 20  
years I have endeavored-indeed, I have  
struggled—along with a majority of this Court,  
to develop procedural and substantive rules  
that would lend more than the mere  
appearance of fairness to the death penalty  
endeavor. Rather than continue to coddle the  
Court’s delusion that the desired level of  
fairness has been achieved and the need for  
regulation eviscerated, I feel morally and  
intellectually obligated simply to concede that  
  
‘State v. Makwanyane and Another, Constitutional Court of South Arica, CCT/2I94,  
June 6 1995, at para 48  
  
5° Sate v. Makwanyane and Another, Constitutional Court of South Arica, CCT/3I94,  
June 6 1998,  
  
‘Bachan Singh v. State of Punjab, (1982) 3 SCC 24, 751, at para 23.  
  
155  
  
  
Page 165:  
the death penalty experiment has failed. It is  
virtually self-evident to me now that no  
combination of procedural rules or substantive  
regulations ever can save the death penalty  
from its inherent constitutional deficiencies.  
The basic question-does the system  
accurately and consistently determine which  
defendants “deserve” to die?—cannot be  
answered in the affirmative. It is not simply  
that this Court has allowed vague aggravating  
circumstances to be employed, relevant  
mitigating evidence to be disregarded, and  
vital judicial review to be blocked. The problem  
is that the inevitability of factual, legal, and  
moral error gives us a system that we know  
must wrongly kill some defendants, a system  
that fails to deliver the fair, consistent, and  
reliable sentences of death required by the  
Constitution.  
  
- Callins v. Collins (Blackmun, J.,  
dissenting)”  
  
() Guilt Determination  
  
5.4.1 Justice Bhagwati’s reminder about the  
finality of capital punishment, and Justice Blackmun’s  
conviction regarding its fallibility should add caution to  
any debate on the death penalty. The desirability of  
retaining such an irreversible punishment has to be  
appreciated in this context of a criminal justice system  
that is both fallible and open to manipulation. A recent  
egregious example highlights this concern. In the  
Akshardham Temple Blasts of 2002, 33 people were  
killed and about 85 injured. Adambhai Sulemanbhai  
Ajmeri and 5 others were arrested for this attack. They  
were tried for various offences, including under the  
Prevention of Terrorism Act. Three of the accused were  
given the death sentence by the trial court. The High  
Court upheld their conviction and sentence. On appeal  
before the Supreme Court, the Court not only found all  
  
6 Callnsv.Colins, 510 US 1141 (1994)  
156  
  
  
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the accused innocent and acquitted them, but also  
expressed “anguish about the incompetence with which  
the investigating agencies conducted the investigation of  
the case of such a grievous nature, involving the integrity  
and security of the Nation. Instead of booking the real  
culprits responsible for taking so many precious  
lives, the police caught innocent people and got  
imposed the grievous charges against them which  
resulted in their conviction and subsequent  
sentencing.”°\*\*  
  
5.4.2 This was therefore not a case of a mistake in  
investigation, but of a complete fabrication by the police.  
Despite this, two tiers of courts were convinced beyond  
reasonable doubt that all the accused were guilty.  
Unfortunately, this is not a one-off case. In multiple  
cases, the Supreme Court has found that accused  
persons were not only convicted, but also sentenced to  
death on the basis of false and fabricated evidence  
generated through manipulated investigations, or  
through the negligence and callousness by various  
actors in the criminal justice system, including the  
police, prosecution and lower courts. A report by the  
Jamia Teachers’ Solidarity Union lists 16 cases of  
serious allegations, all of them involving terror charges,  
which were found to be completely false and fabricated  
by the courts. All of these 16 cases were investigated by  
one police cell. Again, however, the problem is more  
widespread. As the Supreme Court itself recognized, “/tjt  
is well known fact that in our country very often the  
prosecution implicates not only real assailants but also  
implicates innocent persons so as to spread the net  
wide“  
  
5.4.3 In multiple cases, the Court has noted that  
the conviction of the accused (and consequent death  
sentence) by lower courts was based on concocted  
evidence. An example is Ashish Batham v. State of  
Madhya Pradesh,°® where the Supreme Court observed  
  
‘= Adambhal Sulemanbhai Ameri & Ors. State of Gujarat, (2014) 7 SCC 716, at para  
225.  
  
‘ajor Singh v. State of Puri, (2006) 10 SCC 499, a para 15.  
  
6 Ashish Batham v. Stale of Madhya Pradesh, (2002) 7 SCC 317,  
  
157  
  
  
Page 167:  
that, “we could not resist but place on record that the  
appellant seems to have been roped in merely on  
suspicion and the story of the prosecution built on the  
materials placed seems to be neither the truth nor wholly  
the truth and the findings of the courts below, though  
seem to be concurrent, do not deserve the merit of  
acceptance or approval in our hands having regard to the  
glaring infirmities and illegalities vitiating them and  
patent errors on the face of the record, resulting in serious  
and grave miscarriage of justice to the appellant.”551  
  
5.4.4 Similarly, in Rampal Pithwa Rahidas v. State  
of Maharashtra, where the trial court sentenced 8  
persons to death and the high court confirmed the death  
sentence against 5 of them, the Supreme Court  
acquitted all the accused, on the ground that the main  
evidence against them - that of an approver — was not  
reliable. The Court not only found the evidence  
unconvincing, it also concluded that the witness was  
pressured by the police to turn approver because “the  
investigation had drawn a blank and admittedly the  
District Police of Chandrapur was under constant attack  
from the media and the public.”°53  
  
5.4.5 Soalso, in Subash Chander ete. v. Krishan Lal  
and ors.,5+ where the trial court convicted the four  
accused and sentenced three of them to death, and the  
High Court upheld the conviction, but commuted the  
sentence of all to life, the Supreme Court acquitted all  
the accused, observing that, “/wJe have noticed with pain  
that the aforesaid four accused persons were implicated  
not only to mislead the court but also to provide protection  
to the real persons, being sure that ultimately no court  
could convict and sentence any of the aforesaid accused  
persons.”®55 Despite the Court's opinion that “no court  
could convict and sentence any of the aforesaid accused  
  
65% Ashish Batham v. State of Madhya Pradesh, . (2002) 7 SOO 317. at para 15.  
‘se lampal Phwa Plahdae v. Stale of Maharachira, (1994) 2 SCC 685.  
  
6° lampal Pthwa Rahidas v. Stale of Maharashra, (1994) 2 SCC 685, at para 27.  
‘st Subash Chander v. Krishan Lal and Ors, (2001) 4 SCC 458,  
  
6 Subash Chander v. Krishan Lal and Ors, 2001) 4 SCC 458, at para 12.  
  
158  
  
  
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persons,”\*6 3 of them spent nearly six years on death  
row.  
  
5.4.6 Again, in Parmananda Pegu v. State of  
Assam? the Supreme Court noted that the  
confessions were involuntary and that the medical  
evidence and cause of death did not match the  
confessions made. The accused had retracted their  
confessions and informed the trial court of the torture  
that they suffered when they made their statements in  
the court under Section 313 CrPC. The Supreme Court  
acquitted the accused, and found that the facts  
suggested that the police had extracted an involuntary  
confession. Notably, both the lower courts had imposed  
the death sentence on the accused.  
  
5.4.7 Other factors like the denial of effective legal  
representation may send innocent persons to the death  
row. An example is Mohd. Hussain @ Julfikar Ali v.  
State,\*\* where the accused was convicted and  
sentenced to death for a blast in a bus in Delhi which  
Killed 4 persons. His conviction and sentence was  
upheld by the High Court. °° Before the Supreme Court,  
a division Bench noted that the accused had been  
denied fair trial because of the denial of legal  
representation.s©0 Castigating the trial court for its  
“casual manner” in conducting a capital punishment  
case, the division Bench split over whether to acquit the  
accused or to send the case for retrial. %! The matter  
was referred to a three judge Bench which sent the case  
for retrial. In January 2013, Mohd. Hussain was found  
innocent and acquitted of all charges. He was in prison  
for 15, out of which he was on death row for 7 years and  
2 months.  
  
‘= Subash Chander etc. v. Krishan Lal and Ore, (200) 4 SCC 458, al para 12.  
  
°°" Parmananda Pegu v. Stata of Assam, (2004) 7 SCC 779,  
  
(8 Mohd. Hussain @ Julkar All v. State 2012 (8) SCALE 308.  
  
6 State v. Mohd. Hussain @ Jultkar Al, 140 (2007) DLT 428.  
  
‘Mohd. Hussain @ Julkar Allv. State 2012 (1) SCALE 146.  
  
©" Mohd. Hussain @ Jultkar liv. State, 2012 (8) SCALE 308.  
  
2 Stale v. Mohd. Hussain @ Julfkar Al, Sessions Case No. 79/2012, dated  
(04.01.2013 (De,  
  
159  
  
  
Page 169:  
5.4.8 Another example is the case of Ram Deo  
Chauhan v. State of Assam.® Ram Deo Chauhan was  
arrested for an offence that took place in 1992. He was  
convicted and sentenced to death by the trial court, and  
the high court. His plea of juvenility was rejected. A two  
judge Bench of the Supreme Court upheld his death  
sentence in 2000. On review, one judge recorded the  
fact that though Ram Deo was not juvenile at the time  
of commission of the offence, he was close to 16 years,  
and his young age was a mitigating factor. For this  
reason, he refused to impose the death penalty.  
However, per majority, Ram Deo Chauhan’s death  
sentence was upheld.5 In 2002, the Governor of  
Assam, on the intervention of the National Human.  
Rights Commission, commuted his death sentence.  
However, in 2009 in a writ filed by the family of the  
deceased person, the Supreme Court set aside the  
commutation order, and restored the death sentence.°°>  
In a review of this decision, the Supreme Court asked  
Ram Deo Chauhan to approach the appropriate forum  
for determination of his age at the time of committing  
the offence.5\*7 In 2010, the Gauhati High Court finally  
determined the Ram Deo was in fact a juvenile at the  
time of commission of the offence. By this time he had  
spent about 18 years in prison, of which about 6 years  
were on death row. In that time, three different Benches  
of the Supreme Court had imposed the death penalty on.  
him.  
  
5.4.9 Ankush Maruti Shinde v. State of,  
Maharashtra®\* is a similar example. In 2006, Ankush  
Shinde and 5 others were given the death penalty by the  
trial court for rape and murder of a minor. The High  
Court upheld the death sentences of three and  
  
© amdeo Chauhan @ Rajnath Chauhan v. Bani Kant Das, Review Pelion (C)  
1378/2009,  
  
‘st lamdeo Chauhan @ Rajnath Chauhan v. State of Assam, (2007) 7 SCC 458.  
  
‘©: lamdeo Chauhan @ Rajnath Chauhan v. Stale, Review Petition (er) 1105/2000.  
10.05.2001 (SC).  
  
© Bani Kania Das and Ar. v. State of Assam, Writ  
8.05,2008 (SC),  
  
7 Ramdeo Chauhan @ Rajnath Chauhan v. Bani Kant Das, Review Potton (Civ)  
1978/2008, 19.11.2010 (SC),  
  
2 Ankush Marui Shinde v. Slate of Maharashtra, (2009) 6 SCC 667.  
  
160  
  
ition (Civil) 45772005  
  
  
Page 170:  
commuted the others to life. On appeal, the Supreme  
Court imposed the death sentence on all six (relying on  
the per incuriam decision in Ravji for its determination  
that the case fell into the rarest of rare category). In  
2012, about 3 years after the Supreme Court decision,  
a trial court determined that Ankush Shinde was a  
juvenile at the time of commission of the offence. By  
this time, he had spent 6 years on death row, out of a  
total of 9 years in prison.  
  
5.4.10 The study Hanging in the Balance referenced  
above indicates that the cases mentioned above are not  
isolated instances. In the period 2000-2013, 18 persons  
who were awarded the death penalty by both the lower  
courts were finally acquitted by the Supreme Court. An  
additional 67 persons had been given the death penalty  
by at least one court and acquitted by another. Of these,  
the Supreme Court itself imposed the death penalty  
itself on 2 persons who were acquitted by the High  
Court, and on 2 other persons who were acquitted by  
one judge of the Supreme Court. This data, and the  
instances mentioned above raise serious questions  
regarding the robustness of the criminal justice process,  
which provides the context and structure for the  
operation of the irrevocable punishment of death. The  
operation of the criminal justice system raises serious  
concerns if such a large number of people who are given  
the death sentence by one court but are ultimately  
found to be innocent. The very existence of an  
irreversible punishment like death in such a system is  
must be considered in any discussion about the  
abolition of the death penalty.  
  
(ii) Admitted Error in Imposing the Death  
Sentence  
  
5.4.11 Compounding the concerns regarding a  
high reversal rate in cases of capital offences, as well as  
the inconsistencies in the application of the rarest of  
rare doctrine, is the high rate of error acknowledged by  
the Supreme Court itself in its own decisions. In just  
  
© Ankush Maruti Shinde v. State of Maharashtra, Criminal Appiation 05/20%2.  
6.07.2012 (Sessions Court, Nashik)  
  
161  
  
  
Page 171:  
three cases: Bariyar, Sangeet, and Khade, the Court  
acknowledged error in 16 cases, involving death  
sentence to 20 persons. 16 of these persons were  
sentenced to death in the period between 2000-2013,  
which implies that the Supreme Court has admitted  
error in imposing the death penalty on 16 persons out  
of the total of 69 who were given the death penalty by  
the Court in this time period. This is an error rate of  
23.2%. The Supreme Court therefore has acknowledged  
that in close to a quarter of the cases in which it has  
given the death penalty in the recent past, the death  
penalty was imposed erroneously.  
  
5.4.12 In Bariyar, the Court examined the  
decision in Raji alias Ram Chandra v. State of  
Rajasthan, where it was held that  
  
It is the nature and gravity of the crime but not  
the criminal, which are germane \_for  
consideration of appropriate punishment in a  
criminal trial. ... The punishment to be awarded  
for a crime ... should conform to and be  
consistent with the atrocity and brutality with  
which the crime has been perpetrated, the  
enormity of the crime warranting public  
abhorrence and it should “respond to the  
society's cry for justice against the criminal. °?  
  
5.4.13 Bariyar held that the exclusive focus in  
Ravji on the crime, rendered this decision per incuriam  
Bachan Singh. The Court listed a further 6 cases where  
Ravji had been followed, and which had therefore relied  
on incorrect precedent. Two of the 11 persons given the  
death sentence in this manner, including Ravji himself,  
were executed, and of the remaining, 3 are still on death  
row, with their mercy petitions having been  
  
‘> ay alias Ram Chandra v. State of Rajasthan, (1996) 2 SCC 175.  
  
© Ray alias Ram Chandra v. Stato of Rajasthan, (1996) 2 SCC 175, at para 124  
Held par incuriam Bachan Singh in Santosh Bayar v. Slate of Maharashtra, (2009) 6  
‘SCC 498, at para 63.  
  
162  
  
  
Page 172:  
subsequently rejected, despite the Court having  
acknowledged its error 6 years ago.”  
  
5.4.14 Ankush Maruti Shinde v. State of,  
Maharashtra," which was delivered about two weeks  
before Bariyar, and which imposed the death sentence  
on 6 persons relying on Ravji, was not noticed by the  
Court in Bariyar. Surprisingly, even after Bariyar  
expressly held that Ravji was decided per incuriam, the  
decision in that case has been followed by the Supreme  
Court in at least three other cases. Though these cases  
have not been noticed by the Supreme Court so far, in  
all, an additional 9 people have been given the death  
sentence relying on Ravji.7\*  
  
5.4.15 Similarly, the Supreme Court in Shankar  
Khade doubted the correctness of the imposition of the  
death penalty in Dhananjoy Chatterjee v. State of West  
Bengal,\*75 where the Court had held that “the measure  
of punishment in a given case must depend upon the  
atrocity of the crime; the conduct of the criminal and the  
defenceless and unprotected state of the victim.  
Imposition of appropriate punishment is the manner in  
which the courts respond to the society's cry for justice  
against the criminals.” 66 In Khade the Court opined  
that prima facie the judgment had not accounted for  
mitigating circumstances relating to the offender.  
Dhananjoy Chatterjee was executed in 2004.  
  
‘2 The mercy peitions of Saibanna and Shiva Alhat have been rejected. News reports  
ingicate thal the Ministry of Home Alfars has recommended the rejection of the mercy  
peltion presented by Mohan Anna Chavan, See, Reject Mercy Pleas of 2 Convicts  
Pranab. Told, THE HINDU, August 18,2015,  
hip thehindu com/newsinationaieject-mercypleas-ot 2-convics-pranab:  
toldarticle7551067.ece  
  
1° Ankush Maruti Shinde & Ors. v. State of Maharashira, (2008) 6 SCC 667.  
  
© Altsingh Harnamsingh Gujral v. State of Maharashva, (2011) 14 SCC 401: Sunder  
‘Singh v. Utaranchal, (2010) 10 SCC 611; Jagdish v. Stato of M.P, 2008 (12) SCALE  
‘580 In these cases, the Court relied on Raw as a comparator case, to state that inthe  
facts ol his ease the death penalty had been mposed (and using this facto appreciate  
‘whether the death penalty should be imposed i their own fact situations). The Court  
id not note thatthe impositon ofthe death penalty in Fav) was based on a wrong  
application of the law.  
  
eB Dhananjoy Chateree v. State of West Bengal (1994) 2 SCC 220,  
  
© Dhananjoy Chatteree v. State of West Bengal (1994) 2 SCC 220, at para 15. The  
‘exclusive focus ofthis decision on the erme and not the criminal was questioned in  
‘Shankar Kisanrao Khade v. State of Maharashira, (2013) § SCC 546.  
  
163  
  
  
  
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5.4.16  
  
Similarly, in Sangeet, the court noted an  
  
additional 3 cases where Bachan Singh's direction to  
consider both —\_ aggravating  
circumstances had not been followed.\*7”  
  
Table 5.1: List of Cases Doubted in Bariyar,  
Sangeet, Khade  
  
and  
  
mitigating  
  
‘SL | Case No. of | Imposition of  
No. persons | Death Penalty  
given | expressly  
the held  
death | erroneous in  
‘sentence  
1. | Raxjalias Ram Chandra v. State of [1 Bariyar  
Rajasthan, (1996) 2 SCC 175  
Z| Shivaji v. State of Maharashtra, AIR) T Bariyar  
2009 SC 56.  
| Mohan Anna Chavan v. State of T Bariyar  
Maharashtra, (2008) 11 SCC 113  
[Bantu v. State of UP, (2008) 11 SCC | T Bariyar  
113  
5. | Dayanidh Bisoi v. State of Orisa, T Bariyar  
12003) 9 SCC 310  
| Surja Ram v. State of Rajasthan, (1996) | 1 Bariyar  
SCC 271  
7\_\_[ State of UP. Sattan, (2009) 4 SCO 736 [4 Baryar  
| Saibanna v. State of Karnataka, (2005) | 1 ‘Bariyar  
48CC 165  
‘9. | Shiva v. Registrar General, High Court’ [2 Sangest  
of Kamataka, (2007) 4 SCC 713,  
TO. | Rajendra Pralhadrao Wasnik v. State of | T Sangest  
Maharashtra, 2012) 4 SCC 37  
TI. | Mohd, Mannan v. State of Bihar, 2011) | 1 Sangest  
SSCC 317  
12 [BA. Umesh v. Registrar General, High | T Sangest  
Court of Karnataka, 2011] 3 SCC 85  
13. | Sushil Murmu v, State of Jharkhand, | 1 Sangest  
(2008) 2 SCC 338  
14 | Gurmukh Singh v- State of T ‘Shankar Khade  
Haryana, (2009) 15 SCC 635  
TS. | Dhananjay Chaiterjee v. State of Weat\_| T ‘Shankar Khade  
Bengal, (1994) 2 SCC 220  
T6. | Kamta Tiwari v. State of MP, (1996/6 | 1 ‘Shankar Rhade  
  
SCC 250  
  
(7 Shiva v. Registrar General, High Court of Kamataka, (2007) 4 SOC 713; Rajendra  
Pralhadrao Wasnik v. State of Maharashira, (2012) 4 SCC 37: Mohd. Mannan v. State  
of Bhar, 2011) 5 SCC 317.  
  
© in many ofthese cases the Court has pointed out inconsistencies inthe application  
‘of aggravating and mitigating creumstances, In a judicial systom premised on stare  
‘decisis, especialy n the context ofthe Court in Bachan Singh clearly mandating that  
‘Sentencing discretion has fo be exercised in ight of precedent, these inconsistencies  
‘ender many such cases per incuriam as wel, However, since the Supreme Court has  
nol expressly acknowledged that these cases are per incuriam, they have not been  
  
‘added to the ist. Soe especialy. Sangeet and Khade.  
  
164  
  
  
  
Page 174:  
5.4.17 Disturbingly, in over half these cases in  
which the Court later found error, the accused were  
represented by amicus curie. The over-representation of  
amicus curie in cases relating to error is a cause for  
caution, not least because it may signal the impact of  
structural and systemic disadvantages on the  
imposition of the death penalty, as discussed above.  
  
(iii) Variations in Application of the Rarest of Rare  
framework in the same case  
  
5.4.18 In Mohd. Farooq the Supreme Court had  
stated that in order to bring about some objectivity and  
uniformity in the application of the death penalty, the  
“consensus approach” should be adopted, whereby the  
death penalty should be imposed only if there is  
unanimity vertically across the various tiers of the court  
system, as well as horizontally across Benches.57  
  
5.4.19 However, the study Hanging in the Balance  
indicates repeated departures from this “consensus  
approach.” This data shows that in the period 2000-13,  
the cases of 281 persons came up before the Supreme  
Court where at least one court had imposed the death  
sentence. Of these, for 205 persons, the imposition of  
the death sentence was in issue before the Court. Out  
of these 205, the Supreme Court imposed the death  
penalty on 69 (33.7%) people. Of this set, 5.8 % (n=4)  
had been acquitted by one court/ SC judge. Another  
23.2% (n= 16) had been given life by at least one  
court/SC judge. Thus overall in 29% of cases where the  
Supreme Court upheld or imposed the death penalty,  
there was no unanimity between the judges themselves  
on whether the accused was in fact guilty, and/or  
whether his case belonged to the rarest of rare category,  
calling for the death sentence.  
  
5.4.20 Of tthe 281 cases where at least one court had  
imposed the death sentence, the Supreme Court  
acquitted the accused in 60 (21.4%), commuted or  
  
© Mohd, Farooq Abdul Galurv. State of Maharashtra, (2010) 14 SCC 641, at para  
165,  
  
165  
  
  
Page 175:  
imposed life imprisonment in 142 (50.5%), and  
remanded the matter back to the High Court or Trial  
Court in 8 (2.8%) cases. Of the 60 acquitted, 18 had  
been awarded the death penalty by all the lower courts.  
Of the 142 who were ultimately given life imprisonment,  
61 had been given the death sentence by all the lower  
courts.  
  
5.4.21 Therefore, in 79 (28.1%) of the 281 cases the  
Supreme Court found that on the same facts, both the  
lower courts had erroneously imposed the death  
sentence.  
  
5.4.22 Purther, the Supreme Court itself imposed  
the death penalty on 12 persons who were given life  
imprisonment by at least one lower court, and a further  
4 persons who were given life imprisonment by a judge  
of the Supreme Court itself.  
  
5.4.23 It is important to note that merely because  
the imposition of the death penalty is finally overturned  
in such a large number of cases, does not mean that the  
system is functioning well. In most of the instances  
mentioned above, both the lower courts have been in  
error. Such errors have been corrected only after long  
durations in prison, including extended periods on  
death row. The trauma of being under a sentence of  
death, called the “death row phenomenon” exacts its  
own mental and physical punishment, even if the  
person is subsequently not executed.\*\*° Therefore, it is  
no answer to the charge against excessive imposition of  
the death penalty, that most of these cases are  
overturned or commuted by the appellate courts  
anyway. If two courts, staffed by experienced judges can  
commit errors in the determination of guilt or sentence,  
there is nothing to suggest that the same mistake  
cannot be made by the judge of the third tier as well. In  
other countries, most notably the United States, efforts  
to correct wrongful convictions, through the use of  
scientific evidence such as DNA, has led to the  
identification of hundreds of cases where a person was  
wrongfully convicted and sentenced, even to death,  
  
© Discussed in the  
  
chapter.  
16  
  
  
Page 176:  
despite multiple layers of appeals and review up to the  
highest levels of the judiciary.°\*" In the absence of such  
studies in India, it is not possible to determine whether,  
and if so how many such cases exist in India. However,  
the examples given above, and the data presented here,  
caution us that an irreversible punishment like the  
death sentence exists in a fallible system.  
  
5.4.24 Furthermore, since 2000 the Supreme Court  
has dismissed in limine at least 9 special leave petitions  
(‘SLP) against the imposition of the death penalty.°? In  
a system with such a high reversal rate, the Supreme  
Court which is the final appellate court has, as the  
Court itself acknowledged “a far more serious and  
intensive duty to discharge. The court not only has to  
ensure that award of death penalty does not become a  
perfunctory exercise of discretion under section 302 after  
an ostensible consideration of Rarest of Rare doctrine,  
but also that the decision making process survives the  
special rigors of procedural justice applicable in this  
regard.”\*\*\* In light of this principle, the practice of  
dismissing SLPs against the death penalty in limine  
should therefore be done away with, as was also  
recommended by the Commission in its 187" Report.  
  
5.4.25 In sum, the death penalty operates in a  
system that is highly fragile, open to manipulation and  
mistake, and evidently fallible. However objective the  
system becomes, since it is staffed by humans, and thus  
limited by human capacities and tendencies, the  
possibility of error always remains open, as has been  
  
{6% See Brandon L. Garrett, The Banalty of Wrongful Executions, MICH. L. Rev. (2014)  
(isting 18 death row exonerations, amongst more than 250 other exonerations by  
[DNA In all eo far about 155 death om inmates have been exonerated in the US using  
DNA and non-DNA evidence. See The Inngcence List, Death Penaly Information  
Genie, hitpinww.deathpenalyino.orginnocence-lst-those-treed-death-row. See  
‘generally The inevitabityof Error, Tre DEATH PENALTY PROJECT (2014) (or examples  
{f erroneous death sentences in various counties)  
  
Lal Chand @ Lalyav. State of Rajasthan (on 20.02.2004); Jafar Aly. State of Uttar  
Pradesh (05.04.2004), Tote Dewan @ Man Bahadur Dewan v. Slate of Assam  
(08.08.2005). Sanjay v. State of Uttar Pradesh (03.07.2006), Bandu v. State of  
Kamataka (10.07-2006), Dnyanashwar Borkarv. Stale of Maharastra (2107-2008,  
Magan Lalv. Site of Madhya Pradesh (09.01.2012), utendra @ Jeet & Ors. v. Stale  
(of Madhya Pradesh (05.01.2015), Babasaheb Maruti Kamble v. Stale of Maharashira  
(06.01.2015),  
  
© Mohd. Farooq Abdul Gatur v, State of Maharashtra, (2010) 14 SCC 641, at para  
155.  
  
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Page 177:  
acknowledged the world over, including by the most  
highly resourced legal systems.  
  
5.4.26 As the instances cited above indicate, while  
the existence of appellate procedures may reduce the  
chances of error, these cannot be eliminated altogether.  
Given the irreversibility of the death penalty, this  
punishment can only be justified where the entire  
system works in a fool proof manner, having regard to  
the highest standards of due process, the fairest of  
investigation and prosecution, the most robust defence,  
and the most impartial and astute judges. However,  
experiences the world over, including in India suggest,  
that “all it takes is one dishonest police officer, one  
incompetent lawyer, one over-zealous prosecutor or one  
mistaken witness and the system fails.”6\* In a perfect  
criminal justice system, the death penalty may be  
imposed error free. However, no such system has been  
devised so far. The death penalty therefore remains an  
irreversible punishment in an imperfect, fragile and  
fallible system.  
  
5.4.27 \_ The constitutionality of the death penalty has  
to be evaluated in light of the foregoing discussions on  
its stated justifications, as well as the concerns raised  
above. As the Supreme Court cautioned in Bariyar,  
  
[The] right to life is the most fundamental of all  
rights. Consequently a punishment which aims  
at taking away life is the gravest punishment.  
Capital punishment imposes a limitation on the  
essential content of the fundamental right to life,  
eliminating it irretrievably. We realize the  
absolute nature of this right, in the sense that it  
is a source of all other rights. Other rights may be  
limited, and may even be withdrawn and then  
granted again, but their ultimate limit is to be  
found in the preservation of the right to life. Right  
to life is the essential content of all rights under  
  
‘0 The Inevitabilty of Eror, THE DEATH PENALTY PROJECT (2014) (lor examples of  
‘erroneous death sentences in various countries).  
  
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Page 178:  
the Constitution. If life is taken away all, other  
rights cease to exist.  
  
5.4.28 Similarly, in Shankarlal Gyarasilal Dixit v.  
‘State of Maharashtra®® the Court held: “The passing of  
the sentence of death must elicit the greatest concern and  
solicitude of the Judge because, that is one sentence  
which cannot be recalled.”  
  
5.4.29 In light of the degree of intrusion of capital  
punishment into the right to life, and the irrevocability  
of the punishment, the Supreme Court has rightly  
emphasized that:  
  
[ln the context of punishments, the protections  
emanating from Article 14 and Article 21 have  
to be applied in the strictest possible terms.  
  
In every capital sentence case, it must be borne  
in mind that the threshold of rarest of rare  
cases is informed by Article 14 and 21, owing  
to the inherent nature of death penalty. Post  
Bachan Singh (supra), capital sentencing has  
come into the folds of constitutional  
adjudication. This is by virtue of the  
safeguards entrenched in Article 14 and 21 of  
our constitution.9\*°  
  
5.4.30 \_ Itis true that Bachan Singh in 1980 held that  
the death penalty does not violate the Article 21  
requirement on this score.  
  
5.4.31 The Court held that:  
  
by no stretch of imagination can it be said that  
death penalty under Section 302 of the Penal  
Code, either per se or because of its execution by  
hanging, constitutes an unreasonable, cruel or  
unusual punishment. By reason of the same  
constitutional postulates, it cannot be said that  
the framers of the Constitution considered death  
sentence for murder or the prescribed traditional  
mode of its execution as a degrading punishment  
  
5 (ra81) 2806 35,  
= Bary.  
  
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Page 179:  
which would defile “the dignity of the individual”  
within the contemplation of the preamble to the  
Constitution. On parity of reasoning, it cannot be  
said that death penalty for the offence of murder  
violates the basic structure of the Constitution.”  
  
5.4.32 However, the passage of thirty five years since  
that decision, and the considerably altered global and  
constitutional landscape in that time, are factors to be  
considered in any re-evaluation of the constitutionality  
of the death penalty.  
  
5.4.33 The options for reforming the present system  
to remove the concern regarding arbitrariness and  
disparate application of the death penalty, are limited.  
On the one hand, as Bachan Singh, and subsequently  
Mithu v. State of Punjabss” have held, judicial discretion  
cannot be taken out of the sentencing process. A  
sentencing process without discretion may be more  
consistent, but will also be equally arbitrary for ignoring  
relevant differences between cases. In such a system  
sentencing is likely to be severely unfair and would  
definitely not remain a judicial function.  
  
5.4.34 Comparative experiences also warn against  
an approach that focuses on standardization and  
categorization. An instructive example is the U.K. As far  
back as 1953, the British Royal Commission examined  
the death penalty and concluded, “No formula is  
possible that would provide a reasonable criterion for the  
infinite variety of circumstances that may affect the  
gravity of the crime of murder.” 6° The Royal  
Commission was unanimous in its recommendation  
against the adoption of any form of grades or degrees of  
murder, especially given the wide variance of the moral  
incidence of the crime, making it almost impossible to  
determine in advance a category of murder that would  
constitute the worst of the worst. This was the basis of  
the Commission's recommendation for the abolition of  
the death penalty in Great Britain. In 1957, the UK  
  
‘7 Mithu v. Stato of Punjab, (1980) 2 SC Bae.  
‘#8 Report ofthe Royal Commission on Capital Punishment, 1949-1953, Cm. 6992, at  
1595, quoted in MeGautha v. California, 402 U.S. 183, 205 (1971).  
  
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Page 180:  
government introduced the Homicide Act which tried to  
distinguish between different categories of murders and  
restricted death penalty to six classes of murder.5\*°  
‘These included murder committed in the course or  
furtherance of theft; by shooting or causing explosions;  
in the course of or for the purpose of resisting, avoiding  
or preventing lawful arrest or effecting or assisting an  
escape from lawful custody; murder of a police officer in  
the execution of his duty or of a person assisting him;  
and by a prisoner of a prison officer in the execution of  
his duty or of a person assisting him. Along with this,  
the death penalty could be imposed on a person  
committing a second separate murder. The Act also  
introduced the partial defence of “diminished  
responsibility” and of killing in the course of a suicide  
pact. ©  
  
5.4.35 A major criticism of the Act was this random  
basis on which death would be awarded (despite trying  
to introduce more principled and exceptional  
sentencing) - for instance, plotting a premeditated cold-  
blooded murder by poison would not constitute a capital  
offence, but accidentally killing someone in the course  
of a theft would be punishable with the death sentence.  
Similarly, if a person were to kill another using a  
hatchet, it would not be capital murder; but ceteris  
paribus if the weapon was a gun, it would be.%? This  
made the law devoid of any moral or principled basis  
and it became unworkable in practice.  
  
5.4.36 This led to the Murder (Abolition of Death  
Penalty) Act of 1965, which imposed a five-year  
legislative moratorium on the death penalty for murder,  
  
‘Graham Hughes, The English Homicide Act of 1957: The Capital Punishment Issue,  
land Various Reforms inthe Law of Murder and Manslaughter, 43(6)Joumal of Cina  
Law "and Criminology S21 (1959), avalable at  
hitp:/scholarlycommons law northwestern edulcgivioucontent.cqiaricle=47738cont  
cexteil, visited on 25.08.2015,  
  
fe "The abolition of hanging in\_\_Britain, available at:  
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("The Law Commission Consultation Paper 177, A New Homicide Ae for England  
‘and Wales, available a:  
hitpswwiaw.upenn.edulettacutyctinkelsworkingpapersiReport®20!or%20Brish  
Sx20Law\*420Commission®<209p177 pal at page 18, visited on 25.08.2015,  
  
(2 Gorald Gardiner QC, “Criminal Law: Gaptal Punishment in Briain’ 45 ABA Journal  
259, 260-261 (March 1958),  
  
im  
  
  
Page 181:  
which was reaffirmed in December 1969 to formally  
abolish death penalty for murder in Britain. A further  
vote in 1994 to reinstate capital punishment was  
defeated in the House of Commons in 1994.  
Subsequently, the death penalty was abolished for  
arson in the Royal Dockyards in 1971 and for treason  
and piracy with violence in 1998, thus ending it for all  
crimes.59  
  
5.4.37 India’s own jurisprudence, as well as the  
experiences of other countries therefore warns against  
standardization and categorization as a response to the  
arbitrariness of the death penalty.  
  
5.4.38 The other option is to put in place guidelines  
that are less rigid, and allow for flexibility, but  
nonetheless limit the scope of application of the death  
penalty. But this is precisely the route taken by Bachan  
‘Singh. In that case, the Court sought to carve out a very  
narrow exceptional category. However, with the  
accretion of precedent the Bachan Singh guidelines have  
become more a legitimation for imposing the death  
sentence, than any meaningful restriction. In  
comparable contexts, when faced with the arbitrariness  
and disparity in death sentencing, other countries have  
moved towards abolition of the death penalty. In South  
Africa for example, death penalty came to a judicial end.  
The South African Constitutional “Court in  
Makwanyane,\*\* struck down the constitutional validity  
of capital punishment, relying on the arbitrariness and  
inequality inherent in the punishment, holding that:  
  
It cannot be gainsaid that poverty, race and  
chance play roles in the outcome of capital  
cases and in the final decision as to who  
should live and “who should die. It is  
sometimes said that this is understood by the  
judges, and as far as possible, taken into  
account by them. But in itself this is no  
  
(© The abolition of hanging in ‘Britain, available. at  
hipaa capitalpunishmentuk orgtimeline hl  
  
"State v. Makwanyane and Another, Constitutional Court of South Alica, CCT/394,  
June 6 1995,  
  
m  
  
  
Page 182:  
answer to the complaint of arbitrariness; on  
the contrary, it may introduce an additional  
factor of arbitrariness that would also have to  
be taken into account. Some, but not all  
accused persons may be acquitted because  
such allowances are made, and others who  
are convicted, but not all, may for the same  
reason escape the death sentence.695  
  
5.4.39 \_In light of the Court’s own acknowledgment  
that the death penalty system operates in an arbitrary  
manner the current method of application of the death  
penalty has to end. Comparative experience tells us that  
the concerns highlighted by Justice Bhagwati in Bachan  
Singh, and echoed in Supreme Court judgments  
recently, are likely to persist, despite attempts at  
reforming the apparatus of the death penalty.  
  
5 State v. Makwanyane, Constitutional Cour of South Aca, COT/IS4, June 6 1985,  
atparasi  
  
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Page 183:  
Cuaprer - VI  
  
(CLEMENCY POWERS AND DUE PROCESS ISSUES  
PERTAINING TO THE EXECUTION OF DEATH  
SENTENCE  
  
A. Introduction  
  
6.1 The Supreme Court in Shankar Kisanrao  
Khade v. State of Maharashtra® (‘Khade) also referred  
the administration of clemency powers by the executive  
under Articles 72 and 161 of the Constitution of India  
in death cases to the Commission for its consideration.  
This chapter delineates the nature, purpose and scope  
of the power of the executive to commute a death  
sentence. This chapter also analyses the application of  
the mercy jurisdiction in individual cases besides  
examining decisions of courts where the outcome of the  
exercise of these powers has been challenged in writ  
proceedings.  
  
B. Nature, Purpose and Scope of Clemency  
Powers  
  
6.2.1 The State and Central Governments have  
powers to commute death sentences after their final  
judicial confirmation. This power, unlike judicial power,  
is of the widest amplitude and not circumscribed, except  
that its exercise must be bona fide. Issues often alien  
and irrelevant to legal adjudication — morality, ethics,  
public good, and policy considerations — are intrinsically  
germane to the exercise of clemency powers. These  
powers exist because in appropriate cases the strict  
requirements of law need to be tempered and departed  
from to reach a truly just outcome in its widest sense.  
‘The executive's powers to commute a death sentence, in  
other words, exist to remedy deficiencies in the strict  
application of the law. Therefore, in jurisdictions  
retaining capital punishment, the proper exercise of  
mercy powers is of the utmost importance given that  
  
'° Shankar Kisanraa Khade v. Stale of Maharashtra, (2013) SCC 646, at paras 147  
150,  
  
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human lives depend on it. Every citizen has a right to  
petition the government to commute any death  
sentence, since the state’s power to take life emanates  
from the people, and executions are carried out in their  
name.  
  
6.2.2 Clemency powers of either pardoning an  
offender or reducing or altering the punishment  
awarded,” have their provenance in similar powers,  
which, since time immemorial, have vested in the  
sovereign. However, their exercise today, in modern  
democratic states, is not, as it was of yore, a private act  
of grace, but one of solemn constitutional  
responsibility.09  
  
6.2.3. Clemency powers in India are enshrined in  
the Constitution. Article 72 vests these powers in the  
President, and Article 161 vests similar powers in the  
Governors of the States. Article 72 states:  
  
Article 72. Power of President to grant pardons, etc.  
and to suspend, remit or commute sentences in  
certain cases — (1) The President shall have the  
power to grant pardons, reprieves, respites or  
remissions of punishment or to suspend, remit or  
commute the sentence of any person convicted of  
any offence —  
  
(a) in all cases where the punishment or sentence is  
by a Court Martial;  
  
(b) in all cases where the punishment or sentence is  
for an offence against any law relating to a matter  
to which the executive power of the Union extends;  
  
(c) in all cases where the sentence is a sentence of  
death.  
  
(2) Nothing in sub-clause (a) of clause (1) shall affect  
the power conferred by law on any officer of the  
  
‘7 For the meaning of pardon, reprieve, respite, ot, see State (Govt of NCT of Delhi)  
v.Prem Fa, (2003) 7 SCC 121, at para 10.  
9: Epuru Sudhakar v. Govt of AP., 2006) 8 SCC 161, at paras 16-17.  
  
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Armed Forces of the Union to suspend, remit or  
commute a sentence passed by a Court martial.  
  
(3) Nothing in sub-clause of clause (1) shall affect  
the power to suspend, remit or commute a sentence  
of death exercisable by the Governor of a State,  
under any law for the time being in force.  
  
6.2.4 Article 161 states:  
  
Article 161. Power of Governor to grant pardons, etc.  
and to suspend, remit or commute sentences in  
certain cases — The Governor of a State shall have  
the power to grant pardons, reprieves, respites or  
remissions of punishment or to suspend, remit or  
commute the sentence of any person convicted of  
any offence against any law relating to a matter to  
which the executive power of the State extends.  
  
6.2.5 Neither of these powers are personal to the  
holders of the office, but are to be exercised (under  
Articles 745 and 1637, respectively) on the aid and  
advice of the Council of Ministers.  
  
6.2.6 Clemency powers usually come into play after  
a judicial conviction and sentencing of an offender. In  
exercise of these clemency powers, the President and  
Governor are empowered to scrutinize the record of the  
case and differ with the judicial verdict on the point of  
  
© Atcle74. (1) There shall be @ Council of Ministers with the Prime Minster atthe  
head Io ad and adviee the President who shall inthe exercise of he functions, actin  
‘accordance with such adv  
  
Provided thatthe President may require the Council of Ministers to reconsider such  
‘advice, either generally or otherwise, and the President shall actin accordance with  
the advice tendered alter such reconsideration.  
  
(2) The question whether any, and i so what. advice was tendered by Minstrs tothe  
President shall not be inguced into in any court  
  
“9° Arle 163. (1) There shall be a Council of Ministers with the Chief Minister atthe  
head Io aid and advise the Governor inthe exercise of his uncon, except ino far  
{5 he is by or under this Constitution required to exercise his functions or any of them  
ins discretion  
  
(2) any question arises whether any mattoris ors nota matter as respects which the  
‘Governor fs by or under his Consituton required to actin his cscration the decision  
‘the Governor in his dgcretion shall be final. and the vast of anything done by the  
Governor shal not be called m question an the ground that he ought or ought not to  
have acted in his cieretion  
  
{@) The question whether ary, and iso what, advice was tendered by Minstrs tothe  
Governor shall not be inquired into in any court  
  
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guilt or sentence. Even when they do not so differ, they  
are empowered to exercise their clemency powers to  
ameliorate hardship, correct error, or to do complete  
justice in a case by taking into account factors that are  
outside and beyond the judicial ken. They are also  
empowered to look at fresh evidence, which was not  
placed before the courts. In Kehar Singh v. Union of India  
(‘Kehar Singh’),7°! a Constitution Bench (five judges)  
held as follows:  
  
7. ..To any civilized society, there can be no  
attributes more important than the life and personal  
liberty of its members. That is evident from the  
paramount position given by the courts to Article 21  
of the Constitution. These twin attributes enjoy a  
fundamental ascendancy over all other attributes of  
the political and social order, and consequently, the  
Legislature, the Executive and the Judiciary are  
more sensitive to them than to the other attributes  
of daily existence. The deprivation of personal  
liberty and the threat of the deprivation of life by the  
action of the State is in most civilised societies  
regarded seriously and, recourse, either under  
express constitutional provision or through  
legislative enactment is provided to the judicial  
organ. But, the fallibility of human judgment being  
undeniable even in the most trained mind, a mind  
resourced by a harvest of experience, it has been  
considered appropriate that in the matter of life and  
personal liberty, the protection should be extended  
by entrusting power further to some high authority  
to scrutinise the validity of the threatened denial of  
life or the threatened or continued denial of personal  
liberty. The power so entrusted is a power belonging  
to the people and reposed in the highest dignitary  
of the State... The power to pardon is a part of the  
constitutional scheme, and we have no doubt, in our  
mind, that it should be so treated also in the Indian  
Republic. It has been reposed by the people through  
the Constitution in the Head of the State, and enjoys  
high status. It is a constitutional responsibility of  
  
791 (1988) 1 SCC 204.  
7  
  
  
Page 187:  
great significance, to be exercised when occasion  
arises in accordance with the discretion  
contemplated by the context...  
  
10. We are of the view that it is open to the  
President in the exercise of the power vested in him  
by Article 72 of the Constitution to scrutinise the  
evidence on the record of the criminal case and  
come to a different conclusion from that recorded by  
the court in regard to the guilt of, and sentence  
imposed on, the accused. In doing so, the President  
does not amend or modify or supersede the judicial  
record. The judicial record remains intact, and  
undisturbed. The President acts in a wholly  
different plane from that in which the Court acted.  
He acts under @ constitutional power, the nature of  
which is entirely different from the judicial power  
and cannot be regarded as an extension of it. and  
this is so, notwithstanding that the practical effect  
of the Presidential act is to remove the stigma of  
guilt from the accused or to remit the sentence  
imposed on him..  
  
ult is apparent that the power under Article 72  
entitles the President to examine the record of  
evidence of the criminal case and to determine for  
himself whether the case is one deserving the grant  
of the relief falling within that power. We are of  
opinion that the President is entitled to go into the  
merits of the case notwithstanding that it has been  
judicially concluded by the consideration given to it  
by this Court.  
  
16. ...Indeed, it may not be possible to lay down  
any precise, clearly defined and sufficiently  
channelised guidelines, for we must remember that  
the power under Article 72 is of the widest  
amplitude, can contemplate a myriad kinds and  
categories of cases with facts and situations  
varying from case to case, in which the merits and  
reasons of State may be profoundly assisted by  
prevailing occasion and passing time. And it is of  
  
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great significance that the function itself enjoys high  
status in the constitutional scheme."  
  
6.2.7 Thus, it will be seen that clemency powers,  
while exercisable for a wide range of considerations and  
on protean occasions, also function as the final  
safeguard against possibility of judicial error or  
miscarriage of justice. This casts a heavy responsibility  
on those wielding this power and necessitates a full  
application of mind, scrutiny of judicial records, and  
wide ranging inquiries in adjudicating a clemency  
petition, especially one from a prisoner under a  
judicially confirmed death sentence who is on the very  
verge of execution.  
  
6.2.8 The Ministry of Home Affairs, Government of  
India, has drafted the “Procedure Regarding Petitions for  
Mercy in Death Sentence Cases” to guide State  
Governments and the prison authorities in dealing with  
mercy petitions submitted by death sentence prisoners.  
‘These rules were summarized by the Supreme Court in  
Shatrughan Chauhan v. Union of India’®® (‘Shatrughan  
Chauhan’):  
  
98. The Ministry of Home Affairs, Government of  
India has detailed procedure regarding handling of  
petitions for mercy in death sentence cases:  
  
98.1. As per the said procedure, Rule I enables a  
convict under sentence of death to submit a petition  
for mercy within seven days after and exclusive of  
the day on which the Superintendent of Jail informs  
him of the dismissal by the Supreme Court of his  
appeal or of his application for special leave to  
appeal to the Supreme Court.  
  
98.2. Rule II prescribes procedure for submission of  
petitions. As per this Rule, such petitions shall be  
addressed to, in the case of the States, to the  
Governor of the State at the first instance and  
  
“82 ghar Singh v. Union of India, (1988) 1 SCC 204, at paras 7,10 and 16.  
> (2014) 3SCC 1  
  
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Page 189:  
thereafter to the President of India and in the case  
of the Union Territories directly to the President of  
India. As soon as the mercy petition is received, the  
execution of sentence shall in all cases be  
postponed pending receipt of orders on the same.  
  
98.3. Rule III states that the petition shall in the first  
instance, in the case of the States, be sent to the  
‘State concerned for consideration and orders of the  
Governor. If after consideration it is rejected, it shall  
be forwarded to the Secretary to the Government of  
India, Ministry of Home Affairs. If it is decided to  
commute the sentence of death, the petition  
addressed to the President of India shall be  
withheld and intimation to that effect shall be sent  
to the petitioner.  
  
98.4. Rule V states that in all cases in which a  
petition for mercy from a convict under sentence of  
death is to be forwarded to the Secretary to the  
Government of India, Ministry of Home Affairs, the  
Lt. Governor/ Chief Commissioner/ Administrator or  
the Government of the State concerned, as the case  
may be, shall forward such petition, as  
expeditiously as possible, along with the records of  
the case and his or its observations in respect of any  
of the grounds urged in the petition.  
  
98.5. Rule VI mandates that upon receipt of the  
orders of the President, an acknowledgment shall  
be sent to the Secretary to the Government of India,  
Ministry of Home Affairs, immediately in the  
manner prescribed. In the case of Assam and  
Andaman and Nicobar Islands, all orders will be  
communicated by telegraph and the receipt thereof  
shall be acknowledged by telegraph. In the case of  
other States and Union Territories, if the petition is  
rejected, the orders will be communicated by  
express letter and receipt thereof shall be  
acknowledged by express letter. Orders commuting  
the death sentence will be communicated by  
express letters, in the case of Delhi and by telegraph  
  
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in all other cases and receipt thereof shall be  
acknowledged by express letter or telegraph, as the  
case may be.  
  
98.6. Rule VIII (a) enables the convict that if there is  
a change of circumstance or if any new material is  
available in respect of rejection of his earlier mercy  
petition, he is free to make fresh application to the  
President for reconsideration of the earlier order.  
  
99. Specific instructions relating to the duties of  
Superintendents of Jail in connection with the  
petitions for mercy for or on behalf of the convicts  
under sentence of death have been issued:  
  
99.1. Rule I mandates that immediately on receipt  
of warrant of execution, consequent on the  
confirmation by the High Court of the sentence of  
death, the Jail Superintendent shall inform the  
convict concerned that if he wishes to appeal to the  
‘Supreme Court or to make an application for special  
leave to appeal to the Supreme Court under any of  
the relevant provisions of the Constitution of India,  
he/she should do so within the period prescribed in  
the Supreme Court Rules.  
  
99.2. Rule II makes it clear that, on receipt of the  
intimation of the dismissal by the Supreme Court of  
the appeal or the application for special leave to  
appeal filed by or on behalf of the convict, in case  
the convict concerned has made no previous petition  
for mercy, the Jail Superintendent shall forthwith  
inform him that if he desires to submit a petition for  
mercy, it should be submitted in writing within  
seven days of the date of such intimation.  
  
99.3. Rule Ill says that if the convict submits a  
petition within the period of seven days prescribed  
by Rule Il, it should be addressed, in the case of the  
States, to the Governor of the State at the first  
instance and, thereafter, to the President of India  
and in the case of the Union Territories, to the  
President of India. The Superintendent of Jail shall  
  
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forthwith dispatch it to the Secretary to the State  
Government in the Department concerned or the Lt.  
Governor/Chief Commissioner/Administrator, as  
the case may be, together with a covering letter  
reporting the date fixed for execution and shall  
certify that the execution has been stayed pending  
receipt of the orders of the Government on the  
petition.  
  
99.4. Rule IV mandates that if the convict submits  
petition after the period prescribed by Rule Il, the  
‘Superintendent of Jail shall, at once, forward it to  
the State Government and at the same time  
telegraph the substance of it requesting orders  
whether execution should be postponed stating that  
pending reply sentence will not be carried out.  
  
100. The above Rules make it clear that at every  
stage the matter has to be expedited and there  
cannot be any delay at the instance of the officers,  
particularly, the Superintendent of Jail, in view of  
the language used therein as “at once.  
  
101. Apart from the above Rules regarding  
presentation of mercy petitions and disposal  
thereof, necessary instructions have been issued for  
preparation of note to be approved by the Home  
Minister and for passing appropriate orders by the  
President of india.  
  
102. The extracts from the Prison Manuals of  
various States applicable for the disposal of mercy  
petitions have been placed before us. Every State  
has a separate Prison Manual which speaks about  
detailed procedure, receipt placing required  
materials for approval of the Home Minister and the  
President for taking decision expeditiously. The  
Rules also provide steps to be taken by the  
Superintendent of Jail after the receipt of mercy  
petition and subsequent action after disposal of the  
same by the President of India. Almost alll the Rules  
prescribe how the death convicts are to be treated  
till final decision is taken by the President of India.  
  
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Page 192:  
103. The elaborate procedure clearly shows that  
even death convicts have to be treated fairly in the  
light of Article 21 of the Constitution of India.  
Nevertheless, it is the claim of all the petitioners  
herein that all these rules were not adhered to  
strictly and that is the primary reason for the  
inordinate delay in disposal of mercy petitions. For  
illustration, on receipt of mercy petition, the  
Department concerned has to call for all the  
records/materials connected with the conviction.  
Calling for piecemeal records instead of all the  
materials connected with the conviction should be  
deprecated. When the matter is placed before the  
President, it is incumbent on the part of the Home  
Ministry to place alll the materials such as judgment  
of the trial court, High Court and the final court viz.  
Supreme Court as well as any other relevant  
‘material connected with the conviction at once and  
not calll for the documents in piecemeal.70\*  
  
C. Standard of Judicial Review for Examining  
Exercise of Mercy Powers  
  
6.3.1 The Supreme Court has characterized the  
nature of mercy provisions (Articles’72 and 161) as  
constitutional duty rather than privilege or a matter of  
grace. The Supreme Court observed the following in  
‘Shatrughan Chauhan:  
  
In concise, the power vested in the President under  
Article 72 and the Governor under Article 161 of the  
Constitution is a constitutional duty. As a result, it  
is neither a matter of grace nor a matter of privilege  
but is an important constitutional responsibility  
reposed by the People in the highest authority. The  
power of pardon is essentially an executive action,  
which needs to be exercised in the aid of justice and  
not in defiance of it. Further, it is well settled that  
the power under Articles 72/161 of the Constitution  
  
7+ Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1, a paras 98-103.  
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of India is to be exercised on the aid and advice of  
the Council of Ministers.7°5  
  
6.3.2 The Supreme Court has further held in Epuru  
‘Sudhakar v. Govt. of A.P.” that the exercise of power  
under Article 72 by the President and Article 161 by the  
Governor is subject to limited form of judicial review.707  
The Supreme Court has also held that the mercy  
prerogative under Articles 72 and 161should be  
discharged in line with the principle of rule of law, of  
which fairness and legal certainty are essential  
elements.’ Further, various decisions of the Supreme  
Court have provided the following grounds for a  
challenge to the exercise of these clemency powers:70°  
  
(a)Power has been exercised by the  
Governor/President himself without being advised  
by the Government,  
  
(byin the exercise of the power, the  
Governor/President has transgressed his  
jurisdiction,  
  
(c)If the order passed in pursuance to Articles 72 or  
161 betrays non-application of mind or mala fide  
basis  
  
(a)Power has been exercised on the basis of political  
considerations  
  
(c) That the order suffers from arbitrariness  
  
(f That the manner of exercise of power suffers from  
the following defects:  
  
‘= Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1, at para 19.  
  
7 Epuru Sudhakar v. Govt. of AP., (2006) 8 SCC 161  
  
‘wee also Narayan Dutt v. State of Punjab, (2071) 4 SCC 259, at paras 14-21; BP.  
‘Singhal. Union of nda, (2010) 6 SCC 331, al para 76; Shatrughan Chauhan v. Union  
of india, (2014) 3 SCC 1, at para 22  
  
7 Epuru Sudhakar v. Govt of AP., (2006) 8 SCC 161, at paras 65-67  
  
7 Seo Maru Ram v. Union of India, (1981) 1 SCG 107, at paras 62-65; Epurs  
‘Sudhakar v. Govt of AP., (2006) 8 SCC 161, at paras 34.28: Narayan Dut! v. State of  
Punjab, (2011) 4 SCC 358, at para 24; Shatrughan Chauhan v. Union of India, (2014)  
38CO 1, at paras 23-24  
  
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Page 194:  
\* extraneous or wholly irrelevant consideration  
have been taken into account;  
  
+ that relevant materials have been kept out of  
consideration  
  
D.Duty of Writ Courts Carrying Out Judicial  
Review of Exercise of Mercy Powers  
  
6.4 ‘The Supreme Court has enjoined a critical  
role in examining the discharge of mercy jurisdiction by  
the executive authorities in death sentence matters. The  
Court has termed this body of jurisprudence as "mercy  
jurisprudence’7? and has linked it to the “evolving  
standard of decency, which is the hallmark of the  
society.” In fact, the Court in Shatrughan Chauhan  
observed that “judicial interference is the command of the  
Constitution” when the exercise of mercy power by the  
executive is lacking in due care and diligence and has  
become whimsical.’!? The Court has held the following  
in Shatrughan Chauhan in this behalf:  
  
242. In the aforesaid batch of cases, we are called  
upon to decide on an evolving jurisprudence, which  
India has to its credit for being at the forefront of the  
global legal arena. Mercy jurisprudence is a part  
of evolving standard of decency, which is the  
hallmark of the society.  
  
243. Certainly, a series of the Constitution Benches  
of this Court have upheld the constitutional validity  
of the death sentence in India over the span of  
decades but these judgments in no way take away  
the duty to follow the due procedure established by  
law in the execution of sentence. Like the death  
sentence is passed lawfully, the execution of the  
sentence must also be in consonance with the  
constitutional mandate and not in violation of the  
constitutional principles.  
  
7 Shatrughan Chauhan v. Union of India, (2014) 2 SCC 1, at para 242.  
2 Shatrughan Chauhan v. Union of India (2014) 3 SCC 1 at para 242  
"2 Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1, at para 244  
  
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244. It is well established that exercising of power  
under Articles 72/161 by the President or the  
Governor is a constitutional obligation and not a  
mere prerogative. Considering the high status of  
office, the Constitution Framers did not stipulate  
any outer time-limit for disposing of the mercy  
petitions under the said Articles, which means it  
should be decided within reasonable time.  
However, when the delay caused in disposing of the  
mercy petitions is seen to be unreasonable,  
unexplained and exorbitant, it is the duty of this  
Court to step in and consider this aspect. Right to  
seek for mercy under Articles 72/161 of the  
Constitution is a constitutional right and not at the  
discretion or whims of the executive. Every  
constitutional duty must be fulfilled with due care  
and diligence, otherwise judicial interference is the  
command of the Constitution for upholding its  
values.  
  
245. Remember, retribution has no  
constitutional value in our largest democratic  
country. In India, even an accused has a de  
facto protection under the Constitution and it  
is the Court's duty to shield and protect the  
same. Therefore, we make it clear that when  
the judiciary interferes in such matters, it  
does not really interfere with the power  
exercised under Articles 72/161 but only to  
uphold the de facto protection provided by the  
Constitution to every convict including death  
convicts.7'3 (Emphasis supplied)  
  
E. Subjectivity in Exercise of Power under Article  
72 by the President  
  
6.5.1 It is to be noted that in exercise of power  
under Articles 72 and 161, the President or the  
Governor, as the case may be, is to be guided and  
  
directed by th  
  
“aid and advice” rendered by the Council  
  
of Ministers under Articles 74 and 163. The Supreme  
  
78 Shatrughan Chauhan v. Union of Inia, (2014) 3 SCC 1, at paras 242-245,  
186  
  
  
Page 196:  
Court has said so in categorical terms in Maru Ram v.  
Union of India?\*\* in the following paragraph:  
  
Because the President is symbolic, the Central  
Government is the reality even as the Governor  
is the formal head and sole repository of the  
executive power but is incapable of acting  
except on, and according to, the advice of his  
Council of Ministers. The upshot is that the  
State Government, whether the Governor likes  
it or not, can advice and act under Article 161,  
the Governor being bound by that advice. The  
action of commutation and release can thus be  
pursuant to a governmental decision and the  
order may issue even without the Governor's  
approval although, under the Rules of  
Business and as a matter of constitutional  
courtesy, it is obligatory that the signature of  
the Governor should authorise the pardon,  
commutation or release. The position is  
substantially the same regarding the President. Itis  
not open either to the President or the Governor to  
take independent decision or direct release or  
refuse release of anyone of their own choice. It is  
fundamental to the Westminster system that the  
Cabinet rules and the Queen reigns being too  
deeply rooted as foundational to our system no  
serious encounter was met from the learned  
Solicitor-General whose sure grasp of fundamentals  
did not permit him to controvert the proposition, that  
the President and the Governor, be they ever so high  
in textual terminology, are but functional  
euphemisms promptly acting on and only on the  
advice of the Council of Ministers have in a narrow  
area of power. The subject is now beyond  
controversy, this Court having authoritatively laid  
down the law in Shamsher Singh case [Shamsher  
Singh v. State of Punjab, (1975) 1 SCR 814 : (1974)  
2 SCC 831 : 1974 SCC (L&S) 550]. So, we agree,  
even without reference to Article 367(1) and  
Sections 3(8\b) and 3(60)(b) of the General  
  
7 Manu Ram v. Union of Indi, (1981) 1 SCC 107  
187  
  
  
Page 197:  
Clauses Act, 1897, that, in the matter of  
exercise of the powers under Articles 72 and  
161, the two highest dignitaries in our  
constitutional scheme act and must act not on  
their own judgment but in accordance with the  
aid and advice of the ministers. Article 74,  
after the 42nd Amendment silences  
speculation and obligates compliance. The  
Governor vis-a-vis his Cabinet is no higher than  
the President save in a narrow area which  
does not include Article 161. The  
constitutional conclusion is that the Governor  
is but a shorthand expression for the State  
Government and the President is an  
abbreviation for the Central Government.”  
(Emphasis supplied)  
  
6.5.2 While the President of India in considering a  
mercy petition is constitutionally obligated to not  
deviate from the advice rendered by the Council of  
Ministers, there have been occasions where the  
President has refrained from taking any decision  
altogether on the said mercy petition, thus, keeping the  
matter pending. In the table below, the record of mercy  
petitions disposed by various Presidents till date is  
discussed:7!°  
  
Table 6.1. Details of Mercy Petitions Decided by  
the President  
  
'S. [Name of the President | Tenure [Number [Number | Total  
  
No. of Mercy | of “Mercy  
Petitions | Petitions  
  
Accepted | Rejected  
  
1 | Rajendra Prasad 26.1.1950 [180 T Ta  
= 35.1962  
  
2 | SarvapalliRadhaleishnan | 13.5.1962 [57 a 7  
13.5,1967  
  
3 | ZakirFiassain 135.1967 [22 a Ey  
=3.5.1969  
  
75 Maru Ram v. Union of india, (1881) 1 SCO 107. at para 61  
  
"This table is based on archival research and RTI data collecied by Bikram Jeot Batra  
‘and others. Offical figures of mercy peions disposed of by the Presidents at serial  
fos. 1-8 are not available, and the figures in the lable are based on empical  
Vertication from the archives which may not be complet.  
  
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+ [WN Gin 3s1909-]3 a z  
207.1969;  
248.1969  
248.1974  
  
3] Fakradhin AlrAnmed —24.8:1974 [NA A 0  
11.2.1977  
  
© | NSanjeeva Reddy 25.7.1977 [NA A 0  
=8.7.1982  
  
7 | fail Singh 257-1982 |2 30 Es  
28.7.1987  
  
3 | R Venkatraman 28.7.1987 |S as 30  
28.7.1992  
  
9} SD. Sharma 28:7.1992 [0 1 13  
28.7.1997  
  
10 [KR Narayanan 257.1997 [0 a 0  
2s.7.2002  
  
iT [API Kalam 28:7:2002 | 1 T 2  
28.7.2007  
  
12\_| PratibhaPatil 28:7.2007 [34 3 ED)  
287.2012  
  
13 | Pranab Mukherjee 25.7.2012 [2 a Ey  
  
Total 306 Fry a7  
  
6.5.3. During the period 1950-1982, which saw six  
Presidents, only one mercy petition was rejected as  
against 262 commutations of death sentence to life  
imprisonment. As per available records, President  
Rajendra Prasad commuted the death sentences in 180  
out of the 181 mercy petitions he decided, rejecting only  
one. President Radhakrishnan commuted the death  
sentences in all the 57 mercy petitions decided by him.  
President Hussain and President Giri commuted the  
death sentence in all the petitions decided by them,  
while President Ahmed and President Reddy did not get  
to deal with any mercy petitions in their tenure.  
  
6.5.4 In contrast to the first phase (1950-1982),  
between 1982 and 1997, three Presidents rejected,  
between then, 93 mercy petitions and commuted seven  
death sentences. President Zail Singh rejected 30 of the  
32 mercy petitions he decided, and President  
  
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Venkatraman rejected 45 of the 50 mercy petitions  
decided by him. Subsequently, President Sharma  
rejected all the 18 mercy petitions put up before him,  
  
6.5.5 In what can be called the third phase ie  
1997-2007, the two Presidents kept almost all the  
mercy petitions received by them from the government  
of the day pending, and only two mercy petitions were  
decided during this period. While President Narayanan  
did not take any decision on any mercy petition before  
him, President Abdul Kalam acted only twice during his  
tenure resulting in one rejection and another  
commutation. During their combined tenure of ten  
years, they put the brakes on the disposal of mercy  
petitions.  
  
6.5.6 Later, President Pratibha Patil during her  
Presidency rejected five mercy petitions, and commuted  
34 death sentences. The current President of India, Shri  
Pranab Mukherjee has thus far rejected 31 of the 33  
mercy petitions decided by him.  
  
6.5.7 A perusal of the chart of mercy petitions  
disposed by Presidents suggests that a death-row  
convict's fate in matters of life and death may not only  
depend on the ideology and views of the government of  
the day but also on the personal views and belief  
systems of the President.  
  
F, Judicial Review of Exercise of Mercy Powers  
  
6.6.1 The Supreme Court in Shatrughan Chauhan  
has recorded that the Home Ministry considers the  
following factors while deciding mercy petitions:  
  
(a)Personality of the accused (such as age, sex or  
mental deficiency) or circumstances of the case  
(such as provocation or similar justification);  
  
(b)Cases in which the appellate Court expressed  
doubt as to the reliability of evidence but has  
nevertheless decided on conviction;  
  
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(c) Cases where it is alleged that fresh evidence is  
obtainable mainly with a view to see whether  
fresh enquiry is justified;  
  
(d)Where the High Court on appeal reversed  
acquittal or on an appeal enhanced the sentence;  
  
(e}Is there any difference of opinion in the Bench of  
High Court Judges necessitating reference to a  
larger Bench;  
  
( Consideration of evidence in fixation of  
responsibility in gang murder case;  
  
(g)Long delays in investigation and trial ete.”17  
  
6.6.2 However, when the actual exercise of the  
Ministry of Home Affairs (on whose recommendations  
mercy petitions are decided) is analysed, it is seen that  
many times these guidelines have not been adhered to.  
Writ Courts in numerous cases have examined the  
manner in which the executive has considered mercy  
petitions. In fact, the Supreme Court as part of the  
batch matter Shatrughan Chauhan case heard 11 writ  
petitions challenging the rejection of the mercy petition  
by the executive. Some of these decisions are analysed  
in the following pages  
  
(i) Chronic Mental Iltness Ignored: The Case of  
Sunder Singh’!s  
  
6.6.3 Sunder Singh was sentenced to death for  
having burnt five of his relatives alive. His mercy  
petition was dismissed by the Governor on 21.1.2011,  
and then by the President on 31.3.2013, even though  
he had stated in his mercy petition that he had  
committed the offences under the influence of mental  
illness. This claim was corroborated by the jail records,  
which showed that due to his abnormal behavior he had  
been presented before numerous medical boards  
  
“\*7Shatraghan Chauhan v. Union of India (2014) 3 SCC 1, at paras 55-56,  
  
7® Sunder Singh's Writ [Wit Petiton (Cr.) No. 192203] was considered in the batch  
matter Shatrghan Chauhan v. Union of India, (2014) 3 SCC 1. See paras 79-87 for  
discussion on law, and paras 178-195 for the outcome in Writ Petiton (Crl) No.  
9272013,  
  
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Page 201:  
consisting of government psychiatrists who had opined  
that he was suffering from chronic schizophrenia and  
required long term treatment. This information had  
been periodically communicated to the State  
Government and the Ministry of Home Affairs,  
Government of India, who nevertheless chose to reject  
his mercy petitions. He was eventually found to be “not  
mentally fit to be awarded the death penalty”! by a  
team of psychiatrists appointed by the State  
Government and his death sentence was commuted by  
the Supreme Court.  
  
(i) Cases involving Long delays in Investigation  
and Trial  
  
a. The Case of Gurmeet Singh”?  
  
6.6.4 When a convict on death row has already  
spent a considerable period of time in prison, before the  
mercy plea is decided by the President, it becomes a  
strong factor in deciding whether or not such a prisoner  
still deserves the additional punishment of execution.  
  
6.6.5 Gurmeet was arrested on 16.10.1986,  
convicted and sentenced to death by the trial court on  
20.7.1992. The High Court confirmed his death  
sentence (per majority) on 8.3.1996, and the Supreme  
Court upheld the conviction and death sentence on  
28.9.2005. The convict’s mercy petition was decided on  
1.3.2013, by which time he had spent 27 years in  
custody, of which about 21 years were under a death  
sentence. These factors were ignored and his mercy  
petition was rejected. The Supreme Court in Shatrughan  
Chauhan commuted the death sentence of Gurmeet  
Singh on account of inordinate time taken by the  
executive in disposal of his mercy petition.  
  
1 Shatrughan Chauhan v. Union of India, 2014) 3 SCC 1, at para 190  
  
"= Gurmeet Singh s Wet [Wi Petition (Cr) No. 199/2013] was considered inthe batch  
matter Sharughan Chauhan v. Union of India, 2014) 3 SCC 1. See paras 148-16 for  
the outcome in Writ Peiion (Crt) No. 1982013, See also Gurmeet Singh v. State of  
UP. (2005) 12 SCC 107  
  
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b. The Cases of Simon and Others”?!  
  
6.6.6 Simon, Bilavendran, Gnanprakasam and  
Madiah were arrested on 14.7.1993, and convicted by  
the trial court under the Terrorist and Disruptive  
Activities (Prevention) Acton 29.9.2001. They were  
sentenced to life imprisonment. The state appealed to  
the Supreme Court for enhancement of sentence, but its  
special leave petition was dismissed due to delay. When  
the criminal appeal filed by the convicts was being  
heard, the Supreme Court, suo motu, issued notice for  
enhancement of sentence, and then sentenced the  
convicts to death on 29.1.2004. This was the first time  
the convicts had been sentenced to death, and since it  
had been done by the Supreme Court there was no  
appeal possible after this. When the convict's mercy  
pleas were decided 9 years later, they had already spent  
19 years and 7 months in custody in prison. Simon,  
Bilavendran, Gnanprakasam and Madiah were aged 50,  
55, 60 and 64 years when their mercy petitions were  
rejected by the President on 8.2.2013 after a delay of  
about 9 years. Their petitions were finally allowed by the  
Supreme Court.  
  
(iii) Partial and Incomplete Summary Prepared for  
President: The Case of Mahendra Nath Das?  
  
6.6.7 When Mahendra Nath Das challenged the  
rejection of his mercy petition by the President, the  
Supreme Court summoned the records relating to the  
mercy petition and discovered that the recommendation  
for clemency made by a former President in this very  
case was not put before or communicated to the  
President Pratibha Patil when she was asked to reject  
the mercy petition. The Supreme Court held it to be a  
very serious lapse, and, combined with the 11 years  
delay taken in the disposal of the mercy petition, was  
  
7 Wet prefered by Simon and others [Writ Petition (Cr) No. 34/2013) was  
Considered inthe batch matlor Shatrughan Chauhan v. Union of India, (204) 3 SCC  
4. See paras 120-137 for the outcome inthe said Writ Petiion(Cr,) No. 24/2013, See  
aiso Simon v. Slate of Kamataka, (2004) 2 SCC 694  
  
7 Mahendra Nath Das v. Union of Inala, (2013) 6 SCC 252,  
  
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good enough reason to quash the rejection of the mercy  
petition and commute the death sentence.  
  
(iv) Non-Application of Mind  
  
a. The Case of Dhananjoy Chatterjee?  
  
6.6.8 Inthe case of Dhananjoy Chatterjee, when the  
Governor was advised to reject the mercy petition, he  
was not informed about the mitigating circumstances of  
the case. The Supreme Court held the same to be a  
serious error, which had prejudiced the convict, and  
consequently quashed the rejection of the mercy  
petition. However, the mercy petition preferred by  
Dhananjoy Chatterjee was subsequently rejected by the  
executive and he was executed.  
  
b. The Case of Bandu Baburao Tidke”?\*  
  
6.6.9 Tidke’s mercy petition was received in the  
Ministry of Home Affairs in 2007. On 2.6.2012, it was  
decided to commute his death sentence. However,  
unknown to the President, the Ministry of Home Affairs  
and the State Government, Tidke had expired in prison  
about five years earlier on 18.10.2007 while awaiting a  
verdict on his mercy plea. His mercy petition had been  
decided without obtaining updated information from the  
prison authorities or the State Government, raising  
questions about the diligence exercised and procedures  
in adjudicating mercy petitions.  
  
(v) Mercy Petition Rejected Without Access to  
Relevant Records of the Case: The Case of  
Praveen Kumar”\*  
  
6.6.10 Even though Rule V of the Mercy Petition  
Rules specifically requires that the entire record be sent  
to the Central Government when it is deciding the mercy  
  
"= Dhananjoy Chatter v. State of W.B. 2004) 9 SCC 751  
  
72+ Bandy Baburao Tidke v. State of Karnataka (Unreported Order in SLP Cx, 3048 of  
£2008) dated 10.7 2006.  
  
7 Praveen Kuma’s Writ {Wit Petion (Ci) No. 187/2013] was considered inthe batch  
matter Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1. See paras 138-141 for  
the outcome in the Wt Pattion|Crt) No. 187/2013,  
  
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petition, and even though the Guidelines used by the  
Ministry of Home Affairs clearly requires the close  
scrutiny of the record, in many cases it has been found  
that the Central Government has rejected a convict’s  
mercy petition without reading or obtaining the trial  
court record.  
  
6.6.11 For example, in Praveen Kumar's case, the  
Supreme Court found that his mercy petition had been  
rejected by the Central Government and the President  
without reading or obtaining the record of the trial  
court. Consequently, no attention at all was paid to the  
mitigating circumstances in this case or the  
circumstances relating to the convict which are  
necessary for adjudication of mercy petitions as per the  
Ministry of Home Affairs’ guidelines.  
  
(vi) Wrongful Executions and Failure of the  
Clemency Proce:  
  
(a)The Case of Jeeta Singh”?  
  
6.6.12 The case of Jeeta Singh has been discussed  
in the previous chapter, but is of relevance here as well.  
Jeeta Singh, Harbans Singh and Kashmira Singh were  
sentenced to death by the trial court for equal roles in  
an offence of murder. The High Court confirmed their  
death sentences. Each of them filed separate appeals to  
the Supreme Court which came up for hearing before  
different Benches. Jeeta’s special leave petition (‘SLP)  
was dismissed on 15.4.1976. Kashmira’s SLP was  
admitted on the question of sentence, and on 10.4.1977  
his appeal was allowed and the death sentence was  
commuted by the Supreme Court. Harbans Singh’s SLP  
was dismissed on 16.10.1978. His review petition was  
dismissed on 9.5.1980, and his mercy petition was  
rejected by the President on 22.8.1981. While rejecting  
Harbans and Jeeta’s mercy petitions, the executive did  
not note that the Supreme Court had allowed the appeal  
and had commuted the death sentence of an identically  
placed co-accused (Kashmira Singh) more than 4 years  
  
75 Harbane Singh v, Sale of UP., (1982) 2 SCC 101  
195  
  
  
Page 205:  
earlier. Harbans Singh and Jeeta Singh were scheduled  
for execution on 6.10.1981. Harbans Singh once again  
appealed to the Supreme Court by way of an Article 32  
petition, and was saved. Jeeta did not, and was  
hanged.727  
  
(b)The Cases of Ravji Rao?s and Surja Ram’?  
  
6.6.13 Cases of Ravji Rao and Surja Ram have been  
discussed in the previous chapter. Here, the focus is  
how their mercy petitions were dealt with by the  
executive.  
  
6.6.14 In Ravji @Ram Chandra v. State of Rajasthan  
(‘Ravjé},75° a case which was decided by a Bench of two  
judges, the Supreme Court explicitly held:  
  
Itis the nature and gravity of the crime but not the  
criminal, which are germane for consideration of  
appropriate punishment in a criminal trial.”  
  
6.6.15 Thus, the Court while confirming the death  
sentence in Ravji’s case held that the circumstances  
relating to the criminal are irrelevant and focused  
exclusively on the circumstances relating to the crime.  
‘This aspect of the decision in the Ravji’s case is in direct  
conflict with the Bachan Singh ruling where the Court  
held that which held that in all cases, including the  
most brutal and heinous crimes, circumstances  
pertaining to the criminal should be given full weight.”?  
As noted in the previous chapter, the Court in Santosh  
Kumar Bariyar v. State of Maharashtra (‘Bariyar)  
noticed the conflict between Ravji’s case and Bachan  
Singh and noted the Ravji decision as a per incuriam  
judgment.  
  
7 Harbans Singh v. Stato of UP., (1982) 2 SCC 101. See also Bachan Singh v. State  
of Purjab, Uustice Bhagwatis dissent}, 1982) 3 SCC 24, at para 71, where he ter  
Harbans Singh's caso as “the most sttking example of frakishness in impasiion of  
death penalty’.  
  
"Ray alias Ram Chandra v. State of Rajasthan, (1996) 2 SCC 175.  
  
"= Suga Ram v. Stale of Raasthan, (1996) 6 SCG 271  
  
1 (1996) 2 SCC 175.  
  
71 Ray) alias Ram Chandra v. State of Rajasthan, (1996) 2 SOC 175, at para 24  
  
“= Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 161  
  
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6.6.16 Though Ravji was sentenced to death on the  
basis of a per incuriam judgment, his mercy petition was  
rejected in a mere 8 days on 19.3.1996 and he was  
executed on 4.5.1996. Similarly, the mercy petition of  
Surja Ram, who was also wrongly sentenced to death on  
the same reasoning, was executed on 7.4.1997. His  
mercy petition was rejected in 14 days on 7.3.1997.  
  
(vii) Cases of Other Prisoners Sentenced to Death  
under Judgments Subsequently Declared to be  
Per Incuriam  
  
6.6.17 The Supreme Court in the recent years has  
found a number of decisions, which have resulted in  
death sentences to be per incuriam. This aspect has also  
been dealt with in the previous chapter.”  
  
(a)Cases\_which have placed reliance\_on the Per  
Incuriam Decision of Ravji  
  
6.6.18 In Bariyar, the Supreme Court, after pointing  
out the error in Rayji’s case, also noted 6 other cases  
where Ravji’s case was followed and held that these  
decisions were also wrongly decided:  
  
Shivaji v. State of Maharashtra, Mohan Anna  
Chavan v. State of Maharashtra, Bantu v. State of  
U.P, Surja Ram v. State of Rajasthan, Dayanidhi  
Bisoi v. State of Orissa and State of U.P. v. Sattan  
are the decisions where Ravji has been followed. It  
does not appear that this Court has considered any  
mitigating circumstance or a circumstance relating  
to criminal at the sentencing phase in most of these  
cases. It is apparent that Ravji has not only been  
considered but also relied upon as an authority on  
the point that in heinous crimes, circumstances  
relating to criminal are not pertinent.7°\*  
  
6.6.19 The Court, in Bariyar, observed that it is clear  
that none of the circumstances relating to the 13  
  
7 Retort Table 5.1 for an exhaustive list of prisoners from all such cases which have  
‘been rendered per incuram.  
"8 Sanlosh Kuma Bariarv. Stale of Maharashtra, (2008) 6 SCC 498, at para 62  
  
197  
  
  
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convicts in these six cases have been brought on record  
and considered by the Supreme Court during the  
sentencing deliberations. The cases mentioned above  
have been declared to be per incuriam in Bariyar by the  
Supreme Court for having followed Ravji. Another case,  
Ankush Maruti Shinde and Ors v. State of  
Maharashtra,"\*> where six prisoners were sentenced to  
death by explicitly following Rayji’s wrong reasoning like  
the cases mentioned above, was decided just a few days  
before Bariyar and was therefore not noticed in that  
decision.  
  
6.6.20 Subsequent to Bariyar, the Supreme Court  
again in Dilip Tiwari v. State of Mahrashtra”\* raised the  
issue of error committed in Ravji’s case and other cases  
in which Rayji was followed. The Supreme Court in  
Rajesh Kumar v. State”\*” once again emphasized the  
miscarriage of justice caused in the Ravji Rao case, and  
other cases, which followed the Ravji’s precedent.  
‘Thereafter, the Supreme Court in Mohinder Singh v.  
State of Punjab,” has held that Rayj’s case and those  
following it have been wrongly decided.  
  
(b) The Case of Saibanna’s?  
  
6.6.21 The Supreme Court in Aloke Nath and  
Bariyar has doubted the award of death sentence in  
Saibanna v. State of Karnataka (‘Saibanna’). The facts of  
the case bear out that Saibanna had Killed his first wife  
as he suspected that she was unfaithful to him. He was  
convicted and sentenced to life imprisonment on  
2.2.1993. He re-married whilst he was out of the prison  
on parole. Later, on 13.9.1994 when he was again  
released on parole, he killed his second wife as well  
suspecting that she too was unfaithful to him. In 1995  
he was charged under Section 303 IPC, which  
prescribed the mandatory death sentence, even though  
the Section had already been struck down by the  
  
75 (2008) 6 SOC 667 at para 28  
  
"Dilip Tari v. Slate of Mabrashira, (2010) 1 SCC 776, at para 68  
1 Rajesh Kumar v. State, (2011) 13 SCC 706, at paras 66-70.  
  
728 Mohinder Singh v. Slate of Punjab, (2013) 3 SCO 234, at para 37.  
" Saipanna v. State of Karnataka, (2005) 4 SCC 166.  
  
198  
  
  
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Supreme Court in Mithu v. State of Punjab (‘Mithu).7%°  
‘The High Court proceeded to confirm the death sentence  
under Section 303 IPC. The Supreme Court in appeal  
upheld the judgment.’ The Court held that Saibanna,  
already undergoing a life sentence, could not be  
sentenced to life imprisonment again, and therefore the  
death sentence was the only available punishment.  
  
6.6.22 Subsequently, the Supreme Court in Aloke  
Nath Dutta v. State of West Bengal” held that the view  
taken in the petitioner's case by the Supreme Court was  
“doubtful”. Thereafter, in Bariyar, the Court held that its,  
judgment in Saibannawas “inconsistent with Mithu and  
Bachan Singh,”\*\*5 both of which are judgments by  
Constitution Benches. This admission of error in  
Saibanna’s case by the Supreme Court was also  
brought to the notice of the President by 14 retired  
judges (including one former Supreme Court judge, five  
former Chief Justices of different High Courts, and eight  
former High Court judges). The President rejected  
Saibanna’s mercy petition on 4.1.2013.  
  
(©) Decisions held to be Per Incuriam by Sangeet  
and Khade  
  
6.6.23 Similarly, the Supreme Court in Shankar  
Khade doubted the correctness of the imposition of the  
death penalty in Dhananjoy Chatterjee v. State of West  
Bengal,’# where the Court had held that “the measure  
of punishment in a given case must depend upon the  
atrocity of the crime; the conduct of the criminal and the  
defenceless and unprotected state of the victim.  
Imposition of appropriate punishment is the manner in  
which the courts respond to the society's cry for justice  
against the criminals.”"\*5 In Khade, the Court opined  
that prima facie the judgment had not accounted for  
  
2 Mitha v. State of Punjab, (1983) 2 SCC 27.  
  
7 Salbanna v. State of Kamataka, (2005) 4 SCC 165,  
  
7 Aloke NathDuttav. State of West Bengal, (2007) 12 SCC 220, at paras 149-50.  
76 Sanlosh Kumar Bariyarv. State of Maharashira, (2009) 6 SCC 498, at paras 49-62.  
(1994) 2 SCC 220.  
  
5 Dhananjoy Chatterjee v. State of West Bengal 1994) 2 SCC 220, at para 15. The  
‘exclusive focus of this decision on the crime and not the aspects pertaining tothe  
convict was questioned in Kade.  
  
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mitigating circumstances relating to the offender.  
Dhananjoy Chatterjee was executed in 2004.  
  
6.6.24 Similarly, in Sangeet, the Court noted an  
additional three cases where Bachan Singh’s direction  
to consider both aggravating and mitigating  
circumstances had not been followed.”\*5  
  
G. Constitutional Implications of Pain and  
Suffering Imposed on Convicts on Death  
Row in the Pre-Execution Phase  
  
6.7.1 In India, death row convicts typically spend  
many years by the time they exhaust their criminal  
appeals. Once the death sentence is finally confirmed by  
the Supreme Court, a convict further waits for years on  
end waiting to hear from the Governor and the President  
of India on the mercy petition preferred by him. More  
often than not, death row convicts are shifted to solitary  
confinement as soon as the trial court awards them.  
death sentence and are also exposed to multiple  
execution warrants.  
  
6.7.2 Aprisoner under a sentence of death ekes out  
an existence under the hangman’s noose and suffers  
from extreme agony, anxiety and debilitating fear of an  
impending execution and uncertainty regarding the  
same. The amalgam of such unique circumstances  
produces physical and psychological conditions of near-  
torture for the death row convict.”\*7 This experience  
thus endured by a prisoner on the death row is also  
termed as ‘death row phenomena’.  
  
6.7.3. One of the main components of the death row  
phenomena pertain to the unique stresses of living  
under a sentence of death which includes the convict's  
mental anguish of anticipating the impending  
execution. The passage of every moment also presents  
the convict with a prospect of hope, which in turn  
  
"Shiva v. Regisirar General, High Court of Karnataka, (2007) 4 SCO 713; Rajendra  
Pralhadrao Wasnik v. State of Maharashra, (2012) 4 SCC 37: Mohd. Mannan v. State  
of Bhar, 2011) 5 SCC 317,  
  
© Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1. at para 61  
  
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Page 210:  
produces constant mental struggle as to whether he will  
eventually live or not.  
  
6.7.4 Further, the death row phenomenon is  
compounded by the degrading effects of conditions of  
imprisonment imposed on the convict, including  
solitary confinement, and the prevailing harsh prison  
conditions.  
  
6.7.5 Constitutionally, the question relate to  
implications flowing from a scenario where a death row  
convict prior to execution of his death sentence is  
subjected to a prolonged period of imprisonment where  
he suffers from anguish, rising levels of agony and  
stress arising out of living in the ever-present shadow of  
the noose. The question is whether this dehumanizing  
and degrading experience borne by the convict  
constitutes a legal condition which can have the effect  
of rendering the subsequent execution of death  
sentence impermissible.  
  
6.7.6 The Supreme Court in T.V. Vatheeswaran v.  
‘State of Tamil Nadu’\*\* and thereafter in Sher Singh v.  
State of Punjab’\*\* (‘Sher Singh) and Triveniben v. State  
of Gujarat’®® (‘Triveniben’) has recognized the degrading  
and dehumanizing nature of the suffering endured by a  
death row convict on account of prolonged delay in the  
execution of his death sentence. The Court has treated  
prolonged delay as a “supervening circumstance” which  
has the effect of rendering the sentence of death  
inexecutable.  
  
6.7.7 Over the years, an international consensus  
has emerged around the fact that execution after  
avoidable delay under the harsh conditions of death row  
constitutes cruel and excessive punishment.’5!  
  
(1989) 2 SCC 68  
7 (1983) 2 SCC 344.  
  
7 (1988) 1 SCC 678.  
  
1 Sgeting v. United Kingdom, 161 Eur. Ct. H.R. at 154 (1989); Francie v, Jamaica  
(No, 606/1994). UN Doc. CCPRICIS4/D/606/1995 (1995): Pratt v. The Altorey  
‘General for Jamaica, Privy Council Appeal No. 10, 22 (1983). The Privy Coun in Pratt,  
[1994] 2 A.C. 33 held that "t was torture, far more crue that death tse ora parson  
  
201  
  
  
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(i) Enduring Long Years on Death Row  
  
6.7.8 The Supreme Court in T.V. Vatheeswaran v.  
State of Tamil Nadu (‘Vatheeswaran),75? sets the due  
process bar very high for an execution to be allowed to  
be carried out after imposition of an otherwise valid  
death sentence. The Court in Vatheeswaran for the first  
time recognized the constitutional implications flowing  
from the unique nature of suffering and pain implicit in  
pre-execution imprisonment of a convict on death row  
waiting for the hanging to take place. The Supreme  
Court in Vatheeswaran based its analysis on the fact  
that Article 21 inheres in the prisoner till his last breath  
and even while the noose is being fastened around his  
neck. The Court also observed that other than the mass  
of suffering a prisoner has to endure on account of living  
for years in the shadow of death sentence, avoidable  
delay also makes the process of execution of death  
sentence unfair, unreasonable, arbitrary and capricious  
and thereby, violative of procedural due process  
guarantees enshrined under Articles 21, 14 and 19.755  
‘The Court in Vatheeswaran captures the injury done to  
Article 21 rights of the convict in following terms:  
  
11. While we entirely agree with Lord Scarman  
and Lord Brightman about the dehumanising  
effect of prolonged delay after the sentence of  
death, we enter a little caveat, but only that  
we may go further. We think that the cause of  
the delay is immaterial when the sentence is  
death. Be the cause for the delay, the time  
necessary for appeal and consideration of  
reprieve or some other cause for which the  
accused himself may be responsible, it would  
not alter the dehumanising character of the  
delay.  
  
{be kept on death row in a state of suspended arimation, knowing that on any day  
the authonias coud cary out thei announced intention to deliberatly extinguish life”  
7 (1983) 2 SCC 68  
  
7 TV. Vatheeswaran v. State of TIN, (1983) 2 SCC 68, at para 20: Shor Singh v.  
‘State of Punjab, (1989) 2 SCC 344, at para 23; Jagdish v. Stale of MP, (2008) 9  
‘SCC 495, at paras 48-48,  
  
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Page 212:  
12. What are the constitutional implications of the  
dehumanising factor of prolonged delay in the  
execution of a sentence of death? Let us turn at once  
to Article 21 of the Constitution, for, it is to that  
Article that we must first look for protection  
whenever life or liberty is threatened. Article 21  
says: “No person shall be deprived of his life or  
personal liberty except according to procedure  
established by law.” The dimensions of Article 21  
which at one time appeared to be constricted by  
AK. Gopalan v. State of Madras [AIR 1950 SC 27]  
have been truly expanded by —Maneka  
Gandhi v. Union of India [(1978) 1 SCC 248}  
and Sunil Batra v. Delhi Administration (1978) 4  
‘SCC 494).75\* (Emphasis supplied)  
  
6.7.9 The Court while siding with the dissenting  
opinion of Lord Scarman and Lord Brightman in the  
Privy Council decision in Noel Riley v. Attorney-  
General,’5s held that prolonged delay in the execution of  
a death sentence contravenes Article 21 rights of the  
convict regardless of the cause and nature of delay. The  
Court held that “delay exceeding two years in the  
execution of a sentence of death should be considered  
sufficient to entitle the person under sentence of death to  
invoke Article 21 and demand the quashing of the  
sentence of death.”"5° In other words, the Vatheeswaran  
limit of two years did not treat judicial delay differently  
from clemency delay i.e. the Court in Vatheeswaran  
extended this protection also to delays caused during  
trial and appeal. This aspect of Vatheeswaran came to  
be doubted by a three judge Bench of Sher Singh.757 The  
Court observed in Sher Singh that the appellate courts  
in normal course take upto four or five years to process  
appeals apart from the time spent by the Constitutional  
authorities under Articles 72 and 161 in considering the  
mercy petitions. The Court in Sher Singh therefore,  
departed from the rule of thumb approach (of 2 years)  
  
TAT, Vatheeswaran v. State of TN. (1983) 2 SCC 68, at paras 11-12.  
"1982 Criminal Law Review 679  
  
TST. Vathoeswaranv. Sate of T.N., (1983) 2 SCC 68, at para 21  
  
77 Sher Singh v. State of Punjab, (1963) 2 SCC 344  
  
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Page 213:  
propounded by the Vatheeswaran Court and held that  
no pre-determined period of delay can be held to  
guarantee frustration of death sentence.  
  
6.7.10 A Constitution Bench of the Supreme  
Court in Triveniben,’5\* also found favour with the  
conclusions arrived at by the Court in Sher Singh. The  
Court in Triveniben held that a death row convict while  
waiting for his appeal to be taken up in the appellate life  
cycle still has a “ray of hope” of getting a favourable  
judicial order. The Court held that in such  
circumstances where appeal is still pending, the convict  
does not suffer from mental torture of waiting for an  
eventual execution as the sentence of death has not yet  
become a sure certainty. The Triveniben Court in certain  
terms held that the delay for the purpose of an Article  
21 claim made by the convict could only be said to kick  
in once the judicial process has come to an end after the  
Supreme Court has dismissed the appeal.’  
  
6.7.11 The Supreme Court in Sher Singh also held  
that in such Article 32 petitions a death row convict  
cannot be allowed to take advantage of delay which is  
caused on account of proceedings filed by him to delay  
the execution. The Court held that the equitable basis  
of a prisoner's plea for commutation in such a case is  
compromised if he has in any away contributed to the  
delay caused in disposal of his mercy petition.’  
  
a. Revised Standard of Delay in Pratt  
  
6.7.12 The Supreme Court in Sher Singh and  
thereafter in Triveniben purportedly rationalized the law  
on degrading punishment on account of avoidable delay  
in execution by pushing time taken in the appellate  
proceedings out of the delay calculation. It also forbids  
the convict to claim benefit for delay caused on account  
  
1 Trvenbon v. State of Gujarat, (1889) 1 SCC 678  
  
2% Sher Singh . Slate of Punjab, (1989) 2 SCC 944, at paras 18-19: Trveniben v.  
‘State of Guarat, (1988) 1 SCC 678, at para 16; Trveniben v. State of Gujarat (1988)  
4 SCC 574, at para 2  
  
“2 Triveniban v. State of Gujarat, 1989) 1 SCC 678, at paras 17,23: Shatrughan  
‘Chauhan v. Union of Inia, (2014) 3 SCC 1, at para 48.  
  
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Page 214:  
of proceedings preferred by him. It is to be noted that  
the Supreme Court in Sher Singh cited the common  
experience of disposal of appeals before the High Court  
and the Supreme Court to be four or five years on this  
count. However, the international norms on this count  
have since undergone change.  
  
6.7.13 A decade after the decision in Noel  
Riley v. Attorney-General’\*! came out, the Privy Council  
reversed itself in Pratt and Others v. AG of Jamaica  
(Pratt), citing the Indian Supreme Court decisions in  
Vatheeswaran, Sher Singh and Triveniben, and  
recognized that prolonged delay renders the death  
sentence too inhuman and degrading to be executed.  
But in doing so, the Privy Council presented a  
wholesome understanding of delay. The Privy Council  
today does not make a distinction on the basis of nature  
of delay and causes of delay while considering the  
oppressive effect of long years of wait on the death row  
prisoner. The focus of the Privy Council is only on the  
human rights implications flowing from the delayed  
execution. The Privy Council in Pratt noticed the shift in  
Indian law from Vatheeswaran to Triveniben on the  
aspect of definition of delay constituting degrading  
punishment and sided with the former. The Privy  
Council held:  
  
In India, where the death penalty is not mandatory,  
the appellate court takes into account delay when  
deciding whether the death sentence should be  
imposed. In Vatheeswaran v. State of Tamil Nadu  
Chinnappa Reddy J. said at page 353:-  
  
The court held that delay exceeding two  
years in the execution of a sentence of death  
should be sufficient to entitle a person under  
sentence of death to demand the quashing of  
his sentence on the ground that it offended  
against Article 21 of the Indian Constitution  
which provides “No person shall be deprived  
  
7 Noe! Riley v. Atlomey-General, 1982 Criminal Law Review 678  
vee 1994] 2 AC 1  
  
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Page 215:  
of his life or personal liberty except according  
to procedure established by law.”  
  
In Sher Singh and Others v. The State of Punjab the  
court held:  
  
“Prolonged delay in the execution of a death  
sentence is unquestionably an important  
consideration for determining whether the  
sentence should be allowed to be executed.  
But no hard and fast rule that ‘delay  
exceeding two years in the execution of a  
sentence of death should be considered  
sufficient to entitle the person under sentence  
of death to invoke Article 21 and demand the  
quashing of the sentence of death’ can be laid  
down as has been in Vatheeswaran.”  
  
The court pointed out that to impose a strict time  
limit of two years would enable a prisoner to defeat  
the ends of justice by pursuing a series of frivolous  
and untenable proceedings.  
  
In Smt. Treveniben v. State of Gujarat{1989) 1 S.C.J.  
383 the Supreme Court of India approved the  
judgment in Sher Singh v. The State of Punjab and  
held that a sentence of death imposed by the “Apex  
Court”, which will itself have taken into account  
delay when imposing the death sentence, can only  
be set aside thereafter upon petition to the Supreme  
Court upon grounds of delay occurring after that  
date. Oza J. said, at page 410:-  
  
“If, therefore, there is inordinate delay in  
execution, the condemned prisoner is entitled  
to come to the court requesting to examine  
whether, it is just and fair to allow the  
sentence of death to be executed.”  
  
In their Lordships’ view a State that wishes to  
retain capital punishment must accept the  
responsibility of ensuring that execution  
follows as swiftly as practicable after  
  
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Page 216:  
sentence, allowing a reasonable time for  
appeal and consideration of reprieve. It is part  
of the human condition that a condemned man  
will take every opportunity to save his life  
through use of the appellate procedure. If the  
appellate procedure enables the prisoner to  
prolong the appellate hearings over a period  
of years, the fault is to be attributed to the  
appellate system that permits such delay and  
not to the prisoner who takes advantage of it.  
Appellate procedures that echo down the years  
are not compatible with capital punishment.  
The death row phenomenon must not become  
established as a part of our jurisprudence.  
(Emphasis supplied)  
  
6.7.14 The two-year standard set out by the  
Supreme Court in Vatheeswaran was neither sensitive  
to the distinction between executive delay in  
consideration of mercy petitions and judicial delays nor  
to the delay caused on account of litigation efforts of the  
prisoner. The Supreme Court in Vatheeswaran, like the  
Privy Council now in Pratt, took a principled position on  
the consequences and the effect of avoidable delay on a  
death row convict. However, the Vatheeswaran  
decision, which served as a positive precedent for the  
Privy Council decision in Pratt, stands overruled today.  
‘The law as crystallized in Triveniben does not recognize  
pending appeals as actionable delay in terms of the  
death row phenomenon.  
  
(b) Delayed Execution serves No Penological Purpose  
and is, therefore, Excessive  
  
6.7.15 The Supreme Court has also held that  
delayed execution of the death sentence does not serve  
any of the penal purposes originally expected of it at the  
time the court confirmed the same on the convict. A  
delayed death sentence to that extent only embodies  
mindless and medieval retributive quality which offends  
the present civilizational norms of punishment. The  
  
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Page 217:  
Supreme Court in Jagdish v. State of M.P.,76 invoked  
the embargo against cruel and unusual punishment in  
Eighth Amendment to the US Constitution to rule that  
delayed executions fail to serve both the retributive and  
deterrence rationales of death penalty. The Court  
observed:  
  
43. ...Penologists and medical experts agreed that  
the process of carrying out a verdict of death is often  
so degrading and brutalising to the human spirit as  
to constitute psychological torture. Relying  
on Coleman v. Balkcom [68 L Ed 2d 334 : 451 US  
949 (1981)] , US at p. 952 the Court observed that  
“the deterrent value of incarceration during that  
period of uncertainty may well be comparable to the  
consequences of the ultimate step itself” and when  
the death penalty “ceases realistically to further  
these purposes, ... its imposition would then be the  
pointless and needless extinction of life with only  
‘marginal contributions to any discernible social or  
public purposes. A penalty with such negligible  
returns to the State would be patently excessive  
and cruel and unusual punishment violative of the  
Eighth Amendment.” The Courts have, however,  
drawn a distinction whereby the accused himself  
has been responsible for the delay by misuse of the  
judicial process but the time taken by the accused  
in pursuing legal and constitutional remedies  
cannot be taken against him.  
  
44, It has been repeatedly emphasised that the  
death sentence has two underlying philosophies:  
  
(1) that it should be retributive, and  
(2) it should act as a deterrent  
  
and as the delay has the effect of obliterating  
both the above factors, there can be no  
justification for the execution of a prisoner  
after much delay. Some extremely relevant  
  
7 (2008) 9 SOC 485.  
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Page 218:  
observations have been quoted above  
from Coleman v. Balkeom [68 L Ed 2d 334 : 451 US  
949 (1981)] , US at p. 952.  
  
45. While examining the matter in the background  
of the Eighth Amendment to the US Constitution  
which provides that:  
  
“excessive bail should not be required, nor  
excessive fine imposed, nor cruel and unusual  
punishment inflicted”  
  
it has been observed that though the death penalty  
was permissible, its effect was lost in case of delay  
(Gregg v. Georgia [49 L Ed 2d 859 : 428 US 153  
(1976) Jr  
  
(i) Illegal Solitary Conditions of Detention  
  
6.7.16 The Supreme Court outlawed the practice of  
solitary confinement in 1978 in Sunil Batra v. Delhi  
Administration (‘Sunil Batra). Solitary confinement  
was defined by the Supreme Court as confinement of a  
prisoner in a single cell apart from other prisoners.7%  
‘The Supreme Court in Sunil Batra observed that solitary  
confinement, absent a specific judicial order, may only  
be imposed when a prisoner is under an executable  
sentence of death, i.e. after his mercy petition has been  
rejected by the President, and even then under severe  
restrictions and modifications. The Court held:  
  
118. It follows that during the pendency of a  
petition for mercy before the State Governor or the  
President of India the death sentence shall not be  
executed. Thus, until rejection of the clemency  
motion by these two high dignitaries it is not  
possible to predicate that there is a self executory  
death sentence. Therefore, a prisoner becomes  
legally subject to a self-working sentence of death  
only when the clemency application by the  
  
7 Jagdish v. Stale of MP, 2008) 9 SCC 495, a paras 43-45,  
1%: (1878) 4 SCC 494  
7 Sunil Batra v. Delhi Administration, (1978) 4 SCC 494, at paras 91-92.  
  
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Page 219:  
prisoner stands rejected. Of course, thereafter  
Section 30(2) [of Prison Act] is attracted. A second  
ora third, a fourth or further application for mercy  
does not take him out of that category unless  
there is a specific order by the competent  
authority staying the execution of the death  
sentence.°?  
  
6.7.17 While the illegality of solitary confinement  
has been made amply clear by the Supreme Court in  
more than one decision, the practice is still rampant  
especially for prisoners on the death row. In Shatrughan  
Chauhan, relying upon the Sunil Batra decision, the  
Supreme Court lamented about the existence of  
widespread use of solitary confinement for prisoners on.  
death row and urged the prison authorities to  
implement the Sunil Batra decision in spirit. The  
Supreme Court observed:  
  
91. Even in Triveniben [Triveniben v. State of  
Gujarat, (1989) 1 SCC 678 : 1989 SCC (Cri)  
248] , this Court observed that keeping a  
prisoner in solitary confinement is contrary to  
the ruling in Sunil Batra [Sunil Batra v. Delhi  
Admn., (1978) 4 SCC 494 : 1979 SCC (Cri)  
155] and would amount to inflicting  
“additional and separate” punishment not  
authorised by law. It is completely  
unfortunate that despite enduring  
pronouncement on judicial side, the  
actual implementation of the provisions  
is far from reality. We take this occasion  
to urge to the Jail Authorities to  
comprehend and implement the actual  
intent of the verdict in Sunil Batra [Sunil  
Batra v. Dethi Admn., (1978) 4 SCC 494 :  
1979 SCC (Cri) 155] .75 (Emphasis supplied)  
  
57 Suni Batra v. Delhi Administration, (1978) 4 SCC 494, at para 118,  
8 Shatrughan Chauhan v. Union of India, (2014) 3 SCC, a para 1  
  
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Page 220:  
6.7.18 The Supreme Court in Ajay Kumar Pal v.  
Union of India,\*®° noticed that the convict was subjected  
to solitary confinement while he was on death row. The  
Court on account of delay in disposal of mercy petition  
by the executive authorities and imposition of solitary  
confinement, commuted the death sentence to life  
imprisonment.  
  
6.7.19 Likewise, solitary confinement was also  
considered as a relevant supervening circumstance in  
the case of Peoples’ Union of Democratic Rights v. Union  
of India & Others,” where the death sentence of  
prisoner was commuted.  
  
H. Conclusion  
  
6.8.1 The executive’s mercy powers cure defects of  
arbitrary and erroneous death sentences, and provide  
an additional bulwark against miscarriages of justice.  
‘Therefore, cases found unfit for mercy merit capital  
punishment. Mercy powers are thus a safeguard and  
necessary precondition for the death penalty.  
  
6.8.2 When the writ courts in pursuance of judicial  
review powers, on a relative routine basis, find decisions  
of the executive to reject mercy petitions to be vitiated  
by procedural violations, arbitrariness and non-  
application of mind, the safeguard of mercy powers  
appears to not be working very well.  
  
6.8.3 \_\_ It is also distressing to note that the death  
row prisoners are routinely subjected to an  
extraordinary amalgam of excruciating psychological  
and physical suffering arising out of oppressive  
conditions of incarceration and long delays in trial,  
appeal and thereafter executive clemency. Despite  
repeated attempts by death row prisoners to invoke  
judicial review remedies to secure commutations on  
account of penal transgressions by the executive  
authorities, the practice of solitary confinement and  
  
7 (2014) 18 SCALE 762,  
720185 (2) ADL 38.  
  
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Page 221:  
long delays seem to continue unabated. It is the view of  
the Commission that the death row phenomenon has  
become an unfortunate and distinctive feature of the  
death penalty apparatus in India.  
  
6.8.4Further, infliction of additional, unwarranted and  
judicially unsanctioned suffering on death sentence  
prisoners, breaches the Article 21 barrier against  
degrading and excessive punishment. The lingering  
nature of this suffering is triggered as soon as any court  
sentences a prisoner to death, and therefore extends  
beyond the limited number of prisoners who come close  
to an execution after having lost in the Supreme Court  
and in the mercy petition phase as well.  
  
6.8.5 The capital punishment enterprise as it  
operates in India, therefore perpetrates otherwise  
outlawed punitive practices that inflict pain, agony and  
torture which is often far beyond the maximum  
suffering permitted by Article 21. The debilitating effects  
of this complex phenomenon imposed on prisoners what  
can only be called a living death.  
  
6.8.6 While the illegalities pertaining to death row  
phenomenon in a particular case may be addressed by  
the writ courts commuting the death sentence, the  
illegal suffering which the convicts have been subjected  
to while existing on death row casts a long shadow on  
the administration of penal justice in the country.  
  
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Page 222:  
CuapTER - VII  
CONCLUSIONS AND RECOMMENDATION  
A. Conclusions  
  
7.1.1 The death penalty does not serve the  
penological goal of deterrence any more than life  
imprisonment. Further, life imprisonment under  
Indian law means imprisonment for the whole of life  
subject to just remissions which, in many states in  
cases of serious crimes, are granted only after many  
years of imprisonment which range from 30-60  
years.77!  
  
7.1.2. Retribution has an important role to play in  
punishment. However, it cannot be reduced to  
vengeance. The notion of “an eye for an eye, tooth for  
a tooth” has no place in our constitutionally mediated  
criminal justice system. Capital punishment fails to  
achieve any constitutionally valid penological goals.  
  
7.1.3. In focusing on death penalty as the ultimate  
measure of justice to victims, the restorative and  
rehabilitative aspects of justice are lost sight of.  
Reliance on the death penalty diverts attention from  
other problems ailing the criminal justice system such  
as poor investigation, crime prevention and rights of  
victims of crime. It is essential that the State establish  
effective victim compensation schemes to rehabilitate  
victims of crime. At the same time, it is also essential  
that courts use the power granted to them under the  
Code of Criminal Procedure, 1973 to grant  
appropriate compensation to victims in suitable  
cases. The voices of victims and witnesses are often  
silenced by threats and other coercive techniques  
employed by powerful accused persons. Hence it is  
essential that a witness protection scheme also be  
established. The need for police reforms for better and  
  
'Gopal Vinayak Godse v. State of Maharashira, AIR 1961 SC. 600; Maru Ram v.  
Union of nda, (1981) 1 SCC 107. For remission rues, se for example, Category 6 in  
Maharashtra "Guidelines for Premature Release” dated 15.3 2000  
  
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Page 223:  
more effective investigation and prosecution has also  
been universally felt for some time now and measures  
regarding the same need to be taken on a priority  
basis.  
  
7.1.4 In the last decade, the Supreme Court has  
on numerous occasions expressed concern about  
arbitrary sentencing in death penalty cases. The  
Court has noted that it is difficult to distinguish cases  
where death penalty has been imposed from those  
where the alternative of life imprisonment has been  
applied. In the Court's own words "extremely uneven  
application of Bachan Singh has given rise to a state of  
uncertainty in capital sentencing law which clearly  
falls foul of constitutional due process and equality  
principle’. The Court has also acknowledged  
erroneous imposition of the death sentence in  
contravention of Bachan Singh guidelines. Therefore,  
the constitutional regulation of capital punishment  
attempted in Bachan Singh has failed to prevent death  
sentences from being “arbitrarily and freakishly  
imposed’.  
  
7.1.5 There exists no principled method to  
remove such arbitrariness from capital sentencing. A  
rigid, standardization or categorization of offences  
which does not take into account the difference  
between cases is arbitrary in that it treats different  
cases on the same footing. Anything less categorical,  
like the Bachan Singh framework itself, has  
demonstrably and admittedly failed.  
  
7.1.6 Numerous committee reports as well as  
judgments of the Supreme Court have recognized that  
the administration of criminal justice in the country  
is in deep crisis. Lack of resources, outdated modes of  
investigation, over-stretched police force, ineffective  
prosecution, and poor legal aid are some of the  
problems besetting the system. Death penalty  
operates within this context and therefore suffers from.  
the same structural and systemic impediments. The  
administration of capital punishment thus remains  
  
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fallible and vulnerable to misapplication. The vagaries  
of the system also operate disproportionately against  
the socially and economically marginalized who may  
lack the resources to effectively advocate their rights  
within an adversarial criminal justice system.  
  
7.1.7 Clemency powers usually come into play  
after a judicial conviction and sentencing of an  
offender. In exercise of these clemency powers, the  
President and Governor are empowered to scrutinize  
the record of the case and differ with the judicial  
verdict on the point of guilt or sentence. Even when.  
they do not so differ, they are empowered to exercise  
their clemency powers to ameliorate hardship, correct  
error, or to do complete justice in a case by taking into  
account factors that are outside and beyond the  
judicial ken. They are also empowered to look at fresh  
evidence which was not placed before the courts.””?  
Clemency powers, while exercisable for a wide range  
of considerations and on protean occasions, also  
function as the final safeguard against possibility of  
judicial error or miscarriage of justice. This casts a  
heavy responsibility on those wielding this power and  
necessitates a full application of mind, scrutiny of  
judicial records, and wide ranging inquiries in  
adjudicating a clemency petition, especially one from  
a prisoner under a judicially confirmed death  
sentence who is on the very verge of execution.  
Further, the Supreme Court in Shatrughan  
Chauhan?73 has recorded various \_ relevant  
considerations which are gone into by the Home  
Ministry while deciding mercy petitions.  
  
7.1.8 The exercise of mercy powers under Article  
72 and 161 have failed in acting as the final safeguard  
against miscarriage of justice in the imposition of the  
death sentence. The Supreme Court has repeatedly  
pointed out gaps and illegalities in how the executive  
  
‘PaKehar Singh v. Union of India, (1988) 1 SCC 204 paras 7,10 and 16  
‘3ShatraghanChauhan v. Union of India, (2014) 3 SCC 1, at paras 55-56,  
  
215  
  
  
Page 225:  
has discharged its mercy powers. When even exercise  
of mercy powers is sometimes vitiated by gross  
procedural violations and non-application of mind,  
capital punishment becomes indefensible.  
  
7.1.9 Safeguards in the law have failed in  
providing a constitutionally secure environment for  
administration of this irrevocable punishment. The  
Courts’ attempts to constitutionally discipline the  
execution of the death sentence has not always borne  
fruit.  
  
7.1.10 Death row prisoners continue to face long  
delays in trials, appeals and thereafter in executive  
clemency. During this time, the prisoner on death row  
suffers from extreme agony, anxiety and debilitating  
fear arising out of an imminent yet uncertain  
execution. The Supreme Court has acknowledged that  
an amalgam of such unique circumstances produces  
physical and psychological conditions of near-torture  
for the death row convict.’7\* Further, the death row  
phenomenon is compounded by the degrading and  
oppressive effects of conditions of imprisonment  
imposed on the convict, including \_ solitary  
confinement, and the prevailing harsh prison  
conditions. The death row phenomenon has become  
an unfortunate and distinctive feature of the death  
penalty apparatus in India. Further, infliction of  
additional, unwarranted and judicially unsanctioned  
suffering on death sentence prisoners, breaches the  
Article 21 barrier against degrading and excessive  
punishment.  
  
7.1.11 In retaining and practicing the death  
penalty, India forms part of a small and ever dwindling  
group of nations. That 140 countries are now  
abolitionist in law or in practice, demonstrates that  
evolving standards of human dignity and decency do  
not support the death penalty. The international trend  
towards successful and sustained abolition also  
  
"#Shatrughan Chauhan v. Union of India, (2014) 9 SCC 1, at para 61  
216  
  
  
Page 226:  
confirms that retaining the death penalty is not a  
requirement for effectively responding to insurgency,  
terror or violent crime.  
  
B. Recommendation  
  
7.2.1 The Commission recommends that  
measures suggested in para 7.1.3 above, which  
include provisions for police reforms, witness  
protection scheme and victim compensation scheme  
should be taken up expeditiously by the government.  
  
7.2.2 The march of our own jurisprudence -- from  
removing the requirement of giving special reasons for  
imposing life imprisonment instead of death in 1955;  
to requiring special reasons for imposing the death  
penalty in 1973; to 1980 when the death penalty was  
restricted by the Supreme Court to the rarest of rare  
cases ~ shows the direction in which we have to head.  
Informed also by the expanded and deepened contents  
and horizons of the right to life and strengthened due  
process requirements in the interactions between the  
state and the individual, prevailing standards of  
constitutional morality and human dignity, the  
Commission feels that time has come for India to move  
towards abolition of the death penalty.  
  
7.2.3 Although there is no valid penological  
justification for treating terrorism differently from  
other crimes, concern is often raised that abolition of  
death penalty for terrorism related offences and  
waging war, will affect national security. However,  
given the concerns raised by the law makers, the  
commission does not see any reason to wait any  
longer to take the first step towards abolition of the  
death penalty for all offences other than terrorism  
related offences.  
  
7.2.4 The Commission accordingly recommends  
that the death penalty be abolished for all crimes  
other than terrorism related offences and waging war.  
  
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Page 227:  
7.2.5 The Commission trusts that this Report will  
contribute to a more rational, principled and informed  
debate on the abolition of the death penalty for all  
crimes.  
  
7.2.6 Further, the Commission sincerely hopes  
that the movement towards absolute abolition will be  
swift and irreversible.  
  
[Justice A.P. Shah]  
  
Chairman  
sa/- sa/- -  
[Justice 8.N. Kapoor] [Prof. (Dr.) Mool Chand Sharma] [Justice Usha Mehra]  
Member Member Member  
[P.K. Malhotra] [Dr. Sanjay Singh]  
Ex-officio Member Exofficio Member  
sa/- sa/-  
[Dr. G. Narayana Raju) IR. Venkataramani]  
Member-Secretary Member (Part-Time)  
sa/- sa/-  
[Prof. (Dr.) Gurjeet Singh] [Dr. B. N. Mani]  
‘Member (Part-Time) Member (Part-Time)  
  
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Annexure 1  
List of Participants  
  
L Commission of Indi  
  
1 Justice A P Shah  
Chairman  
  
2. Justice § N Kapoor  
Member  
  
3 Justice Usha Mehra  
Member  
  
4, Prof. (Dr.) Mool Chand Sharma  
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5. Dr. G Narayana Raju  
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Law Secretary (Ex-Officio Member)  
  
7. Prof. (Dr.) YogeshTyagi  
Member (PT)  
  
8 R Venkataramani  
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9 Dr. (Smt, Pawan Sharma  
Joint Secretary & Law Officer  
  
10. AK. Upadhyay,  
‘Additional Law Officer  
  
ist Dr. V.K. Singh  
  
Deputy Law Officer  
I. Chief Guest  
  
1 Gopal Krishan Gandhi  
Former Governor, West Bengal  
  
Il. Other Speakers  
  
1. Justice Prabha Sridevan, Retired Judge, Madras High  
Court  
  
2. Justice Hosbet Suresh, Retired Judge, Bombay High  
Court  
  
3. Manish Tewari, Former Minister, Information &  
Broadcasting  
  
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Yug Chaudhry, Advocate, Mumbai  
  
Ashish Khetan, Spokes Person, AAP  
  
Prof. Dr. C Rajcumar, Vice Chancellor, O.P. Jindal Global  
  
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9, Julio Ribeiro, Retired Sr. Police Officer  
  
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Majeed Memon, M.P. & Sr. Advocate  
Brinda Karat, General Secretary, CPI(M)  
  
Sankar Sen, Former D.G., Delhi Police /NHRC  
  
Justice K. Chandra, Former Judge, Madras High Court  
Prof NR Madhava Menon, Former Vice Chancellor,  
National Juridical School, Kolkota  
  
Justice Rajinder Sachar, Former Judge, Delhi High Court  
Shashi Tharoor, Former Union Minister  
  
Kanimozhi, M.P. DMK  
  
Prof Roger Hood, Centre of Criminology, University of  
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Dushyant Dave, Sr. Advocate  
  
‘TR Andhyarujina, Sr. Advocate  
  
Prof Mohan Gopal, Chairman, National Court  
Management system, Supreme Court  
  
Anand Grover, Sr. Advocate  
  
Wajahat Habibullah, Former, Chief Information  
Commissioner, Govt. Of India  
  
DR Karthikeyan, Former Director General, National  
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Varun Gandhi, M.P. Lok Sabha  
  
Sanjay Hegde, Advocate  
  
Chaman Lal, Retired Sr. Police Officer  
  
IV. Other Invitees/Participants  
  
eer gyeen  
  
Kusumjeet Sidhu, Secretary, Deptt. Of Justice,  
Ministry of Law & Justice, GOL  
  
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Meeran C Borwankar, Additional Director General  
Maharashtra (Prison)  
  
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Usha Ramanathan, Social Activist,  
  
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Page 231:  
Aprenbix A  
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Law Commission of India,  
New Deli  
  
sir,  
  
With due respect I humbly state that I do not subscribe to  
the recommendations made by you with regard to the abolition of death  
sentence, I, therefore, pin down few of my thoughts for retention of  
  
death sentence;  
  
4. Death sentence appears in various provisions of Indian Penal  
Code for example Section 376E, 3644, 302 etc. beside others.  
‘These provisions provide for imposition of death sentence or fe  
Imprisonment. Whether life or death would be the proper  
sentence 1s in the discretion of court which the courts are  
‘expected to exercise wisely having regard to the facts of case  
  
‘and the gravity of offence and its severity or barbarity.  
  
2. To say that while deciding the case and imposing death  
sentence there is error in the Judgment or it Is discriminatory,  
to my mind, Is very general statement. Moreover. to err is  
human. Almighty alone Is the dispenser of absolute justice.  
Judges of the highest court do their best, subject of course to  
the limitation of human falibilty. But that does not mean that  
the provision of death penalty should be abolished in all cases  
Irrespective of their gravity and heinousness. Even otherwise  
  
by the time case reaches Supreme Court it passes the scrutiny  
  
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Page 232:  
by High Court which confirms death on reference being made  
  
by Session Courts  
  
Kidnapping by terorsts for ransom, for creating penic amongst  
the people and for securing release of their associates and  
cadres assumed serious dimensions. Menace of kidnapping and  
abduction for ransom is on increase. Therefore, in its wisdom  
punishment of death sentence has to be there on the statue  
  
book.  
  
‘To say that innate disposition of human minds that control,  
manage and administer such punishments, thereby making  
them inevitably arbitrary, isnot correct. Can we loose sight of  
the cases like ‘Kasab’ and “Afzal Guru’. They posed threat to  
security, safety and peace of the society. Se many innocents  
fost their ves. tn such cases extreme punishment awarded on  
the doctrine of ‘rarest of the rare’ case cannot be called  
arbitrary or discriminatory. In fact in the report too much  
emphasis hes been given on human right principle of persons  
subjected to the death penalty, atthe same time forgetting the  
  
human rights of innocent victims.  
  
‘hs already pointed out by me above, possiblity of error should  
rot be the reason to abolish death penalty. Supreme Court in  
Bachan Singh’s case expounded the doctrine of \*rarest of rare”  
wiich principle has with stood the test of time, It has neither  
failed nor faltered. What other sentence could have been given  
  
to \*hithari®. In such cases of heinous crime extreme measures  
ns  
  
  
Page 233:  
are required by giving them harsh punishment keeping in mind  
  
the safety and security of the society.  
  
Recently Supreme Court in the ease of Vikram Singh@Vicky  
& Anr, Vs. Union of India & Ors. decided on 25.08.2015  
obseved that \* In a parliamentary democracy lke ours, laws  
are enacted by parliament or the State Legislature within thelr  
respective legislative fields specified under the Constitution.  
‘The presumption attached to these laws Is that they are meant  
to cater to the societal demands and meet the challenge of the  
time, for the legislature is presumed to be supremely wise and  
aware of such needs and challanges". Even the Supreme Court  
of U.S.A. in recent case Ronald Allan Harmelin vs. Michigan  
501 US 957 based on a conspectus of the decsions,  
formulated some common principle applicable in situation that  
required examination of limits of proportionality, The frst  
principle culled out from the decision earlier pronounced by the  
court was the prescribed punishment for crimes rest with the  
legislature and not courts and that the courts ought to show  
  
deference to the wisdom of the legislature.  
  
In Manu Ram vs Union of India (1981) 1 SCC 107 court  
observed that “on consideration of circumstances mentioned  
above, the conclusion is inescapable that parliament by  
enacting Section 433A has rejected the reformative character  
of punishment, in respect of offences contemplated by it, for  
  
‘the time being in view of the prevailing conditions in our  
  
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country. Te is well settled that the legistature understands the  
needs and requirements of its people much better than the  
courts". Government of India voted against the United Nations  
General Assembly resolution calling for the moratorium on  
death penalty. In November 2012, India again upheld Its  
stance on capital punishment by voting against the United  
Nations General Assembly draft resolution seeking to ban the  
death penalty. This reflect the legislature understanding of the  
needs and requirements of its people beside the conditions  
  
prevailing nour country.  
  
tn the case of State of M.P. vs. Bala allas Bularam (2005)  
8 SCC 1 court sald “the punishment prescribed by the penal  
code reflect the legislative recognition of the social needs, the  
‘gravity of the offence concerned, its impact on the society and  
wnat the legislature considers as a punishment suitable forthe  
particular offence. It necessary for the courts to imbibe that  
  
legislative wisdom and to respect it."  
  
In the case of Vikram Singh(supra) appellant challenged the  
validty of Section 364A of IPC, while upholding the  
constitutional validity of Section 364A of IPC court observed  
that Section 364A came on the statue book intaly in the year  
1993 not only because Kidnapping and abduction for ransom  
were becoming rampant and the Law Commission had  
recommended that @ separate provision making the same  
  
punishable be incorporated but also because activites of  
  
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Page 235:  
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terrorist organizations had acquired menacing dimensions that  
called for an effective legal frame work to prevent such ransom  
  
situations and punish these responsible for the same.  
  
Court further observed that “the statistics further observed that  
kidnapping for ransom has become a lucrative and thriving  
Industry all over the country which must be dealt with in the  
harshest possible manner and an obligation rests on the courts  
  
‘as well. The courts to lend a helping hand in that directions”.  
  
We must appreciate that when the offence of kidnapping for  
ransom, abduction and murder take place then such offence  
has to be treated as heinous crime and contemplating death  
penalty is not disproportionate. How can “terrorist” be  
reformed, whose main aim is to destroy the peace of the  
  
‘society, if not the society as such  
  
supreme court in Vikram Singh's case concluded by saying ~  
‘The gradual gronth ofthe challenges posed by kidnapping and  
‘abductions for ransom, not only by ordinary criminals for  
‘monetary gain or as an organized activity for economic gains  
but by terrorist organizations Is what necessitated the  
incorporation of Section 364A of the IPC and 2 stringent  
punishment for those indulging in such activities. Given the  
ackground in which the law was enacted and the concern  
shown by the Parliament for the safety and security of the  
citizens and the unity, sovereignty and integrity of the country,  
  
the punishment prescribed for those committing any act  
ns  
  
  
Page 236:  
13.  
  
contrary to Section 364A cannot be dubbed as so outrageously  
disproportionate to the nature of the offence as call for the  
  
same being declared unconstitutional Just  
  
because the sentence of death is @ possible punishment that  
‘may be awarded in appropriate cases cannot make it per se  
inhuman or barbark. In the ordinary course and In cases which  
quality to be called rarest of the rare, death may be awarded  
‘only where kidnapping or abduction has resulted in the death  
ether of the victim or anyone else in the course of the  
commission of offence. Fact situations where the act which the  
accused Is charged with is proved to be an act of terrorism  
threatening the very essence of our federal, secular and  
democratic structure may possible by the only other situations  
  
where Courts may consider awarding the extreme penalty”.  
  
In my earller note also 1 had mentioned that recommending  
blanket abolition of death sentence or moratorium on death  
penalty in heinous crimes is not an appropriate course  
  
particularly keeping in view the circumstances prevailing in our  
  
hie ME  
  
Justice Usha Mehre——  
  
‘country.  
  
ar  
  
  
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Note on Death Penalty  
  
At the outset, I would like to point out that the Government of  
India voted against the United Nations General Assembly  
resolution calling for the moratorium on death penalty, In  
November 2012, India again upheld its stance on capital  
punishment by voting against the United Nations General  
‘Assembly draft resolution seeking to ban the death penalty.  
  
In fact, no system of justice can produce results which are 100%  
certain all the time. Mistakes will be made in any system which  
relies upon human testimony for proof. We should be vigilant to  
uncover and avoid such mistakes. Our system of justice  
rightfully demands a higher standard for death penalty cases. The  
risk of making a mistake with the extraordinary due process  
applied in death penalty cases is very small. There is no credible  
evidence to show that innocent persons have been executed.  
  
‘Amnesty International figures of death sentence though are  
available but no official statistics have been released so far. As  
against conviction of death sentence awarded to 1617 prisoners by  
trial court, capital punishment was confirmed in only 71 cases.  
Even out of 71 cases, in the span of last 40 years only 4 Hangings  
have taken place, Two were terrorists ie. Kasab and Afal Guru  
  
and the other two do not belong to minority or dalit. So it would  
  
not be correct to say that our system has discriminated in any  
‘manner on account of poverty, minority, caste or being dalit.  
  
‘Yakub Memon was not a poor person and should have afforded  
  
ma  
  
  
Page 238:  
the best of legal assistance. In fact blanket abolition of death  
sentence will not be conducive to the circumstances in which  
India is placed.  
  
Steven O. Stewart, JD, Presenting Attomey for Clark County  
said “ The inevitability of a mistake should not more than the risk of  
having a fatal wreck should make automobile illegal”.  
  
Death penalty abolition may increase in threats from International  
terror organizations and also internal disturbance like insurgency  
et. to the sovereignty and the territorial integrity of moder state  
  
abolition of death penalty may affects the security of the country.  
  
‘There should not be blanket abolition of death penalty and that to  
make this system work properly we should strengthen the legal  
aid services to be made available to the accused. Death penalty is  
given only in rarest of rare gases after fair and proper trial hence  
to be awarded only in deserved cases.  
  
29  
  
  
Page 239:  
APPENDIX B  
  
‘so dora fig wre a  
‘ofa Government of India  
Dr. Sanjay Singh ‘art ae sara seer  
Secretary = iit ow 8 tosis  
‘Legislative Department  
Dated the 28th August, 2015,  
  
Hon'ble Chairman Sit,  
  
May kindly refer to the draft report relating to “Death Penalty” that  
requires further deliberations. In this regard, it may be mentioned that death  
‘penalty has been a mode of punishment since time immemorial andthe arguments  
for and against have not changed much over the years. With the march of  
civilization, the modes of death punishment have witnessed significant changes  
‘on humanitarian grounds.  
  
2. In India, much has been debated on the issue as to whether to retain or  
abolish death sentence. In our country, the Indian Penal Code (45 of 1860)  
contains a number of provisions where punishment of death penalty exists,  
namely, section 121 (Waging war, etc. against the Government of India), section  
132 (Abetment of mutiny by a member of the armed forces), section 194 (False  
‘evidence leading to conviction of innocent person and his execution), section 302  
(Murder), section 303 (Murder by a person under sentence of imprisonment for  
life), seetion 30S (Abetment of suicide of child or insane’ person), section  
307(Attempt to murder by life convict, if hurt is caused), section 364A  
‘(Kidnapping for ransom, ete.) and section 396 (Dacoity with murder). Certain  
other laws like the Narcotic Drugs and Psychotropic Substances Act, 1985  
(ection 31), the Unlawful Activities Prevention Act, 1967 (sections 10 and 16),  
the Navy Act, 1957, ete also contain provisions for awarding death sentence.  
  
3. The subject of capital punishment attracted the attention of the United  
Nations towards the end of 1957, when the Third Committee of the Twelfth U.N,  
General Assembly opened discussion on Article 6 of the draft Covenant on Civil  
and Political Rights, and adopted the same with modifications. In 1979, India  
‘acceded to the Intemational Covenant on Civil and Political Rights (ICCPR).  
Article 6(2) of the ICCPR states that “In countries which have not abolished the  
death penalty, sentence of death may be imposed only for the most serious  
  
ale won owe wer Oe TOOT  
  
230  
  
  
Page 240:  
4. International laws and standards pertaining to the death penalty are clear on  
this issue and state that death penalty can only be imposed after exacting legal  
standards, Safeguard 5 ofthe Safeguards Guaranteeing Protection ofthe Rights of  
‘Those Facing the Death Penalty, adopted by the UN Economic and Social  
‘Counel in 1984 (ECOSOC Resoltion 50/1984), states that “Capital punishment  
ray only be carried out pursuant to a final judgment rendered by a competent  
court afer legal process which gives all posible safeguards to ensure afr tal,  
‘atleast equal to those contained in Article 14 of the Intemational Covenant on  
Civil and Political Right, including the right of anyone suspected of or charged  
with a crime for which capital punishment may be imposed to sdequate legal  
assistance at all stages ofthe proceedings.”  
  
5. Further precision is provided in Safeguard 1 of the Safeguards  
‘Guaranteeing Protection ofthe Rights of Those Facing the Death Penalty, adopted  
by the UN Economie and Social Council in 1984, which states that "In countries  
‘which have not abolished the death penalty, capital punishment may be imposed  
‘only forthe most serious crimes, it being understood that their scope should not  
{g0 beyond intentional erimes with lth or other extremely grave consequences.”  
  
{6 ‘The Law Commission of India examined the issue in-depth and submitted  
its 35" Report concluding that “The suggestion that death penalty may be  
abolished at an experiment (s that it can be re-introduced fier abolition) is an  
‘argument (0 which we have given our though attention; but we have 10 take  
note of certain possibilities. Between abolition and re-introduction may intervene  
fan era of violence ~ we do not say that this isa certain consequence ~ but itis  
possibilty which cannot be ignored. rreparable harm would then have been done  
‘not ony to the victims of such violence, bt tothe general cause of security of the  
society, Once the forces of lawless-ness are let lose re-introduction of capital  
punishment may not have the desired effect of restoring law and order  
immediately. Further, Parliament may not be sitting all the time and the interval  
that might elapse before the law i again actually amended would prove  
disastrous. On a consideration of all the issues involved, we are of the opinion  
that capital punishment should be retained in the presen state ofthe county.”  
  
7. Im 1973, the Supreme Court upheld the consttuionality of the death  
penalty forthe first time in the case of Jagmohan Singh vs. State of UP. (AIR  
1973 SC 947). In the same year, the Code of Criminal Procedure, 1973 (1 of  
1974) was enacted. The Code required judges to note special reasons when  
Imposing death sentences and required a mandatory pre-sentencing hearing to be  
‘held inthe trial court. The requirement of sucha hearing was obvious as it would  
sss the judge in concluding whether the facts indicated any special reasons for  
imposing death penalty.  
  
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Page 241:  
8 In 1980, the Supreme Court again upheld the constitutioality ofthe death  
penalty inthe landmark ease of Bachan Singh vs. State of Puniab (AIR 1980 SC  
898). Tt was observed therein that a real and abiding concem for the dignity of  
human life postulates resistance to taking a life trough law's instrumentality  
‘That ought not to be done save in the rarest of rare cases when the alternative  
option is unquestionably foreclosed.  
  
9, In 1991, the Constitution Bench ofthe Supreme Court once again upheld  
the constitutonality of the death penalty in Smt. Shashi Nayar v. Union of India  
‘and others (AIR 1992 SC 395). The Cour, citing earlier rulings onthe issue and  
frguing thatthe law and order sitution in the country had worsened and now  
tras, therefore, not an opportune time to abolish the death penalty, held thatthe  
method of execution of death penalty in India being scientific and least painful  
mode under the medical jurisprudence, is not violative of article 21 of the  
Constitution,  
  
10, The capital punishment acts as a deterrent. If death sentence is abolished,  
the fear that comes in the way of people committing heinous crimes will be  
‘removed, which would result in more brtal crimes. All sentences are awarded for  
the security and protection of society and peaceful living ofthe people, Whoever,  
‘committing a pre-meditated heinous crime in an extremely diabolical manner,  
Should not be allowed to go with life imprisonment or a leser punishment on  
humanitarian grounds, as they do not deserve forthe same,  
  
11. However in view of the UN resolution calling for moratorium on death  
penalty, as adopted by the Third Committee of the United Nations General  
‘Assembly, and as adopted by various European nation, though India has voted  
‘against the said Resolution, at this juncture, as a reformative measure it may be  
‘ppropriate to frame guidelines on par with the various rulings ofthe Hon'ble  
‘Supreme Cour, as 19 what would constitutes the “rarest of rare case", which  
‘warrants death penalty under the Indian laws,  
  
12, In view of the postion explained above, it would be just and appropriate to  
get the matter examined further as to what would constitute the “rarest of rare  
tase” for award of death penalty incase of conviction of offences punishable with  
‘eath sentence. In view of above, the report may not resommend something  
‘which has the effect of preventing the State from making any law inthe interest of  
the sovereignty and integrity of India. In other words, ce interest of the State is  
fof paramount importance and any recommendation made inthis regard may be  
‘considered as imposition of restriction on the powers of the State necessary 10  
protect the interest ofthe country.  
  
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Page 242:  
13, The Commission may, if considered appropriate, include the above  
views in its report on Death Penalty:  
  
With highest regards,  
  
‘Yours sincerely,  
  
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oe suinyShoy  
Vee Mets AP. Sah  
Sarma,  
einai  
rane  
  
  
Page 243:  
Anpendin-¢  
  
raga eta age AO  
vita RRL te era area  
P.K. Malhotra fa a ar  
Secretary ee GOVERNMENT OF INDIA  
Ex officio Member, MNSTRY OF LAW 8 JUSTICE  
Law Commission of India DEPARTMENT OF LEGAL AFFAIRS  
  
August 31, 2015  
  
.O. No.31/08/2015-LS  
  
Hon'ble Chairman,  
  
This i in furtherance to the discussions | had on the evening of 27°  
‘August, 2016 on the draft report on ‘death penalty’. The final version was.  
received by me on the evening of 29" August, 2015.  
  
‘As | strongly fee! that the time is not ripe in our country for aboition  
of the death penalty, | am enclosing a note containing my views on the  
subject with the request that the same may be appended to the report of  
  
the Commission  
With kind regards,  
Yours sincerely,  
Encl: As above. — a.  
  
K, Malhotra)  
  
Justice Shri AP. Shah,  
Chairman,  
  
Law Commission of India,  
HT. Building,  
  
‘New Delhi  
  
age 3, we wes, at wok ene aa, a Ref 110 001  
“ts Foo, Shas Bhawan, Or. RP Rad, New Det 110 001  
Tek: 01-11-25984205, 2998798, fy 991-11 25384409, Emal pkmahota@ricia  
  
  
Page 244:  
| have the benefit of going through the draft report on the  
“Death penalty” which was made available to me on 23" August  
2018. The meeting notice appended to the Report says that that  
Report will be discussed in the Commission on 26" and 27"  
‘August, 2015. | could not attend the meeting of the Commission  
‘on 26" August, 2015 due to my pre-occupation in other ime-bound  
‘ssignments in the Ministry. | was told that there is no meeting of  
Law Commission on 27" August, 2018. However, | got an  
‘opportunity to discuss the draft Report withthe Hon'ble Chairman  
ofthe Law Commission of India on 27”  
  
With due respect, | say that | am unable to agree withthe  
Fecommendation that the death penalty be immediately abolished  
‘nal crimes other than terror. However, | agree with the view that  
‘abolition of death penalty is an eventual goal. 1 am of the  
Considered view that the time is not ripe for its aboition in our  
country. Although, | wanted to give my detaled views on the issue,  
it may not be possible to do so as the term of the present Law  
Commission is coming to an end on 31\* August. 2016, Final  
Conclusions and recommendations were made avaliable on 29”  
‘August, 2015 in the evening and the Commission desires to submit  
its Report before 31% August, 2015, There is hardly any time to  
eal with al the points raised in the report. | will ive brief reasons.  
in support of my opinion on the subject,  
  
‘There are certain implications ofa crime and any person who  
Commits a crime should think about its consequences before taking  
  
  
  
Page 245:  
‘any wrong step. Ifthe implications keep getting waived off, atime:  
will come when law will cease to exist. A convict is to be punished  
‘50 that it becomes an example for rest of humanity and deters  
Perverted minds from committing such crimes. Therefore, if a  
‘time, as heinous as taking another person's life is committed, the  
Punishment has to be severe. There may be instanoes where ie  
‘sentence may not serve the desired purpose, There are instances  
where convicts serving a life sentence are granted parole and soon  
return to their old ways, harming the society. While there cannot  
be two opinions that rights of the accused are to be respected itis  
the victims and the society whose rights should get precedence  
‘over the rights of the accused. Thinking of rights of accused  
person committing heinous crime at the cost of violation of rights of  
Victims and safety of society will amount to misplaced sympathy  
with the accused. Former American President ‘Siri Geroge W.  
‘Bush has mentioned in one of his Presidential debates that the  
‘reason to support the death penalty is that saves other people  
le. Sir James F. Steffen, an eminent Jurist has said that no other  
punishment deters men so effectively from commiting crimes as  
the punishment of death. According to him, this is one of those  
Propositions which are dificult to prove simply because they are in  
themselves more obvious than any proof can make them. In any  
secondary punishment, however, terible, there is hope. But death  
|s death ts tertores cannot be described more forceful  
  
‘The Parliament which reflects the will f the people passed  
‘aw with death penalty for certain offences against women as late  
  
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fe  
  
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Page 246:  
‘asin 2013, Recently Goverment has introduced ant Hijacking Bil  
in the Parliament wherein it has proposed death penalty relating to  
Certain offences of hijacking, Interestingly, the law is being  
amended based on Baling Protocol d  
  
ling with ant-acking law.  
Even the Parliamentary Standing Committee, in its Report on the  
‘Anti Hijacking Bil, has observed that a comprehensive and strong  
‘anti hijacking law is need of the hour. Referring othe provisions of  
the Bill which prescribes punishment in the event of death of a  
hostage or a secutty personnel, the Committee observed that in  
‘case of armed intervention, death of personnel may also occur  
either due to cross fre oF throwing of explosive or crashing of  
irra on ground or water. The Committe felt that in case of any  
such event, the maximum penalty should be imposed on the  
offender, which results in death of any person as a direct  
consequence of the offence of hijacking. Therefore, it suggested  
further amendment to the proposed Bill to make provision for  
‘punishment of death where such offence results in the death of any  
[person including hostage or securty personnel as a direct  
‘consequence ofthe offence of hijacking, The wil ofthe Pariament  
shows that looking into the prevalent situation in the country, the  
Indian society has not matured for total abolition of death penalty.  
‘The 35" Report of the Law Commission on Capital  
Punishment specifically stated that based on the past analysis of  
the existing socio-economic cultural structure (including education  
level and crime rates) and the absence of any empirical research to  
‘the contrary, the death penalty should be retained in the present  
sate of the country. The appropriate course for us would have  
  
a  
  
  
Page 247:  
been to analyze the existing socio-economic cultural structure and  
Conduct empirical research to see whether the environment 3s,  
prevalent in 1967 when the 35" Report of the Law Commission  
‘gave its report has changed and iit has changed whether it i for  
better or the worse?  
  
Section 264A ofthe Indian Penal Code was incorporated in  
1983 because of the increasing incidence of kidnapping and  
‘abduction for ransom. Shorty thereafter this provision had to be  
‘amended because India acceded to the Intemational Convention  
‘Against the Taking of Hostages which was adopted by the General  
‘Assembly of the Urited Nations in the background of Iranian  
hhostage crisis. Since India had decided to accede to the said  
‘Convention, Section 364A of the Indian Penal Code was amended  
Widening its scope covering situations where the offence is  
‘committed with a view to compelling foreign State oF international  
inter-governmental organization oto abstain from doing any Actor  
to pay ransom. The validity of this provision was upheld by the  
Supreme Court. It was observed by the Apex Court in the case of  
‘Vikram Singh Vs. Uol (DoJ 21.8.2015) that the punishment must  
be proportionate to the offence is recognized as a fundamental  
Principle of criminal jurisprudence around the world. According to  
the Apex Court, the punishment prescribed by the Penal Code  
reflect the legislative recognition of the social needs, the gravity of  
the offence concermed, its impact on the society and what the  
legislature considers as a punishment suitable for the particular  
offence. It is necessary for the courts to imbibe that legislative  
  
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bx  
  
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Page 248:  
wisdom and to respect i While upholding the Constitutionaly of  
‘364A of the IPC, the court held as under-  
  
We find that he ned to Bring In Section 364A ofthe 1 arose  
Inia Because of te increasing incidence of Ndnappng and  
duction for ransom. Ths Is evident rom the recommendtons  
rade by the Law Commission to which we have made reference in  
the eoror part of this judgement Whle thse recommencatons  
‘wore pending with he Goverment, the specter of ero started  
‘ising ts head tvetening et onl he ecu and sft of he  
tans but the very sovereignty and neg ofthe county. cling  
for adequate, measures 10 curd what has the potent of  
‘stbizing ay county. With tors assuming itematona  
‘mensions, th need fo farther amend the law aoe, eeuling In  
the amendment to Section 364A, Inthe yar 1994 The gradual  
‘growth ofthe challenges posed by kidnapping and abdectons for  
‘ancom, not only by ordinary erminale for monetary gai o as a8  
‘orotnized activity for economle gins but by trot oganzaons  
is what necessitated the incorporation of Section 3BAA ofthe IPC  
tnd stringent punishment fr those indulging in auch active,  
CGven the Background in which the law was enacted and the  
concern shown by the Paramont forthe salty and secunty of he  
tans and the uty, sovereignty and inogty ofthe country, he  
Dunishment prescried for those commiting any act contrary 10  
Section 264A cannot be dubbed as 20 outrageously  
‘proportionate to the natre of he fence ato cll forthe same  
bing declred unconstitutional. Juda isration avaiable tothe  
Courts to choose one ofthe tro sentences prescribed fr these  
faling foul of Sacton 3G4A wil doubess be exercised Dy the  
‘Sais sion leisy commis Snes ond\_dee-enrences  
‘maid only Inthe rarest of rare canen Bu ust bocause the  
sentence of death isa posibe punishment tat may e award in  
[emphasis supple the ordinary course and in cases which  
‘qualify te cal rarest of the rare, death may be awarded ony  
lahore Kidnapping oF abduction has resulted ithe death ether of  
‘he victim of anyone els in the ouree ofthe commission ofthe  
‘offence, Fact stations where the at which he aecued is charged  
‘win i proved to be an act of terrrem tretaniog the very essence  
  
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ne  
  
  
Page 249:  
of er federl, secular and damocrati structure may possibly be the  
only other situations where Court may consiser awarding the  
exe pony. But shot of death in such extreme and aes of  
‘are cana, prison for He for «proved ease of Kidnapping  
duetion wil not qualy for ing descibed as barre or  
Inhuman s0 so ininge the right to Me guaranteed under Aric  
2 ofthe Consttion”  
  
‘am of the view that in spite of economic development,  
improvement in the education levels, there is increase inthe crime,  
rates and overall cultural deterioration. | am of the view that threat  
of terrorism is much more as on today than it was in 1967 when the  
Law Commission gave its 35" Report on capital punishment.  
Cases of kidnapping and abduction for ransom are on the increase  
for monetary gain or as an organized activity for economic gains.  
Safety and securty of the citizens and unity, sovereignty and  
Integy of the country are of paramount important. It is perhaps  
for these reasons thatthe Parliament in its wisdom, in many laws  
passed in the recent past has provided for death penally instead of  
restraining itsel to fe imprisonment or lesser punishment,  
  
It is incorrect to say that prescription of death penalty is  
indulging in revenge kiling or primitive or barbaric. When a death  
penalty is awarded folowing due process of law, there are proper  
‘checks and balances. This is sufficiently in-built inthe legal system,  
‘When the death penalty is imposed by the trial cout, itis subject to  
confirmation by the High Court where the accused person gets  
‘opportunity to present his defence. The accused person gets  
‘another opportunity by way of Appeal before the Supreme Court  
Decisions / Judgements with regard to death penalty are never  
  
‘confirmed by a non-speaking order. Going by the prevalent  
  
ie  
  
  
Page 250:  
practice, the accused person generally prefer a review petition and  
than a curative petition before the Apex Court It will thus be seen  
that after conviction by the trial court, accused person gels as,  
many as four opportunities before the higher Judicial Forum  
arguing his case against the death penalty. If the apex judiciary in  
its wisdom does not find merit in reversing the verdict of death  
penalty, such case wil obviously falls inthe rarest of rare category  
‘as per the principles which have been discussed in various cases  
and discussed in the Report ofthis Commission. The remedy with  
the accused does not end here. He gets en opportunity to file  
mercy petition before President and also Governor ofthe State. It  
‘cannot be said that all these authortes, working atthe apex level  
and discharging constitutional function, are oblivious of the rights  
enjoyed by the accused person. If all such authorties come to  
‘conclusion that the accused person must be penalized with capital  
punishment, it can, by no stretch of imagination be called ‘revenge  
kiting’ bythe State.  
  
Its incorrect to say that judicial discretion provided by the  
legislature is unguided or unbridled, The Supreme Court itself,  
while exercising this discretion in Bachon Singh's case (1980)  
require a mandatory pre-sentence heaing stage in cases where the  
death penalty might be given. The ‘rarest of rare’ classification  
‘evolved in Bachon Singh's case was intended to restrict the case  
‘of death penalty. In Bariyar case (2000), the court further came out  
ith a solution tothe problem of arbitrariness. The Judges have to  
keep in mind and consider the possiblity of reformation of the  
‘convict. Unless the prosecution is able to establish thatthe convict  
  
  
  
Page 251:  
Is beyond reform, the courts cannot, as @ matter of fact, award the  
eath penalty.  
  
‘The Parliament in ts wisdom has prescribed death penalty  
only in heinous crimes. The need of the hour is to retain it but to  
‘exercise power of awarding death penalty in rarest of rare cases  
We have a vibrant judiciary which is respected world over. We  
‘should have faith in the wisdom of our judges that they wil exercise  
this power only in deserving cases for which law is wel laid down  
in various judgements discussed inthis Report  
  
For the reasons discussed in the main Report while | agree  
that aboition ofthe death penalty is an eventual goal, am ofthe  
‘considered view that the time is not yet ripe in our county to  
abolish ita this juncture,  
  
an