GOVERNMENT OF INDIA
LAW COMMISSION OF INDIA

CONSULTATION PAPER ON CAPITAL PUNISHMENT

MAY, 2014

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Theme: Capital Punishment

Part I. Introduction

1. On January 21, 2014, the Supreme Court in the case of *Shatrughan Chauhan v. Union of India*[1], commuted death sentences of 15 death convicts to life sentence. These death row convicts approached the apex court as a final resort after their mercy petitions were dismissed by the President of India. The Court in this batch matter held that various supervening circumstances which had arisen since the death sentences were confirmed by the Supreme Court in the cases of these death row convicts had violated their Fundamental Rights to the extent of making the actual execution of their sentences unfair and excessive. Soon after this decision, the Supreme Court in *V. Sriharan v. Union of India*[2], once again invoked this strand of death jurisprudence to commute the death sentences of all the three convicts in the Rajiv Gandhi Assassination case. Likewise, in the *Devender Pal Singh Bhullar's* case[3], the Court commuted the death sentence of the convict on the ground of inordinate delay in the execution of sentence and mental health problems faced by the petitioner.

   These Supreme Court rulings have averted at least 19 imminent executions in all in the recent past. It is to be borne in mind that India before it executed Ajmal Kasab and Afzal Guru last year, had an execution free run for a period of 8 years. This de facto moratorium led many to believe and argue that India must consider the utility and desirability of retaining this most exceptional and absolute penalty. These commutations affected by the Supreme Court have once again energized the debate on death penalty. Once again, people have begun to speculate about the end

[1] (2014) 3 SCC 1
[2] (2014) 4 SCC 242
[3] *Navneet Kaur v. State (NCT Of Delhi)*, Curative Petition (Criminal) No. 88 of 2013 (Decided on March 31, 2014).

goal of keeping a penalty such as death sentence on the statute book. The issue has also gathered considerable debate in the mainstream media. Editorials in major newspapers have been published asking for a re-look at death penalty[4].

At this juncture, an exhaustive study on the subject would be a useful and salutary contribution to the cause of public debate on this issue. Such a study will also provide a definitive research backed orientation to the law makers and judges on this very contentious issue.

2. In the last decade death penalty has become a subject-matter of intense focus in the Supreme Court. The Apex Court on various occasions has wrestled with the disparate application of law on death penalty and constitutional fairness implications of the same (see Part IV for a detailed treatment of this theme). A systematic study which would address the queries and concerns of Courts and also presents an international perspective on the issue is much needed. The Court in some of these cases has specifically requested the Law Commission to undertake research in this behalf.

   The Supreme Court in *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*[5] has, in this regard, observed:

   "112. 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**

[4] See Indian Express Editorial, "*Justice more humane*", January 22,2014 available at http://indianexpress.com/article/opinion/editorials/justice-more-humane/; Hindustan Times Editorial, "SC ruling on death penalty a step closer to its abolition", January 22,2014 available at http://www.hindustantimes.com/comment/sc-ruling-on-death-penalty-a-step-closer-to-its-abolition/article1-1175780.aspx; The Hindu Editorial, "The Injustice of Delay", January 23,2014 available at http://www.thehindu.com/opinion/editorial/the-injustice-of-delay/article5606434.ece (Last visited on 14.05.2014)

[5] (2009) 6 SCC 498

> **or the National Human Rights Commission may allow for an up-to-date and informed discussion and debate on the subject.”** (Emphasis supplied)

Similarly, the Court in *Shankar Kisanrao Khade v. State of Maharashtra*[6] was also concerned with another dimension of the issue of death penalty and rued lack of research on the issue. The Court held:

> “148. 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.**
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> 149. 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 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**

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[6] (2013) 5 SCC 546

may also need to be considered by the Law Commission of India." (Emphasis supplied)

Part II. Prior Position of the Law Commission on Death Penalty

1. 35th Report (1967)

In 1962, the Law Commission undertook an extensive exercise to consider the issue of abolition of capital punishment from the statute books. A reference to this effect was made to the Law Commission when the third Lok Sabha debated on the resolution moved by Shri Raghunath Singh, Member, Lok Sabha for the abolition of capital punishment. The Law Commission released its 35th report in 1967 recommending retention of death penalty[7].

Many of the conclusions arrived at by the Law Commission were based on deductions on general elements of cultural and social life as it existed then. Also, some of the indicators considered by the commission such as those on education, crime rates et al have drastically changed in the last half a century. The following much quoted view of the Law Commission, for instance, is distinctly rooted in the social-political environment of the day and to that extent is very limited in how it can be put to use in the current day context:

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

[7] This Law Commission report is available on Law Commission website - http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf and http://lawcommissionofindia.nic.in/1-50/Report35Vol2.pdf (Last visited on 14.05.2014)

The report also observed that the suggestion that capital punishment may be abolished for a fixed period of time as an experiment was fraught with the risk as between its abolition and reintroduction there could be an intervening era of violence and reintroduction of capital punishment may not have the desired effect of restoring law and order. It is to be noted that India underwent an execution free period of 8 years between 2004 and 2013. These years when India did not see any execution could be considered as a natural experiment which comes close to a *de facto* moratorium. During this period, crime data from National Crime Records Bureau does not convey any particular spurts in crime rate. But at the same time, we must bear in mind that during this period, death sentences continued to be awarded or upheld by the Courts at the normal rate. To that extent, this period, if at all, can only be considered as a moratorium of sorts only on the actual executions and not on the application of death penalty by Courts and effect thereof on crime rates may have to be considered as such.

The 35th report of the Law Commission observed that the discretion of the Court in the matter of sentence to be awarded in a capital case must be retained and such discretion was by and large being exercised satisfactorily and in accordance with judicial principles. The report observed that "*(t)he considerations which weigh or should weigh with the court in awarding the lesser punishment of imprisonment of life (in respect of offences for which the prescribed punishment is death or imprisonment for life), cannot be codified. The circumstances which should or should not be taken into account, and the circumstances which should be taken into account along with other circumstances, as well as the circumstances which may, by themselves, be sufficient, in the exercise of the discretion regarding sentence cannot be exhaustively enumerated*." The report observed that the exercise of discretion may depend on local conditions, future developments, and evolution of moral sense of the community, state of crime at a particular time or place and many other unforeseeable features. It is pertinent to note that the report of the Law Commission predated the landmark judgment in *Bachan Singh v. State of Punjab*[8] which

[8] 1980 (2) SCC 684

laid down the "rarest of rare" doctrine and held that capital punishment should only be awarded in the “rarest of rare cases” when the alternative option is unquestionably foreclosed. The Court held that aggravating and mitigating circumstances relating to the crime and criminal must weigh in the mind of the Court while sentencing in capital offences.

Therefore, there is a need to examine afresh the guidelines on capital sentencing in light of the "rarest of rare" doctrine. Furthermore, the report of the law commission does not discuss in detail the apprehensions regarding the arbitrary use of the Court's discretion in capital sentencing. In recent years, the Supreme Court has admitted that the question of death penalty is not free from the subjective element and is sometimes unduly influenced by public opinion. In this context it is imperative that a deeper study be conducted to highlight whether the process of awarding capital sentence is fraught with subjectivity and caprice.

The Law Commission in its 35th Report also recommended retaining of section 303 of the Indian Penal Code, which provides for mandatory death penalty. The commission took the following view in this regard:

> “Section 303, Indian Penal Code, under which the sentence of death is mandatory for an offence under the section, need not be amended by leaving the question of sentence to the discretion of the Court, or by confining the operation of the section to cases where the previous offence is an offence for which the offender could have been sentenced to death.”

It is to be noted that section 303 of the IPC was held to be unconstitutional by the Supreme Court in *Mithu v. State of Punjab*[9]. The court held:

> “23. On a consideration of the various circumstances which we have mentioned in this judgment, we are of the opinion that Section 303 of the Penal Code violates

[9] (1983) 2 SCC 277

> the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law. The section was originally conceived to discourage assaults by life convicts on the prison staff, but the legislature chose language which far exceeded its intention."

Relying upon *Mithu*, the Supreme Court in *State of Punjab v. Dalbir Singh*, the Supreme Court struck down section 27(3) of Arms Act, 1959 providing for mandatory death penalty.

The commission in its report also examined the aspect of irrevocability of capital punishment in the context of erroneous convictions and observed that the presence of constitutional and statutory safeguards such as the prerogative power of mercy, the power of appeal and review as well as legal assistance provided to capital convicts reflected the anxious concern of the law to ensure that chances of error are kept to the minimum. While analyzing proposed safeguards against erroneous convictions, the commission observed:

> "We hope, however, that such cases have not been many. After passing through the sieve of judicial scrutiny under the provisions already set out, and the scrutiny applied in proceedings for the exercise of prerogative of mercy, it should be difficult - we do not say it would be impossible - for a case to retain elements of material falsehood. If, in spite of such scrutiny, such elements survive, that only shows the need for keeping the procedural and other provisions constantly under review. Elsewhere, in this Report, we ourselves have raised and discussed the question of improvements in the provisions relevant to safeguards against error. But, viewing the matter in its proper perspective, we are not in a position to say that the possibility of error is an argument which can totally displace the paramount need for a provision intended to protect society."

This conclusion arrived at by commission pertains to pre-*Bachan Singh* era and even predates the amendments made to the Code of Criminal Procedure in the year 1973. The Constitution bench decision in *Bachan Singh* along with the new statutory regime makes the satisfaction recorded by the commission as regards the fitness of norms as existing in the earlier regime irrelevant. In contemporary judicial developments, with fairness norms more stringent than ever before, the Supreme Court has in the last 5 years repeatedly expressed anxiety about uneven application of death penalty as also miscarriages occasioned in death penalty cases.

In 2009, the Supreme Court declared *per incurium* the law laid down in *Ravji alias Ram Chandra v. State of Rajasthan*[10] which held that only the characteristics relating to crime, to the exclusion of the characteristics relating to the criminal were relevant for sentencing in a criminal trial. In *Bariyar*, the Supreme Court held *Ravji* to be per-incuriam *Bachan Singh* dicta on the aforementioned proposition which laid down that circumstances relating to both the crime and criminal must be identified. By the time the judgment in *Bariyar* was rendered, *Ravji* had already been executed and the proposition laid down in the impugned judgment had been followed in several other cases. The aforesaid cases dispute the adequacy of the existing mechanism of appeals and power of review by Courts to safeguard against erroneous convictions. Two of the convicts sentenced to death placing reliance on the impugned judgment in *Ravji* could not escape the noose despite the provision of mercy power as noted in the earlier report (see *Part IV. Judicial Comments on Present Day Administration of Death Penalty in India* for more on the miscarriage of justice arising out of reliance on the flawed *Ravji* dicta)

Moreover, recently, the Supreme Court commuted the death sentence of fifteen convicts to life imprisonment in a batch matter of thirteen petitions on grounds of violation of their fundamental rights due to inordinate delay in exercise of mercy power in deciding their mercy petitions and laid down guidelines for exercise of mercy power[11]. Commutation of

[10] AIR 1996 SC 787

[11] In *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, pronouncing its judgment in a batch matter, the Supreme Court commuted the death sentence of fifteen convicts to life imprisonment in the following

their sentences as a consequence of violation of their fundamental rights begs the question whether the existing power of mercy is an adequate safeguard against erroneous convictions. Against this backdrop, there is a need to review and ascertain the adequacy of existing safeguards against erroneous convictions.

Further, the commission made a reference to the then prevailing very conservative global scenario on abolition of death penalty. Since then, the abolitionist movement in the world has undergone real transformation. It is to be noted that worldwide, over 140 countries have abolished the death penalty and over 20 other countries though retentionists, have not executed capital sentences in ten years. Furthermore, there is also a category of countries that have 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.[12] The international decline of death penalty as form of punishment began 1976 onwards much after the 35th report of the Law Commission of India on Capital Punishment. The issues relating to capital sentencing as well as the widespread abolition world over subsequent to the previous report on capital punishment require consideration and detailed examination. It is worth mentioning here that the death penalty was abolished in South Africa through a decision of the Constitutional Court in the case of *S v Makwanyane and Another*[13].

Moreover, many of the conclusions arrived at by the Law Commission in relation to deterrence, retribution, profile of crime, systems of punishments, alternatives to death sentence etc. are dated. These themes have seen exhaustive and far more rigorous

13 petitions - W.P.(Crl.) No. 34/2013-Shamik Narain & Ors. v. UOI & Ors., W.P.(Crl.) No. 55/2013-Shatrugan Chauhan v. UOI & Ors., W.P.(Crl.) No. 56/2013- PUDR v. UOI & Ors., W.P.(Crl.) No. 132-Suresh & Ramji v. UOI & Ors., W.P.(Crl.) No. 136/2013- PUDR v. UOI & Ors., W.P.(Crl.) No. 139/2013- Shivu v. UOI & Ors., W.P.(Crl.) No. 141/2013 - Jadeswamy v. UOI & Ors., W.P.(Crl.) No. 187/2013-Praveen Kumar v. UOI & Ors., No. 188/2013-Sonia Suresh Kumar & Sanjeev Anup Kumar v. UOI & Ors., W.P.(Crl.) No. 193/2013- Gurmeet Singh v. UOI & Ors. W.P.(Crl.) No. 190/2013- Jaffar Ali v. UOI & Ors., W.P.(Crl.) No. 191/2013- Maganlal Barela v. UOI & Ors., W.P.(Crl.) No. 192/2013- PUDR v. UOI & Ors.

[12] As per death penalty related statistics available at http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries. (Last visited on 14.05.2014)

[13] (CCT 3/94)

academic work since then and need fresh consideration (see *Part V. State of Present Research on Death Penalty* for a preliminary discussion on this theme).

2. 187th Report (2003)

Though the Law Commission presented its 187th report on the limited issue of "Mode of Execution of Death Sentence and Incidental Matters" in 2003[14], the substantial question of desirability of death penalty as a punishment was not part of the terms of this report and the Law Commission accordingly did not express any view on this matter. In the 35th report on capital punishment, the commission did not recommend changing the mode of execution from hanging and observed that "*(p)rogress in the science of anesthetics and further study of the various methods, as well as the experience gathered in other countries and development and refinement of the existing methods, would perhaps, in future, furnish a firm basis for conclusion on this controversial subject*." This 187th report was taken up in 2003 *suo motu* by the commission keeping in mind the technological advances in the field of science, medicine and anesthetics. Keeping in mind the number of the years that have elapsed since the commission last took up the subject of capital punishment, it is imperative for the Law Commission to consider these fundamental questions relating to death penalty afresh and draw on the rich and still emerging scientific, academic and judicial opinion on many of these subjects

Against the abovementioned backdrop, it is evident that the issue of death penalty, its place in a modern criminal justice system, alternatives to the same and the socio-legal costs implicit in retaining the penalty need urgent examination. With this aim at mind, this consultation paper presents an overview of the developments in the field of death penalty.

[14] This Law Commission report is available on Law Commission website - lawcommissionofindia.nic.in/reports/187th report.pdf. (Last visited on 14.05.2014)

Part III. Reach of Death Penalty Laws

1. Statutory Provisions

The Indian Penal Code, 1860 prescribes death penalty for a number of crimes. Some of the offences punishable by sentence of death under the Indian Penal Code are treason (section 121), abetment of mutiny (section 132), perjury resulting in the conviction and death of an innocent person (section 194), threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person (section 195A), murder (section 302), kidnapping for ransom (section 364A) and dacoity with murder (section 396). Amongst these offences, death penalty continues to be used most commonly for section 302.

Additionally, many other special legislations such as the Air Force Act, 1950, the Army Act, 1950, the Navy Act, 1950, Commission of Sati (Prevention) Act, 1987 [section 4(1)], Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 [section 3(2)(i)], Explosive Substances Act, 1908 [section 3(b)], Unlawful Activities Prevention Act, 1967 [section 16(1)] also provide for the death penalty.

2. Extending Death Penalty to Rape

In December 2012, brutal gang rape and fatal assault resulting in the death of a 23 year old medical student in the capital city brought the issue of rampant sexual violence faced by women under intense media spotlight and public gaze. The tragic gang rape case which came to be called as the Nirbhaya rape case, triggered spontaneous mass protests in the city. The issue of women's safety received long overdue prominence in media reports and television debates. The Government of India responded to this high decibel

protest and relentless media campaign by constituting a three member committee headed by former Chief Justice of India, Justice J.S. Verma. Justice Leila Seth and Mr. Gopal Subramanium, Senior Advocate were the other members of the committee. The mandate of the committee was to recommend amendments for quicker trial and enhanced punishment for criminals committing sexual assault of extreme nature against women.

The committee submitted its recommendations within a month of it being constituted.[15] The committee has since received universal accolades for the broad scope of its recommendations, which were worked on the basis of wide ranging consultations with the civil society and other stake holders.

In respect of sentencing, the committee observed that punishments for sexual offences could be categorized into two categories - (i) term sentences and (ii) life imprisonment. While recommending the insertion of a separate provision with enhanced punishment for aggravated sexual assault, the committee 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 committee further noted that though rape was a heinous crime and an extreme violation of self, there were instances where the victim/survivor could lead a normal life with some support from society and overcome the trauma. The committee noted that "*(i)n other words, we do not say that such a situation is less morally depraved, but the degree of injury to the person may be much less and does not warrant punishment with death."*

While taking into consideration the provisions of the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the Convention on the rights of child, Convention against torture and other cruel, inhuman and degrading treatment or punishment and other international Conventions, the committee noted that the abolition of death penalty and the reduction of number of offences in statute books which notify

[15] The committee report is available at http://www.mha.nic.in/cc. (Last visited on 14.05.2014)

capital punishment are stated to be a part of international customary law. Observing that worldwide, over 150 countries have abolished death penalty or do not practice death penalty, the committee took note of the judgment of the United States Supreme Court in *Coker v. Georgia*[16] where the US Supreme Court struck down the sentence of death for a convicted felon who had committed aggravated sexual assault holding that the sentence of death for rape was disproportionate, violative of the 8th and 14th Amendments to the US Constitution and was also "barbaric and excessive". In its conclusion on capital punishment for sexual offences, the committee held:

> "37.Thus, there is a strong case which is made out before us that in India in the context of international law as well as the law as explained in the American Courts, it would be a regressive step to introduce death penalty for rape even where such punishment is restricted to the rarest of rare cases. It is also stated that there is considerable evidence that the deterrent effect of death penalty on serious crimes is actually a myth. According to the Working Group on Human Rights, the murder rate has declined consistently in India over the last 20 years despite the slowdown in the execution of death sentences since 1980. Hence we do take note of the argument that introduction of death penalty for rape may not have a deterrent effect. However, we have enhanced the punishment to mean the remainder of life."

It is also pertinent to note that the committee did not recommend death sentence for sexual offences. The committee proposed "life imprisonment for the remainder of the convict's natural life" as the punishment for repeat offenders.

Following the recommendations of the Verma Committee, the Government of India enacted the amending Act on 02.04.2013. Amongst other provisions, the amendment has led to the insertion of four new sections namely 354A, 354b, 354C and 354D to the already existing section 354 of IPC which deals with assault or criminal force on a

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[16] 433 US 584

woman with intent to outrage her modesty. The amendment has also enlarged the meaning of rape in section 375. Furthermore, the amendment has introduced death penalty as a punishment in section 376E for cases of repeat offences of rape. It is to be borne in mind that the Verma Committee categorically recommended against the punishment of death for the offence of rape.

It is noteworthy that section 376E has already been taken recourse to by the Trial Court to sentence three men to death in the Shakti Mills gang rape case in Mumbai.

Part IV. Judicial Comments on Present Day Administration of Death Penalty in India

While considering the question of constitutionality of death sentence, the Supreme Court in *Bachan Singh*, treated the penalty of death as belonging to a category of its own. But the Court in *Bachan Singh* also took notice of the fact that death penalty as a punishment has found mention in the Constitution in the section on mercy powers of the Governor and the President of India. Further, the Court observed that section 354(3) of the Code of Criminal Procedure, 1973 is part of due process framework on death penalty. In this regard, the Court held the following:

> "209. 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 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)

Propounding of the “rarest of rare” standard as a rigorous test to be fulfilled in all cases where the Courts award death sentence has in its heart the conception of death penalty as a sentence that is unique in its absolute denouncement of life for a penal purpose. As part of this characterization of death penalty standing in its own league, the Court devised one of the most demanding and compelling doctrines in law of crimes as existing in this country. Emergence of the “rarest of rare” dictum was very much the beginning of constitutional regulation of death penalty in India.

In the last decade, the Supreme Court has revisited the theme of constitutional regulation of death penalty multiple times. The comments made by the Supreme Court in this behalf indicate a degree of anxiety felt by the Court in dealing with the issue of death penalty.

1. Inconsistency and arbitrariness in Death Penalty Sentencing

On multiple occasions, the Court has pointed that the rarest of rare dictum propounded in *Bachan Singh* has been inconsistently applied by courts. In *Bariyar*, the Court in this behalf has 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."

The Court relied on the decision in *Swamy Shraddananda (2)*[17], wherein the Court observed:

> "*51*. The truth of the matter is that the question of death penalty is not free from the subjective element and 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.
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> *52*. The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system. Thus the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied."

The Court further observed that both academics and the Court have previously noticed the issue of subjectivity in death penalty. In this regard, the Court made a reference to a joint report by Amnesty International and People's Union for Civil Liberties titled "Lethal Lottery: The Death Penalty in India, A Study of Supreme Court Judgments in Death Penalty Cases, 1950-2006"[18]. The Court further observed:

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[17] (2008) 13 SCC 767

[18] The study is available at http://www.amnesty.org/en/library/info/ASA20/007/2008. (Last visited on 14.05.2014)

> "It can be safely said that the Bachan Singh [(1980) 2 SCC 684] threshold of "the rarest of rare cases" has been most variedly and inconsistently applied by the various High Courts as also this Court."

In *Sangeet and Anr. v. State of Haryana*[19], the Court observed that "*it does appear that in view of the inherent multitude of possibilities, the aggravating and mitigating circumstances approach has not been effectively implemented*." The Court observed:

> "33. Therefore, in our respectful opinion, not only does the aggravating and mitigating circumstances approach need a fresh look but the necessity of adopting this approach also needs a fresh look in light of the conclusions in *Bachan Singh* [(1980) 2 SCC 684]. It appears to us that even though *Bachan Singh* [(1980) 2 SCC 684] intended "principled sentencing", sentencing has now really become Judge-centric as highlighted in *Swamy Shraddananda* [(2008) 13 SCC 767 and *Bariyar* [(2009) 6 SCC 498]. This aspect of the sentencing policy in Phase II as introduced by the Constitution Bench in *Bachan Singh* [(1980) 2 SCC 684] seems to have been lost in transition."

2. Constitutional Implications arising out of Arbitrariness in Death Penalty Sentencing

The Court has also extensively commented on the fundamental rights implications arising out of disparate application of the death penalty law. In *Bariyar*, the Court observed:

> "54. In *Swamy Shraddananda (2)* v. *State of Karnataka* [(2008) 13 SCC 767], the Court notes that the awarding of sentence of death "depends a good deal on the personal predilection of the Judges constituting the Bench". This is a serious admission on the part of this Court. Insofar as this aspect is considered, there is inconsistency in how *Bachan Singh* [(1980) 2 SCC 684] has been implemented, as *Bachan Singh* [(1980) 2 SCC 684] mandated principled sentencing and not judge-

[19] (2013) 2 SCC 452

centric sentencing. There are two sides of the debate. It is accepted that the *rarest of the rare* case is to be determined in the facts and circumstance of a given case and there is no hard-and-fast rule for that purpose. There are no strict guidelines. But a sentencing procedure is suggested. This procedure is in the nature of safeguards and has an overarching embrace of the *rarest of rare* dictum. Therefore, it is to be read with Articles 21 and 14.

…127. Frequent findings as to arbitrariness in sentencing under Section 302 may violate the idea of equal protection clause implicit under Article 14 and may also fall foul of the due process requirement under Article 21.

128. It is to be noted that we are not focusing on whether wide discretion to choose between life imprisonment and death punishment under Section 302 is constitutionally permissible or not. The subject-matter of inquiry is how discretion under Section 302 may result in arbitrariness in actual sentencing. Section 302 as held by *Bachan Singh* [(1980) 2 SCC 684] is not an example of law which is arbitrary on its face but is an instance where law may have been arbitrarily administered.

…130. Equal protection clause ingrained under Article 14 applies to the judicial process at the sentencing stage. We share the Court's unease and sense of disquiet in *Swamy Shraddananda (2) case* and agree that a capital sentencing system which results in differential treatment of similarly situated capital convicts effectively classifies similar convicts differently with respect to their right to life under Article 21. Therefore, an equal protection analysis of this problem is appropriate. In the ultimate analysis, it serves as an alarm bell because if capital sentences cannot be rationally distinguished from a significant number of cases where the result was a life sentence, it is more than an acknowledgement of an imperfect sentencing system. In a capital sentencing system if this happens with some frequency there is a lurking conclusion as regards the capital sentencing system

becoming constitutionally arbitrary. We have to be, thus, mindful that the true import of *rarest of rare* doctrine speaks of an extraordinary and exceptional case."

3. Miscarriage of Justice Occasioned in Death Penalty Cases

The Supreme Court, on more than one occasion, has also brought to light the miscarriage of justice in death penalty cases. The Court in *Bariyar* has pointed out gross mis-application of death penalty law in a host of cases, which have yielded in the award of death sentences without following the stipulated test mandated in *Bachan Singh*.

The Supreme Court in *Bariyar* held the case in *Ravji* to be per-incuriam the constitution bench decision in *Bachan Singh*. The Court in this behalf held:

> "61**.** The background analysis leading to the conclusion that the case belongs to the *rarest of rare* category must conform to highest standards of judicial rigor and thoroughness as the norm under analysis is an exceptionally narrow exception. A conclusion as to the *rarest of rare* aspect with respect to a matter shall entail identification of aggravating and mitigating circumstances relating both to the crime and the criminal. It was in this context noted: (*Bachan Singh case*, SCC p. 738, para 161)
>
> > "*161.* … 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*." (emphasis supplied)
>
> 62. Curiously, in *Ravji* v. *State of Rajasthan* this Court held that it is only characteristics relating to crime, to the exclusion of the ones relating to criminal, which are relevant to sentencing in criminal trial, stating: (SCC p. 187, para 24)

> "*24.* ... The crimes had been committed with utmost cruelty and brutality without any provocation, in a calculated manner. 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 Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it 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'."

63. We are not oblivious that *Ravji case* has been followed in at least six decisions of this Court in which death punishment has been awarded in last nine years, but, in our opinion, it was rendered per incuriam**.** *Bachan Singh* specifically noted the following on this point: (SCC p. 739, para 163)

> "*163.* ... 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 of the 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*."

Further, the Court in *Bariyar* also pointed out 6 decisions of Supreme Court where the per-incuriam reasoning propounded in *Ravji*.

Since *Bariyar,* the Supreme Court has admitted on multiple occasions that *Ravji* has been rendered per-incurium *Bachan Singh*. The Court in *Dilip Tiwari v. State of Mahrashtra*[20], (para 67-68), *Rajesh Kumar v. State*[21], (paras 66-70), *Sangeet v. State of Haryana*[22], *(para 37), Mohinder v. State of Punjab*[23], *(para 37.3)* observed that binding reliance on *Ravji* has led to deeply flawed sentencing by Courts. In these cases not even a single mitigating circumstance has been considered by the Court and only aggravating aspects of the have been given any emphasis which is in clear violation to the Constitution bench decision in *Bachan Singh.*

It also bears mention that 14 former judges addressed an appeal to the President of India to seek his urgent intervention to commute the death sentences of these 13 convicts who have been sentenced to death on account of reliance on the per-incurium precedent of *Ravji*.[24] In this letter, it was also pointed out that two prisoners who had been wrongly sentenced to death, Ravji Rao and Surja Ram (both from Rajasthan), had already been executed on May 4, 1996, and April 7, 1997, respectively, pursuant to the flawed judgments. The appeal letter called these as constituting the gravest known miscarriages of justice in the history of crime and punishment in independent India.

4. Sentencing Bias in Brutal Crimes

In *Om Prakash v. State of Haryana*[25], Thomas, J. deliberated on the apparent tension between responding to "cry of the society" and meeting the *Bachan Singh* dictum of balancing the "mitigating and aggravating circumstances. The Court was of the view that the sentencing Court is bound by *Bachan Singh* and not in specific terms to the incoherent and fluid responses of society.

[20] (2010) 1 SCC 775
[21] (2011) 13 SCC 706
[22] (2013) 2 SCC 452
[23] (2013) 3 SCC 294
[24] V Venkatesan, "A Case against the Death Penalty" 29(17) *Frontline* (25 August–7 September 2012) available at http://www.frontline.in/navigation/?type=static&page=flonnet&rdurl=fl2917/stories/20120907291700400.htm. (Last visited on 14.05.2014)
[25] (1999) 3 SCC 19

In *Rajesh Kumar v. State through Govt. of NCT of Delhi*[26], the Court observed:

> "75**.** On the other hand, while considering the aggravating circumstances, the High Court appears to have been substantially influenced with the brutality in the manner of committing the crime. It is no doubt true that the murder was committed in this case in a very brutal and inhuman fashion, but that alone cannot justify infliction of death penalty. This is held in several decisions of this Court."

In Bariyar, the Court observed, "*that there is no consensus in the Court on the use of "social necessity" as a sole justification in death punishment matters.*" The Court also observed:

> *"2(E) Sentencing justifications in heinous crimes*
>
> 71. It has been observed, generally and more specifically in the context of death punishment, that sentencing is the biggest casualty in crimes of brutal and heinous nature. Our capital sentencing jurisprudence is thin in the sense that there is very little objective discussion on aggravating and mitigating circumstances. In most such cases, courts have only been considering the brutality of crime index. There may be other factors which may not have been recorded.
>
> 72. We must also point out, in this context, that there is no consensus in the Court on the use of "social necessity" as a sole justification in death punishment matters. The test which emanates from *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] in clear terms is that the courts must engage in an analysis of aggravating and mitigating circumstances with an open mind, relating both to crime and the criminal, irrespective of the gravity or nature of crime under consideration. A dispassionate analysis, on the aforementioned counts, is a must. The courts while adjudging on life and death must ensure that rigour and fairness are given primacy over sentiments and emotions.

[26] (2011) 13 SCC 706

> 76. In *Om Prakash* v. *State of Haryana* [(1999) 3 SCC 19 : 1999 SCC (Cri) 334] K.T. Thomas, J. deliberated on the apparent tension between responding to "cry of the society" and meeting the *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] dictum of balancing the "mitigating and aggravating circumstances."

5. Emergence of Alternate Punishment to Capital Sentencing

It is also to be noted that in the last few years, Supreme Court has entrenched the punishment of "full life" or life sentence of determinate number of years as a response to challenges presented in death cases. The Supreme Court speaking through a three-judge bench decision in *Swamy Shraddhanand (2)* laid the foundation of this emerging penal option in following terms:

> "92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh *or it may be highly disproportionately inadequate*. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully

> belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.
>
> 93**.** Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898] besides being in accord with the modern trends in penology."

The observations in *Swamy Shraddhanand (2)* have been followed by the Court in a multitude of cases such as *Haru Ghosh v. State of W.B.*[27], *State of U.P.* v. *Sanjay Kumar* [28], *Sebastian* v. *State of Kerala*[29], *Gurvail Singh* v. *State of Punjab*[30] where full life or sentence of determinate number of years has been awarded as opposed to death penalty.

6. Uneven Application of Death Sentence against the Marginalized

In *Bachan Singh,* while the constitutionality of death penalty was upheld, Justice Bhagwati in his dissenting opinion observed:

> "81. There is also one other characteristic of death penalty that is revealed by a study of the decided cases and it is that death sentence has a certain class complexion or class bias inasmuch as 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

[27] (2009) 15 SCC 551
[28] (2012) 8 SCC 537
[29] (2010) 1 SCC 58
[30] (2013) 2 SCC 713

Warden Duffy is "a privilege of the poor". Justice Douglas also observed in a famous death penalty case, "Former Attorney Pamsey Clark has said: 'it is the poor, the sick, the ignorant, the powerless and the hated who are executed'." So also Governor Disalle of Ohio State speaking from his personal experience with the death penalty said:

> "During my experience as Governor of Ohio, I found the men in death row had one thing in common; they were penniless. There were other common denominators, low mental capacity, little or no education, few friends, broken homes — but the fact that they had no money was a principal factor in their being condemned to death. . . ."

The same point was stressed by Krishna Iyer, J. in *Rajendra Prasad case* [(1979) 3 SCC 646 : 1979 SCC (Cri) 749 : AIR 1979 SC 916 : 1979 Cri LJ 792] with his usual punch and vigour and in hard hitting language distinctive of his inimitable style:

> ". . . Who, by and large, are the men whom the gallows swallow? The white-collar criminals and the corporate criminals whose wilful economic and environmental crimes inflict mass deaths or who hire assassins and murder by remote control? Rarely. With a few exceptions, they hardly fear the halter. The feuding villager, heady with country liquor, the striking workers desperate with defeat, the political dissenter and sacrificing liberator intent on changing the social order from *satanic* misrule, the waifs and strays whom society has hardened by neglect into street toughs, or the poor householder — husband or wife — driven by dire necessity or burst of tantrums — it is this person who is the morning meal of the macabre executioner. (SCC pp. 674-75, para 72)

> Historically speaking, capital sentence perhaps has a class bias and colour bar, even as criminal law barks at both but bites the proletariat to defend the proprietariat a reason which, incidentally, explains why corporate criminals including top executives who, by subtle processes, account for slow or sudden killing of large members by adulteration, smuggling, cornering, pollution and other invisible operations, are not on the wanted list and their offending operations which directly derive profit from mafia and white-collar crimes are not visited with death penalty, while relatively lesser delinquencies have, in statutory and forensic rhetoric, deserved the extreme penalty." (SCC p. 675, para 75)
>
> 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."

Subsequently, this sentiment was echoed in *Mohd. Farooq Abdul Gafur and Anr. v. State of Maharashtra*[31], wherein the Court stated:

> "169...The situation is accentuated due to the inherent imperfections of the system in terms of delays, mounting cost of litigation in High Courts and apex court, legal aid and access to courts and inarticulate information on socio-economic and criminological context of crimes. In such a context, some of the leading commentators on death penalty hold the view that it is invariably the marginalized and destitute who suffer the extreme penalty ultimately."

Moreover, a joint report prepared by Amnesty International India and People's Union for Civil Liberties (Tamil Nadu and Puducherry) in 2008 titled "Lethal Lottery: The Death

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[31] (2010) 14 SCC 641

Penalty in India" has also highlighted the disproportionate use of death penalty against disadvantaged groups. The report observed:

> "The arbitrariness is fatal, but it is also selective and discriminatory. The randomness of the lethal lottery that is the death penalty in India is perhaps not so random. It goes without saying that the less wealth and influence a person has, the more likely they are to be sentenced to death. This is implicit in the concerns expressed in Part II of this report about access to effective legal representation (Section 7.1) as well as about pre-trial investigations and collection of evidence (Section 6.1.1). The Supreme Court itself has acknowledged the class bias in death sentences."

7. Arbitrary Exercise of Mercy Powers leading to Violation of Fundamental Rights of Death Row Prisoners

In *Shatrughan Chauhan*, while commuting the death sentence of fifteen convicts due to inordinate delay in disposal of their mercy petition, the Court observed:

> "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."

While awarding relief to the petitioners, the Supreme Court relied upon a long line of cases where the Supreme Court has recognized that inordinate delay in disposal of mercy petitions by the Governor or the President violate Article 21 rights of the death row prisoners which in turn makes him entitled for the relief of commutation of death sentence to life imprisonment. The Supreme Court in *Sher Singh and Others v State of Punjab*[32] held that Article 21 rights inhere in a person so long as he lives and that they are relevant and applicable at all stages of the judicial process: trial, sentence and execution of the sentence. The Court has held that in such cases, if the delay is shown to be excessive and unjustified in the facts of the case, execution of the death sentence would amount to harsh and inhuman punishment violating Art. 21, and the Court should commute the death sentence. Further in *Smt. Triveniben v State of Gujarat*[33], a Constitutional Bench of the Supreme Court in a categorical ruling held as follows:

> "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 that ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to reopen the conclusions reached by the court while finally maintaining the sentence of death. This Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death inexecutable and to this extent the decision in Vatheeswaran case cannot be said to lay down the correct law and therefore to that extent stands overruled."

Invoking, this unique branch of death penalty law, the Supreme Court has in earlier cases too have stopped the executions on account of delayed rejection of mercy petitions by the executive authorities. In *Mahendra Nath Das v. Union of India*[34], *Madhu Mehta v. Union*

[32] (1983) 2 SCC 344
[33] (1989) 1 SCC 678
[34] (2013) 6 SCC 253

of India[35], *K.P. Mohammed v. State of Kerala*[36], *Shivaji Jaysingh Babar v. State of Maharashtra*[37], *Daya Singh v. Union of India*[38], and *Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra*[39], the Supreme Court prohibited the executive authorities from executing the death row prisoners.

Part V. State of Present Research on Death Penalty

There has been a woeful lack of research on the issue of death penalty in India. The state of research on the application of death penalty law by the judiciary is so inadequate that chances of an informed and rigorous policy analysis on this issue are seriously impeded. A constitutional challenge if and when taken up by the Supreme Court or a legislative change in the law will be ill served in the present environment of lack of study on the issue. Some of the important studies, which have ventured to assess the death penalty environment in India, are flagged below for information.

In a pre-*Bachan Singh* empirical paper authored by Anthony Blackshield, the issue of arbitrariness in award of death sentences was explored. The author showed through a study of 70 judgments of the Supreme Court between 1972 and 1976 that the award of death penalty in a particular case is more a function of the views of the judge concerned on the subject rather than the state of law or the facts of the case.[40]

Another landmark study titled as "Lethal Lottery: The Death Penalty in India" brought out jointly by Amnesty International, India and the People's Union for Civil Liberties charted the gaps and weaknesses in the administration of death penalty in India since 1950. The report in its analysis of Supreme Court decisions on death penalty recorded

[35] 1989) SCC (Cri) 705
[36] 1984 Supp (1) SCC 684
[37] (1991) 4 SCC 375
[38] (1991) 3 SCC 61
[39] (1985) 1 SCC 275
[40] A R Blackshield, "Capital Punishment in India" (1979) 21(2) *Journal of the Indian Law Institute* 137.

that "the death penalty in India has been an arbitrary, imprecise and abusive means of dealing with crime and criminals." This report has been referred to by the Supreme Court in *Bariyar*, *Mohd. Farooq Abdul Gafur,* and *Swamy Shraddananda (2)*.

A recent study which was commissioned by the American Law Institute (ALI) has concluded that the defects and unfairness inherent in the American death penalty system are so intractable and intrinsic to its structural design that its reform is unachievable.[41] The Steiker Committee report as it came to be called has made the ALI withdraw the stipulation on capital punishment from its Model Penal Code.

The Model Penal Code stipulation on death penalty which was incorporated in 1962 was a significant peg of the US Supreme Court decision in *Gregg v. Georgia*[42], wherein the Court reaffirmed the constitutionality of the death penalty in the United States. The US Supreme Court cited the Model Penal Code provision to illustrate that there are ways to achieve constitutionally secure death sentences. The Steiker Committee notes the failure of the reform initiatives in relation to administration of the death penalty in following terms:

> "The foregoing review of the unsuccessful efforts to constitutionally regulate the death penalty, the difficulties that continue to undermine its administration, and the structural and institutional obstacles to curing those ills forms the basis of our recommendation to the Institute. The longstanding recognition of these underlying defects in the capital justice process, the inability of extensive constitutional regulation to redress those defects, and the immense structural barriers to meaningful improvement all counsel strongly against the Institute's undertaking a law reform project on capital punishment, either in the form of a new draft of § 210.6 or a more extensive set of proposals. Rather, these conditions strongly suggest that the Institute recognize that the preconditions for an adequately

[41] Report of the Council to the Membership of the American Law Institute on the matter of the Death Penalty, 4 (2009), available at http://www.ali.org/doc/Capitar/o20Punishment_web.pdf. (Last visited on 14.05.2014)
[42] 428 U.S. 153 (1976)

> administered regime of capital punishment do not currently exist and cannot reasonably be expected to be achieved."

It is to be noted that aspects of "the rarest of rare" doctrine as propounded in *Bachan Singh* were also inspired by the ALI Model Penal Code provision on death penalty. Now that the Model Penal Code provision itself stands withdrawn, it is imperative that a similar study to assess the fitness of Indian system of death penalty against the constitutional standards is also undertaken. Present attempt by the Law Commission to study the constitutional regulation of death penalty amongst other related issues, to that extent, will fill an important academic void on this issue.

Part VI. Inviting Inputs for the Present Study

In the light of the aforementioned, the issue of capital punishment provides the Law Commission a very rich research terrain to engage with. The commission proposes to collect death penalty related data from various Trial Courts, High Courts and the Supreme Court. Prison authorities will also be requested for data on death row conditions. The commission may also involve various law schools to conduct qualitative and quantitative research on various death penalty themes.

This research project, therefore, is timely and much needed to make the public debate on this much contested theme more informed, robust and reasonable. Towards achieving this objective, the commission through this consultation paper reaches out to a wider community of concerned citizens to elicit their views on this issue. A questionnaire is also being attached as an aid which will prove to be helpful to those who may want to express their views on various aspects of death penalty.

Questionnaire on Capital Punishment

1. Are you in favour of retaining capital punishment on the statute book? (If in favour of retention, please see Q.2 & 3. If not in favour of retention, please see Q.4)

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

3. Which of the above arguments in support of death penalty is the strongest?
   a) Deterrence
   b) Justice
   c) Satisfaction of effective punishment being delivered for victim/victim's families
   d) Cost

4. If you are in favour of abolition of capital punishment, please indicate your reasons for the same -
   a) There is no conclusive proof that capital punishment acts as a deterrent for future crimes
   b) Capital punishment imposes hardship and trauma for the convict's family who may have had no role in the crime
   c) Capital punishment confuses the idea of retribution with justice and society must move away from the conception of "an eye for an eye"
   d) Capital Punishment deprives people of the opportunity to reform
   e) Most countries have abolished capital punishment
   f) The imposition of capital punishment is not free from risk as there is a chance of innocent people being sentenced to death
   g) The application of capital punishment is too judge centric and depends on a judge's personal belief against or in favour of death sentence
   h) Economically and socially backward groups will always have greater chance of being subjected to capital punishment than the rich
   i) Capital Punishment is a form of state sponsored violence
   j) The mode of execution i.e. hanging by the neck until death is cruel
   k) Any other reason .

5. In your opinion, can the sentence of life imprisonment as an alternate to capital punishment achieve the arguments mentioned in Q2 (if there is a stringent and periodic system of review of all prisoners before granting remission/reprieve/commutation)? Please indicate why.

6. The recent Criminal Law (Amendment) Act, 2013 introduces capital punishment for the repeat offence of rape (Section 376E). Should capital punishment extend to non-homicide offences? Please indicate your reasons for the same.

7. In your opinion, is the crime of murder as severe and abhorring as an act of terrorism?

8. Is it possible to divide murders into different categories for the purpose of sentencing, such that -
   a) Murders punishable with death
   b) Murders punishable with life imprisonment

If so, what murders would you include in category a)?

9. Do you subscribe to the view that under normal circumstances the punishment of life imprisonment is adequate for murder but under aggravating circumstances, the Court may award death penalty?

10. Is it possible to divide offences into different categories for the purpose of sentencing, such that -
    a) Terror Offences
    b) Non terror Offences

If so, do you think capital punishment should be retained for category a) and abolished for category b)?

11. Do you think the existing framework of police investigation and collection of evidence is full proof and guarantees zero room for erroneous convictions?

12. In your opinion, should crimes mandating capital punishment require a higher burden of proof over and above proof beyond reasonable doubt?

13. Do you believe that capital sentencing carries the risk of being judge centric?

14. In your opinion, should there be a provision for rehabilitation of families of criminals sentenced to death?

15. Do you agree with the current mode of execution i.e hanging by the neck until death? Please indicate why. Please suggest any other preferable mode of execution.

16. In your opinion, should mandatory guidelines be laid down for the Governor and President of India to exercise their powers of granting mercy under the Constitution of India in death penalty cases.