To Kill Or Not To Kill: The Unending Conundrum

Mr. Justice S.B. Sinha*

Abstract

Although there are numerous countries that proscribe death sentences, there is no international consensus till date regarding its legality. The Indian legal system too, has struggled with the constitutionality of death penalty and with delineating the circumstances in which it may be granted. For instance, it is true that the legendary case, Mithu v. State of Punjab, struck down mandatory death sentences under the Indian Penal Code, but mandatory death sentences provided under specific criminal legislations such as the Arms Act are still contested. It is this uneasiness in the approach of the Indian legal system to capital punishment that Justice S.B. Sinha explores in this article. Providing a conceptual, historic overview of the Indian position of law, he explores the avatars of the Bachan Singh 'rarest of rare' test, how trial processes in India are prone to mistakes and the problem of convicts sentenced to death languishing on death row due to delays in execution. Justice S.B. Sinha concludes by observing that the Indian judiciary is becoming more reluctant to award the death sentence as there is greater emphasis on alternative modes of punishment and to the international legal developments which militate against capital punishment.

"Americans consider their criminal justice system to be the best in the world. Some conservatives may carp that it coddles criminals, and some liberals may believe that there not enough protections for suspects, particularly indigent ones. By and large, however, the system yields justice. As former prosecutor and defence counsel, however, I know the system is only good as the lawyers who administer it - prosecutors, defence counsel, judges. If prosecutors abuse their authority, if defence lawyers are lazy or incompetent, if judges are weak or biased, the result is injustice, and in capital cases that can spell death."

Raymond Bonner, "Anatomy of Injustice: A Murder Case Gone Wrong", Knopf, 2012.

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The theoretical fear that an innocent life could be stifled out by an irreversible penalty like death has received chilling confirmation in a recent Colombia University Law School study that found the American State of Texas has wrongfully executed one Carlos DeLuna in 1989.[1] He was alleged to have murdered one Wanda Lopez in Texas and was sentenced to death and executed while the real culprit, one Carlos Hernandez was never brought to justice.

The 2011–2012 editors of the Columbia Human Rights Law Review rightly commented that the article, *"poignantly reveals how easily our legal system can fail to produce just outcomes even without the deliberate interference of individuals acting in bad faith and how the consequences of such failures can be irrevocable and, at times, fatal."*[2]

The authors in the article refer to the trial and execution of one Chipitta Rodriguez in 1863 on the allegation of killing a trader for his gold. Poor and of Mexican descent, she was convicted and sentenced by a jury handpicked by the Sherriff, with her defence lawyer who did very little to defend her.[3]

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1 James S. Liebman, *et al.*, *Los Tocayos Carlos*, 43 COLUMBIA HUMAN RIGHTS LAW REVIEW 711 (2012). [Hereinafter, "Liebman"]

2 Liebman, 712.

3 Liebman, 1105.

In both of these senses, it is not Carlos Hernandez, but justice and truth that are the phantoms of the story told here. It is not the ghost of Chipita Rodriguez, but the specter that the criminal justice system of Texas has mistaken the innocent for the guilty and the guilty for the innocent, that stalks the river bottoms whenever the state punishes the "guilty" with the infinite finality of death. If the truth dies with the executed man, so does justice, not only for him, but for the victim of the crime and for the real killer's other victims later to come.

Things in India are equally bad, if not worse. In *Swamy Shraddananda* v. *State of Karnataka*,[4] the Supreme Court held:

> 33. 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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> 34. 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.
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> Thus the overall larger picture gets asymmetric and lop-sided and presents a poor reflection of the system of criminal administration of justice. This situation is matter of concern for this Court and needs to be remedied.

This paper deals with the uneasy relationship of the Indian justice system with the administration of the death penalty. The fact that imposition of death penalty in India is as uncertain as in any other system prevalent in other countries is neither in doubt nor in dispute. The question for the courts, however, is how to navigate the death penalty maze while being aware of the undeniable truth regarding the rickety nature of the machinery of death in our country.

I. Global Trends on the Death Penalty

Despite fewer countries executing prisoners than ever before, death penalty is still alive and well around the world.[5] Excluding China, the latest Amnesty report records,"*Atleast 676 executions were known to have been carried out worldwide in 2011, an increase on the 2010 figure of at least 527 executions worldwide. The increase is largely due to a significant increase in judicial killings in Iran, Iraq and Saudi Arabia.*"

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4 Swamy Shraddananda v. State of Karnataka, (2008) 12 SCC 288 [Supreme Court of India]. [Hereinafter, "*Swamy Shraddananda*"]

5 Amnesty International, *The State of World's Human Rights*, POL/10/001/2011.

Also, it can be clearly deduced that the gap between actual executions and people sentenced to death is also increasing. In contrast to the execution figures (676 known executions), at least 1,923 people were known to have been sentenced to death in 63 countries in 2011. Amnesty International, in its 2011 report, pegs the number of people sentenced to death at 313 in Pakistan and 108 in Malaysia.[6] The following figures provided by Amnesty International shed some light on the number of people *sentenced* to death in the year 2011.

> Afghanistan (+), Algeria (51+), Bahrain (5), Bangladesh (49+), Belarus (2), Botswana (1), Burkina Faso (3), Cameroon (+), Chad (+), China (+), Congo (Republic of) (3), Democratic Republic of Congo (+), **Egypt (123+)**, Gambia (13), Ghana (4), Guinea (16), Guyana (3+), **India (110+)**, Indonesia (6+), **Iran (156+), Iraq (291+), Japan (10)**, Jordan (15+), Kenya (11+), Kuwait (17+), Lebanon (8), Liberia (1), Madagascar (+), Malawi (2), **Malaysia (108+)**, Mali (2), Mauritania (8), Mongolia (+), Morocco/ Western Sahara (5), Myanmar (33+), Nigeria (72), North Korea (+), **Pakistan (313+)**, Palestinian Authority (5+: 4 in Gaza; 1 in West Bank), Papua New Guinea (5), Qatar (3+), Saint Lucia (1), **Saudi Arabia (9+)**, Sierra Leone (2), Singapore (5+), Somalia (37+:32+ by the Transitional Federal Government; 4 in Puntland; 1 in Galmudug), South Korea (1), South Sudan (1+), **Sri Lanka (106)**, Sudan (13+), Swaziland (1), Syria (+), Taiwan (16), Tanzania (+), Thailand (40), Trinidad and Tobago (2), Uganda (5), United Arab Emirates (31+), **USA (78)**, Viet Nam (23+), Yemen (29+), Zambia (48), Zimbabwe (1+) (emphasis added).[7]

Death sentences, however, are said to be on a decline across the world.[8]

II. The Indian Position

The Indian position on capital punishment has, of late, emerged as one of the most interesting areas to study questions relating to criminal law within the constitutional framework. While clearly, world-over, there is an unmistakable march of law towards full fledged abolition or a *de facto* moratorium on capital punishment, the Indian legislature continues to grope in the dark.

While it cannot be ignored that the judiciary has been at the forefront in gradually reviewing the death sentencing provisions from many legislations that

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6 Amnesty International, *Death Sentences and Executions in 2011*, ACT 50/001/2012.

7 *Supra* note 6, at 7.

8 J. Balaji, *Death Sentence on the Decline across the World*, The Hindu, May 31, 2012.

prescribed mandatory death sentencing, the legislature, it seems, is not able to let go of the same as a punishment.[9]

India, on a factual appraisal, has consistently maintained a stand against the abolition of capital punishment at the international fora.[10] It is interesting to note that while voting against the Draft UN General Assembly Resolution imposing a moratorium on the use of the death penalty in 2010, the Indian representative's justification for the negative vote was that *"India could not support the draft as it ran counter to its statutory law."*[11]

Globally, the picture is hopeful as more than two thirds of all countries have abolished the death penalty, either in law or in practice.[12] India, the report of Amnesty International notes, remained execution-free for the seventh consecutive year as of March, 2012, though about 110 new death sentences were imposed just in 2011, taking the total number of persons under sentence of death by 2011 to somewhere between 400 and 500,[13] including 3 women being on the death row.[14]

The President of India, Pratibha Patil, however, granted clemency to 35 persons who were condemned to death. They had murdered more than 60 persons, out of which about 22 were women and children. In some quarters, it was believed, that the President did so on account of her personal belief against the death sentence which, however, was denied by the Presidential spokesperson.[15]

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9 *See* The Petroleum And Minerals Pipelines (Acquisition of Right of User in Land) Amendment Act, 2012; Bombay Prohibition (Gujarat Amendment) Act, 2009.

10 India voted against the United Nations General Assembly Resolutions of 2007, 2008 and 2010 on "Moratorium on the Death Penalty". *See* A/RES/62/149, A/RES/63/168 and A/RES/65/206. India is also not a signatory to the "Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty" adopted by the United Nations General Assembly on the 15th of December, 1989.

11 *See* 65th United Nations General Assembly, *General Assembly will Call for All States to Establish a Moratorium on Executions with View to Abolishing Death Penalty*, United Nations (November 11, 2010), *available at* http://www.un.org/News/Press/docs/2010/gashc3996.doc.htm.

12 *Supra* note 6.

13 *Supra* note 6. There have, however, been no executions since 2004.

14 *See* Nikita Doval, *Women on Death Row*, The Week, April 13, 2012.

15 *See* Syed Nazakat & Vijaya Pushkarna, *Pardoning President*, The Week, June 13, 2012.

III. Positioning the Death Penalty Laws in India

Modern judicial machinery condemning a man to death in India is always traced back to Maharajah Nanda Kumar, his mock trial and the subsequent hanging by the kangaroo court set up by Warren Hastings in June 1775.[16] After the end of the Company rule, the death penalty was used extensively during the British years too.

The British, who even hanged little children of 7 and 8 years of age for petty thefts in Britain in the 1800s,[17] ceased executing people by 1964 and altogether dropped the death penalty from their statute books by 1998. However, the Indian Parliament did not do so. Despite dissenting voices from many members of the Constituent Assembly during the debates, the death penalty managed to seep through and remain in the system. As far as the legislature is concerned, bills kept getting introduced both for its abolition and for its inclusion in more and more laws. However, the bills proposing abolition kept getting defeated in one way or the other.[18] And now, in the most recent times, the legislature finds it appropriate to include even tampering with an oil pipeline or selling illicit liquor among the offenses punishable by death.[19]

The Law Commission of India also opined that *"India cannot risk the experiment of abolition of capital punishment"*[20] and some of the recent ventures of the Law Commission of India, oddly, have involved exploring alternative methods of putting condemned persons to death.[21]

The judiciary has also been divided on the issue of the desirability of the death penalty. Public utterances of judges on non-judicial matters make for

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16 Anonymous, *The First Impeachment: An Insight into the First Great Criminal trial before the Supreme Court*, India Today, August 20, 2011.

17 *See* Arthur Koestler, Reflections on Hanging (1997).

It is also to be noted that the United States, which is one of the biggest supporters of death sentencing, used to execute minors till the judgment of the United States Supreme Court in Roper v. Simmonds, 543 US 551 (2005). A totalof 366 juvenile offenders were executed by 2005. *See* Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes,January 1, 1973 – February 28, 2005*, The International Justice Project (May 4, 2004), *available at* http://www.internationaljusticeproject.org/pdfs/JuvDeathApril2004.pdf.

18 For a discussion on the topic, see Rajendra Prasad v. State of Uttar Pradesh, AIR 1979 SC 916 [Supreme Court of India]. [Hereinafter, *"Rajendra Prasad"*]

19 *Supra* note 9.

20 35th Report of the Law Commission of India, Capital Punishment (1967).

21 187th Report of the Law Commission of India, Mode of Execution of Death Sentence and Incidental Matters (2003).

interesting analysis. Justice A.K. Ganguly, who retired recently from the Supreme Court of India, termed the death penalty as *"barbaric"*, *"anti-life"*, *"undemocratic"* and *"irresponsible"*, but *"legal"*.[22]

On the other hand, Justice Arijit Pasayat, another former Judge of the Supreme Court of India, opined that *"punishment for the rape of a child should be nothing less than a death sentence in any court of law."*[23]

Apart from the issue of death penalty simpliciter, we are in 2012, still finding ourselves dealing with the issue of mandatory death sentence. While the mandatory death sentence prescribed under Section 303 of the Indian Penal Code was struck down by the Supreme Court as unconstitutional as far back as in 1983 in *Mithu* v. *State of Punjab*,[24] still the mandatory death sentence was till recently a valid penalty under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Section 31-A of the Narcotic Drugs and Psychotropic Substances Act, 1985[25] and Section 27(3) of the Arms Act, 1959. It is to be noted that Section 31-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 was read down by the Bombay High Court in *Indian Harm Reduction Network* v. *Union of India*.[26] The court held such mandatory imposition of the death penalty to be violative of Article 21 of the Constitution of India and directed the judges to use discretion while choosing

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22 J. Venkatesan, *Death Penalty is Barbaric, Says Judge*, THE HINDU, November 16, 2011.

See the views of K.G. Balakrishnan, Chairperson, National Human Rights Commission in The Hindu, August 2, 2010: *"...if you ask me, I personally feel that the death penalty should continue. It has got a very great deterrent effect on society."*

See however, K.G. Balakrishnan's interview by Maneesh Chibber, The Indian Express, May 7, 2012: *"Personally and speaking for the commission, I can't support the death penalty. It is cruel."*

23 Anonymous, *Child Rapist Deserves Death Penalty: Retd. Justice*, Times of India, December 6, 2009.

See however, Justice K.T. Thomas, *Death Penalty is Nothing but Brutal Murder by State*, The Asian Age (September 2, 2011), http://www.asianage.com/ideas/death-penalty-nothing-brutal-murder-state-814.

24 Mithu v. State of Punjab, (1983) 2 SCC 277 [Supreme Court of India]. [Hereinafter, *"Mithu"*]

25 It is also worth mentioning here that the Finance Minister Pranab Mukherjee in response to a parliamentary question has indicated that he is considering bringing an amendment to the Narcotic Drugs and Psychotropic Substances (NDPS) Act, thereby dropping the mandatory death penalty provision for repeat drug offenders. *See* Anonymous, *Mandatory Death Penalty Provision may be Dropped from NDPS Act*, TIMES OF INDIA, May 9, 2012.

26 Indian Harm Reduction Network v. Union of India, Writ Petition No. 1784 of 2010 (June 16, 2011) [Bombay High Court], *available at* http://www.lawyerscollective.org/files/IHRN%20judgment.pdf.

punishment under the said section. Similarly, Section 27(3) of the Arms Act has recently been struck down by the Supreme Court in *State of Punjab* v. *Dalbir Singh*[27] as being unconstitutional following *Mithu*. Earlier, the mandatory death sentence was also prescribed under Section 3(2)(i) of the Terrorist and Disruptive Activities (Prevention) Act, 1985, which later underwent amendment in 1987.

It is also worth noting that *Mithu* has led an international drive of eliminating the mandatory death penalty from the statute books. It has been referred to by the judicial bodies in other jurisdictions, including the Privy Council.[28]

However, in *Saibanna* v. *State of Karnataka*[29], the Supreme Court made an attempt to bring back Section 303 though the side door. In *Saibanna* the Supreme Court seems to have revived the spirit of Section 303, Indian Penal Code which prescribed a mandatory death sentence for murder by life convicts, and was struck off as being unconstitutional by it in *Mithu* way back in 1983. The *Saibanna* court held:

> A prisoner sentenced to life imprisonment is bound to serve the remainder of his life in prison unless the sentence is commuted or remitted and that such sentence could not be equated with any fixed term.... If that be so, there could be no imposition of a second life term on the appellant before us as it would be a meaningless exercise... In the teeth of Section 427(2) of the Code of Criminal Procedure, 1973 it is doubtful whether a person already undergoing sentence of imprisonment for life can be visited with another term of imprisonment for life to run consecutively with the previous one... Thus, taking all the circumstances in consideration, we are of the view that the High Court was right in coming to the conclusion that the appellant's case bristles with special circumstances requisite for imposition of the death penalty.

It is to be noted that the incompatibility of *Saibanna* with *Mithu* was noted subsequently by the Supreme Court in *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*.[30]

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27 State of Punjab v. Dalbir Singh, (2012) 3 SCC 346 [Supreme Court of India]. [Hereinafter, *"Dalbir Singh"*]

28 Various decisions of overseas jurisdictions referring to *Mithu* include R v. Hughes, [2002] 2 WLR 1058, Reyes v. The Queen, [2002] 2 WLR 1034, Boyce v. The Queen, [2005] 1 AC 400, Matthew v. States Trinidad and Tobago,[2005] 1 AC 433, Watson v. The Queen, [2005] 1 AC 472 and Bowe v. Queen, [2006] 1 WLR 1623. This has been noticed by the Supreme Court of India in Aloke Nath Dutta v. State of West Bengal, (2007) 12 SCC 230 [Supreme Court of India] [Hereinafter, *"Aloke Nath Dutta"*] and *Dalbir Singh*.

29 Saibanna v. State of Karnataka, (2005) 4 SCC 165 [Supreme Court of India]. [Hereinafter, *"Saibanna"*]

30 Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498 [Supreme Court of India]. [Hereinafter, *"Bariyar"*]

In another shocking development, the Piracy Bill, 2012 which was tabled in the Parliament on April 24, 2012, if accepted in its original form would be restoring the mandatory death penalty in India.[31]

Section 364A of the Indian Penal Code assumes significance in this context. Even in the jurisdictions where the death penalty remains in the statute books, generally a sentence of death is not imposed unless the crime concerned has resulted in someone's death or unless it is a crime against the State. The United States Supreme Court had held in the decision of *Kennady* v. *Louisiana*[32] that the State has no power to impose the death penalty against an individual for committing a crime that did not result in the death of the victim except in the case of crimes against the State.

However, Section 364A of the Indian Penal Code, which was inserted in the said Act by the Criminal Laws Amendment Act of 1993, speaks in a different language. The section says that:

> Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death or imprisonment for life, and shall also be liable to fine.

It is to be noted that it confers a wide discretion on the court to even award the death sentence though death is not caused to the victim, though the courts have seldom used such a power.

The issue of death penalty took a dramatic turn towards abolitionism with the rulings of the Supreme Court of India that death penalty for murder must be restricted to the 'rarest of rare' cases. However, even this instruction, has mostly been contradicted by the legislature by its consistent increasing of the number of offences punishable by death.

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31 §3, Piracy Bill, 2012.

32 Kennedy v. Louisiana, 554 US 407 (2008) [US Supreme Court].

However, it is not uncommon to see certain retentionist demands from the side of the judiciary as well. Recently, one of the Sessions Courts in New Delhi requested the Parliament to provide for the death sentence to be included as a punishment for certain other categories of offences too.[33]

In *Bhagwan Dass* v. *State (NCT of Delhi)*,[34] the Apex Court opined that honour killings, for whatever reason, come within the category of the rarest of rare cases deserving death punishment, thereby indirectly hinting at the possibility of laying down a judicial *"mandatory death sentencing policy"* for such class of offenses. It opined that *"All persons who are planning to perpetrate* "honour" *killings should know that the gallows await them."* Subsequently in *Mehboob Batcha* v. *State*[35] the court even went to the extent of saying that *"murder by policemen in police custody is in our opinion in the category of rarest of rare cases deserving death sentence."*

IV. Death Penalty with Constitutional Safeguards: The *Bachan Singh* Framework

The concerns regarding arbitrariness and discrimination in the processes leading to a death sentence are indeed grave. Such factors would render India's use of the death penalty to be in violation of International Law and standards. The sentencing norm on the death penalty in India is that the death penalty is not a rule but an exception. But this was not so from the beginning.

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33 *See* State v. Sunil Kumar & Another, Sessions Case No. 56 of 2009 (April 12, 2012) [Delhi Sessions Court], which held as follows: *"This Court feels that our wise representatives in the Parliament should provide for capital punishment of death in such like cases also where senior citizens are the victims, so as to teach a lesson to the offenders and to deter others from indulging in crime against senior citizens."*

There have been more instances of such innovative demands from the side of the judiciary regarding punishments. An Additional Sessions Judge in Delhi recently called on the Parliament to explore "the possibility of permitting the imposition of alternative sentences of surgical castration or chemical castration in cases involving rape of minors and serial offenders." *See* State v. Dinesh Yadav, FIR No. 138/2009 (April 30, 2011) [Sessions Court, New Delhi] and State v. Nandan, FIR No. 72/2011 (January 24, 2012) [Sessions Court, New Delhi].

34 Bhagwan Dass v. State (NCT of Delhi), (2011) 6 SCC 396 [Supreme Court of India]. [Hereinafter, *"Bhagwan Dass"*]

35 Mehboob Batcha v. State, (2011) 7 SCC 45 [Supreme Court of India].

The decision in *Jagmohan Singh* v. *State of Uttar Pradesh*[36] involved a failed challenge to the constitutionality of the death penalty. Its importance lies in the fact that it highlighted the need for noting *"special reasons"* when imposing death sentences. *Bachan Singh* v. *State of Punjab,*[37] which followed, was a landmark decision, which despite affirming the constitutionality of the death penalty, diluted the scope of its imposition substantially by introducing the test of 'rarest of rarest cases'. It held 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.[38]

The *Bachan Singh* verdict sought to put to rest the ever widening divide in the court on the subject of the death penalty, which reached a climax in some of the divided decisions of the court towards the late 1970s.[39] It also put an end to the interpretative disparity triggered by the amendment of the Code of Criminal Procedure. The court, in addition to the 'rarest of rarest' dictum, also emphasised the need for individualised sentencing. It emphasised that when the court is inclined to award the death penalty with all other alternative options being *unquestionably foreclosed,* strict compliance shall be made of the *pre-sentence hearing* and *"special reasons"*[40] must be given for awarding such a sentence.

Bachan Singh has been a watershed moment for the capital punishment law in India. It laid down the law and emphasised the judicial role in relation to the death penalty. The description of the judicial role in *Bachan Singh* is a very nuanced and sensitive formulation which is pregnant with strong caution and advice. To that extent, it was supposed to define the judicial approach to be employed in capital sentencing cases. The court held:

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36 Jagmohan Singh v. State of Uttar Pradesh, AIR 1973 SC 947 [Supreme Court of India].

37 Bachan Singh v. State of Punjab, AIR 1980 SC 898 [Supreme Court of India]. [Hereinafter, *"Bachan Singh"*]

38 *Bachan Singh,* ¶209.

39 *See* Rajendra Prasad v. State of Uttar Pradesh, AIR 1979 SC 916 [Supreme Court of India]; Dalbir Singh and Ors. v. State of Punjab, (1979) 3 SCC 745 [Supreme Court of India].

40 *See* Panchhi v. State of Uttar Pradesh, (1998) 7 SCC 177 [Supreme Court of India].

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

But the aforementioned guidance on sentencing approach has either been lost sight of or has been subject to conflicting interpretations. The different interpretations employed by the courts in death penalty cases have given rise to a subjective judicial environment which has been noted in *Swamy Shraddhananda.*

In *Bariyar,* the Supreme Court expressed in unequivocal terms the constitutional implications including concerns relating to arbitrariness involved in deciding the death penalty cases. This constitutional perspective was also highlighted in *Mohd. Farooq Abdul Gafur and Anr.* v. *State of Maharashtra.*[41]

The Supreme Court in *Bariyar* observed:

> 135. A survey of the application of rarest of rare doctrine in various courts will reveal that various courts have given their own meaning

41 Mohd. Farooq Abdul Gafur and Anr. v. State of Maharashtra, (2010) 14 SCC 641 [Supreme Court of India].

to the doctrine. This variation in the interpretation of Rarest of rare analysis may amount to be constitutionally infirm because of apparent arbitrariness on the count of content of the doctrine.

136. The moot question is whether, after more than quarter of a century since Bachan Singh recognized death penalty as a constitutionally permissible penalty, we can distill a meaningful basis from our precedent on death penalty, for distinguishing the few cases in which the capital sentence is imposed from the many cases in which it is not? A similar question was put by Justice Stewart in Furman. He noted death sentences are cruel and unusual in the same way as being "struck by lightning is cruel and unusual". Moreover, the petitioners sentenced to death were seen as "capriciously selected random handful" and the question posed was whether the eighth amendment could tolerate death sentences "so wantonly and so freakishly imposed." Today, it could be safely said in the context of Indian experience on death penalty that no standards can be culled out from the judge made law which governs the selection of penalty apart from broad overall guideline of rarest of rare under Bachan Singh.

137. 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. 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 is not an example of law which is arbitrary on its face but is an instance where law may have been arbitrarily administered.

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

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

> an acknowledgement of an imperfect 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.
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> 139. We have to be, thus, mindful that the true import of rarest of rare doctrine speaks of an extraordinary and exceptional case.

The Supreme Court in *Bariyar*[42] built on the arbitrariness thesis provided in *Swamy Shraddananda*. In *Swamy Shraddananda* the Supreme Court noted the following with *"extraordinary candour"*:

> 32. The same point is made in far greater detail in a report called, "Lethal Lottery, The Death Penalty in India" compiled jointly by Amnesty International India and Peoples Union For Civil Liberties, Tamil Nadu & Puducherry. The report is based on the study of Supreme Court judgments in death penalty cases from 1950 to 2006. One of the main points made in the report (see chapter 2 to 4) is about the Court's lack of uniformity and consistency in awarding death sentence.
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> 33. 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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> 34. 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.
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> Thus, the overall larger picture gets asymmetric and lop-sided and presents a poor reflection of the system of criminal administration of justice. This situation is matter of concern for this Court and needs to be remedied.

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42 *See* Autri Saha & Pritika Rai Advani, *The Death Penalty: A New Perspective in Light of Santosh Bariyar Case*, 2 NATIONAL UNIVERSITY OF JURIDICIAL SCIENCES LAW REVIEW 668 (2009).

A Division Bench of the Kerala High Court, (R. Basant and Vinod Chandran, J.J.) differed in their opinion in *State of Kerala* v. *Pradeep Borah*[43] on the question as to whether the Sessions Judges also have the power to impose a harsher variety of the life sentence recognised by *Swami Shraddananda* as an option available to avoid the harshest, irreversible and incorrectable sentence of death.

V. MANY *AVATARS* OF THE 'RAREST OF RARE' TEST

The immediate impact of *Bachan Singh* can be seen in *Earabhadrappav. State of Karnataka,*[44] in which Justice A.P Sen, who was the chief dissenter in many of the abolitionist judgments of Justice Krishna Iyer, was, *"constrained to commute the sentence of death passed on the appellant into one for imprisonment for life"*[45] due to the test laid down in *Bachan Singh* being *"unfortunately"* not fulfilled in the said case.

In the times that followed, the effect of *Bachan Singh* slowly started wearing off, with some decisions affirming death sentences without making even a passing reference to it.[46]

In fact, in a number of judgments after *Bachan Singh* where the Supreme Court upheld the death sentence, there was no discussion of the 'rarest of rare' formulation or of the *Bachan Singh* guidelines. After all the discourse on aggravating and mitigating circumstances, etc. by the previous benches, in *Lok Pal Singh* v. *State of Madhya Pradesh,*[47] all that the Court said was, *"This was a cruel and heinous murder and once the offence is proved then there can be no other sentence except the death sentence that can be imposed."*

In *Mohd. Mannan* v. *State of Bihar,*[48] a case involving kidnapping and rape of a minor girl, while upholding the sentence of death imposed on the accused, the Supreme Court opined as follows:

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43 State of Kerala v. Pradeep Borah, Death Sentence Reference No. 2 of 2011 (April 13, 2012).

44 Earabhadrappa v. State of Karnataka, (1983) 2 SCC 330 [Supreme Court of India].

45 *Supra* note 46, at 341.

46 *See* Gayasi v. State of Uttar Pradesh, (1981) 2 SCC 712 [Supreme Court of India]; Mehar Chand v. State of Rajasthan,(1982) 3 SCC 373 (2) [Supreme Court of India].

47 Lok Pal Singh v. State of Madhya Pradesh, (1985) Supp SCC 76 [Supreme Court of India].

48 Mohd. Mannan v. State of Bihar, (2011) 5 SCC 317 [Supreme Court of India].

> So long the death sentence is provided in the statute and when collective conscience of the community is petrified, it is expected that the holders of judicial power do not stammer dehors their personal opinion and inflict death penalty. These are the broad guidelines which this Court has laid down for imposition of the death penalty... This act no doubt 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.

Shortage of reasoning and simple affirmation of death sentences with no reference to *Bachan Singh* were the hallmark of some of the decisions in the late 1980s.[49] Some in addition to all that even went to the extent of claiming to be upholding the concerns of the common man while doing so.[50]

The Court, however, did admit in *Aloke Nath Dutta* the failure on its part to evolve a uniform sentencing policy in capital punishment cases and to conclude as to what amounted to 'rarest of rare'.

It also remains a fact that in many cases, the Apex Court itself has failed to consider the question as to whether the burden of proving the lack of potential for reform as laid down in *Bachan Singh* has been effectively discharged by the State. The decisions that followed *Bachan Singh* generally kept reflecting the growing abolitionist inclinations of the Apex Court, albeit with some exceptional inconsistencies.[51]

In 2011, the Apex Court in the case of *Ajitsingh Harnamsingh Gujral*[52] in which, focusing solely on the nature of the crime committed by the convict (which was in fact gruesome and heinous), the court gave a go by to the *"State's responsibility to prove impossibility of rehabilitation"* guideline in *Bachan Singh*, reiterated in *Bariyar*.

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49 *See* Darshan Singh v. State of Punjab, (1988) 1 SCC 618 [Supreme Court of India]; Ranjeet Singh v. State of Rajasthan, (1988) 1 SCC 633 [Supreme Court of India].

50 *See* Mahesh v. State of Madhya Pradesh, (1987) 3 SCC 80 [Supreme Court of India]: *"To give the lesser punishment for the appellants would be to render the justicing system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon."*

51 *See* Anshad and Ors. v. State of Karnataka, (1994) 4 SCC 381 [Supreme Court of India]; Panchhi v. State of Uttar Pradesh, (1998) 7 SCC 177 [Supreme Court of India]; State of Maharashtra v. Bharat Fakira Dhiwar 2002 (1) SCC 622 [Supreme Court of India]; *Swamy Shraddananda.*

52 Ajitsingh Harnamsingh Gujral v. State of Maharashtra, (2011) 14 SCC 401 [Supreme Court of India]. [Hereinafter, *"Ajitsingh"*]

Critics clamored that it amounted to the replacement of need for evidence with the Judge's personal opinion[53]. The court however, added, in the said judgment that

> It is only the legislature which can abolish the death penalty and not the courts. As long as the death penalty exists in the statute book it has to be imposed in some cases, otherwise it will tantamount to repeal of the death penalty by the judiciary. It is not for the judiciary to repeal or amend the law, as that is in the domain of the legislature.

In a contrasting decision, the court however, rekindled the hopes of the abolitionists. In *Sham* v. *State of Maharashtra*[54] the court set aside the death penalty imposed by the High Court on the accused noting that he could be reformed or rehabilitated. However therein it agreed with the decision in *Ajitsingh*, a decision relied upon by the prosecution, distinguishing, however, the facts thereof from that of the case before it.

In *Ramnaresh* v. *State of Chattisgarh*,[55] the Apex Court reiterated the importance of giving special reasons holding that

> The law contemplates recording of special reasons and, therefore, the expression 'special' has to be given a definite meaning and connotation. 'Special reasons' in contra-distinction to 'reasons' simpliciter conveys the legislative mandate of putting a restriction on exercise of judicial discretion by placing the requirement of special reasons.

In *Amrit Singh* v. *State of Punjab*[56] the accused had raped a minor child which ultimately led to her death. The court noted that though the manner in which the deceased was raped might have been brutal but it could well have been a momentary lapse on part of the accused, seeing a lonely girl at a secluded place. *"The offence may look heinous,"* the court further said, *"but under no circumstances it can be said to be* [a] *rarest of rare case."*

The 'rarest of rare' test came into controversy[57] due to the pronouncement in the *Bhagwan Dass* verdict due to the suggested inclusion of 'honour killings' in the 'rarest of rare' category. 'Honour killing' does not have any precise definition.

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53 V. Venkatesan, *Clear Confusion*, 28(23) FRONTLINE (November 5-18, 2011).

54 Sham v. State of Maharashtra, (2011) 10 SCC 389 [Supreme Court of India].

55 Ramnaresh v. State of Chattisgarh, Criminal Appeal No. 166-167 of 2010 (February 28, 2012), *available at* http://indiankanoon.org/doc/45260772/?type=print [Supreme Court of India].

56 Amrit Singh v. State of Punjab, 2006 (12) SCC 79 [Supreme Court of India].

57 *See* Abhinav Chandrachud, *Inconsistent Death Sentencing in India*, 46 ECONOMIC AND POLITICAL WEEKLY (2011).

This was as much a misreading of *Bachan Singh* as the decision in *Ravindra Trimbak Chouthmal*[58] case wherein the court held that dowry death couldn't be placed in the category which could be regarded as the 'rarest of the rare' type due to the increasing number of dowry deaths.

The inconsistency in the sentencing policy of different benches is also visible in some of the recent judgments.

For instance, in *Amit* v. *State of Uttar Pradesh*,[59] decided on 23rd February, 2012, the death sentence of the accused who had kidnapped, raped and killed a minor girl aged 3 years was converted to life imprisonment by the Supreme Court considering the chances of reformation and other factors. A week thereafter, on 29th February, 2012, a different bench of the same court, in *Rajendra Prahladrao Wasnik* v. *State of Maharashtra*,[60] – a similar case involving the rape and murder of a 3 year old girl, affirmed the death penalty imposed on the accused only on the basis of circumstantial evidence.

Only lip service was paid therein to the guidelines enunciated in *Bachan Singh*,with no discussion at all as to the possibility of reformation or rehabilitation of the accused, stating that the accused by his conduct had belied the human relationship and confidence.

In the same month, on 23rd February, 2012, in a case[61] involving dacoity and murder, the court confirmed, without recording elaborate reasons, the death sentence on the accused holding *inter alia* that the trial court had not found *"any mitigating circumstances in favour of the appellant to avoid death penalty"*. The Court, without discussion, concluded that *"the accused is a menace to the society, is beyond reform and therefore deserves a death sentence."* It has to be further noted that another bench of the Court, just a day prior to the pronouncement in *Rajendra*, i.e. on 28th February, 2012, in a case[62] where the appellant was sentenced to death on the basis of circumstantial evidence, commuted the same to life imprisonment.

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58 Ravindra Trimbak Chouthmal v. State of Maharashtra, (1996) 4 SCC 148 [Supreme Court of India].

59 Amit v. State of Uttar Pradesh, (2012) 4 SCC 107 [Supreme Court of India].

60 Rajendra Prahladrao Wasnik v. State of Maharashtra, (2012) 4 SCC 37 [Supreme Court of India]. [Hereinafter , *"Rajendra"*]

61 Sonu Sardar v. State of Chhattisgarh, (2012) 4 SCC 97 [Supreme Court of India]; *See* however, Ramnaresh v. State of Chhattisgarh, (2012) 4 SCC 257 [Supreme Court of India].

62 Brajendra Singh v. State of MP, (2012) 4 SCC 289 [Supreme Court of India].

It may be true that facts of each case may appear to be different but the principle on which the same are determined must be objective.

Consistency in sentencing leading to death of a person is an important factor in the delivery of justice. It acquires phenomenal significance when the outcome results in depriving the life of an individual.

Sir Anthony Mason, the 9th Chief Justice of Australia, observed as follows:

> Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice.[63]

Also significant is the observation of Chief Justice Gleeson of Australia in *Wong* v. *The Queen:*

> All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.[64]

VI. Rot in the Root: Trial Processes and the Need for Revisiting the Death Penalty

One of the fundamental issues with regard to judicial condemnation of a man to death is regarding the degree or errors and omissions that the trial process is susceptible to.

Mr. Raymond Bonner succinctly commented on the stark reality behind the criminal justice system in America.[65] It is one thing to impose the punishment of

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63 Lowe v. The Queen, (1984) 154 CLR 606, at 610–611 [High Court of Australia].

64 Wong v. The Queen, (2001) 207 CLR 584, at 591 [High Court of Australia].

65 In Anatomy of Injustice, Mr. Bonner deals with the case of Edward Lee Elmore, a mentally retarded African American, who was alleged to have raped and murdered one elderly white female and burglarised her residence in 1982. *See* State v. Elmore, 308 S.E.2d 781, 785-86 (S.C. 1983) [US Supreme Court]; Elmore v. South Carolina, 476 U.S. 1101 (1986) [US Supreme Court]; Elmore v. Ozmint, 661 F.3d 783 (2011) [4th Circuit Court].

imprisonment wrongly, but it entirely different to wrongly direct the life of a person to be taken. This is especially to be noted in the context of the appellate courts, which have to make their decision entirely on the basis of the evidence before them and have no scope for probing into the truth outside such evidence. It is in this context that the question of the reliability of the trial process, which has the power to conclude that a person deserves to die, assumes significance. The situation in the United States needs no elaboration. It is a routine matter in that country that people are sentenced and executed after trials riddled with deficiencies and even the United States Supreme Court turns a blind eye towards such cases.[66]

Corinna Barrett Lain, a Professor of Law at the University of Richmond, in her article "*Deciding Death*",[67] speaks about the general character of people condemned to death in the United States as follows:

> Capital defendants are about as unpopular a minority as one can find (for obvious and perfectly legitimate reasons)—and those who end up on death row tend to be poor[68] black[69] and the recipients of woefully inadequate legal representation.[70] The politics of death

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66 In violation of its international obligations, the State of Texas tried and executed Mr. Humberto Leal Garcia, a Mexican citizen, without informing him that as a Mexican national, he was entitled to assistance from the Mexican consul under the Vienna Convention on Consular Relations. This was also violative of the decision of the International Court of Justice in Mexico v. United States of America (Avena and Other Mexican Nationals) of 2004. On appeal, the United States Supreme Court had denied Leal's request, calling his argument meritless. It even refused to stay the death sentence for a few months despite a prayer in that behalf was made apart from the caveat by the United Nations and the Government of the United States of America. *See* Humberto Leal Garcia v. State of Texas, (2012) 2 SCC FJ 1 [US Supreme Court].

67 Corinna Barrett Lain, *Deciding Death*, 57 DUKE LAW JOURNAL 1 (2007).

68 *See* MARY WELEK ATWELL, EVOLVING STANDARDS OF DECENCY 35 (2004): ("*[V]irtually every person sentenced to death could be classified as 'poor'.*"); Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, WISCONSIN LAW REVIEW 1, 16 (2001) ("*Throughout history, the death penalty has been reserved almost exclusively for those who are poor. The major consequence of poverty is being represented by a court-appointed lawyer who may lack the skill, resources, and, in some cases, even the inclination to provide a competent defense.*").

69 *See* Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAVIOURAL SCIENCE & LAW 191, 195(2002) ("*African-Americans are markedly over-represented on death row compared with theirpercentage of the population (42.72% versus 12.3%).*").

70 Justice Ruth Bader Ginsburg, In Pursuit of the Public Good: Lawyers Who Care, Lecture at the David A. Clarke School of Law, University of the District of Columbia (April 9, 2001), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_04-09-01a.html ("*I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial.*").

only exacerbate their vulnerability, leaving little reason to trust other institutional actors to exercise self-restraint.

The question is, whether we are in a position to say something positive about the Indian judicial system on this count. The answer, unfortunately, would be a big, emphatic *"no"*.

When it is an accepted position even in India that trial processes are not immune from errors, mistakes and deficiencies, can we confidently hand the hangman's noose to the trial courts, trusting that they would exercise their discretion to direct the life of the convicts to be taken properly? Does our legal and precedential framework surrounding the imposition of the death penalty possess enough consistency and certainty to prevent injustice in the cases of this nature? Again, the answer will have to be rendered in the negative.

Instances exposing the perilous susceptibility of trial processes to go wrong in this country are aplenty and have been noticed by the Supreme Court in various cases before it.[71]

The practice of some of the trial courts in imposing the extreme sentence of death, not only ignoring[72] the sentencing principles laid down by the Apex Court in this regard but also foregoing the very basic principles of a fair and just trial is to be noticed in this context.

In *Mohd.Hussain* v. *State (Government of NCT of Delhi)*,[73] the Trial Court had appointed a counsel at the State's expense to defend the accused, an illiterate Pakistani national and he remained absent most of the time, especially during the examination of a large number of witnesses, many of whose testimonies were relied

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71 In the case of Babubhai Udensinh Parmar v. State of Gujarat,(2006) 12 SCC 268 [Supreme Court of India], a labourer on whom the death penalty was imposed by the sessions court on the basis of one amongst a series of judicial confessions made by him, recorded without complying with all the steps and without even providing him free legal aid. The conviction and sentence was upheld by the Gujarat High Court. The Supreme Court, however, noting down the deficiencies in the recording of his confession, set aside the conviction and sentence.

Further on 20th July, 2009, the High Court of Gujarat, in the case of the same person, on the basis of another of those series of confessions, upheld the conviction and sentencing despite the appellant having retracted his confession later and despite the judgment of the Supreme Court involving the same person in 2006.

72 *See Death for Beheading Girl on Campus*, The Hindu, May 3, 2012.

73 Mohd. Hussain v. State (Government of NCT of Delhi), (2012) 2 SCC 584 [Supreme Court of India].

upon for imposing the death sentence upon the accused. Although expressing different opinions as to the final decision, the learned judges of the Supreme Court agreed that the conviction and sentence of the accused was vitiated.

It is probably to that end that the imposition of the death penalty in India should be revisited.

Even the former President of India, Mr. A.P.J. Abdul Kalam was of the opinion that the concept of the death penalty deserves a debate in the Parliament as regards its continued maintenance in the statute books.[74]

The fate of various convicts sentenced to death shall be soon decided as the Supreme Court has reserved judgment[75] in various cases including thoseof Devender Pal Singh Bhullar and Mahindra Nath Das.

VII. "MISTAKES"

In another startling disclosure of the ills of the death penalty system, the Supreme Court in *Bariyar* noted many decisions of the Supreme Court to be *per incuriam Bachan Singh*. The court observed:

> Curiously in Ravji alias Ram Chandra v. State of Rajasthan, AIR 1996 SC 787 [Hereinafter, "Ravji"] 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:
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> ...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.
>
> We are not oblivious that this case has been followed in at least 6 decisions of this Court in which death punishment has been awarded

74 *Death Penalty Only in Extreme Cases: Kalam*, CNN IBN Video Interview, *available at* http://ibnlive.in.com/videos/191780/death-penalty-only-in-extreme-cases-kalam.html.

75 Devender Pal Singh Bhullar v. State of NCT of Delhi and other connected matters, Writ Petition No. 146 of 2011 (April 19, 2012) [Supreme Court of India].

> in last 9 years, but, in our opinion, it was rendered per incuriam. Bachan Singh (supra) specifically noted the following on this point:
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> ...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.
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> Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra, AIR 2009 SC 56, Mohan Anna Chavan v. State of Maharashtra, (2008) 11 SCC 113; Bantu v. The State of U.P., (2008) 11 SCC 113, Surja Ram v. State of Rajasthan, 1997 Cri LJ 51 DayanidhiBisoi v. State of Orissa, 2003 Cri LJ 3697; State of U.P. v. Sattan @ Satyendra and Ors., (2009) 4 SCC 736 are the decisions where Ravji Rao (supra) 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 Rao (supra) has not only been considered but also relied upon as authority on the point that in heinous crimes, circumstances relating to criminal are not pertinent (emphasis added).

The court's decision in *Bariyar* holding *Ravji* to be *per incuriam* was ratified by subsequent decisions of the Supreme Court in *Dilip Premnarayan Tiwari* v. *State of Maharashtra*[76] and *Rajesh Kumar* v. *State through Govt. of NCT of Delhi*.[77] The realisation that the decision in *Ravji* was rendered *per incuriam* came too late for at least 2 prisoners sentenced to death on the basis of this flawed reasoning, including Ravji himself. Ravji was executed on May 4, 1996 and Surja Ram was executed on April 7, 1997. The remaining 12 persons sentenced to death on the basis of the *Ravji* decision continue to languish on death row.

Ironically, in *Sunder Singh v. State of Uttaranchal*[78] the Supreme Court once again made references to the *Ravji* decision to finally affirm the death sentence on the accused whohad murdered 5 people in an incident that had happened in 1989.[79]

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76 Dilip Premnarayan Tiwari v. State of Maharashtra, (2010) 1 SCC 775 [Supreme Court of India].

77 Rajesh Kumar v. State through Govt. of NCT of Delhi, 2011 (13) SCC 706 [Supreme Court of India].

78 Sunder Singh v. State of Uttaranchal, (2010) 10 SCC 611 [Supreme Court of India].

79 *See* the reference to *Ravji* also in Alister Anthony Pareira v. State of Maharashtra, (2012) 2 SCC 648 [Supreme Court of India].

VIII. Capital Convicts on Death Row

Also, while awaiting the outcome of the mercy petition, the prisoner on death row is subjected to a *"lingering death"*, which is something more than the mere extinguishment of life. He exists under the specter of death, coping with a crippling uncertainty about whether he will live to see another day or not. This degrading and brutalising effect on the human spirit of the condemned prisoner is the most disturbing and horrific aspect of the death row phenomenon. This has been considered to constitute psychological torture and cruel punishment in various jurisdictions including India.[80] Justice Krishna Iyer also alluded to this dehumanizing aspect of the death row phenomenon when he pointed out in *Rajendra Prasad* that because the condemned prisoner had *"the hanging agony hanging over his head since 1973 (i.e. for six years)... he must by now be more a vegetable than a person."*[81]

Indian courts have also contributed to another significant aspect of the law on death row. Whether the fact that the condemned prisoner has committed the most horrific crimes shall be a factor in extending the constitutional protection of dignified treatment to the convict has been aptly answered by the Indian courts in the negative. In *Catholic Commission for Justice & Peace in Zimbabwe* v. *Attorney-General,*[82] the Supreme Court of Zimbabwe took inspiration from *Sher Singh and Others* v. *State of Punjab* and observed:

> Having regard to the impressive judicial and academic consensus concerning the death row phenomenon, the prolonged delays and the harsh conditions of incarceration, I am convinced that a sufficient

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80 T. V. Vatheeswaran v. State of Tamil Nadu, (1983) 2 SCC 68 [Supreme Court of India]; Sher Singh and Others v. State of Punjab, (1983) 2 SCC 344 [Supreme Court of India]; Triveniben v. State of Gujarat, (1989) 1 SCC 678 [Supreme Court of India].

81 Judicial bodies such as the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of Uganda and the Privy Council have considered the intense mental anxiety that capital defendants face while awaiting execution as a reason for commutation. *See* also Jagdish v. State of Madhya Pradesh, (2009) 9 SCC 495 [Supreme Court of India] wherein, after surveying international material on the subject, the court observed:

> We are of the opinion that the underlying principles of the Eighth Amendment with regard to the infliction of a cruel and unusual punishment has its echo in Article 21 of our Constitution as well and it would, therefore, be open to a condemned prisoner, who has been under a sentence of death over a long period of time, for reasons not attributable to him, to contend that the death sentence should be commuted to one of life.

82 Catholic Commission for Justice & Peace in Zimbabwe v. Attorney-General, 1993 (1) ZLR 242 (S.Ct.) [Supreme Court of Zimbabwe].

> degree of seriousness has been attained as to entitle the applicant to invoke on behalf of the condemned prisoners the protection against inhuman treatment afforded them by s 15(1) of the Constitution.
>
> .... It is whether the acute mental suffering and brooding horror of being hanged which has haunted them in their condemned cells over the long lapse of time since the passing of sentence of death is consistent with the guarantee against inhuman or degrading punishment or treatment. For, like art 21 of the Constitution of India, s 15(1) stands as sentinel over human misery, degradation and oppression. Its voice is that of justice and fairness. It can never be silenced on the ground that the time to heed to its dictates ended with the passing of the death penalty. It echoes through all stages - the trial, the sentence, the incarceration on death row and, finally, the execution. See Sher Singh and Others v State of Punjab.

It is also interesting to note that that while the Privy Council in *Riley* v. *Attorney-General of Jamaica*[83] held by a majority decision that a delay in carrying out execution could afford no ground for commuting the said death sentence, Lord Scarman and Lord Brightman concluded their dissenting judgment by observing:

> It is, of course, true that a period of anguish and suffering is an inevitable consequence of sentence of death. But a prolongation of it beyond the time necessary for appeal and consideration of reprieve is not. And it is no answer to say that the man will struggle to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhuman and degrading...Prolonged delay when it arises from factors outside the control of the condemned man can render a decision to carry out the sentence of death an inhuman and degrading punishment...

It is also interesting to note that Supreme Court of India, has all along relied upon the minority opinion of Lord Scarman and Lord Brightman in *Riley* v. *Attorney-General of Jamaica* (See *Sher Singh and Others* v. *State of Punjab* and *T.V. Vatheeswaran* v. *State of Tamil Nadu*.[84])

The Privy Council turned around and reached a similar position in *Earl Pratt and Ivan Morgan* v. *The Attorney General for Jamaica*,[85] when it reversed the majority

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83 Riley v. Attorney-General of Jamaica, [1933] 1 AC 719 [Privy Council].

84 T. V. Vatheeswaran v. State of Tamil Nadu, (1983) 2 SCC 68 [Supreme Court of India].

85 Earl Pratt and Ivan Morgan v. The Attorney General for Jamaica, 1993 (4) All ER 769

opinion in *Riley* v. *Attorney-General of Jamaica*. Relying on the decisions of the Indian Supreme Court, in *Earl Pratt* the Privy Council observed:

> In Smt. Treveniben v. State of Gujarat (1989) 1 S.C.J. 383 the Supreme Court of India approved the judgment in Sher Singh v. The State of Punjab and held that a sentence of death imposed by the "Apex Court", which will itself have taken into account delay when imposing the death sentence, can only be set aside thereafter upon petition to the Supreme Court upon grounds of delay occurring after that date. Oza J. said, at page 410:-
>
> "If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether, it is just and fair to allow the sentence of death to be executed."
>
> In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve...The death row phenomenon must not become established as a part of our jurisprudence.[86]

IX. Conclusion

In this overall climate of somber reflection on issues relating to the administration of capital punishment, some very important developments in the capital sentencing law have swung the balance in favour of the capital convicts substantially.

First, in *Swamy Shraddananda*, the court has emphasised the availability of sentences other than the life sentence (a 14 year term) and death penalty to the sentencing court. The court by invoking *"the vast hiatus between 14 years' imprisonment and death"* has significantly expanded the range of *"alternative options"* which need to be exhausted before opting for death. Thus, through this ruling the Supreme Court has raised the threshold in favour of the convict in terms of the *Bachan Singh* dicta – *"that ought not to be done save in the rarest of rare cases when* ***the alternative option is unquestionably foreclosed*** (emphasis added)."

[Privy Council]. [Hereinafter, *"Earl Pratt"*]

86 Also see Soering v. United Kingdom, App. No. 14038/88, 11 Eur. H. R. Rep. 439 (1989) [European Court of Human Rights] wherein the European Court of Human Rights held that possible exposure of a condemned prisoner for many years to the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death would violate protections against *"inhuman or degrading treatment or punishment."*

The court held that:

> 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 emphasized 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.
>
> 67. 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 the rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh (supra) besides being in accord with the modern trends in penology.

A study of death sentences in the post-*Shraddhananda* phase reveals that many cases which normally would have resulted in the award of death sentences to the condemned prisoners, have got the benefit of various "*alternative options*" between the minimum sentence of 14 years to a sentence of full life.[87]

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87 *See* Dilip Premnarayan Tiwari v. State of Maharashtra, (2010) 1 SCC 775 [Supreme Court of India], Haru Ghosh v. State of West Bengal, (2009) 15 SCC 551 [Supreme Court of India], Ramraj @ Nanhoo @ Bihnu v. State of Chhattisgarh, (2010) 1 SCC 573 [Supreme Court of India], Mulla v. State of Uttar Pradesh, (2010) 3 SCC 508 [Supreme Court of India] and Sebastian @ Chevithiyan v. State of Kerala, (2010) 1 SCC 58 [Supreme Court of India]. *See also* State v. Anil Kumar, FIR No. 153/10, P.S. Keshav Puram, decided by Additional Sessions Judge - II (Northwest), Rohini Courts, Delhi on 16.04.2012 wherein it was held that:

Hon'ble Mr. Justice Pradeep Nandrajog in his decision as rendered in Shree Gopal @ Mani Gopal v. State Crl. Appeal No. 528/09 decided on 31.8.2009 examined another important facet pertaining to the sentencing procedure i.e of consideration of alternative options while referring to the decision of Hon'ble Supreme Court of India as rendered in the case Santosh Kumar Satishbhushan Bariyar Vs. State of Maharashtra, JT 2009 (7) SC 249 wherein the Hon'ble Supreme Court of India had observed that a real and abiding concern for the dignity of human life postulates resistance to taking a life through the instrumentality of law.... the present case can be easily classified as a 'Rare Case' which calls for the exercising of alternative options by the court... He is further sentenced to Rigorous Imprisonment for life with the direction that he shall not be considered for grant of remission till he undergoes an actual sentence of 20 (Twenty) years.

Moreover, Indian jurisprudence on the death penalty is not oblivious to the developments in international law as also worldwide trends on this issue.[88] The Supreme Court in *Bariyar* referred to the international trends in the following terms:

> 117. Although these questions are not under consideration and cannot be addressed here and now, we cannot help but observe the global move away from the death penalty. Latest statistics show that 138 nations have now abolished the death penalty in either law or practice (no executions for 10 years). Our own neighbours, Nepal and Bhutan are part of these abolitionist nations while others including Philippines and South Korea have also recently joined the abolitionist group, in law and in practice respectively. We are also aware that on 18 December 2007, the United Nations General Assembly adopted resolution 62/149 calling upon countries that retain the death penalty to establish a worldwide moratorium on executions with a view to abolishing the death penalty.
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> 118. India is, however, one of the 59 nations that retain the death penalty.

It can safely be said that globally even in jurisdictions where death penalties remain on the statute books there is a definitive movement away from indiscriminate awarding of death sentences and actual executions resulting from death sentences initially awarded. In that context, the solemn judicial approach to death penalty cases was defined by the Supreme Court in *Bariyar* in the following words:

> 157. The fact that capital sentence is a live penalty in India; we should strive to **tune the practice to the evolving standards of a maturing society. The normative thresholds attached thereto and evolving**

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88 The international trends on the death penalty continue to inform the penal philosophy of the court in death penalty matters. Recently, in Rajesh Kumar v. State through Govt. of NCT of Delhi, (2011) 13 SCC 706 [Supreme Court of India], the Supreme Court quoted from the famous United States Supreme Court case of Trop v. Dulles, 356 U.S. 86 (1958) [US Supreme Court] and observed:

> 65. These two provisions do not stand in isolation but must be construed as supplementing each other as ensuring the constitutional guarantee of a just, fair and reasonable procedure in the exercise of sentencing discretion by the court.
>
> 66. These changes in the sentencing structure reflect the **"evolving standards of decency"** that mark the progress of a maturing democracy and which is in accord with the concept of dignity of the individual - one of the core values in our Preamble to the Constitution. In a way these changes signify a paradigm shift in our jurisprudence with the gradual transition of our legal regime from 'rule of law' to the 'due process of law', to which this Court would advert to in the latter part of the judgment."

> **constitutional sensibilities shall continue to throw fresh challenges.** We have not fully resolved the dilemma arising from the fact that the Constitution prohibits excessive punishment borne out of undue process, but also permits, and contemplates that there will be capital punishment arising out of an exercise of extremely wide discretion. **This dilemma is inherently difficult to resolve. And we should refrain from enforcing any artificial peace on this landscape.**
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> 158. While choosing for one option or the other, these constitutional principles must be borne in mind. **The nature of capital sentencing is such that it is important that we ask the right questions."** (emphasis added)

It goes without saying that the less wealth and influence a person has, the more likely they are to be sentenced to death. The Supreme Court itself has acknowledged the class bias in death sentences. In his dissenting judgment in *Bachan Singh*, Justice Bhagwati commented, *"death penalty has a certain class complexion or class bias in as much as it is largely the poor and the down-trodden who are the victims of this extreme penalty. We would hardly find a rich or affluent person going to the gallows."* The judge concluded, *"There can be no doubt that the death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived section of the community ... this circumstance also adds to the arbitrary and capricious nature of the death penalty and renders it unconstitutional."*

The absence of detailed studies that track discrimination within the criminal justice system more generally and the implementation of the death penalty more specifically, should not be an excuse for ignoring this terrible injustice.

Recently, the Apex Court in *Vodafone International Holdings B.V* v. *Union of India*[89] stated that certainty is integral to the rule of law. In a case involving the imposition of the death penalty, the courts cannot continue to judge under uncertainty. The normative standards in this behalf must be finally settled leaving the uncertainty into oblivion, which is the least the judiciary can do.

89 Vodafone International Holdings B.V v. Union of India, (2012) 1 SCALE 530 [Supreme Court of India].