

A CASE AGAINST DELAY AS A GROUND FOR COMMUTATION OF DEATH SENTENCES

*Zubin Dash & Shashank Singh**

*With the pronouncement of the judgments in *Triveniben v. State of Gujarat*, *Mahendra Nath Das v. Union of India* and *Shatrughan Chauhan v. Union of India*, the Supreme Court has assumed to itself a 'post-mercy rejection' jurisdiction. Within the constitutional framework, on being awarded death penalty, convicts may, after exhausting certain judicial remedies, approach the President or the Governor, who are constitutionally empowered to grant pardons and reprieves. We argue that this right has often been abused by people who exercise it in the hope of delaying their execution and thereafter using such delay as a ground to seek commutation of their sentence. While the courts have taken note of this fact, they have chosen to rule in favour of the convicted persons whose mercy petitions have been rejected by the President. The convicts seek judicial recourse, in form of commutation of their death sentence, on the grounds there has been a delay in rejection of their clemency petition. We reason that the courts must accept certain inherent systemic features, which although cause delay, also prevent the failure of the constitutional machinery. The courts must consider intervention only in light of all the circumstances that lead to a fundamental change in circumstances since the original sentencing decision. The relevance of considering this fundamental change is that in the intervening period after the awarding of the sentence by the courts, the circumstances are now so different that had the judiciary been considering the case at the initial stage it would not have imposed the death penalty to begin with. This proposition, as laid down by the same Court in *Triveniben* case has over time been diluted. As is seen by the recent cases the judiciary has adopted a very convict-centric approach when considering commutation cases. To carve out an additional ground for clemency even after the convict has been awarded the death penalty by the judiciary and the executive has rejected their mercy petitions, is judicial overreach. In an attempt to conjure novel remedies for convicts from constitutional silences, the judiciary has completely turned a blind eye to justice for the victims, and society as a whole. In the process, it has in essence upset the constitutional scheme and assumed the power of granting mercy to convicts, which hitherto was the sole prerogative of the executive head.*

* 5th year and 4th year students respectively, WB National University of Juridical Sciences, Kolkata. We would like to thank Prof. M.P. Singh, Chairman, Delhi Judicial Academy, and Former Vice Chancellor, NUJS, and Ms. Aparajita Lath for their guidance and valuable inputs while writing this paper.

I. INTRODUCTION

The debate surrounding death penalty as a form of punishment is centred largely on questions of constitutionality of the death sentence, its place in contemporary criminal jurisprudence, and human rights discourses dealing with justice to convicts. This debate has been taken up at various international forums; specifically, the United Nations,¹ international non-governmental organisations ('NGOs'),² as well as the national and global press.³ In India also, abolitionists have repeatedly tried to give legislative sanction to their demands and have raised this issue in the Parliament three times (although rather unsuccessfully).⁴ A Bill taking forward the campaign against the death penalty was introduced in the Lok Sabha in 1956 and twice in the Rajya Sabha in 1958 and 1961.⁵ All three, after significant debate, were either rejected or withdrawn.⁶

The judgment in *Bachan Singh v. State of Punjab* ('Bachan Singh')⁷ relied on the Thirty-Fifth Report of the Law Commission of India,⁸ to uphold the constitutional validity of the death penalty. This position has subsequently been reiterated and upheld by the Supreme Court of India in a number of judgments.⁹ Consequently, India remains one of over a hundred countries that have retained the death penalty.¹⁰

A question that often gets pulled into this debate is what must be done in cases where there has been a delay in the execution of the death sentence. Of late, delay has been employed as a ground for commutation by convicts, whose clemency petitions have been rejected by the executive. They plead that the intervening period between the imposition of death penalty by

¹ G.A. Res.62/149, U.N. Doc. A/RES/62/149 (December 18, 2007).

² Amnesty International, *Abolitionist and Retentionist Countries*, available at <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (Last visited on November 16, 2013); Human Rights Watch, *The Last Holdouts*, available at <http://www.hrw.org/reports/2008/09/10/last-holdouts-0> (Last visited on November 16, 2013).

³ Nilanjana S. Roy, *The New York Times*, *Politics Stalks India's Death Row*, February 27, 2014, available at http://www.nytimes.com/2014/02/28/opinion/politics-stalks-indias-death-row.html?hp&rref=opinion&_r=0 (Last visited on August 5, 2015); *The Hindustan Times*, *Will India Abolish the Death Penalty?*, February 19, 2014, available at <http://www.hindustantimes.com/comment/analysis/will-india-abolish-death-penalty/article1-1185582.aspx> (Last visited on August 5, 2015); Kounteya Sinha, *The Times of India*, *Britain Asks India to Abolish Death Penalty*, February 20, 2014, available at <http://timesofindia.indiatimes.com/world/uk/Britain-asks-India-to-abolish-death-penalty/articleshow/30702498.cms> (Last visited on August 5, 2015).

⁴ *Devender Pal Singh Bhullar v. State (NCT of Delhi)*, (2013) 6 SCC 195 ¶3.

⁵ *Id.*

⁶ *Id.*

⁷ *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684.

⁸ LAW COMMISSION OF INDIA, *Mode of Execution of Death Sentence and Incidental Matters*, Report No. 187, (October 2003), available at <http://lawcommissionofindia.nic.in/reports/187th%20report.pdf> (Last visited on August 5, 2015).

⁹ *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470.

¹⁰ Amnesty International, *supra* note 2.

the judiciary, petitioning to the President for clemency, and the actual rejection of the petition amounts to an “inordinate delay” which results in “inhuman and degrading punishment”.¹¹ Making use of the introduction of substantive ‘due process’ in India’s constitutional mechanism,¹² convicts are turning to the judiciary to seek commutation of their death sentence to life imprisonment.

In the past year, the Supreme Court dealt with the question of delay in three landmark decisions. In *Devender Pal Singh Bhullar v. State of N.C.T. of Delhi* (‘Bhullar’),¹³ the Court rejected the petition and opined that delay could not be a ground for commutation in terror cases.¹⁴ In *Mahendra Nath Das v. Union of India* (‘M.N. Das’),¹⁵ it was held that a period of twelve years amounted to an inordinate delay and was a ground for commutation of death penalty.¹⁶ The execution of fifteen convicts on death row, whose clemency petitions had been rejected, was stayed by this judgment.¹⁷ Concerned, the Chief Justice of India constituted a bench to examine the correctness of ‘post-mercy rejection’ jurisdiction.¹⁸ The judgment on this matter was delivered on January 21, 2014, in *Shatrughan Chauhan v. Union of India*.¹⁹ The bench passed a decision in favour of commuting death sentences on grounds of delay and held that delay in execution can be the sole ground for commutation of death sentence.²⁰ Particularly, the judgment sought to frame guidelines for dealing with the procedural aspects surrounding commutation/acceptance of mercy petitions along with other compliance mechanisms that were to be satisfied before execution.

Before delving into this debate, a caveat must be placed. Much like the Supreme Court judgments rendered in this regard, this paper does not aim to enter into the debate regarding the validity of the death penalty, be it on constitutional, sociological, penological, human rights or moral basis. This paper limits discussion to the question of whether delay can be a ground for commutation of the death sentence to life imprisonment.

In Part II, we will examine the existing criminal justice mechanism on awarding death penalty – the process of conviction, sentencing, appeal and petitioning for clemency. In Part III, the Bhullar, M.N. Das, and Shatrughan Chauhan judgments will be critically analysed to examine how

¹¹ *Devender Pal Singh Bhullar v. State (NCT of Delhi)*, (2013) 6 SCC 195.

¹² *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

¹³ *Devender Pal Singh Bhullar v. State (NCT of Delhi)*, (2013) 6 SCC 195.

¹⁴ *Id.*

¹⁵ *Mahendra Nath Das v. Union of India*, (2013) 6 SCC 253.

¹⁶ *Id.*

¹⁷ The Times of India, *Execution of Two Rape-Murder Convicts Stayed*, available at http://articles.timesofindia.indiatimes.com/2013-08-22/india/41436045_1_mercy-pleas-mercy-petitions-execution (Last visited on November 16, 2013).

¹⁸ The Hindu, *Larger Bench of SC to Hear Pleas of Death Row Convicts*, available at <http://www.thehindu.com/news/national/larger-bench-of-sc-to-hear-pleas-of-death-row-convicts/article4956418.ece> (Last visited on November 18, 2013).

¹⁹ *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1.

²⁰ *Id.*

the Court has interpreted the existing body of jurisprudence relating to death penalty and how it has departed from the law laid down by the Constitutional Bench in *Triveniben v. State of Gujarat* ('Triveniben').²¹ Taking off from this very proposition, it will be argued in Parts IV and V, as to why it is incorrect to commute the death sentence in cases of delay alone, and why doing so would *inter alia* amount to excess activism on part of the courts. Such activism goes against the judicial and executive appeals framework envisaged by the Constitution of India ('the Constitution') under Article 72.²² Lastly, contrary to popular opinion, we will argue that the judgment in Shatrughan Chauhan is not a step towards abolition. Rather, it merely sets a procedural standard, the effect of which can only be realised in the near future by analysing the government's response to the Supreme Court's decision. We conclude with the warning that the effect of the judgment can also be negative, leading to an increase in the number of executions.

II. THE LEGAL FRAMEWORK GOVERNING DEATH PENALTY IN INDIA

In India, the death penalty is the most severe form of punishment meted out to convicts. It is prescribed as the highest punishment under a host of special Central and State legislations.²³ The death sentence is executed by way of hanging, which was constitutionally upheld in *Deena v. Union of India*.²⁴ The laws of the armed forces also provide for execution by way of shooting.²⁵ This part exclusively discusses the codified criminal justice machinery of India dealing with the death penalty. Its utility in this discussion is to bring to fore the concept of 'post-mercy' jurisdiction after the two phases of review, judicial and executive, have been exhausted.

²¹ *Triveniben v. State of Gujarat*, (1989) 1 SCC 678.

²² The Constitution of India, 1950, Art. 72.

²³ The Indian Penal Code, 1860, §53, §120B, §121, §132, §194, §195A, §302, §303, §305, §307(2), §364A, §396; The Air Force Act, 1950; The Army Act, 1950; The Navy Act, 1950; The Indo-Tibetan Border Police Force Act, 1992; Defence and Internal Security of India Act, 1971; Defence of India Act 1971, §5; Commission of Sati (Prevention) Act, 1987, §4(1); Terrorist and Disruptive Activities (Prevention) Act, 1987, §3(2)(i); Prevention of Terrorism Act, 2002, §3(2)(a); Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, §3(2)(i); Explosive Substances Act, 1908, (as amended in 2001) §3(b); Unlawful Activities Prevention Act, 1967 (as amended in 2004) §16(1); The Arms Act, 1959 (s amended in 1988), §27; The Narcotic Drugs & Psychotropic Substances (Prevention) Act, 1985 (as amended in 1988), §31A; The Karnataka Control of Organised Crime Act, 2000, §3(1)(i); The Andhra Pradesh Control of Organised Crime Act, 2001, §3(1)(i); The Arunachal Pradesh Control of Organised Crime Act, 2002, §3(1)(i); The Maharashtra Control of Organised Crime Act, 1999, §3(1)(i).

²⁴ *Deena v. Union of India*, (1983) 4 SCC 645.

²⁵ LAW COMMISSION OF INDIA, *Review of the Indian Evidence Act, 1872*, Report No. 185 (March 2003) available at <http://lawcommissionofindia.nic.in/reports/185threport-parti.pdf> (Last visited on October 17, 2015).

A. LEGISLATIVE PRESCRIPTIONS AND THE JUDICIAL PROCESS OF THE IMPOSITION OF THE DEATH PENALTY

1. Sessions Court

On a combined reading of §28 and §29 of the Code of Criminal Procedure, 1973 ('CrPC'), it becomes clear that the lowest level of the criminal justice system where death penalty may be imposed is the Sessions Court.²⁶ Death penalty is not a mandatory sentence but is given at the discretion of the judge.²⁷ Once the death sentence is awarded, the convict is committed to jail custody under §366(2). Justice Oza, in his judgment in *Triveniben* ruled that the requirement for committing a convict to jail custody after the imposition of the death sentence does not offend the constitutional guarantee against double jeopardy,²⁸ as it is necessary to secure the presence of the accused at the time of his execution.²⁹

2. High Court/Confirmation/Appeal

In addition to §366, §28 of the CrPC, welds another procedural safeguard into the system. Under these sections, the Court of Sessions is compulsorily required to submit the case proceedings to the respective High Court of the State for confirmation and without such confirmation, the execution of the death penalty cannot take place. This is a mandatory requirement and is therefore not at the discretion of the judge at the trial court level.

The High Court can either take action under §367 or under §368 of the CrPC once the Court of Sessions sentences someone to death. Under §367(1), it can either ask for additional evidence to make further enquiry into the case or revert the matter to the Sessions Court. §368 confers upon the High Court the power to confirm or annul the conviction. This section also gives the High Court the power to pass any other sentence it deems appropriate and even empowers it to order a new trial on the existing or amended charge(s). However, an order of confirmation under this section cannot be made until the period for appeal has expired, or if an appeal is presented within such period, until such appeal is disposed of. The conformation of the death sentence has to be signed by two judges as provided under §369. However, if the judges differ in opinion, then a third judge may be called for his advice as provided under §370 and §392 of the CrPC.

Additionally, the High Court itself has the power to sentence a person to death without the Sessions Court passing such an order. Under §407 of the CrPC the High Court can withdraw a case pending before any

²⁶ The Code of Criminal Procedure, 1973, §28, §29.

²⁷ *Bachan Singh v. State of Punjab*, (1982) 3 SCC 24. ¶344 (*per* Bhagwati, J., dissenting opinion).

²⁸ The Constitution of India, 1950, Art. 20(2).

²⁹ *Triveniben v. State of Gujarat*, (1989) 1 SCC 678 ¶19.

subordinate court and after conducting a trial can pass a death sentence. On an appeal against acquittal by the Sessions Court, the High Court can convict a person and pass a death sentence under §386(a) of the CrPC. Lastly, the High Court can also enhance any existing sentence and can award the death penalty under §386(c) of the CrPC.

3. Supreme Court

After the death sentence has been confirmed by the High Court, the accused has a right to appeal to the Supreme Court against the order of the High Court. The One Hundred and Eighty-Seventh Law Commission Report suggested an amendment to the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, to allow for a direct appeal as currently, there is no statutory right of appeal against death penalty but only a general right to appeal.³⁰ This suggestion, however, has not been accepted. The accused may appeal to the Supreme Court from the order of death sentence passed by the High Court in three instances. First, where the High Court convicts a person on a trial held by it under its extraordinary jurisdiction provided in §374(1) of the CrPC; second, where the High Court withdraws a case from any of its subordinate courts under Article 134(1)(b) of the Constitution and awards the death sentence; third, where the High Court on appeal reverses an order of acquittal of an accused and condemns him to death. The right to appeal in these cases is provided under §379 of the CrPC, §2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, and Article 134 (1)(a) of the Constitution.

When the High Court confirms a death sentence awarded by the Sessions Court under §368, no appeal may be allowed to the Supreme Court unless the High Court in exercise of its power under Article 134(1)(c) of the Constitution grants leave to appeal to the Supreme Court or the Supreme Court grants special leave under Article 136(1) of the Constitution. Similarly, if the High Court enhances the sentence of the Sessions Court to death, by the power provided under §386(c)(iii), §397 and §401 of the CrPC, the accused has no statutory right to appeal to the Supreme Court.

B. EXECUTIVE PROCESS DEALING WITH DEATH ROW CASES

The exclusive prerogative of the President to commute death sentences is provided for under Article 72 of the Constitution, which is of great importance. However, while arriving at his decision, the President is bound by the advice rendered by the executive. The *locus standi* for filing an application for commutation of death sentence is extremely diluted and anyone can file it on the behalf of the condemned person.³¹

³⁰ LAW COMMISSION OF INDIA, *supra* note 8, 3.

³¹ See, e.g., Bhullar's case wherein mercy petitions were filed by his wife and various NGOs.

The executive process for the commutation of a death sentence can be initiated anytime, even while the judicial procedure is underway.³² In cases where the appeal reaches the Supreme Court and the death sentence is upheld or the petition for special leave is dismissed, the Superintendent of the jail must inform the convicted prisoner of such an order.³³ The convict is then allowed a period of seven days to submit a mercy petition to the Governor, in case of a State, and the President, in case of a Union Territory.³⁴ On the rejection of a mercy petition by the Governor, the mercy petition is forwarded to the Secretary, Ministry of Home Affairs ('MHA'), Government of India.³⁵ If the petition is filed after seven days, the petition addressed to the Governor is also forwarded to the Secretary, Ministry of Home Affairs.³⁶

The President is entitled to examine the case on its merits,³⁷ and any decision made by the President, even if no reason is given, is non-justiciable.³⁸ The power itself and the procedure to exercise this power are at the discretion of the executive. The Court in *Kehar Singh v. State (Delhi Administration)* refused to spell out any guidelines for the exercise of this power as it held the power under Article 72 to be of the "widest amplitude".³⁹

III. ANALYSING THE BHULLAR, M. N. DAS AND SHATRUGHAN CHAUHAN DECISIONS

Bhullar and M.N. Das are both Division Bench decisions of the Supreme Court, delivered by Justice G.S. Singhvi. Naturally, a consistency is seen in the reasoning of the two judgments. Bhullar and M.N. Das, delivered within twenty days of each other, reinvigorated the death penalty debate in India. Following these decisions, the Chief Justice of India constituted a larger bench in Shatrughan Chauhan,⁴⁰ to deal with the question of delay as a ground for commutation of the death penalty. In all three cases, the Court has correctly approached the issue of delay independently without getting into the murky debate between the abolitionists and retentionists.

In Bhullar, the petitioner was responsible for the death of the Senior Superintendent of Police of Chandigarh, by using remote controlled bombs.⁴¹ He was also responsible for the death of nine persons, in an attack on the then

³² In re Maddela Yerra Channugadu, AIR 1954 Mad 911.

³³ Devender Pal Singh Bhullar v. State (NCT of Delhi), (2013) 6 SCC 195, ¶23.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Kehar Singh v. Union of India*, (1989) 1 SCC 20, ¶11.

³⁸ *G. Krishta Goud v. State of A.P.*, (1976) 1 SCC 157; *Maru Ram v. Union of India*, (1981) 1 SCC 107.

³⁹ *Kehar Singh v. State (Delhi Administration)*, (1988) 3 SCC 609, ¶11.

⁴⁰ *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1.

⁴¹ *Devender Pal Singh Bhullar v. State (NCT of Delhi)*, (2013) 6 SCC 195.

President of the Youth Congress, by employing forty kilograms of RDX.⁴² The petitioner was held guilty of the offences provided under §§419, 420, 468, and 471 of the Indian Penal Code, 1860 ('IPC'), §§2, 3 and 4 of the Terrorist and Disruptive Activities Act, 1987 ('TADA'), and §12 of the Passports Act, 1967.⁴³ His review petition was also dismissed by the Supreme Court.⁴⁴

In M.N. Das, the petitioner, a man already sentenced to life imprisonment for the murder of one Rajen Das, killed another person when he was out on bail.⁴⁵ The petitioner was then sentenced to death by the Sessions Court which was subsequently confirmed by the High Court.⁴⁶ On appeal the Supreme Court noted the aggravating circumstances of the manner of murder, which were, blows to the body of the victim with a sword, amputating his hand and beheading him, that too when he had already been sentenced to life imprisonment. These factors left the Court with no choice but to impose the death penalty.⁴⁷ The common denominator of both the cases was with regard to the delay of the executive in responding to the petitioners' clemency petitions.

Unlike Bhullar and M.N. Das, which dealt with single writ petitions, the Court in Shatrughan Chauhan dealt with twelve different writs. While eleven of the twelve writs petitions dealt with pleas for commutation of death sentences, there was also a solitary plea by the People's Union for Democratic Rights with a prayer to set guidelines for dealing with similar mercy petitions. There was one plea for commutation solely on the ground of mental illness, one on grounds of delay in hearing the clemency petition as well as mental illness, one on grounds of delay and solitary confinement, while the others were solely on the basis of delay by the executive in deciding the mercy petitions.

Pertinent to our discussion are the arguments by the petitioners in all of the above cases on the issue of 'supervening circumstances' that resuscitated their demand for commutation. Counsel for the petitioner in Bhullar drew the Court's attention to various international human rights instruments to which India is a signatory.⁴⁸ The real thrust of his arguments however, was based on the well-entrenched understanding of 'due process' under the Indian Constitution. Post the decision in *Maneka Gandhi v. Union of India* ('Maneka Gandhi'),⁴⁹ every executive and legislative decision must pass the tripartite

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Mahendra Nath Das v. Union of India, (2013) 6 SCC 253, ¶¶3-6.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Universal Declarations of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (December 12, 1948) Art. 5; see also International Covenant on Civil and Political Rights, December 23, 1976, 999 U.N.T.S. 171, Art. 7 (Those arguing in favour of commutation suggest that these treaties stipulate that India too must commute the death sentences of those languishing in prisons for long periods of times).

⁴⁹ Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

‘golden triangle’ touchstone of Articles 14, 19 and 21 of the Constitution.⁵⁰ This test requires State action to be just, fair and reasonable, and to be in consonance with the high standards of liberty, dignity and freedom guaranteed under Part III of the Constitution. It was pleaded that inordinate delay in the executive’s decision to reject the petitioner’s mercy petition offended the principles of the Constitution as it was arbitrary and lead to inhumane and degrading treatment of the petitioner. Further, courts are bound to uphold the right to speedy trial of accused persons which means that they should commute death sentences that are delayed. In the present case, the agonising nature of such delay had left the petitioner mentally ill. Moreover, the petitioner had prayed for commutation on sympathetic grounds as circumstances had drastically changed from the time the offence was committed.

A more limited plea, a subset of sorts, of the range of aforesaid issues was raised in *M.N. Das*. Counsel argued extensively that a delay of twelve years was sufficient reason for the court to exercise its powers under Article 136 and to commute the death penalty.

The plea in *Shatrughan Chauhan* considered four other ‘supervening circumstances’, apart from delay, which could possibly be considered as grounds for commutation. These are: the convict was suffering from insanity, schizophrenia or mental illness; the judgments relied on by the Trial Court/ High Court for coming to its sentencing decision being declared *per incuriam*; the convict was being kept in solitary confinement; and lapses in procedure.⁵¹

For the abovementioned ‘supervening circumstances’ the dictum of the Court can be broadly divided into three categories. First, delay and insanity, schizophrenia or mental illness can be the sole ground for commutation of death sentence. Second, judgments being declared *per incuriam* and solitary confinement cannot be grounds for commutation.⁵² Finally, the Court held that procedural lapses would only be examined on a cases-to-case basis, testing strict compliance of the rules.

A. DELAY AS A GROUND FOR COMMUTATION

The rule as laid down in *Triveniben*, is the most definitive judicial dictum with regard to delay cases, although judicial pronouncements subsequently have deviated from this position. The rule, simply put, is that delay must be seen in light of all circumstances to constitute a ground for commutation of the death sentence.⁵³

⁵⁰ *Id.*

⁵¹ *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, ¶24.

⁵² However, it is pertinent to note that with respect to the factor of the judgment being declared *per incuriam*, the Court only took cognisance of the cases cited by the various petitioners in the *Shatrughan Chauhan*. This was based only on the cases brought to the notice of the bench. But in a different factual matrix the basis of conviction may be different from the one in *Shatrughan Chauhan*; and therefore, for future cases, this question still remains unanswered.

⁵³ *Triveniben v. State of Gujarat*, (1989) 1 SCC 678.

In Bhullar, one of the arguments by counsel for the petitioner was that the ruling in *T.V. Vatheeswaran v. State of Tamil Nadu* ('Vatheeswaran')⁵⁴ which had held that long delay makes the sentence inhuman and degrading was the correct position of law, even though it had been overruled in *Triveniben*. Yet, the Court neither accepted nor rejected such an argument and merely termed it "attractive".⁵⁵

Since the present case was a terror case, the Court looked at it in a very restricted manner as it felt terror cases ought to be dealt with differently. In doing so, it carved out an exception to the *Triveniben* rule, which we shall refer to as the 'terror exception'. It felt that even if the decision in *Triveniben* was still the correct position of law, such a rule would have no applicability to offences where conviction was under the Terrorist and Disruptive Activities (Prevention) Act, 1987 ('TADA'), or related statutes. The reason stated was that in cases involving terrorist activities there was a higher threshold of culpability than other offences. This is largely due to the political nature of such offences, their scale and magnitude and the type of weapons used. The Court also underscored the effect of such offences on society. They have a demonstrative effect which has the tendency of dividing large sections of society and also induces the youth to join mindless militant campaigns in the name of religion or other objectives that can result in the death of many.⁵⁶ Moreover, the Court placed an additional burden on the petitioner to show that physical or mental illness due to detention was of such a degree that it renders the death sentence cruel, inhumane and degrading, and therefore, non-executable.⁵⁷

However, subsequently, in *M. N. Das*, the same judge acknowledged the existence of the rule that an inordinate delay will, in fact, give rise to a cause of action to the petitioners. He stated that the decisions in *Madhu Mehta v. Union of India*⁵⁸ and *Daya Singh v. Union of India*,⁵⁹ where delay alone was considered sufficient to commute the death sentence, were not in exercise of the Court's power to do complete justice under Article 142, but under Article 136. This is important, because this was the first time the Court identified the source of its power to commute a death sentence, one that is not explicitly codified anywhere as a legal principle. Therefore, although the Court felt that delay could be a ground for commutation, the same must be coupled with other circumstances mandating commutation. This is evidenced from the ratio, where the Court held that the delay of twelve years, coupled with the rejection of clemency petition by the President being *ultra vires*, jointly constituted grounds for vacating the death sentence.

⁵⁴ *T.V. Vatheeswaran v. State of Tamil Nadu*, (1983) 2 SCC 68.

⁵⁵ *Devender Pal Singh Bhullar v. State (NCT of Delhi)*, AIR 2013 SC 1975, ¶39.

⁵⁶ *Id.*, ¶8.

⁵⁷ *Id.*, ¶46.

⁵⁸ *Madhu Mehta v. Union of India*, (1989) 4 SCC 62 : AIR 1989 SC 2299.

⁵⁹ *Daya Singh v. Union of India*, (1991) 3 SCC 61 : AIR 1991 SC 1548.

Later, in *Shatrughan Chauhan*, the Court resumed the discussion from *Vatheeswaran*, and also took note of Justice Shetty's concurring opinion in *Triveniben*, which held that "inordinate delay may be a significant factor, but that cannot render execution unconstitutional".⁶⁰ The Court, however, observed that this concurring opinion was overruled by the majority judgment delivered by Justice Oza.⁶¹

Chronologically, the Court noted that until the 1980s, the average time for disposing of mercy petitions was between fifteen days to eleven months. This later increased to four years in the period between 1980-88, and subsequently, to twelve years from the 1990s to present. At this point, however, the court observed that no time could be fixed for their disposal.⁶² It went on to reiterate the self-imposed guidelines that the Union Government had adopted for dealing with mercy petitions,⁶³ and suggest that 'delay by the executive in deciding mercy petition' be included as a factor while disposing the mercy petitions.⁶⁴ An interesting observation pertinent at this point is that the Court in *Shatrughan Chauhan* worked on a premise that delay alone constituted a 'supervening circumstance' which mandated commutation. It therefore impliedly accepted the petitioners' argument that delay, or mental sickness, as listed above, alone could constitute valid grounds for commutation.

The court then specifically dealt with Bhullar's "terror exception" and took strong objection to such a position. It held that the legal effect of sentencing a person to death, under any law in India, would have a similar outcome. Additionally, the court reasoned that once condemned to death, no person could be further punished based on the depravity of his act.⁶⁵ The

⁶⁰ *Triveniben v. State of Gujarat*, (1989) 1 SCC 678 : AIR 1989 SC 1335, ¶76.

⁶¹ *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, ¶62.

⁶² *See Sher Singh v. State of Punjab*, AIR 1983 SC 465 (*per* Chandrachud, J.).

⁶³ The following are the broad guidelines considered by the Ministry of Home Affairs:

- a. Personality of the accused (such as age, sex or mental deficiency) or the circumstances of the case (such as provocation or other similar justification).
- b. Cases in which the Appellate court has expressed its doubt as to the reliability of the evidence and has nevertheless decided on conviction.
- c. Cases where it is alleged that fresh evidence is obtainable mainly with a view to seeing whether fresh enquiry is justified.
- d. Where the High Court has reversed on appeal an acquittal by a Session Judge or has on appeal enhanced the sentence.
- e. Difference of opinion in a Bench of two Judges necessitating reference to the third Judge of the High Court.
- f. Consideration of evidence in fixation of responsibility in gang murder cases.
- g. Long delays in the investigations and trial etc.

See Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1, ¶48; LOK SABHA DEBATES, *Clemency of Death Row Convicts*, 2014, 2014/MAGHA 22, 1935, February 11, Unstarred Question No. 3017, *answered by* Shri Mullappaly Ramachandra, Minister of State in the Ministry of Home Affairs, available at <http://mha1.nic.in/par2013/par2013-pdfs/l5-110214/3107.pdf> (Last visited on October 17, 2015).

⁶⁴ *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, ¶49.

⁶⁵ *Id.*, ¶57.

court then went so far as to declare the judgment in Bhullar *per incuriam* and held that death penalty under IPC and non-IPC cases are similar in nature.⁶⁶ Consequently, the convict's family filed a curative petition before the Apex Court and on February 19, 2014.⁶⁷ The Court ordered a medical examination of Bhullar's health to determine his mental condition.⁶⁸ Thereafter, on perusal of the medical report and in light of the dictum in Shatrughan Chauhan, the Supreme Court commuted the convict's death sentence to life imprisonment.⁶⁹ Similarly, deriving legal sanction from the same case, the Supreme Court commuted the death sentences of Rajiv Gandhi's assassins on account of delay.⁷⁰

While concluding the judgment in Shatrughan Chauhan, the Court listed certain guidelines for the uniform implementation of the existing procedure. Under the larger umbrella of Article 21, the Court held that solitary confinement prior to the rejection of a mercy petition is unconstitutional; legal aid should be provided as a matter of right and the rejection of a mercy petition should be intimated to the nearest Legal Aid Clinic, the prisoner and his family members; the self-imposed guidelines of the Union Government should be implemented uniformly without delay; a minimum of fourteen days' notice should be given to the convict before execution; regular mental health evaluation of death row convicts should be undertaken; all documents pertaining to the case should be made available to the convict; facilitation of meeting between the convict and family prior to execution should be ensured; and there should be compulsory post-mortem after execution.⁷¹

B. EXAMINING THE POWERS OF THE EXECUTIVE UNDER ARTICLES 72 AND 161 AND THE EXTENT OF JUDICIAL REVIEW OVER SUCH EXECUTIVE ACTIONS

As it had been contended in Bhullar that the position as laid down in Triveniben was incorrect in light of *Kehar Singh v. Union of India*,⁷² the Court deemed it necessary once again to clarify the executive's role under Articles 72 and 161 of the Constitution, and the extent of judicial review over such executive acts. In order to do this, the Court referred to a catena of cases to arrive at its decision.⁷³ It began by categorically stating that the power to commute a death sentence is not a private act of grace, rather a duty and constitutional

⁶⁶ *Id.*, ¶70.

⁶⁷ Navneet Kaur v. State (N.CT of Delhi), (2014) 7 SCC 264.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Union of India v. V. Sriharan, (2014) 11 SCC 1.

⁷¹ Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1, ¶259.

⁷² Kehar Singh v. Union of India, (1989) 1 SCC 204 : AIR 1989 SC 653 (This decision vested wide ranging powers of review over executive acts in the judiciary).

⁷³ Kehar Singh v. Union of India, (1989) 1 SCC 204 : AIR 1989 SC 653; Maru Ram v. Union of India, (1981) 1 SCC 107 : AIR 1980 SC 2147; Samsher Singh v. State of Punjab, (1974) 2 SCC

responsibility. Therefore, a balance must be struck between the interests of the convict and larger public welfare. It also noted that in exercising this power, the President or the Governor, must act on the aid and advice of the Council of Ministers. Moreover, the government has an affirmative duty to place all materials relevant to the case before the President or Governor, in order for him to make an objective and informed decision. After scrutinising all the facts relating to the nature and magnitude of the crime, its general effect on society, and the so-called ‘balance sheet’ of mitigating and aggravating circumstances, the President or the Governor, without being able to absolve the convict of his or her guilt, may change the final sentencing decision.

As regards the question of judicial review over the grant or rejection of clemency petitions, the Court took an interesting view. It observed that the judiciary could not sit in appeal or even review the powers exercised by the President or the Governor.⁷⁴ It could only interfere if the executive decision was taken without application of mind or without considering all the relevant facts and circumstances or if it was taken arbitrarily.⁷⁵ It further clarified that it could not review any finding of guilt since the Court was not competent to do so at that stage.⁷⁶ Therefore, to give convicts, who have suffered delay, the opportunity for a review of the executive’s decision would be an attempt to short-circuit the constitutional machinery and may also be barred as *res judicata*. To this extent, the Court ought to be commended for respecting the constitutional boundaries demarcated by the principle of separation of powers.

The Court felt that the “peculiar facts” of Bhullar did not justify an examination of the executive action taken under Article 72. Since the Court had created its own position of law under the ‘terror exception’, the question that comes to mind is whether the Court was creating yet another exception, and that the judiciary does not have the power to review executive actions taken under Articles 72 and 161 in terror cases. Was the position then, to be that even if exercised arbitrarily and against the principles of equality, justice and fairness, such actions could not be questioned in courts? From its subsequent decision in *M.N. Das*, it seems as though the court did concede that judicial review was an overarching power of the Court, and thus was available as a suitable remedy to death row convicts even in terror cases. However, the Court should not have left this position ambiguous.

In *M. N. Das*, the Court felt that the fact that President Patil was not made aware of an earlier decision by President Kalam on death sentence which had been commuted compelled the Bench to declare the decision as

831 : AIR 1974 SC 2192; *State (NCT of Delhi) v. Prem Raj*, (2003) 7 SCC 121; *Epuru Sudhakar v. State of Andhra Pradesh*, (2006) 8 SCC 161 : AIR 2006 SC 3385.

⁷⁴ *Devender Pal Singh Bhullar v. State (NCT of Delhi)*, (2013) 6 SCC 195 : AIR 2013 SC 1975, ¶41.

⁷⁵ *Id.*

⁷⁶ *Id.*

illegal. The court held that such retention of information stripped the then incumbent President of the opportunity to objectively consider all relevant facts and materials pertaining to the case.⁷⁷ This, in addition to the prolonged delay, was the basis of the vacation of the appellant's death sentence.

In Shatrughan Chauhan, the Court considered the aforementioned points, but further opined that the power under Articles 72 and 161 is subject to limited judicial review. The Court cited *Narayan Dutt v. State of Punjab* ('Narayan Dutt'),⁷⁸ where it was held that the power under these Articles could be challenged only on the following grounds:⁷⁹ (i) if the President/Governor was found to have exercised the power himself without the advice of the government; (ii) if the President/Governor transgressed his jurisdiction in exercising the said power; (iii) if the President/Governor passed the order without applying his mind; (iv) if the President/Governor passed the order on *mala fide* grounds; (v) if the President/Governor passed the order on some extraneous considerations.

These grounds were in addition to the grounds laid out in *Epuru Sudhakar v. State of Andhra Pradesh* ('Epuru Sudhakar'),⁸⁰ where the Court ruled that there must not be any political consideration in the exercise of such power. Moreover, if the executive does choose to exercise this power, it must do so after considering all relevant materials and circumstances before arriving at any conclusion. In Shatrughan Chauhan, the Court held that the executive overlooked certain "supervening circumstances" and thus it had the power of judicial review over the decision.⁸¹ This is in compliance with the Narayan Dutt guidelines,⁸² since it falls under the category of "an order passed without applying his mind", as application of mind would necessarily involve considering all relevant materials and circumstances.⁸³

IV. ARGUMENTS AGAINST DELAY AS A GROUND FOR COMMUTATION

The strongest arguments in favour of commutation have been that sentences of death accompanied by prolonged delay cause mental agony to the convicts and amount to inhuman punishments, perhaps even offending the rule against double jeopardy.⁸⁴ The advocates of commutation argue that since the death penalty is an irreversible decision, the duty of the State to exercise caution is much higher in these cases.⁸⁵ Moreover, they argue that the State ought

⁷⁷ *Mahendra Nath Das v. Union of India*, (2013) 6 SCC 253.

⁷⁸ *Narayan Dutt v. State of Punjab*, (2011) 4 SCC 353.

⁷⁹ *Id.*, ¶24.

⁸⁰ *Epuru Sudhakar v. Govt. of A.P.*, (2006) 8 SCC 161 : AIR 2006 SC 3385, ¶34.

⁸¹ *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1, ¶21.

⁸² *See Narayan Dutt v. State of Punjab*, (2011) 4 SCC 353.

⁸³ *Id.*

⁸⁴ *Devender Pal Singh Bhullar v. State (NCT of Delhi)*, (2013) 6 SCC 195 : AIR 2013 SC 1975; *Mahendra Nath Das v. Union of India*, (2013) 6 SCC 253.

⁸⁵ *Sher Singh & Ors. v. State of Punjab*, AIR 1983 SC 465; *Devender Pal Singh Bhullar v. State (NCT of Delhi)*, (2013) 6 SCC 195 : AIR 2013 SC 1975; *Shatrughan Chauhan v. Union of India*,

to respect the 'due process' rights of the convicts.⁸⁶ While considering of all of this, though the courts may not visit the merits of the initial case at the stage of assessing the question of commutation, they do keep in mind the gravity of the nature of the crime committed due to which the death penalty initially imposed. Herein lies the crux of the controversy: the proponents of commutation cry foul due to delay, but forget that at the stage of commutation, the convicts remain just as guilty. The reason that the judicial mechanism felt that death penalty was the only appropriate punishment in the case cannot be ignored if 'complete justice' is to be done. To analyse this point, it is important to understand how small the window of cases where the death penalty is awarded really are, which is discussed in Part A. In Parts B and C we then examine additional reasons for delay, and how the Triveniben decision has come to be misconstrued over time. Part D examines the impact of Shatrughan Chauhan judgment and reasons as to why judgment should not be considered a definitive step towards abolition of the death penalty in India.

A. DEATH PENALTY AS AN EXCEPTION RATHER A RULE

Death penalty in India, as has been made clear, is not awarded for ordinary offences. It is prescribed for certain very serious cases. Additionally, Indian jurisprudence with regard to the death penalty is constantly evolving, with the window of cases for which such a penalty is imposed, being narrowed rapidly. Several safeguards have been built into the system to ensure that judicial error is corrected in a multi-level process.

1. Procedural Sentencing

It is pertinent to note that under the IPC, no offence has a mandatory death sentence attached to it. The only provision which provided for mandatory imposition of the death sentence was §303 of the IPC which was struck down in *Mithu v. State of Punjab*,⁸⁷ on the grounds that it treated convicts sentenced to life differently from others and it arbitrarily took away their right to life and personal liberty thereby contravening Part III of the Constitution. Furthermore, this provision did not allow for judicial discretion.

In fact, long before this judgment, the Supreme Court in *Surja Ram v. State of Rajasthan*,⁸⁸ cited the famous American decision of *Dennis Councle McGautha v. State of California*,⁸⁹ wherein the court underscored the importance of judicial discretion in the sentencing process. Such discretion is

(2014) 3 SCC 1.

⁸⁶ *Id.*

⁸⁷ *Mithu v. State of Punjab*, (1983) 2 SCC 277 : AIR 1983 SC 473.

⁸⁸ *Surja Ram v. State of Rajasthan*, (1996) 6 SCC 271 : AIR 1997 SC 18; *see also* *Jagmohan Singh v. State of Uttar Pradesh*, (1973) 1 SCC 20 : AIR 1973 SC 947.

⁸⁹ *Dennis Councle McGautha v. State of California*, 28 L Ed 2d 711 : 402 US 183 (1971).

important in the interest of justice and equity because no objective standards of punishment can be placed by either the legislature or the judiciary.⁹⁰ As the Supreme Court has rightfully pointed out:

“We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society. A legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accenting the trend against the extreme and irrevocable penalty of putting out life”.⁹¹

After the conviction stage, the decision as to what sentence must be imposed is ultimately left to the judge. Although judges enjoy wide discretionary powers in awarding sentences, these powers are not unfettered as they are limited by guiding principles evolved by the judiciary and the legislature. While the Criminal Procedure Code of 1898 stipulated that “special reasons” must be recorded by the judge awarding life imprisonment as opposed to capital punishment, the re-enacted statute now requires the judge to record such reasons when passing the death sentence.⁹² Similarly, §235(2) of the CrPC provides useful guidance on how the sentencing decision must be taken. As observed by the Law Commission,⁹³ the legislature introduced this section in order to curb the inherent deficiencies of the existing sentencing system. It sought to bring about uniformity in the sentencing mechanism. This section states that after the determination of guilt of the accused, the judge must inform the accused of their conviction in order to give them the opportunity to present any mitigating circumstances or factors that may enable him to lower the penalty.⁹⁴ Non-compliance with this section constitutes a material irregularity and could vitiate the sentence.⁹⁵

In fact, the Supreme Court in *Santa Singh v. State of Punjab*,⁹⁶ went so far as to say that at this stage, not only could oral arguments be advanced by the accused but they could also place new evidence on record. Much later, in *Allaudin Mian v. State of Bihar*,⁹⁷ the Court reiterated the same and held that the courts at the trial level ought to adjourn proceedings and give sufficient

⁹⁰ PSA PILLAI, CRIMINAL LAW 392 (K.I. Vibhute eds., 11th edn., 2012).

⁹¹ *Id.*, 406; *Ediga Anamma v. State of Andhra Pradesh*, (1974) 4 SCC 443 : AIR 1974 SC 799, ¶126.

⁹² The Code of Criminal Procedure, 1973, §354(3).

⁹³ LAW COMMISSION OF INDIA, *Some Questions under the Code of Criminal Procedure Bill, 1970*, Report No. 48, 29, (July 1970), available at <http://lawcommissionofindia.nic.in/1-50/Report48.pdf> (Last visited on October 17, 2015).

⁹⁴ The Code of Criminal Procedure, 1973, §235(2); PILLAI, *supra* note 90, 406.

⁹⁵ *Santa Singh v. State of Punjab*, (1976) 4 SCC 190 : AIR 1976 SC 2386.

⁹⁶ *Id.*

⁹⁷ *Allaudin Mian v. State of Bihar*, (1989) 3 SCC 5 : AIR 1989 SC 1456.

time for both sides to place the relevant material when called upon to decide the question of the quantum of the sentence.⁹⁸ It sought to simplify the process of deciding this question and held that in case doubts arose in the minds of the judges in choosing between two sentences and recording reasons thereof, the court ought to award the lower sentence.

While awarding death sentences, courts not only have to follow statutory safeguards but also have to be wary of the possibility of judicial error. This was a concern expressed by Justice Bhagwati in his dissenting opinion in *Bachan Singh*.⁹⁹ This possibility of error is to a large extent rectified by the rule of confirmation at the High Court level. Moreover, it has been seen, that most cases proceed all the way up to the Supreme Court,¹⁰⁰ and even then, modern trends show the Court very rarely chooses to award such a sentence due to its ratio in the *Bachan Singh* case, as explained below.

2. The ‘Rarest of the Rare’ Doctrine

The judiciary, espousing a humanitarian approach toward the death penalty has sought to reinterpret the cases in which capital punishment may be awarded. Aware of India’s international commitments under various human rights treaties, it has been sensitive to the rising global outcry to put an end to this form of punishment. In doing so, it has tried to evolve jurisprudence that is representative of the changing attitude towards the death penalty. In this subsection, we argue that the decision in *Bhullar*, which noted that delay should not be a ground for commutation of a death sentence in exceptional cases such as those concerning terrorist activities; carries merit. In fact, our contention is that this rationale should apply not just for terror cases, but to all the ‘rarest of rare cases’, simply because the subset of the ‘terror exception’ created in criminal jurisprudence is congruous with that of the ‘rarest of rare cases’ subset. It is therefore necessary to examine the criteria for ascertaining both of these types of cases.

The Apex Court has taken up the question of the constitutional validity of death penalty a number of times. It did so for the first time, in *Jagmohan Singh v. State of Uttar Pradesh* (*Jagmohan Singh*),¹⁰¹ where it upheld the validity of the death sentence. It has also, on occasions, remarked that in the interests of social justice, an important role is discharged by judges in “suppressing grievous injustice to humanist values by inflicting deterrent punishment on dangerous deviants”,¹⁰² by imposing the death penalty.

⁹⁸ *Id.*

⁹⁹ *Bachan Singh v. State of Punjab*, (1982) 3 SCC 24 : AIR 1982 SC 1325.

¹⁰⁰ *Sher Singh v. State of Punjab*, (1983) 2 SCC 244 : AIR 1983 SC 465.

¹⁰¹ *Jagmohan Singh v. State of U.P.*, (1973) 1 SCC 20 : AIR 1973 SC 947 (The Court heavily emphasised that the Constitution through Articles 21, 72, 134, 161 and Entries I and II of List III of the Seventh Schedule pointed to intention of the framers’ to allow for such punishments).

¹⁰² *Paras Ram v. State of Punjab*, (1981) 2 SCC 508.

Subsequently, the decision in *Bachan Singh* was rendered in light of changes in legislative as well as judicial policy such as amendment of §303 of IPC and the *Maneka Gandhi* decision which brought in the “due process” right within Indian jurisprudence. Any law was now to be tested against Articles 14, 19 and 21 which were not mutually exclusive, rather complementary of one another.¹⁰³ The judges were also influenced by the Law Commission’s opinion that capital punishment be retained owing to the circumstances in India.¹⁰⁴ They held that the death penalty neither offended the golden triangle of fundamental rights nor did it offend the basic structure of the Constitution.¹⁰⁵ On matters of procedure, the Court reiterated the guidelines stated by the Bench in *Jagmohan Singh* that in awarding the death sentence, the courts ought to draw up a balance sheet of aggravating and mitigating circumstances. The Court held that certain facts like the age of the accused, their mental condition, their socio-economic condition, whether life imprisonment would reform and ultimately rehabilitate them, if the accused is a woman, if she is pregnant and so on,¹⁰⁶ merit consideration at the stage of sentencing.

Additionally, the Court noted that due regard must be paid to the brutal and horrendous nature of the crime before awarding such a harsh sentence. It sought to determine the nature of the crime by examining the *modus operandi*, the type of weapons used, and the circumstances of the offender. Justice Sarkaria, very rightfully noted that such a sentencing decision must be taken after leaving no question unanswered and after considering all relevant factors. He opined:

“Judges should never be bloodthirsty [...] A real and abiding concern for the dignity of human life postulates resistance to taking a life through life’s instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.”¹⁰⁷

Up until this point, the judicial trend was to impose the death sentence as a rule of thumb.¹⁰⁸ *Bachan Singh* marked a change in the judicial fiat in favour of life imprisonment being the rule and death sentence being the excep-

¹⁰³ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597.

¹⁰⁴ LAW COMMISSION OF INDIA, *supra* note 8, 354, as cited in *Bachan Singh v. State of Punjab*, AIR 1980 SC 898, ¶72

“Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to 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.”

¹⁰⁵ *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 : AIR 1980 SC 898.

¹⁰⁶ LAW COMMISSION OF INDIA, *supra* note 25.

¹⁰⁷ *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 : AIR 1980 SC 898, ¶209.

¹⁰⁸ See PILLAI, *supra* note 90, 402 (For a more elaborate discussion on the judicial imposition of the death sentence).

tion. This position was reaffirmed in *Machhi Singh v. State of Punjab*.¹⁰⁹ The Court also sought to expound the meaning of these ‘rarest of rare’ cases. It was explained that when faced with the following circumstances, it must consider awarding the death penalty:

“When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community [...] When the murder is committed for a motive which evinces total depravity and meanness [...] When the crime is enormous in proportion [...] [and] when the personality of the victim of murder [elicits similar reactions]”.¹¹⁰

Over the years, the judicial standards have made tests more specific and narrowed their scope of application.¹¹¹ Much later, in *Santosh Kumar Bariyar v. State of Maharashtra*,¹¹² the Court evolved a novel test. It was held that in coming to the sentencing decision, the Court should conduct a comparative analysis of death sentences awarded in past. This would ensure consistency in death penalty jurisprudence and would also ensure that judges do not arbitrarily impose such punishments. Though each case must be judged on its individual merit, judges should be cognisant of other cases where death sentences have been imposed in order to ascertain the common thread.

Having established that the death penalty may only be imposed in the most exceptional circumstances, let us juxtapose the basis on which the Supreme Court in the abovementioned decisions distinguished the nature of cases where death penalty is imposed, from other criminal cases, with Bhullar’s basis of distinguishing the nature of crime in terror cases from other cases attracting the death penalty. The Court in Bhullar held:

“...long delay may be one of the grounds for commutation of the sentence of death into life imprisonment cannot be invoked where a person is convicted for offence under TADA or similar statutes. Such cases stand on an altogether different plane and cannot be compared with murders committed due to personal animosity or over property and personal disputes. The seriousness of the crimes committed by the terrorists can be gauged from the fact that many hundred innocent civilians and men in uniform have lost their lives...They use bullets, bombs and other weapons of mass killing for achieving their perverted political and other goals or wage war against the State. [...] they do not show any respect for human lives. [...]

¹⁰⁹ *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470 : AIR 1983 SC 957.

¹¹⁰ *Id.*; see also *Lehna v. State of Haryana*, (2002) 3 SCC 76, ¶25.

¹¹¹ *Panchhi v. State of U.P.*, (1998) 7 SCC 177 : AIR 1998 SC 2726.

¹¹² *Santosh Kumar Bariyar v. State of Maharashtra*, (2009) 6 SCC 498.

The families of those killed suffer the agony for their entire life, apart from financial and other losses. It is paradoxical that the people who do not show any mercy or compassion for others plead for mercy and project delay in disposal of the petition filed under Article 72 or 161 of the Constitution as a ground for commutation.”¹¹³

Note that the abovementioned paragraph in essence bears striking resemblance to the factors that are considered when imposing capital punishment. For instance, when Justice Singhvi sought to distinguish terror cases from other cases where the death penalty is awarded, he cites the impact of terrorism on the collective conscience and moral fabric of society, the abhorrent nature of the crime etc. Similarly when the death penalty is imposed, similar factors, such as the depravity of crime, or the *modus operandi* are taken into consideration. In cases where the death penalty is awarded, the court has to ascertain whether the crime constitutes the ‘rarest of rare’ case. Similarly, in Bhullar commutation could not be allowed for terror cases because they involved the most heinous crimes. On a closer reading, it becomes clear that basis for distinction used in regular death penalty cases and the one used in Bhullar are analogous. Therefore, both classes of cases constitute subsets within the most exceptional criminal cases, and the Court created an exception within an exception, which was unnecessary.

However, the larger point made by the Court must not be missed. The point is that when there are crimes so heinous that they are on a higher threshold than other crimes, courts cannot simply commute death sentence on account of a delay. While the Court restricted the class of heinous crimes to terror cases, it is our argument that all cases where the death penalty is imposed already belong to the ‘rarest of rare’ category, of which no further categorisation is possible, and therefore, commutation should not be so easily handed out on account of delay, owing to the exceptional nature of the crime.

It is clear that death penalty today is awarded after much deliberation and to very limited category of cases. Therefore, while operating within the narrowed sphere, the courts have to hold a much higher threshold of humanist values, without being swayed by public opinion. These convicts have been held guilty by courts of law; and even the executive, which is empowered to commute death sentences for larger public welfare has chosen not to do so. Therefore, the nature of such crimes ought to be placed on a higher pedestal than others. In light of the aforementioned standards for the imposition of the death penalty, mere delay cannot absolve the convict from execution of the death sentence. In circumstances of delay, courts must exercise caution in order to ensure that those guilty of the most brutal crimes: murderers, rapists, the

¹¹³ Devender Pal Singh Bhullar v. State (NCT of Delhi), (2013) 6 SCC 195 : AIR 2013 SC 1975, ¶167.

scourge of the underworld and those responsible for the deaths of innocent men, women, and children, leaving indelible scars in the minds of families and friends of the victims, and the society at large, are not allowed to take the benefit of procedural delays at their instance, or inherent systemic delays in the criminal justice framework.

B. DELAY CANNOT BE THE SOLE FACTOR FOR COMMUTATION

Numerous courts, even before independence, have considered the question of delay as a ground for commutation of death sentences. The Supreme Court however, in light of conflicting decisions rendered in the cases of *Vatheeswaran*, *Sher Singh*,¹¹⁴ and *Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra*,¹¹⁵ felt that the issue ought to be settled once and for all by a constitutional bench.¹¹⁶ Consequently, the main source of law, which has till date defined the position of law with regard to delay as a ground for commutation of the death penalty, is the final order of the Apex Court in *Triveniben*:

“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 light of all circumstances of the case to decide whether the execution of the 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* [...] stands overruled”.¹¹⁷

This order has been misconstrued to impress that a delay in the disposal of a clemency petition automatically compels courts to commute the death sentence. However, on a closer look at the wording of the above order, the elements that define the power of the courts in exercise of this post-mercy jurisdiction become abundantly clear: (i) the court may examine the nature of the delay; (ii) the court may examine the circumstances that ensued after the imposition of the death sentence; (iii) the court may not reopen the question

¹¹⁴ *Sher Singh v. State of Punjab*, (1983) 2 SCC 244 : AIR 1983 SC 465.

¹¹⁵ *Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra*, (1985) 1 SCC 275 : AIR 1985 SC 231.

¹¹⁶ V.N. SHUKLA, *CONSTITUTION OF INDIA* 406 (M.P. Singh eds., 4th edn., 2008).

¹¹⁷ *Triveniben v. State of Gujarat*, (1989) 1 SCC 678 : AIR 1989 SC 1335.

of the guilt of the accused; (iv) no fixed period can be prescribed to define the term ‘delay’; (v) the court must entertain the question of delay in light of all circumstances of the case.

The Triveniben judgment however, is not the only decision on this point, for the Sher Singh judgment had already clarified this position before Triveniben. Justice Chandrachud, while admitting that such post-mercy jurisdiction existed with the Court, cautioned courts from exercising a free hand over such cases. He warned that all prisoners on death row belong to the same breed of the ‘rarest of rare’ criminals and to allow only some of them to take the benefit of the delay would be unfair to the others.¹¹⁸ He noted that it was far-fetched to think that the court for sheer helplessness could be forced to commute the sentences of hardened criminals who would subsequently become eligible for parole. While he emphasised on the fact that the judiciary must not stipulate a time period for the executive to dispose of such petitions, he also noted that a self-imposed deadline must be set by the executive who must expeditiously deal with such matters. Further, when considering such cases, the court cannot lose sight of circumstances that lead to the judicial imposition of the sentence – the nature of the crime, its impact on society, and the likelihood of the repetition of the offence. These suggestions were very similar to what was later held in Triveniben.

On a harmonious reading of the two judgments, we find a framework is created for dealing with such matters. The most important proposition culled out by the court is that a delay can never be the only factor considered. Delays can furnish a cause of action but can never be the only factor to commute death sentences. Also, delays must have led to some consequential, fundamental change of circumstances or ‘supervening circumstances’ that must have occurred in the period when the executive was considering the clemency petition. These ‘supervening circumstances’ must be so exceptional in nature that they would have influenced the original sentence of death itself, when it was being awarded. The courts in such situations must look into whether the convict has shown signs of reform is engaged in any socially productive activity or has contributed innovatively in fields where the society would benefit. Simply put, at the stage of commutation, the Constitutional Bench insisted that courts apply a ‘delay *plus* all other circumstances’ formula to ascertain if a fit case was made out for commutation of the death sentence.

We do not, however, wish to turn a blind eye to the realities of the Indian criminal justice system, which is sadly marred, *inter alia*, by instances of custodial deaths, inhumane living conditions, and brutality by prison authorities.¹¹⁹ In all such cases, where in the period during which the executive

¹¹⁸ Sher Singh v. State of Punjab, (1983) 2 SCC 244 : AIR 1983 SC 465.

¹¹⁹ Amnesty International, *India: Torture, Rape and Deaths in custody*, June 20, 1992, available at <http://www.amnesty.org/en/library/asset/ASA20/006/1992/en/d8f411b5-edaa-11dd-9ad7-350fb2522bdb/asa200061992en.html> (Last visited on March 1, 2014).

is considering the clemency petition, there is reason to suggest that prisoners have been unlawfully treated; commutation would be the order of the day. Similarly, if the convict is suffering from a debilitating disease or is suffering in prison due to the authorities violating the guidelines of *Sunil Batra (2) v. Delhi Administration*,¹²⁰ then too, the courts must not be reluctant to commute the death sentence of the convicts. However, in all other cases, where convicts have been provided sufficient facilities in prison, such as work, sports and recreational programs, education, etc., and the circumstances have not changed sufficiently for the court to intervene with the original sentencing decision, petitions for commutation ought to be rejected.

Another reason why delay alone should not be used as an excuse to commute death sentences is that one of the most important tests applied by the courts before imposing capital punishment is to ascertain whether the accused shows remorse, and if there is any possibility of reform.¹²¹ It is only after answering these questions in the negative that the death sentence is awarded. Thus, when the death sentence is vacated in the post-mercy rejection stage, the question beckons, whether the person has really shown potential to reform. This issue has never been addressed by the courts. Moreover, if the appropriate test/issue is that of reformation of the convict, then at the review stage also the courts are bound to follow the 'delay plus all circumstances' formula, as reformation would constitute one of these 'all circumstances'.

In addition, the judiciary has incorrectly adopted the understanding that convicts lose hope as soon as they are sentenced to death and that from then on the thought of their pending demise is an agonising experience.¹²² If that were true then people would not appeal from lower courts to higher ones but rather approach the executive directly for pardon. It is our opinion that it is hope that singularly pushes any person along the entire tedious legal process and a person does not cease to be hopeful towards favourable outcome immediately after the death sentence has been imposed. There is still the hope that the executive may pardon the person. There is, in fact, a higher possibility that the executive may pardon the convict, as the President or the Governor is not bound by the strict rules of evidence.¹²³ The boundaries set by the law in this regard are considerably loose, in the sense that the President or the Governor can choose to turn a blind eye to the matter of the guilt of the convict, and may pardon them if they see fit in public interest, and so on.¹²⁴

¹²⁰ *Sunil Batra (2) v. Delhi Administration*, (1980) 3 SCC 488 : AIR 1980 SC 1579.

¹²¹ *Santosh Kumar Bariyar v. State of Maharashtra*, (2009) 6 SCC 498.

¹²² *T.V. Vatheeswaran v. State of T.N.*, (1983) 2 SCC 68 : AIR 1983 SC 361; *Sher Singh v. State of Punjab*, (1983) 2 SCC 244 : AIR 1983 SC 465; *Mahendra Nath Das v. Union of India*, (2013) 6 SCC 253.

¹²³ *Mahendra Nath Das v. Union of India*, (2013) 6 SCC 253.

¹²⁴ *Id.*

Ultimately, the problem with delay cases is that the approach of courts is myopic. They restrict their basis for commutation from the point of view of the convict alone. If at the time of conviction the courts are compelled to consider the brutal nature of the crime, the plight of the victims, the worthiness of the death sentence, then why should the court not consider these factors at the commutation hearing? If, at the original conviction and sentencing stage, courts are required to balance the aggravating and mitigating circumstances, the same approach must naturally be resorted to in case of a plea to commute the sentence. Therefore, the courts must not continuously reinterpret the authoritative decision of the five-judge Bench in *Triveniben* from time to time,¹²⁵ and must respect *stare decisis*.

With the advent of the Right to Information, convicts are empowered with a tool to track the status of their petitions at every stage. This tool may be used to ensure that every application is expeditiously processed and they may seek recourse in the courts in case they feel that their petitions are not being treated with the attention they deserve. It is not unreasonable to expect this minimal standard of vigilance from the convict, especially since they constantly complain of the agonising mental torture and cruelty of the shadow of death hovering over them.

C. ARTICLE 72 AND 161 PETITIONS HAVE A NUMBER OF ASSOCIATED FACTORS LEADING TO DELAY

The Federal Court, as early as 1944, observed that in commutating death sentences that have been marred by delay, the powers that the court exercises are very similar to that of the executive.¹²⁶ It must be kept in mind that the power to grant pardon is one of the highest constitutional responsibilities, vested solely in the executive.¹²⁷ When convicts reach out to the executive, although they have not been absolved of their guilt, they are in principle at least, going on appeal to a constitutional terminus of authorities that can commute their sentence. This power is the sole prerogative of the executive. To allow the

¹²⁵ This can be seen from the evolving decisions in *Madhu Mehta v. Union of India*, (1989) 4 SCC 62 : AIR 1989 SC 2299, *Daya Singh v. Union of India*, (1991) 3 SCC 61 : AIR 1991 SC 1548, *Bhullar*, and finally *Shatrughan Chauhan*. All of these are cases where the court did not strictly abide by the 'delay plus other circumstances' formula while commutating.

¹²⁶ *Piare Dusadh v. King Emperor*, AIR 1944 FC 1, ¶6

“This is a jurisdiction which very closely entrenches on the powers and duties of the executive in regard to sentences imposed by courts. It is a jurisdiction, which any court should be slow to exercise. We do not propose ourselves to exercise it in these cases. Except in Case No. XLVII (in which we are commutating the sentence largely for other reasons as hereafter appears), the circumstances of the crimes were such that if the death sentence which was the only sentence that could have been properly imposed originally, is to be commuted, we feel that it is for the executive to do so.”

¹²⁷ *Devender Pal Singh Bhullar v. State (NCT of Delhi)*, (2013) 6 SCC 195 : AIR 2013 SC 1975, ¶¶21-2.

judiciary an opportunity to review a matter, which after a three-tier judicial process and possibly with review and curative petitions, has been rejected by the executive, seems like an invention of jurisdiction, against the intention of the Constitution. While there is a legal basis for admitting such claims within the extraordinary writ jurisdiction conferred upon the Supreme Court, the essence of this principle-based argument must be kept in mind while dealing with such cases, especially since this is a persisting concern displayed by the Supreme Court.¹²⁸ The court must thus, tread these waters with utmost care.

There are two factors that the court in commutation cases must consider. *First*, at whose instance has such a delay been caused? Although the judiciary is vigilant towards such abuses, on several occasions, it is the lawyers of death row convicts who file their petitions as late as possible, in a bid to delay the disposal of a petition.¹²⁹ They also often resort to filing multiple petitions so that the executive takes longer to consider the entire case.¹³⁰ Later, in the event their petitions get rejected, the same lawyers are the first to run to court on the false pretext of delay being attributed to the State alone.¹³¹ It is in such circumstances that a fault-based approach is preferable. In *Sher Singh*, it was aptly held that to allow convicts to take advantage of delays caused on their account would be arbitrary and unfair, as one class of death row convicts would now be eligible for having their sentences commuted, while the others would not.¹³²

The *second* consideration is, if the delay has been caused by the State, the court must provide certain latitude for unavoidable delays in the system. In India, any convict on death row may, under Articles 72 and 161 of the Constitution, petition for clemency. However, before this is placed before the President for consideration, the Judicial Wing of the MHA has to make a recommendation. For such a recommendation to be made, the petitions are firstly considered by officers at various levels within the MHA.¹³³ These officers may have different ideologies, morals and philosophies. After the lower level bureaucrats of the MHA make their recommendation, they may be modified or even completely changed by their seniors and political heads at the Ministry.¹³⁴ Other administrative incidentals may crop up, such as the transfer of officers, issuance of notifications by the Ministry to deal with such cases in a particular manner, requirement of further consideration by the Ministry in the event that

¹²⁸ *Sher Singh v. State of Punjab*, (1983) 2 SCC 244 : AIR 1983 SC 465; *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1.

¹²⁹ *Sher Singh v. State of Punjab*, (1983) 2 SCC 244 : AIR 1983 SC 465.

¹³⁰ See, e.g., *Mahendra Nath Das v. Union of India*, (2013) 6 SCC 253; *Devender Pal Singh Bhullar v. State (NCT of Delhi)*, (2013) 6 SCC 195 : AIR 2013 SC 1975.

¹³¹ *Pratt v. Attorney General of Jamaica*, (1994) 2 AC 1: (1993) 3 WLR 995 (Jamaica), ¶60.

¹³² *Sher Singh v. State of Punjab*, (1983) 2 SCC 244 : AIR 1983 SC 465.

¹³³ Ministry of Home Affairs, Judicial Division, available at http://www.mha.nic.in/judicial_new (Last visited June 10, 2014) (Within the MHA the petition is considered by the Under Secretary, Joint Secretary (Judicial) and Joint Secretary (C&PG)).

¹³⁴ Interview with Advocate Raj Kamal, K.T.S. Tulsi Chambers, April 19, 2015 (Advocate Raj Kamal was counsel arguing for the petitioners in *Shatrughan Chauhan* case).

the President returns the petitions with certain reasons and so on. This may elicit a reassessment of petitions.¹³⁵ On a more macro level, governments may change, with a new one having a different agenda altogether; the personal belief systems of the incumbent President may differ from the last one (as was the case in M.N. Das's petition). Consider the following instances:

Instance 1: Multiple representations made by NGOs, international institutions, statesmen and foreign governments to pardon convicts on death row may in some cases also add to the delay. This is on account of submitting such representations to Ministries or Departments within the government not concerned with their disposal. This in fact was one of the arguments advanced by the State in Bhullar case, where a number of foreign governments, Sikh organisations, human rights groups and so on, had filed various petitions at various levels of the government, transcending ministries.

In *Epuru Sudhakar*, the Supreme Court emphasised on the requirement of decisions taken under Article 72 to be based on the principles of justice, fairness and rule of law, which must be free of political, religious or social considerations. It warned that the Court would be forced to step in, if the decision-making process was vitiated by arbitrariness.¹³⁶ Thus, any executive action in this regard, must be taken with utmost care and caution, and it is because such care has to be exercised that delay may be caused.

Instance 2: Another corollary to the concept of rule of law being read into executive actions under these Articles is the inevitable linking of multiple cases. For instance, consider A's case, a convict on death row whose mercy petition has been rejected by the MHA and all that is awaited is the President's signature. However, before the petition is rejected, there comes the case of B, another convict with identical facts, but whose case the media has sensationalised. The government may decide to accept B's petition, but by doing so, it would be forced to reconsider A's case.

Evidently, with due process, come undue delays. However, the balance would always tilt in favour of protection of these procedural safeguards *vis-à-vis* speedy disposal of such cases. In these circumstances, the courts must factor such incidental delays as inherent to the criminal justice system, and not label them as grounds to commute a death sentence.

D. EFFECT OF SHATRUGHAN CHAUHAN

Apart from the substantive discussion surrounding delay as a ground for commutation of death penalty, Shatrughan Chauhan also gave some procedural guidelines for the executive to comply with. While following the

¹³⁵ *Id.*; Mahendra Nath Das v. Union of India, (2013) 6 SCC 253.

¹³⁶ *Epuru Sudhakar v. State of A.P.*, (2006) 8 SCC 161 : AIR 2006 SC 3385.

established jurisprudence on the subject, the case fell just short of recommending a specific time period within which the mercy petitions should be disposed. It noted that the onus is on the MHA to send recommendations to the President within a “reasonable and rational” time frame.¹³⁷

Now it is important to analyse the executive’s response to the ratio of this judgment. One can reasonably infer that the Court seeks to motivate the executive to ensure timely disposal of the mercy petitions. However, one must understand that timely disposal of mercy petitions must not be misconstrued as passive acceptance of mercy petitions. The executive could very well choose to comply with the order of the Court and yet reject the mercy petitions. To argue that Shatrughan Chauhan would lead to suspension of imposition of death penalty would be wholly incorrect. It is only after the next set of mercy petitions are cleared by the MHA that the effect of Shatrughan Chauhan can be analysed. It is our opinion that this effect can also be negative.

In a scenario where the executive decides to strictly comply with Shatrughan Chauhan and reject mercy petitions on a timely basis, will convicts choose the same line of argument? Thereafter, if the executive refuses to execute convicts on a timely basis, will they then argue that the delay in execution is a ground for commutation of death penalty? The answers to all such questions lie in respecting the established constitutional framework wherein the decision of the executive is final unless procedurally flawed. Further, delay cannot be the sole ground for commutation of death penalty and the ‘delay plus all circumstances’ must be the standard which can give rise to such a cause of action.

V. CONCLUSION

Public sentiment channelled through the efforts of the legislators in the hallowed chambers of Parliament has reflected time and again a resolve to retain the death penalty. This sentiment is not the cogitation of some mindless ‘mob mentality’. The intelligentsia, as evidenced through the reports of the Law Commission, and numerous judgments by the highest judicial authorities has time and again felt the need to retain such a punishment. Such a belief persists not just in India, but transcends jurisdictions of ‘civilised nations’, many of whose legal systems are also premised on justice, equity, fairness and rule of law. Moreover, this discussion is not merely academic, neither is it correct to solely rely on practical approaches of collecting statistics and other empirical data, since they can never truly capture the intangible sentiment and impact that the idea of the death penalty has on the mind of society as a whole. Therefore, courts must tread with caution when they impose such a punishment, and more so when they choose to commute the same.

¹³⁷ Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1, ¶259.

Perhaps a day may come when India decides to do away with this punishment altogether, and in all likelihood, it rightfully may. However, until that day comes it must be noted that the apprehensions of most abolitionists have found voice by way of judgments, which have narrowed the scope of when the death penalty may be awarded. In fact, one would say, in the present scheme of things, the number of cases in which the death penalty may be inflicted, if correctly applied according to judicial guidelines, would only further dwindle. The issue at hand to be understood, though, is not the legality or morality of awarding such a punishment. The fact that remains is, in post-mercy cases such a punishment has already been awarded, and reaffirmed by the various organs of the state based on notions of rule of law.

It must ultimately be remembered, that the power to commute death sentences has not been derived from any codified legal principles. The court in exercise of its supervening powers to do “complete justice”¹³⁸ vacates the sentence if it is the most appropriate remedy. However, the courts, primarily enforcers of individual rights, must not lose sight of the fact that justice is not a one-sided concept. Looking merely at the effects of delay on the prisoner alone does not satisfy the interests of justice, since it does not factor in the interests of society at large, or the agony of the friends and families of those who have lost their loved ones, for whom no amount of compensation can have a restorative effect. The Supreme Court, essentially a constitutional court, must be mindful of its role in setting the law of the land, which has far-reaching implications that permeate the lives of real people, and goes deep into the hearts and minds of society, to which not only the victims and their families belong, but also the convicts themselves. The courts must find it in themselves to be humanitarian in their approach, yet not shy away from their responsibility to steel their hearts and award the correct, exemplary punishment when the situation so demands.¹³⁹

Delay matters represent a special category of cases where as discussed above, after due consideration, both the judiciary, as well as the legislature, in all of their wisdom have not found it fit to commute the sentence of the those convicted for the rarest of rare cases. The question of commuting their sentences must therefore be treated with caution. So long as the judge considering the matter does not find himself going against the *Triveniben dicta*, he must not commute the sentences of death row inmates. As Justice Mukherjee had put it when reaffirming the death penalty, “If, in spite thereof, we commute the death sentence to life imprisonment we will be yielding to spasmodic sentiment, unregulated benevolence and misplaced sympathy”.¹⁴⁰ Accordingly, in light of the arguments advanced above, we conclude that delay *simpliciter* must not be the only ground to commute the death sentences of a convict.

¹³⁸ The Constitution of India, 1950, Art. 142.

¹³⁹ See *Mahesh v. State of Madhya Pradesh*, (1987) 3 SCC 80 and *Ravji v. State of Rajasthan*, (1996) 2 SCC 175 (for a discussion on the same); see also *State of M.P. v. Munna Choubey*, (2005) 2 SCC 710, as cited in *Mahendra Nath Das v. Union of India*, (2013) 6 SCC 253, ¶12.

¹⁴⁰ *Govindaswami v. State of T.N.*, (1998) 4 SCC 531.