



JUDICIARY IS NOT INFALLIBLE: CRITICAL ANALYSIS OF DEATH PENALTY CASES IN INDIA

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Abstract

Our criminal justice system is fallible. We know it, even though we don't like to admit it. It is fallible despite the best efforts of most within it to do justice. And this fallibility is, at the end of the day, the most compelling, persuasive, and winning argument against a death penalty. This paper primarily talks about the uncertainty in system of legal decision-making that fortify the vindication for Abrogation of the Death sentence. The purpose of study is to bring to light that to indicate that legal decision-making is enigmatic with error, indeterminacy and uncertainty, and though this is not necessarily a question for law in general, it does pose a problem to capital punishment in particular. Given that in the secular perspective, death signifies complete end to life, so it is irrevocable, its inconsistency with uncertainty of law makes the punishment exceptionally cruel and unreasonable.

The investigator has pursued secondary data collection. This is a doctrinal study. The investigator has made broad use of judicial precedents in this paper, so as to perceive tendency in the judicial utterance in context of the 'Rarest of the Rare' principle. The researcher has also utilized books, commentaries, comments, articles, treatises, notes, and other writings to consolidate the various prospects of jurists, with the purpose of introducing a comprehensive view.

Keywords: The Supreme court, Death penalty, Rarest of Rare, Law commission India, Amnestyinternational.

“We are all the creation of god. I am not sure
a human system created by a human being is
Competent to take away a life based on artificial
and created evidence”.

- **A.P.J. Abdul Kalam**

I. INTRODUCTION

The capital punishment is a lawful penalty in India, which is authorised for some criminal act under the country's main substantive penal laws, the Indian Penal Code, 1860, as well as other legislations.¹To save the death penalty from the miscarriage of justice, the Supreme Court of India in the Bachan Singh case²has accepted the norm that the punishment of death can be imparted only in “rarest of the rare” cases. But this is evident from some cases that there are certain inherent defects in the application of this principle. The Court itself recognized the fallibility in the application of death sentence by stating that extremely uneven application of “rarest of the rare” cases principle has brought on inconsistency in the administration of death sentence.³The death penalty is the extremelyinhuman, crueland degrading punishment. It expresses an unacceptable negation of dignity and integrity ofhuman. It is irreversible, and where court system is open to error or discrimination, the capital punishment will unavoidably be imposed on the innocent.⁴ Mahatma Gandhi who uses to believe and follow the principle of “ahimsa” said that an eye for an eye one day will make whole world blind (Krishnan and more, 1978)⁵

A generous system of criminal justice is presumed on a statement that “it is better that ten guilty persons escape thanthat one innocent suffer”.⁶ An adjudicator recommended this viewsaying, “the principle of benefit of the doubt supports thefact that you can acquit hundred guilty people for want ofevidence, but convicting an innocent is a great sin”.

The People's Union for Civil Liberties (a human rights organization) andAmnesty International India (a non-governmental human rights body) has outlined thecontrol of capital punishment system in India on the project of “Lethal Lottery: TheDeath Penalty in India”. It has analyzed the Capital punishment cases decided by the ApexCourt of India from 1950 to 2006. This has confirmed some defects in theadministration of the death penalty in India. It argued that over the years, the person ororganization who is demanding the abolition of the death penalty has relied heavily onthe faulty application the “rarest of the rare” cases principle.

¹en.wikipedia.org

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

³Santosh Kumar Bariyar v. State of Maharashtra, (2009) 6 SCC 498, para 110.

⁴cdn.penalreform.org

⁵docs.manupatra.in

⁶ Sir William Blackstone, Commentaries on the Laws of England,4 (Clarendon Press 1765-1769); Alexander Volokh, ‘N Guilty Men’,University of Pennsylvania Law Review,1 (1997)173, 216.

The 262nd report of the Law Commission of India also recognized that the doubtfulness has remained a major concern in the administration of death sentence cases in the 35 years since the leading precedent on the subject has been propounded.⁷ The Indian law commission's 262nd report has suggested the abolition of penalty of death for all crimes except terrorism related cases. That report has been widely accepted as a liberal step in Indian death penalty jurisprudence. Presently, in India about 403⁸ prisoners are on death row. The most latest executions carried out in India. In March 2020, four men were hanged in the Tihar Prison Complex for gang rape and murdering Jyoti Singh in Delhi in December 2012.

II. LEGISLATIVE BACKGROUND OF DEATH PENALTY IN INDIA

The death penalty was the default punishment for murder in the Criminal Procedure code (CrPC) of 1898, and judges had to show reason in their judgments if they wished to inflict life imprisonment instead⁹. The necessity of documented justifications for not inflicting the death sentence was abolished from the CrPC in 1955, demonstrating no legislative preference between the two penalties. When the CrPC was again revised in 1973, life imprisonment became the rule, with the death sentence reserved for "extraordinary situations" requiring "special reason".¹⁰ This substantial shift indicates a willingness in India to minimise the use of the capital punishment. The Criminal procedure code of 1973, similarly divided the trial of criminal proceedings in dual parts, one is distinct hearings for conviction and another for sentence.

III. LAW COMMISSION REPORT NO. 262 (2015)

In 2015, India's Law Commission released its 262nd report on the topic of death punishment.¹¹ The matter was brought before the Law Commission, which was led by Justice A.P Shah. in the case *Bariyar v. State of Maharashtra*, April 2009¹² and *Shankar Kisanrao Khade v. State of Maharashtra*, April 2013.¹³ The commission extensively studied various aspects of death penalty such as a role of deterrence, uniform applicability of guidelines, victim justice and concluded that the punishment should be abolished except for in the matters of terrorism. The Commission concluded after studying the issue extensively that the death penalty does not serve the penological goal of deterrence any more than life imprisonment. It was opined that it fails to achieve any constitutionally valid penological goals. The Law Commission also concluded that in focusing on the death penalty as the ultimate measure of justice to victims, the restorative and rehabilitative aspects of justice are lost sight of. The discretionary power of judges and uneven application of *Bachan Singh v. State of Punjab*, May 1980 in these cases goes against the constitutional principles and principle of equality making the whole process arbitrary and subjective to whims of the judges. The

⁷ 262nd Report of the Law Commission of India, The Death Penalty, 2015, p. ii.

⁸ "Project 39A — Annual Statistics" (<https://www.project39a.com/annual-statistics>). *Project 39A*. Retrieved 6 October 2020.

⁹ *Lethal Lottery: The Death Penalty in India*. Amnesty International India and People's Union for Civil Liberties (Tamil Nadu & Puducherry). 2008.

¹⁰ "Section 354 in The Code Of Criminal Procedure, 1973" (<https://indiankanoon.org/doc/1266667/>). *Indian Kanoon*. Retrieved 7 October 2020.

¹¹ 262nd Report of the Law Commission of India, The Death Penalty, 2015, p. ii.

¹² "Santosh Kumar Satishbhushan Bariyar vs State Of Maharashtra on 13 May, 2009". *Indian Kanoon*

¹³ "Shankar Kisanrao Khade vs State Of Maharashtra on 25 April, 2013". *Indian Kanoon*.

commission also identified some systematic impediments such as lack of resources, outdated modes of investigation, over-stretched police force, ineffective prosecution, and poor legal aid making the administration of the death penalty vulnerable to errors .¹⁴

IV. INTERNATIONAL SCENARIO

“The International panorama concerning the death sentence has transformed in recent decades, in terms of international law as well as state practise.” In comparison to 1967, when the Commission's 35th Report was released, and 1980, when the Bachan Singh decision was handed down, today the vast majority of nations have abolished the death sentence in law or practise. Even those that keep it carry out very lesser killings than in previous decades.”¹⁵ “The current status and application of the capital punishment point to an undeniable trend toward abolition. Only seven nations in the world had abolished the capital punishment when the United Nations was founded in 1945.”¹⁶ Now 144 nations throughout the world, on the other hand, had abolished the Capital punishment in law or practise so far December 31, 2020. Throughout history, capital punishment has been utilised in practically every country. The vast majority of nations have now either eliminated or phased out the practise.

In December 2020, the plenary session of the UN General Assembly (UNGA) saw a record number of states (123) supporting the adoption of its biennial resolution calling for the establishment of a moratorium on executions with a view to fully abolishing the death penalty.¹⁷ For 40 years, Amnesty has been agitating to abolish the capital punishment all over the world. Amnesty observes its use by all countries to reveal and holds to account authorities that continue to use the utmost inhuman, cruel and degrading punishment Amnesty's latest report, Death Sentences and Executions 2020, was released in April 2021. Despite the nature or circumstances of the wrong; an individual's guilt, innocence, or other characteristics; or the state's method of execution, Amnesty International condemns the death penalty in all circumstances. The Amnesty efforts for complete ending of death penalty. The pious document on human rights (Universal declaration of human rights) right to life and the right not to be subjected to inhuman, cruel or degrading treatment or penalty are protected in, other international human rights instruments, The only treaty Second Optional Protocol to the ICCPR, directly related with absolute ending of the capital punishment, it invites signatures from all countries across the world, “The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, The Convention on the Rights of the Child”¹⁸, According to Amnesty capital punishment breaks these rights. This concept is gaining traction among intergovernmental bodies, as well as in court rulings and national constitutions. According to observation of Amnesty International at least 42 states have repealed the death sentence in their constitutions. Almost all of these bans are on grounds of humanitarian values.¹⁹ Worldwide, of the 195

¹⁴en.wikipedia.org

¹⁵indiankanoon.org

¹⁶lawcommissionofindia.nic.in

¹⁷UN General Assembly Resolution 75/183 of 16 December 2020.

¹⁸Www.refworld.org

¹⁹ Amnesty International, Constitutional prohibitions of the death penalty, AI Index: ACT 50/009/2005, April 2005.

independent countries that have UN membership or have UN observer status,²⁰ countries are categorized into following four segments on the basis of their capital punishment status:²¹

- **54** (28%) states hold it in their system in law and practice.
- **27** (14%) have abolished it *de facto*, namely, according to Amnesty International standards, that they have executed nobody during the last decade or more *and* are believed to have a policy or established practice of not carrying out executions.²²
- **7** (4%) have abolished it *de facto*, namely that they have executed nobody during the last 14 or more years *and* have abolished it *de jure*, but retain it for exceptional or special circumstances (such as crimes committed in wartime).
- **107** (55%) have abolished it for all crimes, most recently: Mongolia (2017), Guinea (2017), Bosnia and Herzegovina (2019), Chad (2020), Kazakhstan and Malawi (both 2021) ²³.

V. RESEARCH METHODOLOGY

In this doctrinal research the researcher has used books, Case Laws, journals, articles, etc. To identify the defects in the process of the death sentence the investigator has collected the data from the decided cases of the Supreme Court. As the area of the problem is wide and ever expanding with the regular output of decisional material from the Courts, some relevant death penalty cases have been selected to cover all the important aspects of the chosen problem.

VI. CRIMINAL JUSTICE PROCESS OF CAPITAL PUNISHMENT IN INDIA

(a) Trial court

"After the completion of the proceedings as stipulated by the Code of Criminal Procedure, the judge pronounces the decision in a case under Section 235 of the Code of Criminal Procedure."²⁴ As per Sec. 235(2) of Criminal Procedure code, if the accused is sentenced, a mandatory pre-sentencing hearing will be held²⁵. A clause relating extraordinary reasons for death sentences is also included in the Criminal Procedure code 1973. As according to this concept of criminal procedure code "Life imprisonment is the

²⁰" Abolitionist and Retentionist countries as of July 2018"

(<https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf>) (PDF). Retrieved 10 February 2020.

²¹This system is followed by the United Nations and by non-governmental organizations like Amnesty International. See for example, "Capital punishment and implementation of the safeguards guaranteeing .

²²"DEATH SENTENCES AND EXECUTIONS REPORT 2015" (<https://www.amnesty.org/en/documents/act50/3487/2016/en/>). Amnesty International. April 2016. Retrieved 10 August 2016.

²³wiki2.org

²⁴"Section 235 in The Code Of Criminal Procedure, 1973" (<https://indiankanoon.org/doc/1604716/>).

²⁵ Ibid.

rule, and punishment of death is the exception,"²⁶ the court must record "Special reasons" supporting the sentence and describe why an alternative penalty would not achieve the goals of justice in the case.

(b) Confirmation by High Court

After the decision and sentencing by the Court of Sessions, a high court needs to confirm it for the death sentence to be valid. The high court may confirm the death sentence awarded by the Court of Sessions, pass any other sentence warranted by law, annul the conviction, convict the person of any offence for which the Court of Sessions might have convicted them, order a new trial on the same or amended charge or acquit the accused person under Section 368,²⁷ Code of Criminal Procedure. The High Court may also enhance the sentence awarded by the Court of Session to death sentence according to Section 386 (c), CrPC. The High Court shall not enhance the sentence awarded to the accused without giving them a reasonable opportunity of showing cause against such enhancement and while showing such cause, the accused may even plead for acquittal or reduction of sentence awarded by the Court of Session.²⁸ Additionally, the State Government or the Central Government under Section 377,²⁹ CrPC may direct the public prosecutor to appeal to the High Court against the sentence granted by the Court of Session on grounds of inadequacy. Further, exercising of its suo-moto revisional powers under Section 397³⁰, CrPC read with Section 401, CrPC, the High Court may, even in the absence of an appeal enhance the sentence awarded by the Court of Session.³¹ The High Court may also in accordance with Section 367 of the Code conduct or direct further inquiry into or additional evidence to be taken on any point bearing upon the guilt or innocence of the convicted person.³² Unless directed by the High Court, the accused need not be present during this period of this inquiry or when additional evidence is taken. The High Court also has the power under Section 407 of the CrPC to withdraw a case pending before a subordinate court and conduct the trial, and may award the sentence of death.³³

(c) Special leave petition

After the death sentence is confirmed by the High Court, an appeal by Special Leave Petition (SLP) under Article 136 of the Constitution may be filed.³⁴ The Supreme Court may in its discretion after considering the issues grant special leave to appeal under Article 136 of the Constitution. Exercising its power under Article 136, the Supreme Court decides whether the special leave petition deserves to be heard as appeals. Correcting an earlier trend of dismissal of SLPs involving the death sentence *in limine* (dismissal of Special Leave Petition at the threshold without giving any detailed reasons) it was held in two cases of Babasaheb

²⁶en.wikipedia.org

²⁷ "Section 368 in The Code Of Criminal Procedure, 1973" (<https://indiankanoon.org/doc/734802/>).

²⁸ "Stages in Death Penalty Cases" (<https://www.project39a.com/resources-stages-in-death-penalty-cases/>). *Project 39A.*

²⁹ "Section 377 in The Code Of Criminal Procedure, 1973" (<https://indiankanoon.org/doc/195753/>).

³⁰ "Section 397 in The Code Of Criminal Procedure, 1973" (<https://indiankanoon.org/doc/1457888/>).

³¹ "Section 401 in The Code Of Criminal Procedure, 1973" (<https://indiankanoon.org/doc/1571667/>).

³² "Section 367 in The Code Of Criminal Procedure, 1973" (<https://indiankanoon.org/doc/940370/>).

³³en.wikipedia.org

³⁴ "Article 136 in The Constitution Of India 1949" (<https://indiankanoon.org/doc/427855/>).

M. Kamble v.State of Maharashtra³⁵, November 2018 and Jeetu v. State Of Madhya Pradesh & Others³⁶, July 2020 that SLPs brought in matters where capital punishment is imposed by lower courts should not be dismissed without explanation, at least in terms of the death penalty. It was suggested that in such circumstances, the Court should conduct a more thorough scrutiny and provide justifications for the death penalty.

(d) Review and reopening of a review

“A petition seeking review of a judgment or order passed by the Supreme Court may be filed under Article 137of the Constitution before the Supreme Court within thirty days from the date of such judgment or order.³⁷As per the Supreme Court in MohdArif @ Ashfaq v. The Registrar, Supreme Court of India & Ors,September 2014,³⁸review petitions for death sentence cases should be heard in open court, but there wouldbe a time limit of 30 minutes for oral hearing. Such a procedure would be just and fair. The cases would beheard by a bench of three judges, and the special procedure would apply to all cases of death sentence wherethe review had been dismissed but the sentence was yet to be executed, including cases brought underTerrorist and Disruptive Activities (Prevention) Act.³⁹ Various cases such as M.A. Antony @ Antappan v.State of Kerala, April 2009⁴⁰, Md. Mannan @ Abdul Mannan v. State Of Bihar ⁴¹, April 2011,⁴²AmbadasLaxman Shinde And Ors V. The State Of Maharashtra, October 2018 were reopened after being dismissedearlier to be heard in the open court after the above judgement, which resulted in commutations and anacquittal.⁴³

(e) Curative petition

As per the Supreme Court judgment in Rupa Ashok Hurrah v. Ashok Hurrah & Ors, April 2002 after the dismissal of the review petition,⁴⁴the Supreme Court may allow a curative petition to reconsider its judgment or order if it is established that there was a violation of natural justice principles or fear of biasness on the part of the judge.In the stated case, the Supreme Court declared that it may revisit its judgments in the use of its powers which are inherent to, in place to evade misuse of its process and to correct severe miscarriages of justice⁴⁵. If available, the hearing of curative petition would be done by the

³⁵ "Babasaheb Maruti Kamble vs The State Of Maharashtra on 1 November, 2018" (<https://indiankanoon.org/doc/28102290/>). *Indian Kanoon*.

³⁶ "Jitendra @Jitu vs State Of M.P. on 14 July, 2020" (<https://indiankanoon.org/doc/75430838/>).

³⁷ "Article 137 in The Constitution Of India 1949" (<https://indiankanoon.org/doc/249731/>).

³⁸ "Mohd. Arif @ Ashfaq vs The Reg. Supreme Court Of India & Others on 2 September, 2014" (<https://indiankanoon.org/doc/80457116/>). *Indian Kanoon*.

³⁹ "University of Minnesota Human Rights Library" (<http://hrlibrary.umn.edu/research/terroristpreventionact-1987.html>). *hrlibrary.umn.edu*. Retrieved 7 October 2020.

⁴⁰en.wikipedia.org

⁴¹en.wikipedia.org

⁴²"Md.Mannan @ Abdul Mannan vs State Of Bihar on 20 April, 2011" (<https://indiankanoon.org/doc/625626/>).

⁴³ "Ambadas Laxman Shinde vs The State Of Maharashtra on 31 October, 2018" (<https://indiankanoon.org/doc/148694419/>). *Indian Kanoon*.

⁴⁴ "Rupa Ashok Hurra vs Ashok Hurra&Anr on 10 April, 2002" (<https://indiankanoon.org/doc/123456797/>). *Indian Kanoon*.

⁴⁵ "The curious case of a curative petition" (<https://www.hindustantimes.com/india/the-curious-case-of-a-curative-petition/story-obpyeDrE84KTJgzSw8CML.html>). *Hindustan Times*. 28 July 2015. Retrieved 7 October 2020.

same bench that heard the petition for review, or by the three judges of Supreme Court who would be the senior most. Unless the Apex Court orders differently, the disposal of curative petition will be without further arguments.⁴⁶

(f) Mercy

Constitution of India authorise the president of India and the governor under Articles 72 and 161 to exercise mercy powers to grant pardons and suspend, remit, or commute punishment of death in specific circumstances.⁴⁷ The president or governor may review the convict's case and decide to commute his or her sentence to life in prison. Various legal concerns relating to mercy petitions have sprung up time and time again, one of which being delay. The apex Court maintained in *V. Sriharan @ Murugan v. Union of India*, February 1947,⁴⁸ that Article 72/161's mercy procedure gives condemned inmates and their families a ray of hope by permitting death sentences to be converted to life imprisonment and, for that reason, the executive branch should take the initiative and exercise its time-honoured mercy power., which is granted under the constitution of India, in a timely manner. In the case *Shatrughan Chauhan v. Union of India*, January 2014,⁴⁹ a three-judge bench of the Indian Supreme Court delivered a landmark judgment on the⁵⁰ death penalty: holding, in particular, that an excessive delay in carrying out the death sentence was an essential mitigating factor in a plea for commutation.⁵¹ This was also held in a previous case *Triveniben V. State of Gujarat & Ors*, February 1989 stating that the Court may consider whether there was undue long delay in disposing of mercy petition;⁵² whether the State was guilty of dilatory conduct and whether there was no reason for delay at all. Though the excessive delay is a substantial consideration, it cannot render the "execution" unlawful on its own. Furthermore, the courts have recognised various other extenuating situations that should be taken into account during a petition of mercy, such as trauma, mental illness/insanity, solitary incarceration, and so on.⁵³

(g) Death order

Criminal Procedure code, 1973 in its 2nd Schedule provides for Form No. 42, which comprises the "death warrant" or "black warrant"⁵⁴ form in cases when the death penalty is imposed. It is written to the concerned superintendent of prison that is responsible for returning the warrant to the court once the punishment of death has been carried out.⁵⁵ The court of sessions cannot issued a death warrant before the

⁴⁶ "Stages in Death Penalty Cases" (<https://www.project39a.com/resources-stages-in-death-penalty-cases>). *Project 39A*.

⁴⁷ "Article 161 in The Constitution Of India 1949" (<https://indiankanoon.org/doc/873751/>).

⁴⁸ "*V. Sriharan @ Murugan vs Union Of India And Others on 18 February 1947*" (<https://indiankanoon.org/doc/109400871/>). *Indian Kanoon*.

⁴⁹ "*Shatrughan Chauhan & Anr vs Union Of India & Ors on 21 January 2014*" (<https://indiankanoon.org/doc/59968841/>). *Indian Kanoon*.

⁵⁰ en.wikipedia.org

⁵¹ "Indian Supreme Court Changes Stance on Death Penalty: Holds Delay to be a Ground for Commutation" (<http://ohrh.law.ox.ac.uk/indian-supreme-court-changes-stance-on-death-penalty-holds-delay-to-be-a-ground-for-commutation/>). *OHRH*. 5 February 2014. Retrieved 7 October 2020

⁵² "*Smt. Triveniben & Ors vs State Of Gujarat & Ors on 7 February 1989*" (<https://indiankanoon.org/doc/751831/>).

⁵³ "*Shatrughan Chauhan & Anr vs Union Of India & Ors on 21 January 2014*" (<https://indiankanoon.org/doc/59968841/>). *Indian Kanoon*.

⁵⁴ "FORM No. 2, WARRANT OF ARREST" (https://upload.indiacode.nic.in/showformfile?aid=A_C_CEN_5_23_000010_197402_1517807320555&rid=2). *India Code*.

⁵⁵ "THE CODE OF CRIMINAL PROCEDURE, 1973" (<http://legislative.gov.in/sites/default/files/A1>)

exhaustion of all the judicial and administrative process by the convict, if he does so, It would be a serious violation of the law as stated by the apex Court in *Shabnam v. Union of India*, May 2015,⁵⁶ which confirmed the instructions given by the Allahabad High Court in *PUDR v. Union of India*, January 2015.⁵⁷ The SC ruled in *Shabnam v. Union of India* that natural justice standards must be used for the hearings of death warrant. The convict must be given the opportunity to exhaust all legal remedies available, including appeals, reviews, and mercy requests. Before issuance of warrant of death, the principles set forth in the *PUDR* case must be complied.⁵⁸

VII. THE “RAREST OF THE RARE” CASE PRINCIPLE

In India, the issue of the faulty exercise of the capital punishment was first raised in the case of *Jagmohan Singh v. State of U. P.*⁵⁹ Mr. R.K. Garg, Appellant's Counsel, argued that the judges' discretion to give the sentence of death or life imprisonment is unrestrained and unguided in this case. Because each case are differ in the facts and circumstances, the Apex Court decided that if the law allows the judge to have extensive discretion, the imposition of a sentence after evaluating the aggravating and mitigating elements of the crime will not be discrimination.⁶⁰ Further, in *Rajendra Prasad v. State of Uttar Pradesh*, the Judiciary acknowledged the death penalty's sentencing discretion. The Court determined that deterrence and reform are the primary social purposes that justify the use of life and liberty as a punitive remedy. In *Bachan Singh v. State of Punjab*, the apex court of India approved the following rules for imposition of a capital sentence to resolve the above-mentioned inconsistent statements;

- For murder, life in prison is the norm, with the punishment of death being the exception.
- The punishment of death can be applied "only in the most serious cases of extreme culpability," after take in to account the aggravating and mitigating circumstances of the case, as well as the "circumstances of the crime" and "circumstances of the criminal."
- The selection of aggravating and mitigating circumstances would be constructed on a set of predetermined criterion developed over time by means of legal precedents.
- Only in the "rarest of rare" cases, when the "other option is unquestionably foreclosed" and for "special reasons" must be recorded, can the death penalty be imposed. The Supreme Court has referred to the *Amicus Curiae's* recommended illustrative 'aggravating circumstances' and 'mitigating circumstances,' suggesting that these could be factors in calculating a punishment.⁶¹

974-02.pdf) (PDF). *Legislative Department, Ministry of Law and Justice*.

⁵⁶ "Shabnam vs Union Of India And Anr on 27 May 2015" (<https://indiankanoon.org/doc/46910974/>).

⁵⁷ "Peoples' Union Democratic Rights ... vs Union Of India Thru' Secy. & 3 ... on 28 January 2015" (<https://indiankanoon.org/doc/19008747/>). *Indian Kanoon*.

⁵⁸en.wikipedia.org

⁵⁹AIR 1973 SC 947

⁶⁰*Jagmohan Singh v. State of U. P.*, (1973) 1 SCC 20, para 27.

⁶¹Report of the Amnesty International India and People's Union for Civil Liberties (Tamil Nadu &

(A) Aggravating Circumstances–

In the following circumstances a Court can impose the death penalty in its discretion-

- (a) If the homicide was carried out after prior concert and with the highest brutality; or
- (b) when the homicide accomplishes uncommon depravity; or
- (c) If a member of the central military service, a member of the police, or a member of the civil service was engaged in the homicide: (i) While on the job; or (ii) As a result of anything done or attempt has been made by such member or civil servant in the legal performance of his duty as such member or civil servant, whether or not he was such member or civil servant at the time of homicide; or
- (d) If the homicide was committed in the legal performance of his assigned duty U/Sec. 43 of the criminal procedure code, 1973, or if the victim had refused to assist a Magistrate or a officer of police who had asked for his counsel or required his assistance under Sections 129 and 37 of the Cr.P.C., 1973.

(B) Mitigating circumstances-

following factors are considered as mitigating circumstances by the court-

- (a) That the crime was committed while the perpetrator was suffering from severe mental illness.
- (b) "If the accused is young or old, he should not be put to death.
- (c) The possibility that the offenders would not commit heinous acts of violence that would pose a constant threat to society.
- (d) The likelihood that the convicts can be corrected and rehabilitated.
- (e) When the accused assumed that he was morally bound in performing the crime.
- (f) That the convicts acted under the coercion or domination of other man"⁶².
- (g) That the criminals' circumstances revealed that he was emotionally flawed, and that this flaw harmed his ability to recognise the criminality of his actions.

In *Bachan Singh v. State of Punjab*⁶³ the Court has also stated that it is not realistic or desirable to accept a hard or fixed formula for the imposition of the capital punishment.⁶⁴ Even within a single category of offences, there are unlimited, unforeseen, and unforeseeable variations as well as endless permutations and combinations. A formulaic and mechanical approach would lose its judicial essence. Instead, such uniformity would provide justice in the form of blind resemblance, which could devolve into a bed of uniform peril.⁶⁵ The application of the "rarest of the rare" cases principle has created confusion in the adjudication of the death penalty system. In some of the subsequent cases, the Court has given faulty application of this principle. The Supreme Court of India in *Mohammad Farooq Abdul Gafur* case⁶⁶ has acknowledged that the "rarest of the rare cases" principle lost in translation. On the same way in *Sangeet* case⁶⁷ the Court has held that different in sentencing by the Court effuse of different explanations to

Puducherry),
Death Penalty Cases 1950-2006, 2008, p.48.

⁶²Submitted to University of Cambridge

⁶³Supra note 1.

⁶⁴Id., para 195.

⁶⁵Id., para 173.

⁶⁶*Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641, para 165.

⁶⁷*Sangeet v. State of Haryana*, (2013) 2 SCC 452, para 33.

the “rarest of the rare” concept and this is falling down under the ground of dissimilar explanations. Thus in Alope Nath Dutta case⁶⁸ the Supreme Court opined that what makes a “rarest of the rare” case should be decided on the basis of the fact of each case and the various measures have been accepted by various Benches of this Court, although the crimes are same no policy of sentencing has been accepted by the Supreme Court. From the analysis of data, the researcher has identified the following mentioned elements which smash the backbone of this principle as well as some international standards on the Capital punishment.

VIII. FOCUS ON “CIRCUMSTANCES OF THE OFFENCE” AND AVOID THE “CIRCUMSTANCES OF THE OFFENDER”

The “rarest of the rare” cases principle provides that for infliction of the death sentences both the “nature of the crime” and the “nature of the criminal” should be construed harmoniously. The misapplication of this objective began with the judgment of the Machi Singh case⁶⁹. In this case, the Court focuses on “circumstances of the offence” and avoids the “circumstances of the offender”. The accused were given punishment of death because the ‘nature of the crime’ was ‘extremely brutal, heinous, atrocious and cruel’. Thus, departing from the guidelines propounded in Bachan Singh case⁷⁰. Machhi Singh case has introduced India’s criminal science the notion of society’s “collective conscience” as the criteria for imposition of the capital punishment.

But Bachan Singh case⁷¹ explicitly warned that the judges should not depend on public opinion because the belief of ‘community’ standards are different from judge to judge and judges also have not correct technique to examine the will of the people. In the case of Ravji @ Ram Chandra v. State of Rajasthan⁷² the SC of India again imposed the capital punishment without evaluation of the “circumstances of the offender”. The Court held that the offence had been performed with extreme brutality without any incitement and in a calculated method. The type and severity of the offence, not the criminal, are relevant in assessing the appropriate penalty in a criminal prosecution..

Thus, it is proved that the Ravji judgment has violated the rule of law for application of the death penalty in India. So, in Bariyar case⁷³ Court decided that the sole emphasis in Ravji on the crime made this decision per incuriam of Bachan Singh case⁷⁴ decision. Later on, some of the cases courts depend on the Ravji precedent and give rise of error death sentences.

The Supreme Court has acknowledged the high rate of erroneous death sentences in its own cases. The Court has admitted erroneous death sentences awarded in sixteen cases, involving the death penalty of twenty people, in only three cases, namely Bariyar, Sangeet, and Khade. In the years 2000 to 2013, sixteen of these individuals were sentenced to death. It means that the Supreme Court admits to making a mistake

⁶⁸Alope Nath Dutta and Ors. v. State of West Bengal, 2007 (12) SCC 230.

⁶⁹Machi Singh v. State of Punjab, AIR 1983 SC 597.

⁷⁰Supra note 1.

⁷¹Supra note 1, para 126.

⁷²(1996) 2 SCC 175.

⁷³Sanosh Kumar Bariyar v. State of Maharashtra, (2009) 6 SCC 498.

⁷⁴Supra note 1.

in inflicting the punishment of death on 16 people out of a total of 69 people sentenced to death during this time period. This equates to a 23.2 percent mistake rate.⁷⁵

Table : List of cases find out erroneous in Bariyar,Sangeetand Khadecases

Error death sentence	No. of persons	Held erroneous
Ravji @ Ram Chandra v. State of Rajasthan ⁷⁶	1	Bariyar
Shivaji v. State of Maharashtra ⁷⁷	1	Bariyar
Mohan Anna Chavan v. State of Maharashtra ⁷⁸	1	Bariyar
Bantu v. State of U.P ⁷⁹	1	Bariyar
Dayanidhi Bisoi v. State of Orissa ⁸⁰	1	Bariyar
Surja Ram v. State of Rajasthan ⁸¹	1	Bariyar
State of UP v. Sattan ⁸²	4	Bariyar
Saibanna v. State of Karnataka ⁸³	1	Bariyar
Shivu v. Registrar General, HC of Karnataka ⁸⁴	2	Sangeet
R. P. Wasnik v. State of Maharashtra ⁸⁵	1	Sangeet
Mohd Mannan v. State of Bihar ⁸⁶	1	Sangeet
B.A. Umesh v. Registrar General, HC of Karnataka ⁸⁷	1	Sangeet
Sushil Murmu v. State of Jharkhand ⁸⁸	1	Sangeet
Gurmukh Singh v. State of Haryana ⁸⁹	1	Shankar Khade
Dhananjay Chatterjee v. State of West Bengal ⁹⁰	1	Shankar Khade
Kamta Tiwari v. State of M.P ⁹¹	1	Shankar Khade

Source: 262nd Law Commission of India's Report, The Death Penalty, 2015

⁷⁵Supra note 3, p.162.

⁷⁶libraryopac.iimk.ac.in

⁷⁷AIR 2009 SC 56.

⁷⁸(2008) 11 SCC 113.

⁷⁹Ibid

⁸⁰(2003) 9 SCC 310.

⁸¹(1996) 6 SCC 271.

⁸²(2009) 4 SCC 736.

⁸³(2005) 4 SCC 165.

⁸⁴(2007) 4 SCC 713.

⁸⁵(2012) 4 SCC 37.

⁸⁶(2011) 5 SCC 317.

⁸⁷(2011) 3 SCC 85.

⁸⁸(2004) 2 SCC 338.

⁸⁹(2009) 15 SCC 635.

⁹⁰(1994) 2 SCC 220.

⁹¹(1996) 6 SCC 250.

From the above table, it is clear that in the Bariyar case, the Court identified six cases where the Ravji precedent had been followed. Likewise in the Sangeet case, the Court distinguished three cases where aggravating and mitigating circumstances had not been construed harmoniously. On the same way in the Shankar Khade case the Court has suspected the accurateness of the infliction of the capital sentence in *Dhananjay Chatterjee v. State of West Bengal*⁹² and delivered that the calculation of punishment must rely on the cruelty of the offence, the character of the criminal and the helpless & unsaved state of the victim. Regarding the Dhanajay Chatterjee's punishment, in the Khade case the Court commented that presumed judgment had not considered for mitigating nature of the offender.

There are some other cases where the death sentences were awarded relying on the Ravji precedent. *A.M Shinde v. State of Maharashtra*⁹³, which was handed down about two weeks before the Bariyar decision and granted the death penalty to six people based on the Ravji precedent, was not taken into account by the Court in Bariyar. On the other hand after Bariyar consider that Ravji precedent as erroneous it was again followed in three other cases i.e. *Ajit Singh Harnam Singh Gujral v. State of Maharashtra*⁹⁴, *Sunder Singh v. Uttaranchal*⁹⁵, *Jagdish v. State of M.P*⁹⁶ and On the basis of Ravji, nine persons have been sentenced to death.

Table : List of cases doubted beyond the Bariyar, Sangeet and Khade cases

Error death sentence imposition cases	No. of persons
<i>Ankush Maruti Shinde v. State of Maharashtra</i>	6
<i>Ajit Singh Harnam Singh Gujral v. State of Maharashtra</i>	3
<i>Sunder Singh v. Uttaranchal</i>	3
<i>Jagdish v. State of M.P</i>	3

IX. CRIME-TEST, CRIMINAL-TEST AND BALANCING-TEST CONFLICT

In *Shankar Kisanrao Khade v. State of Maharashtra* the Court proposed a 'triple test' and held that before awarding the death penalty three tests have to be satisfied: the crime test, the criminal test and if both tests are satisfied then the R-R test. This application of the "triple test" has added to the conceptual ambiguity surrounding the premise of "rarest of the rare" cases. This test seeks to create separate test of the "nature of the crime" and "nature of the criminal" and evaluate them distinctly. In reality, in *Mahesh Dhanaji Shinde v. State of Maharashtra*⁹⁷, the SC raised this problem with the 'triple test,' holding that this 'triple test' may design conditions that will reasonably go beyond what was permitted in the "rarest of the rare" cases premise.⁹⁸ However, the SC continues to observe and apply the triple test in following decisions, such as in

⁹²(1994) 2 SCC 200.

⁹³(2009) 6 SCC 667.

⁹⁴(2011) 14 SCC 401.

⁹⁵(2010) 10 SCC 611.

⁹⁶(2009) 9 SCC 495.

⁹⁷*Mahesh Dhanaji Shinde v. State of Maharashtra*, (2014) 4 SCC 292.

⁹⁸*Id.*, para 24.

Birju v. State of M.P.⁹⁹, Anil @ Anthony Arikswamy Joseph v. State of Maharashtra¹⁰⁰ and so on. The 'triple test' has limited the possibility of the infliction of the Capital punishment to the very restricted category of cases in which there are no mitigating circumstances. The concept of categorising sorts of crimes that warrant the death penalty has been rejected by the Bachan Singh guidelines, Separating aggravating and mitigating variables from the "rarest of the rare" approach also departs from paradigm of Bachan Singh case. The triple test formula seeks to "create distinct lists of the circumstances relating to the crime and the circumstances relating to the criminal and evaluate them separately. This goes against the Bachan Singh injunction that circumstances relating to the crime and to the criminal cannot be treated as distinct water-tight compartments."¹⁰¹

X. 'SPECIAL REASONS'-AMBIGUITY IN JUDICIAL INTERPRETATION

In Bachan Singh case¹⁰² according to the court the term "special reasons" mentioned in the Sec. 354 (3) Cr.P.C, 1973 means "exceptional reasons" based on the uncommon serious nature of the special case relating to the offence and the offender. But in a large number of cases judges have determined the "exceptional reasons" according to his own choice and violate this desired aim. It led to divergent and sometimes inconsistent judicial decisions. Thus, the application of the death penalty has risen from Section 354(3) of the Cr.P.C, 1973 which states that each judgment shall deal with the reasons for the awarded punishment and in the case of death punishment the special reasons should be provided. According to a study on "trends in sentencing and judicial pronouncements," the death penalty has been justified in a number of cases where the murder was "brutal," "violent," "coldblooded," "heinous," "deliberate," "callous," "unprovoked," "fatal," "wicked," "gruesome," "etc., "according to the respective judges' assessment of the facts and their aversion to nature or modus operandi of the offender's young age, the length of time between sentencing and execution of capital penalties have all been cited as mitigating circumstances for commuting sentences of death to life imprisonment. Courts in India have repeatedly used the above or similar expressions as "special reasons" to justify the imposition of the death penalty over life imprisonment or the commuting of the death penalty to life imprisonment"¹⁰³.¹⁰⁴

⁹⁹2014 (2) SCALE 293.

¹⁰⁰(2014) 4 SCC 69.

¹⁰¹bareactslive.com

¹⁰²Supra note 1, Para 161.

¹⁰³Submitted to NALSAR University of Law Hyderabad

¹⁰⁴Raizada, Trends in Sentencing: A Study of the Important Penal Statutes and Judicial Pronouncements

XI. “Residual doubt

“The Supreme Court of India commuted the death penalty to life imprisonment with a minimum sentence of 20 years in prison in Ashok Debbarma v. State of Tripura in March 2014. In Indian sentencing law, it established the idea of "residual doubt" as a mitigating condition. Beyond 'reasonable doubt,' but below 'absolute certainty,' the court mentioned that there could be a state of lingering uncertainty. In 2019, Ravishankar v. State of Madhya Pradesh, the SC reiterated Ashok Debbarma's 'residual doubt principle,' holding that it establishes a higher standard of proof than the 'beyond reasonable doubt' barrier in order to sentence someone to death”^{105, 106}.

“The culprit in Rajendra Prahladrao Wasnik v. State of Maharashtra was found guilty of raping and murdering a three-year-old girl. In a three-judge bench hearing, his sentence was commuted to life in prison. The Court, citing Bachan Singh, stated that it was compelled to evaluate the likelihood of reform and rehabilitation rather than its potential or impossibility... 'It is the prosecution's responsibility to demonstrate to the court, by evidence, that the criminal cannot be changed or rehabilitated.' The Court also ruled that the mere fact that one or more criminal charges against a defendant are pending cannot be taken into account while determining a sentence”¹⁰⁷.

“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.”¹⁰⁸

XII. Conclusion and suggestion

In the concluding part of this paper the researcher has come to know that there is no significance of death penalty nor it serves the penological goal of deterrence any more than imprisonment for life. The Supreme Court has voiced concern over inappropriate sentencing in death sentence prosecutions several times in the recent decade. It has been difficult for the court to distinguish between situations in which the death penalty was imposed and those in which the alternative of life imprisonment was used. "Extremely uneven application of Bachan Singh has given rise to a condition of uncertainty in capital sentencing legislation," the Court concluded, "obviously violating constitutional due process and equality principles." In addition, the Court has accepted erroneous parts of death sentences imposed in violation of Bachan Singh rules. The judiciary has admitted erroneous capital punishment awarded in sixteen cases, involving the death penalty of twenty people, in only three cases, namely Bariyar, Sangeet, and Khade. In the years 2000 to 2013, sixteen of these individuals were sentenced to death. It means that the Supreme Court admits to making a mistake in inflicting the punishment of death on 16 people out of a total of 69 people sentenced to death

¹⁰⁵en.wikipedia.org

¹⁰⁶ "Ravishankar @ Baba Vishwakarma vs The State Of Madhya Pradesh on 3 October 2019". Indian Kanoon.

¹⁰⁷en.wikipedia.org

¹⁰⁸Santosh Kumar Santibhushan Bariyar v. State of Maharashtra (2009) 6 SCC 498, 130.

during this time period. This equates to a 23.2 percent mistake rate. As a result, the constitutional restriction of punishment of death proposed in Bachan Singh failed to prevent punishments of death from being "imposed arbitrarily and unpredictably." According to many committee conclusions and Supreme Court rulings, the country's criminal justice system is in serious disarray. To name a few issues, the system is beset by a lack of resources, antiquated investigation processes, an overburdened police force, insufficient prosecution, and poor legal help. Because the death sentence operates within this environment, it faces the same structural and institutional challenges. As a consequence, the administration of punishment of death is still flawed and open to misuse. The system's whims also favour the socially and economically disadvantaged, who may lack the resources to adequately defend for their rights in an adversarial criminal court system. In our legally mediated criminal justice system, the concept of "an eye for an eye, a tooth for a tooth" has no place. Because it is based on a subjective interpretation of the theory that violates human rights, death sentence fails to attain any constitutionally viable penological purpose. In the focus on the death penalty as the final measure of justice for victims, the restorative and rehabilitative aspects of justice are neglected. "It is safe to say that the Bachan Singh horizons of the rarest of rare circumstances has been implemented in a variety of ways by several High Courts, as well as this court. At this point, we'd like to point out that the uncertainty in capital sentencing law has a particular impact on the death sentence: the most severe consequence resulting from the exercise of very broad sentencing discretion, which is irreversible in nature. Our own jurisprudence demonstrates the path we must take – from 1955, when there was no requirement to give special reasons for imposing life imprisonment instead of death, to 1973, when special reasons were required for imposing the death penalty, to 1980, when the Supreme Court limited the death penalty to the rarest of rare cases. The Law Commission believes that it is past time for India to abolish the death punishment. The acknowledgement of human rights is one of the reasons why India should abolish the death sentence. The horrors of World War II made the world realise the need of human life protection. As a result, there has been a worldwide effort to ensure that human life is protected and that human rights violations be removed. The creation of international human rights law has aided this effort. The death sentence has been condemned and prohibited by international law due to the awareness that it violates basic human rights by exposing persons to torture and inhumane conditions. According to Researcher, the death sentence should not be applied to anyone, regardless of how heinous and disgusting the offence is. Not only is the death penalty discriminatory, ineffective at deterring crime, and defective, but it also violates universally accepted human rights law. In India, reformatory theory should take the role of capital punishment. Prisoners should be taught so that they can become normal people who make money legally rather than illegally.

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