Need for a Strict Sentencing Policy in Awarding Capital Punishment in India

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Abstract

This paper seeks to analyze the approach of the Supreme Court of India (hereinafter, the Supreme Court) in cases dealing with 'rarest of the rare' doctrine. Papers further seeks to identify whether the approach of the Supreme Court in matters awarding the extreme punishment and interpretation as to application of rarest of rare doctrine has been consistent or varying. Paper also analyzes the Law Commission of India’s 262nd Report on Death Penalty to touch upon the retention versus abolition debate on the death penalty. Lastly, paper develops an argument that the consistency in the judicial approac

Key Words


Introduction

One of the lexical meanings of ‘capital punishment’ is the ‘practice of killing people as punishment for serious crimes’.¹ Capital punishment has been existing since time immemorial and is traceable to the Code of Hammurabi (1750 B.C.). From a very

long time, there have been countless debates on the subject of awarding death sentence to specific criminals. Before the amendment in the Code of Criminal Procedure of 1973, death sentence in India was the general rule and life imprisonment an exception. But after the amendment, Section 354 (3)\(^2\) of the Code provided that ‘special reasons’ have to be given by the judge while awarding capital punishment.

The Supreme Court of India in its decision in *Bachan Singh v. State of Punjab*,\(^3\) in which the constitutionality of death penalty was challenged, came up with a new doctrine specifically for awarding the punishment of death to the accused *i.e.*, ‘the rarest of the rare’ doctrine (*hereinafter*, the doctrine). The doctrine involved some factors to be kept in mind by the judges but ultimately giving way to judicial discretion. Further, the Supreme Court in *Macchi Singh v. State of Punjab*,\(^4\) reiterated that the guidelines laid down in *Bachan Singh* case were to be applied. The Court in its several decisions, has reiterated this position. But the real question that arises here is that whether these guidelines are being followed thoroughly by the judges in cases dealing with death penalty. This question also arise for another reason that death penalty is not an established rule but an exception to the rule which the judges have discretion to go for.

Judges, after all, are humans and may differ in their opinions and reasonings. The decision of the Court in *Santosh Kumar Bariyar v. State of Maharashtra*,\(^5\) where the judges did not award death penalty to the accused giving their reasons which were inconsistent with *Bachan Singh* ruling. The Court also in this case stated that six of the judgments previously delivered were *‘per incuriam’*, the first one of them being *Ravji Ramchandra v. State of Rajasthan*.\(^6\) This departure from the settled approach and principle proved to be judge-centric. Thus, the life of a convict depends on the decision of the judge who may be either in favour or in against awarding death penalty. This further results in violation of basic human rights because once a person is sentenced to death, the administration of courts in India is such that it takes lot of time for the convict to exercise his right to appeal and mercy petition which are evident from many cases.

In *T. V. Vatheeswaran v. State*,\(^7\) the Supreme Court commuted the death sentence to life imprisonment based on the reason of two or more years of delay in execution whereas in the same year in *Sher Singh v. State of Punjab*,\(^8\) the Court stated that the said ground was not a rule to substitute death sentence with life imprisonment.

In *Dhananjoy Chatterjee v. State of West Bengal*,\(^9\) the accused was punished with death on the basis of circumstantial evidence for raping and

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\(^{2}\) The Code of Criminal Procedure, 1973. Section 354 (3) reads as ‘When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.’

\(^{3}\) (1980) 2 SCC 684.

\(^{4}\) (1983) 3 SCC 470.

\(^{5}\) (2009) 6 SCC 498.

\(^{6}\) AIR 1996 SC 787.

\(^{7}\) AIR 1983 SC 361.

\(^{8}\) AIR 1983 SC 465.

\(^{9}\) (1994) 2 SCC 220.
murdering a 13-year-old girl. Three days after this decision, the Supreme Court in *Rahul alias Raosaheb v. State of Maharashtra*,\(^\text{10}\) commuted the Appellant’s sentence to life imprisonment although the victim in this case (for the same offence) was four and a half years old.

Recently, Justice Kurien Joseph in *Channu Lal Verma v. State of Chhattisgarh*\(^\text{11}\) stated that *Bachan Singh* guidelines have “failed to prevent death sentences from being ‘arbitrarily and freakishly imposed’ and that capital punishment has failed to achieve any constitutionally viable penological goals and should be revisited in order to remove inconsistencies.” Many rights which are guaranteed to the accused by the Indian Constitution and are laid down in the Code of Criminal Procedure, 1973 have been ignored in various judgments of the Indian Courts, particularly the subordinate judiciary. It is pertinent to note that similar problem came before the US Supreme Court in 1972. But it was responded through guidelines which were laid down by the respective states by amending their criminal procedure. Also, in Uganda, in 2013, the Chief Justice issued sentencing guidelines on the same subject matter thereby “reducing judicial discretion” in capital cases to a larger extent.

The paper will thus also have comparative analysis with both the said countries.

This paper aims to evaluate these aspects related to the subject, specifically the interpretation of the ‘rarest of the rare’ doctrine by the Courts. How judges have differed and why there is uncertainty and inconsistency in awarding the extreme punishment which is also the major aspect which this paper tries to evaluate. It also includes analysis of the 262\(^{nd}\) Law Commission’s Report (2015) on ‘death penalty’ which is analysed critically keeping in regard the ever-existing tussle between abolitionists and retentionists’ approach. Majority and dissent opinions on the subject matter have been studied and analyzed in the conclusion. As India has not yet abolished capital punishment and is not likely to do the same in near future, it is of utmost priority that the sentencing policy as to the awarding of capital punishment be formulated.

**Development of the Rarest of the Rare Doctrine through Supreme Court’s Guidelines**

In India, before the amendment of the Code of Criminal Procedure in 1973 was made, capital punishment was the general rule whereas life imprisonment was the exception. Section 367 (5) of the Code of Criminal procedure1955 stipulated that the court had to give reasons, if the sentence of death was not imposed in a case of murder. After the said amendment, Section 354 (3) provided that the judges are required to record reasons for awarding capital punishment, thus making life imprisonment a general rule and death penalty an exception.

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\(^\text{10}\) (1994) Cri L J 3792.
This part of the paper will discuss the judicial decisions through which the doctrine of rarest of the rare has evolved. In Jagmohan Singh v. State of U.P.,\textsuperscript{12} for the first time, the constitutionality of death penalty was challenged before the Supreme Court. The arguments given by the petitioners were that such punishment was violative of Article 19 (1) of the Constitution of India. Another argument was that the provisions of the Code of Criminal Procedure, 1973 (hereinafter, Cr.P.C.), gave discretion to the judges which was not based on any sentencing policy required from the legislature. It was further argued that the uncontrolled and unguided discretion given to judges was violative of Article 14\textsuperscript{13} as two persons found guilty of murder on similar facts in different cases could be treated differently depending on the mentality of the judges in both the cases which could differ. No legal provisions in the laws at that time existed which could facilitate judges to make a choice between imprisonment for life and death penalty. The Cr.P.C. and the Indian Evidence Act, 1872, only talked about the guilt part of the accused and its determination. Therefore, Section 302 of the Indian Penal Code\textsuperscript{14} was prayed to be held unconstitutional.

The Supreme Court, rejecting the arguments stated that 'special reasons' as required by Section 354 (3) of the Cr.P.C.\textsuperscript{15} served as a guide to the judge on the basis of which death penalty could be given thus maintaining the constitutionality of death penalty through this case.

In Ambaram v. State of Madhya Pradesh,\textsuperscript{16} the High Court did not appear to have applied at all the changes brought about in the matter of awarding a death sentence by Section 354 (3) of the New Code. The Supreme Court stood on a footing that under Section 367 (5) of the Code of Criminal Procedure, 1898, as it stood before the Amending Act,\textsuperscript{17} it was a duty upon the Court convicting a person of capital offence, to give reasons why imprisonment for life, instead of a death sentence was being awarded. That was the applicable general rule, and death sentence an exception in the matter of awarding punishment for murder. Now, if a death sentence was to be awarded to a person found guilty of murder, the Court awarding it had to justify it by giving special reasons. Therefore, the High Court had not given any special reasons why Ambaram had been singled out for the award of the extreme penalty nor the apex court found any special reasons to treat him differently in the matter of sentence from his companions, on this ground the Supreme Court commuted the death sentence to that of life imprisonment.

In Bachan Singh v. State of Punjab,\textsuperscript{18} for the first time, a new doctrine was used to determine or categorize cases that would invite death penalty to the convict. It was discussed whether death penalty provided for the offence of murder in Section 302 IPC is unconstitutional? If the answer to this question is in negative,

\textsuperscript{13} Article 14, The Constitution of India, 1949.
\textsuperscript{14} Section 302, Indian Penal Code, 1860.
\textsuperscript{16} AIR 1976 SC 2196.
\textsuperscript{17} Act 26 of 1955.
\textsuperscript{18} (1980) 2 SCC 684.
then the question arises whether the procedure of sentencing under the relevant provision of Cr.P.C. is unconstitutional for the fact that it gives unguided and untrammeled discretion to the judges which leads to arbitrary imposition of taking the convict's life. The judges while dealing with both the issues considered the following questions.

Whether Article-19 is at all applicable for judging the validity of S-302 IPC?

Whether the impugned limb of S-302 IPC contravenes Article-21?

On the first issue, the majority decided that the Section 302 of the IPC violated neither the letter nor the ethos of Article 19. And as far as Article 21 is concerned, the words 'procedure established by law' would mean procedures to be fair, just and reasonable that were included by the makers of the Constitution because they were fully aware of the existence of capital punishment in our criminal statute.

On the second issue, the Court stated that the judges had to give 'special reasons' for awarding death penalty where life imprisonment was an alternative. Therefore, the judges had duty to follow the provision's language and thus it was not giving unfettered discretionary powers to the judges. While deciding the case, the majority came up with four guidelines which gave birth to the 'rarest of the rare case' doctrine. These guidelines are:

When the act is the gravest case of extreme culpability;
There should be a balance made between aggravating and mitigating circumstances;
Life Imprisonment is the rule and Death Penalty is the exception; and Crime is enormous in proportion.

Through this judgment, the Indian judiciary limited the scope of awarding death penalty but the whole issue was so controversial in nature that again a major loophole was left by the Court in regard to the second guideline as mentioned above. The Court did not make any remarks as to what would fall under aggravating and mitigating circumstances. To put it simply, again the discretion was left to the judges who may apply different principles in different cases of the same nature.

It is worth noting that Justice P.N. Bhagwati’s dissenting opinion came after two years of the judgment. He expressed his views that because there were ‘no legislative guidelines as to when life could be taken by law’, Section 302 of the IPC was ultra vires of Articles 14 and 21 and therefore unconstitutional. What Justice Bhagwati said after the 1980 judgment still exists today as even now there is no sentencing policy framed by the legislature. In Macchi Singh v. State of Punjab,\(^{19}\) the issues to be decided by the Supreme Court were as follows:

Application of rarest of rare cases rule in question – when the community felt that for sake of self-preservation, the killer had to be killed, community might withdraw protection by sanctioning death penalty

A synthesis has emerged in Bachan Singh wherein the "rarest of rare" formula for imposing death sentence in a murder case had been evolved by this Court.

\(^{19}\) AIR 1983 SC 957.
The Court would address the issue of identification of the guidelines spelled out in *Bachan Singh* in order to determine whether or not death sentence should be imposed.

The question relating to the motive for commission of the offence which was dealt by the High Court in which it was observed that the motive was reprisal (counter attack).

The Court observed as under:

Insofar as the three appellants were concerned the rarest of rare cases rule prescribed in *Bachan Singh*’s case was clearly attracted and sentence of death was called for.

A sentence of imprisonment for life would not be adequate in the circumstances of the crime.

The view taken by the Sessions Court and the High Court that extreme penalty of death required to be imposed on the appellants was upheld by the Supreme Court.

As per the guidelines spelled out in *Bachan Singh*, the proposition that emerged was that the Court would consider the cumulative effect of both these aspects and normally, it might not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring their classes under other heads. To balance the two is the primary duty of the Court. It would be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354(3) of the Criminal Procedure Code.

Thereafter the Court enunciated the two categories of factors to be considered which are as follows:

- **Aggravating Circumstances**
- **Mitigating Circumstances**

The principle of proportion between the crime and the punishment was the principle of ‘just deserts’ that served as the foundation of every criminal sentence that is justifiable. In other words, the ‘doctrine of proportionality’ had a valuable application to the sentencing policy under the Indian criminal jurisprudence. It had to be realized that every member of the community was able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it.

*Dhananjoy Chatterjee v. State of West Bengal*, was a case which exposes a big problem in the criminal system of our country is that there may be already a lot of delay in deciding a matter and when a death row convict’s mercy petition is put on hold for many years, it has to be considered as inhuman treatment of that particular individual because of the constant fear leading to negative effects on mental as well as physical health. Finally, the court decided that delay caused due

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to filing of writ petitions would not be a ground for commuting the death sentence to life imprisonment.

The case became very popular in the Indian society and there was huge public outrage in support of hanging the appellant. The Court by stating that delay would not be a ground simply made it clear again that there was no one to hear a death row convict’s side of the story. Ultimately, Dhananjoy, who was in jail since 1991, was hanged in 2004 after his mercy petition was rejected. The judgment makes us wonder that why delay was not considered as a ground for commutation. Why there was not a disposal of the mercy petition within a reasonable period of time. Recently, a website ‘india-hanged-innocent’\(^{21}\) was created with the aim of re-investigating the death penalty issue regarding Dhananjoy Chatterjee which has a list of forensic documents to prove that there was no rape but still Dhananjoy was charged for rape also.

According to the 2nd ARC report, ”Administration of criminal justice in India is in “deep crisis,” due to lack of resources, an overstretched police force and ineffective prosecution as among the reasons. As a result, the administration of capital punishment is vulnerable to misapplication, it said. Mercy powers have failed in acting as a final safeguard against a miscarriage of justice, the report says, adding that the Supreme Court has pointed out gaps and illegalities in how courts have discharged the powers.”

**Judicial Interpretation of “Rarest of Rare” Doctrine**

Justice P. N. Bhagwati in *Bachan Singh v. State of Punjab*,\(^{22}\) observed that “It is, therefore, obvious that when a judge is called upon to exercise his discretion as to whether the accused shall be killed or shall be permitted to live, his conclusion would depend to a large extent on his approach and attitude, his predilections and preconceptions, his value system and social philosophy and his response to the evolving norms of decency and newly developing concepts and ideas in penological jurisprudence.” There are various factors which have to be kept in consideration by the judges when the question of death sentence comes before them. However, there is inconsistency in considering those factors in favour of the accused.

The Apex Court in *Jagmohan Singh’s case* held that it is required of the courts to exercise their discretion by applying its judicial mind on well-established principles. And the principles were established through landmark judgments of *Bachan Singh* as well as *Machhi Singh*. The balance between aggravating and mitigating circumstances has to be made while deciding. But it is important to note that any objective criteria for laying down a list of such circumstances is not possible because of variations in the facts and circumstances of each and every case. But still, some circumstances have to be necessarily taken into consideration. In this regard, *Bachan Singh* judgment was the rule in awarding capital punishment until Ravji and Surja Ram’s case was decided by the Supreme Court in *Ravji v.*

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\(^{22}\) (1980) 2 SCC 684.
State of Rajasthan. In this case, it was held that the previous decisions of Bachan Singh and Rajendra Prasad were erroneous or in legal world, per incurium.

The earlier judgments talked about analyzing and concentrating on the circumstances of the accused rather than the gravity and nature of the act committed. Thus, through this case, the Supreme Court turned upside down the whole jurisprudence of awarding capital punishment in India. This new principle then became the new rule and it was used again and again six different times. Those six cases included thirteen convicted who were executed.

Ravji decision was finally overruled in 2009 through the decision of the Supreme Court in Santosh Kumar Bariyar’s case. The Court mentioned that while degree of punishment of a crime is to be fixed, it is both the circumstances relating to the crime as well as to the criminal that need to be considered. Therefore, Bachan Singh decision which talk for the first time about the same is legally valid. The Court in this case also cited the 48th Law Commission Report which had mentioned with great emphasis ‘the need to consider the socio-economic conditions of the accused while awarding punishment.’

The decision in Bariyar’s case is appreciable and was very much required in this regard. But, what about the six cases that were declared per incurium? Merely stating that the thirteen convictions in those cases were erroneous in law does not make any difference to those executed and their families. Because capital punishment is irrevocable, utmost caution and importance must be given while deciding to award the same.

In this case, it is clear and accepted by the Supreme Court itself that it failed in doing so. Those thirteen persons were not executed by ‘procedure established by law’ and therefore all those six cases and the Ravji judgment on whose basis the principle was being followed were violative of the Indian Constitution. There are many other conditions and mandates laid down in the CrPC which have to be followed when talking about the sentencing policy.

Also, before a convict is awarded a sentence, Section 235 (2) of the Cr.P.C. has to be complied with by the judge which states that: “If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.” So, when we read Section 235 (2) with Section 354 (3) of the CrPC, it is clearly stated that special reasons have to be recorded if the judge wants to award capital punishment after hearing the accused on the question of sentencing. The Law Commission of India in its Report has also stressed on the need of studying every detail of the accused before awarding a sentence. The sad part however is that there is a huge difference in the procedure laid down and its implementation and practice. The best example of this would be the Rajiv Gandhi

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23 AIR 1996 SC 787.
25 Ibid.
Assassination Case\(^26\) in which the accused which were twenty-six in number were granted two hours of time period to speak on the sentence being awarded to them. This pre-sentence hearing is a very important opportunity for the accused which cannot simply be used in the most effective way in a two-hours’ time period. Thus, in this case, Section 235 (2) was used as a mere formality of following the laid down procedure.

This problem was finally solved by the Supreme Court in *Santa Singh v. State of Punjab*\(^27\) in which it was held that the opportunity before sentencing is for placing all circumstances before the Court which may have an effect on the sentence being awarded to him. If it is not followed and complied with in this way, such sentence stands void and unconstitutional, which again observes the Court’s non-compliance with the procedure in Rajiv Gandhi’s assassination case.

Thus, the pre-sentencing hearing is a rule which must be duly followed by the courts. The procedure established by law enshrined in Article 21 of the Indian Constitution must be a procedure which is just, fair and reasonable, as pointed out by the highest court in *Maneka Gandhi v. Union of India*.\(^28\) And pre-sentence hearing is an integral part of that procedure.

Another important aspect of *Bachan Singh* judgment is that it talked about considering whether the convict can be reformed or not. But this principle has not been followed much by the courts. The awarding of capital punishment to an offender has been more like a lottery system depending on who tries the offender.

If a judge believes in the reformist idea, he would consider the chances of the offender’s reformation in depth while a judge who is a follower of the deterrence idea would not do the same and award the highest punishment neglecting the circumstances of the criminal which is a mandate given by the Supreme Court of the country.

In *Harbans Singh v. State of U.P. and Others*,\(^29\) three accused i.e., Harbans Singh, Jeeta Singh and Kashmira Singh were all given capital punishment by the Court of Session for a family’s murder. In the SLP filed in different Supreme Court benches, only Kashmira’s sentence was commuted from capital punishment to life imprisonment. Although it was proved that all the three convicts participated equally in the crime, still their final sentences varied. And this was noted to be a failure of justice by the Supreme Court. The Supreme Court observed the uncertainty of decisions based on the differences in views of different judges.

It is very important to note how there has been an inconsistency in the judgments in the post- *Bachan Singh* era. The sentence of death was set aside by the Supreme Court in *Ujagar Singh v. Union of India*\(^30\) considering that the convict was a seventeen-years old individual. So, here the age of the person was considered a relevant factor and a mitigating circumstance so as to commute the

\(^26\) C.C. No. 3 of 1992.  
\(^27\) AIR 1976 SC 2386.  
\(^28\) AIR 1978 SC 597.  
\(^29\) AIR 1982 SC 849.  
\(^30\) (1993) 50 DLT 674.
highest punishment. Although in *Lok Pal Singh v. State of M.P.*, the fact that the offender was an individual of nineteen years of age was not considered a relevant factor because he shared a ‘common intention of murder’.

Even after a long time since the principles of ‘rarest of rare cases’ have been laid down, it is still unclear as to which case falls under the category because of the contrary decisions in cases of similar facts and circumstances. For example, in *State of M.P. v. Manohar Singh*, unfortunately an old man was murdered and another was almost murdered by the convict, but the case was not considered to be a ‘rarest of the rare’ case. On the other hand, the judgment of *Panchi Singh v. State of U.P.*, the Supreme Court decided that the convicts for the murder of four people in which one was child of five years in age and one was an old woman deserved only and only the capital punishment.

**Law Commission of India, 2015 (Report No. 262 on Death Penalty)**

The Law Commission of India (*hereinafter*, LCI) in its 262nd Report on Death Penalty, by majority opinion, recommended abolition of death penalty with offences related to terrorism as an exception. Various reasons given by the majority include: Death penalty does not serve deterrent effect.

Most of the states have abolished the death penalty and follow reformative approach.

(ii) The *Bachan Singh* guidelines have not been thoroughly and uniformly followed by the judiciary. Clemency powers exercised by the Union and State Governments have not been followed as per the procedure which have resulted in undue delay.

However, three of the Commission’s members came up with their dissenting views regarding the above-mentioned reasons for recommending abolishment of death penalty in India. Justice (Retd.) Usha Mehra, and ex-officio members Dr. Sanjay Singh and P.K. Malhotra rejected the recommendations of the LCI and, instead, reasserted their support for death penalty. The Appendix to the Report, twenty short pages, consists of their counter to this 200-page report. An initial glimpse will leave the reader curious about how they countered a deep, well researched and reasoned report in just twenty pages, with hardly any footnotes and references to support their claims. Not surprisingly, the counter is rather trite, banal, and lacking in research. Their broad sets of arguments can be summarized as follows:

**Human Fallibility Argument:**

As Justice Usha Mehra states in all wisdom, “To err is human. Almighty alone is the dispenser of absolute justice. Judges of the highest court do their best, subject of course to the limitation of human fallibility.” As per this argument, error in

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32 1998 Cri L J 3305.
33 AIR 1974 SC 799.
34 Law Commission of India Report on Death Penalty (2015), Appendix A.
judgment is obvious, yet this is not reason enough to abolish death penalty. In effect, she is suggesting that it is reasonable to kill a few innocent persons on account of errors in judgment and that these ‘accidental’ deaths are inevitable by-products of a system, and this by itself is no reason to abolish the punishment itself.

Fear and Insecurity Argument:

P. K. Malhotra is of the opinion that “In spite of economic development, improvement in the education levels, there is increase in the crime rates and overall cultural deterioration”. In a more apocalyptic tone, Malhotra even suggests that abolition of the death penalty may eventually lead to a time “when the law will cease to exist”.35

He even referred to former U.S. President George W. Bush to note that “The reason to support the death penalty is that it saves other people’s lives”36. Mr. Malhotra alludes, without evidence, to the growing threat of terrorism, increased cases of kidnapping and abduction for ransom, organised crime etc. as the reason for retaining the punishment. He, of course, presumes that deterrence works in order to make such an argument in the first place. And second, by whipping up fear and insecurity, he prevents us from reflecting on all the evidence that been repeatedly suggesting that death penalty does not result in deterrence of crime.

Due Process of Law Argument:

These three members agree that there is an unbridled, arbitrary and judge-centric application of death penalty in most cases. But they assert their faith in ‘due process of law’, ‘rule of law’, procedural safeguards, checks and balances, to remedy this arbitrariness. As per this argument, the problem with death penalty in India is in its implementation, the problem is not essential, it is incidental. That is, the legal framework, in essence, can handle death sentence cases in a principled manner and so, as this argument goes, we just have to start doing it right.

Deterrence Argument:

This is the all-famous “deterrence argument”, a stubborn misconception that has rendered us blind to all evidence busting this myth. Yet, Dr Singh parrots this claim yet again:

“The capital punishment acts as a deterrent. If death sentence is abolished, the fear that comes in the way of people committing heinous crimes will be removed, which would result in more brutal crimes. All sentences are awarded for the security and protection of society and peaceful living of the people. Whoever committing a pre-mediated heinous crime... should not be allowed to go with life imprisonment...as they do not deserve for the same.”37

Majoritarian Argument:

This is the strongest argument against the abolition of death penalty stating that it is the law-makers (and majority of the citizens) who want to retain it. As Mr. Malhotra states, “The Parliament which reflects the will of the people passed law

36 Ibid.
37 Ibid.
with death penalty for certain offences against women as late as in 2013 and offences against children recently in 2018.” With a paternalistic subtext, he laments that the will of the Parliament shows that looking into the prevalent situation in the country, the Indian society has not matured for total abolition of death penalty”, and that the “time is not ripe” yet.38

Conclusions and Suggestions

There have been developments in the forms of punishment and awarding punishments. When we talk about the capital punishment, there have been numerous debates over the time. However, no scientific evidence has led us to the absolute acceptance of one or the other argument. In India, Section 354 (3) of the Cr.P.C. provides the power for the death sentence to be awarded to a convict. This being the general legislation, there are other special laws which have death penalty as one of the sentences, e.g., the Army Act of 1950; the Narcotics Drugs and Psychotropic Substances Act, 1985; and the Navy Act, 1950 etc.

The provisions of Cr.P.C. read with the provisions of the Constitution of India make sure that certain rights are guaranteed to the accused and his life or liberty may be taken but only if it is done by the procedure established by law which should always be at every stage, just, fair and reasonable. When a person is made accused in a case, his life and liberty are at stake because one mistake at any stage may result in his conviction. Thus, everything that revolves around the law must not be arbitrary.

The Supreme Court of India has decided various cases and ensured numerous times that justice be served. It has issued guidelines with respect to almost every issue that has come before it like torture in custody, handcuffing, fee legal aid, etc. Judicial activism has helped everyone in the society as it has thrived in ensuring collective good. However, it seems that even the Supreme Court is unable to work with one hundred percent success rate. When it comes to awarding death sentence, the trend followed by the judiciary is very confusing. When the death penalty was challenged in Jagmohan Singh’s case, one of the main arguments was that there is wide discretion given to the judge. The challenge to death penalty failed in that case. However, in cases like Bachan Singh, Machhi Singh and later Santosh Kumar Bariyar, the Court accepted the flaws in the existing law but sadly, till date nothing even close to an objective set of guidelines have been laid down to guide judges and minimize the discretionary power so as to avoid the miscarriage of justice.

There is an immediate need of a uniform sentencing policy because India does not have any and decisions can still be freakishly and arbitrarily imposed on individuals. This has been pointed out time and again by the Supreme Court judges itself. Justice Bhagwati rightly pointed out what fate will the accused have would be decided on the basis of the judges before whom he is standing. And judges will

always have the same opinion on any point of law is not possible. Thus, this unguided discretion has led to and further may lead to wrong executions. Also, the results of this arbitrary discretion which is not guided by any uniform set of guidelines is faced by the lower class. Even after the accused’ socio-economic conditions were decided as a mitigating factor by the Apex Court, it is evident by analyzing various judgments that the courts have ignored the same. Isn’t it a violation of the law? But still, because of the powers given, the judges cannot be made answerable and such confusion will exist in future as well if it stays the same.

On the basis of the analysis of statutory provisions and judicial pronouncements, it may be concluded that:

Since the ‘rarest of rare’ case was decided, no yardstick has been developed through which the punishment in similar cases may be measured. Thus, the discretion given to the judiciary by the provision of Cr.P.C. i.e., Section 354 (3) is very wide and has not been used properly as is seen in many cases and accepted by the Supreme Court itself.

The factors laid down by the Supreme Court in considering the question of capital punishment have not been taken seriously by the Courts particularly the subordinate judiciary which is evident from the fact that awarding death penalty by the lower courts is quite high and only a few ultimately result into executions. Some are even acquitted. The cause of crime is not studied thoroughly by the Courts. Penology requires that it is necessary to study why a person has committed the crime. This would lead to a better understanding of the situation but it is not done.

Many a times the judges do not follow the procedure which is guaranteed to the convict i.e., pre-sentence hearing. Proper consideration of all the aggravating and mitigating circumstances is absent as is seen at various instances which has been observed in the previous chapters.

Ensuring a sentence of capital punishment is considered a big thing for the prosecutor and is motivated as is seen in the Madhya Pradesh High Court Rules which rewards prosecutors if the final decision results in capital punishment.

The subordinate judiciary has failed to follow the balancing of all factors which is a rule given by the Apex Court time and again. The Courts have not talked about the Bachan Singh and Machhi Singh at all in some cases and have awarded capital punishment.

The wide discretion has led to disparity in the sentencing procedure which can surely be termed as miscarriage of justice.

There is no mandate of considering and studying the report of the convict before the sentence is passed on him.

The decision on the question of capital punishment still depends on the personal value system of the judges.

Many judges in the lower judiciary do not even the know the concept of ‘special reasons’ which are needed to be given in writing while awarding capital punishment.
In order to decrease the work load of the Courts and dispose of cases in a swift manner, the judges do not pay much heed to the facts and circumstances of the cases which are fundamental.

It is thus concluded that in this regard, the theory of reformative justice has not been given much thinking before sentencing the convicts.

Paper further suggests that to remove the arbitrary imposition of death sentences and also disparity in sentences, it is absolutely necessary that the judges must study the case thoroughly, consider everything related to it and then arrive at a conclusion. This can be done if the guidelines are brought down in the Cr.P.C. by the legislature as was done in the United States after the *Furman case*. In addition to this, paper also suggests that:

There should also be a mandatory provision in the Cr.P.C. that the judge shall be given a pre-sentence investigation report. This report will help the judge to uniformly decide the appropriate sentence after considering every aspect related to the criminal.

The cause of crime *i.e.*, the etiology should always be discussed in cases of such sensitive and important nature and then only the appropriate sentence must be passed.

There should be mandatory training of the judges at every stage about the sentencing process with respect to modern developments and balancing of aggravating and mitigating factors before awarding capital punishment. Criminology and Penology play a very important role in this regard and must be included in the course curriculum as the subject is related to commission of offences, criminal and punishment.

Just like there is a jury system in the United States, therefore before arriving at a decision, various people give their opinions which make the process smoother. In India too, when a question comes before the court as to decide whether death or life imprisonment is to be given, a Council specifically for sentencing should be made which would include psychologists, social scientists, medical experts, and retired judges of High Courts and Supreme Court who have dealt with such issues. If there is a unanimous opinion, then only the judge should go forward in awarding death sentence to the convict.

The rules talked about in earlier chapter such as the M.P. High Court Rules with respect to acclaim to the public prosecutor should be removed so as to guarantee the independence of public prosecutor and ensure that his work which is to bring out the truth is unaffected and leave the question of choosing punishments to the judges.

The patterns of sentencing, the reasons given in such cases in a particular state should be studied by all the judges in that state so that the pattern can be compared, mistakes can be identified and improved thereby. Thus, this circulation should be done mandatorily on an annual basis.

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The process of pre-sentence hearing under Section 235 (2) must be duly followed and thereby special reasons must be recorded. If it is not done, this should fall in the favor of the convict and he should not be given death in such case.

The time between the pronouncing of the sentence and its execution should be reduced to a reasonably shorter time period as he has already exhausted the remedies in the subject matter and if the person who is to be executed stays in jail for years awaiting his execution, it depicts a state of affairs of miscarriage of criminal justice.

References

Maneka Gandhi v. Union of India AIR 1978 SC 597.
The Indian Penal Code, 1860.