DOES DEATH DETER? A CRITICAL ANALYSIS OF THE NEED FOR CAPITAL PUNISHMENT IN INDIA

A Dissertation submitted to the National University of Advanced Legal Studies, Kochi in partial fulfillment of the requirements for the award of L.L.M Degree in Constitutional and Administrative Law

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I Declare that this Dissertation Titled, "Does Death Deter? A Critical Analysis of the Need of Capital Punishment in India" researched and submitted by me to the National University of Advanced Legal Studies in partial fulfilment of the requirement for the award of Degree of Master of Laws in Constitutional and Administrative Law, under the guidance and supervision of Dr. Sandeep M.N. is an original, bona-fide and legitimate work and it has been pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.

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ABBREVIATIONS

CrPC	The Code of Criminal Procedure
ECHR	The European Convention on Human Rights
ECtHR	The European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
IPC	The Indian Penal Code
OHCHR	Office of the United Nations High Commissioner for Human Rights
UDHR	The Universal Declaration of Human Rights
UN	The United Nations
UNGA	The United Nations General Assembly
US	The United States
UK	The United Kingdom

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CHAPTER 1 INTRODUCTION

1.1 INTRODUCTION

The death penalty is the severest punishment imposable by a State, and it has long been a subject of great debate. Although many countries have outlawed death penalty, there has been no international consensus regarding its legality[1]. And countries such as India continue to retain and use capital punishment.

The Indian legal system has time and time again faced repeated challenges to the constitutionality of capital punishment. Article 21 of the Constitution of India provides that "*no person shall be deprived of his life or personal liberty except according to a procedure established by law*". The right to equality under Article 14 entitles a person to equality before laws and equal protection of laws, meaning that no person shall be discriminated against or treated unfairly or arbitrarily. So, it stands to reason that the equal protection clause under Article 14 applies to the judicial process during sentencing[2]. The finding of arbitrariness in sentencing may violate the idea of the equal protection under Article 14 and may also fall foul of the due process requirement under Article 21[3].

In this respect, it is still true that the question of death penalty is not free from the subjective element and the court's confirmation of a death sentence, or its commutation relies heavily on the personal predilection of the judges[4].The question of constitutionality of the death penalty in India hinges on this aspect.

Capital punishment as a penalty has been discretionary since it was first introduced in the Indian Penal code[5]. Until 1955 the Code of Criminal procedure required reasons to recorded if a capital crime was not dealt a death sentence. However, upon the adoption of the new Code of Criminal Procedure in 1973, the courts were required to record "special reasons" as to why they imposed the death penalty. This too was not able to wipe away the doubts that a subjective element exists in

[1] S.B. Sinha, To Kill or Not to Kill: The Unending Conundrum, 24 NAT'l L. Sch. INDIA REV. 1(2012)
[2] S.B. Sinha, To Kill or Not to Kill: The Unending Conundrum, 24 NAT'l L. Sch. INDIA REV. 1(2012)
[3]Santosh Kumar SatishbhushanBariyar v. State of Maharashtra, (2009) 6 SCC 498
[4] Swamy Shraddananda v. State of Karnataka, (2008) 12 SCC 288 para 33
[5] Jill Cottrell, Wrestling with the Death Penalty in India, 7 S. AFR. J. oN HUM. Rts. 185 (1991)

awarding the sentence of death, leading to several cases challenging the constitutional validity of the death penalty.

The constitutional validity of the death penalty was upheld in *Jagmohan Singh v. State of Uttar Pradesh*[6]. It was contended that the death sentence was unconstitutional as no procedure was provided for awarding the death sentence, and that the procedure under the CrPC was confined only to findings of guilt. The court held that the choice of death sentence is done in accordance with the procedure established by law and observed that the judge makes the choice between capital sentence or imprisonment of life based on circumstances and facts and nature of crime brought on record during trial. The bench unanimously upheld that capital punishment was not violative of Articles 14, 19 and 21. It was later stressed in another case that that death penalty is violative of articles 14, 19 and 21, and to impose death penalty the special reason should be recorded for imposing death penalty in a case and the death penalty must be imposed only in extraordinary circumstances[7].

The principal cases on when the death penalty should be imposed are *Bachan Singh v. State of Punjab*[8]and *Machhi Singh v. State of Punjab*[9]. In the former, the Supreme court overruled its earlier decision in Rajendra Prasad and was of view that death penalty is not unreasonable as an alternative punishment for murder and hence not violative of articles 14, 19 and 21 of the Constitution of India. The rarest of rare doctrine was formulated in this case and it was held that the death penalty was only to be imposed in the 'rarest of rare cases'. The latter case summarized the former and laid down the broad outlines of the exceptional circumstances in which the when the sentence of death should be imposed, considering the nature of the crime and the circumstances of the criminal, and taking into account all aggravating and mitigating circumstances.

This resultant 'rarest of rare' doctrine serves as a guideline for awarding the death penalty. The Court in Bachan Singh recognized that each case is unique and has to be decided on its own facts and circumstances. For this reason, the Court refused to provide any categorization of the kind of circumstances that would invoke the death penalty. And courts were directed to determine whether a

[6]Jagmohan Singh v. State of Uttar Pradesh, A.I.R. 1973, S.C 947
[7]Rajendra Prasad v. State of UP, A.I.R. 1979, S.C.p.916.
[8]Bachan Singh v. State of Punjab, A.I.R. 1980, S.C 898
[9]Machhi Singh v. State of Punjab, A.I.R. 1983, S.C 957.

case is rarest of rare keeping in mind judicial principles derived from a study of precedents as to the kinds of factors that are aggravating and those that are mitigating. Bachan Singh thus endorsed the twin elements of individualized yet principled sentencing[10]. At the core of this doctrine lies the complete irrevocability of this punishment, which is why the courts devised this to be one of the most demanding and compelling standards in the law of crimes[11]. The emergence of the 'rarest of rare' dictum marked the beginning of the constitutional regulation of the death penalty in India[12].

However, there was no clarity on the judges' discretion in applying this doctrine, meaning that the imposition of the death penalty cannot be free from subjectivity[13]. Thus, the criminal justice system is unable to deal with all crimes equally, as there is an imbalance in sentencing due to judges' predilection. Such an imperfect sentencing system would be constitutionally arbitrary since it would accord differential treatment for similarly situated convicts, i.e., it would not provide those convicted of similar crimes equal protection with respect to their right to life[14]. These concerns have reiterated on several occasions where the Supreme court has pointed out the inconsistent application of 'rarest or rare' doctrine[15]. The Supreme Court has repeatedly recognized that the subjective and arbitrary imposition of the death penalty has caused "principled sentencing" to become "judge- centric sentencing"[16] based on the "personal predilection of the judges constituting the bench"[17]. In addition to this various courts have given their own meaning to the 'rarest of rare' doctrine and the variation in interpretation might amount to constitutional infirmity due to apparent arbitrariness on account of the content of the doctrine[18].

Nevertheless, if awarded the death sentence, a convict always has recourse to the executive, by way of commutation of the death sentence by the appropriate government[19] and granting of pardon by the

[10] Law Commission of India, The Death Penalty, (Law Commission of India, No. 262, 2015)
[11] Law Commission of India, The Death Penalty, (Law Commission of India, No. 262, 2015)
[12]Law Commission of India, The Death Penalty, (Law Commission of India, No. 262, 2015)
[13]S.B. Sinha, To Kill or Not to Kill: The Unending Conundrum, 24 NAT'l L. Sch. INDIA REV. 1(2012)
[14]Swamy Shraddhananda v. State of Karnataka (2008) 12 SCC 288
[15]See Aloke Nath Dutta v. State of West Bengal (2007) 12 SCC 230; Swamy Shraddhananda v. State of Karnataka (2008) 12 SCC 288; Farooq Abdul Gafur v. State of Maharashtra (2010) 14 SCC 641; Sangeet v. State of Haryana (2013) 2 SCC 452; Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546
[16]Sangeet v. State of Haryana (2013) 2 SCC 452
[17]Swamy Shraddhananda v. State of Karnataka (2008) 12 SCC 288
[18]Santosh Kumar SatishbhushanBariyar v. State of Maharashtra, (2009) 6 SCC 498
[19]Section 433, Code of Criminal Procedure, 1973

President[20] or Governor[21]. But, since the commutation powers of the government and the President or Governors are not limited by the evidence permitted before the courts, the exercise of executive powers to grant pardons and commutations have the authority and the moral justification to go beyond the legal position[22]. And while the judiciary applies the standards set out by the 'rarest of rare' principle, there is no known standard of how the executive grants commutation[23]. Appeals to the executive are, therefore, open to discrimination[24].The Supreme Court has also expressed its concern with the lack of a coherent and consistent basis granting clemency[25].

During their terms as President, President Rajendra Prasad commuted the death sentences in 180 out of the 181 mercy petitions he decided, rejecting only one, President Radhakrishnan commuted the death sentences in all the 57 mercy petitions decided by him, President Hussain and President Giri commuted all the death sentence petitions decided by them, President Ahmed and President Reddy did not get to deal with any mercy petitions in their tenure. President Zail Singh rejected 30 out of the 32 mercy petitions he decided, and President Venkatraman rejected 45 of the 50 mercy petitions decided by him, President Sharma rejected all the 18 mercy petitions put up before him, President Narayanan did not take any decision on any mercy petition before him, President Abdul Kalam acted only twice during his tenure resulting in one rejection and another commutation, President Pratibha Patil during her Presidency rejected five mercy petitions, and commuted 34 death sentences, President Pranab Mukherjee has rejected 30 of the 34 mercy petitions decided by him[26]. Observing this, it is discernable that the fate of a death row convicts mercy plea is heavily influenced by the ideologies and views of the President handling the matter.

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[20] Constitution of India, 1950,Article 72; Also see Maru Ram v Union of India, (1981) 1 SCC 107, the constitutional bench of the Supreme Court of India held that the power under Article 72 is to be exercised on the advice of the Central Government and not by the President on his own at his discretion. And the advice of the Government is binding on him.

[21] Constitution of India, 1950, Article 161

[22]S.B. Sinha, To Kill or Not to Kill: The Unending Conundrum, 24 NAT'l L. Sch. INDIA REV. 1(2012)

[23]Bachan Singh v. State of Punjab, A.I.R. 1980, S.C 898

[24]To rule out any case of arbitrariness or executive mala fide upheld that the granting of clemency by the President or Governor can be challenged in court on various grounds such as, the order has been passed without application of mind, or the order is mala fide, or the relevant material has been kept out of consideration (Epuru Sudhakar v Govt, of A.P. AIR 2006 SC 3385)

[25] Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546

[26] Law Commission of India, The Death Penalty, (Law Commission of India, No. 262, 2015)

Furthermore, beside potential for arbitrariness in death sentencing, and the unknown basis for executive other factors have led disputation within the country regarding the death penalty.The inordinate delay in the execution of the death penalty is one such reason. Convicts on death row exists under a specter of death while awaiting the outcome of mercy petitions, it is a degrading and brutalizing effect on the spirit of the condemned as he is being subjected to something more than the mere extinguishment of life[27].This is a horrifying and dehumanizing aspect of the death row phenomenon[28].

Additionally, the possibility for mistakes and the irreversible nature of the punishment are another reason for the turmoil surrounding capital punishment. The fear that an innocent life could be snuffed out by an irreversible penalty like death has chillingly and often been realized[29]. With an imperfect sentencing system there always exists the possibility of inevitable error leading to unavoidable injustice[30].The evolution of the concept of justice implies that an accused is presumed not to be guilty unless proved otherwise and that proof should be beyond all reasonable doubt[31].

Much of the support for capital punishment rests on its value as a general deterrent. Deterrence aims at the preventing persons from committing offences by utilizing the fear of punishment. The deterrence theory assumes that all persons are rational individuals and will commit a crime only if they perceive that the gain, they will derive from the criminal act will be greater than the pain they will suffer from its punishment[32]. This is strengthened by the belief that greater the punishment, greater will be its deterrent value, and there is no greater punishment than death[33].There has not yet been any empirical evidence supporting the deterrent value of the death penalty. This correlation between the imposition of the death penalty and subsequent rate of crime is without conclusive basis or proof.

[27]S.B. Sinha, To Kill or Not to Kill: The Unending Conundrum, 24 NAT'l L. Sch. INDIA REV. 1(2012)
[28]S.B. Sinha, To Kill or Not to Kill: The Unending Conundrum, 24 NAT'l L. Sch. INDIA REV. 1(2012)
[29]See R v Bentley (Deceased), [1998] EWCA Crim 2516; Ed Pilkington, 'The wrong Carlos: how Texas sent an innocent man to his death', The Guardian (last visited April 11, 2021, 4:00 P.M.) https://www.theguardian.com/world/2012/may/15/carlos-texas-innocent-man-death
[30] LETHAL LOTTERY: THE DEATH PENALTY IN INDIA (Amnesty International India and People's Union for Civil Liberties (Tamil Nadu & Puducherry), 2008)
[31]Bachan Singh v. State of Punjab, A.I.R. 1980, S.C 898
[32]SENTENCING AND CRIMINAL JUSTICE (Andrew Ashworth, 4th Ed., 2005)
[33]Ernest Haag, The Ultimate Punishment- A Defense, 99 Harvard Law Review 1662, 1666 (1986)

Capital punishment is a hot topic in the international sphere as well. Most countries in the world have now abandoned the use of the death penalty. But the world has not yet formed a consensus regarding its use. Till date, there exists nothing under international law which abolishes the death penalty, however a trend toward abolition has been noticed over the years with fewer and fewer countries retaining the death penalty[34]. The reason for this trend is manifold and no one factor can be responsible for it; the development in international human rights, increased affirmation to international instruments that aim for the progressive abolition the death penalty etc. are considered contributing factors[35].

The Universal Declaration of Human Rights (UDHR) was adopted in 1948. The UDHR, under Article 3 ensures to every person the right to life liberty and security of person[36]. However, no mention of capital punishment was made until 1966, which marked the adoption of the International Covenant on Civil and Political Rights (ICCPR). Since then, there has been a continuing discourse about the death penalty and its impact on the right to life.

At the international level, the most important treaty provision relating to the death penalty is Article 6 of the ICCPR Article 6 contains guarantees concerning the right to life and holds within itself important safeguards to be followed by signatories who retain the death penalty. It is evident from the provisions of this Article that stern restrictions are imposed on the use of capital punishment.

These restrictions include, but are not limited to, the right to a fair trial prior to the infliction of capital punishment, the limitation of the use of the death penalty to only the most serious of offences, prohibiting the retroactive imposition of the death penalty, prohibiting the imposition of the death penalty in the event of violation of other rights provided for under the ICCPR, the right to seek amnesty or the commutation of a sentence of death, and express provisions proscribing the execution of pregnant women and persons who has not yet attained eighteen years of age during the time when the offence was committed[37].Additionally, outside of the

[34] Amnesty International Home Page https://www.amnesty.org/en/ (last visited August 24, 2021, 5:40 P.M.)
[35]Hood, R., Hoyle, C. (2009) 'Abolishing the Death Penalty Worldwide: The Impact of a 'New Dynamic', *Crime and Justice*, Vol. 38, no. 1, 2009, pp. 1–63.
[36] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) Article 3
[37]AMNESTY INTERNATIONAL REPORT 2020/21 (Amnesty International, 2021)

provisions of Article 6 other limits are also emerging, one such prohibiting the imposition of death sentence on persons with mental or intellectual disabilities[38].

In spite of the fact that Article 6 of the ICCPR permits the use of the death penalty subject to its restrictions, it also provides that nothing Article 6 shall be called upon by any party State to delay or prevent the abolition of capital punishment.[39]

The UN Human Rights Committee in its general comment in 1982, first discussed in detail Article 6 of the ICCPR. The committee clarified that while this convention did not outright necessitate the death penalty, abolition was desirable. This body also stated that it would consider any move in the direction of abolition as "progress in the enjoyment of the right to life" and also said that the death penalty should be an "exceptional measure". The committee went on to reiterate important procedural safeguards like the death penalty be imposed only in accordance with law in force, the right to fair hearing, presumption of innocence, right to review, etc. be strictly followed[40]

The United Nations Economic and Social Council supplemented what was provided for under Article 6 of the ICCPR in 1984 by adopting penalty. This stipulates that those member states that have not abolished the death penalty apply these safeguards that guarantee the protection of the rights of those facing the death penalty. These safeguards state that capital punishment be imposed only for the most serious of crimes, and their scope does not go beyond intentional crimes with lethal or other extremely grave consequences; that a person facing the death penalty is given all guarantees to ensure a fair trial, that the person facing the death penalty is fully informed of the proceedings in the event that he does not understand the language used in the court, that the member states in which death penalty is still carried out allow adequate time for the preparation for appeal and completion of appeal proceedings and petitions for clemency, and that the officials involved in decisions to carry out an execution are fully informed of the status of appeals and petitions for clemency of the prisoner in question which stipulated that the most serious crimes should not go beyond intentional crimes with lethal or other extremely grave consequences.

[38] G.A. Res. 69/186 (Dec. 18, 2014)
[39] G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Mar. 23, 1976) Article 6 (6)
[40] U.N. Human Rights Committee, General Comment No 6 (Apr. 30, 1982) para 6

After the adoption of the ICCPR, the UN General Assembly adopted the Second Optional Protocol to the ICCPR in 1989. This was one of many protocols to human rights treaties that ban the use of the death penalty. In which it is provided that no execution shall happen within the jurisdiction of the States which are party to the protocol[41]. Keeping in mind Article 3 of the UDHR and Article 6 of the ICCPR, States party to this protocol, believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights, agreed that it would be desirable to take up an international commitment to abolish the death penalty[42].

Moreover, by way of a series of resolutions by the United Nations General Assembly adopted over the years, namely in 2007, 2008, 2010, 2012, 2014, 2016, 2018 and most recently in 2020, seek to establish a moratorium on the use of the death penalty. The General Assembly encouraged Member States to respect international standards that provide safeguards that protect the rights of those facing the death penalty, to make the information that is relevant with regards to the death penalty readily available, to progressively restrict the use of capital punishment, to create a moratorium on executions with the ultimate goal of abolishing the death penalty and calls upon State that have abolished the death penalty not to introduce it again. From only 104 in 2007, the States that have voted in favor of these resolutions have now risen to 123 in 2020[43].

1.2STATEMENT OF RESEARCH PROBLEM

The system of imposition of the death penalty is not a perfect one[44].The most prominent systemic imperfection in death sentencing is the unbridled discretion of judges. Even though the courts have provided for guidelines in awarding the death sentence, the manner in which these guidelines are applied rests solely with the judges and are subject to their personal predilections. Thus, similar cases would be adjudged differently and similarly situated convicts would receive

[41] G.A. Res 44/128 Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, (Dec. 15, 1989) Article 1

[42] G.A. Res 44/128 Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, (Dec. 15, 1989)

[43] Amnesty International Press Release, *UN: Opposition To The Death Penalty Continues To Grow*, Amnesty International (December 16, 2020, 6:05 P.M.) https://www.amnesty.org/en/latest/press-release/2020/12/un-opposition-to-the-death-penalty-continues-to-grow/

[44] S.B. Sinha, To Kill or Not to Kill: The Unending Conundrum, 24 NAT'l L. Sch. INDIA REV. 1(2012)

disparate treatment. Besides this, capital punishment brings with the risk of mistakes as irreversible as the sentence of death; inordinate delay in execution which leaves convicts languishing in prison; and executive discrimination in pardons and commutation. Capital sentencing cannot be taken lightly, and the Indian system of capital sentencing is one that is fraught with subjectivity and capriciousness. The judicial discretion in applying the "rarest of rare" doctrine by judges runs the risk of arbitrary decision making, which would affect prejudicially the right to equality and right to life of capital offenders.

1.3SCOPE OF STUDY

The imposition of the death penalty in India is done by applying the "rarest of rare" doctrine. However, the way the "rarest of rare" doctrine is to be applied falls under the discretion of the judges, and as such will not always be the same even when the facts of the cases are similar[45]. The existing system for death sentencing in India has a high potential for resulting in constitutional arbitrariness[46].

The present study is an analysis of the sentencing practices by the Constitutional courts between 2005 and the present. The sentencing phase of the trial is quite distinct from the conviction phase and a wide range of factors, that might be irrelevant in determining the guilt of the accused, must play an important role in determining the appropriate sentence[47].

Section 354(3) of the Code of Criminal Procedure, 1973 calls for giving special reasons in cases where death penalty is being awarded. In cases where the death penalty is sought, the Supreme Court of India in Bachan Singh's case has laid down an elaborate sentencing framework to be adopted before sentencing an individual to death. The 'rarest of rare' doctrine developed in Bachan Singh requires judges to balance aggravating and mitigating circumstances while determining whether a death sentence should be imposed. Judges are required not only to

[45]Swamy Shraddhananda v. State of Karnataka (2008) 12 SCC 288
[46]Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498
[47] LETHAL LOTTERY: THE DEATH PENALTY IN INDIA (Amnesty International India and People's Union for Civil Liberties (Tamil Nadu & Puducherry), 2008)

consider the brutality of the crime, but also to consider the possibility of reformation of prisoners and to ensure that the alternative option is unquestionably foreclosed[48].

This study explores the constitutional challenges to the death penalty, and the guidelines evolved by the judiciary in determining whether a particular case would attract the death penalty, primarily the 'rarest of rare' doctrine evolved in Bachan Singh's case and its judicial interpretation, judicial application and judicial development and evolution

This study is confined to the sentencing practices in cases from the year 2005 to the present, and cases before this time will only be referred to if they are landmark decisions in the development of death penalty and its application in India. This analysis those decisions by the Constitutional courts rendered during this period, in which the courts considered the award of the death penalty or where it has adjudicated on a particular aspect of the death penalty.Emphasis will be placed the analysis of the sentencing guidelines in cases with similar facts, aspects, or circumstances in order with relation to aggravating and mitigating circumstance to determine whether the judicial award of the death penalty is consistent or not. The research for this study involved the analysis of judgments given during the period that were reported in online case resources.

In addition to this, this study examines the deterrent value of the death penalty in India to find whether there exists a correlation between the death penalty and the rate of crime. This part of the study seeks to determine whether the relationship between the death penalty and the rate of crime in the country is coincidental or correlational. This involves the study of the recorded number of executions within the country and the subsequent recorded rate of crime.

As the deterrent theory of punishment is the strongest advocate for the retention of the death penalty, examining the relationship between the death penalty and the rate of crime will help determine whether India has a need to retain the death penalty.

The final party of the study includes a global analysis of capital punishment, the international trends and the international laws and instruments and developments that have shaped the changes in death penalty.

[48]Bachan Singh v. State of Punjab, A.I.R. 1980, S.C 898

1.4OBJECTIVES

- To examine the imposition of the death penalty in India through judicial decisions from the year 2005 onwards.
- To identify instances of differential treatment in similar capital offence cases.
- To examine the penological purpose of the death penalty.
- To examine the correlation between the death penalty and the rate of crime in India.
- To analyze the deterrent value of the death penalty in India.
- To analyze the need for the death penalty in India.

1.5RESEARCH QUESTIONS

- Whether judicial discretion involved in awarding death penalty in India has resulted in arbitrary decisions?
- Whether capital offence cases from 2005 onwards with similar facts are decided differently especially with regard to analyzing aggravating and mitigating circumstances?
- Whether there is a correlation between the use of the death penalty and the incidence of crime?
- Whether the death penalty serves as an effective deterrent?
- Whether there exists a need for India to retain the death penalty?
- Whether there are lessons to be learnt for India from the global scenario with regard to abolition of capital punishment?

1.6 HYPOTHESIS

There exists an imbalance in the sentencing of capital crimes due to the discretion of the judges. The death penalty in India has no sufficient proof of its effectiveness as a deterrent. The Indian legal system would benefit more from the abolition of the death penalty than from retaining it.

1.7 RESEARCH METHODOLOGY

This research involves a doctrinal approach. This would include the analysis of judgements of the Supreme Court, various High courts, statutes, online resources, publications, studies etc.

An attempt has also been made to collect data of the number of executions in India by way of RTIs to the Ministry of Home Affairs.

1.8 CHAPTERIZATION

The first chapter is an introduction to the whole study. It contains a brief introduction to the topic, statement of problem, scope of study of the topic, research questions, objectives of the study, of the study hypothesis and methodology adopted for this study

The second chapter is titled 'The death penalty in India' and will discuss the constitutionality of capital punishment, application of '"rarest of rare"' doctrine, and will analyze the 'crime' test and 'criminal' test as well as sentencing practices in capital offence cases.

The third chapter titled 'Death penalty as a deterrent' deals with the deterrent theory of punishment and the correlation between the rate of crime and capital punishment. This chapter aims to provide a detailed analysis of the deterrent value of the death penalty in India.

The fourth chapter considers the international scenario regarding capital punishment. This chapter contains the position of capital punishment under international law, international human rights and the death penalty and a global perspective of capital punishment with reference to select countries.

The fifth chapter deals with conclusions, finding and suggestions.

1.9 LIMITATIONSOF THE STUDY

This study is subject to certain limitations, namely, the study is concerned with capital offence cases for the period of 2005 to the present and will not give great emphasis on capital offence cases prior to this time frame.

Next is the inability to include all cases of imposition of the death penalty due to limited access to data. This study will not be able to cover every instance of imposition of death penalty as access to such data is limited.

In addition to this, this study is limited in providing the complete statistics of crime rate in India as the same is unavailable. Similarly, there is also a possible inability to provide an accurate account of execution statistics in India due to possible limited access to data.

Lastly, the comparative analysis of the global perspective is restricted to a few selected countries.

CHAPTER 2 DEATH PENALTY IN INDIA

2.1 CONSTITUTIONALITY OF CAPITAL PUNISHMENT

The subject of death penalty can arouse intense passion, vehemence, and fervour[49]. So it is without doubt that it has never been received with indifference. So it goes without saying that it has faced its fair share of tribulations. Capital punishment in India has, historically always been subject to challenge. In this regard the decision in *Bachan Singh v. State of Punjab*[50] is momentous.

In Bachan Singh, the court while upholding the constitutionality of the death penalty also sought to formulate a framework to guide sentencing discretion in capital cases. Considered a pivotal move in sentencing jurisprudence in India, this marked the initial attempt to guide the exercise of judicial discretion in sentencing, beyond the rudimentary guiding provisions set out by the legislature at that time. To fully comprehend how much of a shift was brought about in Bachan Singh, the legislative attitudes and changes prior to it require a perusal.

After independence in 1947, India continued to retain a majority the legislation introduced by the colonial British Government of India. Of these, relevant to this chapter are the Indian Penal Code (IPC) of 1860 and the Code of Criminal Procedure (CrPC) of 1898.

While the IPC provided for death as a punishment, and for the offences where death penalty was an option, CrPC laid out that; "*If the accused is convicted of an offence punishable with death, and the court sentences him to any punishment other than death, the court shall in its judgment state the reason why sentence of death was not passed." These reasons for not awarding a sentence of death were referred to in case law as 'extenuating circumstances'*[51].

However, this provision under Section 367(5) was repealed by way of Amending Act XXVI of 1955, significantly altering the position of the death sentence .at this juncture, there was no substantive difference between sentencing a person to death or life imprisonment. The death

[49] LETHAL LOTTERY: THE DEATH PENALTY IN INDIA (Amnesty International India and People's Union for Civil Liberties (Tamil Nadu & Puducherry), 2008)
[50] Bachan Singh v. State of Punjab (1980) 2 SCC 684
[51] Code of Criminal Procedure, 1898, section 367(5)

penalty was no longer the norm, and courts did not need extenuating circumstances as to why they were not imposing the death penalty in cases where it was a prescribed punishment. Later, a resolution was moved in the Lok Sabha on abolition of death sentence. The views of Law Commission were also sought on the subject who had recommended retention of death penalty in its 35th Report in 1967. This was followed by the subsequent 1973 re-enactment of The Code of Criminal Procedure, which made several changes. Most notable were the changes to Section 354(3) which states that "*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.*[52]", effectively making the imposition of death the exception in capital cases.

The shift in the legislature from death being the norm to it being the exception as punishment for murder resulted in a corresponding evolution in the judiciary[53]. However, the first constitutional challenge to the death penalty arose before the 1973 amendment was effected.

In *Jagmohan Singh v. State of UP*[54] looked into the constitutional concerns surrounding judicial discretion in capital cases under the 1955 CrPC. The decision in *Ediga Anamma v. State of Andhra Pradesh*[55] emphasized the role of personal and social factors relating to the accused in sentencing. The recognition of death sentence as an extraordinary punishment in law in the 1973 CrPC eventually led the courts to interpret the meaning of 'special reasons' under Section 354(3). The meaning of 'special reasons' was first attempted by the Supreme Court in *Rajendra Prasad v. State of UP*[56]. While the decision in Rajendra Prasad's case sought to introduce individual circumstances of the offender into sentencing, it too could not effectively provide clarity for sentencing judges[57]. It also set out categories of crime that that the judges saw as more deserving of death.

[52] Code of Criminal Procedure, 1973, section 354(3)
[53] LETHAL LOTTERY: THE DEATH PENALTY IN INDIA (Amnesty International India and People's Union for Civil Liberties (Tamil Nadu & Puducherry), 2008)
[54] Jagmohan Singh v. The State of Uttar Pradesh (AIR 1973 SC 947)
[55] EdigaAnamma v. State of Andhra Pradesh, (1974) 4 SCC
[56] Rajendra Prasad v. State of Uttar Pradesh, (1979) 3 SCC 646

An impasse was reached on the matter of death sentencing in 1979 when different Benches of the Supreme Court heard the cases of *Dalbir Singh v. State of Punjab*[58], and *Bachan Singh v. State of Punjab*[59]. While the deliberations in Dalbir Singh's case relied on the decision in Rajendra Prasad to arrive at a decision, in Bachan Singh the Bench noted that the judgment in Rajendra Prasad was contrary to the decision in Jagmohan Singh's case and referred it to a Constitutional Bench. This culminated in the landmark decision of *Bachan Singh v. State of Punjab*[60].

In Bachan Singh, of the five-judge constitutional bench, four did not accept the contention that the death penalty was unconstitutional[61]. Here, the decision in Jagmohan Singh's case was affirmed and that of Rajendra Prasad was overruled. By affirming Jagmohan Singh, the Court held that the death penalty could not be restricted to only those cases set out in Rajendra Prasad. In an attempt to guide sentencing discretion the Court formulated the 'rarest of rare' doctrine, a sentencing framework for the imposition of the death penalty. The Court went on to state that both the circumstances of the crime and criminal must be included in the reasons for the imposition or non-imposition of death. It also observed that 'special reasons' under section 354(3) for inflicting the death penalty would mean "*'exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal*".[62]

Bachan Singh's sentencing framework is considered in many ways to be an attempt by the Supreme Court to limit the powers of sentencing courts by laying down some guiding principles for sentencing discretion, and the need for a framework was an attempt by the Court to reduce the arbitrary imposition of the death penalty by providing a loose boundary within which unfettered judicial discretion could be exercised[63].

Bachan Singh's case was the juncture at which the Court made a decisive shift in its approach to sentencing. This shift was crucial to the jurisprudence pertaining to sentencing and punishment

[58]Dalbir Singh v. State of Punjab (1979) 3 SCC 745
[59]Bachan Singh v. State of Punjab (1980) 2 SCC 684
[60]Bachan Singh v. State of Punjab (1980) 2 SCC 684
[61] J. Bhagwati dissented stating that the imposition of the death penalty is whimsical, arbitrary and capricious
[62]Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 161

in India. Bachan Singh expanded on the guiding provisions set by the legislature, and for the first time put forward guidelines for exercising judicial discretion in sentencing

However, the framework in Bachan Singh itself has many ambiguities, which have given rise to re-interpretations that do not sit comfortably with its original framework[64]. At the core of the uncertainty surrounding the Bachan Singh framework is the lack of normative clarity on sentencing factors. While Bachan Singh provides an indicative, not exhaustive, list of aggravating and mitigating circumstances, it does not clarify why these factors are relevant in a sentencing. By plainly asserting the relevance of these factors without explanation, the Bachan singh framework left the courts to fill any normative gaps with their own considerations.

Further, a failure to indicate the integral role of sentencing factors subjects the collection, presentation, and consideration of these factors to a very low threshold. Bachan Singh sets out for individualized punishment and the mitigating circumstances of a criminal are a crucial aspect in this respect. However, this framework did not provide clarity as to who would bring such mitigating evidence before sentencing courts, i.e. it did not provide for procedure. Furthermore, Bachan Singh provides no guidance on the standard of proof that is to be used in considering sentencing material[65].

Given this lack of normative explanation, subsequent judgments of the Supreme Court have invoked penological justifications such as deterrence and retribution instead. By imposing death sentences citing penological goals, the Supreme Court has effectively substituted the original capital sentencing framework developed in Bachan Singh with these justifications, without adhering to the framework.

At the core of the Bachan Singh framework is the identification of aggravating and mitigating factors followed by the application of judicial mind to these factors. However, Bachan Singh has very little to offer in terms of guiding judicial discretion on this aspect[66]. The lack of any real

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[64] Dr. Anup Surendranath, *India's Broken Criminal Justice System Cannot Support The Death Penalty*, Project 39A (last visited August 13, 2021, 9:35 P.M.) https://www.project39a.com/op-eds/2019/3/13/indias-broken-criminal-justice-system-cannot-support-the-death-penalty

[65] Preeti Dash & Rahul Raman, Beyond Inconsistent Application: Inherent Gaps in The 'Rarest Of Rare' Framework , Project 39A (last visited October 2, 2021, 9:35 P.M.) https://www.project39a.com/op-eds/2018/5/1/with-death-penalty-it-will-be-harder-to-punish-child-rapists

[66] Dr. Anup Surendranath, *Matters of Judgment*, Project 39A (last visited September 13, 2021, 9:35 P.M.) https://issuu.com/p39a/docs/combined231117

guidance on weighing aggravating and mitigating factors has led to a crime-centric focus in sentencing, and has also resulted in some judgments that outright dismiss the role of mitigating factors. Resultantly, the very foundations of the Bachan Singh framework have been unsettled by subsequent decisions that stray further away from it.

2.2 APPLICATION OF THE ‘‘RAREST OF RARE’’ DOCTRINE

The leading cases on capital sentencing are those of Bachan Singh and Machhi Singh. *Bachan Singh v. State of Punjab*[67] laid down a sentencing framework in an attempt to guide judicial discretion in sentencing. In its essence, this framework was aimed to guide the judiciary in choosing between life imprisonment and death penalty, and attempted to give substance to the ‘special reasons’ provided under Section 354(3) of the CrPC.

Following the decision on Bachan Singh in 1983, *Machhi Singh v. State of Punjab*[68], expanded on the ‘‘rarest of rare’’ formulation and listed out five instances where the death penalty would be suitable. Furthermore, Court held that the death penalty may be imposed where the “collective conscience” of society is so shocked that it will expect the holders of the judicial power to inflict death penalty. Machhi Singh, thus, cemented the applicability of the ‘‘rarest of rare’’ doctrine to distinct categories, which was something the Court had expressly sought not to do in Bachan Singh. By doing so, Machhi Singh considerably enlarged the scope for imposition of the death penalty beyond what was set out in Bachan Singh[69]

Although, the Court in Bachan Singh set out principles to guide sentencing in the hopes that that it would cure the deficiencies in sentencing and thus minimize the risk of arbitrariness, the concerns that capital punishment is being “arbitrarily or freakishly imposed” still persist. And on perusal of how the Supreme Court had applied the ''rarest of rare'' concept it can be concluded that it was indeed applying the penalty quite rarely, but that it was proving very difficult to develop satisfactory criteria for when the ultimate penalty should be applied. Frequent findings as to arbitrariness in sentencing under Section 302 may violate the idea of equal protection

[67] Bachan Singh v. State of Punjab, (1980)
[68] Machhi Singh v. State of Punjab, (1983) 3 SCC 470
[69] Swamy Shraddananda v. State of Karnataka, (2008) 12 SCC. 288

clause implicit under Article 14 and may also fall foul of the due process requirement under Article 21[70].

In judgments such as *Aloke Nath Dutta v. State of West Bengal*[71],*Swamy Shraddhananda v. State of Karnataka*[72], *Santosh Bariyar v. State of Maharashtra*[73], *Mohd. Farooq Abdul Gafur v. State of Maharashtra*[74],*Sangeet v. State of Haryana*[75],and *Shankar Kisanrao Khade v. State of Maharashtra*[76] the Supreme Court has in no unclear terms acknowledged that the imposition of the death penalty is subjective and arbitrary.

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

The Supreme court in Swamy Shraddananda stated that "*the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the judges constituting the Bench*."[77]Following suit, in Santosh Bariyar the Supreme Court admitted that "there is inconsistency in how Bachan Singh has been implemented, as Bachan Singh mandated principled sentencing and not judge centric sentencing[78]". The Court further noted that the "'rarest of rare'" formulation in Bachan Singh has been applied inconsistently and the balance sheet of aggravating and mitigating factors being implemented on an individual case basis has not served well enough to rid capital sentencing from arbitrariness[79].

Despite the decision in Bachan Singh holding that well recognized principles evolved through judicial precedent would guide courts in capital sentencing, the Supreme Court has admitted that the precedent on death penalty is constitutionally infirm owing to the content of the doctrine[80].

Since the death penalty is to be awarded only in the 'rarest of rare' cases, Bariyar required judges to survey a pool of similar cases to determine whether the case before them was 'rarest of rare'

[70] S.B. Sinha, To Kill or Not to Kill: The Unending Conundrum, 24 NAT'I L. Sch. INDIA REV. 1 (2012).
[71]Aloke Nath Dutta v. State of West Bengal, (2007) 12 SCC 230
[72]Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767
[73]Santosh Bariyar v. State of Maharashtra, (2009) 6 SCC 498
[74]Mohd. Farooq Abdul Gafur v. State of Maharashtra, (2010) 14 SCC 641
[75]Sangeet v. State of Haryana, (2013) 2 SCC 452
[76]Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546
[77]Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC. 767, at para 51
[78]Santosh Bariyar v. State of Maharashtra, (2009) 6 SCC 498, at para 54
[79] Santosh Bariyar v. State of Maharashtra, (2009) 6 SCC 498
[80] Mohd. Farooq Abdul Gafur v. State of Maharashtra, (2010) 14 SCC 641

or not. In Khade, the Supreme Court, alluded to the need for evidence based death sentencing, over concerns that the 'rarest of rare' formulation is unworkable unless empirical evidence is made available which allows the Court to evaluate whether that a particular case is "rarer" than a comparative pool of rare cases. In the absence of this data, the Court felt that the application of the 'rarest of rare' formulation becomes "extremely delicate" and "subjective."While surveying a pool of cases relating to rape and murder, the Court found that the the rape and murder of a young child shocks the judicial conscience in some cases but not in others.

In *Shivaji v State of Maharashtra*[81] the death sentence of the accused was upheld as he not only committed the rape of his nine year old neighbour, he also killed the victim to hide his crime. The Court held that this was an act of extreme brutality and the accused in his killing of the victim to silence her. Additionally, the Court also considered the fact that the victim was a defenceless young girl.

State of Uttar Pradesh v. Satish[82], is a case where the accused was acquitted by the High Court and yet the death penalty awarded by the Trial Court was upheld by the Supreme Court for the rape and murder of a young child. The special reasons for awarding the death penalty were the diabolic and inhuman nature of the crime.

A similar view was held in *Rajendra v State of Mahrashtra*[83] which upheld the death sentence in the case of rape of a three year old girl after kidnapping her, the accused then killed the victim to hide his crime. The Court considered the brutality of the crime and the conduct of the accused prior to, during, and after the crime.

In *Bantu v. State of Uttar Pradesh*[84], the death sentence was confirmed for the special reason of the depraved and heinous act of rape and murder of a five year old child, which included assaulting the victim with a wooden stick in an attempt to cover up the crime as an accident. This Court in this case held that the facts of this case evidences that it falls into the 'rarest of rare' category, and that the depraved acts of the accused calls upon nothing short of the death sentence.

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[81] Shivaji v State of Maharashtra AIR 2009 SC 56
[82] State of Uttar Pradesh v. Satish, (2005) 3 SCC 114
[83] Rajendra v State of Mahrashtra AIR 2012 SC 1377
[84] Bantu v. State of Uttar Pradesh, (2008) 11 SCC 113

For the above cases, the principal reasons for confirming the death penalty include the cruel, diabolic, brutal, depraved and gruesome nature of the crime, the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community the reform or rehabilitation of the convict is not likely or that he would be a menace to society the crime was either unprovoked or that it was premeditated. However, this reasoning of the courts has seen not seen a uniform application.

In *Neel Kumar v. State of Haryana*[85], the Supreme Court modified the death penalty awarded to the accused for the rape and murder of his four year old daughter to one of thirty years imprisonment without remission.

In *Haresh Mohandas Rajput v. State of Maharashtra*[86], the Trial Court had awarded life sentence to the accused for the rape and murder of a ten year old child but the High Court enhanced it to a sentence of death. Taking into account the view of the Trial Court, this Court converted the death sentence to one of life imprisonment, stating that this case did not fall into the ‘‘rarest of rare’’ category.

Surendra Pal Shivbalakpal v. State of Gujarat[87], was a case in which the death penalty awarded to the accused who had raped a minor child, was converted to life imprisonment considering the fact that he was thirty six years old and there was no evidence of the accused being involved in any other case and there was no material to show that he would be a menace to society.

In *State of Maharashtra v. Mansingh*[88], the accused was acquitted by the High Court of the offence of rape and murder of the victim. In a brief order, this Court noted this fact as well as the fact that this was a case of circumstantial evidence and, therefore, the death sentence was converted to imprisonment for life to meet the ends of justice. Similar was the case of *Bishnu Prasad Sinha v. State of Assam*[89], which involved the rape and murder of a child aged around seven years by two accused persons. The death penalty awarded to them was converted to life imprisonment since the conviction was based on circumstantial evidence.

[85] Neel Kumar v. State of Haryana (2012) 5 SCC 766
[86] Haresh Mohandas Rajput v. State of Maharashtra, (2011) 12 SCC 56
[87] Surendra Pal Shivbalakpal v. State of Gujarat, (2005) 3 SCC 127
[88] State of Maharashtra v. Mansingh, (2005) 3 SCC 131
[89] Bishnu Prasad Sinha v. State of Assam, (2007) 11 SCC 467

Rahul v. State of Maharashtra[90], was a case of the rape and murder of a four and a half year old child by the accused. The death sentence awarded to him was converted by this Court to one of life imprisonment since the accused was a young man of twenty four years when the incident occurred, he had no previous criminal record, and would not be a menace to society.

Santosh Kumar Singh v. State[91], was a case in which the sentence of death was converted to life imprisonment by this Court since the accused had been acquitted by the Trial Court and the High Court had reversed the acquittal on circumstantial evidence. The accused was young man of twenty four years when the incident occurred. There was nothing to suggest that he was not capable of reform.

Rameshbhai Chandubhai Rathod (2) v. State of Gujarat[92], was a case in which the accused who was about twenty eight years had raped and killed a child. The accused was awarded a sentence of imprisonment for life subject to remissions and commutation at the instance of the Government for good and sufficient reasons

In *Amit v. State of Uttar Pradesh*[93], the death penalty awarded to the accused for the rape and murder of a three year old child was converted to imprisonment for life since the accused was a young man of twenty eight years when he committed the offence, and he had no prior history of any heinous offence. There was nothing to suggest that he would repeat such a crime in future, nothing to suggest he wasn't capable of reform. He was sentenced him to life imprisonment subject to remissions or commutation.

A study of the above cases suggests that there are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include the young age of the accused, the possibility of reforming and rehabilitating the accused, the accused had no prior criminal record, the accused was not likely to be a menace or threat or danger to society or the community, the crime was not premeditated, and the case was one of circumstantial evidence

[90] Rahul v. State of Maharashtra, (2005) 10 SCC 322
[91] Santosh Kumar Singh v. State, (2010) 9 SCC 747
[92] Rameshbhai Chandubhai Rathod (2) v. State of Gujarat, (2011) 2 SCC 764
[93] Amit v. State of Uttar Pradesh, (2012) 4 SCC 107

However, as noted there are inconsistencies in the application of death penalty, these inconsistencies have moved the Supreme Court to itself acknowledge that "*there is a very thin line on facts which separates the award of a capital sentence from a life sentence in the case of rape and murder of a young child by a young man and the subjective opinion of individual Judges as to the morality, efficacy or otherwise of a death sentence cannot entirely be ruled out.*"[94]

In the abovementioned cases, one of the major factors that have resulted in the death sentence being commuted to the death penalty has been the young age of the accused. The young age of the accused is closely associated with another mitigating factor, the possibility of reform as well. Bachan Singh had recognized that the young age of the offender is a relevant mitigating circumstance which should be given great weightage in the determination of sentence. The Supreme Court has repeatedly held that if the offender committed the crime at a young age, the possibility of reforming the offender cannot be ruled out.

In *Ramnaresh v. State of Chhattisgarh*[95] , involving a gang rape and murder, the Court imposed a life sentence taking into account the young age of the convicts, all between twenty and thirty years of age, which pointed to the possibility of reform.

Similarly, in *Ramesh v. State of Rajasthan*[96], a case involving a double murder for gain, the Court imposed a life sentence by holding that the young age of the convict was a mitigating factor since he could be reformed.

In *Surendra Mahto v. State of Bihar*[97],the primary mitigating factor considered by the Court in imposing the life sentence was that the offender was only 30 years old and hence could be reformed

The Supreme Court in *Khade* pointed to the inconsistent use of age as a mitigating factor in otherwise similar cases of rape and murder. On the one hand, the offenders in *Rahul v. State of Maharashtra*[98], *Santosh Kumar Singh v. State*[99] , *Rameshbhai Chandubhai Rathod (2) v. State of*

[94] Rameshbhai Rathod (2) v. State of Gujarat, (2011) 2 SCC 764, at para 8
[95] Ramnaresh v. State of Chhattisgarh , (2012) 4 SCC 257
[96] Ramesh v. State of Rajasthan(2011) 3 SCC 685
[97] Surendra Mahto v. State of Bihar Criminal Appeal No. 211/2009
[98] Rahul v. State of Maharashtra, (2005) 10 SCC 322

Gujarat[100], and *Amit v. State of Uttar Pradesh*[101], were not given the death sentence since their age was considered a mitigating factor, on the other in *Shivu&Anr. v. Registrar General, High Court of Karnataka*[102], the young age of the accused was either not considered or was deemed irrelevant. In *State of Maharashtra v. Purushottam Dashrat Borate*[103], the young age of the accused was not was not considered enough to mitigate the brutal rape and murder of a young girl. In all these cases the accused persons were in their twenties.

The possibility of reform is central to the ‘‘rarest of rare’’ formulation in Bachan Singh. The Supreme Court recognized in Bariyar, that under the Bachan Singh framework, the option of life is “unquestionably foreclosed” and only when the sentencing aim of reformation can be said to be unachievable. Reformation was identified as one of the mitigating factors and onus was placed on the prosecution to show that the accused could not be reformed.

Bariyar reiterated that it is the duty of the courts to show that the convict is not open to any reformation or rehabilitation. The requirement that the state should justify, not only through arguments, but through evidence, that the exceptional penalty of death is the only option in the case, has been reiterated by the Court in Khade. In *Anil @ Anthony Arikswamy Joseph v. State of Maharashtra*[104], and *Birju v. State of M.P*[105], amongst others, the Court has again reiterated the need for evidence based assessment of the possibility of reformation of the offender.

The Supreme Court in the case of *Ajitsingh Harnamsingh Gujral v. State of Maharashtra*[106] emphasized the responsibility on the State to prove the impossibility of rehabilitation. In *Sham v. State of Maharashtra*[107] the court set aside the death penalty imposed by the High Court on the accused noting that he could be reformed or rehabilitated.

Dilip Premnarayan Tiwari v. State of Maharashtra[108] was a case in which three convicts had killed two persons and grievously injured two others, leaving them for dead. the Court reduced

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[99] Santosh Kumar Singh v. State, (2010) 9 SCC 747
[100] Rameshbhai Rathod (2) v. State of Gujarat, (2011) 2 SCC 764
[101] Amit v. State of Uttar Pradesh, (2012) 4 SCC 107
[102] Shivu&Anr. v. Registrar General, High Court of Karnataka, (2007) 4 SCC 713
[103] State of Maharashtra v. Purushottam Dashrat Borate, 2015 6 SCC 652
[104] Anil @ Anthony Arikswamy Joseph v. State Of Maharashtra, (2014) 4 SCC 69
[105] Birju v. State Of M.P., (2014) 3 SCC 421
[106] Ajitsingh Hamamsingh Gujral v. State of Maharashtra, (2011) 14 SCC 401
[107] Sham v. State of Maharashtra, (2011) 10 SCC 389
[108] Dilip Premnarayan Tiwari v. State of Maharashtra, (2010) 1 SCC 775

the death sentence awarded to imprisonment for life. The fact that these criminals were young persons who did not have criminal antecedents and could thus be reformed influenced the commutation of their death sentence.

In *Amar Singh Yadav v. State of Uttar Pradesh*[109], the death sentence was commuted to life imprisonment in a triple homicide primarily because there was no reason to believe that the appellant could not be reformed or that he would continue to commit offence and be a menace to society.

Nevertheless the courts have still continued to, while looking at the facts of a case, preclude any possibility of reformation on the part of the accused without providing sufficient evidence for the same. In *Mohd. Mannan v. State*[110], the accused was convicted for rape and murder. The Court in this case opined that the accused is "a menace to the society and shall continue to be so and he cannot be reformed." This case was noted in Sangeet wherein the Supreme Court stated that the judgment did not indicate any material on the basis of which the Court concluded that the criminal was a menace to society and could not be reformed. It appeared that the only factor upon which the Court had based this conclusion was the nature of the crime.

While the Court has often taken into account the prior criminal record of the offender in determining whether the person is capable of reform, the Supreme Court in Sangeet and Khade pointed to instances where the Court had taken into account cases that were merely pending before the courts, and had not been finally decided. Holding that basing the decision to impose the death penalty on such pending cases would amount to a negation of the principle of presumption of innocence, the Supreme Court admitted that these decisions were erroneous.

In *B.A. Umesh v. Registrar General, High Court of Karnataka*[111]was a case of the rape and murder of a woman. The Supreme Court confirmed the death penalty since the crime was unprovoked and committed in a depraved and merciless manner; the accused was alleged to have been earlier and subsequently involved in criminal activity; he was a menace to society and incapable of rehabilitation; the accused did not feel any remorse for what he had done. The Court held that his antecedents and subsequent conduct indicate that he is a menace to society and is

[109] Amar Singh Yadav v. State of Uttar Pradesh AIR 2014 SC 2486
[110]Mohd. Mannan v. State of Bihar, (2011) 5 SCC 317
[111] B.A. Umesh v. Registrar General, High Court of Karnataka, (2011) 3 SCC 85

incapable of rehabilitation. As noted by the Supreme Court itself in Sangeet, the allegations against the accused of having committed other offences were never proven or brought on record. Despite this, a review petition against this decision was dismissed by the Court, again referencing the allegation that he was subsequently found committing a similar offence in another house.

However, *Sebastian v. State of Kerala*[112] was a case in which the accused had raped and murdered a child of only two years. Earlier, he was convicted of an offence under Section 354 of the IPC. Subsequently, he was convicted for a more serious offence under Sections 302, 363 and 376 of the IPC but an appeal was pending against his conviction. The accused was also tried for the murder of several other children but was acquitted with the benefit of doubt, the last event having taken place three days after he had committed the rape and murder of the two year old child. Notwithstanding the nature of the offence as well the sentence of death awarded to him was reduced to imprisonment for the rest of his life.

From the above it can be seen that the courts have taken two views in determining the matter of prior criminal record of the accused. On one hand, the courts have taken into account cases pending against the accused such as that in the case of Umesh, and on the other hand in cases like Sangeet, as well as *Mohd. Farooq Abdul Gafur v. State of Maharashtra*[113], the Court has held that unless a person is proven guilty in a case, it should not be counted as an aggravating factor against him. The decision in Gafur also opined *a court may choose to give primacy to life imprisonment over death penalty in cases which are solely based on circumstantial evidence or where high court has given a life imprisonment or acquittal"*[114]

Concerned with the potential fallibility of convictions based only upon circumstantial evidence, and cognizant of the fact that the death penalty is irreversible, the Court has, in various cases cautioned that the death penalty should ordinarily be avoided when the conviction is based solely upon circumstantial evidence. The Court has held that cases based on circumstantial evidence

[112] Sebastian v. State of Kerala, (2010) 1 SCC 58
[113] Mohd. Farooq Abdul Gafur v. State of Maharashtra, (2010) 14 SCC 641
[114] Mohd. Farooq Abdul Gafur v. State of Maharashtra, (2010) 14 SCC 641, para 164

have far greater chances of turning out to be wrongful convictions later when compared to cases where the evidence is not circumstantial.[115]

Therefore, in cases like *Aloke Nath Dutta v. State of West Bengal*[116], *Swamy Shraddananda* and *Bishnu Prasad Sinha v. State of* Assam[117], the Court did not impose the death penalty on the consideration that the conviction was based on circumstantial evidence. But,in cases like *Shivaji v. State of Maharashtra*[118], and *State of Uttar Pradesh v. Satish*[119], the Court categorically rejected the view that death sentence cannot be awarded in a case where the evidence is circumstantial and has held that circumstantial evidence has no role to play in the formulation of a balance sheet of aggravating and mitigating factors.

The 'rarest of rare' doctrine provides a very narrow margin for the imposition of the death penalty, limited only to the most exceptional of cases. Given this extremely narrow exception, it would be expected that the judges of the various courts who have heard the case, would show a degree of unanimity regarding whether or not the case belongs to the 'rarest of rare' category. Further, given the irreversible nature of the death penalty, if a judge has doubts about the very guilt of the accused, this by itself should be a ground for not imposing the death penalty[120]. However, as in the cases mentioned in the previous sections, on this point too, there exists a considerable diversity of precedent.

In *Santosh Kumar Singh v. State*[121], the Supreme Court refused to impose the death penalty since, amongst other reasons, a lower court had acquitted the accused and in *State of Madhya Pradesh v. Vishweshwar*[122] the Supreme Court commuted the death sentence of the accused to life imprisonment for the killing of his wife and three children primarily on the groung that he had been acquitted by the High Court. While in *B.A. Umesh v. Registrar General, High Court of Karnataka*[123], the same sentiment was not expressed.

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[115] Kalu Khan v. State of Rajasthan, Criminal Appeal 1891-1892/2014
[116] Aloke Nath Dutta v. State of West Bengal, (2007) 12 SCC 230
[117] Bishnu Prasad Sinha v. State of Assam, (2007) 11 SCC 467
[118] Shivaji v. State of Maharashtra, (2008) 15 SCC 269
[119] State of Uttar Pradesh v. Satish, (2005) 3 SCC 114
[120] Mohd. Farooq Abdul Gafur v. State of Maharashtra, (2010) 14 SCC 641
[121] Santosh Kumar Singh v. State, (2010) 9 SCC 747
[122] State of Madhya Pradesh v. Vishweshwar (2011)11 SCC 472
[123] B.A. Umesh v. Registrar General, High Court of Karnataka, (2011) 3 SCC 85

Although the facts of each case appear to be different, the principle on which the same are determined must be objective[124]. Consistency in sentencing leading to death of a person is an important factor in the delivery of justice. And it acquires a special significance when the outcome results in depriving the life of an individual.

2.3 ANALYSIS OF CRIME TEST AND CRIMINAL TEST

The sentencing framework in Bachan Singh required the subsequent sentencing courts to consider factors relevant to the accused on the basis of aggravating and mitigating factors and the possibility of reformation. But subsequent cases have shown a trend away from the Bachan Singh's formulation of individualized sentencing, through a consideration of mitigating circumstances. The trend of not accounting for mitigating factors started with the decision in *Machhi Singh v. State of Punjab*[125] which presented a crime- centric framework in capital sentencing. The five categories mentioned in Machhi Singh namely the brutality of the crime, the motive of the crime, the abhorrent nature of the crime, magnitude of the crime, and personality of the victim, have offered the courts in subsequent cases a means to sidestep considering the mitigating factors relating to the criminal.

The Court in Machhi Singh held for the imposition of the death penalty where the "collective conscience" of society is shocked in a way that society will expect the courts to award a sentence of death, and such a sentiment would arise when the crime is viewed for the motive, manner of commission or the anti- social or abhorrent nature of the crime.[126] The introduction of "collective conscience" gives way for public opinion to be brought into sentencing.

In *Dhananjoy Chatterjee v. State of West Bengal*[127], the Court held that the appropriate punishment is to be determined in response to "society's cry for justice". And subsequent courts have used this "society's cry for justice" as a valid reason to impose the death penalty.

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[124] Preeti Dash & Rahul Raman, *Beyond Inconsistent Application: Inherent Gaps in The 'Rarest Of Rare' Framework* , Project 39A (last visited October 2, 2021, 9:35 P.M.) https://www.project39a.com/op-eds/2018/5/1/with-death-penalty-it-will-be-harder-to-punish-child-rapists

[125] Machhi Singh v. State of Punjab, (1983) 3 SCC 470

[126] Machhi Singh V. State Of Punjab (1983) 3 SCC 470

[127] Dhananjoy Chatterjee v. State of West Bengal (1994) 2 SCC 220.

By way of introducing elements like "collective conscience" and "society's cry for justice" in deciding individual capital offence cases, the focus in sentencing pivoted from individual culpability and proportionality to retaliation and sending a message to society. This in turn led to the imposition of the death penalty without giving appropriate consideration to mitigating factors, effectively substituting the Bachan Singh framework with imposing the death penalty based on justifications like deterrence and retribution.

This in turn has resulted in the Supreme Court dismissing mitigating circumstances like young age and presence of dependents while expressing views such as that most cases would always present compassionate grounds and so are not relevant considerations[128], the court also held that punishment should be proportionate to the gravity of the offence and that factors like religion, race, caste, economic or social status of the accused cannot mitigate the punishment[129], and that punishment must depend on the conduct of the accused and the gravity of the crime and not the social status is of the accused[130]. Such views deeming irrelevant the role of mitigating circumstances run contrary to the Bachan Singh framework.

Bariyar discussed the courts role of considering aggravating and mitigating circumstances[131]. Bariyar examined the decision in *Ravji v. State of Rajasthan*[132],where it was held that it was *nature and gravity of the crime that should be considered in arriving at an appropriate punishment.* Bariyar held that the exclusive focus in Ravji on the crime, rendered this decision per incuriam of Bachan Singh. In Sangeet, the Court recognized that the circumstances of the criminal, referred to in Bachan Singh have taken a backseat in the sentencing process.

The Court, in reaction to recent cases articulating that capital sentencing is "judge centric" and arbitrary, has developed three tests to be satisfied before the imposition of death; the crime test, which are the aggravating circumstances of the crime; the criminal test, which are the mitigating circumstances that pertain to the criminal; and on satisfaction of both, then the 'rarest of rare'

[128] Sevaka Perumal and another vs. State of Tamil Nadu, (1991) 3 SCC 471
[129] Shimbhu v. State of Haryana, (2014) 13 SCC 318
[130] Krishnappa v. state of Karnataka Criminal Appeal No. 669 of 1982
[131]Santosh Bariyar v. State of Maharashtra, (2009) 6 SCC 498, para 71
[132]Ravji alias Ram Chandra v. State of Rajasthan, (1996) 2 SCC 175

cases test, which depends on the perception of the society and not on the predilection of the judges[133].

To award a sentence of death the crime test has to be fully satisfied, and the criminal test i.e. mitigating factors favouring the accused should not be present in the case. In the event of circumstances favouring the accused such as possibility of reformation, age of the accused, etc., the criminal test may favour the criminal to avoid capital punishment. Even upon satisfaction of both these tests, the 'rarest of rare' test has to be carried out.

The application of the 'rarest of rare' cases test takes into account factors like "*society's abhorrence, extreme indignation and antipathy to certain types of crime*"[134]. The Court explained this test in *Mofil Khan v. State of Jharkhand*[135], stating that the test is to "*basically examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community.*"[136]

However, in Bariyar, the Supreme Court observed that public opinion was incompatible with the framework in Bachan Singh, as individual rights should be placed higher than the preferences of society[137]. Another problem to this approach was the difficulty in defining what public opinion on a given matter actually is. In addition to this, the Supreme Court was of the view that the expression ''rarest of rare'' used in Bachan Singh was to confine the imposition of death in very limited cases and so the expression of ''rarest of rare'' could not be reduced to a 'cry for justice'[138]. Recently as well the Supreme Court has noted issues with imposing punishment based on collective conscience[139]. In spite of these concerns imposition of death sentences invoking public opinion as a justification persists[140].

The triple test serves as a means to limit the imposition of death only to those cases where no mitigating circumstances whatsoever apply. And so the triple test keeps with the spirit of the 'rarest of rare' doctrine in that the death penalty should be imposed in the rarest or most

[133] Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546
[134]Gurvail Singh @ Gala v. State of Punjab, (2013) 2 SCC 713, para 19.
[135]Mofil Khan v. Jharkhand, (2015) 1 SCC 67
[136] Gurvail Singh @ Gala v. State of Punjab, (2013) 2 SCC 713, para 19.
[137] Santosh Bariyar v. State of Maharashtra, (2009) 6 SCC 498
[138] Rameshbhai Chandubhai Rathod (2) v. State of Gujarat, (2011) 2 SCC 764
[139] See MA Antony v. State of Kerala Review Petition (Crl.) No. 245 of 2010, Chhannu Lal Verma v. State of Chattisgarh (2019) 12 SCC 438
[140] Mukesh v. State (NCT of Delhi) (2017) 6 SCC 1

exceptional cases. The triple test analysis prevents the "judge centric" application of the death penalty by focusing on society's response to the crime. However, it was stated in Bachan Singh as well as in Bariyar that there is a real possibility that judges are likely to substitute their own assumptions, values and predilections in place of the perceptions of society, because even if one were to assume that society has determinate, stable and wide shared preferences on these matters, judges have no means of determining these preferences.

In addition to this, as mentioned above, Bachan Singh rejected the notion of categorization of types of crime which are fit for the death penalty. However, this triple test formulation seeks to do just that in its "'rarest of rare' test" which is predicated on "*society's abhorrence, extreme indignation and antipathy to certain types of crimes*."[141]

Recently however in 2019, a Supreme court bench consisting of Justice N.V. Ramana, Justice Mohan M. Shanthanagoudar, and Justice Ajay Rastogi in *State of Madhya Pradesh v. Udham and Others*[142], briefly explained the three tests to be applied while sentencing in a criminal case. The Court said that the crime test, the criminal test, and the comparative proportionality test have to be applied.

The crime test takes into account aggravating factors, i.e those pertaining to the crim, the criminal test accounts for the circumstances of te criminal, i.e. mitigating circumstances and The Comparative proportionality test determines whether a given death sentence is "excessive or disproportionate" compared to the penalty imposed in "similar cases". The comparative proportionality test could work as a means to further the objective application on the death penalty, since it is based proportionality which is one of the central tenets of individualized sentencing under the Bachan Singh framework[143].

According to the Bachan Singh, along with proportionality, culpability is a central aspect the courts need to consider in sentencing. Decisions made considering factors like "collective conscience" and "society's cry for justice" have undermined culpability and strayed from individualized sentencing. Despite these concerns, however, the Supreme Court, in some cases,

[141]Gurvail Singh @ Gala v. State of Punjab, (2013) 2 SCC 713, para 19.
[142] State of Madhya Pradesh v. Udham and Others, Criminal Appeal No. 690 of 2014
[143] Surendranath, A., Vishwanath, N. and Dash, P. P. (2019) 'Penological Justifications as Sentencing Factors in Death Penalty Sentencing', Journal of National Law University Delhi, 6(2), pp. 107–125.

continues to impose death sentences invoking public opinion as a justification[144]. The Supreme Court has acknowledged that it has fallen short in cases where only the circumstances of the crime were considered, without adequately considering the circumstances of the criminal. In spite of recognizing this there are still incidents of judges continuing to impose death based solely on the former set of considerations[145]

2.4 ANALYSIS OF SENTENCING PRACTICES IN CAPITAL OFFENCE CASES

The previous sections have pointed out how the many avatars of the rarest of rare doctrine and how it has been applied inconsistently by the courts over the years. The inconsistent and arbitrary application of the Bachan Singh framework has been at the forefront of the sentencing issues in capital cases. The Bachan Singh decision was a landmark in capital sentencing. This judgment upheld the constitutional validity of the death penalty and when confronted with the question of arbitrary sentencing and violation of Article 14, held that the sentencing procedure is neither arbitrary nor gives excessive discretion to judges. However Justice Bhagwati in his dissent stated with extreme candour that "*sentencing discretion conferred upon the court is totally uncontrolled and unregulated …it is standardless and unprincipled*"

On this point, the Court proceeded to develop a framework for future sentencing judges when deciding between life imprisonment and the death sentence. This framework required judges to consider aggravating and mitigating circumstances concerning both the crime and the criminal, and use the death penalty only in the 'rarest of rare' cases, when the option of life imprisonment is ' unquestionably foreclosed'. However, the judicial journey of the Bachan Singh framework has been characterized by, misinterpretations, error and subjectivity[146].

All discretionary decision making involves a degree of subjectivity[147]. Add to this the fact Bachan Singh left huge gaps in its normative foundations and procedure, then the degree of

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[145] Anup Surendranath et. al, The Enduring Gaps and Errors in Capital Sentencing in India, 32(1) NAT'I L. Sch. India REV. 45 (2020)

[146] Dr. Anup Surendranath, India's Broken Criminal Justice System Cannot Support The Death Penalty, Project 39A (last visited August 13, 2021, 9:35 P.M.) https://www.project39a.com/op-eds/2019/3/13/indias-broken-criminal-justice-system-cannot-support-the-death-penalty

[147] Wong v the queen, (2001) 207 CLR 584

subjectivity skyrockets[148]. Judges were left to fill these gaps on their own, in essence creating disparate and sometimes incorrect interpretations, and in essence leaving Bachan Singh a hollow doctrine[149]. A study by Project 39A showed that the individual articulation of the 'rarest of rare' doctrine by no two judges were the same[150]. So if Bachan Singh envisaged an objective guideline for death sentencing in order to limit sentencing discretion, is the purpose of the same not defeated when no two judges understand these guidelines the same. A dissimilar understanding leads to a dissimilar application, thus resulting in inconsistency, arbitrariness, and finally falling foul of the constitutional mandate of equality.

Confusion regarding the weight and scope of mitigating factors and their consideration in sentencing, the balancing of these factors with aggravating factors, has resulted in uncertainty and a marked imbalance in capital sentencing. Differences between courts in the identification of aggravating mitigating circumstances, how they are considered, and balanced, weaken the 'rarest of rare' doctrine, and its inconsistency application raise serious concerns of arbitrariness as well as judge- centric sentencing. In a 2020 report by Project 39A on the sentencing practices in trial courts, it was found that they heavily relied only on aggravating circumstances of the crime to decide the outcome in many cases, mitigating circumstances were not considered. Further, in complete defiance of the spirit of individualized justice envisaged in s.235(2) CrPC, many cases involved sentencing on the same day as conviction, and several cases also were decided without considering the default punishment of life imprisonment[151]. It would, however, be incorrect to attribute complete blame for a broken state of capital sentencing in trial courts exclusively to these courts themselves. The Supreme Court in Swamy Shraddananda noted that the inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results[152].

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[148] Anup Surendranath et. al, The Enduring Gaps and Errors in Capital Sentencing in India, 32(1) NAT'I L. Sch. India REV. 45 (2020)
[149] Dr. Anup Surendranath, *Matters of Judgment*, Project 39A (last visited September 13, 2021, 9:35 P.M.) https://issuu.com/p39a/docs/combined231117
[150] Dr. Anup Surendranath, *Matters of Judgment*, Project 39A (last visited September 13, 2021, 9:35 P.M.) https://issuu.com/p39a/docs/combined231117
[151] DEATH PENALTY SENTENCING IN TRIAL COURTS (Project 39A, 2020)
[152] Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC. 767

The 'rarest of rare' principle has not been followed uniformly or consistently[153]this is in large part to the unguided discretion of judges under the 'rarest of rare' doctrine. Discretion under this doctrine is vague, unstructured and unfettered. This unguided discretion was identified as being due to the lack of a sentencing policy and because judges were not trained in a way to undertake principled sentencing. A lack of structure in sentencing is fraught with the risk of error. As a possibly remedy to this, judges have suggested that the legislature set out sentencing guidelines. But even in this scenario subjectivity could not be rule out.[154]

It is not just the normative and procedural ambiguities of the Bachan Singh framework that have adversely affected death sentencing. The introduction of elements like "collective conscience", "society's cry for justice" paved the way for public opinion to be introduced into sentencing. This, aside from causing the trend toward crime- centric sentencing, also caused the introduction of penological goals like retribution and deterrence as factors in sentencing.

Macchi Singh fist introduced the "collective conscience" of society into sentencing, and ever since the sentencing judges have placed their focus mainly on the brutality of the crime without paying adequate attention to the circumstances of the criminal. The categorization of crime in Machhi Singh went against Bachan singh's stance against confining what would constitute the 'rarest of rare'. Even though Machhi Singh has stated that its categorization is illustrative and not exhaustive, this along with the introduction of outraging the collective conscience of society into sentencing has led sentencing courts down a path that largely focuses on the crime aspect and not so much on the criminal. This concept of responding to "society's cry for justice" does not fit into Bachan Singh's model of proportionality to culpability[155].

There has been a judicial disagreement over "collective conscience" in death sentencing[156]. On one hand, while it is argued that punishment has to be proportionate to the crime, there exists no means by which the proportionality can be judged. One means to judge this is with respect to the effect a crime has on the public, what it thinks about it etc. However, involving public opinion

[153] Dr. Anup Surendranath, *Matters of Judgment*, Project 39A (last visited September 13, 2021, 9:35 P.M.) https://issuu.com/p39a/docs/combined231117
[154] Dr. Anup Surendranath, *Matters of Judgment*, Project 39A (last visited September 13, 2021, 9:35 P.M.) https://issuu.com/p39a/docs/combined231117
[155] Surendranath, A., Vishwanath, N. and Dash, P. P. (2019) 'Penological Justifications as Sentencing Factors in Death Penalty Sentencing', Journal of National Law University Delhi, 6(2), pp. 107–125.
[156] Dr. Anup Surendranath, *Matters of Judgment, Project* 39A (last visited September 13, 2021, 9:35 P.M.) https://issuu.com/p39a/docs/combined231117

in death sentencing is a slippery slope as in runs the risk of media trials, and sentencing solely on the basis of assuaging public outrage. Bachan Singh has explicitly prohibited the same stating that judges should not become the spokespersons for public opinion, as there is a real risk of a judge substituting their personal predilection for what they sincerely consider the community ethic. Additionally the perception of community ethic could also vary between judges as well because there is no way to accurately discern what the will of the people is.

When upholding the constitutionality of the death penalty in Bachan Singh, the Court acknowledged the deterrent and retributive role of retaining the death penalty. Its penological goals play a huge part in the continued use of the death penalty. Following this on the matter of the absence of a framework for capital sentencing, the Court laid down a sentencing framework with both the nature of the crime and the individual circumstances of the criminal at its core, which had its normative foundations in reformation and proportionality. Simply put, individualized sentencing is based in well established legal principles. And in sentencing, the Court emphasized the need to pursue individualized sentencing in the pursuit of its penological goals.

However, the penological justification for the death penalty has often been used as a factor in sentencing. Bachan Singh does not explicitly place reliance on penological purposes in sentencing, under this framework, for a case to fall within the 'rarest of rare' the aggravating circumstances must outweigh the mitigating circumstances. Bachan Singh emphasized that mitigating circumstances should receive a liberal and expansive interpretation.

The Bachan Singh framework hinges on individual culpability and proportionality, and this works best when aggravating and mitigating circumstances are duly considered, so that the severity of the sentence can be adequately measured to ensure that the punishment is no disproportionate. It is in light of this that sentencing based on achieving penological goals becomes a problem. The introduction of concepts like deterrence and retribution by Courts as sentencing factors, subvert the role of mitigating factors[157]. After Macchi Singh brought in "collective conscience", the Supreme Court enlarged the scope for the use of penological justifications in sentencing.

[157] LETHAL LOTTERY: THE DEATH PENALTY IN INDIA (Amnesty International India and People's Union for Civil Liberties (Tamil Nadu & Puducherry), 2008)

Sentencing based on deterrence and retribution foreclosed the consideration of the circumstances of the criminal and diminished the role of mitigating factors. Deterrence has been relied on as a factor in sentencing especially in particularly brutal cases to punish such crimes with incredible severity in an attempt to deter future offenders, at the same time precluding any chance of considering mitigating circumstances of the criminal such as reformation. In addition to this no empirical proof exists that the deterrent theory of punishment works for simple punishments, let alone in the case of the death penalty. So, the sentencing of a person to death based on penological justifications is not only contrary to the Bachan Singh framework, it is also unjust and without proof of utility.

The lack of clarity on its sentencing goals is a broader problem that can be seen in capital sentencing. This lack of clarity leads to the sentencing goals being used in place of sentencing factors causing them to be substituted for the Bachan Singh framework. The Supreme Court arbitrarily invoking a variety of penological justifications as sentencing factors cause confusion among the lower courts as well. Trial courts have used such justifications to leave little to no room for mitigating factors, so even when a claim is made is made for proportional punishment focus would largely lie on the brutality of the crime. This issue can be said to stem from a lack of clarity from the legislature on the topic of prioritizing sentencing goals, which stems from the underlying lack of clarity in the Indian criminal justice system on the penological goals of the death penalty[158].

The problem of inconsistent application of the 'rarest of rare' framework and lack of clarity in sentencing become more pronounced in light of the fact that this would adversely affect the right to a fair trial, further emphasizing the broken nature of the criminal justice system[159]. Given the reality of these situations, it is not surprising that the death penalty has shown a disparate impact on socio-economically marginalized sections of society[160]. Given that a large portion of prisoners sentenced to death of are very poor and cannot adequate of competent legal representation, barely any factors regarding their lives, i.e. mitigating factors get presented before sentencing courts. Such cases end up being decided solely on the nature of the crime. The imperfect nature

[158] LETHAL LOTTERY: THE DEATH PENALTY IN INDIA (Amnesty International India and People's Union for Civil Liberties (Tamil Nadu & Puducherry), 2008)
[159] Dr. S. Muralidhar, (1998) 'Hang Them Now, Hang Then Not, India's Travails with the Death Penalty', Journal of the Indian Law Institute no. 1/4 , pp.143–73
[160] *The Death Penalty India Report*, National Law University, Delhi (2016)

of the capital sentencing system unfairly affects the most vulnerable in society and this concern by itself should serve as reason consider the removal of a punishment so brutal from a system so flawed.

Moving toward abolition is not unfamiliar territory to India as mandatory death penalty had been ruled unconstitutional[161]. Recent developments in sentencing have enhanced the range of alternative options that have to be foreclosed before opting for death. Swamy Shraddananda emphasized the availability of sentences other than life imprisonment and the death penalty, by invoking the vast hiatus between fourteen years imprisonment and death. A study of death sentences after this decision has revealed that many cases that would have occasioned of the death penalty has been met with the benefit of the various alternative options between a minimum sentence of fourteen years and a full sentence of life[162]. The Supreme Court in *Union of India v. V. Sriharan*[163], reaffirmed Swamy Shraddanada but held that it is open to only appellate courts to impose a life sentence for the rest of the prisoner's natural life, without any possibility of review or remission, in cases where death is one of the statutorily prescribed punishments. The court held that the State government's power of remission under section 432 of the CrPC. could be ousted while determining the sentence in an appellate court. This has been met with criticism as the executive power cannot be usurped by the judiciary. It is of note, though, the constitutional powers of pardon of the Governor and President under Articles 161 and 72 would not be abridged. But judges have been divided on whether the punishment so envisaged would be a legally valid one[164].

Clemency powers play a crucial role in a death penalty jurisdiction. The executive can use these powers to circumvent a flawed judicial system and save potential innocents from the gallows. But, what if this system is flawed as well. Under the constitution, in all cases where a convict is condemned to death by the courts, both the president and the governor of the state where the crime took place have concurrent jurisdiction over mercy petitions. It is solely up to the appropriate executive head to decide whether or not to grant a pardon. On what considerations

[161] Mithu v. State of Punjab, AIR 1983 SC 473
[162] S.B. Sinha, To Kill Or Not To Kill: The Unending Conundrum, 24 NAT'I L. Sch. INDIA REV. 1 (2012).
[163] Union of India v. V. Sriharan (2014) 4 SCC 242
[164] Dr. Anup Surendranath, *Matters of Judgment, Project* 39A (last visited September 13, 2021, 9:35 P.M.) https://issuu.com/p39a/docs/combined231117

this decision is made is unknown. Pardons depend wholly on the personal views of the particular executive head and this blaringly evident.

President Gaiani Zail Singh who was in office at this time rejected twenty one of the twenty three mercy petitions presented before him. President R Venkataraman, who followed, rejected thirty four of thirty nine petitions. President Shankar Dayal Sharma rejected the mercy petitions in all fourteen of the cases presented before him. President KR Narayanan rejected one mercy petition, and left another eight pending for his successor to deal with. President APJ Abdul Kalam, rejected a mercy petition in one case, and commuted a death sentence in another. Aside from this, President Kalam did not decide on the other twenty three mercy petitions presented before him. The next President, Pratibha Patil, inherited those twenty three petitions when she took office, she accepted thirty four petitions, and rejected five. She left sixteen mercy petitions pending when she retired from office. President Pranab Mukherjee rejected mercy petitions in thirty cases, and commuted death sentences to life imprisonment in four cases.[165]

The powers under Article 72 are not bound by evidentiary rules or criminal procedure, and the president is free to reassess all available information before arriving at a decision. The grounds for judicial review of the president's decision are also very narrow and limited. Article 74, provides that the President is to act advised by the council of ministers, this bars court interference and means there is no way to scrutinize how the President reached a decision A lack of transparency also adds to the belief that clemency powers are subjective and potentially discriminatory.

While still on the subject of pardoning powers, several issues have cropped up time and time again surrounding mercy petitions, one which is delay. The Supreme Court has emphasized the immense hope clemency powers provide for death row convicts, and therefore impressed the need of the executive to use such powers in a prompt and timely manner[166]. The Court in *Shatrughan Chauhan v. Union of India*[167], held that undue delay in rejecting a mercy petition

[165] Amartya Kanjilal, *The Quality of Mercy*, Project 39A (last visited October 8, 2021, 9:10 P.M.) https://www.project39a.com/op-eds/2018/2/20/should-we-do-away-with-capital-punishment-y2ndy-65mpf-r9c9a
[166] Union of India v. V Sriharan (2014) 4 SCC 242
[167] Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1

was sufficient in itself to entitle a commutation for the accused. It was also held that mental illness would be a factor in commutation and a mentally ill person would be spared th death penalty.[168] Another recent development came in the Supreme Court's judgment in *Babasaheb Kamble v. State of Maharashtra*[169]. Previously, the Supreme Court could dismiss the special leave petitions without giving any reasons and not admitting them to be heard as appeals. With this requirement, 'in limine' dismissals of these petitions were done away with.

The concept of residual doubt was introduced and its role as a mitigating factor was explored in *Ashok Debbarma v. State of Tripura*[170]. The concept of residual doubt envisages a situation where even after a case is proven to be "beyond reasonable doubt" to if there exists a lingering doubt in the judge's mind over the offender's guilt, this should serve as a grounds to alter death sentence[171].

Capital sentencing practices cannot be mentioned without mentioning the existence of mistakes. Death sentencing always carries with it the potential of taking an innocent life[172]. Wrongful convictions are and will always be an issue, however the seriousness of this is manifold where there is a potential loss of life. A most recent instance saw the Supreme Court acquitting all six persons wrongly accused in a case, and ordering a reinvestigation. Despite the wrongful incarceration of innocent persons for over a decade, this is one of the more fortunate outcomes as it could be rectified[173]. Some outcomes are far graver[174].

There has also been acknowledgement by judges of widespread use of torture to generate evidence especially in capital offence cases[175], and continued use of custodial torture is an open

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[168]Maitreyi Misra & Neetika Vishwanath, *Mental Illness, Sentencing, and The Death Penalty*, Project 39A (last visited October 8, 2021, 10:30 P.M.) https://www.project39a.com/op-eds/2019/6/5/mental-illness-sentencing-and-the-death-penalty See also Navneet Kaur v. NCT of Delhi AIR 2014 SC 1935

[169] Babasaheb Kamble v. State of Maharashtra Review Petition (Criminal) No. 324 of 2015 in Special Leave Petition (Criminal) 111 of 2015

[170] Ashok Debbarma v. State of Tripura, (2014) 4 SCC 747

[171] See also Ravishankar v. State of Madhya Pradesh Criminal Appeal No. 1523-1524 OF 2019

[172] S.B. Sinha, To Kill Or Not To Kill: The Unending Conundrum, 24 NAT'I L. Sch. INDIA REV. 1 (2012).

[173] Ankush Maruti Shinde v. State of Maharashtra, (2009) 6 SCC 667

[174] Avijit Chatterjee, *You Were Wrong, My Lords*, The Telegraph Online (last visited September 30, 2021, 11:07 P.M.)https://www.telegraphindia.com/7-days/you-were-wrong-nbsp-my-lords/cid/1314002

[175] Dr. Anup Surendranath, *Matters of Judgment*, Project 39A (last visited September 13, 2021, 9:35 P.M.) https://issuu.com/p39a/docs/combined231117

secret[176].This furthers concerns regarding the integrity of the criminal justice system. Also, while awaiting the outcome of their mercy petition, the death row convict is subjected to something more brutal than the extinguishment of life; they are subject to a lingering death. The convict exists under the crippling uncertainty of whether he will live or die, and has a deep brutalizing effect on the human spirit[177].This mental anguish has been widely regarded as cruel and inhuman. The long delays between sentence and execution, on one hand, deeply traumatize the death row convict, but eliminating this any sort of delay would prove to be a fatal mistake in cases of wrongful conviction[178].

The death penalty has always raised concerns. The State sanctioned deprivation of life would be unconstitutional if not for its safeguards put in place. However, the lack of any clear guidelines has vested immense discretion with judges capital sentencing system is one that is prone to subjectivity, arbitrariness and error. The judiciary has made attempts to address all issues the plague the capital sentencing system, but these issues persist. Still, India retains the death penalty several and people are sentenced to death every year.

4.5 FINDINGS AND CONCLUSION

Assessing Bachan Singh, Justice Kurian Joseph in *Chhannu Lal Verma v. State of Chattisgarh*[179] called for a re-examination of the need for the death penalty. He said "*Bachan Singh has failed to prevent death sentences from being arbitrarily and freakishly imposed and capital punishment has failed to achieve any constitutionally valid penological goals*"

The sentencing framework developed in Bachan Singh offered a transformative potential for the death penalty jurisprudence in India which was not sufficiently utilized in the subsequent judgments. Though the framework is subject to its inherent weaknesses, its essence lay in the crucial embracing of the spirit of individualized justice under Section 235(2) of the CrPC by emphasizing the questions of individual culpability and proportionate punishment, and stressing

[176] Anup Surendranath, Neetika Vishwanath, *Police Violence And How Some Lives Do Not Matter* , The Hindu (last visited OCTOBER 8, 2021, 10:22 P.M.) https://www.thehindu.com/opinion/op-ed/police-violence-and-how-some-lives-do-not-matter/article31984186.ece
[177] S.B. Sinha, To Kill Or Not To Kill: The Unending Conundrum, 24 NAT'I L. Sch. INDIA REV. 1 (2012).
[178] COMPARATIVE HUMAN RIGHTS LAW (Sandra Fredman, 6th ed, 2018)
[179] Chhannu Lal Verma v. State of Chattisgarh (2019) 12 SCC 438

on the relevance of mitigating factors with a liberal and expansive construction. The incredibly high standard for ruling out life imprisonment and imposing death sentence in Bachan Singh truly embodied the legislative mandate in Section 354(3) of the CrPC.

However, the sentencing framework is now unrecognizable, characterized by error inconsistency and arbitrariness, serving as little more than an empty judicial doctrine. Owing in part to its misplaced penological justifications, and dilution by Machhi Singh, which turned the framework into a more crime centric one that often time completely disregarded the mitigating circumstances of the criminal.

Despite the 'rarest of rare' doctrine in death penalty cases having very specific requirements as laid down by the Supreme Court in Bachan Singh, multiple and varied notions of the doctrine exists among different judges. It is evident that there exists no uniform understanding of the requirements of the 'rarest of rare' doctrine and this gave rise to serious concerns of judge-centric sentencing[180]. The Supreme Court has itself acknowleged the same in the decisions of Aloke Nath Dutta, Bariyar, Gafur, Sangeet and Khade. Inconsistent and arbitrary application of the Bachan Singh framework has been at the forefront of the problems in the capital sentencing system. Similar cases with similar circumstances have resulted in different outcomes.

These failing are more likely o affect the weaker sections of society as 74.1% of prisoners are socio-economically disadvantaged[181]. Quality of representation in capital cases contributes a great deal to the outcome. So, for such persons who cannot afford such a quality of legal representation coupled with the evidentiary gaps in the Bachan Singh framework regarding the presentation of mitigating factors would further add to the large number of disadvantaged persons imprisoned and on death row. Justice Bhagwati while expressing his dissent had commented in Bachan Singh that the death penalty has a certain class bias, and it is usually the poor and downtrodden who are victims of this extreme penalty.

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[180] Dr. Anup Surendranath, *Matters of Judgment*, Project 39A (last visited September 13, 2021, 9:35 P.M.) https://issuu.com/p39a/docs/combined231117

[181] *The Death Penalty India Report*, National Law University, Delhi (2016)

When considering that mistakes can occur in a perfect system, it is not surprising that the same would be a lot more frequent in India's imperfect sentencing system. What with the normative and procedural ambiguities in the Bachan Singh doctrine itself, and the subsequent changes to this framework contrary to Bachan Singh, along with the disparate interpretation of the rarest of rare, its inconsistent application, and subjectivity in discretion, it truly frightening to be faced with the reality that the criminal justice system is preying on the most vulnerable in society.

When the judicial machinery has failed, even recourse to executive could be subject to discrimination due to the absence of a coherent basis for granting clemency[182]. Additionally executive delay leaves the death row convict in state of limbo never truly knowing his fate. It is dehumanizing. The fact of the matter is death sentences are not about justice, they are about those who have institutional power and those who don't.[183]

[182] Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546

[183] Edward Helmore, *Pleas for clemency grow ahead of Ernest Lee Johnson's execution*, The Guardian, (last visited October 8, 2021, 7:14A.M.) https://www.theguardian.com/us-news/2021/oct/04/ernest-lee-johnson-execution-clemency-appeals

CHAPTER 3 DEATH PENALTY AS A DETERRENT

3.1 THE DETERRENT THEORY OF PUNISHMENT

The death penalty has been termed as being barbaric, undemocratic, anti-life and irresponsible but legal[184]. The topic of capital punishment has always been polarizing. On the one hand, it is irreversible, prone to error, and applied so inconsistently that it is hard to understand whether the death penalty exists to serve the ends of justice[185]. But on the other hand, the penological purposes that it purportedly serves cannot be disproven. Or proven

Why impose the death penalty, if not for its penological role. The primary penological argument for the same is deterrence[186]. Deterrence is the central objective of the death penalty in modern society. the deterrent theory of punishment seeks to deter further crime by deterring any potential offenders, and is understood two ways i.e. general deterrence and specific deterrence. The former seeks to prevent any potential future criminals from committing crimes by instilling a fear of punishment, while the latter aims at punishing the particular offenders concerned from committing crimes in the future. For obvious reasons, the death penalty is viewed only in terms of general deterrence. The deterrence theory sets out that for a punishment to act as an effective deterrent to crime, it must be severe enough to outweigh any pleasure the commission of the crime might bring, it must be certain, prompt, and administered publicly[187]. Typically, only the severity aspect has been examined as in deterrence. It is in light of this that the assertion that objectively the death penalty deters is made, as the deterrent theory is revolves around the fear or threat of punishment and the threat to life is the greatest threat of all.

This view has been followed by the Indian judiciary as well. While upholding the constitutional validity of the death penalty in Bachan Singh's case, the Court made a point of acknowledging the retributive and deterrent role of retaining this punishment. The majority in Bachan Singh

[184]J. Venkatesan, *Death Penalty is Barbaric, Says Judge*, The Hindu, November 16, 2011
[185] S.B. Sinha, To Kill or Not to Kill: The Unending Conundrum, 24 NAT'I L. Sch. India REV. 1 (2012)
[186] Surendranath, A., Vishwanath, N. and Dash, P. P. (2019) 'Penological Justifications as Sentencing Factors in Death Penalty Sentencing', *Journal of National Law University, Delhi*, 6(2), pp. 107-125
[187] William C. Bailey, Murder and the Death Penalty, 65 J. Crim. L. & Criminology 416 (1975).

took into deep consideration retribution and deterrence while considering the constitutional validity of the death penalty. While on the subject of deterrence, the court was met with the issue of a blaring lack of evidence regarding the death penalty's deterrent effect. The Court in Bachan Singh found that while there was no evidence to show the deterrent effect of the death penalty, there existed no evidence to the contrary either.

Further the Court went on to state that "*in most countries in the world, including India, a large segment of the population, including notable penologists, judges, jurists, and other enlightened people believe that the death penalty serves as a greater deterrent than life imprisonment*"[188]. This would be the relevant question to ask in terms of the death penalty, not whether it acts as a deterrent but whether it acts as a greater deterrent than life imprisonment. The Court, in Bachan Singh answered this question in the affirmative, and thus the deterrent value of the death penalty served as one the grounds that upheld the constitutionality of the death penalty.

And on the matter of exercising discretion, deterrence has usually been cited as the moral philosophy that guides, or more accurately misguides, the courts. The Supreme Court has placed a tentative faith in the deterrent value of the death penalty, especially in the case of particularly heinous crimes[189]. Legislative changes have also been made citing deterrence as the reason. The Protection of Children from Sexual Offences (Amendment) Bill, 2019 introduced the death penalty to certain offences like committing aggravated penetrative sexual assault on a child[190]. However this amendment has raised concerns that the possibility of death could prevent victims from reporting the crime as many victims of child sexual abuse know the accused, and a far more pressing is the likelihood that criminals would murder their victims to hide their crime[191].

By upholding the death penalty as a means to deter future offenders, the Court has gone on to use deterrence as a factor in sentencing and not as a goal of sentencing. Thus, opening the gates for trial courts to follow suit and in doing so emphasizes the nature of the crime, straying away from

[188]Bachan Singh v. State of Punjab, A.I.R. 1980, S.C 898, para 713
[189] Surendranath, A., Vishwanath, N. and Dash, P. P. (2019) 'Penological Justifications as Sentencing Factors in Death Penalty Sentencing', *Journal of National Law University, Delhi*, 6(2), pp. 107-125
[190] Protection of Children from Sexual Offences Act, 2012, section 6
[191] Sana Ali, *Death Penalty in POCSO Offences Imperils Child Victims of Sexual Offences*, IndiaSpend, (last visited October 9, 2021, 10: 50 A.M.) https://www.indiaspend.com/death-penalty-in-pocso-act-may-imperil-child-victims-of-sexual-offences/

the Bachan Singh framework that requires that the mitigating factors relating to the criminal should be considered.

The Court has gone on to stress time and time again that the function of the death penalty is to deter, in spite of the blaring lack of empirical data to this effect, but more particularly so to the fact that death is a far more effective deterrent than life imprisonment. When faced with this problem, the courts resort to the familiar assumption that the death penalty is effective because everyone loves life[192].This assumption, along with certain others that underline the deterrent theory are not entirely sound.

The deterrent theory of punishment presupposes the existence of a society of similar minded people and every person in this society is rational and will weigh the consequences of any potential commission of crime with the punishment for that crime, the rationality fallacy. Another precondition to the deterrent theory of punishment is that every person in society is aware of the punishment for a particular crime, i.e. the knowledge fallacy. There also exists vast debate on the efficacy of the deterrent theory of punishment, and moreover on whether the quantum of punishment affects the outcome[193].

Given that the reliance on deterrence as a penological goal serves as the primary basis for the use of the death penalty, the efficacy of the death penalty in deterring crime is something that should be closely examined.

3.2 CORRELATION BETWEEN THE RATE OF CRIME AND CAPITAL PUNISHMENT

The belief that capital punishment deters others from committing capital offences has long been on e of the most cogent arguments advanced to justify the State doing what it seeks to deter it individual citizens from doing; deliberately ending a human life[194]. When all other argument for the death penalty are debated, its proponents invariably fall back on deterrence as reason why

[192] Jill Cottrell, Wrestling with the Death Penalty in India, 7 S. AFR. J. oN HUM. Rts. 185 (1991)
[193] Surendranath, A., Vishwanath, N. and Dash, P. P. (2019) 'Penological Justifications as Sentencing Factors in Death Penalty Sentencing', *Journal of National Law University, Delhi*, 6(2), pp. 107-125
[194] Espy, M. Watt, (1980), 'Capital Punishment and Deterrence', *Crime & Delinquency*, 26.4, pp. 537-544

executions should be continued. Such a view has very often been offered without any examination.

Extensive American studies have made attempts to evidence the deterrent value of the captal punishment through a study of homicide rates and executions. The first thing researchers would look for is a correlation between homicide rates and the death penalty to see whether the death penalty had a significant deterrent effect compared to other methods of punishment, such as long-term incarceration. To study this three lines of investigation are usually seen to be followed; a comparative analysis of homicide rates which differ in provisions for the death penalty, longitudinal investigations of homicide rates in states before and after the abolition or restoration of the death penalty, as the case may be, and longitudinal examinations of homicide rates immediately preceding and immediately following the publicity of executions[195].

The most common study has been a comparison of homicide rates between abolitionist and retentionist states. In one study the crime data for the years 1920 to 1958 was used to compare between the American states which had the death penalty and neighboring states that didn't. no apparent correlation was found in the rate of homicide with the existence of the death penalty. States with the death penalty and those without it showed similar patterns in crime rates, completely unaffected by the imposition of death[196]. In addition, this study noted that the removal of death penalty did not did not result in a higher rate of homicides[197]. Other studies that investigate along these lines have shown that homicide rates in the retentionist states have been two to three times that of the abolitionist states[198]. Examinations on the risk of execution and the homicide rates in retentionist states have not shown any discernible correlation between these two factors[199].

These studies have also explored the brutalization effect. This phenomenon is characterized by the cause effect relationship between executions and a rise in the rate of crime. simply put, it is the increase in the murder rate with the increase in executions. American studies have noted that

[195] William C. Bailey, Murder and the Death Penalty, 65 J. Crim. L. & Criminology 416 (1975).
[196] Baldus, David C., James W. L. Cole. (1975) 'A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment.' *The Yale Law Journal*, vol. 85, no. 2, pp. 170–86
[197] In 2006, North Carolina stopping executions was followed by a fall in its homicide rates
[198]Schuessler, Karl F. (1952) 'The Deterrent Influence of the Death Penalty.' *The Annals of the American Academy of Political and Social Science*, vol. 284, pp. 54–62 Sutherland, Murder and the death penalty
[199] Bedau, Hugo Adam. (1970), 'The Death Penalty as a Deterrent: Argument and Evidence', *Ethics*, vol. 80, no. 3, pp. 205–17

this is not an uncommon theme. For instance, California, had higher rates of murder between 1952 and 1967, when it was executing people, as compared to the years between 1968 and 1991 when it wasn't. One study also showed that between the years 1907 and 1963 the homicide rates in New York increased on average in the month following an execution[200].

Comparative studies of the homicide rates before and after the abolition of, or in some cases, the restoration of the death penalty have also shown no evidence tending toward the efficacy of the death penalty. Such investigations have revealed that the abolition of the death penalty is certain has not shown an unusual increase in homicide, similarly the reintroduction of the same to certain states has not been followed by a significant decrease in homicide[201].

Another source of questioning the effectiveness of the death penalty arises from the studies that investigate the effect of publicity of executions and its relationship to the death penalty. Studies of this effect have analyzed the rates of homicide at different time periods before and after these executions have found no significant difference in the homicide rates.

Although, the aforementioned investigations have presented no evidence to corroborate the deterrent effect of the death penalty on murder, a 1976 study by economist Isaach Ehrlich has shown a slight negative relationship between the murder rate and execution rate[202]. However, this study has been under scrutiny, with one criticism being that the indication of deterrence was very unstable when even the smallest changes were made to the assumptions of the study, and therefore does not offer much in terms of evidence to change the former conclusion that homicide statistics show no unique deterrent effect of the death penalty[203].

Prof. John Lamperti, on the subject of whether capital punishment is uniquely effective as a deterrent against murder has presented the example of cigarette smoking and the occurrence of lung cancer. A relationship between these factors was first suspected during the 1920s and 1930s when physicians in U.S.A and England observed that nearly all their lung cancer patients were

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[200] Bowers, W. J. and Pierce, G. L. (1980) 'Deterrence or Brutalization: What Is the Effect of Executions?', *Crime & Delinquency*, 26(4), pp. 453–484

[201] Bedau, Hugo Adam. (1970), 'The Death Penalty as a Deterrent: Argument and Evidence', *Ethics*, vol. 80, no. 3, pp. 205–17

[202] Baldus, David C., James W. L. Cole. (1975) 'A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment.' *The Yale Law Journal*, vol. 85, no. 2, pp. 170–86

[203] Baldus, David C., James W. L. Cole. (1975) 'A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment.' *The Yale Law Journal*, vol. 85, no. 2, pp. 170–86

heavy smokers. A 1955 study compared smoking rates and lung cancer deaths and found a high positive correlation, i.e. higher lung cancer rates went with more smoking. Lamperti says that these studies make it clear that there is a strong association between smoking and lung cancer, but not that smoking causes lung cancer. These studies are indicative of cancer proneness and not of cancer causation. Smoking would only indicate, but not cause, cancer proneness. Similar issue arises while investigating capital punishment also[204].

It can be observed from the above that American studies have produced widely varying and even contradictory conclusions regarding the deterrent effect the death penalty has on homicide rates. While some studies assert that the threat of capital punishment deters murders, other studies have shown that executions have occasioned a rise in homicide rates, while still others state that executions have no effect on rates of homicide. It is also to be noted that the fundamental problem that underlies the disparate findings on deterrence effects of death sentencing is that individual studies reflect specific assumptions about the appropriate data, control variables, model specification, etc. on the part of the researcher, and can have major effects on the conclusions of a particular data analysis[205]. All in all, these findings, while not invalidating the theory that capital punishment occasionally may deter, or the general theory of deterrence, do however suggest that on balance that the death penalty does not have a perceptible influence on the homicide rate[206] .

In the 21st century, India has seen a total of eight executions, six of these involved murder convictions. The following will be a rudimentary study of whether the executions have showed any marked difference in the subsequent rate of murder. On August 14, 2004 Dhananjoy Chatterjee was executed for a murder he was convicted of in 1990. A perusal of the National Crime Records Bureau's yearly crime report showed that subsequent to this execution the rate of murder increased when compared to the preceeding year, rising to 2.7. The execution of Mohammed Ajmal Kasab was carried out on November 21, 2012. He was involved in the 26/11 terrorist attacks in 2008, and was convicted of murder and waging war against the government of

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[204] John Lamperti, *Does Capital Punishment Deter Murder? A Brief Look At The Evidence*, Dartmouth (last visited October 9, 2021, 3:32 P.M.) https://math.dartmouth.edu/~lamperti/my%20DP%20paper,%20current%20edit.htm

[205] REEVALUATING THE DETERRENT EFFECT OF CAPITAL PUNISHMENT: MODEL AND DATA UNCERTAINTY (Ethan Cohen-Cole, Steven Durlauf, Jeffrey Fagan, Daniel S.Nagin, 2006)

[206] Frost, Brian , (1983) 'Capital Punishment and Deterrence: Conflicting Evidence?', *The Journal of Criminal Law and Criminology*, Vol. 74, No.3, pp. 927 -942

India. The following year had a recorded decrease in the incidence of murder compared to previous years. However, the rate violent crime as a whole had been trending upwards in period from 2009 to 2013. The most recent executions were that of four persons involved in the 2012 Nirbhaya rape case. After their execution on March 20, 2020, records showed no discernible change and the rate of murder remained a steady 2.2 for the years of 2018, 2019, and 2020. This bare look at how these executions have impacted future incidence has found that nothing conclusive. One instance showed a subsequent rise in the rate of murder, another showed a subsequent decrease, and another has shown no marked difference. Although this simple look into the correlation of executions for murder and murder rates lacks the intricacies of a full fledged study, all of these cases had caught public interest and were well known to the people. So, if the primary function of the death penalty is to deter, then should these executions for the crime of murder not have negatively impacted future incidences of murder?

In India, the Court upheld the constitutionality of the death penalty relying heavily on it s penological goals, especially deterrence. The retention of the death penalty is in a large part due to the assumption that it deters crime more than life imprisonment. And this belief is founded on the assertion that the threat to life is the greatest threat of all and would thus deter potential offenders. And since there is no empirical evidence that can conclusively suggest the deterrent effect of capital punishment[207], a serious consequence like death arising out a dubious claim of deterrence requires a thorough analysis of the deterrent value of capital punishment. As things stand the correlation between rate of crime and the death penalty remains coincidental at best.

3.3 THE DETERRENT VALUE OF THE DEATH PENALTY

On the matter of the death penalty as a deterrent, no fixed answer, nut the fact that legal scholars and practitioners are devoid in their opinion shows that it is not completely devoid of any purpose[208]

High courts have cited deterrence as a reason for confirming the death penalty, and the constitutional courts have stressed the importance of strict punishments to create fear as a matter

[207] DETERRENCE AND THE DEATH PENALTY (Daniel S. Nagin and John V. Pepper, 2012)
[208] Bachan Singh v. State of Punjab, A.I.R. 1980, S.C 898, para 729

of social necessity, as conscious reminder to society that undue sympathy would be harmful to the cause of justice, and that inadequate sentence would not deter others[209] . The Supreme Court imposed death penalty in many cases thrusting the need to impose severe punishments so that people fear the law and do not commit crimes. And as mentioned before this line of reasoning that does not differentiate between deterrence being the outcome and penological goal and it being a factor in sentencing it has very little to do with individual culpability, deters renders the goal of individualized sentencing invalid. The trial courts as well have invoked deterrence as a sentencing factor especially in crimes considered to have a large scale impact on society, and it has in often cases been the sole justification in passing a sentence of death.[210]

The deterrent value of the death penalty has been asserted time and time again since it is objectively considered to have a greater deterrent impact than life imprisonment. However, studies on deterrence provide no conclusive effect of the deterrent impact of harsh criminal punishment generally, or of that of the death penalty in particular.[211] The deterrent theory has been subject to criticism such as the inability to determine whether criminal law and punishment have any deterrent impact, and second is the disagreement surrounding whether an addition to the quantum of punishment can result is a measurable decrease in that particular crime[212].

criminologist have also identified weaknesses in the deterrence theory namely the rationality fallacy and the knowledge fallacy. the former is the reasoning that offenders are not always rational decision makers as the deterrent theory assumes, and the commission of crime many emotions that affect their behavior. The latter weakness questions the assumption that offenders are aware of thee quantum of punishment[213].

One very pertinent question when considering the deterrent value of the death penalty is whether what the death penalty achieves could be achieved by a lesser punishment, i.e. by not putting someone to death[214]. If a lesser punishment could provably yield the same benefits as the death

[209] See Paniben v. State of Gujarat, (1992) 2 SCC 474.
[210] Surendranath, A., Vishwanath, N. and Dash, P. P. (2019) 'Penological Justifications as Sentencing Factors in Death Penalty Sentencing', *Journal of National Law University, Delhi*, 6(2), pp. 107-125
[211] DETERRENCE AND THE DEATH PENALTY (Daniel S. Nagin and John V. Pepper, 2012)
[212] DETERRENCE AND THE DEATH PENALTY (Daniel S. Nagin and John V. Pepper, 2012)
[213]Apel, Robert, (2013) 'Sanctions, Perceptions, and Crime: Implications for Criminal Deterrence', *Journal of Quantitative Criminology*, vol. 29, no. 1, pp. 67–101
[214] Surendranath, A., Vishwanath, N. and Dash, P. P. (2019) 'Penological Justifications as Sentencing Factors in Death Penalty Sentencing', *Journal of National Law University, Delhi*, 6(2), pp. 107-125

penalty, then this would be a sufficient argument against the assumption that death is a greater deterrent than life imprisonment. To truly understand the deterrent effect of the death penalty, it must first be understood that society is not homogenous and there will always exist a section in this society that will not be deterred by any punishment, irrespective of the severity. Conversely, there could also exist a section of society that would be deterred by any sort of sanction, as well a unique group that could only be deterred by capital punishment.

The above considerations would also be reliant on a variety of factors as well as the receptivity of an individual society to these factors. For instance, mass media and public communication would offer a better deterrence by spreading to the masses the information of executions, and capital trials, etc. However, if a society is consisted mostly of those persons that rent deterred by any kind of punishment, then this factor would not do much in terms of deterring future offenders. But if a society is consisted of those person easily deterred or those deterred by solely by a punishment as severe as death, then the deterrent effect of capital punishment would be sufficiently higher. Whether or not a punishment deters relies heavily on social circumstances, and is intrinsically linked to human nature. Therefore, it is also subject to the fickleness of human nature[215]. Owing to this, no absolute answer can be provided to the question of whether the death penalty deters more than a lesser penalty, for example life imprisonment.

So in such circumstances opting for the method that will minimize loss of life if assumptions about deterrence are wrong is suggested[216]. If it is incorrectly assumed that the death penalty deters, people could die, and some of whom could even be innocent. On the other hand, if it is incorrectly assumed that the death penalty does not deter and it is abolished, the people who could have been deterred by it commit crimes like murder which also results in loss of life. Here the former alternative minimizes losses as it is assumed that number of potential victims cannot possibly outnumber the number of convicts that would be executed. However, such estimations can only be made relative to each other, so no actual figures can be formulated on this subject.

[215] Apel, Robert, (2013) 'Sanctions, Perceptions, and Crime: Implications for Criminal Deterrence', *Journal of Quantitative Criminology*, vol. 29, no. 1, pp. 67–101

[216] Apel, Robert, (2013) 'Sanctions, Perceptions, and Crime: Implications for Criminal Deterrence', *Journal of Quantitative Criminology*, vol. 29, no. 1, pp. 67–101

Arguments on the deterrent value of capital punishment also need to be discussed from a utilitarian standpoint[217]. The use of the death penalty to deter potential offenders serves as a large part of the reason it is imposed. According to Kant, punishment by the government for a crime cannot be administered merely as a means to promote another good, either with regards to the criminal himself or society at large. It must, in all cases be imposed only because the individual on whom it is inflicted has committed the crime[218]. So, given the questionable deterrent effect of criminal sanctions invoking deterrence would only be appropriate when combined with other non utilitarian sentencing goals. This means that capital punishment is not justified as a punishment unless in some sense those who have been convicted of capital crimes deserve such a punishment apart from the deterrent effect it has on others[219]. This argument keeps in line with the individualized sentencing envisaged under the Bachan Singh framework.

Deterrence occasioned by the imposition of death is also affected by the length of time convicts spend on death row[220]. The longer the hiatus between the sentencing and carrying out of death the less effective it would be. Death in an uncertain future deters less than prompt penalization. The certainty and efficiency of the criminal sentencing system play a role in how effective a deterrent death would be. Conviction for a capital crime rife with uncertainty depends on multiplicity of factors, quality of representation, the judges, etc. On the matter of certainty, if the judicial trend evidences an uncertain or inconsistent imposition of death, this too would diminish its deterrent value, since the certainty, efficiency and mandatoriness of a punishment play a great part in its ability to deter crime[221]. There also exist certain kinds of offences that cannot be deterred by the death penalty, such as crimes of passion and murders by inmates[222]. There will always be cases where to be determined individuals will not be deterred by any prospect of

[217] Patnaik, Nishad. (2015) 'On the Question of Capital Punishment', *Economic and Political Weekly*, vol. 50, no. 32, pp. 55–61
[218] THE SCIENCE OF RIGHT (Immanuel Kant, 1790)
[219] Surendranath, A., Vishwanath, N. and Dash, P. P. (2019) 'Penological Justifications as Sentencing Factors in Death Penalty Sentencing', *Journal of National Law University, Delhi*, 6(2), pp. 107-125
[220]Shepard, Joanna, M., (2004) 'Murders of Passion, Execution Delays and the Deterrence of Capital Punishment', *The Journal of Legal Studies*, Vol. 33, No. 2, pp 283-321
[221] Surendranath, A., Vishwanath, N. and Dash, P. P. (2019) 'Penological Justifications as Sentencing Factors in Death Penalty Sentencing', *Journal of National Law University, Delhi*, 6(2), pp. 107-125
[222] Shepard, Joanna, M., (2004) 'Murders of Passion, Execution Delays and the Deterrence of Capital Punishment', *The Journal of Legal Studies*, Vol. 33, No. 2, pp 283 -321

punishment; presumably they are deterred only by the prospect of failure[223]. However the looming threat of death would at least warrant deeper consideration of their actions.

Another point for consideration is that as per the general theory of deterrence, punishing an offender for a certain crime deters others from future incidences of crime. This requires that people be made known of the punishment they would be subject to if they committed a particular crime. So logically, for executions to be most effective as a deterrent , they must be as public as possible[224]. However, no democratic society engages in public executions as the demoralizing effect of the death penalty in this instance far outweigh any deterrent value[225]

As previously mentioned deterrence or the amenability to deterrence is based on social factors aside from the severity of the punishment. One factor which affects the degree to which murder will be committed in a given society is the strength with which the value prohibiting murder in inculcated in the society[226]. In such societies, perception serves as the weight of the punishment with which the society backs up this value. A person is deterred by capital punishment not because he weighs the factors potential murder with punishment and moves forward from there but because deterrence is a value internally inculcated and not one that can be imposed on the population[227] . Since the deterrent value of the death penalty is lies on shaky foundations, the morality of using one person in carrying out larger goat of sending a message to society is called into question. Especially, when the majority of convicts on death row are made up of the most marginalized and vulnerable members of society[228].

As can be seen, the deterrent value of the death penalty cannot be conclusively proven or disproven, what can be said with said with certainty is that the arguments and theoretical underpinnings for deterrence of capital punishment are unpersuasive.

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[223] Jill Cottrell, Wrestling with the Death Penalty in India, 7 S. AFR. J. oN HUM. Rts. 185 (1991)
[224] Espy, M. Watt, (1980), 'Capital Punishment and Deterrence', *Crime & Delinquency*, 26.4, pp. 537-544
[225] Espy, M. Watt, (1980), 'Capital Punishment and Deterrence', *Crime & Delinquency*, 26.4, pp. 537-544
[226] Goldberg, Steven, (1974) 'On Capital Punishment', *Ethics*, Vol 85, No. 1, pp. 65-75
[227] Goldberg, Steven, (1974) 'On Capital Punishment', *Ethics*, Vol 85, No. 1, pp. 65-75
[228] *The Death Penalty India Report*, National Law University, Delhi (2016)

3.4 FINDINGS AND CONCLUSION

The alleged deterrent value of the death penalty has served as the primary argument for retentionists. However, with the issues that surround death sentencing, is the purported deterrent quality of capital punishment sufficient to keep it in our judicial system.

The deterrent value of capital has yet to find a means to be discerned. And questions of whether death deters more than life imprisonment cannot be answered with certainty. What can be said for sure is that the criminal justice system is not ideal, and death sentencing is subject to error, subjectivity and arbitrariness. In light of this, the prudence of keeping a punishment as severe and irreversible as the death penalty, whilst being unable to conclusively prove it serves its raison d'être is queried. Aside from the lack of empirical data to attest to how productive the deterrence of death is, the only other way to test the efficiency of death in this regard is to examine how many capital crimes have not been committed due to the fear of death, which is impossible to quantify[229]. But accepted weakness of the evidence about deterrence suggests that lesser penalty likely to deter should be considered.

The deterrence theory of punishment has more often than not placed an undue importance on the severity of the punishment. And aside from the lack of proof that death deters more than a lesser punishment, placing too much importance on the severity of punishment has taken away from the other equally important aspects of the deterrent theory. There will be an inevitable distance between crime and punishment, so shorter the distance, the better. Deterrence lies not in the severity of the punishment but in the promptness and certainty of the punishment. Uncertainty and delays in death sentencing diminishes any deterrent value.

Given the actual deterrent impact of criminal sanctions is doubtful, the theory should be invoked in a manner that does justice to other sentencing goals instead of giving individuals disproportionally harsh punishments for a larger aim of preventing crimes[230]. In light of social utility, Punishment cannot be administered as a means of promoting another good, but must be imposed based on individual culpability[231]. Invoking deterrence would be right in consonance

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[229] R. Basant, *An ideal death penalty law,* Youtube (last visited September 25, 2021, 6: 00 P.M.) https://www.youtube.com/watch?v=qOP0jb5hM8g
[230] PROLEGOMENON TO THE PRINCIPLES OF PUNISHMENT (H.L.A. Hart, 2008)
[231] THE SCIENCE OF RIGHT (Immanuel Kant, 1790)

with other non utilitarian sentencing goals, especially proportionality to ensure that offenders are punished in a manner and in quantum that is proportional to their individual culpability.

Deterrence is dependent on social factors, and its effects vary between individuals and societies. There are certain individuals that cannot be deterred by ant punishment, those easily deterred, and those that serve deterred only by a punishment as severe as the capital punishment. The distributions of these persons in societies, and other factor, conditions, times etc, and even differences within the same society can have a marked impact on how a punishment deters. Moreover, the deterrability of an individual arises out of internalized values either characteristic of the individual or their society.

Additionally, the deterrent theory's assumption that potential offenders will rationally weigh the crime with the consequences of the crime does not hold true for every crime. And human behavior is affected by a multiplicity of factors and so cannot be said to be rational at all times. The same can be said of the assumption that all potential offenders are aware of the punishment for a particular crime.

No society is homogenous, and India in all its diversity is especially stratified. An analysis of the sentencing practices has revealed that a large part of convicts on death row are those who are socially and economically vulnerable. Subjecting such individuals to a punishment this brutal on the grounds of deterrence cannot be considered democratic in a civilized society. There is also the matter of the morality in using one person's death as a warning to society. Conclusive evidence of the deterrent effect of the death penalty would not change the moral acceptability of the death penalty, but would play a crucial role in the public perception of the same, especially in the minds of those whose position is based only on in deterrence.[232] Changing public opinion can be a momentous first step in abolishing the death penalty, or at least in limiting its use.

Of the arguments made of the view that capital punishment is cruel and unusual, one that holds substantial merit is that the pain it involves cannot be justified by its use as a deterrent. In the absence of deterrence, what goal does the death penalty serve other that revenge[233].

[232]Goldberg, Steven, (1974) 'On Capital Punishment', *Ethics*, Vol 85, No. 1, pp. 65-75
[233] Patnaik, Nishad. (2015) 'On the Question of Capital Punishment', *Economic and Political Weekly*, vol. 50, no. 32, pp. 55–61

CHAPTER 4 THE INTERNATIONAL SCENARIO

4.1 CAPITAL PUNISHMENT IN INTERNATIONAL LAW

Can the death penalty be considered a valid exception to the right to life or should it be abolished? This chapter seeks an answer to this question through an international comparative analysis, namely of the U.S, South Africa, and the European Union, with India. The U.S. has had an interesting history with the death penalty, having at one point of time declaring it unconstitutional and no sooner reversing this decision. And countries like India and South Africa have surveyed the death penalty jurisprudence of the U.S. in deciding on the validity of the capital punishment in their jurisdictions, with varying results. The European Union, on the other hand, has taken a strong stance against the death penalty and has made the abolishing of the death penalty a requirement for membership.

Recently Amnesty International has recorded a trend of the decline in the use of the death penalty[234]. But the world has not yet formed a consensus regarding its use[235]. The concept of abolition of the death penalty at the international level took its first step with the 'eventual abolition of the death penalty' provided under the Article 3 of the UDHR[236], followed by the guarantee of legal safeguards against the death penalty in Article 6 of the ICCPR[237]. But it was the second optional protocol to the ICCPR that made the greatest stride in providing that no one within the jurisdiction of a State party to the protocol shall be executed[238]. Such a provision constitutes of the death penalty no longer being a matter of domestic jurisdiction but a matter of the U.N., since the provisions of the protocol apply as additional provisions to the ICCPR and are legally binding on party States. The ICCPR requests states to consider suspending executions and impose a moratorium on the death penalty.

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[234] AMNESTY INTERNATIONAL REPORT 2020/21 (Amnesty International, 2021)
[235]Dieter, R., *The Death Penalty and Human Rights: US Death Penalty and International Law*, Death penalty Information Centre (last visited August 22, 2021, 7:15 A.M.) https://files.deathpenaltyinfo.org/legacy/files/pdf/Oxfordpaper.pdf
[236] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) Article 3
[237] G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Mar. 23, 1976) Article 6
[238] G.A. Res 44/128 Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, (Dec. 15, 1989) Article 1

The idea of abolition gained momentum in this way, starting with the UDHR. International lawmakers urged the limitation of the death penalty, by excluding minors, pregnant women, and the elderly from its scope and by restricting it to an ever-shrinking list of serious crimes[239]. Enhanced procedural safeguards were necessary in jurisdictions death penalty remained. In several subsequent international human rights instruments, notably the European Convention on Human Rights[240], and the American Convention on Human Rights[241], the death penalty is mentioned as a carefully-worded exception to the right to life[242]. From a normative standpoint, the right to life protects the individual against the death penalty unless otherwise provided as an implicit or express exception. Eventually, three international instruments were drafted that proclaimed the abolition of the death penalty[243].

International legal norms to the effect of abolition impact individual countries. The importance of international standard setting was evidenced by parallel developments in domestic laws. When the UDHR was adopted, there were only a handful of abolitionist states. By 2020, considerably some 150 members of the U.N. have abolished the death penalty de facto or de jure[244].

Those that still retain it find themselves increasingly subject to international pressure in favor of abolition[245]. Sometimes the pressure is quite direct. One example is the refusal by certain countries to grant extradition where a fugitive will be exposed to a capital sentence[246]. Abolition of the death penalty is generally considered to be an important element in democratic development for states breaking with a past characterized by terror, injustice, and repression[247]. In some cases, abolition is affected by explicit reference in constitutional instruments to the

[239] G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Mar. 23, 1976) Article 6
[240] 213 U.N.T.S. 221, (Sept. 3, 1953), Article. 2 section 1
[241] American Convention on Human Rights, 1144 U.N.T.S. 123,(Jul. 18, 1978)
[242] Schabas, William A., International Law And Abolition Of The Death Penalty: Recent Developments, ILSA Journal of Int'l & Comparative Law, Vol. 4:535 (1998)
[243] Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, E.T.S. no. 114, (Mar. 30, 1985) ; Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at Abolition of the Death Penalty, G.A. Res. 44/128 (Jul. 7, 1991); Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, O.A.S.T.S. no. 73, 29 I.L.M. 1447 (Oct. 6, 1993). The American Convention on Human Rights, is also an abolitionist instrument because it prevents countries that have already abolished the death penalty from reintroducing it.
[244] AMNESTY INTERNATIONAL REPORT 2020/21 (Amnesty International, 2021)
[245] Schabas, William A., International Law And Abolition Of The Death Penalty: Recent Developments, ILSA Journal of Int'l & Comparative Law, Vol. 4:535 (1998)
[246] COMPARATIVE HUMAN RIGHTS LAW (Sandra Fredman, 6th ed, 2018)
[247] Schabas, William A., International Law And Abolition Of The Death Penalty: Recent Developments, ILSA Journal of Int'l & Comparative Law, Vol. 4:535 (1998)

international treaties that prohibit the death penalty and in others; it has been the contribution of the judiciary[248].

Within the laws of a country, the question of the legitimacy or otherwise of the death penalty generally revolves around the interpretation of primarily the right to life[249]. The constitutional texts of the U.S., South Africa, and India differ to this effect.

In the US Constitution., the Fourteenth Amendment states that no State shall 'deprive any person of life, liberty, or property, without due process of law'. Also relevant is the Fifth Amendment, which states: 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury' except in relation to those serving in the armed forces. Both these provisions have been relied on by judges in the US Supreme Court to support the view that the death penalty is permitted. On the other hand, the death penalty must conform to the Eighth Amendment's prohibition on the infliction of 'cruel and unusual punishment'. It is in an attempt to reconcile these two provisions that the major divergences between different justices in the US Supreme Court arise. The resultant struggle ended with the death penalty remaining in use.

The Indian Constitution, in Article 21, states that 'no person shall be deprived of his life or personal liberty except according to procedure established by law'. In the death penalty context, this means that no person should be deprived of life or liberty 'except according to fair, just and reasonable procedure established by a valid law. The Indian Supreme Court has relied on this formulation to time again uphold the constitutionality of the death penalty.

Unlike the former two illustrations, section 11 of the Constitution of South Africa on the right to life does not include any caveat. It simply states that 'everyone has the right to life'. Only the general limitation clause in section 36 that expressly requires a limitation which is reasonable, proportionate, and justifiable in an open and democratic society based on human dignity, equality, and freedom is applicable. The South African Constitutional Court, in one of its very first decisions, struck down the death penalty on the basis that it infringed the right to life.

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[248] Schabas, William A., International Law And Abolition Of The Death Penalty: Recent Developments, ILSA Journal of Int'l & Comparative Law, Vol. 4:535 (1998)

[249] COMPARATIVE HUMAN RIGHTS LAW (Sandra Fredman, 6th ed, 2018)

The conflict between permitting right to life and capital punishment is similarly evident in the international and European human rights instruments. Both the European Convention on Human Rights and the International Covenant on Civil and Political Rights include an exception for the death penalty while at the same time prohibiting cruel, inhuman, or degrading punishment. Article 2(1) of the ECHR states that 'no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'. Similarly, Article 6(2) of the ICCPR provides that 'in countries that have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime'. But, recognition of the unacceptability of the death penalty gathering momentum in Europe led to the ECHR adopting Protocol 6 in 1982, which provided for the abolition of the death penalty in peacetime. States could, however, make provision for the death penalty in time of war or of imminent threat of war. However, Protocol 13 in 2003 abolished the death penalty in all circumstances.

4.2 HUMAN RIGHTS AND THE DEATH PENALTY

The emerging trend in the global decline in the use of capital punishment cannot be conclusively attributed to any one cause; however evidence suggests that human rights have played an immense role in many countries worldwide abandoning the death penalty[250].

On the subject of the human rights aspect of the death penalty there are two very pertinent questions. The first is whether the death penalty breaches human rights, and if the answer to this is in the affirmative, whether countries which have not abolished the death penalty are therefore in breach of human rights[251]. The answer to the first question has been contentious, and judicial responses vary between different jurisdictions and different times.

For instance, the SCOTUS in *Furman v. Georgia*[252] held that the imposition of the death penalty constituted cruel and unusual punishment in violation of the US Constitution. However, only

[250]DEATH PENALTY: A WORLDWIDE PERSPECTIVE (Roger Hood and Carolyn Hoyle, 4th ed, 2008)
[251] COMPARATIVE HUMAN RIGHTS LAW (Sandra Fredman, 6th ed, 2018)
[252] Furman v Georgia 408 US 238 (1972) (US Supreme Court).

four years later, this decision was reversed in *Gregg v. Georgia*[253]. The South African surveyed U.S capital punishment jurisprudence and in *S v Makwanyane*[254] , held that capital punishment is in discord with the right to life under the new South African Constitution it was struck down. But the Indian Supreme, after a similar survey of American death penalty jurisprudence, in *Bachan Singh v. State of Punjab*[255] and upheld the constitutionality of the death penalty, albeit with the 'rarest of rare' caveat. One way to make sense of these divergent responses is in light of relevant international human rights instruments.

The body of international human rights primarily rests on the UDHR, which for the first time, set forth those fundamental human rights which are to be universally protected. Article 3 of the UDHR states that "*everyone has the right to life, liberty and security of person*". In the context of capital punishment, the main argument that it is a breach of the human rights arises from this article and its closely related Article 5 which states that "*no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*", and Article 9 which states that "no one shall be subjected to arbitrary arrest, detention or exile". So, in short, the basis for the international acceptability of use of the death penalty generally revolves around the interpretation of three key rights; the right to life, the right not to be subjected to cruel or inhuman punishment or torture, and the right to due process of law[256].

In terms of the right to life, Article 3 is not closed in ambit only to be pertinent in the case of capital punishment; it is that right upon which other rights are situated. It is fundamental to the enjoyment of all other rights.[257]

Keeping this in mind, the rights associated with the Article 3, i.e. Articles 5 and 9 must reconcile permitting the State to take life after meeting the requirements of the due process of law and forbidding punishment that is cruel and inhuman. To this end, human rights instruments such as the ECHR and the ICCPR have both included an exception in the case of the death penalty while at the same time prohibiting cruel, inhuman, or degrading punishment.

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[253] Gregg v. Georgia (1976) 428 US 153(US Supreme Court)
[254] S v Makwanyane 1995 (3) SA 391 (CC) (South African Constitutional Court)
[255]Bachan Singh v. State of Punjab, A.I.R. 1980, S.C 898
[256] COMPARATIVE HUMAN RIGHTS LAW (Sandra Fredman, 6th ed, 2018)
[257]U.N. Human Rights Committee, General Comment No. 36 (Oct. 30, 2018)

Article 2(1) of the ECHR states that '*no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*'. Simultaneously, Article 3 prohibits inhuman or degrading punishment. And again, in Article6(2) of the ICCPR it is provided that '*in countries that have not abolished the death penalty sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime*'. And Article 7 prohibits 'cruel, inhuman or degrading treatment or punishment'.

The ECHR adopted Protocol 6 in 1982 which provided for the abolition of the death penalty in peacetime[258]. States could, however, make provision for the death penalty in time of war or of imminent threat of war[259]. This was followed by Protocol 13 in 2003, which called for the abolition of the death penalty in all circumstances.[260]. A similar move was taken by the Organization of American States, which adopted a Protocol to the American Convention on Human Rights which calls on States to abstain from the use of the death penalty and prevents States from reintroducing the death penalty. The ICCPR too has similarly been augmented by the Second Optional Protocol, adopted in 1989, which added that no executions shall happen within the jurisdiction of States party to the protocol.[261]

Advocacy for the universal abolition of the death penalty also come from the Office of the UN High Commissioner for Human Rights (OHCHR). The UN High Commissioner has said of the death penalty that there exists within it no is no procedure that would lower unacceptable risk of executing innocent people, that there is no proof to the effect that the death penalty serves to deter crime, and that the right to life is fundamental"[262]

The international march toward universal human rights have contributed to the growing recognition that the capital punishment is a denial of the universal right to life and the right to be

[258] Council of Europe, ETS 114, Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty (Apr. 28, 1983) Article 1
[259]Council of Europe, ETS 114, Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty (Apr. 28, 1983) Article 2
[260]Council of Europe, ETS 187, Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances (May 3, 2002)
[261]G.A. Res 44/128 Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, (Dec. 15, 1989)
[262] OHCHR, 'Death Penalty'(last visited August 16, 2021, 4:37 P.M.)
http://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIndex.aspx

free from cruel and inhuman punishment.[263] There has been growing acceptance that the legitimacy of the use of the death penalty is not simply a domestic matter, left to individual States[264]. In Europe, and South Africa, the commitment to eradicating the death penalty extends beyond abolition at home to a refusal to be complicit in executions abroad[265]. This manifests itself in particular in a refusal to extradite offenders wanted for trial on a charge which might carry the sentence of death in the requesting country, without assurances that the death penalty will not be applied. In *Soering v UK*[266]the ECtHR held that it would be a breach of the prohibition on inhuman or degrading treatment or punishment in Article 3 ECHR for the UK to extradite an offender to the US State of Virginia without assurances that he would not face the death penalty. Similarly, the South African Constitutional Court in *Mohammed v. President of the Republic of South Africa*[267] held that it would be in breach of the right not to be subjected to degrading and inhuman treatment or punishment to extradite an offender to the US without an assurance that he would not be subject to the death penalty. Additionally, political pressure on retentionist States by abolitionist States on has been a striking development in Europe, where the abolition of the death penalty is an absolute condition for becoming a member of the European Union[268].

Many countries have, and have put pressure on the governments of retentionist nations to end executions[269]. A significant human rights issue that affects capital offence countries is the fact that the 'crimes' that would attract the death penalty in many nations are themselves human rights violations[270]. Homosexuality is a capital offence in most Sharia law countries, so is apostasy[271]. Punishing the exercise of freedoms with death is a massive human rights violation.

It isn't just enough to abolish the death penalty citing human rights concerns, the resultant fallout must also be considered. The strictest possible penalty after death is life imprisonment without

[263] Hood, R., Hoyle, C. (2009) 'Abolishing the Death Penalty Worldwide: The Impact of a 'New Dynamic', *Crime and Justice*, Vol. 38, no. 1, 2009, pp. 1–63.
[264] COMPARATIVE HUMAN RIGHTS LAW (Sandra Fredman, 6th ed, 2018)
[265] COMPARATIVE HUMAN RIGHTS LAW (Sandra Fredman, 6th ed, 2018)
[266] Soering v UK (1989) 11 EHRR 439 (European Court of Human Rights)
[267] Mohammed v. President of the Republic of South Africa (2001) 3SA 893(South African Constitutional Court)
[268] The U.K. has since left the European Union in 2020, but still remains an abolitionist State
[269] THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT (F.E. Zimring, 2003)
[270] David T. Johnson, A Factful Perspective on Capital Punishment, Journal of Human Rights Practice 11.2 (2019)
[271] SHARIA LAW AND THE DEATH PENALTY (Penal Reform International, 2015)

parole, which is also been seen as a human rights violation[272]. Life imprisonment without parole has been seen as cruel and inhuman punishment as it extinguishes all hope for the offender. There has also been pressing concerns over the rise of extra judicial killings in the event of abolition. These concerns in turn put forward the likelihood of situations of more human rights violations arising out of scrapping the death penalty machinery.

From a human rights perspective, it would appear that attempts to reconcile the death penalty with human rights standards are doomed to fail. There is no doubt that the pace of abolition of the death penalty is quickening, and of course it would be preferable for the momentum to come from democratically elected legislatures. However, if these legislatures do not prohibit the death penalty, it is precisely the function of human rights instruments, and the judges who enforce them, to ensure that fundamental principles of human rights are adhered to.

4.3 ABOLITION OR RETENTION? A GLOBAL PERSPECTIVE

As has been previously mentioned in this chapter, there is no international consensus on the use of the death penalty. It has always been the subject of heated debate owing to its brutal character and far-reaching human rights implications.

The countries of the world cannot be neatly divided into abolitionist and retentionist States, there are countries who retain the death penalty to varying degrees[273]. There are states that are abolitionist for ordinary offences such as Brazil and Chile for example, where the death penalty is available only for crimes of an exceptional nature, and de facto abolitionist counties like Laos and Mali, where executions have not been carried out in the past ten consecutive years.

The UN General Assembly stated that the main objective of the United Nations, "in accordance with Article 3 of the Universal Declaration of Human Rights and Article 6 of the ICCPR" is to "progressively restrict the number of offenses for which capital punishment might be imposed, with a view to its eventual abolition."[274] However, the UDHR is not legally binding, and while the ICCPR is legally binding, it applies to only party States. It does not prohibit capital

[272] David T. Johnson, A Factful Perspective on Capital Punishment. Journal of Human Rights Practice 2 (2019)
[273] David T. Johnson, A Factful Perspective on Capital Punishment. 11 Journal of Human Rights Practice 2 (2019)
[274]G.A. Res. 28/57 (Dec. 20, 1971) , G.A. Res. 32/61 (Dec. 8, 1977)

punishment. Instead, it sets out procedural safeguards to be followed by those member States who still retain the death penalty.

Nevertheless, over the recent years there has been a global trend tending toward abolition with 2020 marking a further decline in the use of the death penalty[275]. The number of known executions was 483. This was a 26% decrease from 2019 and a 70% decrease from 2015 where executions peaked at 1,634. This is in continuation of the year-on-year reduction recorded since 2015 and in 2020 reached the lowest figure recorded in the last decade[276]. The number of known executing countries in 2020 decreased by two (Chad and Kazhakstan) from the previous year. As it stands, 108 countries are abolitionist for all crimes, 8 are abolitionist for ordinary crimes, 28 are abolitionist in practice, which brings up the total of countries that have discontinued capital punishment to 144. The resort to executions remained confined to a minority of 55 retentionist countries[277].

There was also a significant recorded decline in the number of new death sentences known to have been imposed globally in 2020, marked by a 36% decrease from 2019 and a 53% decrease from 2016; this was coupled with an increase in the number of commutations. There was a recorded decrease in the number of new death sentences imposed in 30 out of 54 countries where death sentences were known to have been imposed. While at the same time increases were also recorded in 13 countries[278].

The main pattern over the years has been a striking decline in the use of the death penalty. Analysis of the reasons for this decline have pointed to two main forces namely, economic development and the general political orientation of the government have a strong influence[279]. While economic development and national prosperity is not by itself a condition for abolition, economic development tends to encourage declines in executions. And the political make up of a country does have a strong influence on the capital punishment policy[280]. Higher execution rates tend to be observed in countries under authoritarian rule in countries such as North Korea, Saudi Arabia, etc, and lower executions have been noticed in democratized States, like South Korea

[275] AMNESTY INTERNATIONAL REPORT 2020/21 (Amnesty International, 2021)
[276] AMNESTY INTERNATIONAL REPORT 2020/21 (Amnesty International, 2021)
[277]AMNESTY INTERNATIONAL REPORT 2020/21 (Amnesty International, 2021)
[278]AMNESTY INTERNATIONAL REPORT 2020/21 (Amnesty International, 2021)
[279] David T. Johnson, A Factful Perspective on Capital Punishment, Journal of Human Rights Practice 11.2 (2019)
[280] David T. Johnson, A Factful Perspective on Capital Punishment, Journal of Human Rights Practice 11.2 (2019)

and India, for instance[281]. However, some exceptions exist like the U.S. being on the higher end of the spectrum in spite of being a democracy. Aside from these reasons, concerns about wrongful conviction and executing innocent people have made States more cautious about executing people.

The international movement and the impact of a new human rights dynamic has also contributed to this trend toward abolition. The influence of a developing international climate that saw abolition as a goal for civilized countries, the development of international covenants, treaties and legal institutions embodying a commitment to abolish and never reintroduce the death penalty, a wider understanding of human rights, and the impact of abolitionist States on retentionists are all in no small part influencing factors[282].

While some analysts argue that abolition of the capital punishment will have the added benefit of ensuring that the State killing of its citizens will no longer have any legitimacy, and stigmatize extra judicial executions[283]. Others are of the opinion that State killing will survive abolition, such as in the instances of Mexico, Brazil, etc., and in countries where the death penalty has not been abolished, extra judicial executions are frequently carried out even after the number of executions have fallen, as seen in Indonesia, Bangladesh, etc.[284].

Additionally, the death penalty survives in certain places because of the welcome functions performs for some interests[285].. One example is how it has been used government against dissenters and anti government demonstrators after the Arab Spring movements in Egypt and other Middle Eastern countries. Besides for it s instrumental value for the government, capital punishment is retained for its performative value, i.e. as a political token in elections[286]. It is also an instrument that enables the judiciary to harness the power of death in pursuit of professional objectives. It is also a conduit for moral outrage for the on looking public[287].In addition to these

[281] David T. Johnson, A Factful Perspective on Capital Punishment, Journal of Human Rights Practice 11.2 (2019)
[282]Hood, R., Hoyle, C. (2009) 'Abolishing the Death Penalty Worldwide: The Impact of a 'New Dynamic', *Crime and Justice*, Vol. 38, no. 1, 2009, pp. 1–63.
[283] Hood, R., Hoyle, C. (2009) 'Abolishing the Death Penalty Worldwide: The Impact of a 'New Dynamic', *Crime and Justice*, Vol. 38, no. 1, 2009, pp. 1–63.
[284] David T. Johnson, A Factful Perspective on Capital Punishment, Journal of Human Rights Practice 11.2 (2019)
[285] David T. Johnson, A Factful Perspective on Capital Punishment. Journal of Human Rights Practice 11.2 (2019)
[286] David T. Johnson, A Factful Perspective on Capital Punishment. Journal of Human Rights Practice 11.2 (2019)
[287] David T. Johnson, A Factful Perspective on Capital Punishment. Journal of Human Rights Practice 11.2 (2019)

long standing obstacles to abolition, there have also been instances of capital punishment making its way back to the statute books after being removed.

The death penalty has very rarely been reintroduced in countries that have once abolished it, but this phenomenon is not unheard of. In 2004, Sri Lanka declared an end to its moratorium on the death penalty which was in force since 1976[288], although it has not yet performed any further executions. The Philippines abolished the death penalty in 1987, reintroduced it in 1993 but abolished it again in 2006. However, officials are lobbying for the reimposition of the death penalty for drug-related offences[289].

The above has shown that there is a gradual shift toward abolition or at least limiting the use of the death penalty. This is evidenced by a decline in the number of executions, and the nuber of executing countries. This decline in use of the death penalty can be attributed to the international clmate, and developments in human rights. The move toward abolition has also seen its fair share obstacles an retentionist countries hold on to the death penalty for various reasons. Nevertheless, the decline in the use of the death penalty is nothing recent, it is part of a longer trend away from the death penalty which shows no signs of stopping anytime soon.

4.4 ANALYSIS AND CONCLUSION

As of 2020, 108 countries have abolished the death penalty for all crimes and 144 countries have abolished it in law or practice[290], however the death penalty persists in many places around the globe. And while its continued existence and use has for a long time been a matter of debate in the international community, international law does not prohibit the death penalty.

In recent times there has been a notable trend amongst countries away from the death penalty, marked by a rise in countries abolishing capital punishment and a noticeable decline in the rate of execution in those countries that continue to retain it[291]. A myriad of factors have contributed

[288] Amnesty International U.K. Home Page http://www.amnesty.org.uk/news_details_p.asp?NewsID=16269 (last visited August 23, 2021, 12:13 P.M.)
[289] Preeti Jha, *Philippines death penalty: A fight to stop the return of capital punishment*, BBC News (last visited August 22, 2021, 6:17 A.M.) https://www.bbc.com/news/world-asia-53762570
[290] Amnesty International Home Page https://www.amnesty.org/en/ (last visited August 24, 2021, 5:40 P.M.)
[291] AMNESTY INTERNATIONAL REPORT 2020/21 (Amnesty International, 2021)

to this, such as the influence of a developing international climate that saw abolition as a goal for civilized countries, the development of international covenants, treaties and legal institutions embodying a commitment to abolish and never reintroduce the death penalty, a wider understanding of human rights, and the impact of abolitionist States on retentionist Countries[292].

Developments in international human rights as well as international instruments aiming at abolition are at the forefront in this global shift away from capital punishment. The UDHR came into existence at a time when the world had seen the horrors of the Second World War and the Nazi regime. The rally for protecting the basic rights intrinsic to every person was never stronger. The UN by way of conventions, treaties and other international instruments have furthered their aim of championing human rights while at the same time establishing that capital punishment cannot run parallel to human rights. And even though no international instrument by the U.N. declares that the death penalty be abolished, they were created with the eventual abolition in mind.

Clearly, the move toward abolition has received great traction with over 70% of the world's countries having abolished capital punishment in law or practice[293]. This is a steep increase compared to the past few decades, but the minority of the countries that do retain the death penalty are, in fact some of the most populous (countries like India, China and Indonesia to name a few). Therefore, the resultant effect is that although most nations have scrapped it, a majority of people are still subject to the death penalty[294].

The international sentiment toward capital punishment has been a gradual progression toward its abolition or at the very least against its use, with the number of executions being on the decline. In 1945, when the UDHR was adopted only 8 countries had abolished the death penalty, this number has since risen to 108. Besides this there has been an increase in international support for a moratorium on the use of the death penalty. The eighth UNGA resolution calling for a moratorium on executions with a view to abolish the death penalty was adopted by an

[292]Hood, R., Hoyle, C. (2009) 'Abolishing the Death Penalty Worldwide: The Impact of a 'New Dynamic', *Crime and Justice*, Vol. 38, no. 1, 2009, pp. 1–63.
[293] Death penalty information center home page (last visited October 9, 2021, 9:30 P.M.) https://deathpenaltyinfo.org/policy-issues/international
[294]Law Commission of India, The Death Penalty, (Law Commission of India, No. 262, 2015)

overwhelming majority, the highest ever number of countries having voted in favor when compared to seven resolutions that preceded it.

In practice as well, the number of executions has been on the decline, the number of commutations and pardons have been on the rise, there has been a decrease in new death sentencing, and the number of countries that choose to retain the death penalty has been dwindling. And though nothing can be said immediately about abolition, it seems to be the gradual result of this progression. The scales are noticeably tipping in favor of international abolition, and even if this result isn't sudden, judging from the state of things, it seems certain.

Public opinion is moving away from the death penalty, and legal challenges it continues to be made in various jurisdictions. Also, research has contributed to the decline of capital punishment, both by undermining the claims of it being an effective general deterrent, and more so by exposing the inherent flaws in the capital punishment administration machinery[295]. India too, can make a note of the international move toward abolition. The Indian judiciary has in no unclear terms expressed its concerns about the issues that plague the capital sentencing system. And no conclusive empirical data to its deterrence has been found. This being the case it is about time that India seriously consider joining the majority of nations in abolishment. And even though India has low rates of actual executions, just being condemned to death has a deep demoralizing effect on the human spirit. The death row effect or the lingering death waiting of death row without fully knowing whether or when death would come is cruel and inhuman[296].

In spite of more than half the nations of the world being abolitionist in law or practice, the nations that do retain the death penalty hold more than half the world's population, so in effect most of the world is still under the risk of State imposed death[297].

The abolition movement has been going at a steady pace, and most of the world is on board with it. However, India is one country that retains the death penalty and uses it infrequently. An uncertain punishment does not serve as a good deterrent and the infrequent use of the death penalty does little in the way of deterrence. Besides the capital sentencing process in India ias also fraught with uncertainty and difficulties and error. Amidst the human rights concerns as

[295] David T. Johnson, A Factful Perspective on Capital Punishment. 11 Journal of Human Rights Practice 2 (2019)
[296] S.B. Sinha, To Kill or Not to Kill: The Unending Conundrum, 24 NAT'l L. Sch. INDIA REV. 1(2012)
[297] COMPARATIVE HUMAN RIGHTS LAW (Sandra Fredman, 6th ed, 2018)

well as the flaws in its criminal justice system, keeping the death penalty presents itself as potentially detrimental from a human rights point of view as well as a justice point of view. In light of this, perhaps India could do abolishing the death penalty; however this cannot be without public support and legislative backing.

CHAPTER 5 CONCLUSIONS AND SUGGESTIONS

5.1 CAPITAL SENTENCING AND CRIMINAL JUSTICE INDIA: SUGGESTIONS

From the previous chapters it can be seen that, Capital sentencing in India is prone to error subjectivity and arbitrariness. There has been blaring inconsistencies in the sentencing practices of different judges and different benches. The 'rarest of rare' doctrine evolved in Bachan Singh has been subject to disparate interpretations and misinterpretations[298]. And the principled sentencing that had been set out in this case has ultimately become judge centric. One part of this problem is due to the inherent gaps in Bachan Singh's framework, that provide no normative support for the relevance or consideration of mitigating factors, and the weighing of aggravating and mitigating factors[299]. The judges have been left to fill these gaps. In addition to this, Bachan Singh is also silent about procedure; it provides no clarity on who has to present evidence of mitigating factors and what factors what constitutes such evidence. The shortcomings of the Bachan Singh framework have only been aggravated by the introduction of public opinion into sentencing.

The decision in Machhi Singh involved the element of "collective conscience" and has since resulted in the courts considering the outrage of the public as one of the factors which affect capital sentencing[300]. This has significantly diluted what was set out in Bachan Singh's framework, and made sentencing crime-centric. Bachan Singh called punishment based on proportionality to culpability. The punishment has to fit the guilt of the criminal. However, public opinion has resulted in the focus shifting from the guilt of the accused to the sentiments of the people. Additionally, decisions made on the sentiments of the people or the community ethic

[298] S.B. Sinha, To Kill or Not to Kill: The Unending Conundrum, 24 NAT'I L. Sch. INDIA REV. 1 (2012).
[299] Preeti Dash & Rahul Raman, *Beyond Inconsistent Application: Inherent Gaps in The 'Rarest Of Rare' Framework* , Project 39A (last visited October 2, 2021, 9:35 P.M.) https://www.project39a.com/op-eds/2018/5/1/with-death-penalty-it-will-be-harder-to-punish-child-rapists
[300] Dr. Anup Surendranath, *Matters of Judgment*, Project 39A (last visited September 13, 2021, 9:35 P.M.) https://issuu.com/p39a/docs/combined231117

always runs the risk of the judge unconsciously substituting his views for the views of the public. Thus, furthering the concerns of subjectivity.

However, the most significant of the issues in the capital sentencing and criminal justice system relate of the human factor. Hundreds of people are on death row in India, and of these more than half are disadvantaged either socio-economically or in some other way. Since the result in trials depends in large part on the quality of representation, those who cannot afford or have sufficient access to the adequate representation are more than likely to end up with less than the desired result. And when the element of death is also introduced, the potential results are far more chilling. Fortunately however, very few executions are carried out India, however spending time imprisoned while waiting out a long appeal process or clemency is not ideal. Living with the uncertainty of death strips the remaining life away from a death row convict, and is a fate almost as painful as death. It has also been seen that the issues extend beyond inconsistencies in sentencing, torture to elicit evidence in capital cases, wrongful conviction, etc all mar the criminal justice system.

The real crux of what has been set out in Bachan Singh is what is mentioned in paragraph 209 of its judgment, i.e. the real litmus test of 'rarest of rare' is whether the alternative option is unquestionably foreclosed in a given situation. At the time, the only lesser or alternative option was life imprisonment for a fourteen year term. Since then however, the alternative to death has been expanded, so revisiting the Bachan Singh decision in light of these changes would be prudent. The enlarged area of unquestionably foreclosed in Swamy Shraddananda should included into the Bachan Singh framework. Judges have been torn about the validity of this punishment, so amending the IPC to add the life imprisonment envisaged in Swamy Shraddanada to make it statutorily valid is suggested[301].

In Swamy Shraddanada, Justice Aftab Alam had voiced his opinion that the resort to the death penalty must be less frequent. Enlarging the scope of unquestionably foreclosed is one way to do the same. And using this as a standard in deciding whether a case was deserving of the death

[301] R. Basant, *An ideal death penalty law,* Youtube (last visited September 25, 2021, 6: 00 P.M.) https://www.youtube.com/watch?v=qOP0jb5hM8g

penalty, i.e. fell into the 'rarest of rare' category would limit subjectivity is a way. However, there are parallel concerns of judges being less likely of looking into the circumstances of the accused and passing an order of conviction based solely on the nature of the crime, as the consequence is not as drastic as death. And following the recent decision in V. Sriharan, several examples have cropped up of where life imprisonment has been invoked without really considering the mitigating circumstances, or in cases lacking necessary evidence[302]. So, in order to avoid unjust results, a proper examination of both the death sentence and life imprisonment must be made before passing a sentence.

Bariyar's decision said that the track record of the Indian judiciary with the 'rarest of rare' has been an uneven application, and no uniform standard or thread is identifiable. If the sentence is based on judges and not on objective criteria, this would be the greatest hurt to Article 14. No argument against the death penalty impresses more than the decision may depend on the individual judges concerned. Justice should be certain and not based on chance. Ideal death penalty law must have more objective criteria.

Human discretion will always have a role in death sentencing, no criteria so objective cannot be made. It is not possible to eliminate subjectivity altogether but at least reduce it to the most miniscule degree in the matter of life and death. Additionally, Justice administered through the human agency is prone to error, so in order to minimize error as well, the following suggestions are made.

Prosecution should at the first instance state whether death sentence is demanded in a given case and not. This should not be left till after conviction, so the adequate evidence can be collected to prove the mitigating circumstances of the accused[303]. In addition to this a more robust defence strategy is required at the trial court stage. The increased intervention of the trial courts and an integrated and thorough defence at the trial stage would substantially reduce the likelihood of

[302] Project 39A, 40 Years of Death Penalty Sentencing: The Uncertain Legacy of Bachan Singh, Youtube (last visited September 24, 2021, 6:50 A.M.) https://www.youtube.com/watch?v=p2FHKQPNQ7E
[303] R. Basant, *An ideal death penalty law,* Youtube (last visited September 25, 2021, 6: 00 P.M.) https://www.youtube.com/watch?v=qOP0jb5hM8g

error. The structure of a capital case is founded on the trial stage, so a proper foundation is paramount in overcoming any possible shortcomings in evidence or procedure[304].

The quality of the available sentencing material is not in general the best. So the relying on the Supreme Court to guide the trial courts on what they do not themselves understand is problematic. So the issues in capital sentencing should be addressed from the trial courts upwards[305].

Another suggestion is when the higher judiciary is deciding on death sentence matters, all judges be made to write their own judgment[306]. Mere concurrence with one opinion lacks initiative and enterprise. Separate judgement should be written in these cases and a sentence of death be upheld only in the cases where all individual judgements agree on the same. Since invariably all death penalty cases go the Supreme Court, make this suggestion part of procedure could reduce subjectivity.

And on the matter of delays, it is suggested that capital offence cases get priority and be fast tracked to the High court for confirmation, and that a separate Bench of the Supreme Court be constituted solely for dealing with the death penalty. Increased efficiency can mitigate delays and in turn not subject death row convicts to more suffering.

Another suggestion is removing public opinion from capital sentencing. As when the public lays in on the legitimacy of the death penalty in major cases, one of two things can happen. One, this could become an avenue for legal change, or two the court give in to majoritarian opinion, and use the accused as a scapegoat. The latter has usually been observed to happen. The former could bring about great benefits to society and death penalty jurisprudence, but involving public opinion in deciding on the life of a person has too high a risk to reward ratio.

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[304] Project 39A, 40 Years of Death Penalty Sentencing: The Uncertain Legacy of Bachan Singh, Youtube (last visited September 24, 2021, 6:50 A.M.) https://www.youtube.com/watch?v=p2FHKQPNQ7E

[305] Project 39A, 40 Years of Death Penalty Sentencing: The Uncertain Legacy of Bachan Singh, Youtube (last visited September 24, 2021, 6:50 A.M.) https://www.youtube.com/watch?v=p2FHKQPNQ7E

[306] R. Basant, *An ideal death penalty law,* Youtube (last visited September 25, 2021, 6: 00 P.M.) https://www.youtube.com/watch?v=qOP0jb5hM8g

A study of death row convicts has shown that 74% of them are economically disadvantaged, 61% of them have little to no education, and 76% of them belong to socially marginalized groups[307]. This is a testament to the how much the quality of representation contributes to the outcome in capital trials. In order to mitigate the inadvertent discrimination in capital sentencing, the monitoring of such cases in trial courts is suggested. The court must be vigilant of the nature of the crime, the criminal, the evidence etc. It is to be noted that ideally the death sentence was envisaged to deter others from future crime, but it has devolved into a broken tool that preys on the weakest in society.

5.2 DETERRENCE AND DEATH: SUGGESTIONS

Why impose death if not for its penological purpose. The primary purpose of death is to deter others. Deterrence is the primary objective for the imposition of death in a modern society. the actual question is not whether death deters, it is whether death deters more than life imprisonment. But the concern about death as a deterrent has been the lack of evidence to substantiate this point. It cannot be argued with empirical evidence that the deterrence of death is productive. In general however, since the deterrent theory of punishment is based on threat of punishment deterring future crime, it must objectively deter as the threat to life is the greatest threat of all. Since no correlation could be found between the rate of crime and the death penalty, the only other way to find out the same is by measuring the crime not committed because of the death penalty, which is impossible to quantify.

Deterrence lies not in the severity of the punishment but in the promptness and certainty of the punishment, death in an uncertain future. Death deters less than a timely penalization of any kind. It is promptness and not severity that show results, therefore refining the criminal justice system should be a top priority[308] India can do more to deter future crime by way of a more

[307] Project 39A, 40 Years of Death Penalty Sentencing: The Uncertain Legacy of Bachan Singh, Youtube (last visited September 24, 2021, 6:50 A.M.) https://www.youtube.com/watch?v=p2FHKQPNQ7E
[308] R. Basant, *An ideal death penalty law,* Youtube (last visited September 25, 2021, 6: 00 P.M.) https://www.youtube.com/watch?v=qOP0jb5hM8g

efficient criminal justice system than by the looming threat of death. There will always be an inevitable. Distance between crime and punishment, so shorter the distance, the better.

5.3INTERNATIONAL IMPACT AND DOMESTIC CONCERNS

Domestic laws can always be improved upon by analysing global trends, and in the case of the death penalty, the trend has been toward abolition. More than 60% of the countries of the world have bid farewell to capital punishment, either in law or practice. India could also attempt the same[309]. The judiciary has expressed its lack of faith in the capital sentencing machinery and the effectiveness of death as a deterrent remains questionable, and executions in India have always been infrequent, however out rightly abolishing the death penalty is not possible at the present.

The judiciary cannot be more refined than the polity of a country[310]. The criminal justice system is weak to the pressures on external forces, and political, religious, and sectarian violence is characteristic to India. If the capital punishment is removed altogether, a more violent outcome awaits. The Current climate does not make it conducive to eliminate the death penalty altogether, but it should be the eventual goal[311].

Currently what India needs is a death penalty law that can meet the requirements of the present, one that is just and subject to as much subjectivity as can be avoided. Above all, one that is humane. There is also a need for a criminal justice system that minimizes error and delay. Deterrence is served best in an efficient system. Moreover the rights of the accused cannot be abridged. A conviction will not override the right to life under the Constitution, and a prisoner does not become any less of person[312]. A society should be judged not by how it treats its outstanding citizens but by how it treats its criminals.

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[309] AMNESTY INTERNATIONAL REPORT 2020/21 (Amnesty International, 2021)
[310] R. Basant, *An ideal death penalty law,* Youtube (last visited September 25, 2021, 6: 00 P.M.) https://www.youtube.com/watch?v=qOP0jb5hM8g
[311] R. Basant, *An ideal death penalty law,* Youtube (last visited September 25, 2021, 6: 00 P.M.) https://www.youtube.com/watch?v=qOP0jb5hM8g
[312] Project 39A, 40 Years of Death Penalty Sentencing: The Uncertain Legacy of Bachan Singh, Youtube (last visited September 24, 2021, 6:50 A.M.) https://www.youtube.com/watch?v=p2FHKQPNQ7E

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