DEATH PENALTY IN INDIA

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ABSTRACT

Death penalty has become an exception from the rule after an amendment to the Code of Criminal Procedure in 1973. Nevertheless, the Law Commission in its 35th report in 1967 assessed the need of the death penalty in India and recommended the retention of death penalty.

Even after ratifying International Covenant on Civil and Political Rights that requires a progression towards abolition of death penalty, India seems to be heading into different way altogether. The principle of the death penalty being applied in the rarest of rare laid down in the landmark judgment of Bachan Singh v State of Punjab has been interpreted differently in various cases. This paper proposes to examine the application of the test of rarest of rare in subsequent cases and tries to trace down the recent trend of the death penalty, its effectiveness, and its effects on society.

I. INTRODUCTION

"Death penalty is irrevocable; it cannot be recalled. It extinguishes the flame of life forever and is plainly destructive of the right to life, the most precious right of all, a right without which enjoyment of no other rights is possible...." 1

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P N Bhagwati, Former Chief Justice of India

The recent execution of Mohammed Afzal Guru, convicted for the 2001 attack on the Indian Parliament, has stirred up new debates between the abolitionists and retentionists about the existence of the death penalty in India.\(^1\) The revived debate on the death penalty was also ignited across the country after one of the most brutal and horrifying gang rapes in New Delhi where six men raped a girl in a moving bus and penetrated her with the iron rod.\(^2\) After this brutal gang rape in Delhi, there were calls for the use of the death penalty.\(^3\) In the end, the four accused were sentenced to death, with societal opinion prevailing that this punishment was just for the crime.\(^4\)

The paper attempts to question whether this punishment will help in combating the rising crimes against women. Is the death penalty the only solution that can be offered to the rising crimes? Most importantly, will death penalty even help in combating any crime? Abolitionists argue that human rights are sidelined by awarding the death penalty; on the other hand, retentionists paint a picture of the death penalty as an effective measure to counter crime due to its deterrence effect. This paper tries to answer these questions. This paper discusses the judicial trends of awarding death penalty, where judiciary deviates from the law and principles, and examines the theories on which death penalty rests its foundation.

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4. ibid.
II. PUNCTURED WHEELS OF JUSTICE: SUPREME COURT FINDINGS REVEALED THIRTEEN DEATH SENTENCES AWARDED ON FLAWED PRINCIPLES

The case against abolishing the death penalty has become stronger due to the Supreme Court's admission of error in sentencing to death to as much as 13 convicts. Within weeks of Pranab Mukherjee assuming office as the President of India, fourteen judges\(^5\) appealed to seek his intervention in commuting the death sentences of thirteen convicts.\(^6\) The amount – thirteen \textit{per incurium}\(^7\) judgments sending convicts to irrevocable punishments – made a huge uproar in the legal world. Judges drew attention towards the wrongful executions of Ravji Rao and Surja Ram on 4 May 1996 and 7 April 1997 respectively following the principle laid down in \textit{Ravji @}\(^8\) \textit{Ramchandra v State of Rajasthan},\(^9\) a two-judge bench Supreme Court judgment which overruled the previous existing law of \textit{Bachan Singh v State of Punjab}.\(^10\)

\textit{Bachan} was a Supreme Court constitutional judgment that laid down the landmark principle of the \textit{rarest of the rare}, which established guidelines on how to determine whether a death sentence was to be awarded or not. It noted

\footnotesize{\begin{itemize}
\item \(^5\) Justice P. B. Sawant, former Judge, Supreme Court, Justice A. P. Shah, former Chief Justice, Delhi High Court, Justice Bilal Nazki, former Chief Justice, Orissa High Court, Justice P. K. Mishra, former Chief Justice of Patna High Court, Justice Hosbet Suresh, Former Judge Bombay High Court, Justice Panachand Jain, former Judge of Rajasthan High Court, Justice Prabha Sridevan, former Judge of Madras High Court, Justice B. H. Marlapalle, former Judge of Bombay High Court, Justice B. A. Khan, former Chief Justice of J&K High Court, Justice Ranvir Sahai Verma, former Judge of Rajasthan High Court, Justice B. G. Kolse Patil, former Judge of Bombay High Court, Justice S. N. Bhargava, former Chief Justice of Sikkim High Court, Justice P. C. Jain, former judge of Rajasthan High Court, Justice K. P. Sivasubramaniam, former Judge of Madras High Court.
\item \(^6\) V. Venkatesan, A Case Against the Death Penalty, Cover Story, Frontline, September 7, 2012, 4.
\item \(^7\) Out of error or ignorance, not having precedential value.
\item \(^8\) '@' is a commonly used expression for alias names in India.
\item \(^9\) 1996 AIR 787, 1996 SCC (2) 175.
\item \(^10\) 1980 (2) SCC 684.
\end{itemize}}
that: “the court must have regard to every relevant circumstance relating to the crime as well as the criminal,” emphasising that “in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender, also”.\textsuperscript{11} This was overruled by the Ravji, where the Supreme Court held that: "It is the nature of and gravity of the crime but not the criminal which are germane for consideration of appropriate punishment in a criminal trial".\textsuperscript{12}

In several cases after Ravji, Supreme Court repeatedly invoked its precedent in the cases involving the death penalty limiting the focus to circumstances pertaining to crime only and not to the criminal. In 2009, the Supreme Court held, in the judgment of Santosh Kumar Satishbhushan Bariyar v State of Maharashtra,\textsuperscript{13} that the Ravji was \textit{per incurium} and held the in all the cases circumstances pertaining to the criminal should be given full weight. The Bariyar bench further identified six different cases which erroneously applied precedent laid down by Ravji judgment.\textsuperscript{14}

\section*{III. DEATH PENALTY FROM RULE TO EXCEPTION}

Before the re-enactment of Code of Criminal Procedure ("CrPC") in 1955, s. 367(5) of CrPC required a court, sentencing a person convicted of an offence punishable with death with a punishment other than death, to state reasons why it was not awarding death sentence. It made death penalty a rule

\textsuperscript{11} Bachan Singh v State of Punjab, 1980 (2) SCC 684 [171].

\textsuperscript{12} Ravji @ Ramchandra v State of Rajasthan, 1996 AIR 787 [24].

\textsuperscript{13} (2009) 6 SCC 498.

and life imprisonment an exception.\textsuperscript{15} The 1973 CrPC deleted the provision but still the ambiguousness remained on which cases called for life imprisonment and which cases called for death penalty.\textsuperscript{16} With the re-enactment of the 1973 CrPC, section 354(3)\textsuperscript{17} required special reasons for death penalty to be awarded. This amendment made death penalty an exception from a rule.

\section*{A. Constitutionality of the Death Penalty}

While the death penalty has always been questioned as being violative of the fundamental rights, the courts have, after extensive discussions, rejected this viewpoint. \textit{Jagmohan Singh v State of U.P}\textsuperscript{18} was the first attack by abolitionists on death penalty, challenging the validity of the punishment against multiple constitutional rights. The challenge of constitutionality of the punishment was rejected by the constitutional bench of the Supreme Court. Validity of the punishment was attacked on four vital points. It was said to be infringing fundamental right guaranteed by the Constitution of India. Firstly, it was contended that it infringed all the freedoms guaranteed under art. 19(1)(a)-(g).\textsuperscript{19} Secondly, the process of awarding the punishment ran contrary to the article 14 of the Constitution guaranteeing equality. It was contended that the discretion the judges had to award two persons guilty of the same crime with different punishments of either a sentence of life or death

\begin{itemize}
\item \textsuperscript{15} Criminal Procedure Code (CrPC) 1955, s. 367(5), before the amendment, read: "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."
\item \textsuperscript{16} Criminal Procedure Bill, 1973.
\item \textsuperscript{17} CrPC 1973, s 354(3) states: "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."
\item \textsuperscript{18} (1973) 1 SCC 20.
\item \textsuperscript{19} Constitution of India, art. 19(1)(a)-(g).
\end{itemize}
was violative of equality before the law.\textsuperscript{20} Thirdly, there was no procedure in CrPC for the determination of the punishments to be awarded. The absence of any procedure established by law under which life could be extinguished resulted in violation of the right to life and liberty.\textsuperscript{21} Lastly, the contention was that the complete discretion the judges had to award punishments without any legislative policy or standard formulated by legislature was a case of excessive delegation.

The Supreme Court was not persuaded by the contentions raised in the case. Against the argument of excessive delegation, court held that the impossibility of setting down the standards was at very core of the criminal law which invests judge with a very wide discretion of power which is liable to be corrected by superior courts. It also opined that deprivation of life was constitutionally permissible as it was imposed after a trial in accordance with the procedure established by law.

\textit{B. Judicial application of the death penalty}

Justice Krishna Iyer, of the Supreme Court, is among one of the few judges who took a stand for the abolition of death penalty in India. His judgments show a different aspect of the penalty where he tries to contemplate the emotions of the accused to find out the reasons which eventually led to the crime. \textit{Ediga Anamma v State of Andhra Pradesh}\textsuperscript{22} is an important judgment delivered by Justice Iyer, in which it was held that the crime and criminal are equally material while deciding the sentence. The Court extensively dwelt upon the social background the accused who had killed her lover's wife and her kid in cold blood and brilliantly wiped off all the evidences. The Court

\begin{itemize}
  \item \textsuperscript{20} ibid, art. 14.
  \item \textsuperscript{21} ibid, art. 21.
  \item \textsuperscript{22} 1974 AIR 799.
\end{itemize}
also considered her social and mental conditions, and after considering all the mitigating and aggravating circumstances, dissolved the death sentence awarded to her and awarded her life imprisonment, with the Court noting:

"Modern penology regards crime and criminal as equally material when the right sentence has to be picked out although in our processual system there is neither comprehensive provision nor adequate machinery for collection and presentation of social and personal data of the culprit to the extent required in the verdict on sentence. However, in the Criminal Procedure Bill, 1973, Parliament has wisely written into the law a post conviction stage when the judges shall "hear the accused on the question of sentence and then pass sentenced upon him according to law."23

The need for special reasons in awarding the death penalty as demanded in the amended CrPC was reiterated in Rajendra Prasad v State of U.P.,24 a case in which the Court tried to set the standards for the imposition of the death penalty. The Supreme Court held that the special reasons which were mandatory before awarding death penalty in cases punishable by life imprisonment as per section 354(3) of CrPC re-enacted in 1973,25 must relate not to the crime but to criminal. It could be awarded only if the security of state and society, public interests, and order of the general public compelled that course.

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23 Ediga Anamma vs State of Andhra Pradesh,1974 AIR 799 [334C].
24 (1979) 3 SCC 646.
25 CrPC 1973, s 354(3) states: "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."
C. The Bachan Singh Test

After the prior landmark judgment, came the most pivotal case in the jurisprudence of the death penalty in *Bachan Singh v State of Punjab*.\(^{26}\) Validity of the punishment was again challenged in this case decided before the constitutional bench of the Supreme Court. The court affirmed the decision of *Jagmohan* and overruled *Rajendra Prasad*. It rejected the restriction on the imposition of death penalty only if the security of state and society, public interests and order of the general public compelled that course. It supported the retention of the penalty as an alternative punishment and held that circumstances pertaining to crime and circumstances pertaining to criminal cannot be held in two separate water tight compartments. It said: “The expression ‘special reasons’ in the context of this provision obviously means ‘exceptional reasons’ founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal.”\(^{27}\)

On the suggestion of amicus curiae,\(^{28}\) court recorded following possible aggravating circumstances to be considered before awarding death penalty:

1) Murder committed after previous planning and involves extreme brutality;

2) Murder involving exceptional depravity; and

3) Murder of a member of any of the armed forces or any police force or of any public servant and committed:
   a. while such member of public servant was on duty

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\(^{27}\) ibid, [161].

\(^{28}\) Dr. Y. S. Chitale, Senior Advocate acted as amicus curiae.
b. in consequence of anything done or attempted to be done by such member of public servant in the lawful discharge of his duty.

Mitigating circumstances suggested by amicus curiae were:

1) An offence committed under the influence of extreme mental or emotional disturbance.

2) The age of the accused. If accused was young or old, he was not to be sentenced to death.

3) The probability that the accused would not commit criminal acts of the violence as would constitute a continuing threat to a society.

4) The probability that the accused could be reformed and rehabilitated.

5) The accused believed that he was justified morally while committing the offence.

6) The accused acted under the duress or domination of another person.

7) The accused was mentally defective and that the said defect impaired his capability to appreciate the criminality of his conduct.

The principle laid in Bachan Singh was followed by Supreme Court in the case of Machhi Singh v State of Punjab. It took ahead the principle laid in Bachan Singh and held that a balance-sheet if aggravating and mitigating circumstances has to be made before awarding the punishment:

29 (1983) 3 SCC 470.
"The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability…In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances. A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

Further in order to explain the application of these principles that how these principles will apply court laid a two-part test. In order to apply these guidelines inter-alia the following questions may be asked and answers:

(a)  Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and called for a death sentence?

(b)  Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

In these cases mentioned above, the constitutional validity was extensively discussed along with the application the death penalty. One thing common in

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31 ibid.
Jagmohan, Bachan Singh, and Machhi Singh is that all three judgment made death penalty an exception and not the rule.

A major setback came in the case of Ravji @ Ramchandra v State of Rajasthan came, which led to the executions of Ravji and Surja Ram. Ravji held that the prior decisions in Rajendra Prasad and Bachan Singh were per incurium. In Ravji, court held that:

"It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to end be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should respond to the society's cry for justice against the criminal."33

The principle was applied repeatedly invoked in six further cases which led to the execution of thirteen individuals, before being overruled in 2009 by Bariyar case.

In Santosh Kumar Satishbhushan Bariyar v State of Maharashtra, the court held that Ravji was decided per incurium and upheld the principle laid down in Bachan Singh; that is, the courts needed to consider the circumstances pertaining to the criminal as well as crime:

32 Ravji @ Ramchandra v State of Rajasthan 1996 AIR 787.
33 ibid, [25].
34 ibid.
"We are not oblivious that this case has been followed in at least 6 decisions of this court in which death punishment has been awarded in last 9 years, but, in our opinion, it was rendered per incuriam. Bachan Singh specifically noted the following on this point:.....The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302 of the Penal Code, the court should not confine its consideration.....merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal.\textsuperscript{35}

Court cited many judgments while coming to this decision including Bachan Singh, Rajendra Prasad, Machhi Singh and drew support from 48th Report of Law Commission which emphasized considering the background (socio-economic) circumstances of criminal during sentencing.

IV. ABERRATIONS: LAW AND PRACTICE

A. Pre-Sentence Hearing: The deviation from the law

Section 235(2) of CrPC states that:

"If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."\textsuperscript{36}

This section of CrPC mandates that the court provide the convicted the fair opportunity to speak on the sentence. The section 235(2) read with 354(3)

\textsuperscript{35} Santosh Kumar Satishbhushan Bariyar v State of Maharashtra (2009) 6 SCC 498 [32].

\textsuperscript{36} Criminal Procedure Code 1973, s. 235(2).
lays down the guidelines that court has to arrive to the special reasons for awarding death penalty taking into consideration what the accused has to say about it. Reports such as the one by the Law Commission of India have noted the importance of comprehensive information of the offender prior to sentencing.\textsuperscript{37} However, there seems to be a difference between the practice and law.

All the 26 accused in Rajiv Gandhi's assassination case were given a time limit of two hours to express themselves on the sentence awarded to them.\textsuperscript{38} The trial judge strictly followed this time limit, recording down S. 235(2) of the CrPC proceedings as being from 11.30 a.m. to 1.30 p.m.\textsuperscript{39} It seems that this requirement of hearing the accused was observed mere as a formality. It might be argued that the word hearing creates an impression of oral hearing that operates as a formality. However, in Santa Singh v State of Punjab,\textsuperscript{40} court cleared all the confusion from the word by holding that:

"Here, in this provision, the word 'hear' has been used to give an opportunity to the accused to place before the court various circumstances bearing on the sentence to be passed against him…Non-compliance with the section is not a mere irregularity which can be cured by s. 465 of the Code. It is an illegality which vitiates the sentence."\textsuperscript{41}

The court in the judgment emphasized serious compliance with the provision.


\textsuperscript{38} S. Murlidhar, ‘Hang them Now, Hang them Not: India Travails with The Death Penalty’ (1998) 40 Journal of Indian Law Institute 143, 152.

\textsuperscript{39} ibid.

\textsuperscript{40} 1976 AIR 2386.

\textsuperscript{41} Santa Singh v State of Punjab 1976 AIR 2386 [232].
The non-dispensability of the pre-sentence hearing was reiterated in *Allaudin Mian v State of Bihar*. In this judgment, the court held that section 235(2) should not be treated mere as a formality and appropriate orders were needed to follow the full spirit of the provision. In the judgment, the court also laid down the rule that trial courts should adjourn the matter for further date after recording the conviction for hearing the accused:

"As a general rule, the Trial Courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender."

Despite the rule laid down in *Allaudin Mian*, it was not followed in *Rameshbhai Chandubhai Rathod vs State Of Gujarat* where trial court, without adjourning, sentenced the individual. The Supreme Court held that it failed the purpose of rule laid down and changed the sentence. The Supreme Court held that:

"Section 235(2) as interpreted by this Court in *Bachan Singh*, provides for a ‘bifurcated trial'. It gives the accused (i) a right of pre-sentence hearing, on which he can (ii) bring on record material or evidence which may not be (iii) strictly relevant to or connected with the particular crime but (iv) may have a bearing on the choice of sentence. Therefore it has to be a regular hearing like a trial and not a mere empty formality or an exercise in an idle ritual....Here prosecution has not discharged any burden at all

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42 1989 AIR 1456.
43 *Alaudin Mian v State of Bihar* 1989 AIR 1456, [14].
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for less the burden referred to above. This is a statutory obligation which is cast on the Court in a case where both Sections 235(2) read with Section 354(3) apply in view of the law laid down in Bachan Singh. The mandate of Article 141 of the Constitution cannot be ignored either by the trial Court or the High Court. Therefore, regardless of whether the accused asks for such a hearing, the same must be offered to the accused and an adequate opportunity for bringing materials on record must be given to him especially in case where Section 354(3) comes into play. It is only after undertaking that exercise that 'special reasons' for imposing death penalty can be recorded by the Court."

As held in Maneka Gandhi v Union of India, natural justice is the distillate of due process of law and natural justice is necessary as to prevent the miscarriage of justice. The requirement of a pre-sentence hearing safeguards the principle of natural justice. Its compliance in its true spirit is necessary and its implementation is needs renewed attention.

The problem does not end with pre-sentence hearing. It is seen that court seldom makes any effort to contemplate on the reformation of the accused despite this circumstance being mentioned as a relevant in being Bachan Singh.

B. Personal Predilections

The decision to invoke the death penalty seems to have been a lottery depending on the judges. It has been observed that presence and absence of certain judges can become the determining factor of the survival or death of

45 Rameshbhai Chandubhai Rathod vs State Of Gujarat, AIR 2011 SC 803 [67].
46 1978 AIR 597.
an accused. The biggest example of this personal predilection of judges is the case of Harbans Singh.47 In that case, Harbans Singh, Kashmira Singh, and Jeeta Singh were involved in murder of a family and sentenced to death by common judgment in the sessions court. All the three accused applied through Special Leave Petition48 (SLP) in different benches of the Supreme Court to review their sentence. Jeeta Singh's SLP was dismissed. Kashmira Singh's appeal was entertained and death sentence was commuted to sentence of life by the bench of Bhagwati and Fazal Ali, JJ. On the other hand, Harbans Singh's appeal was rejected by Sarkaria and Singhal, JJ and his mercy petition was rejected by the president. Given that all the charges were same and the offence committed equally by all the three accused, the Supreme Court opined that:

"For the same offence and for the same kind of involvement, responsibility and complicity, capital punishment on one and life imprisonment on the other would never have been just."  

If the involvement in the crime is equal, then the different treatment is solely because the judges’ decisions were different. This makes the fate of accused depending on the judge. This raises the question of uncertainty of the sentence on the personal predilection of the judges.50

The sentences being judge centric has been observed in the case of Swamy Shraddhananda @ Murali Manohar Mishra v State of Karnataka51 and Sangeet and Anr. v State of Haryana.52 In Swamy Shraddhananda, the court

47 Harbans Singh v State of UP and Others 1982 AIR 849.
48 Constitution of India, art 136.
49 Harbans Singh v State of UP and Others 1982 AIR 849 [242].
51 AIR 2008 SC 3040.
52 Sangeet and Anr. v State of Haryana 20 November 2012.
noted that: "The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the judges constituting the bench." In Sangeet, the court opined that: "In the sentencing process, both the crime and the criminal are equally important. We have, unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing."

It is evident that the application of the death penalty largely depends upon the composition of Bench, as rightly observed by Justice Bhagwati.

C. Income Disparities

The death penalty’s application in India has been noted to be discriminatory on the basis of class. Capital punishments seem to be strike the ones without capital. Arguably, the death penalty affects the poorest of the population due to their lack of qualified representation by competent lawyers, making the punishment one applied on the basis of the poorest of poor instead of rarest of rare. Indeed, it was observed by Justice V. R. Krishna Iyer in Rajendra Prasad that capital sentences were usually applied against “proletariat” crimes of murder. Corporate criminals, who killed large numbers of people through adulteration, smuggling,cornering, pollution and other invisible operations, were not visited with the death penalty.

53 Swamy Shraddananda @ Murali Manohar Mishra v State of Karnataka AIR 2008 SC 3040 [33].
54 Sangeet and Anr. v State of Haryana, 20 November 2012 [80].
55 Rajendra Prasad v State of UP (1979) 3 SCC 646 [118].
V. DEBATE: ABOLITIONISTS VS. RETENTIONISTS

With more than two-thirds of the countries of the abolishing death penalty, few countries are left with this extreme punishment. As of 31st December 2012, 140 countries have abolished death penalty and 58 countries, including India, have retained it.\(^{56}\) The trend followed by the world is towards abolition as more and more countries are abolishing death penalty. However, India, despite being a party of *International Covenant on Civil and Political Rights*, under which India committed itself towards progressive abolition of death penalty, seems to be moving on a different path altogether. Nevertheless, *per incurium* judgments and judgments deviating from binding principles have again revived the debate of abolition of the extreme punishment.

A. Deterrence: Myth or Reality

Three main theories on which the penology system is based are: retribution, deterrence and rehabilitation.\(^{57}\) The main argument of retentionists is the deterrence effect created by the death penalty. But the reality is that there are no scientific or empirical basis to show that the death penalty is deterrent against any crime.\(^{58}\) On the contrary, the figures tell the different story altogether. In 1980, the majority judgment in *Bachan Singh*, said that most countries including India and judges, jurists, and other enlightened people of India, believe that the death penalty acts as a deterrent effect in the society.\(^{59}\) Nevertheless, Justice Bhagwati in his dissenting opinion on *Bachan Singh* noted the statistics on the states of Travancore and

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\(^{58}\) 1982 AIR 1325 [317].

\(^{59}\) 1980 (2) SCC 684 [197].
Cochin where incidences of murders did not increase in the six years despite capital punishment being on abeyance.\textsuperscript{60} The story is not different today. Incidents of murder cases have been reduced from 36,202 cases in 2001 to 33,335 in 2010 with only one execution of Dhananjoy Chatterjee\textsuperscript{61} reported in 2004; meanwhile the population of India grew from 1.028 million to 1.21 million in the given decade.\textsuperscript{62} The figures clearly establish that the death penalty has no such deterrence and the efficacy of deterrence of the extreme punishment remains unproven.

\textbf{B. Unique Deterrence by Death Penalty?}

A rational man while committing murder does not get more scared of getting executed and less scared of ending his whole life in the prison. Both, the death sentence and life imprisonment are so severe to destroy the future of anyone subjected to them, so the only thing that deters anyone from committing any offence is the probability of getting caught. A person will not commit any offence if there is not chance that he will go unpunished irrespective of the punishment, sentence of death or sentence of life. As observed by Justice Bhagwati in his dissenting opinion in \textit{Bachan Singh}: “More than the severity of the sentence, it is the certainty of detection and punishment that acts as a deterrent.”\textsuperscript{63}

On the certainty of the punishment, Justice Bhagwati was of view that a convicted murderer would unlikely be deterred by the thought of the death penalty during the commission of his crime due to the uncertainty and of the

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\item \textsuperscript{60} \textit{Bachan Singh v State Of Punjab} 1982 AIR 1325.
\item \textsuperscript{61} \textit{Dhananjay Chatterjee Alias Dhana v State Of W.B.} 1994 (1) ALT Cri 388.
\item \textsuperscript{62} National Crime Records Bureau, ‘Crime in India’ \textit{(Ministry of Home Affairs, 28 June 2012), Table 1.3, Incidence And Rate of Cognizable Crimes (IPC) Under Different Crime Heads And Percentage Changes <http://ncrb.nic.in/CD-CII2011/Statistics2011.pdf> accessed 10 October 2013.}
\item \textsuperscript{63} \textit{Bachan Singh v State Of Punjab} 1982 AIR 1325 [330] (Justice P. N. Bhagwati).
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Contrary to the popular belief that death penalty acts deterrent, the empirical data have shown that the murder rate has declined proving the deterrent-effect theory wrong. Moreover, the belief that incarceration is not as severe as death penalty is false. Life imprisonment is equally destructive as a person lives without any liberty and does not have any hope of getting it.

Deterrence is the lifeblood of the retentionist’s argument, but it is still been empirically unproven. With the existence of life imprisonment, death penalty serves no additional purpose. It is good time to reconsider the practice of death penalty when it has been abolished by 66% of the nations.

C. Death Penalty: Irrevocable

The death penalty is an irrevocable punishment. Any mistake cannot be reversed. In the Harbans Singh case, the arbitrariness of procedures were discussed, but the result of this arbitrariness was paid by Jeeta Singh by his life. In the case, the court held that: "The fate of Jeeta Singh has a posthumous moral to tell. He cannot profit by the direction which we propose to give because he is now beyond the processes of human tribunals." Court admitted the mistake in this case, but this will not help the fate of Jeeta Singh. Rajiv Gandhi assassination case is another example that serves as the warning to the dangerous results of irrevocable punishment. The twenty-six accused of the Rajiv Gandhi assassination were charged under Terrorist and Disruptive Activities (Prevention) Act 1987 and were sentenced to death by trial court. Court did not mention any special reasons for treating each accused differently and obviously did not dwell upon aggravating and mitigating circumstances as laid down in Bachan Singh. The Supreme Court

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64 ibid, [331].
65 ibid.
66 Harbans Singh v State of U.P. & Others 1982 AIR 849 [238].
held that only seven out of 26 were guilty under section 302 Indian Penal Code ("IPC") read with 120-B IPC and of which only four were sentenced to death. Other nineteen accused were set free as they had been in prison for 8 years and the punishment of offences namely, Foreigners Act, Passports Act was maximum of 2 years. The unfortunate aspect of this case was that they had to spend 6 years in prison with loss of reputation, mental agony and acute loss of liberty for which nothing can be a compensation. Perhaps the execution of Ravji and Surja Ram serve the best example of the malignant aspect of the extreme punishment.

The most dangerous face of death penalty is its irrevocability. Human fallibility is not a new thing and the judiciary is no exception to this, as can be seen in the cases above mentioned. Non-compliance to the principles eventually becomes deadly to some and cannot be reverted. Flawed imprisonment can be compensated, but death is impossible to compensate.

VI. DEATH PENALTY AND HUMAN RIGHTS

Death penalty is the ultimate denial of human rights as guaranteed by the Universal Declaration of Human Rights. Article 5 states that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."\(^{67}\) If hanging a person is considered to be cruel and torture, then surely hanging a person by neck until death cannot be justified. Execution is indeed cruel and hence in contrary to the principles of human rights.

Death penalty has another relation with human right in India. In death row, an accused, after getting sentence to death, waits for his execution, which sometimes extends to months, years and even decades in some cases. Rajiv

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\(^{67}\) United Nations Declarations of Human Rights (adopted 10 December 1948) UNGA Res 217A(III), art. 5.
Gandhi assassination case serves a good example of this; the convicts Murugan, Santhan and Perarivalan spent 22 years in prison. Justice K.T. Thomas who was the member of the bench who sentenced the convicts has called for a review, arguing that the application of the death penalty to the accused now would be double jeopardy. Many other convicts are in death row waiting for their execution. Sitting in prison and waiting for the execution for an inordinate period of time constitutes psychological pain which amounts to one of the most cruel and unusual treatments which can be applied to individuals.

VII. CONCLUSION

“Our penal code provides for capital punishment for wide range of offence. But sadly, the death penalty has never reduced these crimes in the country”.

Justice V.R. Krishna Iyer

While over 66% of the countries in the world abolishing death penalty, India still retains it, largely believing it to have a deterring effect. The punitive system is based on three major theories of retribution, deterrence and rehabilitation. Deterrence and retribution, where the society demands revenge, fail to provide adequate reasons for the use of the death penalty. It is evident that killing a killer has never stopped from a new killer emerging. Moreover, the death penalty neglects the rehabilitation or reformative theory


from the very beginning. India needs to move from a retributive model to reformative-punitive system. Killing is and has never been a solution. The solution lies in the effective system to apprehend the perpetrators and effective prosecution so that no one escapes from the hands of law. If that happens, life imprisonment will adequately fulfill the deterrence and retributive theory; the death penalty will not serve any additional purpose. It is high time that India renews its attention towards the abolishment of the death penalty.

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