CAPITAL PUNISHMENT TO BE OR NOT TO BE: A COMPARATIVE STUDY OF INDIA USA AND UK

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By

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Under the Guidance

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List Of Abbreviation

1,	AF Act	Air Force Act
2,	AI	Amnesties International
3,	AIR	All India Report
3,	CPL	Criminal Procedural Law
4,	CPPCC	Chinese People's Political Consultative Conference
5,	IPC	Indian Penal Code
6	NDPS	Narcotics Drugs, and Psychotropic Substances Act
7,	NPC	National People's Congress of the People's Republic Of China

List Of Cases

- Attorney General of India vs Lachmi Devi AIR (1986) SC 467
- B.A. Umesh vs Registrar General, High Court of Karnataka,(2011) 3 SCC 85
- Bachan Singh vs State of Punjab (1982)3 SCC 24, See Also (1980) SCC 684 715 para 88
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- In Ediga Anduma vs state of A.P. (1974) 4 SCC 445,
- In Noel Riby vs A.G. of Jamaica (1982) 3 WLR 557
- In Rajendra Prasad Vs State of UP AIR (1979)SC 916,
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- Jagmohan Singh vs State of UP AIR (1973) SC 947, (1973) G.W. 330 (1973) SCC (Orig)162
- Machhi Singh and Others vs State Of Punjab 1983 AIR 957
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- Sandeep vs State of UP(2012) 6 SCC 107
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- Sher Singh vs State of Punjab (1983)2 SCC 344
- Shivu&Anr vs Registrar General, High Court of Karnataka, (2007) 4 SCC 713
- State of UP vs Dharmendra Singh
- Surendra Pal Shiv Balakppal vs state of Gujarat
- T.V. Vatheeswaran vs State of Tamil Nadu (1983) 2 SCC 68

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CHAPTER I

INTRODUCTION

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INTRODUCTION

"State shouldn'tpunish by way of vengeance",Emperor Ashoka

Death penalties has been a mode of punishment since time immemorial,The arguments for, and against haven'tchanged much over the years, Crime as well as the mode of punishment correlate to the culture, and form of civilization from which they emerge, by way of the march of civilization, the modes of death punishment have witnessed significant humanized changes, However, within Indian'tmuch has been debated going on the issue of mode of execution of death sentence,

Capital Punishment is to be very sparingly applied by way of special reasons within cases of brutal murder, and gravest offences against the state,About retention or abolition of capital punishment, debates are raging the world over amongst social activists, legal reformers, judges, jurists, lawyers, and administrators, Criminologists, and penologists are engaged within intensive study, and research to know the answer to some perennially perplexing questions going on Capital Punishment,

Human beings are neither angels capable of doing only good nor are they demons determined to destroy each other even at the cost of self destruction, Taking human nature as it is, complete elimination of crime from societies isn'tonly impossible but also unimaginable, Criminologists, and penologists are concerned about, and working going on reduction of crime rate within the society, Criminals are very much part of our society, and we have to reform, and correct them, and make them sober citizens, Social attitude also needs to change towards the deviants so that they do enjoy some rights as normal citizens though within certain circumscribed limits or under reasonable restrictions,

But we also have to think from victims' point of view, If victims realize that the state is reluctant to punish the offenders within the name of reform, and correction, they may take the Law within their own hands, and they themselves may try to punish their offenders,

and that will lead to anarchy, Therefore, to avoid this situation, there is a great need for prescribed, and proportional punishment following Bentham's theory of penal objectives that pain of offender should be higher than pleasure he enjoys by commission of the crime, But this "higher" must have proportionality, and uniformities too; for example, for theft, trespass, extortion, and so forth, capital punishment isn'treasonable, and even life imprisonment is disproportionate, and unreasonable,

The Law Commission, within pursuance of the observations made within the 35th Report, decided to conduct study of various modes of execution of death sentence, and to suggest any reforms if needed within the present system of execution of death sentence within India, The purpose of this Consultation Paper isn'twhether the death punishment should be abolished or be retained but this is strictly confined to three issues, namely,:~

(a) the method of execution of death sentence,

(b) the process of elimination of difference within judicial opinion among Judges of the apex Court within passing sentence of death penalty,, and

(c) the need to provide a right of appeal to the accused to the Supreme Court within death sentence matters, within this paper, the Commission has referred to the cases decided by the Hon'ble Supreme Court of India, various enactments, the reports of various Commissions, history of various modes of execution, various books, articles, newspaper reports, contemporary developments, and concerned web sites going on these aspects,

"These special reasons must relate,n'tto the crime as such but to the criminal,The crime maybe shocking, and yet the criminal mayn'tdeserve the death penalty,"[1],

Throughout the world 'Abolition of Death Penalty' is being popular these days which questions countries which are still practicing death penalties including U,S,A,, China, India, Arab Countries etc, whether they consider Death Penalties as a Human Right violation or do they believe within deterrent theory of punishment than Reformative theory,

Role of punishment has everything to do by way of the crime, and it's Justice, If the punishment isn'tsolving the purpose of achieving justice then that punishment is within itself wrong, When we look at the theories of punishment there are three types of

[1]Justice V,R, Krishna Iyer commented within *Rajendra Prasad v, State of U,P*

punishment Deterrent, Punitive, and Reformative since the world is opting for abolishment of death penalties it is seen that they no longer have the Punitive approach towards the punishment but the consideration is going on reformative approach,

Among the countries, which practice, Death Penalties China carries out maximum number of executions, and contribute to the world executions within 60%-80% within number,So many human lives are being sacrificed within the name of justice; does it give ends, which the lawmakers wanted to achieve? How does a death reform a person to see, and do things within a different way to change the way one lives?

The debate of Capital Punishment is endless but what cann'tbe denied is that whatever the reason maybe punishment of death is extreme, and severe so does the situation demands to take the extreme road or are we becoming sensitive to the issues within a way that this method is the last resort for us,

So can this be justified some might say it can within a case where a man has heinously raped a girl that she doesn't survive to live within this world going on this when that human isn'tgoing against the law of nature, and doing this act one might wonder whether he deserves to be within this world,

1,1 RESEARCH OBJECTIVE

- To study the historical development of capital punishment,
- To study the case laws within which constitutional validities of capital punishment has been determined,
- To study, and analyze it's substantive, and procedural legal provisions,
- To study international perspective of capital punishment,
- To study the case-laws going on which capital punishment was awarded,
- To study basic approach behind the capital punishment , various theories & philosophy related to it,
- To study whether capital punishment is an effective mode of criminal justice, and social justice,
- To study whether capital punishment reduces crime rate,

1,2HYPOTHESIS

Capital punishment produce deterrent effect within the societies for preventing crime of serious nature,It is the means of retribution for the societies within the crimes having grievous nature, So, the question is should capital punishment be retained or n't,

1,3 RESEARCH METHEDOLOGY

Primarily the research has relied going on books available within the university's library, The researcher has also tried to utilize the resources, articles, e-books available going on internet, So researcher will use DOCTRINAL RESEARCH within his dissertation, within which, capital punishment, it's meaning , it's mode ,, and application within other countries has been taken from the Law text-books, Historical background has been taken from the sources of websites, and e-journals, Criminological theories, and penological theories has been taken from the various text books of CRIMINAL, and SECURITIES LAW, and penology, Legal provisions regarding capital punishment has been taken from various bare acts dealing by way of capital punishment within substantive, and procedural nature, Execution of death penalties has been taken from code of criminal procedure,1973, and by various jail manual, Various case laws has been studied by criminal manual, and commentaries like ALL INDIA REPORTER, SUPREME COURT CASES etc,, and within order to explore new ideas, and finding related to research problems, The methods, and techniques which researcher will be adopt will be a QUALITATIVE-METHEDOLOGY, The whole study which will be employed a qualitative approach using the theories of symbolic interactionism, and phenomenology connected by way of criminological, and penological school of thoughts, However , slight use of NON-DOCTRINAL RESEARCH has also been taken by the help of questionnaire, and check-lists to know the mood of the societies within this regards,

CHAPTER II

HISTORICAL PERSPECTIVE OF CAPITAL PUNISHMENT

CHAPTER II

HISTORICAL PERSPECTIVE OF CAPITAL PUNISHMENT

Unlike animals, human beings within the course of time have upgraded their social standards within which they reside, and where they can claim to be proud residents of a protective society, where they have a prerogative claim to basic civic, political, economic, and legal rights, where State watches, and prevails over crime, and they are also the recipients of persistent, and unwavering justice, which being stringent ensures that any slight deviation from time honored, and accepted behavior by any citizen brings them under the austere eyes of the law which then helps within preserving the fabric of the society, and the efficiency of its social network which de facto is one core reason why societies should have capital punishment as a tool, and aid to be used as a deterrent; it has been universally supported by the great political thinkers like John Locke who propounded his concept of capital punishment containing elements of retributive, and utilitarian theory, where he contends that a person forfeits his rights for the commission of even minor crimes, and such rights are forfeited, punishments can be rightly pronounced going on them as they have made a breach to the social contract to which they had agreed, and the remedy is punishment to the wrongdoer which within itself is an endeavor to darn the damage done to the social fabric, Punishment is needed to protect our societies by deterring crime through such examples, does societies may punish the criminal within anyway it deems necessary which may include taking away his life so as to set an example for other would be criminals, and is further justified for the reason that the acts which are so wile, and destructive for society, and dignities of the people, Invalidating the right of the perpetrator to membership, and even to life, because preciousness of life within a moral communities must be so highly honored that those who don'thonor the lives of others make null, and void their own right to membership, which is why within a communities based going on love, and ideals when made to face the music of hostility, and having to deal by way of people who have committed brutal errors of terror, violence, and murder, face a dilemma by the way of the set of ideals the communities propagates; it cann't imbibe the philosophy of , “An eye for an eye, a tooth for a tooth, and a

life for a life", But would be forced to act for the safeties of the members of the communities from further destruction, and would have to treat the perpetrators who had shown no respect for life to be restrained, permanently if necessary, so that they couldn'tfurther endanger other members of the communities which would leave a sense of satisfaction, and happiness to all by way of whom the wrong has been done or relatives of the victim, and to societies as such, if he who breaks the law isn'tpunished then he who obeys it is cheated which can also be rightly corroborated from the utilitarian, and retributive perspective of capital punishment, Jurist Hobbes asserted that every man had under the natural order has the right of reappraisal for wrongs done to himself or anyone else, Then he said that social contract had left this right to the sovereign while taking it away from everyone else, Jurist Kant viewed that every political societies had a duties to enforce retributive justice, Jurist Roussoeu felt that the subject oughtn'tto complain if the sovereign demanded the subject's life, He considered death as a proper punishment, if the criminal was beyond redemption, Jurist Salmond has said that a societies which felt neither anger nor indignation at outrageous conduct would hardly enjoy an effective system of law,

2 , 1 CAPITAL PUNISHMENT within ANCIENT ROME, and GREECE

The law administrators unflinchingly executed murderers because they believed that "the life of each man should be sacred to each other man", They realized that it isn'tenough to proclaim the sacredness, and inviolabilities or human life, it must be secured as well, by threatening by way of the loss of life of those who violate what has been proclaimed inviolable the right of innocent to live, Murder, being the worst of crimes, must deserve the highest penalties which is death sentence, This shall also be within accordance of the principle that punishment must be within proportion to the gravities of the offence, Ancient Romans accepted the deterrent value of death penalty, Under the Roman criminal law, the offender was put to public ridicule, and his execution took the form of a ceremony, Death was caused to the condemned person within a most tortuous manner, For example, one who killed his father was sewn within a sack along by way of a live dog, cat, and a cobra, and thrown into river, The object was to make him die most painfully, The sentence of death could be awarded even to a debtor who was unable to pay off the debt of his creditor, Thus, a creditor who found that his debtor was unable to pay off the debt, could vent his wrath upon

the debtor by marching him up the Tarpeian rock, and hurling him from there to death, The Greek penal system also provided death sentence for many offences, The offenders were stripped, tarred, and feathered to death publicly, Execution of death penalties within public places was favoured because of its deterrent effect,

2,2ENGLISH LAW, and CAPITAL PUNISHMENT

The history of crime, and punishment within England during the medieval period reveals that infliction of death penalties was commonly practiced for the elimination of criminals, Henry VIII who reigned within England for over fifties years, was particularly infamous for his brutalities towards the condemned prisoners, He used to boil the offenders alive, His daughter Queen Elizabeth who succeeded him, was far more stiff within punishing the offenders, The offenders weren'tput to death at once but were subjected to slow process of amputation by bits so that they suffer maximum pain, and torture, The condemned offenders were often executed publicly, These brutal methods of condemning the offenders were, however, abandoned by the end of eighteenth century when the system of transporting criminals to distant American Colonies at their option was firmly established, Dr, Fitzgerald observed that the history of capital punishment within England for the last two hundred years recorded a continuous decline within the execution of this sentence,[2] During the later half of the eighteenth century as many as two hundred offences were punishable by way of death penalty, The obvious reason for the frequency of execution was the concern of the ruler to eliminate criminals within absence of adequate police force to detect, and prevent crimes, The methods of putting offenders to death were extremely cruel, brutal, and torturous, As the time passed, the severities of capital punishment was mitigated mainly within two ways :~ Firstly, this sentence could be avoided by claiming the 'benefit of clergy' which meant exemption from death sentence to those male offenders who could read, and were eligible for holy Order,[3] Secondly, the prisoners who were awarded death sentence could be pardoned if they agreed to be transported to American Colonies, During later half of the eighteenth century, condemned felons could be transported for seven years within lieu of capital

[2]Henry VIII ruled over England from 1491 to 1541 AD, 4 Fitzerald, P,J,, Criminal Law, and Punishment ,1962 p, 216, 117

[3] within subsequent years, this benefit was extended to women also,It was finally abolished within 1927,

sentence, within course of time, death punishment for felony was abolished,[4], and within 1853, the system of transporting criminals also came to an end, and a new punishment of penal servitude was introduced,Commenting going on the frequency of executions during the eighteenth century Donald Taft observed that during no period within the history of western civilization were more frantic legislative efforts made to stem crime by infliction of capital punishment as within that century,[5] within his opinion, the growing importance of this punishment was owing to the agrarian, and industrial changes within the English societies resulting into multiplicities of crimes which had to be suppressed by all means, Supporting this view it was observed that more than 190 crimes were punishable by way of death during the reign of George III within 1810, However, by way of the advance of nineteenth century, the public opinion disfavoured the use of capital punishment for offences other than the heinous crimes, Bentham, and Bright, the two eminent English law reformers opposed frequent use of capital punishment, Sir Samuel Romilly also advocated a view that the use of capital punishment should be confined only to the cases of intentional, and willful murder, The irrevocable, and irreversible nature of death penalties gave rise to a number of complications which invited public attention towards the need for abolition of death sentence, Consequently, the British Royal Commission going on Capital Punishment was appointed within 1949 to examine the problem, As a result of the findings of this Commission, death sentence was suspended within England, and Wales for five years from 1965, and was finally abolished by the end of 1969, However, the constant rise within the incidence of crime within recent decades has necessitated Britain to re-assess its penal policy regarding death penalty, The two decisions of the Privy Council emphatically stressed that the award of death sentence isn'tviolative of human rights or fundamental rights,,

2 , 3 CAPITAL PUNISHMENT within INDIA

The ancient law of crimes within India provided death sentence for quite a good number of offences, The Indian epics, viz,, the Mahabharata, and the Ramayana also contain references about the offender being punished by way of vadhadand which meant amputation by bits,

[4] Death as a punishment for felony was abolished within 1827,
[5]Taft & England, Criminology (4th Ed,) p, 297, 118

Fourteen such modes of amputating the criminals to death are known to have existed which included chaining and

imprisonment of the offender, Justifying the retention of death penalty, King Dyumatsenaobserved :~*"ifthe offenders were leniently let off, crimes were bound to multiply",*He pleadedthat true ahimsa lay within the execution of unworthy persons, and therefore, execution of unwanted criminals was perfectly justified,[6] His son Satyaketu, however, protested against the mass scale execution, and warned his father that destruction of human life can never be justified going on any ground, But Dyumatsena, ignored the advice of his son, and argued that distinction between virtue, and vice mustn'tdisappear, and vicious elements must be eliminated from society,[7] The great ancient law-giver Manu also placed the element of fear as an essential attribute of judicial phenomenon, According to him, within order to refrain people from sinful murders, death penalties was necessary, and within absence of this mode of punishment, state of anarchy will prevail, and people would devour each other as the fish do within water, the stronger eating up the weaker, During the medieval period of Mughals rule within India, the sentence of death revived within its crudest form, At times, the offender was made to dress within the tight robe prepared out of freshly slain buffalo skin, and thrown within the scorching sun, The shrinking of the raw-hide eventually caused death of the offender within agony, pain, and suffering,An'ther mode of inflicting death penalty-was by nailing the body of the offender going on walls, These modes of putting an offender to death were abolished under the British system of criminal justice administration

during early decades of nineteenth century when death by hanging remained the only legalised mode of inflicting death sentence,

[6]Mahabharat-Shantiparva chapter CCLXVII Verses 4-13,

[7]*Ibid*,

CHAPTER III

Capital Punishment ; its Constitutional validity, and international Perspectives

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Capital Punishment ; its Constitutional validity, and international Perspectives

Article 21 of the constitution guarantees right to life, and personal liberties to all which includes right to live by way of human dignity, No person shall be deprived of his right except according to the procedure established by law, Therefore, the state may take away or abridge even right to life within the name of Law, and public order following the procedure established by Law, But this procedure must be "due process" as held within Maneka Gandhi v, Union of India[8], The procedure which takes away the sacrosanct life of a human being must be just, fair, and reasonable, So, fair trial following principles of natural justice, and procedural Laws are of utmost importance when capital punishment is going on the statute book, Therefore, our constitutional principle is within tune by way of procedural requirements of Natural Law which constitute the inner moralities of Law which may be stated as follows:~

(i) Death sentence is to be used very sparingly only within special cases,

(ii) Death sentence is treated as an exceptional punishment to be imposed by way of special reasons,

(iii) The accused has a right of hearing,

(iv) There should be individualisation of sentence considering individual circumstances,

(v) Death sentence must be confirmed by the High Court by way of proper application of mind,

(vi) There is right to appeal to the Supreme Court under article136 of the Constitution, and under section 379 of the Cr,P,C, The Supreme Court should examine the matter to its own satisfaction,

[8]AIR 1978 SC 597,

(vii) The accused can pray for pardon, commutation etc, of sentence under sections 433, and 434 of the Cr,P,C,, and under articles 72, and 161 to the President or the Governors, Articles 72, and 161 contain discretionary power of the President, and the Governor beyond judicial power to interfere going on merits of the matter; though judiciary has limited power to review the matter to ensure that all relevant documents, and materials are placed before the President or the Governor, However, the essence of the power of the Governor should be based going on rule of Law, and rational considerations, andn'tgoing on race, religion, caste or political affiliations,

(viii) The accused has a right to speedy, and fair trial under articles 21, and 22 of the Constitution,

(ix) The accused under article 21, and 22 has rightn'tto be tortured,

(x) The accused has freedom of speech, and expression within jail custody under articles 21, and 19 of the Constitution,

(xi) The accused has right to be represented by duly qualified, and appointed legal practitioners,

3,1 CONSTITUTIONAL APPROCH

within **Jagmohan Singh v, State of U,P,**[9]

it was argued that capital punishment for murder violates articles 21, and 14 of the Constitution, The counsel for the appellant contended that when there are discretionary power conferred going on the judiciary to impose life imprisonment or death sentence, imposing death sentence is violative of article 14 of the Constitution if within two similar cases one gets death sentence, and the other life imprisonment, going on this point the Supreme Court held that there is no merit within the argument, If the Law has given to the judiciary wide discretionary power within the matter of sentence to be passed, it will be difficult to expect that there would be uniform application of Law, and perfectly consistent decisions because facts, and circumstances of one case cann't be the same as that of the

[9]AIR 1973 SC 947, 1973 Cr,L,J, 330, 1973 SCC (Original) 162,

other, and thus these will remain sufficient ground for scale of values of judges, and their attitude, and perception to play a role, It was also contended that death penalties violatesn'tonly article 14 but also articles 19, and 21 of the Constitution, Here *procedure* isn'tclear because after the accused is found guilty, there is no other procedure established by law to determine whether death sentence or other less punishment is appropriate within that particular case,

But this contention was rejected by the Supreme Court, and the Court held "*in important cases like murder the court always gives a chance to the accused to address the court going on the question of death penalty",* The Court also held *"deprivation of life is constitutionally permissible provided it is done according to procedure established by Law, The death sentence per se isn'tunreasonable orn'tagainst public interest, The policy of the Law within giving a very wide discretion within the matter of punishment to the Judges has its origin within the impossibilities of laying down standards, Any attempt to lay down standards as to why within one case there should be more punishment, and within the other less punishment would be an impossible task, What is true by way of regard to punishment imposed for other offences of the Code is equally true within the case of murder punishable under section 302 I,P,C, No formula is possible that would provide a reasonable criterion for infinite varieties of circumstances that may affect the gravities of the crime of murder, The impossibilities of laying down standards is at the very core of the criminal law as 'administered within India which invests the Judges by way of a very wide discretion within the matter of fixing the degree of punishment"*[10]

within Rajendra Prasad v, State of U,P,[11] V, R, Krishna Iyer, J, observed

"……,the humanistic imperative of the Indian Constitution, as paramount to the punitive strategy of the Penal Code, has hardly been explored by the courts within this field of 'life or death' at the hands of the Law, The main focus of our Judgement is going on this poignant gap within human rights Jurisprudence within the limits of the Penal

[10]See supra note 5, at 956-59,
[11]AIR 1979 SC 916,

Code, impregnated by the Constitution…,,in the Post-Constitutional period section 302, IPC, and section 354(3) of the Code of Criminal Procedure have to be read within the human rights of Parts III, and IV, further illuminated by the Preamble to the Constitution,"

The Court held that it is constitutionally permissible to swing a criminal out of corporal existence only if the securities of state, and society, public order, and the interests of the general public compel that course as provided within article 19(2) to (6), Social justice has to be read by way of reasonableness under article 19, and non-arbitrariness under article 14, V, R, Krishna Iyer, J, also observed that such extraordinary grounds alone constitutionally qualify as special reasons as to leave no option to the court but to execute the offender if the state, and societies are to survive, and progress, He was within favour of abolition of death penalties within general, and retention of it only for *White Collar Crimes*,

within Bachan Singh v, State of Punjab[12] the Supreme Court by 4:~1 majorities has overruled its earlier Judgment pronounced within Rajendra Prasad's case, and held that death sentence under section 302 IPC doesn'tviolate article 21 , The International Covenant going on Civil, and Political Rights to which India has become a parties within the year 1979, doesn'tabolish imposition of death penalties wholly, But it must be reasonably imposed, andn'tarbitrary; it should be imposed within most serious crimes, within this case the Court held that

"Judges shouldn'tbe blood thirsty, A real, and abiding concern for the dignities of human life postulates resistance to taking a life through laws' instrumentality,That oughtn'tto be done save within the rarest of rare cases when the alternative option is unquestionably foreclosed,"

within T,V,Vatheeswaran v, State of Tamil Nadu[13] the issue was whether delay within execution of death sentence violates Art 21 of the Constitution, and whether going on that

[12]AIR 1980 SC 898, See also (1980) 2 SCC 684, 715 para 88,
[13](1983) 2 SCC 68,

ground death sentence may be replaced by life imprisonment, A Division Bench consisting of Chinnappa Reddy, and R B,Misra JJ, held that prolonged delay within execution of death penalties is unjust, unfair, unreasonable, and inhuman; which also deprives him of basic rights of human being, guaranteed under article 21 of the Constitution i,e,, right to life, and personal liberty,Mr, Reddy, and Mr, Mishra JJ, Observed thus,

"Making all reasonable allowance for the time necessary for appeal, and consideration of reprive, we think that delay exceeding two years within the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 of the Constitution, and demand quashing of the sentence of death,"

Therefore, 'due process' i,e, just ,fair, and reasonable process as held within Maneka Gandhi[14] doesn'tend by way of only reasonable pronouncement of death sentence rather it extends till the proper, and due execution of sentence, There was two years delay within execution of death sentence, The court reiterated that speedy trial is an integral part of Part III of our Constitution, and it is included under article 21, and there was prolonged detention before execution of death sentence, and the accused was waiting every moment for due execution of death sentence, Every moment he was terrorised, Therefore, it must be treated as violation of the Constitutional mandate,

within Noel Riley v,A,G, of Jamaica[15]the Privy Council held that prolonged delay within execution of death sentence due to external factors is inhuman, and degrading, But from which date the period will be counted, and whether a period like two years is the yardstick? It isn'tclear even from the decisions of different benches of the Supreme Court, within EdigaAnamma v, State of A,P,[16] V,R, Krishna Iyer, and R,S,Sarkaria, JJ:~ substituted capital punishment by imprisonment for lifen'tonly for twelve years delay of

[14]Maneka Gandhi v, Union of India, AIR 1978 SC 597,
[15] (1982) 3 WLR 557,

[16] (1974) 4 SCC 443,

hanging but also going on personal grounds such as youth, imbalance, sex, and expulsion from her conjugal relation,

within Sher Singh v, State of Punjab[17] (Y, V,Chandrachud C,J,; V,D,Tulzapurkar, and A,Varadrajan, J,J,) Chief Justice disaffirmed the decision within Vatheeswaran[18]where the court had held that two years delay within execution of death sentence would be replaced by life imprisonment as binding rule, and rejected the plea for replacement of death sentence by life imprisonment, When delay within execution is within issue, the court must find out reasons for delay, Therefore two judges' decision was overruled by three judges' bench, The court held that prolonged delay within the execution of a death sentence is an important consideration to determine whether the sentence should be allowed to be executed,

As the doctrine of *rarest of rare cases* evolved within Bachan Singh v, State of Punjab[19], the Supreme Court tried to formulate specific criteria to determine scope of 'rarest of rare' within Macchi Singh v, State of Punjab[20], The court opined that while one is killed by an'ther, the societies mayn'tfeel bound by this doctrine,It has to realize that every person must live by way of safety,*Rarest of rare* doctrine has to be determined according to following factors

(1) *Manner of Commission of murder:~* If the murder is committed within an extremely brutal, revolting, grotesque, diabolical or dastardly manner to intense indignation of the community,

(2) If *Motive for the Commission of Murder* shows depravity, and meanness,

(3) Anti-social or socially abhorrent nature of the Crime,

(4) Magnitude of the Crime,

(5) Personalities of Victim of the murder that is, Child, helpless Woman, public figure, and so forth,

[17](1983)2 SCC 344,
[18]Supra note 10,
[19]AIR 1980 SC 898,
[20]AIR 1983 SC 957,

The Supreme Court held within Attorney General of India v,Lachmi Devi[21] that the mode of carrying out death penalties by public hanging is barbaric, and violative of Art,21, and that there must be procedural fairness till last breath of life as held within Triveniben v, State of Gujarat[22]

within Madhu Mehta v, Union of India[23]the mercy petition of the accused was pending before the President of India for about nine years, This matter was brought to the n'tice of the court by the petitioner, The court directed to commute death sentence to imprisonment for life because there were no reasons to justify prolonged delay, and speedy trial was said to be included within article 21 of the Constitution, There was nine years' delay within execution of death sentence,SabyosachiMukharji J,, and B,C, Roy J, approved, and relied going on Triveniben[24], and again held

",,,,,,,undue long delay within execution of the sentence of death would entitle the condemned person to approach this court or to approach under article 32 of the constitution, but this court would onlyexamine the nature of delay caused, and circumstances,,,, No fixed period of delay can be considered to be decisive, It has been emphasised that article 21 is relevant here, Speedy trial within criminal cases though mayn'tbe fundamental right is implicit within the broad sweep, and context of article 21, Speedy trial is part of one's basic fundamental right i,e,, right to life, and liberty, This principle is no less important for disposal of mercy petitions, It has been universally recognised that a condemned person has to suffer a degree of mental torture even though there is no physical mistreatment, and no primitive torture,,,,,,,"

within the State of U,P, v, Dharmendra Singh[25] the U, P, High Court commuted death sentence to life imprisonment going on the ground that the accused had spent three years within a death cell after final order of the court for death because he was dying every moment,

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[21] AIR 1986 SC 467,

[22] AIR 1989 SC 142,

[23] (1989)4 SCC 62,

[24] See supra note 19,

[25] Decided going on September 21, 1999,

In the well-known case of **State of*Tamil Nadu v, Nalini & others,****27* DP Wadhwa, J, took the following view:~

"… Judges should never be bloodthirsty, Hanging of murderers has never been too good for them, Facts, and figures, albeit incomplete, furnished by the Union of India, show that within the past, courts have inflicted the extreme penalties by way of extreme infrequency- a fact which attests to the cautions, and compassion which they have always brought to bear going on the exercise of their sentencing discretion within so grave a matter, …A real, and abiding concern for the dignities of human life postulates resistance to taking a life through law‟s instrumentality," Thus, the above statements show the viewpoint of the Supreme Court of India, when faced by way of a question whether to award capital punishment or life-imprisonment,

3 , 2 Constitutional Validities

The constitutional validities of the capital punishment has been challenged from time to time, within *Jagmohan Singh v, State of UP,* it was argued that the „right to live‟ was the very basic right to the freedoms guaranteed under Article 19 of the Constitution, The Supreme Court rejected the contention, and held that death penalties cann't be regarded unreasonable *per se* orn'twithin the public interest, and hence couldn'tbe said to be violative of Article 19 of the Constitution, It is n'teworthy that Hon‟bleMr, Justice Krishna Iyer had within *Rajendra Prasad v, State of UP*29 empathetically stressed that death penalties is violative of articles 14, 19, and 21 of the Constitution of India, However, he made it clear that where murder is deliberate, premeditated, cold-blooded, and gruesome, and there are no extenuating circumstances, the offender must be sentenced to death as a measure of social defense, A year later within the landmark case of *Bachan Singh v, State of Punjab,30* by a majorities of 4 to 1 (Bhagwati, J, dissenting) the Supreme Court overruled its earlier decision within *Rajendra Prasad's* case, It expressed the view that death penalty, as an alternative punishment for murder isn'tunreasonable, and hencen'tviolative of articles 14, 19, and 21 of the Constitution of India, because the

"public order" contemplated by clauses (2) to (4) of Article 19 is different from "law, and order",

Then again within *Smt, Shashi Nayar v, Union of India,* a very desperate, and futile attempt was made to get capital punishment declared unconstitutional, The Hon‟ble Supreme Court, however, rejected all the arguments, and held that „ death penalties has a deterrent effect, and it does serve a social purpose‟, and hence within the framework of constitution,

3,3 THE CONSTITUTIONAL CHALLENGES TO THE CAPITAL PUNISHMENT

The *Bachan Singh* case of 1980 is importantn'tjust for the fact that the majorities ruling of the Constitution Bench of the Supreme Court about the constitutionalitiesof the death penalties continues to determine the legalities of the issue to date, by way of no challenge within sight, It is equally important to understand the context within which the case came up for hearing before a Constitution Bench, The 1970s was a period of ferment within the Indian Supreme Court, This period, that witnessed the Supreme Court's sanction of Indira Gandhi's declaration of Emergency – within the *ADM Jabalpur* judgment (*ADM v,Shivkant Shukla* AIR 1976 SC 1207) – also witnessed the emergence of 'Public Interest Litigation,'[26] within relation to the death penalties there were a number of judicial innovations by the Court which sought to reduce the harshness of the law, The issues framed within *Bachan Singh* unambiguously questioned these interpretations brought about by judges including Justices Krishna Iyer, Chinnappa Reddy, Bhagwati, and Desai, A majorities of the Bench within *Bachan Singh* chose to take a more conservative line within interpreting legal provisions relating to the death penalty,

The Supreme Court within *Bachan Singh* identified the issues as (i) whether the death penalties provided for within Section 302 IPC was unconstitutional,, and (ii) whether the sentencing procedure provided for within Section 354(3) CrPC invested the court by way

[26] within the 1980s the Supreme Court recognized that a third parties could directly petition the Court, and seek its intervention within matters of "public interest" where another party's fundamental human rights were being violated,

of unguided, and untrammeled discretion, and allowed death sentences to be arbitrarily or freakishly imposed, The majorities ruling, written by Justice Sarkaria, dismissed the challenge that the death penalties was unconstitutional, within violation of Articles 14, 19, and 21,, and found that the discretion of the courts, being subject to corrections, and review, couldn'tbe said to be arbitrary or freakish,

One of the most quoted parts of the majorities ruling is the paragraph below, which illustrates the underlying perspective of the majority:~

"If, n'twithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists,judges, and administrators still firmly believe within the worth, and necessities of capital punishment for the protection of society, if within the perspective of prevailing crime conditions within India, contemporary public opinion channelised through the peoples representatives within Parliament, has repeatedly within the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalties is still a recognised legal sanction for murder or some types of murder within most of the civilised countries within the world, if the framers of the Indian Constitution were fully aware as we shall presently show they were of the existence of death penalties as punishment for murder, under the Indian Penal Code, if the 35th Report, and subsequent reports of the Law Commission suggest retention of death penalties ... it isn'tpossible to hold that the provision of death penalties as an alternative punishment for murder, within Section 302, Penal Code is unreasonable, andn'twithin the public interest",

The global context has changed markedly since the majorities ruling within 1980, As highlighted earlier within this chapter, over two thirds of the nations of the world have abolished the death penalties within law or practice, Using public opinion as the rationale for retaining the death penalties is no longer acceptable, The rationale of deterrence is increasingly being questioned, considering the situation within abolitionist countries where there has been no resurgence of crime following abolition, and the continuing lack of scientific evidence that the death penalties deters crime more effectively than lesser punishments,

Unfortunately, all policy discussion going on the legality, and constitutionalitiesof the death penalties within Indian law begins, and ends by way of this majorities ruling of four judges of a five-judge Constitutional Bench, Little attention is paid to the dissenting judgment,[27]14 Justice Bhagwati was the sole dissenting judge within *Bachan Singh*, He differed from the other four judges by way of respect to almost all of their arguments, Based going on both Constitutional principles as well as the arbitrariness of the sentencing process, he pointed out the dangers inherent within retaining the death penalties within law,

On the issue of deterrence, and retribution:~ Both the majorities decision within *Bachan Singh* as also Justice Bhagwati within his dissenting judgment elaborately discuss the issue of the deterrent value of the death penalty, Both rulings discussed how there can be said to be three broad categories justifying death sentence:~ (i) reformation, (ii) retribution,, and (iii) deterrence, going on the issue of retribution Justice Bhagwati referred to the UK Royal Commission going on Capital Punishment 1949-1953 which concluded that "modern penological thought discounts retribution within the sense of vengeance," He quoted from Arthur Koestler's authoritative treatise going on the death penalties – *Reflections going on Hanging* – that abolitionists have seldom acknowledged that deep down within our personalities there are times when we seek to take revenge, and want to take an 'eye for an eye', But he pointed out that despite this, we would rathern't have such a person dictating our law, Ironically, a large number of recent rulings of the Indian Supreme Court appear to reflect such a tendency to seek revenge, and retribution (see Section II,2,3,3 below),

On the issue of deterrence, Justice Bhagwati quoted the statement by the eminent US criminologist Professor Thorsten Sellin, cited by the Royal Commission going on Capital Punishment, that "whether the death penalties is used or n't, and whether executions are frequent or n't, both death penalties states, and abolition states show [homicide] rates which suggest that these rates are conditioned by other factors than the death penalty",, and the Royal Commission's own statement that "the general conclusion which we have reached is that there is no clear evidence within any of the figures we have examined that

[27] *Bachan Singh v, State of Punjab* (Minorities Judgment) (AIR 1982 SC 1325),

the abolition of capital punishment has led to an increase within the homicide rate, or that its reintroduction has led to a fall,"[28]It is thus clear that we need to have a fresh assessment of the efficacy of the death penalties within deterring crime, and criminals,

Arbitrariness, and the judicial process:~ Justice Bhagwati held thatn'tonly was the death penalties against national, and international norms, and therefore unconstitutional, he also pointed out that within practice the death penalties process created a context of arbitrariness, and that it was unsafe to provide powers to any set of judges since a fool-proof manner of administering criminal justice systems could never be developed, He also pointed to the dangers of depending going on judges to administer laws, and follow procedures providing for sentencing guidelines, As he explained, "It is, therefore, obvious that when a judge is called upon to exercise his discretion as to whether the accused shall be killed or shall be permitted to live, his conclusion would depend to a large extent going on his approach, and attitude, his predilections, and preconceptions, his value system, and social philosophy, and his response to the evolving norms of decency, and newly developing concepts, and ideas within penological jurisprudence,"

Expanding going on the theme, Bhagwati highlighted the realities of different attitudes, and responses of judges to issues that were brought before them, within his inimitable style, Bhagwati pointed out:~

"One judge may have faith within the Upanishad *doctrine that every human being is an embodiment of the divine, and he may believe by way of Mahatma Gandhi that every offender can be reclaimed, and transformed by love, and it is immoral, and unethical to kill him, while an'ther judge may believe that it is necessary for social defence that the offender should be put out of way, and that no mercy should be shown to him who didn'tshow mercy to an'ther, One judge may feel that the Naxalites, though guiltiesof murders, are dedicated souls totally different from ordinary criminals as they are motivatedn'tby any self-interest but by a burning desire to bring about a revolution by*

[28]15 Para 47, pg, 1362, *Bachan Singh v, State of Punjab* (Minorities Judgment) (AIR 1982 SC 1325); paras 64-65, *Royal Commission going on Capital Punishment 1949-1953, Report,* London, Her Majesty's Stationery Office, 1953,

eliminating vested interests, and shouldn'ttherefore be put out of corporal existence while an'ther judge may take the view that the Naxalites being guiltiesof cold premeditated murders are a menace to the society, and to innocent men, and women, and therefore deserve to be liquidated, The views of judges as to what may be regarded as special reasons are bound to differ from judge to judge depending upon his value system, and social philosophy by way of the result that whether a person shall live or die depends very much upon the composition of the Bench which tries his case, and this renders the imposition of death penalties arbitrary, and capricious",

As regards the actual conduct of investigations, Bhagwati identified a number of areas where problems abounded, As he pointed out then, methods of investigation are crude, and archaic, a context as truly representative today within 2008 as it was within 1982, The police, as highlighted by numerous official bodies, are by, and large ignorant of modern methods of investigation based going on scientific, and technological advances, and still resort to third degree torture as a way of gathering evidence, He explained within clear terms:~

"Our convictions are based largely going on oral evidence of witnesses, Often, witnesses perjure themselves as they are motivated by caste, communal, and factional considerations, Sometimes they are even got up by the police to prove what the police believes to be a true case, Sometimes there is also mistaken eyewitness identification, and this evidence is almost always difficult to shake within cross-examination, Then there is also the possibilities of a frame up of innocent men by their enemies, There are also cases where an overzealous prosecutor may fail to disclose evidence of innocence known to him butn'tknown to the defence, The possibilities of error within judgment cann't therefore be ruled out going on any theoretical considerations, It is indeed a very live possibilities …"[29]

[29]Ibid, Para 24, pg,1344,

The concerns raised by Justice Bhagwati about the infirmities inherent within the criminal adjudicatory process reflected concerns raised by many members of the Constituent Assembly thirties years ago (see above),

Justice Bhagwati warned:~

"Howsoever careful may be the safeguards erected by the law before death penalties can be imposed, it is impossible to eliminate the chance of judicial murder… the possibilities of error within judgment cann't therefore be ruled out going on any theoretical considerations, It is indeed a very live possibility, and it isn'tat all unlikely that so long as death penalties remains a constitutionally valid alternative, the court or the State acting through the instrumentalities of the court may have going on its conscience the blood of an innocent man"

This was a clear recognition of the inherent problems within the administration of criminal justice that render the system of sentencing individuals to death arbitrary, Unfortunately the majorities of the judges didn'tsupport this view, and held the death penalties to be constitutional, directing instead that it shouldn'tbe used except within the 'rarest of rare' cases, The study that follows only serves to highlight that despite this 'rarest of rare' formulation, these problems continue to render the process arbitrary,

3 , 4 THE SUPREME COURT AS A GAURDIAN OF JUSTICE

3 , 5 Constitutionalitiesof the Death Penalties Round I – *Jagmohan Singh v, The State of Uttar Pradesh*

In *Jagmohan Singh v, The State of Uttar Pradesh* (AIR 1973 SC 947), a five-judge Constitutional Bench of the Supreme Court rejected a challenge to the constitutionalitiesof the death penalty, The Court distinguished the Indian situation from that of the United States (where the death penalties had been struck down as cruel, and inhuman within *Furman v, Georgia* [33 L Ed 2d 346]),, and warned against transplanting the western experience,

In the absence of sociological data from India going on deterrence, the Supreme Court relied going on the 35th Report of the Law Commission of India (1967) as authoritative,

Relying going on the Law Commission's conclusion that "India cann't risk the experiment of abolition of capital punishment," the Court concluded, "it will be difficult to hold that capital punishment as such is unreasonable orn'trequired within the public interest," The Court then referred to the various failed legislative attempts at abolition, and argued, "If the legislature decides to retain capital punishment for murder, it will be difficult for this Court within the absence of objective evidence regarding its unreasonableness to question the wisdom, and proprieties of the Legislature within retaining it," Furthermore, the Court n'ted that the fact that "representatives of the people don'twelcome the prospect of abolishing capital punishment" didn'tassist the argument that the death penalties is either unreasonable orn'twithin the public interest,

The abolitionists had also claimed that the unguided discretion within the law going on capital sentencing brought about by the 1955 Amendment Act amounted to excessive discretion, and made the punishment arbitrary, and violative of Article 14 of the Constitution as two persons found guiltiesof the same offence could suffer different fates, within its response, the Supreme Court relied upon the 1953 report of the UK Royal Commission going on Capital Punishment where it found it impossible to improve the situation within the UK by redefining murder or by dividing murder into degrees, The Court n'ted that within India, within fact, the situation was already better than the conclusion of the Royal Commission, and the public had accepted that only the judges should decide going on sentence, The Court also quoted from a listed text by way of respect to the aggravating, and mitigating circumstances judges could consider when sentencing an offender,

The Court thus concluded, "the impossibilities of laying down standards is at the very core of the criminal law as administered within India which invests the judges by way of a very wide discretion within the matter of fixing the degree of punishment,The discretion within the matter of sentence is, as already pointed out, liable to be corrected by superior courts… The exercise of judicial discretion going on well-recognised principles is, within the final analysis, the safest possible safeguard for the accused,"

The Supreme Court also dismissed the plea of discrimination, arguing that such a claim couldn'tbe made as the facts, and circumstances within each case were themselves different, and a judgment within one case couldn'tbe compared by way of an'ther, The Court also summarily dismissed the argument that the lack of sentencing procedure within awarding death sentences fell foul of Article 21 of the Indian Constitution as the deprivation of the right to life was onlypossible as per the procedure established by law, The Court n'ted that the accused was well aware of the possibilities of the sentence during trial, and also had an opportunities to address the Court as also examine himself as a witness, and give evidence going on material facts, within fact soon after this judgment, a formal sentencing procedure was introduced within the new Code of Criminal Procedure, 1973, a possible legacy of the 1972 challenge to the constitutionalitiesof the death penalty,

The impact of such pointers was immediate, The same bench of Justices Krishna Iyer, and Sarkaria within *Chawla, and Anr, v State of Haryana* (AIR 1974 SC 1039) further developed the idea of cumulative commutation – a reduction within the sentence going on the basis of totalities of circumstances rather than going on the basis of one particular fact, within this instance, this included nearly one year, and ten months going on death row, the immature age of the appellant, provocation by the conduct of the deceased as also the fact that other accused who had caused greater wounds had only been sentenced to life by the lower courts, The Court concluded that, "perhaps, none of the above circumstances, taken singly, and judged rigidly by the old draconian standards, would be sufficient to justify the imposition of the lesser penalty, nor are these circumstances adequate enough to palliate the offence of murder, But within their totality, they tilt the judicial scales within favour of life rather than putting it out," going on the same day, an'ther accused *Raghubir Singh v, State of Haryana* (AIR 1974 SC 677) too was fortunate to receive a commutation within the wake of *EdigaAnamma v, State of Andhra Pradesh* as a different bench too followed a cumulative approach, It is arguable that had his case been heard a few weeks previously, he would have been sent to the gallows for the premeditated murder by poisoning he was found guiltiesof,

In *Suresh v, State of U,P,*[(1981) 2 SCC 569] (a case where the original trial was conducted under the old CrPC – see below), the Supreme Court observed that the trial

court should have given the accused a hearing going on sentencing even though it wasn'trequired to, as this would have furnished useful data going on the question of sentence, The Court commuted the sentence going on cumulative grounds as it found that the accused was only 21 years old, there was no established motive (though robbery or sexual assault was claimed by the prosecution), that the accused didn'teven try to run away even thoughn'tinjured,, and that thoughn'tinsane, "he was somewhat unhinged" at the time of the offence, Lastly, the Supreme Court also considered the fact that the main witness for the prosecution was a child of five, The Court concluded, "the extreme sentence cann't seek its main support from evidence of this kind which, even if true, isn'tsafe enough to act upon for putting out a life,"

3,5,1 The inter-regnum:~ old &new Codes of Criminal Procedure (1974– 75)

When the new Code of Criminal Procedure, 1973 came into effect going on 1st April 1974, it clarified that all trials that had already begun would be completed under the 1898 Code,This meant that appeals from trials begun prior to the n'tification of the new code would also proceed under the old law, This parallel system appeared to have little impact going on the different benches of the Supreme Court,

A number of Supreme Court benches continued to follow the pre-1956 sentencing practice of citing 'extenuating circumstances,' for why the death penalties shouldn'tbe imposed, within *Mangal Singh v, State of Uttar Pradesh* [(1975) 3 SCC 290] the Supreme Court upheld the death sentence as no extenuating circumstances were referred to it; within *Maghar Singh v, State of Punjab* (AIR 1975 SC 1320) none could be inferred;, and within *Suresh @ Surya Sitaram v, State of Maharashtra* (AIR 1975 SC 783) none could be found, within other cases, the Supreme Court often fell back going onn'tdiscussing sentencing at all [*BhagwanDass v, State of Rajasthan* [(1974) 4 SCC 781], *Lalai @ Dindoo, and Anr, v, State of U,P,*(AIR 1974 SC 2118), *Shri Ram v, The State of U,P,*(AIR 1975 SC 175), *Mahadeo Dnyamu Jadav v, State of Maharashtra* (AIR 1976 SC 2327),, and *Harbajan Singh v, State of Jammu & Kashmir* (AIR 1975 SC 1814)],

3, 5,2 The new Code of Criminal Procedure (1975 – 2006)

"It seems to meabsurd that laws which are an expression of the public will, which detest, and punish homicide, should themselves commit it,"

Justice Krishna Iyerwithin *Shiv Mohan Singh v, The State (Delhi Administration)*
(AIR 1977 SC 949)

Though some judges within the Supreme Court had already stated so within *EdigaAnamma v, State of Andhra Pradesh* (AIR 1974 SC 799), the amended CrPC of 1973 was the first time the legislature laid down that the death penalties was an exceptional punishment under the IPC, Section 354(3) of the Code required judges to n'te 'special reasons' when awarding sentences of death, Importantly the new CrPC also required a mandatory pre-sentencing hearing within the trial court under section 235(2) (for more going on this, see Section 6,2,1 below), This was a complete 180 degree turn from the pre-1955 position when the death sentence was the preferred punishment,, and a "gradual swing against the imposition of such penalty" as the Court n'ted within *Balwant Singh v, State of Punjab* (AIR 1976 SC 230), This judgment, delivered going on 11th November 1975, was the first capital case where the new CrPC came into play within the Supreme Court, Though the murder itself had taken place after the new CrPC came into operation, the Supreme Court n'ted that the High Court judgment had erroneously continued to apply the pre-1974 law going on sentencing,N'ting that the killing was intentional, and the appellant had a motive, the Court argued, "but the facts found weren'tsuch as to enable the court to say that there were special reasons for passing the sentence within this case,"

Court continued further to n'te, "It is unnecessary nor is it possible to make a catalogue of the special reasons which may justify the passing of the death sentence within a case,But we may indicate just a few, such as, the crime has been committed by a professional or a hardened criminal, or it has been committed within a very brutal manner, or going on a helpless child or a woman or the like,"

Despite the change within the law, lower courts appeared to continue to use the outdated practice of providing 'extenuating circumstances' ifn'tawarding death sentences, Rather than pointing to the error within sentencing practice, within a number of cases the Supreme Court

upheld the sentences, finding their own 'special reasons' for doing so [for example within *Sarveshwar Prasad Sharma v, State of Madhya Pradesh* (AIR 1977 SC 2423)], While within some cases the Bench attempted to disguise the old approach to fit the new, within other cases Benches didn'teven make the effort, and merely continued applying the previous law going on sentencing, Thus within *Gopal Singh v, State of U,P,*(AIR 1979 SC 1822), the Supreme Court n'ted, "There is no extenuating circumstance, The appellant was rightly awarded the capital sentence," Similarly within *Nathu Garam v, State of Uttar Pradesh* [(1979) 3 SCC 366], the Court was unable to find any 'extenuating or mitigating circumstances', and therefore agreed by way of the views of the lower courts, Just to highlight that n'thing had really changed, within *Baiju alias Bharosa v, State of Madhya Pradesh* (AIR 1978 SC 522), *Tehal Singh, and Ors, v, State of Punjab* (AIR 1979 SC 1347), and *Ramanathan v, The State of Tamil Nadu* (AIR 1978 SC 1204), there was little or no discussion of sentence even though the Supreme Court upheld the death sentence within all these cases,

within *Srirangan v, State of Tamil Nadu* (AIR 1978 SC 274), only a few weeks after the judgment within *Sarveshwar Prasad Sharma v, State of Madhya Pradesh* (AIR 1977 SC 2423), a completely different face of the court was visible, Even though this was n'ted to be a "brutal triple murder," by way of the new winds of penology blowing, observed the Court, "the catena of clement facts, personal, social,, and other, persuade us to hold that… the lesser penalties of life imprisonment will be more appropriate," There were hardly any facts stated within the judgment, Perhaps unsurprisingly this judgment was delivered by Justice Krishna Iyer who – post *EdigaAnamma*- was carrying the abolitionist flag within the hallowed premises of the Supreme Court,

His abolitionist agenda no secret, within both *Shiv Mohan Singh v, The State (Delhi Administration), and Joseph Peter v, State of Goa, Daman, and Diu* [(1977) 3 SCC 280], Justice Krishna Iyer attempted to reconcile his personal views going on the subject by way of his professional duties as a judge, within the former case, a special leave petition had previously been rejected as had a motion for rehearing of the petition, A first review petition wasn'tadmitted, a second modified review petition was dismissed, and an'ther application for

resending the matter to the trial court was also dismissed, This third review petition was surprisingly admitted, by way of the Bench stating, "we have desisted from a dramatic rejection of the petition outright, anxious to see if there be some tenable ground which reasonably warrants judicial interdicts to halt the hangman's halter," by way of little within the facts to support any change, the learned judge embarked going on an assault going on capital punishment, cleverly suggesting that these could be campaign points for abolitionists, commenting, "Moreover, the irreversible step ofextinguishing the offender's life leaves societies by way of no opportunities to retrieve him if the conviction, and punishment be found later to be founded going on flawsome (*sic*) evidence or the sentence is discovered to be induced by some phoney aggravation, except the poor consolation of posthumous rehabilitation as has been done within a few other countries for which there is no procedure within our system," Even after considering all the factors, unable to find sufficient cause to reduce the sentence, and weighed down by the large number of previous legal failures of the accused, the bench attempted to influence the President's clemency decision stating, "The judicial fate n'twithstanding, there are some circumstances suggestive of a claim to Presidential clemency, The two jurisdictions are different, although some considerations may overlap, We particularly mention this because it may still be open to the petitioner to invoke the mercy power of the President, and his success or failure within that endeavour may decide the arrival or otherwise of his doomsday," Similarly, within a rarely reported refusal to admit the special leave petition itself within *Joseph Peter v, State of Goa, Daman, and Diu*, a reluctant Justice Iyer, again unable to overrule the law resorted to suggesting a possible recourse to a clemency petition observing that "Presidential power is wider,"

While none can grudge this brave, and lonely battle being waged within the Supreme Court, it is obvious that all those whose appeals were heard by a Bench within which Justice Krishna Iyer featured were more likely to receive a sympathetic hearing, and even perhaps a suggestion of presidential pardon, ifn'ttheir sentence commuted, This merely reconfirms Professor Blackshield's previous observation that a key factor within determining a question of life or death was which judges heard the appeal, The features of the new CrPC could do little to limit this arbitrariness, even though they perhaps ensured that the overall number of persons sentenced to death was reduced,

3,5,3 Battles going on the Bench

by way of the emergence of a small but vocal minorities of judges who opposed the death penalty, led by Justice Krishna Iyer, a sharp divide within the Supreme Court itself became apparent, Matters came to a head within a judgment within *Rajendra Prasad v, State of Uttar Pradesh* (AIR 1979 SC 916), where the majorities decision of Justices Krishna Iyer, and Desai was opposed tooth, and nail by Justice A,P, Sen,

In the majorities judgment – which resembles an academic essay replete by way of headings – even though the Bench clarified that they wouldn'tenter into questions of constitutionality, going on the issue of sentencing discretion they observed:~ "the latter is within critical need of tangible guidelines, at once constitutional, and functional, The law reports reveal the impressionistic, and unpredictable n'tes struck by some decisions, and the occasional vocabulary of horror, and terror, of extenuation, and misericordia, used within the sentencing tailpiece of judgments, Therefore this jurisprudential exploration, within the framework of Section 302 IPC has become necessitous, both because of the awesome 'either/or' of the Section spells out no specific indicators, and law within this fatal area cann't afford to be conjectural, Guided missiles, by way of lethal potential within unguided hands, even judicial, is (*sic*) a grave risk where the peril ismortal though tempered by the appellate process," The learned judges made this observation after quoting approvingly from Professor Blackshield's analysis which had also concluded that the inconsistencies within sentencing led to the conclusion that "arbitrariness, and uneven incidence are inherent, and inevitable" within the system of capital punishment within contemporary India,

3,6ConstitutionalitiesRound II – *Bachan Singh v, State of Punjab* (AIR 1980 SC 898)

"In this sensitive, highly controversial area of death penalty, by way of all its complexity, vast implications, and manifold ramifications, even all the judges cloistered within this

Court, and acting unanimously, cann't assume the role which properly belongs to the chosen representatives of the people within Parliament,"

Instead the Supreme Court referred to some illustrative 'aggravating circumstances', and 'mitigating circumstances' as suggested by the Amicus Curiae, and suggested that these could be indicators, and relevant circumstances within determining sentence,

"Aggravating Circumstances – A court may however within the following cases impose the penalties of death within its discretion:~

(a) If the murder has been committed after previous planning, and involves extreme brutality; or

(b) If the murder involves exceptional depravity; or

(c) If the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant, and was committed:~

(i) While such member or public servant was going on duty; or

(ii) within consequence of anything done or attempted to be done by such member or public servant within the lawful discharge of his duties as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) If the murder is of a person who had acted within the lawful discharge of his duties under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37, and Section 129 of the said Code,

Mitigating circumstances – within the exercise of its discretion within the above cases, the Court shall take into account the following circumstances:~

(1) That the offence was committed under the influence of extreme mental or emotional disturbance,

(2) The age of the accused, If the accused is young or old, he shalln'tbe sentenced to death,

(3) The probabilities that the accused wouldn'tcommit criminal acts of violence as would constitute a continuing threat to society,

(4) The probabilities that the accused can be reformed, and rehabilitated, The State shall by evidence prove that the accused doesn'tsatisfy the conditions 3, and 4 above,

(5) That within the facts, and circumstances of the case the accused believed that he was morally justified within committing the offence,

(6) That the accused acted under the duress or domination of an'ther person,

(7) That the condition of the accused showed that he was mentally defective, and that the said defect impaired his capacities to appreciate the criminalities of his conduct,"

The Supreme Court also clarified that the mitigating circumstances should receive a "liberal, and expansive construction" by way of scrupulous care, and humane concern, and "judges should never be blood-thirsty," within such a vein, the Court concluded:~ "*A real, and abiding concern forthe dignities of human life postulates resistance to taking a life through law's instrumentality, That oughtn'tto be done save within the rarest of rare cases when the alternative option is unquestionably foreclosed,*"

3,6,1'Rarest of Rare' (1980 – present)

"*The question may well be asked by the accused:~ Am I to live or die depending upon the way within which the Benches are constituted from time to time? Is thatn'tclearly violative of the fundamental guarantees enshrined within Articles 14, and 21?*"

Justice Bhagwati within his dissenting judgment

Bachan Singh v, State of Punjab (AIR 1982 SC 1325)

The concluding paragraph within the majorities opinion within *Bachan Singh v, State of Punjab* (AIR 1980 SC 898) limiting the death sentence to the 'rarest of rare' cases reinforced the exceptional nature of the death penalties that Parliament had secured within the new CrPC within 1973, The aggravating, and mitigating factors added a new element within the sentencing process, coming as they did from a Constitutional Bench of five judges of the Supreme Court, Even though the *Rajendra Prasad v, State of Uttar Pradesh* reading of 'special reasons' was rejected, the specific reference within the mitigating

factors to the fact that the state had to establish – by way of evidence – that the accused was likely to commit crime again, and couldn'tbe reformed, before the death sentence could be awarded, continued by way of the reformist approach that *Rajendra Prasad* had sought,

The impact of the *Bachan Singh* judgment was palpable, and almost all cases within the following few years that came before the Supreme Court resulted within commutation due to the understanding that the 'rarest of rare' formulation restricted the sentence to be awarded to extreme cases only (see *ShidagoudaNingappaGhandavar v, State of Karnataka* [(1981) 1 SCC 164]), within fact *Earabhadrappa alias Krishnappa v, State of Karnataka* [(1983) 2 SCC 330] is a good illustration of an otherwise 'hanging' judge "constrained to commute the sentence" as "the test laid down within Bachan Singh's case is *unfortunatelyn't*fulfilled within the instant case," (emphasis added) Yet within a few other cases, some benches awarded the death sentence without following the aggravating, and mitigating circumstances approach prescribed by the Constitutional Bench or even discussing what the 'special reason' for the award was, within fact within *Gayasi v, State of U,P* [(1981) 2 SCC 712] (a two paragraph judgment), and *Mehar Chand v, State of Rajasthan* [(1982) 3 SCC 373], no reference at all was made to the *Bachan Singh* judgment or the 'rarest of rare' formula,

In *Machhi Singh, and Others v, State of Punjab* [(1983) 3 SCC 470], the Bench upheld three death sentences within a complex case that involved five different incidents over one night within which 17 persons within all were killed by the accused Machhi Singh, and 11 of his accomplices, This judgment is best known for its discussion of the 'rarest of rare' formulation, and the guidelines set out within the *Bachan Singh* judgment, The judgment was, within fact, seen by many assupporting the death penalty, as it appeared to expand the 'rarest of rare' formulation beyond the aggravating factors listed within *Bachan Singh* to cases where the 'collective conscience' of a communities may be shocked, The judgment further illustrated cases where such sentiment may arise:~

a) "When the murder was committed within an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense, and extreme indignation of the communities e,g, when the victim is sought to be put going on fire by burning of his

house; where the victim is subject to inhuman torture, and cruelties to cause death, and where the body of the victim is dismembered within a fiendish manner,

b) When the murder is committed for a motive which evinces total depravity, and meanness e,g, a hired assassin killing for profit; a cold-blooded murder for properties or of someone by way of whom the murderer is within a position of trust; murder committed within the 'course of betrayal of the motherland,'

c) Anti social or socially abhorrent murder – dowry deaths or killing due to infatuation by way of an'ther woman, of a member of a scheduled tribe or scheduled caste going on grounds of his caste/tribe; offences to terrorize people to give up property, and other benefits within order to reverse past injustices, and to restore the social balance,

d) within cases of multiple murders of a members of a particular family, caste, communities or locality,

e) Where the victim is an innocent child, helpless woman, aged or infirm person, a public figure whose murder is committed other than for personal reasons,"

The judges therefore argued that the *Bachan Singh* guidelines would have to be read within the above context and, "a balance sheet of aggravating, and mitigating circumstances has to be drawn up, and within doing so the mitigating circumstances have 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," The Bench also suggested two questions for judges to consider within awarding the death sentence:~

a) "Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate, and calls 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 within favour of the offender?"

While the reference to the balancing of aggravating, and mitigating circumstances, and the questions to be asked by the judge appear useful, the correctness of the expansion of the *Bachan Singh* guidelines by the judges within *Machhi Singh, and Others v, State of Punjab* [(1983) 3 SCC 470] is debatable given that the former were listed by a five-judge Constitutional Bench, and the latter by a regular three-judge bench, Despite this, as many of the cases discussed later within this section indicate, the latter were used by many successive benches within upholding death sentences, even though they would have otherwise failed the *Bachan Singh* test,

3,6,2 Applying, ignoring, misunderstanding the 'rarest of rare' test

Some authors have argued that the *Bachan Singh* judgment was "neither a small nor insignificant achievement for the abolitionists" as "the rate of imposition of death penalties would definitely have been higher" but for the judgment,42 Such a claim is difficult to conclusively establish, firstly due to the paucities of information going on trial court judgments where the direct impact of the judgment could have been observed,, and secondly since there is no way of knowing how many judgments *could* have resulted within death sentences being upheld by the Supreme Court had the *Bachan Singh* judgmentn't been delivered at all, All the same, there is little doubt that the *Bachan Singh* formulation saved many from the gallows within the early eighties due to Supreme Court commutations,

The impact of the judgment, and its guidelines within the mid-1980s, and thereafter however, is less impressive, within fact within a number of judgments where the Supreme Court upheld the death sentence, there was no discussion of the 'rarest of rare' formulation or of the *Bachan Singh* guidelines, Thus within *Lok Pal Singh v, State of M,P,*(AIR 1985 SC 891), the Bench merely stated, "This was a cruel, and heinous murder, and once the offence is proved then there can be no other sentence except the death sentence that can be imposed," within fact the particular bench of Justices Fazal Ali, Varadarajan, and RanganathMisra appeared to turn the clock back by arguing that there were "no

extenuating circumstance", and therefore no reason to show leniency, References were also conspicuously missing within *Mahesh s/o Ram Narain, and ors, v, State of Madhya Pradesh* [(1987) 3 SCC 80], *Darshan Singh, and anr, v, State of Punjab* [(1988) 1 SCC 618], and *Ranjeet Singh, and anr, v, State of Rajasthan* (AIR 1988 SC 672),

3,6,3Public pressure, and the Supreme Court

While there were very few judgments within which the Supreme Court upheld a death sentence within the early 1980s, within both *Kuljeet Singh alias Ranga v, Union of India, and anr,*[(1981) 3 SCC 324] (the 'Billa-Ranga case'), and *Munawar Harun Shah v, State of Maharashtra* (AIR 1983 SC 585) (the 'Joshi-Abhyankar case'), public, and media outrage, and pressure played a vital role within the Supreme Court's rejection of pleas for commutation,

The case of Billa, and Ranga involved the kidnapping, and murder of two young children of a naval officer within Delhi, The incident led to widespread protests, and pressure upon the judiciary to punish the offenders severely, Surprisingly, the judgment of the Supreme Court within dismissing the special leave petitions (dated 8th December 1980) of both the accused aren'treported, and it isn'tclear whether the Court dismissed these summarily or whether they heard the entire matter, and upheld the death sentences, finding the case to be the 'rarest of rare,' However within *Kuljeet Singh alias Ranga v, Union of India, and anr,*[(1981) 3 SCC 324] (the judgment going on a writ petition filed subsequently by one of the accused), the Supreme Court rejected the argument for mitigation of sentence, and despiten'tproviding any evidence, n'ted that the accused were professional murderers, and deserved no sympathy "even within terms of the evolving standards of decency of a maturing society," The Court observed that, "The survival of an orderly societies demands the extinction of the life of persons like Ranga, and Billa who are a menace to social order, and security," The Supreme Court went even further, and stated, "We hope that the President will dispose of the mercy petition stated to have been filed by the petitioner as expeditiously as he find his convenience," This appears to be a bold step indeed, perhaps by a Court that was being pushed into a corner,

The effect of pressure going on the Court becomes even more apparent going on perusal of the Court's later judgments regarding this case, A few months after its rejection of the previous writ petition (*Kuljeet Singh alias Ranga v, Union of India, and anr,*), the Court admitted an'ther writ petition (*Kuljeet Singh alias Ranga v, Lt, Governor, Delhi, and anr,*[(1982) 1 SCC 11]) challenging the arbitrariness of the clemency powers of the President, The Supreme Court sought details from the Government as to whether there were any uniform standards or guidelines relating to the manner within which the President, and the executive dealt by way of mercy petitions, Yet a couple of months later within *Kuljeet Singh alias Ranga, and anr v, Lt, Governor of Delhi, and ors,*[(1982) 1 SCC 417], despite there being no information received from the state going on that point, the Supreme Court changed its mind, and dismissed the petition, stating that the broader question of the power of the President to commute "may have to await examination going on an appropriate occasion, This clearly isn'tthat occasion insofar as this case is concerned, whatsoever be the guidelines observed for the exercise of the power conferred by Article 72, the only sentence which can possibly be imposed upon the petitioner is that of death, and no circumstances exist for interfering by way of that sentence…n't even the most liberal use of his mercy jurisdiction could have persuaded the President to interfere by way of the sentence of death imposed upon the petitioner,"n'tonly was this sudden change of heart within the Supreme Court odd, but the perverse logic of the Supreme Court is curious, especially since the Court had previously admitted the writ petition going on the grounds that the petition raised a

question of "far-reaching importance," within the absence of any other credible explanation, we are left within little doubt that the Court's position had more to do by way of public opposition to commutation than the merits of the petition itself,

3,6,4 Lip service to Bachan Singh

A number of other benches made the mandatory references to the *Bachan Singh* judgment but showed no real understanding either of the sentiment of 'the rarest of rare' or of the obligation placed upon judges to compare aggravating, and mitigating circumstances, Thus within *Suresh Chandra Bahri v, State of Bihar* (AIR 1994 SC 2420), the Court found a number of aggravating factors as described within *Bachan Singh, and Machhi Singh, and Others v, State of Punjab*, but there was no apparent attempt made to examine the mitigating

circumstances, and none are mentioned within the Supreme Court judgment, Similarly, within *Suresh, and anr, v, State of Uttar Pradesh* (AIR 2001 SC 1344), the Supreme Court judgment is largely focussed going on discussion of a particular point of law but scant going on sentencing, The judgment merely records the defence counsel argument that the case didn'tfall within the 'rarest of rare' requirement of *Bachan Singh, and* further states that the Court doesn'tagree by way of this argument,

> In *GentelaVijayavardhan Rao, and anr, v, State of Andhra Pradesh* (AIR 1996 SC 2791), a case where a large number of persons were burnt alive within a bus within a failed robbery attempt, the Court rejected the various mitigating circumstances put forward (that the accused were young at the time of the offence; that the killings were unplanned as the prime motive was robbery;, and that the accused didn'ttry to prevent persons from escaping) finding these "too slender", and arguing that even if accepted they were "eclipsed by the many aggravating circumstances," within fact, despite evidence to the contrary, the Supreme Court appeared to go out of its way to argue that the bus was intentionally burnt, referring to the incident as a "planned pogrom … executed by way of extreme depravity", and a rarest of rare case due to the "inhuman manner within which they plotted the scheme, and executed it,"[30]

3,7ConstitutionalitiesRound III – *Smt, ShashiNayarv, Union of India, and ors,*

After a gap of over a decade (since *Bachan Singh within* 1980) the question of constitutionalitiesof the death penalties received a hearing by a Constitutional Bench within *Smt, Shashi Nayar v, Union of India, and ors,*(AIR 1992 SC 395), The petition was filed by the wife of the accused as a last resort two days before the date of hanging, following dismissal of the Special Leave Petition, and Review Petition by the Supreme Court, and rejection of mercy petitions by the Governor, and President, within fact previous writs had been filed but rejected by the High Court, and the Supreme Court, However, since none of these judgments were reported, there is little known about the merits of the case,

[30]A subsequent campaign for commutation led by the Andhra Pradesh Civil Liberties Committee argued that the killings were unintentional, and unplanned, and was ultimately successful within obtaining a commutation of the sentences by the executive,

The Constitutional Bench didn'tgo into the merits of the argument against constitutionality, as they n'ted that the same grounds had been dealt by way of within *Bachan Singh, and Deena v, State of U,P,*[(1978) 3 SCC 540], and since they fully agreed by way of the position taken, it wasn'tnecessary to reiterate the same, The petitioner sought that the matter be heard by a larger bench than *Bachan Singh*, going on the basis that that decision was based largely going on the Law Commission's 35th Report which was now very old, and within the absence of an empirical study to show that the circumstances of 1965 were still relevant, The Supreme Court however found no merit within these claims, asserting:~ "The death penalties has a deterrent effect, and it does serve a social purpose, The majorities opinion within Bachan Singh's case held that having regard to the social conditions within our country the stage wasn'tripe for taking a risk of abolishing it, No material has been placed before us to show that the view taken within Bachan Singh's case requires reconsideration," Further the Court also took judicial n'tice of the fact that the law, and order situation within the country hadn'timproved since 1967, had deteriorated, and was worsening, The Court therefore concluded that it was the most inopportune time to reconsider the constitutionalitiesof the death penalty,

within *Govindasami v, State of Tamil Nadu* (AIR 1998 SC 2889), the case came by way of a mandatory appeal to the Supreme Court as the High Court had overturned the acquittal of the accused, and sentenced him to death ten years after the end of the trial court proceedings, The appellant had been convicted of killing his paternal uncle, his wife,, and three children, and the High Court had found that there was no provocation, the killing was pre-meditated, and there was no mental derangement, It argued that the manner of the killings was "gruesome, calculated, heinous, atrocious, and cold-blooded", and concluded that if the appellant was allowed to live he would be a grave threat to fellow human beings, and therefore he should be sentenced to death, The Supreme Court also observed, "…*we looked into the record to find out whether there was any extenuating or mitigating circumstance within favour of the appellant but found none*, If within spite thereof, we commute the death sentence to life imprisonment we will be yielding to spasmodic sentiment, unregulated benevolence, and misplaced sympathy," However both the High Court, and the Supreme Court ignored the rehabilitation of the accused that had taken place within the ten years between his acquittal

by the trial court, and the award of the death sentence by the High Court that, would have countered the High Court's logic that he was a threat to society, The fact that the Supreme Court restricted itself to the facts going on record rather than seeking details about the conduct of the accused following his acquittal only suggests that the Court was more interested within the offence rather than the offender,[31]

3,7,1 'Social Necessity', and 'Cry for Justice':~

The fading impact of the *Bachan Singh* test

Increasingly during the 1980s, and 90s, the Supreme Court appeared to prioritise sentiments of outrage about the nature of the crimes committed over the requirement to carefully consider the threat to societies versus the possibilities of reform, and rehabilitation of offenders as part of a sentencing process that had at its heart the concept that imposition of the death penalties should be exceptional,

The principle of 'social necessity' first made an appearance within *Earabhadrappa alias Krishnappa v, State of Karnataka* [(1983) 2 SCC 330] where Justice A,P, Sen continued by way of his opposition to any moves to abolish the death penalty, observing that, "It is the duties of the court to impose a proper punishment depending upon the degree of criminality, and desirabilitiesto impose such punishment as a measure of social necessities as a means of deterring other potential offenders," Restrained by the guidelines within *Bachan Singh*, within this case the bench decided grudgingly to commute the sentence, warning that, "Failure to impose a death sentence within such grave cases where it is a crime against societies – particularly within cases of murders where committed by way of extreme brutalities – will bring to naught the sentence of death provided by Section 302 of the Indian Penal Code,"

Machhi Singh, and Others v, State of Punjab was seen by Justice A,P, Sen within *Amrik Singh v, State of Punjab* (1988 Supp SCC 685) as "retrieving" the virtually abolitionist situation created by *Bachan Singh*,n'tonly did *Amrik Singh* reiterate the concern of the

[31] within this case too, it was largely the effort of voluntary groups led by the People's Union for Civil Liberties – Tamil Nadu, that ensured that relevant facts relating to the rehabilitation of the accused were made available to the executive during the campaign for the sentence to be commuted,This sentence was also commuted by the executive,

retentionists going on the bench about the impact of *Bachan Singh going on* sentencing, but it also warned of its consequences:~"We had indicated within *Earabhadrappa alias Krishnappa v, State of Karnataka*, the unfortunate result of the decision within *Bachan Singh* case is that capital punishment is seldom employed even though it may be a crime against society, and the brutalities of the crime shocks the judicial conscience, We wish to reiterate that a sentence or pattern of sentences which fails to take due account of the gravities of the offence can seriously undermine respect for law…"

Though the principle was enunciated within 1983, it was only within 1987 – when the impact of the *Bachan Singh* judgment had reduced considerably – that an'ther bench of the apex Court put forward the deterrence, and social necessities argument within *Mahesh s/o Ram Narain, and others v, State of Madhya Pradesh* (AIR 1987 SC 1346), within this oft-quoted judgment, Justices Khalid, and Oza upheld the death sentences handed down to both the accused who committed five murders during a dispute over caste, The judgment is scant going on facts, and doesn'trefer to the role of either of the accused, focussing instead going on the 'the evil of untouchability,' Sharing the High Court's observation that the act of one of the appellants "was extremely brutal, revolting, and gruesome which shocks the judicial conscience … within such shocking nature of crime as the one before us which is so cruel, barbaric, and revolting, it is necessary to impose such maximum punishment under the law as a measure of social necessities which work as a deterrent to other potential offenders," the Supreme Court concluded:~ "We also feel that it will be a *mockery of justice* to permit these appellants to escape the extreme penalties of law when faced by way of such evidence, and such cruel acts, To give the lesser punishment for the appellants would be to render the justicing [*sic*] system of this country suspect, The common man will lose faith within courts, within such cases, he understands, and appreciates the language of deterrence more than the reformative jargon" (emphasis added), Though the Supreme Court did acknowledge the need to take a reformative approach within general, it asserted that the Court had no alternative within the present case, There was no discussion of mitigating circumstances, and it was evident that *Bachan Singh's* influence going on sentencing was already severely reduced,

Mahesh was only the first within a series of cases within which arguments around the 'social necessity' of the death penalties were seen, and mitigating circumstances received no mention [see also *Asharfi Lal, and ors, v, State of Uttar Pradesh* (AIR 1989 SC 1721)],

within *Sevaka Perumal etc, v, State of Tamil Nadu* (AIR 1991 SC 1463), a bench of Justices Ray, and Ramaswamy referred extensively to *Mahesh, and* argued that, "protection of society, and stamping out criminal proclivities must be the object of law which must be achieved by imposing appropriate sentences," By now it had become clear that the reformative approach was being discarded, and deterrence, and the protection of societies from 'criminals' was the focus, The Supreme Court continued, "undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine public confidence within the efficacy of law, and societies couldn'tlong ensure under serious threats," The Supreme Court also argued that the death sentence was required because "if the court didn'tprotect the injured, the injured would then resort to private vengeance," A similar warning was also evident within *GentelaVijayavardhan Rao, and anr, v, State of Andhra Pradesh* (AIR 1996 SC 2791) (see above) where the Supreme Court argued that, "if this type of persons are allowed to escape death penalty, it would result within miscarriage of justice, and common man would lose faith within justice system," The High Court within this case had earlier n'ted that the death sentence was imperative to avoid any private vengeance against the accused persons,

In *Ravji alias Ram Chandra v, State of Rajasthan* (AIR 1996 SC 787), the bench of Justices Ray, and Nanavati, relying going on *Dhananjoy Chatterjee alias Dhana v, State of West Bengal* [(1994) 2 SCC 220], concluded that the Court would be, "failing within its duty" if it didn't"respond to the society's cry for justice against the criminal", and award appropriate punishment to a man found guiltiesof killing his pregnant wife, and three small children,

Same bench once again upheld the death sentence within *Surja Ram v, State of Rajasthan* (AIR 1997 SC 18) where the accused had killed his brother's entire family, observing:~ "Such murders, and attempt to commit murders within a cool, and calculated manner without provocation cann't but shock the conscience of the societies which must abhor such heinous crime committed going on helpless innocent persons, Punishment must also respond to society's cry for justice against the criminal, While considering the punishment to be given to the accused, the Court should be aliven'tonly to the right of the criminal to be awarded just, and fair punishment by administering justice tempered by way of such mercy as the criminal may justly deserve, but also to the rights of the victims of the crime

to have the assailant appropriately punished, and the society's reasonable expectation from the court for the appropriate deterrent punishment conforming to the gravities of the offence, and consistent by way of the public abhorrence for the heinous crime committed by the accused,"

In *Ram Deo Chauhan, and anr, v, State of Assam* (AIR 2000 SC 2679), the bench of Justices Thomas, and Sethi took the argument of protection of societies to a new low, arguing that, "… when a man becomes a beast, and menace to the society, he can be deprived of his life…" The Supreme Court reasoned that for an accused guiltiesof a pre-planned, cold-blooded, brutal quadruple murder, life imprisonment would be inadequate, and the death penalties was necessary to protect the community, and deter others, Similarly within *Narayan Chetanram Chaudhary, and anr, v, State of Maharashtra* [(2000) 8 SCC 457], the same bench upheld the death sentence of the accused found guiltiesof five murders as part of a robbery plot, The Supreme Court observed that the accused were "so self-centered going on the idea of self preservation that doing away by way of all inmates of the house was settled upon them as an important part of the plan from the beginning", and therefore didn'tdeserve sympathy from the law, and society,

3,7,2The current situation:~ 'rarest of rare' lost within translation

going on 12 December 2006 a bench of Justices S,B, Sinha, and Dalveer Bhandari delivered a judgment within the case of *Aloke Nath Dutta, and ors, v, State of West Bengal* (MANU/SC/8774/2006), within an unusually candid judgment the Court admitted its failure to evolve a sentencing policy within capital cases, The Bench examined various judgments over the past two decades within which the Supreme Court adjudicated upon whether a case was 'rarest of rare' or n't, and concluded, "What would constitute a rarest of rare case must be determined within the fact situation obtaining within each case [*sic*], We have also n'ticed hereinbefore that different criteria have been adopted by different benches of this Court, although the offences are similar within nature, Because the case involved offences under the same provision, the same by itself mayn'tbe a ground to lay down any uniform criteria for awarding death penalties or a lesser penalties as several factors therefore are required to be taken into consideration," The frustration of the Court was evident when it stated, "No sentencing policy within clear cut terms has been evolved by the Supreme Court, What should we do?" The Court commuted the sentence, **going on** the same day however, an'ther

bench of Justices Arijit Pasayat, and S,H, Kapadia delivered a judgment within *Bablu @ Mubarik Hussain v, State of Rajasthan* (AIR 2007 SC 697), within this case the Court upheld the death sentence of the appellant who had murdered his wife, and four children, The judgment didn'tdiscuss a motive for the killing, After referring to the importance of reformation, and rehabilitation of offenders as among the foremost objectives of the administration of criminal justice within the country, the judgment merely referred to the declaration of the murders by the accused as evidence of his lack of remorse, No discussion about the specific situation of the appellant or the possibilities of reform within his case was undertaken,

The fact that both these judgments were delivered going on the same day within the Supreme Courtn'tonly highlights the whimsical nature of the benches but also further reiterates the point made by the bench within *Aloke Nath Dutta, and ors, v, State of West Bengal* (MANU/SC/8774/2006) about the lack of sentencing policy, leaving the decisions to the particular views of the judges of the day, Despite legislative reform, and reform-minded jurisprudence over a number of years, the death penalties has continued to be a lethal lottery,

3, 8 Human Rights, and Capital Punishment

While human rights defenders have long campaigned for the abolition of the death penalties within India, it is former President Abdul Kalam who has brought it to the center stage by way of his request to the government to review all pending cases due to the capital punishment being so obviously applied by way of a bias against the economically, and socially weaker sections:~ meaning the poor, and the ‘lower’ castes, India is one of the 78 countries including the US, China, Iran, and Vietnam which haven'tbanned the death penalty, Near about 86 countries, and territorieshave abolished the death penalties for all crimes,, and a total of 121 countries have abolished the death penalties within law or practice, Over 40 countries have abolished the death penalties for all crimes since 1990, 10 December 2005, the International Human Rights Day was observed as Anti-Capital Punishment Day within India, There are several arguments against the capital punishment, Some are systemic, some procedural, and some are ideological, Mahatma Gandhi provides the best logic:~ What isn'tpermissible for an individual (in this case to kill) isn'tpermissible for a group, Criminal Justice has to discharge three functions:~ deter, reform, and punish, Capital punishment

doesn'tgive the criminal any chance to reform, Punishment has two components:~ one to restore as close as possible, status quo ante,, and to fulfill the need for revenge of the victim, While other crimes can restore status quo ante, within this one, the victim who was murdered cann't be brought back to lifeby 'punishing' the criminal by capital punishment, So it isn't'restitution' within any sense of the term, but only codified revenge,, and a futile one at that, Most civilized societies accept that this form of 'justice' is only thinly veiled revenge,

3,8,1 International Scenario

A) The United Nations (UN)

Capital punishment is one of the most debated issues around the world, The UN General Assembly recognised that within case of capital punishment there is a need for high standard of fair trial to be followed by every country, Procedures to be followed must be just, fair, and reasonable, For example the UN Economic, and Social Council (ECOSOC) within resolution No, 15 of 1996 (23 July 1996) encouraged member countries to abolish death sentence, and recommended that those countries who retain it must ensure defendants a speedy, and fair trial,

Article 5 of *the Universal Declaration of Human Rights 1948* provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,Article 7 of *the International Covenant going on Civil, and Political Rights (ICCPR) 1966* provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,By several resolutions the United Nations suggested protection of human rights of the persons facing capital punishment which were again approved by Economic, and Social Council within resolution No, 50 of 1984 (26th May ,1984), These may be summarised as follows:~

(I) Countries which haven'tyet abolished capital punishment may impose it only for the most serious crimes;

(II) Capital punishment may be imposed only within case of serious offences according to established law for the time being within force,There mustn'tbe any retrospective effect of the punishment;

(III) Young persons at the time of commission of crime, whose age was below16 years, shouldn'tbe awarded death penalty;

(IV) Death penalties mustn'tbe imposed upon pregnant women or going on new mothers or insane persons;

(V) Capital punishment must be imposed after following fair procedure according to Article 14 of the ICCPR, and when guilt is clearly proved leaving no room for reasonable doubt or alternative explanation of the fact;

(VI) Any person sentenced to capital punishment shall have right to appeal to the higher court, and steps should be taken to ensure him right to appeal;

(VII) Any one sentenced to capital punishment should be given the right to seek pardon or commutation of sentence;

(VIII) When appeal, pardon or commutation of sentence proceeding is pending, capital punishment shalln'tbe executed;

(IX) Execution of capital punishment must be by way of minimum possible suffering,

(B) The European Union

During 19th century due to work of Prof, Beccaria, and other criminologists, political, and economic changes as well as due to initiatives of Central, and Eastern Europe, the European countries almost became capital punishment-free area, and recognised death penalties as cruel, and inhuman, which imposes psychological terror, and gives scope for disproportional punishment, The 6th protocol to the European convention going on Human Rights 1982 provides for the complete abolition of death sentence within peacetime by all members, The Assembly of the Council of Europe within the year 1994 by way of further protocol to the European convention going on Human Rights recommended for the complete abolition of death penalties even within war time, and under the Military Laws,

On 3rd May 2002 the 13th protocol to the European convention for the protection of Human Rights, and Fundamental Freedoms was open for signature of member states which provides for the total abolition of death penalties within all circumstances, Most of the countries within the European Union have abolished death sentence, Capital Punishment has been recognised as cruel, degrading, and inhuman punishment which infringes upon the basic human rights of the accused as expressed within article 3 of the

European Convention going on Human Rights,[32] Article 3 of the UDHR also provides for right to life, liberty, and securities of human beings,

Following the resolutions of the European Union, and the United Nations, several countries abolished death penalties completely, For example, Germany is a death penalty-free zone, However, China imposed maximum death penalty, Saudi Arabia, Iran, Iraq, the United States of America (USA) are also within the first row so far the application of capital punishment is concerned, within England it was abolished by the Murder (Abolition of Death Penalty) Act, 1965 though at the end of 18th century about 200 offences were punishable by death,

within Warwickshire (England) a person was prosecuted going on the charge of murder,[33]A little girl was under the care, and custody of her uncle due to death of her multi-millionaire father, Accordingly she was about to inherit her father's properties when she would become 16 years of age ,The uncle was affectionate to her about her food, shelter, education, and other reasonable necessities, When she was about nine years of age, one night the neighbours heard her cry which was quite unnatural saying "oh good uncle, please don't kill me", and so forth, Just after this incident she disappeared, and couldn'tbe traced, The police were informed about the matter, The uncle was suspected of committing murder of his niece, and disposing of her body as within her absence he was her father's heir apparent, and would inherit his huge estate, He was arrested immediately though was released going on bail going on condition to produce the girl soon before the court, He couldn'tproduce the girl, and he was sentenced to capital punishment, But after several years of the execution of death sentence, the girl returned to Warwickshire, She said that due to fear of punishment for her mischief, she had escaped to the neighbouring town for those years, Death sentence once enforced is irreversible, and irrevocable, and the life which is lost cann't be brought back, and the injustice done is irreparable,

[32]For details see 13th protocol to the European convention for the protection of Human Rights, and Fundamental Freedoms,

[33]A,Felicitla, Human Rights, and Capital Punishment, within Human Rights, and the Law:~ National, and Global Perspectives, (Snow white) 1997, 207,

CHAPTER IV

CAPITAL PUNISHMENT UNDER INDIAN LAWS

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CAPITAL PUNISHMENT UNDER INDIAN LAWS

4,1Capital Punishment (Death Sentence) Under The Indian Penal Code,1860

Capital Punishment is prescribed within India for various offences under the Indian Penal Code,The offences for which capital punishment is prescribed under Indian Penal Code are as follows:~

1, Waging war against the Government of India (Section 121)

2, Mutiny, and its abetment (Section 132)

3, Giving or fabricating false evidence upon which an innocent person suffers death (Section 194)

4, Murder (Section 302)

5, Punishment for murder by life-convict (Section 303)10

6, Abetment of suicide of child, insane person (Section 305)

7, Dacoities accompanied by way of murder (S, 396)

8, Attempt to murder under sentence of imprisonment,If hurt is caused in such attempt (Section 307)

9, Kidnapping for ransom (Section 364-A)

*10,*Causing death or resulting within persistent vegetative state of victim (Section 376-A)

Despite frequent demand from some sections of society, India hasn'tso far, abolished capital punishment,But even within India there has been a decline within the frequency of such punishment, it is now awarded only within case of hardened criminals, and only when it is established that the murder wasn'tthe result of momentary impulse, the result of serious provocation, but well planned, and coldblooded, within such cases, it is felt that n'thing less than capital punishment would

within Mithu v, State of Punjab, AIR 1983 SC 45,

Section 303 of Indian Penal Code hasbeen declared unconstitutional,

This section has been substituted by Amendments Act 13 of 2013,, and it has beenenforced from 03-02-2013, meet the ends of justice, that it is just, and proper that such beasts of societies are eliminated, It is, therefore, within the fitness of things that India hasn'tso farabolished capital punishment but used it more judiciously, sociologists are of the view that capital punishment serves no useful purpose,

In addition to *Indian Penal Code, 1860* other laws like *Narcotic drugs, and Psychotropic Substances Act, 1985, Explosive Substances Act, 1908, Prevention of Terrorism Act, 2002,* etc, also have the capital punishment that can be awarded as the maximum punishment,*The Air Force Act, 1957, The Army Act, 1950, and The Navy Act, 1957* provide for imposition of the capital punishment, either by hanging by neck till death or being shot to death,

4,2Death Sentence under different Statutes

Capital Punishment is laid down as a penalties within several Legislative Acts, such as the Indian Penal Code, 1860, (IPC), and the penalties provisions of national security, and anti-narcotics legislation, Under the I,P,C, approximately eleven offences are punishable by death, A death sentence may also be imposed for a number of offences committed by members of the armed forces under the Army Act, 1950, the Air Force Act, 1950, and the Navy Act 1956,

Several legislative attempts to abolish the death penalties within India have failed, Before Independence a private Bill was introduced within the year 1931 Legislative Assembly to abolish the death penalties for Penal Code offences, The British Home Secretary at the time however rejected the motion, The Government of Independent India also rejected a similar Bill introduced within thefirst Lok Sabha, Resolutions introduced within the Rajya Sabha within 1958, and 1962 house debates of the Law Commission which was at the time reviewing the Indian Penal Code, 1860, and the Code of Criminal Procedure, 1973, The Law Commission within its Report presented to the Government within 1967, and to the Lok Sabha within 1971 concluded that the death penalties should be retained, and theexecutive (President) should continue to possess powers of mercy, National discussion about the death penalties has resurfaced from time to time, The Lok Sabha specifically discussed abolition of the death penalties within 1983, While the Prime Minister at the time publicly favored abolition, her Minister within Home Affairs denied that the Government was considering any

specific proposals toabolish the death penalty, Some time back, the debate over the death penalties was reinvigorated when all 26 defendants within the Rajiv Gandhi assassination case were sentenced to death,

within fact within recent years the Indian Parliament (Lok Sabha, and Rajya Sabha) has dramatically extended the scope of the penalty, The Terrorist, and Disruptive Activities (Prevention) Act, 1985 (TADA) which was extended within 1987 empowered special courts to impose the death penalties for certain broadly defined 'terrorist' acts, Although the Parliament decided to let this hugely unpopular, and controversial Act lapse within 1995, it is now considering new legislation, within the formof the Prevention of Terrorism Bill which would reintroduce many aspects of the Terrorist, and Disruptive Activities (Prevention) Act, 1985 TADA, Use of the death penalties has also been extended through other legislation, The Commission of Sati (Prevention) Act, 1987, which prescribes punishment by death for any person who either directly or indirectly abets the commission of 'Sati'(immolation of a widow), The Narcotics, Drugs, and Psychotropic Substances (Amendment) Act, 1988, introduced the death penalties as a punishment for financing, or engaging within the production, manufacture or sale of narcotics or psychotropic substance of specified quantities (eg, opium 10 kgs, cocaine 500 grams) after previous convictions, The Scheduled Castes, and Scheduled Tribes (Prevention of Atrocities) Act, 1989, introduced the death penalties for fabricating of providing false evidence that results within the conviction, and execution of an 'innocent' member of a scheduled caste or scheduled tribe, within February 2013, the Criminal Amendment Act, 2013 came into force whichprovides death penalties for causing death of rape victim,

4,3 MODE OF EXECUTION

The execution of death sentence within India is carried out by two modes namely hanging by neck till death, and being shot to death, The jail manuals ofvarious States provide for the method of execution of death sentence within India, Once death sentence is awarded, and is confirmed after exhausting all the possible available remedies the execution is carried out within accordance by way of section 354(5) of the Code of Criminal Procedure 1973 i,e, hanging by neck till death, It is also

provided under The Air Force Act, 1950, The Army Act 1950, and The Navy Act 1957 that the execution has to be carried out either by hanging by neck till death or by being shot to death,

Execution of Death Sentence

Section 413 of Criminal Procedure Code provides that when within a case submitted to the High Court for the confirmation of a sentence of death, the court of session receives the order of confirmation or other order of the High Court thereon, it shall cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary,

Section-414 of the Criminal Procedure Code provides that when a sentence of death is passed by the High Court within appeal or within revision, the court of session shall, going on receiving the order of the High Court, cause the sentence to be carried into effect by issuing a warrant,

Section-415 (1) of the Criminal Procedure Code provides that where a person is sentenced to death by the High Court, and an appeal from its judgment lies to the Supreme Court under sub clause (1) of clause (1) of Article 134 of the Constitution, the High Court shall order the execution of the sentence to be postponed until the period allowed for preferring such appeal has expired, or if an appeal is preferred within that period, until such appeal is disposed of,

Section 415 (2) of the Criminal Procedure Code provides that where a sentence of death is passed or confirmed by the High Court,, and the person sentenced makes an application to the High Court for the grant of a certificate under Art, 132 or under sub- clause(c) of clause(1) of Article 134 of the Constitution, the High Court shall order the execution of the sentence to be postponed until such application is disposed of by the High Court, or if a certificate is granted going on such application, until the period for preferring an appeal to the Supreme Court going on such certificate has expired, Further, Section 425 (3) of the Criminal Procedure Code provides that when a sentence of death is passed or confirmed by the High Court,, and High Court is satisfied that the person sentenced intends to present a petition to the Supreme Court for the grant of special leave to appeal under Article 136 of the

Constitution, the High Court shall order the execution of the sentence to be postponed for such period as it considers sufficient to enable him to present suchpetition,

Section-416 of the Criminal Procedure Code provides that if a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to imprisonment for life,

4,4 Capital Punishment, and provisions under Code of Criminal Procedure, 1973,, and the Prison Manual

Section 368(1) of the Code of Criminal Procedure, 1898 provided for hanging by neck till death, This hasn'tbeen amended by the Code of Criminal Procedure, 1973, Section 354(5) reads as under:~-

"When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead,"

The execution of the death penalties within India, under the Code of Criminal Procedure, is thus carried out by way of hanging by neck till death during the last over hundred year, The execution of the death penalties is carried out within accordance by way of section 354(5) of the Code of the Criminal Procedure, 1973,, and Jail Manuals of the respective States, For example, Chapter XXXI, Jail Manual of Punjab, and Haryana provides for the various steps leading to the execution of the death sentence:~-

“Paragraph 847(1) Every prisoner under the sentence of the death shall immediately going on his arrival within the prison after sentence, be searched by, or by order of the Deputies Superintendent,, and all articles shall be taken from him which the Deputies Superintendent deems it dangerous or inexpedient to leave within his possession,”

“Paragraph 847(2) Every such prisoner shall be confined within a cell apart from all other prisoners,, and shall be placed by day, and by night under the charge of a guard,”

After such admission of the prisoner within the jail, the Deputies Superintendent is required to examine the cell, and has to satisfy himself that it is secure, and has no article which can be used as a weapon or instrument by way of which the prisoner can commit

suicide,Thesaid Deputies Superintendent also has to ensure that there is n'thing within the cell which within his opinion is inexpedient to permit its remaining within such cell,

Paragraph 848 Cell to be examined - Every cell within which any convict who is under sentence of death, is at any time to be confined shall, before such convict is placed within it, be examined by the Deputies Superintendent, or other officer appointed within that behalf, who shall satisfy himself that it is secure, and contains no article of any kind which the prisoner could by any possibilities use as a weapon of offence or as an instrument by way of which to commit suicide, or which it is, within the opinion of the Superintendent, inexpedient to permit to remain within such cell,'

The Manual also describes the various restrictions pertaining to the use of the apparels etc, Paragraph 851 provides that the condemned prisoner shalln'tbe provided Munj mat or bhabbar mat,This clause is intended to avoid presence of any substance which can be used by the prisoner as instrument for committing suicide,

"Paragraph 851 Munj matn'tto be issued - Prison clothing, bedding, and necessaries shall be issued to condemned as to other convicts, by way of the exception of the Munj or bhabbar mat which shall be withheld, and an extra blanket substituted,"
The para 854 provides that such prisoner shall be under the constant surveillance of the guard,, and further that he shouldn'tbe allowed to meet or communicate by way of any person except those persons authorized by the Superintendent, Paragraph 855 provides for raising of the alarm within case the prisoner tries to commit suicide,

Paragraph 855 :~ Management of keys, Conditions under which the door may be opened
(1) The keys of the cell within which a condemned prisoner is confined shall be kept by the head warder going on duties who, going on hearing the alarm, shall proceed to such cell which, within case of emergency such as attempt by the prisoner to commit suicide, he shall enter, and by way of the help of the sentry fregrate it,
(2) At no other time shall the door of the cell within which a condemned prisoner is confined, be opened without first handcuffing the prisoner, and so securing him against

the possibilities of using violence or, if he declines to be handcuffed, unless at least three members of the establishment are present,

(3) The locks within use within a condemned cell shall be such as cann't be opened by any keys within use within the jail, other than those properly belonging to them,

The condemned prisoner, and the cell within which he is residing are required to be searched twice a day by Deputies Superintendent,The paragraph also provides for maintenance of a journal of such searches, and results thereof,

Paragraph 858 Condemned prisoners to be searched twice daily - Morning, and evening daily, the Deputies Superintendent or, under his directions, the Assistant Superintendent, shall carefully search every condemned prisoner, and the cell he occupies, by way of his own hands, and make a n'te of his having done so, and of the result within his Journal,

Paragraph 859 casts duties going on Deputies Superintendent, and other officers to examine the food given to such condemned prisoner,It is enunciated that the ordinary diet of a labouring convict should be provided to the condemned prisoner,

Para 859 - Diet, Precautions to be taken - (1) A prisoner under sentence of death shall be allowed the ordinary diet of a labouring convict,

(2) All food intended for consumption by a condemned prisoners shall be examined by the Deputies Superintendent, Assistant Superintendent or Medical Subordinate, who may withhold any article he regards by way of suspicion, and report the circumstances to the Superintendent, The food shall be delivered to the prisoner within the presence of one or other of these officers,

The provisions regarding the execution of a pregnant woman, exceptions within cases of female, allowing the prisoner to make use of books etc, are elaborately discussed within Paragraphs 859 to 864, The elaborate description of the rope to be used for the purpose of hanging, its testing etc, is provided within Paragraph 866,

Paragraph 866 Description, and testing of rope, - (1) A Manilla rope one inch within diameter shall be used for executions, At least two such ropes within serviceable condition shall be maintained at every jail where executions are liable to take place,

N'te - The rope should be 19 feet within length, well twisted,, and fully stretched, It should be of equal thickness, capable of passing readily through the noose-ring, and sufficiently strong to bear a strain of 280 lbs, by way of a 7 foot drop,

(2) The ropes shall be tested within the presence of Superintendent, at least a week before the date fixed for the execution, and if they fail to pass the test, others shall be obtained at once, and tested when received,

(3) Ropes that have been tested shall be locked up within a place of safety,

(4) going on the evening before the execution is to take place, the gallows, and rope should be examined to ascertain that they have received no injury since being tested,

N'te - The rope shall be tested by attaching to one end a sack of sand or clay equal to one, and a half times the weight of the prisoner to be executed, and dropping this weight the distance of the drop to be given to the prisoner,

The above provision provides for the testing of the rope to be used for the execution at two occasions firstly at least before a week form the date of the execution, and secondly going on the evening before such execution is to take place, It provides for the maintaining at least two Manilla ropes of one inch diameter within serviceable condition, The method for testing such rope is by attaching the sack of clay or sand to one end which is equivalent to one, and half times of the weight of such prisoner, The length of the drop to be kept same as required for the condemned prisoner,

The actual execution process by way of such background of preparations etc, made has to be carried out within accordance by way of Paragraphs 868 to 873, It is briefly as follows:~-

1, Officers to present at the execution:~ the officers required to be present at the execution are, Superintendent, and Medical officer of the jail, and Magistrate of the District, (Paragraph 867)

2, The execution is to be carried out by the public executioner wherever service of such executioner are available, If such services aren'tavailable then some trustworthy individual

who is locally trained is to be assigned this job, The duties is entrusted to the Superintendent to satisfy himself that the person so assigned is competent to fulfill the job,

3, Regulation of the drop:~ it is most important factor within deciding the regulation of the death sentence to be executed, The slightest error within deciding the length of the drop may lead to the lingering death of the condemned man, The drop is regulated according to the height, weight, and physique of the prisoner, The Superintendent may also take the advice of the Medical Officer within this regard, Paragraph 871 provides for the comparative chart for general guidance of the Superintendent as follows:~-

Paragraph 871, Regulation of the "drop" - The following scale of drop proportioned to the weight of the prisoner, is given for general guidance, the Superintendent must use his discretion, and be guided by the advice of the Medical Officer, and the physical condition of the prisoner :~-

For a prisoner under 100 lbs weight 7

For a prisoner under 120 lbs weight 6,

For a prisoner under 140 lbs weight 5- 1/2,

For a prisoner under 160 lbs weight 5,

N'te:~ The last figures namely 7, 6, 5-1/2, 5 den'te the height of the drop within terms of feet,

N'te:~- The "drop" is the length of the rope from a point going on the rope opposite the angle of the lower jaw of the criminal as he stands going on the scaffold, to the point where the rope is embraced within the noose after allowing for the constriction of the neck that takes place within hanging,

Time of the execution:~ The time of the execution is provided within the early hours of the day,However the time varies as per the chart within the Paragraph 872,Paragraph 872, Time of executions,

Procedure to be adopted –

(1) Executions shall take place at the following hours:~-

November to February 8 AM

March, April, September, and October 7 AM

May to August 6 AM 25

4, The Superintendent, Deputies Superintendent will reach to the cell of the condemned prisoner, and will ensure that the identities of such condemned prisoner, The warrant of death will be read over to him, and the signatures required going on the various documents such as will etc, may be placed by the prisoner within the presence of the Superintendent, Then the Superintendent will move towards the scaffold, within the presence of the Deputies Superintendent the convict will be pinioned behind his back, and his legs irons (if any) will be struck off,

5, Marching towards death:~ The condemned prisoner shall be marched to the scaffold under the charge of the Deputies Superintendent, He will be guarded by Head warder, and six warders, two proceeding within front, two behind, and one holding either arm,

6, After reaching at the scaffold {where the Superintendent, District Magistrate, Medical Officer already at their respective places} the warrant should be read within the vernacular to the convict, and he be made over to the executioner,

7, The warders holding the arm of the convict also shall also mount the scaffold by way of the convict, and place him under the direct beam to which rope is attached,

8, The executioner shall next strap his legs tightly together, place the cap over his head, and face, and adjust the rope tightly around his neck,The noose should be placed one, and half inches to the right or left of the middle line, and free from the flap of the cap,

9, The warders holding the condemned man’s hand to withdraw at that time, and at the signal from the Superintendent the executioner shall draw the bolt,

10, The body of such condemned prisoner should remain suspended half an hour, and shalln'tbe taken down till the medical officer declares the life extinct, The Superintendent is required to return the warrant by way of the endorsement to the effect that the sentence has been carried out,

4,5Capital Punishment within accordance by way of Army Act, Air Force Act, and Navy Act

The Army Act, and Air Force Act also provide for the execution of the death sentence,The procedure of execution of death sentence are thoughn'texplained within detail but the relevant provisions as has been mentioned within this consultation paper are important from the view of provisions pertaining to the confirmation, and revision petition too, The various provisions under these Acts can be stated here as under,

A - The Air Force Act, 1950

The Air Force Act, 1950 also provides for the awarding of the death sentence, and its executions relating to some offences provided there under[34]explained within detail,

The Death Sentence as provided under The Air Force Act, 1950 will be relevant for the purpose of studying the execution of the death penalties awarded according to the provisions of the Act, Section 34 of the Act provides for the various offences contemplated for which the death penalties can be awarded,It provides as,

"„„shall, going on the conviction by court-martial, be liable to suffer death or such less punishment as is within this Act mentioned",

This section empowers the court martial to award the death sentence for the offences mentioned within section 34 (a) to (o) of The Air Force Act, 1950, These punishments however are subject to provisions as enunciated within Chapter XII which within Section 34 provides for the offences within relation to the enemy, and punishable by way of death, Section 37 is going on mutiny, and provides for the infliction of death sentence within case

[34]Chapter VI of The Air Force Act, 1950

the accused is convicted, Chapter VII provides for the various punishments, and the competent court-martials to pass it, section 73 provides for the punishments awardable by Court martial, Chapter XII provides for the Confirmation, and Revision provisions, Chapter XIII provides for the Execution of Sentences, section 163 deals by way of the form of the sentence of Death,

SECTION 163 provides for the form of the sentence of death as:~-

"In awarding a sentence of death, a court-martial shall, within its discretion, direct that the offender shall suffer death by being hanged by the neck until he be dead or shall suffer death by being shot to death",

This provides for the discretion of the Court Martial to either provide for the execution of the death sentence by hanging or by being shot to death, This section provides for the procedure, and method within which death sentence is to be carried out within accordance by way of the provisions under the Act, It is important to n'te that The Air Force Act, 1950 provides for the execution of the death by being "shot to death," This method thoughn'tbeing prescribed under the Code of Criminal Procedure, is provided within The Air Force Act, 1950 for the execution of the Death sentence, This means that the execution procedure within India also permits the execution of the Death sentence up to certain extent by an'ther method namely by being shot to death, This is by way of the objective to provide for the easy simple method of the execution within case of the convicted offender of the offences mentioned within the Act[35],

It is worth mentioning that unless the punishment is confirmed by the concerned authorities under the Act[36]convict willn'tbe executed, It provides for the findings, and the order to be confirmed by the Central Government or any officer empowered by the same within this behalf[37], This provides for the mandatory review of the all the decisions of the Court Martial by the central government, This enables the Central Government to scrutinize the irregularities pertaining to the procedure or the finding of the Court Martial,

[35] Section 34 (a) to (o) of The Air Force Act, 1950,
[36] Chapter XII of The Air Force Act, 1950,

[37]6Section 153 of The Air Force Act, 1950 29

The Army Act, 1950, The Navy Act 1957 also provide for the similar provisions as within The Air Force Act, 1950, The provisions that are similar within nature to that of within The Air Force Act, 1950 also provide for the option of the execution of the death penalties by being shot at death[38],

After referring to these relevant provisions within these Acts inference can be drawn that the shooting as one of the method provided for execution of the death penalties under the Act aims to make it simple, and easily executed by way of the availabilities of the weapons, and equipments within these forces, The form of the shooting a condemned man necessarily involves less agony as that within the case of the hanging where there is procedure as to weighting, measuring of the height, etc, within order todetermine the length of the drop specific restrictions are also put as to wearing certain kinds of apparel, etc,

It may be pointed out here that during the Nuremberg trials after the Second World War executions, the members of the German High Command who were condemned to death opted for the execution of the death sentence by being shot to death against hanging, They wanted soldiers' death instead of degrading death by hanging, This is sufficient to objectively assert that the execution by being shot to death is simpler, and less painful to

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The provisions relating to awarding the Death penalties within The Army Act, 1950 are enunciated within Chapter VI Section 34 (a) to (l) relates to offences within relation to the enemy, and punishable by way of death, Section 37 deals by way of Mutiny, and provides for the infliction of death sentence within case the accused is convicted, Chapter VII pertains to Punishments awardable by Court Martial, Chapter XII is going on Confirmation, and Revision, Chapter XIII is going on Executtion going on Sentences, Section 166 deals by way of form of Sentence of Death, Section 147 of The Navy Act 1957 provides for the Form of Death Sentence,

the hanging by neck till death, The practice of this method both within various developing, and developed countries is apparently because this method being simple, easy to execute, less painful too,

4 , 6 MEDICO- LEGAL ASPECT OF HANGING

A hanging may induce one or more of the following medical conditions, some leading to death:~

- Closure of carotid arteries causing cerebral hypoxia
- Closure of the jugular veins

- Induction of carotid sinus reflex death, which reduces heartbeat when the pressure within the carotid arteries is high, causing cardiac arrest
- Breaking of the neck (cervical fracture) causing traumatic spinal cord injury or even decapitation
- Closure of the airway

The cause of death within hanging depends going on the conditions related to the event, When the body is released from a relatively high position, the major cause of death is severe trauma to the upper cervical spine, However, the injuries produced are highly variable, One study showed that only a small minorities of a series of judicial hangings produced fractures to the cervical spine (6 out of 34 cases studied), by way of half of these fractures (3 out of 34) being the classic "hangman's fracture" (bilateral fractures of the pars interarticularis of the C2 vertebra),[21] The location of the kn't of the hanging rope is a major factor within determining the mechanics of cervical spine injury, by way of a submental kn't (hangman's kn't under the chin) being the only location capable of producing the sudden, straightforward hyperextension injury that causes the classic "hangman's fracture",

There is evidence suggesting that there might be superior alternatives if there were sufficient interest to support research into such matters, Consider within particular an event recounted within the biography of Albert Pierrepoint,Events followed a most unconventional sequence during the hanging of a particularly powerful, and uncooperative German spy during World War II, Pierrepoint relates:~ "Just as I was crossing to the lever, he jumped by way of bound feet, The drop opened,, and he plunged down,, and I saw by way of horror that the noose was slipping, It would have come right over his head had itn'tcaught roughly at a point halfway

up the hood – it had within fact been stopped going on his upper lip by the projection of his nose –, and the body jerked down, then became absolutely still apart from the swinging of the rope, I went down into the pit by way of the prison medical officer, He examined the body, and said to me:~ "A clean death, Instantaneous," He sounded surprised,, and I didn'tblame him, I was surprised myself,, and very relieved, going on my next visit to Wandsworth the governor told me that the severance of the spinal cord had been perfect,"

n'tsurprisingly within retrospect, it appears that such unconventional application of forces might be particularly efficient, There is at least some evidence that some of the countries by way of particularly active programs of judicial execution may have given the question of the design of efficient, and reliable nooses practical attention, For example, photographs of nooses within a South African execution chamber opened to the public after abolishment of the death penalty, showed double nooses,Presumably the upper noose held the lower one within place to ensure a perfect hangman's fracture, The possibly more elegant, but probably more tricky English technique by way of a single running noose, and a rope so arranged as to whip around into the ideal position, might well have been too error-prone to be satisfactorily reliable within any but highly skilled hands, If so, the likes of the double noose might have much merit,

4,7 Concept of Rarest of Rare Cases within code of criminal procedure

Whether a case falls under the category of rarest of rare case or n't, forthat matter the Apex Court laid down a few principles for deciding the questionof sentence, One of the very important principles is regarding aggravating andmitigating circumstances, Court opined that while deciding the question ofsentence, a balance sheet of aggravating, and mitigating circumstances within thatparticular case has to be drawn, Full weightage should be given to the mitigatingcircumstances, and even after that if the Court feels that justice willn'tbe done ifanypunishment less than the death sentence is awarded, then, and then only deathsentence should be imposed,

Again within Machhi Singh v, State of Punjab[39]the court laid down :~-

"In order to apply these guidelines inter- alia the following questions may

[39]AIR 1983 SC 947,

be asked, and answered :~-

(a) Is there something uncommon about the crime which renders sentence ofimprisonment for life inadequate, and calls for a death sentence?

(b) Are there circumstances of the crime such that there is no alternative butto impose death sentence even after according maximum weightage to themitigating circumstances which speak within favour of the offenders?"

The principles laid down by the Apex Court were reiterated within itsjudgment in Sushil Murmu v, State of Jharkhand[40]:~

within rarest of rare cases, when the collective conscience ofthe communities is so shocked that it will expect the holdersof the judicial power center to inflict death penalties irrespective of their personal opinion as regards desirabilitiesor otherwise of retaining death penalty, death sentence canbe awarded,

The Supreme Court has also discussed the circumstances within various cases,

These circumstances include:~-

• Murder committed within an extremely brutal, grotesque, diabolical, revoltingor dastardly manner so as to arouse intense, and extreme indignation of thecommunity,

• Murder for a motive which evinces total depravity, and meanness,

• Murder of a Scheduled Caste or Scheduled Tribe arousing social wrath(n'tfor personal reasons)

• Murderer is going on dominating position, position of trust or within course ofbetrayal of the motherland,

• Where it is enormous within proportion,

• Victim-innocent child, helpless woman, old/infirm person, public figuregenerally loved, and respected by the community,

If upon taking an overall view of all the circumstances, and taking it intoaccount the answers to the question posed by way of the test of rarest of rarecases, the circumstances of the case are such that death penalties is warranted, thecourt would proceed to do so,

[40]2004 (2) SCC 338,

In Lalit Kumar Yadav @ Kuri v, State of UttarPradesh[41],In the present case, the circumstantial evidence comes to only oneconclusion that appellant attempted to commit rape, and because of resistance hecommitted the murder of the deceased, The appellant was aged about 21 years atthe time of offence, Initially when the matter for confirmation of death sentencewas heard by the two learned Judges of the High Court there was a dividedopinion, one Judge confirmed the death sentence while the other acquitted theappellant, It is the other Bench which affirmed the death sentence, It isn'tthecase of the Prosecution that the appellant cann't be reformed, within fact thepossibilities of his reformation cann't be ruled out, There is no criminal antecedentof the appellant, The Court has to consider different parameters as laid down within Bachhan Singh followed by Machhi Singh, and balance the mitigatingcircumstances against the need for imposition of capital punishment, Courtobserved that considering the age of the accused, the possibilities of reforming himcann't be ruled out, He cann't be termed as social menace, Further, the case doesn'tfall under the "rarest of rare" category,

4,8 Previous Efforts to Abolish Death Penalty

Legislative attempts to abolish the death penalties within India have failed,Before Independence a private Bill was introduced within 1931 within LegislativeAssembly to abolish the death penalties for penal code offences, The British HomeSecretary at the time however rejected the motion, The Government of Indiarejected a similar Bill within the first Lok Sabha, Efforts were also made within RajyaSabha to move resolution for abolition of death sentence within 1958, and 1962 butwere withdrawn after some debate, The Law Commission within its Report presentedto the Government within 1967, and to the Lok Sabha within 1971 concluded that the deathpenalties should be retained, and that the executive (President) should continue topossess powers of mercy,

The issue of constitutional validities of Section 302 of Indian Penal Code,the Supreme Court within Jagmohan vs, State of U,P,[42]Apart thrashed out I,P,C, within detail from the

[41]2014 STPL (Web) 318 SC

[42], 21 AIR 1973 SC 947,

constitutional validity, the Supreme Court also discussed position within other countries, the structure of Indian Criminal Law, the extent of Judicialdiscretion etc, It was held within Jagmohan Singh vs, State of U,P,[43], that deathsentence act as deterrence but as token of emphatic disapproval of the crime bythe society, where the murder is diabolical within conception, and cruel within execution, and that such murderers cann't be simply wished away by finding alibis within thesocial maladjustment of the murderer, Expediency of transplanting westernexperience within our country was rejected, as social conditions, and so also thegeneral intellectual levels are different, The Court referred to the 25th Report ofthe Law Commission of India, within which it was stated that India cann't risk theexperiment of abolition of capital punishment, The fact that the possibilities of anerror being committed within the matter of sentence can be corrected by appeals, and revisions to higher courts was relied upon,

The approach of our Supreme Court within the matter of death sentence iscautious as well as restrictive which is within consonance by way of the modern, and liberaltrends within criminal jurisprudence, The doctrine of Rarest of Rare evolved by theApex Court reflects the humanist Jurisprudence, There have been ample instanceswhere the Supreme Court has restricted the use, and imposition of death penalties only to cases coming by way of within the category of rarest of rare case, Under *Sec,354(3)* of the Criminal Procedure Code, 1973 a new provision has beenintroduced to say when the conviction is for an offence punishable by way of death or, within the alternative by way of imprisonment for life or imprisonment for a term of years,the judgment shall state the reason for the sentence awarded, and within the case ofsentence of death, the special reason for such sentence,

4,9 Death Penalties is no more 'Mirage' within India

Death penalties entangles unavoidable element of suffering, and humiliation, If delay occurs within the execution of death penalties it causes severemental anguish to the person awaiting death which is cruel, and inhuman, Atinternational level, by way of the

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[43]22 *Ibid*,

endeavoursof the United Nations OrganizationGeneral Assembly, and the Commission going on Human Rights, Second OptionalProtocol to the International Covenant going on Civil, and Political Rights, has beenadopted by which, State Parties to the Covenant took an additional obligation ofabolition the death penalty,

In our country, within this context, it is well settled legal position that thedeath penalties may be awarded only within the case of rarest of rare cases, and theHon'ble Judge of the Supreme Court Mr, Krishna Iyer[44] had propounded keyverdict that within criminal trial possibilities of imposing death penalties should be onlyif the nature, and manner of offences committed fall within category of rarest of rarecases, Decades past, the Indian Courts have followed this magic judicial n'teresulting undeclared abolition of death penalties although the punishment as todeath penalties hasn'tbeen removed from Indian Penal Laws,

On number of occasions the Supreme Court of India has laid down thatthe delay within execution of death sentence would entitle the convicted person toseek conversion or alteration of death sentence into life imprisonment, within TriveniBen v, State of Gujrat,[45]the five judge Bench of the Supreme Court has heldthat undue delay within execution of the death sentence will entitle the condemnedperson to approach the court to seek commutation of death sentence into lifeimprisonment, The Court expressed the view that before passing order ofcommutation it is necessary to examine the nature of delay, and circumstances ofthe case, Even if the person facing death penalties shows genuine repentance whichis evident from report of jail authorities, it was held by the Supreme Court thatthe death sentence could be commuted to life imprisonment,[46]Thus, within case ofdelay within execution of death sentence it could be commuted to life imprisonment,

Article 21 of the Constitution of India, 1950 which guarantees right to life, and personal liberties can be invoked by the person anticipating death penalty,Recently going on march 31, 2014, the Supreme Court commuted the death penalties of terror convict Devinder

[44]Supra 23,

[45]AIR 1989 SC 142,

[46]Javed Ahmad v, State of Maharashtra, AIR 1985 SC 231

PalSingh Bhuller to life term over mental illness, and aninordinate delay by the government within deciding his mercy plea,[47]

4, 10Judicial Trend Qua Death Penalty

The magistracy has more often than, n't, used Section 354(3) of the Codeof Criminal Procedure to justify its stand either within support of or against the awardof capital punishment,Theabolitionists see this provision a green signal fordilution of capital punishment while for the receptionists the special reasonscontemplated by Section 354 (3) implicitly suggest that death sentence is legally, and constitutionally permissible,

A perusal of some of the Supreme Court decisions involving award ofdeath penalties would reveal that sudden impulse or provocation[48]uncontrollable hatred arising out of sex indulgence,[49] family feud or land dispute, infidelities of wife[50] or sentence of death hanging over the head of the accused for aconsiderable long period of time due to law's delay,[51] have been accepted asextenuating circumstances justifying lesser penalties of life imprisonment instead of death sentence,Mr, Justice Krishna Iyyer of the Supreme Court of India,however, made it clear within Rajendra Prasad v, State of U,P,,[52]that where themurder is deliberate, premeditated, cold-blooded, and gruesome[53]34, and there are noextenuating circumstances, the offender must be sentenced to death as a measureof social defence[54],

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[47] Navneet Kaur v, State of NCT Delhi, 2014 STPL (Web) 226 SC,

[48]Ummilal v, State of M,P,, AIR 1981 SC 1710, Dalbir Singh v, State of Punjab, AIR 1979 SC 1384, Gura Singh V, State of Rajasthan, (1984) Cr,L,J, 1423 (1428),

[49]EdigaAnamma v, State of Andhra Pradesh, AIR 1974 SC 799,

[50]Bishnu Dev Shaw v, State of West Bengal, AIR 1979 SC 702,

[51] T, V,Vatheeswaran v, State of Tamil Nadu, 1983 Cr LJ 481,

[52]AIR 1979 SC 916,

[53]Harihar Singh v, State of U,P,, AIR 1975 SC 1501,

[54]Sarveshwar Prasad Sharma v, State of M,P,, AIR 1977 SC 2423,

The pros, and cons of "life or death" sentence have been extensively dealt by way of by the Supreme Court of India within Rajendra Prasad's[55] case,Therefore itwould be pertinent to state the facts of the case to analyse the entire issue within itsproper perspectives,

The Supreme Court within Ranjit Singh v, Union Territory ofChandigarh[56]*37* was once again called upon to decide an appeal relating to thequestion of sentence, within the instant case, murder was committed by appellant, alife convict during parole, The accused was sentenced to death going on convictionunder Section 303, I,PC,, and the co-accused was awarded life-imprisonment,Agreeing by way of the contention of deceased's counsel the Supreme Court commutedthe sentence of death to that of imprisonment for life as Section 303, I,P,C, hadbeen declared unconstitutional within Mithu v, State of Punjab,[57] The Court heldthat during parole appellant should have behaved like a law abiding citizen butinstead he indulged into heinous crime of murder hence the case fell within thecategory of "rarest of rare cases",

Again, within Mahesh etc, v, State of M,P,[58] the Supreme Court maintainingthe sentence of death passed by the High Court observed :~it would be mockery of justice to permit theappellants to escape the extreme penalties oflaw,,,,,,,,,,,,,,and to give lesser punishment for theappellants would be to render justicing system ofthis country suspect, the common man would losefaith within courts,The Supreme Court within its decision within T, V,Vatheeswaran v, State ofTamil Nadu,reiterated that prolonged delay within execution exceeding two yearswill be a sufficient ground to quash death sentence since it is an unjust, unfair, and unreasonable procedure, and the only way to undo the wrong is to quash the deathsentence, The Court further observed that the cause of delay is immaterial whenthe sentence is that of "death", and a person under sentence of death may alsoclaim fundamental rights, i,e, procedure under Article 21 must be just, fair, and reasonable,

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[55]Supra 33,

[56]AIR 1984 SC 45,

[57]AIR 1983 SC 473,

[58] AIR 1983 SC 473,

At present time, the Indian judiciary is playing a role, which has noparallel within the history of the judiciaries of the world, It has been upholding therights of citizens, both the formal political rights contained within Part III, and also thesocio economic rights within Part IV of the Constitution, Many people regard thejudiciary as the last hope of the nation, despite all its defects, The Indian judiciarymust therefore prove itself worthy of the trust, and confidence which the peoplereposes within it, Justice must prevail within all circumstances,

4 , 11 Judicial Discretion, and Death Penalty

For all the offences, within which death sentence is the punishment, it may ben't‌ed that it isn't‌the only punishment, it is the extreme penalty, Thus, thesesections, by virtue of their very wordings itself, provide for a discretion which isto be vested within courts right from the inception of Penal Code within 1860, However,the manner of exercising this discretion has undergone various changes by way of thechanging time, and evolution of new principles, There is also a debate going on,about the extent of this judicial discretion, within Jagmohan's case the SupremeCourt held:~-

> The structure of our criminal law which isprincipally contained within the IPC, and the Cr,P,C,undertakes the policy that when the legislatureshave defined an offence by way of clarity, and prescribedthe maximum punishment, therefore a widediscretion within the matter of fixing the degree ofpunishment should be allowed to judges,Thus the Supreme Court was within favour of wide discretion to be given tojudges for deciding the degree of punishment, However, this wide discretion wasrestricted by Section 354(3) of Criminal Procedure Code, 1973 which laid downthe law for death sentence special reasons Judges are left by way of the task ofdiscovering 'Special Reasons', within the case of Dalbir Singh v, State of Punjab,the court expressed itsconcern for the way within which this discretion was being used:~N'twithstanding the catalogue of groundswarranting death sentence as an exceptionalmeasure, 'life' being the rule, the judicial decisionshave been differing at various levels by way of the resultthe need for a through re-examination has beenforced going on courts by counsel going on both sides, within Bachan Singh's case this problem was solved by the Apex Courtitself to a very large extent, The court observed:~It is imperative to voice the concern that courts,aided by the broad illustrative guidelines indicatedby us, will discharge the onerous function by way of evermore

scrupulous care, and humane concern,directed along by way of high road of legislative policyoutlined within Sec, 354(3) of Criminal ProcedureCode,

4,12Legalities of Death Sentence

In the case of Jagmohan v, State of U,P, the question of constitutionalvalidities of Sec, 302, I,P,C, was discussed within detail by the Supreme Court, Apartfrom the constitutional validity, the Supreme Court also discussed positions within other countries, the structure of Indian Criminal Law, various policies, and billsproposed within the Parliament, the extent of Judicial discretion etc, going on the questionof constitutional validities the Court observed:~-The Cr,P,C, requires that the accused must bequestioned by way of regard to the circumstancesappearing against him within the evidence, He is alsoquestioned generally going on the case, and there is anopportunities for him to say whether he wants tosay…… within important cases like murder, theCourt always gives a chance to the accused toaddress the Court going on the question of sentence,Under the Cr,P,C, after convicting the accused, theCourt has to pronounce the sentence according tothe law, going on all these grounds the Supreme Court rejected the argument that underSection 302, Indian Penal Court, life of convict is taken without any procedureestablished by law, and therefore, it violates Article 21 of the Constitution, Thus,the Supreme Court settled this controversy long back within 1973, However evenafter Jagmohan's case45 this question came up again, and again, The SupremeCourt reviewed Jagmohan's Case46 within the case of Bachhan Singh v, State ofPunjab47 because after Criminal Procedure Code, 1973, death sentence cease tobe the normal penalties for murder, 354(3),An'ther reason was that ManekaGandhi's case48 gave a new interpretation to Article 14, 19, and 21 of theConstitution, and their interrelationship, Main issues before the SC wereconstitutional validities of Sec, 354(3) of Criminal Procedure Code, 1973, within Shankar KisanraoKhade v, State of Maharashtra , the Supreme Courtn'ticed aggravating circumstances (crime test) – mitigating circumstances-(criminal test), and rarest of rare case –(R-R test), and aggravating circumstancesas pointed above, of course, aren'texhaustive so also the mitigatingcircumstances, within the considered view, the tests which have to be applied are thatwhile awarding death sentence are "crime test", "criminal test", and the "R-R test"andn'tthe "balancing test", To award death

sentence, the "crime test" has to befully satisfied, that is, 100%, and "criminal test" 0%, that is, no mitigatingcircumstance favouring the accused, If there is any circumstance favouring theaccused, like lack of intention to commit the crime, possibilities of reformation,young age of the accused,n't'a menace to the society, no previous track record,etc, the "criminal test" may favour the accused to avoid the capital punishment,Even if both the tests are satisfied, that is, the aggravating circumstances to thefullest extent, and no mitigating circumstances favouring the accused, still wehave to apply finally the rarest of the rare case test (R-R test), R-R test dependsupon the perception of the societies that is "society- centric", andn't"Judgecentric",that is, whether the societies will approve the awarding of death sentenceto certain types of crimes or n't, While applying that test, the court has to lookinto varieties of factors like society's abhorrence, extreme indignation, and antipathy to certain types of crimes like sexual assault, and murder ofintellectually challenged minor girls, suffering from physical disability, old, and infirm women by way of those disabilities, etc, Examples are only illustrative, andn'texhaustive, The courts award death sentence since situation demands so, due toconstitutional compulsion, reflected by the will of the people, andn'tthe will ofthe Judges,

4,13Reasonableness of Death Sentence

The need of retaining death penalties as well as its constitutionalitieshasalready been upheld within theSupreme Court, The Supreme Court within the case ofBachhan Singh v, State of Punjab50 observed:~

if n'twithstanding the view of the abolitionists tothe contrary, a very large segment of people, theworld over, including sociologists, legislature,Jurists, judges, and administrators still firmly believe within the worth, and necessities of capital punishmentfor the protection of society, if within the perspective ofreviling crime conditions within India, contemporarypublic opinion canalized through the people'srepresentative within Parliament, has repeatedlyincluding the one made recently to abolish orspecifically restrict the area of death penalty, ifdeath penalties is still a recognized legal sanction formurder or some types of murder within most of thecivilized countries within the world, if the framers of theIndian

Constitution were fully aware of theexistence of death penalties as punishment formurder, under the Indian Penal Code, if the 25th Report, and subsequent reports of Law Commissionsuggesting retention of death penalty,, and recommending revision of the Cr,P,C,, and theinsertion of the new sections 235(2), and 354(3) were before the Parliament when ittook up revision of the Cr,P,C, , it isn'tpossible toheld that the provision of death penalties as analternative punishment for murder, within Sec, 302,Penal Code is unreasonable, andn'twithin the publicinterest, The impugned violates neither the letter nor the ethos of Article19",

4,14Indian Law going on Death Penalty

The members of the judiciary are sharply divided going on the crucial issue oflife or death sentence,Those who support abolition argue that death penalties isegrading, and contrary to the n'tion of human dignity; it is irrevocable, and anexpression of retributive justice, which has no place within modern penology, Theretentionists, going on the other hand, justify capital punishment as a social necessities having a unique deterrent force,The shifting trend towards imposition of death sentence for the offence ofmurder is clearly discernible from the amendments made within criminal law fromtime to time, Prior to 1955, judicial discretion within awarding a lesser penalties insteadof death sentence was circumscribed by requiring the Judge to record his reasonsfor awarding a lesser punishment, This within other words, meant that the discretionof the Judge was open to further judicial review, However, it was subsequentlyrealised that this restriction going on the power of Court was unnecessary because attimes it nullified the achievement of the Judge if his reasons for awarding lifeimprisonment instead of death sentence, didn'targue well even though he mightbe ultimately correct within his final judgment,

within RathinamNagbhusan Patnaik v, Union of India, AIR 1994 SC 1844, the SupremeCourt had ruled that attempt to commit suicide(i,e, Sec, 309 IPC) deserves to be effacedfrom IPC being violative of Art, 21 of the Constitution, But this decision wassubsequently over-ruled by the Supreme Court within Gyan Kaur v, State of Punjab, AIR1996 SC 946, and consequently Sec, 309, IPC is valid,Tthe Judge concerned considered it proper to award a sentence of lifeimprisonment instead of death, for the reason that the accused was initiallycondemned to death which remained suspended for a period of over six

months,Giving reasons for his decision, the learned Judge observed that it was unjust to keep the sentence of death hanging over the head of the accused for a long periodof over six months because it must have caused him great mental torture, TheJudge therefore, thought it proper to reduce the sentence of death to that of lifeimprisonment, But within an'ther case, i,e,, Queen v, Osram Sungra,[59]where theaccused committed a deliberate cold blooded murder for ulterior motives, theCourt awarded a lesser punishment of life imprisonment instead of death, withoutrecording reasons of such leniency,

Restrictions going on the discretion of the Judge to record reasons for awardinga lesser punishment of life imprisonment to the murderer instead of sentence ofdeath were withdrawn by the Amendment Act,of 1955, After this amendment,the Judge had the discretion to commute the sentence of death to that of lifeimprisonment, but within case he considered the imposition of death sentencenecessary, he had to state the reasons as to why a lesser penalties wouldn'tservethe ends of justice, Thus, the amendment clearly reflected the shift within trendtowards death penalty,

The Code of Criminal Procedure, 1973, also contains a provisionregarding death sentence, Section 354 (3) of the Code provides that whileawarding sentence of death, the Court must record "special reasons" justifying thesentence, and state as to why an alternative sentence of life-imprisonment wouldn'tmeet the ends of justice within that particular case, Commenting going on this provisionof the Code, Mr, Justice V,R, Krishna Iyer of the Supreme Court (as he wasthen) observed that the special reasons which Section 354(3) of CriminalProcedure Code speaks of reasonableness as envisaged within Article 19 as a relativeconn'tation dependent going on a varieties of variables, cultural, social, economic andotherwise",[60]

4 ,15 Religion, and Capital Punishment

Very few crimes associated by way of religious riots or communal clashes have led to death sentences, and therefore they have rarely come up before the Supreme Court, within *Dharma Rama Bhagare v, The State of Maharashtra* [(1973) 1 SCC 537], the Court upheld the death sentence awarded to the accused for killing unarmed members of one family who were

[59](1886) 6 WR (Cr) 82,

[60] Rajendra Prasad v, State of U,P,, AIR 1979 SC 916 (931),

attempting to escape a mob during communal riots within Gujarat, The Court concluded that such killings were "n't only destructive of our basic traditional social order founded going on toleration within recognition of the dignities of the individual, and of other cherished human values, but also have a tendency to mar our national solidarity," Similar anguish was evident within *Dilaver Hussain s/o MohammadbhaiLaliwalaetc v, State of Gujarat, and anr,*(AIR 1991 SC 56) where even though the Supreme Court acquitted the accused for their role within a communal riot within March 1985 within Gujarat, it n'ted, "We however hope that our order shall bring good sense to members of both communities within Dhabargad, and make them realise the disaster which such senseless riots result in, and they shall within future take steps to avoid recurrence of such incidents…"

However, within the various capital cases that emerged from the 1984 anti-Sikh riots that occurred within Delhi within the aftermath of the assassination of Indira Gandhi, the Courts viewed the fact that the killings were committed by a mob as a mitigating factor rather than an aggravating factor, Thus within *Kishori v, State of Delhi* (AIR 1999 SC 382), the Supreme Court commuted the sentence of one accused who had been sentenced to death by a trial court which n'ted that this was his seventh conviction for a murder committed during the riots, The Supreme Court however argued that of the seven convictions, the accused was acquitted within four by the High Court, and the other two were also before the Supreme Court going on appeal, and further that since all were alleged to have taken place going on the same night, he couldn'tbe said to be a "hard boiled criminal," The Court further stated, "We may n'tice that the acts attributed to the mob of which the appellant was a member at the relevant time cann't be stated to be a result of any organised systematic activities leading to genocide", and therefore commuted the sentence, The Supreme Court also commuted the sentence within a second case going on appeal before it within *Kishori v, State of Delhi*, within this judgment the Bench relied going on the previous Kishori judgment, and commuted this sentence arguing that the circumstances were the same, ignoring the fact that a key reason for commuting the sentence within the previous case (1998) had been that the conviction within the other cases wasn'tfinal, within *Manohar Lal alias Manu, and anr, v, State* (NCT) of Delhi [(2000) 2 SCC 92], the Supreme Court also relied going on *Kishori v, State of Delhi* as a precedent within commuting the sentence, Further, ignoring evidence that the attacks going on Sikhs had been planned, and orchestrated, the Court argued that while

the killings were most gruesome, the accused were berserk, and "on a rampage, unguided by sense or reason, and triggered by a demented psychiatry'',

4,16 Politics, and capital punishment

The Supreme Court was also lenient by way of political parties within *Apren Joseph alias Current Kunjukunju, and ors, v, the State of Kerala* (AIR 1973 SC 1) where even though five persons were killed, the Court commuted the sentence arguing that the accused within "excessive zeal for their parties … felt unduly provoked by the success of the meeting organised by the KarshakSangham, and being misguided by political intolerance, and cult of violence they committed the offences within question soon after the said meeting," The Supreme Court within this case appears to have found attacks motivated by political zeal as a mitigating factor, and commuted the sentence within the 'interest of justice', The Court did however clarify that they weren'tlaying down any general rule by way of regard to cases of political murders, This was proved by the Supreme Court within *Balak Ram v, State of Uttar Pradesh* (AIR 1974 SC 2165) where the Supreme Court upheld the death sentence for killings that emerged from rivalry between the Congress (O), Congress (R), and *Bhartiya Jan Sangh* during local town elections,

4 , 17 Is Delay:~ A ground for commutation?

This chapter looks at how the Supreme Court has dealt by way of the issue of delay within judicial, and executive proceedings as a factor to be taken into account when deciding going on sentence, As the following narrative shows, within this as by way of so many other factors, the court has been,, and continues to be, inconsistent, While jurisprudence has developed, as is to be expected within a common law context, glaring anomalies exist which highlight death row, and the death penalties itself as cruel, inhuman, and degrading punishment, Perhapsn'tsurprisingly, the Supreme Court – which sits at the apex of a criminal justice system that allows individuals to languish within jails awaiting trial for many years (in many cases longer than their sentences would be) because of the huge backlog of cases – has gradually moved to a position within which it currently refuses to consider judicial delay as a ground for commutation, However within doing so, it ignores a crucial fair trial standard that

individuals should be tried without undue delay set out within Article 14(3)(c) of the ICCPR to which India is a party,

within *Mohinder Singh v, The State* (AIR 1953 SC 415), finding that the accused hadn'treceived a fair trial, the Supreme Court acquitted him, holding that though it would ordinarily order a retrial, this would "be unfair to ordinary, and settled practice seeing that the appellant has been within a state of suspense over his sentence of death for more than a year," This judgment showsn'tonly that executions were being carried out soon after court verdicts but also that a period of one year spent going on death row was considered a ground for commutation, within *Habeeb Mohammad v, State of Hyderabad* (AIR 1954 SC 51) too, an acquittal was directed within place of a retrial as six years had passed since the offence by way of the accused imprisoned throughout, part of the time going on death row, as also within *Abdul Khader, and ors, v, State of Mysore* (AIR 1953 SC 355), where the sentence was commuted going on the grounds that three years had elapsed since conviction, within contrast to these early cases, the last person to be executed within India - Dhananjoy Chatterjee – had completed over 14 years within prison, most of them under the sentence of death, and within solitary confinement, before he was eventually executed within August 2004, Yet this wasn'tconsidered a ground for commutation by the Supreme Court, which refused to be drawn into going on the issue of delay (see box below),

Interestingly, within *Nawab Singh v, State of Uttar Pradesh* (AIR 1954 SC 278), a Supreme Court Bench clarified that while delay may be a factor, it was no rule of law, and was a factor primarily to be considered by the executive within its decision going on clemency, Subsequently, a Constitutional Bench within *Babu, and 3 others v, State of Uttar Pradesh* (AIR 1965 SC 1467) rejected the ground of delay for commutation without giving any reasons why it was doing so, A change was visible however within *Vivian Rodrick v, The State of West Bengal* [(1971) 1 SCC 468] where a five judge Bench of the Supreme Court commuted the sentence as the accused had been "under the fear of sentence of death" for over six years, The bench ruled that, "extremely excessive delay within the disposal of the case of the appellant would *by itself* be sufficient for imposing a lesser sentence," within this case the High Court had n'ted the delay even when it confirmed the death sentence within 1967 but stated that since the law was clear that delay alone couldn'tbe a ground for commutation, it had to reject this plea, by way of the case again before it after being

remanded by the Supreme Court going on an'ther ground (*Vivian Rodrick v, The State of West Bengal* [(1969) 3 SCC 176], the High Court repeated its previous position but also suggested that the state government could examine the delay,

The Court's judgment within *Vivian Rodrick v, The State of West Bengal* [(1971) 1 SCC 468] remained the legal position for some time [the issue of delay wasn'taddressed within detail within *Jagmohan Singh v, The State of Uttar Pradesh* (AIR 1973 SC 947)] although within practice the Court was inconsistent, The long lapse of time between being sentenced to death by the trial court, and an appeal hearing before the Supreme Court was a key factor guiding the Court within commuting the sentence within *NetiSreeramulu v, State of Andhra Pradesh* [(1974) 3 SCC 314] for example, yet within *EdigaAnamma v, State of Andhra Pradesh* (AIR 1974 SC 799), even though delay was included as a factor, it was just one of several other factors, within *Shanker v, State of U,P,*(AIR 1975 SC 757), the bench of Justices Krishna Iyer, and Sarkaria curiously observed that delay within hearing within conjunction by way of other circumstances may be sufficient for commutation but this wasn'tan absolute rule, The Bench however reiterated the position that delay was a relevant factor for consideration by the executive within deciding going on clemency, Justice Krishna Iyer was also going on the bench within *Mohinder Singh v, State of Punjab* (AIR 1976 SC 2299) where the Court observed that the accused had been under sentence of death within this case for around six years but that the Court couldn'tintervene at this stage (his appeal, and various writ petitions were previously disposed of) especially since a mercy petition was pending before the President, The ambiguities around the impact of delay within commutations continued by way of the judgment within *Lajar Masih v, State of Uttar Pradesh* (AIR 1976 SC 653), where the Court upheld the death sentence, clearly rejecting the argument that there had been a delay of 18 months, and n'ting that delay wasn'tan absolute factor but one to be viewed by way of the circumstances of the crime itself (in this case the crime was pre-meditated, and pre-planned, and the conduct of the accused "immoral"),

The ambiguities within law unsurprisingly led to an increase within the arbitrary way within which the Supreme Court dealt by way of capital cases, within *Hardayal v, State of U,P,*(AIR 1976 SC 2055), a delay of 21 months taken within conjunction by way of the fact that the Court was unable to clearly establish that the intent was to murder, andn'tmerely kidnap was held sufficient to commute, within *Balak Ram v, State of U,P,*(AIR 1977 SC 1095), the delay

of approximately six years since the death sentence was awarded by the trial court, wasn'tconsidered sufficient for commutation, within *Joseph Peter v, State of Goa, Daman, and Diu* [(1977) 3 SCC 280], an appeal to the Supreme Court itself wasn'tadmitted despite the accused being a young man who had already been under sentence of death for six years, though Justice Iyer did suggest again that the executive may be more receptive to such a plea, Yet within *BhagwanBux Singh, and anr v, State of Uttar Pradesh* [(1978) 1 SCC 214], the Court argued that it was commuting the sentences "in the peculiar circumstances of the case, and having regard, particularly, to the fact that the said appellant was sentenced to death 2 ½ years ago" but gave no other indication, beyond delay, of other factors relevant to its decision, within *Sadhu Singh alias Surya Pratap Singh v, State of U,P,*(AIR 1978 SC 1506), and *Guruswamy v, State of Tamil Nadu* (AIR 1979 SC 1177) too, delay of over three-and-a-half, and six years respectively was given as part of the reason for commutation while within *Ram Adhar v, State of U,P,*[(1979) 3 SCC 774], delay of over six years was the only reason given by the Court for commutation,

Eventually it was the Bench of Justices Chinappa Reddy, and R,B Misra within *T,V,Vatheeswaran v, The State of Tamil Nadu* (AIR 1983 SC 361) that finally laid down a clear guideline that where there was a delay of two years between the initial sentence of death, and the hearing of the case by the Supreme Court, such sentence would be quashed, within the particular case before it, the accused had been under sentence of death – including solitary confinement – for eight years, within fact two other accused sentenced to death along by way of Vatheeswaran had previously received commutation within *Kannan, and anr, v, State of Tamil Nadu* [(1982) 2 SCC 350] due to their 'junior' roles within the killings, and a delay of seven years, Only a few weeks after the *TV Vatheeswaran*judgment however, an'ther Bench of Chief Justice Chandrachud, and Justice A,N Sen while commuting the sentence of an accused within *K,P, Mohammed v, State of Kerala* (1984 Supp SCC 684), made an indirect though obvious reference to *T,V,Vatheeswaran v, The State of Tamil Nadu* (AIR 1983 SC 361), stating, "It is however necessary to add that we aren'tsetting aside the death sentence merely for the reason that a certain number of years have passed after the imposition of the death sentence, We don'thold or share the view that a sentence of death becomes inexecutable after the lapse of any particular number of years,"

An'ther two weeks later the judgment within *T,V,Vatheeswaran v, The State of Tamil Nadu* was over-ruled by a Bench of Chief Justice Chandrachud, and Justices Tulzapulkar, and Varadarajan within *Sher Singh, and Ors, v, State of Punjab* (AIR 1983 SC 465), within this case the accused had been sentenced to death within November 1977, and the sentence was confirmed by the High Court within July 1978, The appeal before the Supreme Court was dismissed within March 1979, a writ petition challenging constitutionalitiesof the death sentence was dismissed within January 1981, a review petition was dismissed within March 1981, and an'ther writ petition dismissed within April 1981 (all unreported), The Bench within its 1983 judgment n'ted that the *Vatheeswaran*rule of two years was unrealistic, and no hard, and fast rule could be laid downgiven the present statistics going on disposal of cases as also that no priorities was given to mercy petitions by the President, The Court also argued that the cause of the delay too was relevant, and the object would be defeated if the accused benefited from such a rule after resorting to frivolous litigation,

This judgment was followed by *Munawar Harun Shah v, State of Maharashtra* (AIR 1983 SC 585) where a delay of five years was rejected as a ground for commutation, However, within *Javed Ahmed Abdul Hamid Pawala v, State of Maharashtra* [(1985) 1 SCC 275], a Bench of Justices Chinappa Reddy, and Venkataramiah questioned the technical correctness of a three-judge Bench within *Sher Singh* over-ruling the decision of a two-judge Bench within *Vatheeswaran*, by way of respect to the case at hand however, the bench did commute the sentence going on an "overall view of all the circumstances" after discussing the issue of delay of two years, and nine months as also reformation of the prisoner, Similarly, within *Chandra Nath Banik, and anr, v, State of West Bengal* (1987 Supp SCC 468), Justices Chinappa Reddy, and Shettiestoo commuted the sentence but didn'tspecify delay as the ground, preferring to argue that the appellant's culpabilities was unclear, and it was "safer" to set aside the death sentence within such cases,

4,18 Right Of Appeal To The Apex Court within Cases Where Death Senetence Has Been Affirmed By The High Courts, and The Process within Apex Court Relating To Passing Of Death Sentence

After examining this issue what remains to be examined is the process of the confirming the death penalty,

As has been provided within ECOSOC resolution as to safeguard No, 6 as,

" Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction , and steps should be taken to ensure that such appeals shall become mandatory"

The similar view has also been expressed by Justice Bhagwati, within Para 82 within Bachan Singh v,State of Punjab (supra) of dissenting judgment as,

"Before I part by way of this topic I may point out that the only way within which the vice of arbitrariness within the imposition of death penalties can be removed is by the law providing that within every case where the death sentence is confirmed by the High Court there shall be an automatic review of the death sentence by the Supreme Court sitting as a whole, and the death sentence shalln'tbe affirmed or imposed by the Supreme Court unless it is approved unanimously by the entire court sitting en banc, and the only exceptional cases within which death sentence may be affirmed or imposed should be legislatively limited to those where the offender is found to be so depraved that it isn'tpossible to reform him by any curative or rehabilitative therapy, and even after his release he would be a serious menace to the society, and therefore within the interest of the societies he is required to be eliminated, Of course, for reasons I have already discussed such exceptional cases would be practically nil because it is almost impossible to predicate of any person that he is beyond reformation or redemption, and therefore, from a practical point of view death penalties would be almost non-existent, But theoretically it may be possible to say that if the State is within a position to establish positively that the offender is such a social monster that even after suffering life imprisonment, and undergoing reformative, and rehabilitative therapy, he can never be claimed for the society, then he may be awarded death penalty, If this test is legislatively adopted, and applied by following the procedure mentioned above, the imposition of death penalties may be rescued from the vice of arbitrariness, and caprice, But that isn'tso under the law as it stands today,"

The Law Commission is quite aware within difficulties of formulating standard guidelines for channelizing the discretions of the courts as observed by Mr, Justice Harlan within McGautha Vs, California (402 US 183) "Those who have come to grips by way of the

hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by,,, history,,, To identify before the fact those characteristics of criminal homicides, and their perpetrators which call for the death penalty,, and to express these characteristics within language which can be fairly understood, and applied by the sentencing authority, appear to be tasks which are beyond present human ability,"

Justice Bhagwati within Bachan Singh case (supra) has made these observations pertinent to the arbitrariness involved within awarding the death sentence, He observes as follows:~-

"70, Now this conclusion reached by me isn'tbased merely going on theoretical or a priori considerations, going on an analysis of decision given over a period of years we find that within fact there is no uniform pattern of judicial behaviour within the imposition of death penalty, and the judicial practice doesn'tdisclose any coherent guidelines for the award of capital punishment, The judges have been awarding death penalties or refusing to award it according to their own scale of values, and social philosophy, and it isn'tpossible to discern any consistent approach to the problem within the judicial decisions, It is apparent from a study of the judicial decisions that some judges are readily, and regularly inclined to sustain death sentences, other are similarly disinclined, and the remaining waver from case to case, Even within the Supreme Court there are divergent attitudes, and opinions within regard to the imposition of capital punishment, If a case comes before one Bench consisting of Judges who believe within the social efficacy of capital punishment, the death sentence would within all probabilities be confirmed but if the same case comes before an'ther Bench consisting of Judges who are morally, and ethically against the death penalty, the death sentence would most likely be commuted to life imprisonment, The former would find, and I say thisn'twithin any derogatory or disparaging sense, but as a consequence of psychological, and attitudinal factors operating going on the minds of the Judges constituting the Bench - 'special reasons' within the case to justify award of death penalties while the latter would reject any such reasons as special reasons, It is also quite possible that one Bench may, having regard to its perceptions, think that there are special reasons within the case for which death penalties should be awarded while an'ther Bench may bona fide, and conscientiously take a different view, and hold that there are no special

reasons, and that only life sentence should be imposed, and it mayn'tbe possible to assert objectively, and logically as to who is right, and who is wrong, because the exercise of discretion within a case of this kind, where no broad standards or guidelines are supplied by the legislature, is bound to be influenced by the subjective attitude, and approach of the judges constituting the Bench, their value system, the individual tone of their mind, the color of their experience, and the character, and varieties of their interests, and their predispositions, This arbitrariness within the imposition of death penalties is considerably accentuated by the fragmented Bench structure of our courts where Benches are inevitably formed by way of different permutations, and combinations from time to time, and cases relating to the offence of murder come up for hearing sometimes before one Bench, some times before an'ther sometimes before a third, and so on, Professor Blackshield has within his article going on "Capital Punishment within India" published within Volume 21 of the Journal of the Indian Law Institute (At pp, 137-226 (Issue of April-June, 1979)) pointed out how the practice of Bench formation contributes to arbitrariness within the imposition of death penalty, It is well known that so far as the Supreme Court is concerned, while the number of Judges has increased over the years, the number of Judges going on Benches which hear capital punishment cases has actually decreased, Most cases are now heard by two-Judge Benches, Professor Blackshield has abstracted 70 cases within which the Supreme Court had to choose between life, and death while sentencing an accused for the offence of murder, and analysing these 70 cases he has pointed out that during the period April 28, 1972 to March 8, 1976 only 11 Judges of the 45

Supreme Court participated within 10 per cent or more of the cases, He has listed these 11 Judges within an ascending order of leniency based going on the proportion for each Judge of plus votes (i,e, votes for the death sentence) to total votes, and pointed out that these statistics show how the judicial response to the question of life, and death varies from judge to judge, It is significant to n'te that out of 70 cases analysed by Professor Blackshield, 37 related to the period subsequent to the coming into force of Section 354, sub-section (3) of the Code of Criminal Procedure, 1973, If a similar exercise is performed by way of reference to cases decided by the Supreme Court after March 8, 1976, that being the date up to which the survey carried out by Professor Blackshield was limited, the analysis will reveal the same pattern of incoherence, and arbitrariness, the decision to

kill orn'tto kill being guided to a large extent by the composition of the Bench, Take for example Rajendra Prasad case ((1979) 3 SCC 646) decided going on February 9, 1979, within this case, the death sentence imposed going on Rajendra Prasad was commuted to life imprisonment by a majorities consisting of Krishna Iyer, J,, and Desai, J,, A,P, Sen, J, dissented, and was of the view that the death sentence should be confirmed, Similarly within one of the cases before us, namely, Bachan Singh v, State of Punjab ((1979) 3 SCC 727) when it was first heard by a Bench consisting of Kailasam, and Sarkaria, JJ,, Kailasam, J, was definitely of the view that the majorities decision within Rajendra Prasad case ((1979) 3 SCC 646) was wrong, and that is why he referred that case to the Constitution Bench, So also within Dalbir Singh v, State of Punjab ((1979) 3 SCC 745), the majorities consisting of Krishna Iyer, J,, and Desai, J, took the view that the death sentence imposed going on Dalbir Singh should be commuted to life imprisonment while A,P, Sen, J, struck to the original view taken by him within Rajendra Prasad case ((1979) 3 SCC 646), and was inclined to confirm the death sentence, It will thus be seen that the exercise of discretion whether to inflict death penalties orn'tdepends to a considerable extent going on the value system, and social philosophy of the Judges constituting the Bench,

However, to reduce the arbitrariness within imposing death punishment which is irreversible the Law Commission suggest that there should be a mandatory right of appeal within case of death punishment even if it is confirmed within reference by the High Court, The Supreme Court (Enlargement of Jurisdiction) Act, 1970 at present allows right of appeal only within cases where the High Court references the decision of acquittal by district court, and punish the accused for 10 or more years including death punishment, The Law Commission is of the opinion that within view of the above the accused under sentence of death should have the satisfaction that his appeal is heard by the highest court of the land, Furthermore, to avoid the arbitrariness within awarding death punishment the appeal should be heard by the bench comprising of five Judges of the Supreme Court,

It may be mentioned that right of appeal was guaranteed till 1979 under pre-amended Article 133 of the Constitution when the pecuniary amount was more than Rs,20,000/-, Similarly, right to appeal to Supreme Court is guaranted against the decision of the Bar Council of India as follows:~-

"**Appeal to the Supreme Court** - Any person aggrieved by an order made by the disciplinary committee of the Bar Council of India under Section 36 or section 37 (or the Attorney-General of India or the Advocate General of the State concerned, as the case may be) may, within sixties days of the date going on which the order is communicated to him, prefer an appeal to the Supreme Court, and the Supreme Court may pass such order (including an order varying the punishment awarded by the disciplinary committee of the Bar Council of India) thereon as it deems fit:~

Provided that no order of the disciplinary committee of the Bar Council of India shall be varied by the Supreme court so as to prejudicially affect the person aggrieved without giving him a reasonable opportunitiesof being heard, "

So also under the Representation of Peoples Act, 1951, the right of appeal is guaranteed as follows:~-

"116A, Appeals to Supreme court - (1) N'twithstanding anything contained within any other law for the time being within force, an appeal shall lie to the Supreme Court going on any question (whether of law or fact) from every order made by High Court under section 98 or section 99,

(2) Every appeal under this Chapter shall be preferred within a period of thirties days from the date of the order of the High Court under section 98 or section 99:~

Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirties days if it is satisfied that the appellant had sufficient cause forn'tpreferring the appeal within such period,"

Similarly, under Section 55 of the Monopolies & Restrictive Trade Practices Act, 1969, the right to appeal to the Supreme Court is guaranted as follows:~-

"55, Appeals,-- Any person aggrieved by any decision going on any question referred to within clause (a), clause (b) or clause (c) of section 2A, or any other made by the Central Government under Chapter III or Chapter IV, or, as the case may be, or the Commission under section 12A or section 13 or section 36D or section 37,may, within sixties days from the date of the order, prefer an appeal to the Supreme Court going on one or more of the grounds specified within section 100 of the Code of Civil Procedure, 1908 (5 of 1908),"

If the right of appeal to the Supreme Court is guaranteed within such matters, the question arises is why should right of appeal ben'tguaranteed when death punishment is qualitatively different from any other punishment, and is irreversible, and there is scope for correcting an error,

Law commission invites views, and suggestions as to whether the execution of death sentence by hanging should be replaced by any other mode which is less painful, more fast,, and without mutilation of body,, and also seeks suggestions going on other issues mentioned within this paper, within order to obtain concretized suggestions, a Questionnaire is also prepared, and annexed by way of the Paper, Your replies may be forwarded to the Commission within a period of one month of the issue of this Consultation Paper,

CHAPTER V

CONCLUSION, and SUGGESTION

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At last my view of death penalties considers death penalties necessary

on the following grounds:~

1, Elimination of murderers by execution is fair retribution, and serves the ends of justice,

2, Punishment must match the gravities of offence, and worst crimes should be severely dealt by way of for the sake of deterrence, and securities of the society,

3, Death penalties shows society's reaction to heinous crimes,

4, One who ends somebody's life, forfeits his right to life,

5, Death sentence should be looked as a form of retributive justice insofar as it provides satisfaction, and peace of mind for many victims of crime, and their families or relatives,

6, It is the most effective way to protect societies against condemned offenders,This is the reason why death penalties has been held to be constitutionally valid,

7, Some authorities believe that death penalties is less cruel than a prolonged life imprisonment,

8, Considered from the economic point of view also it is for less expensive to execute a convict than to house him/her within a prison institution for life,

9, It prevents over-crowding within prisons, and helps within elimination of offenders who are potential danger to the institution thereby making maintenance of discipline within prisons easy,

10, It upholds rule of law because it discourages vigilantism or self-help going on the part of victim's family,

5 , 1 ARGUMENTS within FAVOUR OF RETENTION OF CAPITAL PUNISHMENT

India is currently one of only 83 countries within the world, which retains the capital punishment,Till today,n'tmany substantive changes have been made within the old Indian Penal Code that was enacted within 1860, which shows its efficiency, and relevancy

even within the 21st century, Those who advocate the abolition of the death penalties may be well nailed up from head to foot by way of the following counter arguments:~

A, JUDICIAL VIEW

Judiciary, as expected, and acknowledged, answers the cries of common men of the society,Society‟s need, and approval to the retention of the death penalties has, from time to time, been voiced by the Apex Court through several judgements which may be set forth under following headings:~ I, Necessities

In *Triveniben v, State of Gujrat,* the Supreme Court reinforced the need for retention of capital punishment within the following words:~ “In our country, although there is a shift from „sentence to death‟ to „lesser sentence‟ yet there is a clear intention of maintaining this sentence to meet the ends of justice within appropriate cases,"

In *R v, Howells* Court of Appeal, Criminal Division said:~ “Court should always bear within mind that sentences were within almost every case intended to protect the public, whether by punishing the offender or reforming him, or deterring him, and others, or all of those things,” II, Delay within executions A considerable time between imposition of the capital punishment, and the actual execution is unavoidable, given the procedural safeguards required by the courts within such cases, It is, within fact, within favour of the convict,

In *Sher Singh & others v, State of Punjab,56* the Supreme Court refused to follow the ratio of *TV Vatheeswaran's*case,, and held that delay within execution of death penalties exceeding two years by itself doesn'tviolate Article 21 of the constitution to enable a person under sentence of death to demand quashing of sentence, and converging it into sentence of the life-imprisonment, III, Securities within Societies

In *Mahesh v, State of M,P,*the Apex Court expressing a fear observed:~ "… to give the lesser punishment for the appellants would be to render the justicing system of this country suspect, The common man will loose faith within courts, within such a case, he understands, and appreciates the language of deterrence more than the reformative jargon,"

B, CHANCES OF MISTAKE BY THE JUDICIARY

One of the arguments, fervently offered against the retention of death penalties is that, by way of the present judicial system, the chances of error being committed by the judges, and sending an innocent person to gallows cann't be reeled out, However, after having a look going on the following facts, and legal provisions, the above argument lasts no longer than a rainbow:~

i,First of all, the apex court has confined the imposition of capital punishment to *rarest of rare* cases60 so few people, after long careful proceedings, are awarded death penalty,

ii,The processes of ascertaining guilt, and awarding sentence are separated by distinct hearings,

iii,The sentence awarded by the session courts is subject to automatic confirmation by the High Court of the concerned state,

iv, If a woman sentenced to death is found to be pregnant, the High court shall order the execution of the sentenced to be postponed,, and may, if it thinks fit, commute the sentence to imprisonment for life,

v, within every case within which sentence of death is passed, the appropriate government may, without the consent of the offender, commute the punishment for any other

punishment provided by the Indian Penal Code, 1860,64 Similar provisions are provided within the Code of Criminal Procedure,

vi, 95% cases go to the Apex court,

vii,Even thereafter, these cases are subject to an endless procession of clemency appeals, reprieves, and pardons, etc, under Articles 72, and 161 of the Constitution of India, This eliminates even single atom of judicial error, which might have remained after such a long purification process,

viii, The Supreme Court has also struck down mandatory death sentence for an offender already undergoing life sentence,Virtually no category of offence now involves automatic or mandatory death penalty, as it does within several other countries, Thus, the chance of an innocent person being sent to the gallows is statistically infinitesimal,

C, ARGUMENTS BASED going on THE THEORIES OF PUNISHMENT

I, Deterrence theory

Deterrence is the threat of punishment or some other harm that will result from a particular action, The function of this theory can be understood from the statement of a judge:~

" I don'tpunish you for stealing the ship, but so that the ship mayn'tbe stolen,"

i, Regarding the deterrent effect of capital punishment, *Edward J, Allen* gives a very convincing argument by raising a pertinent question:~

"If this be true, then why do criminals, even the braggadocios chessman type, fear it most? Why does every criminal sentenced to death seek commutation to life imprisonment?"

ii,If someone is imprisoned for life, there is no deterrence for him to kill off other inmates, and prison personnel‟s, since there is no harsher punishment than life-imprisonment, which already has been given to him,

iii,Even if we assume that death penalties willn'toperate as deterrence going on some criminals, then, no other lesser punishment can, logically, deter them too, Then, it would

lead to the conclusion that they shouldn'tbe given any kind of punishment because it is of no effect,

iv, It is impossible to find out as to within how many cases it actually deterred the potential offenders, Royal Commission going on death penalties of England remarked:~

" We can number its failures but we cann't number its successes,"

II, Retributive theory

It is said that unless the criminal gets the punishment he deserves, one or both of the following effects will be produced:~

i,The victim will seek individual revenge;

ii, The victim shall refuse to make a complaint or offer testimony,, and the state will, therefore, be handicapped within dealing by way of criminals,

The object of sentencing should be to see that the crime doesn'tgo unpunished, and the victim of crime as also the societies has the satisfaction that justice has been done to it,

III, Preventive theory An'ther aspect of punishment is to disable the offenders from repeating the crime by punishment like death, exile etc, If terrorists, gangsters, etc, are given imprisonment for life instead of death penalty, it is evident from day to day incidents that they, by hook or by crook, break away from the prisons very soon, and again become threat to society, IV, Reformative theory Though going on papers, and within discussions it seems good as well as possible to reform the criminals, within practical realities it mayn'tbe possible to do so, Professional, and hardheaded criminals can never be reformed by any therapy or theory,An'ther logical apprehension is that if criminals are sent to prison to be transformed into good citizens, the prisons will no more remain prison, but will become dwelling houses,

D, LEGAL ARGUMENTS

Further worries, and apprehensions of the abolitionists, may be well countered within light of following statutory provisions, and judicial precedents:~

I, Crimes under grave, and sudden provocations,

For the crimes within the heat of moment, death penalties is eithern'tpossible or isn'tawarded,

II,**Self-defense** If we see within the broader, and liberal context, death penalties is n'thing but the exercise of „right to private defense,"

III, Fundamental right to life within this regard Article 21 of our Constitution, clearly provides:~ "A person can be deprived of his life, and liberties according to the procedure established by law," Moreover, the Supreme Court within a catena of decisions has held it to be constitutional,

If death penalties is infringement of fundamental right to life, then, logically, why should a convicted person also be given life sentence since they also have right to freedom along by way of right to life?

IV, Stockholm Declaration, 1977

The above declaration didn'tstand for the abolition of death penalties but required that the penalties oughtn'tto be awarded arbitrarily, and must be confined to the extremely heinous crimes only, Thus, Indian position is identical to the covenant by virtue of Article 20, and 21 of the Constitution, and Section 354(3) of the Code of Criminal Procedure, 1973,70

E , MORAL ARGUMENTS

i,It is humbly submitted that it itself is a greatest debate whether God exist or n't,

ii,It is submitted that laws are enacted when moralities becomes impotent within regulating the society; therefore, moralities shouldn'tobscure our minds while discussing legal issues,

iii,It"s a misconception that death penalties undermines the value of human life, within fact, it is by exacting the highest penalties for taking of human life that we affirm the highest value of human life,

F, ECONOMIC ARGUMENTS

Death penalties saves hard-earned money of taxpayers as once a convicted murderer is executed, and buried, there is no further maintenance cost to the state,

G ,**SOCIAL ARGUMENTS**

i,The argument that even the worst criminal deserves our humanity- and, by implication, protection against premature death- naively assumes that the right to belong to a societies is absolute, and unconditional, The community, within turn, cann't make any demand-moral or otherwise – going on the individual member, This is mistaken,71

ii,n't giving capital punishment isn't the first, and only criteria of becoming civilized nation,

H, LAW COMMISSION‟S OBSERVATIONS

The Law Commission within its 35th report concluded:~

i, Basically, every human being dreads death;

ii, Death, as a penalty, stands going on a totally different level from imprisonment for life or any other punishment,The difference is of quality, and merely a degree,

iii,Whether any other punishment can possess all the advantages of death penalties is a matter of doubt,

iv, Statistics of other countries are inconclusive going on the subject, if they aren't regarded as proving the deterrent effect; neither can they be regarded as conclusively disproving it,

I, MURDER VERSUS CAPITAL PUNISHMENT

Murder, and execution are morally equivalent because they both kill people, But this doesn't make sense, If that were so, it could be logically said that wrongful confinement72of an innocent person by a civilian, and imprisonment of an offender by the state are morally equivalent, because they both confine a person, „Murder‟ term is used for unlawful killings only, and capital punishment by the judiciary isn't unlawful,

Moreover every type of killing even by civilians isn'tmurder, Thus there is a fundamental legal difference between killing innocent people (murder), and capital punishment for murder**,**

J, POOR‟S CONVICTION

Though there may be some substance within the arguments of poor‟s, and innocent‟s convictions but going on careful scrutiny, it is clear that they point out defects within the administration of justice, andn'tanything against capital punishment as such,

K, VOICE OF PEOPLE

On an Internet poll75 only 19% participants voted within favour of the question " Should death sentence be banned within India?", and rest of 81% wanted to retain the capital punishment,

It may be reiterated that capital punishment is undoubtedly against then'tions of modern rehabilitative processes of treating the offenders, It doesn'toffer an opportunities to the offender to reform himself, That apart, going on account ofits irreversible nature, many innocent persons may suffer irredeemable harm ifthey are wrongly hanged, As a matter of policy, the act of taking an'ther's lifeshould never be justified by the State except within extreme cases of dire necessity, and self-preservation within war,[61] Therefore, it may be concluded that though capitalpunishment is devoid of any practical utilities yet its retention within the penal lawseems expedient keeping within view the present circumstances when the incidence ofcrime is going on a constant increase within India, Time isn'tyet ripe when completeabolition of capital punishment can be strongly supported without endangeringthe social security, It is no exaggeration to say that within the present time theretention of capital punishment seems to be *morally, and legally* justified, It servesas a reminder to everyone that within case of unpardonable crime one has to forfeithis own right to life, and survival, For example, no sensible man can suggest anyother punishment for the culprits of 16 December,

[61]Kethaleen J,Smith :~ "A Cure to Crime" Gerald Duckworth Ltd,, London (1964), p,57,

2012 gang rape case within Delhi,It must also be n'ted that the essence of criminal jurisprudence hasalways been to provide protection, as also to contrive measures against the fearsboth from within, and without, for the individuals, and also for the social orderitself, The criminal jurisprudence while it provides protective devices throughpunitive sanctions, also aims at securing better social order by insulating againstthe unwarranted acts emanating from the individual, It is by way of this backdrop thatthe desirabilitiesor otherwise of the capital punishment has to be judged, Whileadministrating justice, a look to the human rights of victims is also must for fairjustice, As a n'te of caution *S, Venugopal Rao* who chaired the session going on capital punishment of International Congress of Criminal Law,[62] rightly pointedout that there is no objection to according a humane treatment to the offender butthis shouldn'tmean that the victims be at the mercy of criminals who pose adanger to the society, and deserve treatment through deterrent, and preventivemeasures, Therefore, there is a need for searching out a viable alternative todeterrence, which has a vital protective function within society,

At present, as many as 127 countries out of 191 countries of the worldhave retained death penalties but renovations are continuously being made by them within the methods of execution81 so that the person going on whom the sentence has beenordered suffers minimum torture, The Amnesties International had started a globalcampaign within 1989 for the abolition of death sentence but it hasn'tyet fullysucceeded within its mission though many countries have reopened favorably to itsappeal, and abolished death penal from their criminal law, The Indian law within thisregard, however, seems to be satisfactory as the Supreme Court,

The Supreme Court within AllauddinMian v, State of Bihar has stressed going on the penological aspect of death sentence, and observed that provisions ofSections 354(3), and 235(2) of the Code of Criminal Procedure, 1973, require thesentencing Judge to state reasons for awarding death sentence, and giving anopportunities to the condemned person to be-heard going on the point of sentence,satisfy the rule of natural justice,, and fair play, This enables the sentencing Courtto endeavour to see that all the relevant facts, and circumstances

[62] The International Congress of Criminal Law was held within New Delhi going on 8th Feb,,1983,

which havebearing going on the question of sentence are brought going on record, and no injustice iscaused to the accused, within the instant case, the Apex Court n'ted that the trialJudge hadn'tattached sufficient importance to mandatory requirements of theabove provisions, and the High Court confirmed the death sentence withouthaving sufficient material placed before itgoing on record to know about theantecedents of the accused, his socio-economic conditions, and impact of crimeetc, Which rendered the rationale of the judgment doubtful,The Indian sentencing law contains certain admirable principles which theJudges who have responsibilities for passing sentence, should bear within mind whilefinalizing the sentence of the accused, The objectives of sentences, and the rangeof sentences have widened over the years, and this calls for properly marshaled observation of the results of similar sentences imposed within similar circumstances

The Law Commission of India within its 45th Report going on capital punishment suggestedthe use of lethal injection for execution as it is simplest decent, and ensues within the past,The sentencing courts should therefore, keep themselves abreast ofthe penological developments, specially when the choice is between 'death' or'life imprisonment, At present, there is no provision within law which provides onlydeath penalty,

Due to arbitrary, and discriminatory decisions, and unjust procedures, basic rights of accused are violated within inhuman, and brutal manner which aren'tonly contrary to the National Human Rights principles envisaged within the Constitution but also contrary to the Universal Human Rights ethos, within order to serve as a just, and effective mechanism for administration of justice to all sections of society, law should be nourished by, and nurtured within human rights, There is n'thing to prove the fact that extreme measure of death sentence reduces crime rates within contemporary society; rather death sentence has failed as a deterrent, Life imprisonment is enough for deterrence as well as for mental, and moral metamorphosis of a human being,

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