9 RMLNLUJ (2017) 1

On Capital Punishment

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I. INTRODUCTION

There is practically no country in the world where the death penalty has never existed. Clearance Patrick, who studied 128 countries on the use of capital punishment, found that 109 countries resorted to it for a total of 109 crimes. About 90% of all the countries surveyed punished murder and treason by death Penalty.[1] The term "capital punishment" stands for the most severe form of punishment that is generally awarded for the most heinous, grievous and detestable crimes. While the definition and extent of such crimes vary from country to country, state to state, age to age the implication of capital punishment has always been the death sentence. By common usage in jurisprudence, criminology and penology, capital sentence means a sentence of death.[2]

In India, it is as old as the Hindu Society itself. Hindu lawgivers did not find anything abhorrent in it; they justified it in the cases of certain serious offences against the individuals and the State. As far back as the 4th century B.C. the science of penology was a fully developed subject of study and statecraft in India. The death penalty occupies a peculiar place in discussions of punishments. The present situation in this matter like many others is largely linked with the past. This paper attempts to study the implications of capital punishment with special emphasis on legislative and juridical riposte. It also examines the legitimacy and constitutionality of mandatory death sentence, particularly its continuance despite our Supreme Court's disapproval of it.

Page: 2

We need to examine the effect of the 'doctrine of rarest of rare' on the rate of death penalty. The hypothesis which is tested here is that 'after the doctrine of rarest of rare there is no substantive change in the frequency of award of death penalty'. In other words, the doctrine which endeavoured to lessen the rate of death penalty has, in fact increased it. The judges have now got a pliant doctrine which they can employ in any case whenever they want to justify infliction of death penalty. It should be noted that for centuries the legitimacy and efficacy of death penalty was not contested. Its acceptance in early societies appears to be contingent on three vital principles:

a) Inconsequential ideals attached to human life or at least, to the life of any individual, or class of individuals.
b) Death of offender was considered to be fair and essential under retributive theory of punishment.
c) The death penalty was to find natural support by the arrival or gradual establishment of an all-powerful state, where the sovereign, considered so by divine right, was both the only source of justice and the guardian of peace or of public safety.[3]

These three reasons contributed to make death penalty an alternative punishment.

But people had failed to note that certain primitive societies did not know the death penalty or accorded it an extremely restricted place. Such was the case in ancient Chinese Law as revealed in the famous treatise "Five Punishments."[4] It was unknown in Slavic customary law before the Ukases of the Tsars and even then, it was found only exceptionally in certain population group, such as the Cossacks, where it was provided only for the theft of horses. Finally, we know that it was rejected by the Canon Law, which only worried about penitence and left the death penalty to the secular branch.[5] The abolition movement can doubtless point to ancient precursors and, in that connection, one should not forget the activity of George Fox in the 17th Century. But, it was with the publication of the treatise "Crimes and Punishment" by Cesare Beccaria some two hundred fifty years ago that the movement brilliantly asserted itself. For the first time, an authoritative and widely heard voice raised a doubt about the very legitimacy of the death penalty. In 1767 Catherine II ordered the commission that she had appointed to draft a new code to exclude the death penalty. In 1786 and 1787, respectively Leopold II of Tuscany and Joseph II of Austria removed the death penalty from their Corpus Jurio Criminal.[6] In England Sir Samuel Romilly began his famous campaign for reducing capital crimes,

Page: 3

which at the time numbered over 200, and in 1829 the first association for the abolition of the death penalty was formed in London.[7] The Austrian Code of 1805, the French Code of 1810 and the Bavarian Code of 1813, lent strength to the abolition movement. Thorsten Sellin has demonstrated a scientific investigation of crime rates and trends which shows that the abolition or the reinstallation of death penalty in a country has never led to a sudden and substantial upsurge or decline in criminality.[8]

The problem of abolition of capital punishment in India was first time raised in the Legislative Assembly (1931). One of the members from Bihar, Shri Gaya Prasad wanted to introduce a Bill to abolish capital punishment but it was defeated.[9] Once again leave was granted to introduce a Bill to abolish capital punishment in 1933 but it was never moved.[10] In British India, the government's policy on death penalty was clearly stated twice in 1946 by the then Home Minister, Sir John Throne, in the Legislative Assembly: "The government does not think it wise to abolish capital punishment for any type of crime for which that punishment is now provided."[11] Resolutions for the abolition of capital punishment in post-independent India were moved thrice in Parliament but nothing could be attained. In 1956 the central government sought the opinion of all the states in India on the question of abolition of capital punishment, but all the states emphatically opposed abolition of capital punishment. The Law Commission in its 35th Report favoured a cautious approach and pleaded its retention as an exceptional penalty.[12]

II. RETENTIONIST V. ABOLITIONIST

Hackel regarded capital punishment as a process of artificial selection and Garofalo went to the extent of saying that elimination of criminals was a sort of moral war for the good of society. For Lombroso; capital punishment should be good as a threat to habitual and incorrigibles. George Ives believed the incorrigible or hopeless criminal should be painlessly removed rather than that the State should have to maintain him unnecessarily.[13] Convincing arguments have been made by the abolitionists. Prof. H.L.A. Hart said, "It would be a terrible thing if a man has been hanged for a crime which he has not committed, in such a case, law itself would be a murderer.[14] Beccaria condemned capital punishment on the ground that the

State has no right to take the life of an individual, because the life of the individual was not surrendered to state as a part of the consideration for the social contract. Stutsman also opposed death penalty.[15] Henting opposes it because of the likelihood of judicial error.[16] David Abrahamsen argues that during 18th Century pick-pocketing was punishable with death but in spite of that when the offender was being hanged, there were sharpers ready to pickpockets of those who pleased themselves as viewers at the scene of the execution. This shows how "effective and deterrent", has been the punishment of death.[17] Wendell Phillips says that the number of persons sent to execution by the courts, and afterwards proved to be innocent, has been counted by hundreds in Great Britain, and most probably be counted by thousands, considering even only the civilized states.[18]

Then death penalty results in sympathy for the criminal. It is rightly said that people forget the crimes of the prisoners and remember only what happens last, the execution of death sentence. The accused becomes to some extent a hero; his photograph is published in all papers.[19] The Kehar Singh case[20] in India is the glaring example in this connection. All newspapers published his photographs and termed his execution in their editorials as "Judicial murder", "Shame" etc. Beccaria argues that it is not the intensity but the duration of punishment which has the greater effect upon man's mind, because our sensitivity is affected more easily and permanently by small but repeated impressions than by a strong but momentary shock.[21] Then, it is also questionable whether death is a punishment at all. Caesar's answer is in the negative:[22]

> *So far as the penalty is concerned, I can say with truth that amid grief and wretchedness death is a relief from woes, not a punishment; that it puts an end; to all moral ills and leaves no room either for joy…..To kill is not to punish…. If by death we cut off his joys and happiness in the same measure we cut off his sorrows and humiliation…. Death is an asylum, impregnable against punishment.*

Finally, no uniformity has been practiced in the award of death sentence. From the world survey report it can be said that between 1930 to 1980, 3860 persons were executed from eight different crimes. Almost all of them were males. Since 1930 only 32 women have been executed. A gross comparison of the death-sentencing rates for men and women indicates that women convicted of murder are unrepresented on death row. 2% of men but only one tenth of one per cent of women convicted of murder are destined to die.[23] Discriminatory treatment in award of death sentence is another problem. In U.S., when charged with murder, black males stood twice a chance of conviction about that for white males. That chance was even greater when black and white females are compared.[24] But in a recent research it has been demonstrated that there will be no change in the fate of blacks even if more black judges are appointed because there are remarkable similarities in the sentencing decisions of black and white judges. In fact; black judges punish black offenders more severely than the white offenders.[25] The national records in the U.S. show that during the 20th century executions reached a peak in the mid-1930s after which they steadily declined. The annual average during the 1930s was 1967; during the 1940s, 128; in

the 1950s, 72 and 19 in the 1960s. In the 1970s only three persons, all male and all white, were put to death.[26] But the decline in executions since the mid-1930s may be somewhat deceptive, in that the awarding of death sentences per se has not diminished at the same rate. During the 1970s, an average of 160 persons were sentenced to death annually, whereas during the previous decade the average was 113. Only a few of these sentences were carried out, owing primarily to appellate litigation over the constitutionality of the death sentence. Even during 1981 more than 800 persons in twenty-nine jurisdictions were awaiting execution.[27]

III. PARADIGM SHIFT IN THE MODERN PENOLOGY

The modern penology is shifting from crime to criminal, objective to subjective and from retribution to correction. This trend is deliberated in Economic and Social Council, 6th Congress on Crime and Treatment of Offenders and in the 35th regular session of the General Assembly of the United Nations.[28] The U.N. Declaration of December 1977 observed that death sentence is recurrently used as an instrument of repression against

opposition i.e. racial, ethnic, religious and under-privileged groups and hence it should be declared illegal. It is unfortunate that in the age of human rights and progressive civilization power holders make use of death sentence through judicial institutions to hold their position.

The Amnesty International, in its appeal for commutation of death penalty imposed on Mr. Zulfiqar Ali Bhutto, former Prime Minister of Pakistan, had stated, "we regard death penalty to be cruel, inhuman and degrading punishment" and a trial like Mr. Bhutto's conducted in ….. a true political atmosphere, there is a risk of miscarriage of Justice.[29] Second optional protocol to International Covenant on Civil and Political Rights (December 1989) though aiming at the abolition of death penalty, in addition to the United Nations Declaration of Protection of All Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (December 1975) and United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (December 1986) which also condemns death penalty. But still there is a perceptible diffidence on the part of many nations to concede to the abolition of death sentence because of the rising tide of terrorism, drug -trafficking etc.

IV. CAPITAL PUNISHMENT IN INDIA

The drafters of Indian Penal Code 1860 (I.P.C) viewed that capital punishment should be used parsimoniously.[30] The position of capital punishment in the Indian Penal Code has not changed as such[31] in hundred and fifty years of its existence but the leaning in the direction of the abolition in many countries has affected legislative as well as judicial thinking on the subject.[32] Before the amendment in 1955 of the Criminal Procedure Code (Cr.P.C) of 1898, it was obligatory for a court to give reasons for not awarding death sentence in a case of murder. The 1955 Amendment did away with the obligation of assigning reasons for not giving death sentence in an appropriate case. Under new Cr.P.C of 1973, the court must record reasons for awarding death sentence. It is evident that the revision regarding death sentence has progressively been relaxed in favour of the condemned person.[33]

The Supreme Court of India has shown its preference to life imprisonment in several cases but at the same time the Supreme Court has upheld the constitutionality of death sentence in number of cases. In *Jagmohan Singh case*[34] the question of constitutional impermissibility of death sentence based on provisions of Articles 16, 19 and 21 of the Constitution was raised for the first time. But the court negatived the contention and held that deprivation of life is constitutionally permissible provided it is done according to procedure established by law. However, the court tried to achieve the elimination of death sentence in an indirect manner.[35] In *Ediga Anamma*[36] Justice Krishna Iyer commuted death sentence to one for life-imprisonment on the ground of delay of two years in execution.[37] The court again tried to abolish death sentence in *Rajendra Prasad*[38] when it referred to the history, humanization of law and said the social justice projected by Article 21 colours the concept of reasonableness in Article 19 and non-arbitrariness in Article 14. This interpretation of articles 14 and 19 validated death penalty in a limited class of cases only viz. terrorists, drug traffickers, train dacoit and bank robbery bandits, reaching menacing proportions, economic offender profit-killing in an intentional and organized way etc. The Supreme Court in momentous *Bachan Singh case* once again indorsed the constitutionality of the death sentence, but then the court cautioned that judges should not be blood-thirsty.[39]

> *"Facts and figures show that, in the past, courts have inflicted the extreme penalty with extreme infrequency, a fact which attests to caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by broad illustrative guidelines indicated by us, will discharge the onerous function with more scrupulous care and humane concern that courts, aided by broad illustrative guidelines indicated by us, directed along the high road of legislative policy outlined in Section 354(3) of Cr. P.C that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of*

rare case when the alternative option is unquestionably foreclosed.

V. COMPULSORY CAPITAL PUNISHMENT

The discussion in the aforesaid paragraphs referred to death sentence as one of the alternative sentences. Now we come to the question of mandatory death sentence which is a much graver matter than a provision of death sentence as one of the options available to the judge. The Indian Penal Code has only one section (Section 303) which provides for the mandatory death sentence for the person who commits murder being under sentence of imprisonment for life. There are as many as 52 sections in the Indian Penal Code (I.P.C) which provide for the sentence of life imprisonment.[40]

A person sentenced to life-imprisonment invites mandatory death penalty if he commits murder while he is under the sentence of life-imprisonment. The reason, or at least one of the reasons why no discretion in such a case was given to the judge to impose a lesser sentence appears to have been that if, even the sentence of life imprisonment was not sufficient to act as a deterrent and the convict was hardened enough to commit murder while serving that sentence, the only punishment in

consonance with the deterrent and retributive theories of punishment which he deserved was death. The severity of this legislative judgment was in consonance with the deterrent and retributive theories of punishment which then held sway.

The law Commission in its 35the Report considered the issue of mandatory death sentence under section 303 but it did not suggest any change. In its 42nd Report, again, the commission did not recommend any change, saying that section 303 is rarely used and in a hard case recourse can be hard to mercy powers of the executive. The reformative theory of punishment attracted the attention of criminologists later in the day and, influenced by the theory, the full bench of the Supreme Court in *Mithu* v. *State of Punjab*[41] held Section 303 as ultra-vires to the constitution. Delivering the judgment of the court, the then Chief Justice Y.V. Chandrachud, observed that:[42]

> *"the framers of the I.P.C seem to have had only one kind of case in their mind and that is the commission of murder of a jail officials who were foreigners, mostly Englishmen, and, alongside other provisions which were specially*

designed for the members of the ruling class, as, for example, the choice of jurors, upon the white officers." Even the Law Commission observed that "the primary object of making the death sentence mandatory for the offence under this section seems to be to give protection to the prison staff.[43]

VI. REASONED DECISION

a) The Court observed that there is no legal base for categorizing persons who commit murders whilst they are under the sentence of life-imprisonment as distinguished from those who commit murders whilst they are not under the sentence of life-imprisonment for the purpose of making the sentence of death mandatory in the case of the former class and optional in the case of the latter class.

b) The context that a person is enduring a sentence of life-imprisonment does not minimize the importance of mitigating factors which are relevant on the question of sentence. Indeed, a crime committed by a convict within the jail while he is under the sentence of life-imprisonment may, in certain circumstances, demand and deserve greater consideration, understanding and sympathy than the original offence for which he has been sentenced to life-imprisonment. A life convict for instance may be driven to retaliate against his systematic harassment by a warden, who habitually tortures, starves and humiliates him.

c) The court did not find any articulate difference between a person who commits a murder after serving out the sentence of life-imprisonment and a person who commits a murder while he is still under that sentence. This classification proceeds upon irrelevant considerations and bears no nexus with the object of the statute, namely, the imposition of a mandatory sentence of death. A person who stands unreformed after a long term of incarceration is not, by any logic, entitled to preferential treatment as compared; with a person who is still under the sentence of life-imprisonment.

d) A standardized mandatory sentence of death fails to consider the facts and circumstances which institute a safe guideline for determining the question of sentence in each individual case.

e) The self-confidence which is manifested in the legislative prescription of a computerized sentence of death is not supported by scientific data. There appears to be no reason why in the case of a person whose case falls under

Section 303, factors like the age and sex of the offender, the provocation received by the offender and the motive

of the crime should be excluded from consideration of the question of sentence.

f) Concurring with Chief Justice Chandrachud, Justice Chinnappa Reddy, observed: "Section 303, Indian Penal Code, is an anachronism. It is out of tune with the march of the times. It is out of tune with the rising tide of human consciousness. It is out of tune with the philosophy of an enlightened constitution like ours."

VII. PARALYZING PROGRESSIVE TREND

It is clear from the above discussion that mandatory death sentence is held as the negation of civil liberty jurisprudence and a relic of outdated era.[44] But, unfortunately, recent legislative exercises appear to have completely ignored the Supreme Court's observations and have made further provisions for such a draconian sentencing policy.

The Arms (Amendment) Act 1988, keeping in view the violent conditions prevailing in several states in India proposed, among others, an amendment to Section 27 of the Arms Act.[45] While Sec. 5 prohibited the use, manufacture, sale, transfer, test or possession of any fire-arm without a license prescribed in that behalf, Sec. 7 forbids acquiring of possession, use, sale, manufacture etc. of any prohibited arms or prohibited ammunition unless specially authorized by the Central Government in this behalf. But then clause (3) of Sec. 27 provided mandatory death sentence in all cases where a person is dead by virtue of use of prohibited weapons and therefore even the requirement of case falling under Section 299 and 300 is not prescribed.

The vires of Section 27(3) of the Arms Act was questioned in *State of Punjab* v. *Dalbir Singh*.[46] The Supreme Court relying on *Mithu ratio held this provision* ultra vires. In addition court observed that it seems that in Section 27(3) of the Act the provision of mandatory death penalty is more

unreasonable in as much it provides whoever uses any prohibited arms or prohibited ammunition or acts in contravention of Section 7 and if such use or act results in the death of any other person then that person guilty of such use or acting in contravention of Section 7 shall be punishable with death. The word 'use' has not been defined in the Act. Therefore, the word 'use' has to be viewed in its common meaning. In view of such very wide meaning of the word 'use' even an unintentional or an accidental use resulting in death of any other person shall subject the person so using to a death penalty. Both the words 'use' and 'result' are very wide. Such a law is neither just, reasonable nor is it fair and falls out of the 'due process' test. The court further observed:[47]

> *A law which is not consistent with notions of fairness while it imposes an irreversible penalty like death penalty is repugnant to the concept of right and reason. All these concepts of 'due process' and the concept of a just, fair and reasonable law has been read by this Court into the guarantee under Articles 14 and 21 of the Constitution. Therefore, the provision of* Section 27(3) *of the Act is violative of* Articles 14 *and* 21 *of the Constitution.*

The Narcotic and Psychotropic Substances (Amendment) Act, 1988:[48] Section 31A

which was inserted by this amendment provided for *mandatory death penalty* for any person who has been convicted of the commission of or attempt to commit, or abetment of, a criminal conspiracy to commit, any of the offences punishable U/Ss. 15 to 25 (both inclusive) or Section 27A, if he is subsequently convicted of the commission of or attempt to commit or abetment of, or criminal conspiracy to commit an offence relating to:

a) engaging in the production, manufacture, possession, transportation, import into India, export from India or transshipment, of the narcotic drugs or psychotropic substances specified under column (1) of the Table and involving the quantity which is equal to or more than the quantity indicated against each such drug or substances, as specified in column (2) of the said Table;

b) financing, directly or indirectly, any of the activities specified in clause (a).

This is another very wide-ranging provision for imposition of mandatory death penalty that raises constitutional and human right questions.

The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989: Sec. 2(1) of the Act provides that whoever, not being

a member of a Scheduled Caste or a Scheduled Tribe, gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will cause, any member of a Scheduled Caste or a Scheduled Tribe to be convicted of any offence which is capital by the law for the time being in force shall be punished with imprisonment for life and with fine; and if an innocent member of a Scheduled Caste or a Scheduled Tribe be convicted in consequence of such false or fabricated evidence, the person who gives or fabricates such false evidence, *shall be punished with death*.[49] This is again a clear case of mandatory death sentence. Even otherwise, the provision does not seem to be reasonable because a similar provision (Sec. 194 Part II, I.P.C.) in respect of persons other than Scheduled Caste or Scheduled Tribe prescribes death penalty, albeit as an alternative sentence.

The Indian Penal Code (Amendment) Act, 1992: The Act is in response to an unprecedented increase in the heinous cases of rape of minor girls. Such an offence is a stigma on the society. The victim of such a crime cannot lead a normal life because the traumatic past always haunts her. She feels withdrawn and helpless and is haunted by nightmare. Further our heads bow in shame when it is learnt that the girl has been raped by her close relative. She becomes the victim of trust. Such act by a relative beast must not be spared and needs to be hanged to death. The statistics are indeed grim. In Delhi, for example, in the first six months of 1994, nearly two out of three rape victims were children. Of the 162 rape cases registered, 98 are cases of child-rape. In 1993, out of total of 321 victims, 197 were minors of which 35 were less than seven years and 119 between 12 and 16 years.[50] And this is but the tip of the iceberg as rape cases specially rape within family is rarely reported. In view of such an alarming situation, the amendment provides that whoever commits rape on a woman when she is less than ten years of age shall be punished with death. Similarly, whoever is a relative of a woman commits rape on such woman when this is again the case of making provision for mandatory death sentence. The amendment has given no definition of "relative" and therefore its ambit is very wide.

VIII. DOCTRINE OF RAREST OF RARE: THE ONTOLOGICAL SURVEY

Time-Period	No. of Cases	No. of Cases in which Death Sentence was confirmed	%	No. of Cases in which Death Sentence was reduced to life imprisonment	%
1970-1980	61	23	37.7%	38	62.2%
1981-1990	101	40	39.6%	61	60.3%
1990-1999	72	30	41.6%	42	58.3%
2000-2010	56	20	35.7%	36	64.2%

[Table — 1]

A. High Court Decisions

Time — Period	No. of Cases	No. of Cases in which Death Sentence was confirmed	%	No. of Cases in which Death Sentence was reduced to life imprisonment	%
1970-1980	103	60	59%	43	41%
1981-1991	194	126	65%	68	35%

[Table — 2]

B. Survey X-Rayed

This short review was conducted to examine the effect of the doctrine of "Rarest of Rare" in order to test the hypothesis that the doctrine instead of bringing down the rate of death penalty has, in fact, contributed to its increase. The Bachan Singh decision in which the doctrine of rarest of rare was propounded was delivered in 1980. In this survey, all reported decisions involving death penalty which had come to either High Courts or Supreme Court have been studied. High Courts survey is complete only till 1990 i.e. first decade after the Bachan Singh case was decided.

The two Tables confirm that in the decade just before *Bachan Singh case* i.e. 1970-80, 61 cases came to the Supreme Court in which the question of death penalty was involved. Out of these 61 cases, in 23 cases the court confirmed the death penalty and in 38 it reduced death penalty to life imprisonment. Thus, in 37.7% cases the court confirmed death penalty. However, post-Bachan Singh case decade i.e. 1981-91, 101 cases were

disposed of by the Supreme Court in which the question of death sentence was involved. Out of these in 40 cases, the Supreme Court confirmed death penalty and in 61 cases it reduced death sentence into life-imprisonment. Thus, in approximately 40% cases the highest court of the land has awarded death penalty. It is significant that there *is an increase of 3% in the confirmation of death sentence by the Supreme Court itself. During 1990-99, in* 41.6% of cases Supreme Court confirmed the death sentence while during 2000-2010 Supreme Court confirmed death sentences in 35.7% cases. Therefore, there is hardly any significant impact on the award of death sentence. Moreover, at times there is upsurge. The doctrine was an attempt to reduce death penalties but it failed.

As far as High Courts are concerned, in the decade just before *Bachan Singh case*

i.e. 1970-80, a total of 103 cases came up before different High Courts and in 60 cases the High Courts confirmed the death penalty and in 43 cases the death penalty was commuted to life-imprisonment. Thus, in 59% cases the court confirmed death penalty. On the other hand, in the decade after *Bachan Singh case* i.e. 1981-91, 194 cases were disposed of by the High Courts, out of which in 126 cases the death penalty was confirmed and in only 68 cases the High Courts changed death sentence to life-imprisonment. Thus, in approximately 65% cases the High Courts awarded death penalty, *an increase of 6%.*

A study of Amnesty International along with PUCL on the judgments of the Indian Supreme Court (between 1950 to 2006) reveals various crucial facts on application of "rarest of rare". Notwithstanding all recent judgments of the Supreme Court being reported in various journals, this has not always been the case and many judgments prior to the last two decades may have never been reported at all. In some cases, court may have marked certain cases as "not to be reported at all" for various reasons. Contrary to popular belief, not all the cases involving death penalty are granted leave to appeal by the Supreme Court and orders for dismissal of Special Leave petitions are almost never reported. The report also mentioned that in the recent past most condemned prisoners have been able to access to Supreme Court even through assistance from prison authorities or through Supreme Court Legal Service and Legal Aid Committee, this was not always the case and therefore it cannot be assumed that all the cases in the past reached to the Supreme Court.

The impact of *Bachan Singh case* was tangible but it was not followed in all the cases consistently by the Supreme Court. In few cases, some benches awarded 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. In fact, a

two-paragraph judgment in *Gayasi* v. *State of U.P.*,[51] and *Mehar Chand* v. *State of Rajasthan*,[52] no reference at all was made to 'rarest of rare' principle or *Bachan Singh case*.

We examined cases where judges have mentioned *Bachan Singh case* without displaying the real understanding or sentiment of rarest of rare or the compulsion of comparing the aggravating and mitigating circumstances. In *Suresh Chandra Bahri* v. *State of Bihar*,[53] *the court found several aggravating factors* as described in *Bachan Singh* v. *State of Punjab* and *Machhi Singh* v. *State of Punjab*,[54] but there was no ostensible effort on the part of judges to scrutinize the mitigating circumstances. Similarly, in *Suresh and* v. *State of Uttar Pradesh*,[55] the Supreme Court largely engrossed on a point of law but little on sentencing. It only archives the arguments of defence counsel that the case did not fall within the purview of "*rarest of rare*" and further states that court does not approve these arguments. Recently Yakub Memon was executed after being in jail for 21 years on his birthday and it was claimed that due process of law was followed which many people doubt. Whether it is Maharashtra Jail Manual or Supreme Court ruling in *Shatrughan Chauhan* v. *Union of India*[56] which provided that there must be a gap of 7 days or 14 days respectively between the rejection of mercy petition by the President and the execution, were annulled by the Supreme Court on the ground that this was not the first mercy petition. However, another constitutional technicality which could not get the attention of the judges was the rejection of mercy petition by the President on the advice of the Home Minister. The Constitution vests clemency powers in the President which can be exercised only

on the aid and advice of the council of ministers. Amazingly, Yakub's mercy petition was rejected by the President on the advice of the Home Minister, which is certainly against constitutional principle and due process. But now he is hanged and it won't be possible to restore *status quo ante*. This is precisely one of the reasons why death penalty must be abolished in our country.

IX. RECENT TREND: FALLING JUST SHORT OF RAREST OF RARE

A new and of course progressive trend "*falling just short of rarest of rare*" can be seen in *Swamy Shraddananda (2)* v. *State of Karnataka*[57] *where Supreme Court looked at whole issue from a somewhat different*

angle. Taking into account the totality of facts and circumstances the imposition of death sentence was converted into life imprisonment. The Court observed:

> *The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment that subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then the Court should do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the court, i.e., the vast hiatus between 14 years' imprisonment and death. It needs to be emphasized that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.*[58]

This current trend was followed by this Court many other recent cases viz. *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*,[59] *State of U.P.* v. *Sanjay Kumar*;[60] *Gurvail Singh* v. *State of Punjab*,[61] and *Sandeep* v. *State of U.P.*[62] where court was of the considered opinion that ends of justice would meet if they are awarded the sentence of 30 years without remission instead of death. The Supreme Court very explicitly declared in Santosh Bariyar case:

> *We have previously noted that the judicial principles for imposition of death penalty are far from being uniform.*

Without going into the merits and demerits of such discretion and subjectivity, we must nevertheless reiterate the basic principle, stated repeatedly by this Court, that life imprisonment is the rule and death penalty an exception. Each case must therefore be analysed and the appropriateness of punishment determined on a case-by-case basis with death sentence not to be awarded save in the 'rarest of rare' case where reform is not possible.[63]

X. CONCLUSION

The hypothesis which is tested here is that 'after the doctrine of rarest of rate there is no substantive change in the award of death penalty' is proved positively. There is a difference between the Supreme Court's attitude and that of High Courts. The High Court's appear to be more inclined towards awarding of death penalty in comparison with the Supreme Court. This difference can be explained by applying the theory that the greater the distance from the scene of the crime, the more lenient would be the attitude of the court in awarding the sentence. Because High Courts are closer to the scene of the crime they are less philosophical and more realist as far as death sentence is concerned. What is most discouraging is, the fact that at times there was a split verdict on the issue of case falling under rarest of rare doctrine? In our opinion if there is split verdict, the case cannot fall under the rarest of rare doctrine and death penalty cannot be given in such a situation. The increase in the number of death penalty cases can further be explained by considering the overall increase in capital cases and deteriorating law and order situation in the country. Notwithstanding all this, we argue that the death penalty would not bring down the rate of criminality. In fact, arguments for the abolition of this most cruel punishment are much weighty. The 262nd Report of Law Commission of India has recommended the abolition of the death sentence for all offences except "terrorism related offences" is a progressive and welcome move but it would not be easy to bring consensus amongst law makers soon. The Supreme Court must follow its progressive trend. Finally, we would like to end by citing the argument of Robespierre in the French Assembly that still holds good:

> *Listen to the voice of justice and of reason! It tells us and tells us that human judgments are never so certain as to permit society to kill a human being judged by other human beings …….. Why deprive yourselves of any chance to redeem such errors? Why condemn yourselves to helplessness when faced with persecuted innocence.*

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[1] Raina, A.K., Some notes on the '*Stockholm Declaration for Abolition of the Death Penalty*' quoted in (Gupta, Subhash), Capital Punishment in India, Deep & Deep, New Delhi (1986) p. 97.

[2] Gupta, Subhash, *Ibid*, p. 17.

[3] Ancel Marc, "*The Problem of Death Penalty*", in Capital Punishment ed. By Sellin T., New York (1967 P. 5.

[4] *Ibid*. p. 5.

[5] *Ibid*.

[6] *Ibid*, p. 6.

[7] Radzinowicz, L. *A History of English Criminal Law and Its Administration from 1750*, Vol. I (1948) p. 3001 (Note, P. 348).

[8] Ancel Marc, *Supra* note 3, p. 6.

[9] Report of the Legislative Assembly Debates Vol. 2 (1937), p. 4.

[10] *Ibid*, Vol. 3, Shimla, 1933 p. 2538.

[11] Report of the Legislative Assembly Debates vol. 4 (1946), p. 2770.

[12] Law Commission of India (1967), Thirty fifth Report on Capital Punishment, Vols. I & II.

[13] Sethna, J.M.J., *Society and the Criminal*, fifth ed. (1989) Tripathi, Bombay, p. 231.

[14] See Generally, Hart, H.L.A., *Punishment & Responsibility (1968)*.

[15] Stutsman, J.O., *CURING THE CRIMINAL*, Macmillan, New York (1926), pp. 335-336.

[16] Henting, H.: *Punishment — Its Origin, Purpose And Psychology London (1937)*, PP. 169-170.

[17] Abrahamsen, D.: *The Psychology of Crime*, New York (1960), p. 246.

[18] Phillips, Wendell, Selected Articles on Capital Punishment, New York, (1925), p. 247.

[19] Green, W.A., "*An ancient Debate on Capital Punishment*", SELLIN, *Supra* note 3, pp. 50-51.

[20] *Kehar Singh* v. *Union of India*, (1989) 1 SCC 204.

[21] Beccaria, C., "*On the penalty of Death*", Sellin, *Supra* note 3, p. 40.

[22] *Supra* note 3, p. 51.

[23] U.S. Bureau of Justice Statistics (1990:9), reporting findings of a survey of state prison inmates in 1986; See Generally, Rapaport, Elizabeth, "The Death Penalty and Gender Discrimination", Law & Society Review, Vol. 25, No. 2 (1991) pp. 367-383.

[24] Brearley, H.C., "*The Negro and Homicide*", Social Forces, Vol. IX (1930), p. 252.

[25] Spohn, Cassia, "*The Sentencing Decisions of Black and White Judges Expected and Unexpected Similarities*", Law & Society Review, Vol. 24, No. 5 (1990), pp. 1196-1216.

[26] Bedau, Hugo, Adam "*Capital Punishment*", Kadish, *H. Sanford Encyclopaedia of Crime and Justice*, Vol. I New York 91983), p. 134.

[27] *Ibid*. p. 135.

[28] See Generally, United Nations — Capital punishment (1962).

[29] Amnesty International Report, Todesstrafe Die, 1979.

[30] The penal code provides for the imposition of capital punishment in several sections such as sections 121, 132, para 2 of Sections 194, 302, 305, para 2 of sections 307 and 396.

[31] Except that section 303 which provided for mandatory death sentence has been struck down as unconstitutional. See *Mithu* v. *State of Punjab*, (1983) 2 SCC 277 : AIR 1983 SC 473.

[32] Siddique, Ahmad, *Criminology — Problems & Perspectives* Second ed. (1983), p. 297.

[33] *Ibid*., p. 298.

[34] *Jagmohan Singh* v. *State of U.P.*, (1973) 1 SCC 20 : AIR 1973 SC 947.

[35] Blackshield, '*Capital Punishment in India*', 21 Journal of Indian Law Institute (1979).p. 137.

[36] *Ediga Anamma* v. *State of A.P.*, (1974) 4 SCC 443.

[37] See Generally, Mustafa, Faizan, '*Commutation of Death Sentence — Inconsistent Response of the Supreme Court*', Civil & Military Law Journal Vol. 28, No. 1, pp. 23-31.

[38] *Rajendra Prasad* v. *State of U.P.*, (1979) 3 SCC 646.

[39] *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : AIR 1980 SC 898, 945.

[40] These sections are: Sections 121, 121-A, 122,124-A, 125, 130, 131, 132, 194, 222, 225, 232, 238, 255, 302, 304 Part I, 305, 307, 311, 313, 314, 326, 329, 363-A, 364, 364-A, 371, 376, 388, 389, 394, 395, 396, 400, 409, 41 2, 413, 436, 438.

[41] (1983) 2 SCC 277 : AIR 1983 SC 473.

[42] (1983) 2 SCC 277 : AIR 1983 SC 473.

[43] Law Commission of India. "*Forty Second Report*" (1971), P. 239.

[44] See Generally, Sellin, T. The '*Penalty of Death*', London (1980), according to the U.S. statistics, out of 6835 life-convicts who were released on parole, 310 were returned to prison for new crimes committed by them while

on parole. Out of these 310, only 21 parolees were returned on the charge of murder, P. 115.

[45] Lucknow Law Times, January 1989, (Part II). Act No. 2 of 1989, Received the Assent of President on 6th January, 1989. The amended Section 27 stands as follows:

a) Whoever uses any arms or ammunition in contravention of Sec. 5 shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

b) Whoever uses any prohibited arms or prohibited ammunition in contravention of Sec. 7 shall be punishable with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine.

Whoever uses any prohibited arms or prohibited ammunition or does any act in contravention of Sec. 7 and such use or act results in the death of any other person shall be punishable with death (emphasis supplied).

[46] (2012) 3 SCC 346.

[47] *Ibid*.

[48] The Hindustan Times, Aug. 21, 1994, Sunday Magazine P. 5.

[49] See section 2(1) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

[50] Sellin, *Supra* note 3, P. 220, Also see Tharyan, *P. Capital Punishment — Vertige of Pitiless' Age*, Hindustan Times, Feb. 1, 1989.

[51] (1981) 2 SCC 712.

[52] (1982) 3 SCC 373 (2).

[53] 1995 Supp (1) SCC 80 : AIR 1994 SC 2420.

[54] (1983) 3 SCC 470.

[55] AIR 2001 SC 1344.

[56] (2014) 3 SCC 1.

[57] (2008) 13 SCC 767.

[58] *Ibid*.

[59] (2009) 6 SCC 498.

[60] (2012) 8 SCC 537.

[61] (2013) 2 SCC 713.

[62] (2012) 6 SCC 107.

[63] *Supra* n. 59.