Chapter - IV

DEATH SENTENCE: A CRITICAL ANALYSIS

[1] CONSTITUTIONAL VALIDITY OF DEATH SENTENCE

Indian constitution is an amalgam of many constitutions, i.e., the constitution of America, Britain and Japan. It should not surprise anyone, therefore, that the main provisions of the constitution of India guaranteeing the right to life has been lifted from the American and the Japanese constitutions. It may be added here that what we have borrowed is the form or style of expression and not the right itself. The right to life is not the something that constitutions create or even confer. The constitution only recognises this inalienable and indispensable right. The constitutional provision is therefore, only evidentiary value. Allan Gledhill has given an interesting statement regarding it, which is:

In some of the older countries the right to life and liberty receives more effective protection from constitutional conventions than they do in countries with constitutions elaborating the right. The degree of personal liberty enjoyed by the average Indian is not remarkably less than that enjoyed by a citizen of any other parliamentary democracy.¹

In a case under Section 302 of the IPC, the judges are supposed to choose between death and imprisonment for life. They enjoyed a discretion to that effect, though the discretion is not totally unqualified. The question of life and death is left to a judge, susceptible to value preferences and error or judgement like any other. It is here that the constitutionality of laws providing Death Penalty becomes suspect.

In addition, the constitution of India guarantees to every person a fundamental right to life subject to its deprivation by the procedure
established by law, it can be argued that sentence of death in the present form violates the citizen's right to life.

Further Art. 14 of Constitution declares "equality before law and equal protection of the laws", which means that no person shall be discriminated against unless the discrimination is required to achieve equality. The concept of equality incorporated in Art. 14 finds echo in the preamble to the constitution. Capital sentence, it seems, is therefore, an anti-thesis of one's right to life.

It is an indisputable fact that there is nothing in the Constitution of India which expressly holds capital punishment as unconstitutional, though there are provisions that suggest that the constitutional scheme accepts the possibility of capital punishment. However, there are several provisions in the constitution such as the preamble, the Fundamental Rights and Directive Principles which can be relied upon for challenging the constitutionality of capital punishment. It is clear that only a limited category of serious offenders visited with capital punishment. That means a person's life is liable to be extinguished any time after he has extinguished the life of another or committed some other serious offence. The crux of the whole issue is that each one of us has an inherent right to life and none of us can divert any one of this precious right, and, if he does so, it has to be at the cost of his own life. There are numerous legal luminaries who argue that the very fact that the death penalty is retained in Indian criminal statutes runs counter to one's right to life. It is submitted that these learned jurists probably overlook the fact that even right to life is not an absolute right. In America, the constitutionality of death penalty has been challenged in various cases - For instance in Furman’s case, capital sentence was challenged on the ground of its violating in Eighth and Fourteenth Amendments. Five judges invalidated
the Georgia death penalty statutes while four justices delivered the dissent. Out of the majority justice, only two judges Brennenj and Marshall J. declared all capital punishment unconstitutional. The other three justices, justice Douglas, Stewart and White, who constituted the majority declared the death penalty in this particular case because of certain factors like wide discretion granted to judges and juries and the racial discrimination. Justice Brennenj declared death penalty in general unconstitutional, as being violative of the Eighth Amendment of the U.S. Constitution. Explaining the import Eighth Amendment, the learned judge observed:

At bottom, then, the cruel and unusual punishments clause prohibits the infliction of uncivilized and inhuman punishments. The state, even as it punishes, must treat its members with respect of their intrinsic worth as human beings. A punishment is “cruel and unusual” if does not comfort with human dignity.6

Justice Marshall also declared death penalty as constitutionally impermissible. The judge referring to the discrimination inherent in it, made the following significant observation:

Usually the poor, the illiterate, the under privileged, the member of the majority group. The man who, because he is without means, and is defended by a court appointed attorney - who becomes society's sacrificial lamb.7

Chief Justice Berger dissented and justice Blackman , Powell and Rehnquist joined him. The learned chief justice rejected the. Argument that death penalty is cruel and unusual cruel in the very day sense of the word and unusual because of its limited use.

In India there is no Eighth Amendment, yet the constitutionality of death penalty was challenged a number of times mainly in pursuance of
Articles 14 and 21. In Buddha’s case judicial discretion was challenged. Justice S.R. Das rejected the challenge, and observed quoting Stone, C.J. in Snowden v/s Hughes.

The judicial decision must of necessity depend the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there is shown to be present in it an element of international and purposeful discrimination.

Constitutional validity of the capital punishment as provided in the Indian Penal Code has been challenged in many cases and so far as the Supreme Court has always upheld that the capital punishment provided in the Indian Penal Code is constitutionally valid. However the abolitionists have not become disheartened by various pronouncement of the Supreme Court declaring capital punishment to be constitutional. The various arguments given by the abolitionists in support of their contention that capital punishment is unconstitutional and replies to their contentions by the Retentionists who argue that capital punishment as provided at present is fully constitutional may be summarised as follows:

Constitutionality of capital punishment may be considered in respect of two aspects of the matter. Firstly, the question is whether the capital punishment as such is unconstitutional and cannot be awarded in any case whatsoever. In other words, the problem is whether capital punishment cannot be awarded for any offence and by following any procedure at all. Secondly, the question is that even though the capital punishment as such may not be unconstitutional, whether capital punishment as provided in various sections of the Indian Penal Code is unconstitutional because the provisions of the Indian Penal Code forwarding capital punishment, is violative of certain provisions of the
constitution. These two aspects of the matter may have to be considered separately so as to have a clear vision on the subject at issue.

(i) Constitutionality of capital punishment as such.

(ii) Constitutionality of the provisions of I.P.C. providing for capital punishment.

But before discussing these two issues, we have to discuss the cases in which constitutionality of the death sentence was challenged.

In Jag Mohan Singh V. State of U.P., the validity of death sentence was challenged on the ground that it was violative of Articles 19 and 21 because it did not provide any procedure. It was contended that the procedure prescribed under Cr. P.C. was confined only to findings of guilt and not awarding death sentence. The Supreme Court held that the choice of death sentence is done in accordance with the procedure established by law. The judge makes the choice between capital sentence or imprisonment of life on the basis of circumstances and facts and nature of crime brought on record during trial. Accordingly a five member Bench of the court held that capital punishment was not violative of Articles 14, 19 and 21 and was therefore constitutionally valid. After the decision of Jagmohan's case the constitutional validity of death sentence was not open to doubt. But in Rajendra Prasad V. State of U.P., Krishna Iyer, J., held that capital punishment would not be justified unless it was shown that the criminal was dangerous to the society. He further held that giving discretion to the judge to make choice between death sentence and life imprisonment on "special reasons" under section 354(3), Cr.P.C., would be violative of Art. 14 which condemns arbitrariness. He pleaded for the abolition of death sentence and retention of it only for punishing "white collar offences", Sen, J., in his dissenting judgment held that the question whether the death sentence should be
abolished or the scope of section 302 I.P.C. and section 354(3) should be curtailed or not is a question to be decided by Parliament and not by the court. It is submitted that the minority judgment is correct because after the amendment in the I.P.C. and the decision in Jag Mohan Singh's case the death penalty is only an exception and the life, imprisonment is the rule. The discretion to make choice between the two punishments is left to the judges and not to the executive.

In *Bachan Singh V. State of Punjab* the S.C. by majority overruled Rajendra Prasad's decision and has held that the provisions of death penalty under section 302, I.P.C. as an alternative punishment for murder is not violative of Article 21. Article 21 of the constitution recognises the right of the state to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law. In view of the constitutional provision by no stretch of imagination it can be said that death penalty under section 302, I.P.C. either per se, or because of its execution by hanging constitutes an unreasonable cruel or unusual punishment. The death penalty for the offence of murder does not violate the basic feature of the constitution. The International covenant of civil and political Rights to which India has become party in 1979 do not abolish imposition of death penalty in all circumstances. All that it requires is, that (1) death penalty should not be arbitrarily inflicted, (2) it should be imposed only for most serious crimes. Thus the requirements of International Convenant is the same as the guarantees or prohibitions contained in Articles 20 and 21 of our constitution. The Indian Penal Code prescribes death penalty as an alternative punishment only for henious crimes. Indian Penal laws are thus entirely in accord with international commitment.
In **Deena V. Union of India**\(^{14}\) the constitutional validity of section 354(5) I.P.C. 1973 was challenged on the ground that by rope as prescribed by this section was barbarous, inhuman and degrading and therefore violative of Art. 21. It was urged that state must provide a humane and dignified method for executing death sentence. The court unanimously held that the method prescribed by section 354(5); for executing the death sentence by hanging by rope does not violate Art. 21. The court held that section 354(5) of the I.P.C., which prescribed hanging as mode of execution laydown fair, just and reasonable procedure within the meaning of Art- 21 and hence is constitutional. Relying on the report of U.K. Royal Commission 1949, the opinion of the law commission, opinion of Prison Advisers and forensic medicine, the court held that hanging by rope is the best and least painful method of carrying out the death sentence than any other methods. The judges declared that neither electrocution, nor lethal gas, or shooting, nor even the lethal injection has "any distinct or advantage" over-the system of hanging by rope.

In **Attorney General of India V. Lachmi Devi**\(^{15}\) has been held that the execution of death sentence by public hanging is barbaric and violative of Art. 21 of the constitution. It is true that the crime of which the accused have been found to be guilty is barbaric, but a barbaric crime does not have to be visited with a barbaric penalty such as public hanging.

In **Triveniben V. State of Gujarat**\(^{16}\) it has been held that a person sentenced to death is also entitled to procedural fairness till his last breath of life. Art 21 demands that any procedure which takes away the life and liberty of such person must be reasonable, just and fair. Undue delay in disposal of mercy petition by the President would certainly cause mental torture to the condemned prisoner and therefore would be volatile of
Article 21. A condemned prisoner has to suffer a degree of mental torture even though there is no physical mistreatment and no primitive torture. He may be provided with amenities of ordinary inmates in the prison/ but nobody could succeed in giving him peace of mind. In such a situation, the court will examine the delay factor in the light of the circumstances of the case and in appropriate cases commute death sentence to the sentence of life imprisonment.

In Madhu Mehta V. Union of India\textsuperscript{17} the mercy petition of the petitioner who was sentenced to death was pending before the President of India for about 8 or .9 years. This matter was brought to the notice of the court by one Madhu Mehta, the National Convenor of Hindustani Andolan. Following Triveniben's decision the court directed the death sentence to be commuted to life imprisonment as there were no sufficient reasons to justify such a long delay in disposal of the convict's mercy petition. Speedy trial in criminal cases is implicit in the broad sweep and content of Art. 21. This principle is no less important for disposal of mercy petitions.

Now, we shall discuss the two points so as to have a clear vision on the subject at issue:

(i) Constitutionality of capital punishment as
(ii) Constitutionality of the provisions of I.P.C. providing for capital punishment.

\textbf{(i) Constitutionality of Capital Punishment as such:}

The abolitionists contend that the very concept of the death sentence is against the various provisions of the constitution. They argue that Art. 19 of the constitution grants fundamental rights to various human freedoms. No doubt reasonable restrictions may be imposed on these freedoms on various grounds in that article. The crux of these
grounds is that the restrictions on freedoms must be reasonable and must also be in public interest. However the state is not empowered to take away all these freedoms in to. For example the state may provide that the freedom of speech will be subject to the condition that no citizen shall say anything which may be harmful to security of the state. But the state cannot order that a citizen will not speak at all. Similarly, the state is not empowered to order that a citizen will not form any kind of association or move in any part of India or reside anywhere in India or abroad or any profession business or occupation at all which is the effect of capital punishment. By awarding capital punishment to a citizen the state takes away all his freedoms granted under Article 19 of the constitution and does not merely impose reasonable restrictions on them. On the other, hand the Receptionists argue that by awarding capital punishment the state prevents citizens from murder by destroying their freedoms which are granted to them under Article 19(a). The grant of certain freedoms to citizen does not mean that any citizen may exercise them so as to destroy similar freedoms of others. The object of awarding capital punishment is to regulate the freedom of citizens in such a way that all may not remain confined to a few stronger citizens only. Moreover the highest court of justice in this country has held in more than one case that reasonable restrictions may extend even to total prohibition, if the facts and circumstances of a particular case so demand. It follows that capital punishment as such is not unconstitutional being violative of Article 19 of the constitution.

The abolitionist further argue that Article 21 of the constitution guarantees the right to life. It imposes a restriction on the state not to deprive a person of his right to life except according to procedure established by law. Nothing is a good law which does not give effect to
the fundamental values and purposes of the constitution. Thus, they argue that the death sentence being not in keeping with the constitutional values and purposes is violative of Article 21 of the constitution. Against this the Receptionists argue that Article 21 instead of denoting that capital punishment is prohibited by the constitution denotes that even life of a citizen may be taken away by the state under certain circumstances but only according to the procedure established by law. It follows that subject to the restrictions imposed by Article 21, capital punishment is constitutionally permissible. No doubt the procedure referred to in Art. 21 must be fair, just and reasonable. But that does not follow that even the capital punishment awarded according to the fair just and reasonable procedure prescribed by law would be unconstitutional. Thus capital punishment is contemplated by Article 21 itself and there is no question of its being unconstitutional in its entirety.

Besides countering the arguments of abolitionists about the unconstitutionality of capital punishment on the ground of violation of Articles 19 and 21, the retentionists argue that Article 72, which confers power on the President in pardon, remit, or commute a sentence of death contemplates capital punishment. Similarly Article 161 of the constitution which confers similar powers on the Governor of a state, also contemplates capital punishment. Thus Articles 21, 72 and 161 clearly indicate that the founding fathers proceeded on the assumption that capital punishment as such is constitutional unless the law providing for capital punishment violates any of the provisions of the constitution.

(ii) **Constitutionality of the provisions of I.P.C. providing for capital punishment**

Under the Indian Penal Code, there are provisions which provide capital punishment as alternative to the punishment of
imprisonment for life. The arguments given by the abolitionists against the constitutionality of the provisions of I.P.C. providing for capital punishment covers only those sections of the code where death sentence is an alternative sentence but do not cover cases when death sentence is the only sentence provided for the" of death is violative of Article 14 of the constitution because of the discrimination between the citizens as life imprisonment may be awarded to some convicts while death sentence may be awarded to others. They argue that it is also violative of Article 245 of the constitution by reason of excessive delegation of legislative powers to the judiciary. Their contention is that the legislature has not made reasonable classification on the basis of which court could avoid capital punishment nor has the legislature laid down any principles on the basis of which the court could make such classification that awarding sentence of death or imprisonment for life. They argue that a study of decided cases would reveal that in similar circumstances, death sentence is awarded while the imprisonment for life has been awarded in other cases. It shows that arbitrariness in the matter of choosing death sentence instead of imprisonment for life which is awarded in other cases Against this the receptionists argue that alternative sentence of death as provided in sections of the I.P.C. does not violate Article 14 or 245 of the constitution. They argue that it is not possible for the legislature to provide for the exact quantum of sentence to be awarded in different cases. In most of the sections of the I.P.C. the courts have been given ample discretion in the matter of awarding actual sentence subject to the maximum laid down for a particular offence by the legislature. The reason is obvious; the legislature can not foresee all the facts and circumstances in which different offences may be committed. Therefore, sufficient discretion must as of necessity be given to the courts in the
matter of awarding sentence keeping in view all the facts and circumstances of a given case. Moreover, the judges are by the very nature of their profession trained to decide cases objectively and not subjectively. It follows that the indecent be no question of arbitrariness in the matter of awarding sentence in a given case. Moreover, S. 235(2) of the code of Criminal Procedure 1973 provides for a separate hearing on the question of sentence after an accused has been convicted of an offence. This further obviates the fear of arbitrariness in the matter of providing death sentence. Besides this S. 354(3) I.P.C. requires special reasons to be given for awarding death sentence. In the very nature of things the judges would be inclined to adopt the easy course of awarding imprisonment for life instead of taking the trouble of giving special reasons for giving death sentence. Unless they find that the brutality and gruesomeness of the accused demand that death sentence should be awarded to him. It follows that death sentence will be awarded after due consideration and not arbitrarily. The retentions further point out that after the award of death sentence by the session the case has to go to the High Court for confirmation and the accused has also right to appeal to the High Court against the decision of the session’s judge and further to the Supreme Court if the High Court goes against him. Moreover, it has been held by the Supreme Court in a number of cases that where power is given to a high officer, there is a presumption that it will not be used arbitrarily without due consideration. If it be so there can be definite presumption that the highest court of justice in the country would not allow death sentence unless there are special reasons to do so.

**Desirability of Capital Punishment:**

The abolitionists argue that even if capital punishment is constitutionally permissible, it is not desirable for the society to take the
life of a man merely because his mind had at one time derailed and the India his imbalance mind committed wrongful act. Sometimes, the abolitionists even argue that the capital punishment being undesirable cannot be held to be constitutional. On the other hand, the receptionists argue that capital punishment may not foe desirable as a general rule but it may be necessary in certain exceptional cases.

[2] PHASE WISE CHANGE IN JUDICIAL MIND IN AWARDING DEATH SENTENCES

The attitude of the Supreme Court of India towards death penalty has been considerably changed to one of observing more lenience to the offender when his life is at peril. The court has to overcome many fetters imposed by statutes. Thus, in Joseph Vs. State of Goa, Daman\textsuperscript{18} Justice V.C. Krishna Iyer stated that judges are bound by the statutes by the oath of their office.\textsuperscript{19} This helplessness is implicit in many decisions and in some cases the Supreme Court has gone to the extent of mentioning it.\textsuperscript{20}

In order to understand the judicial attitude towards death penalty in the last five decades, this period can be divided in five phases depicting the judicial response to the legislative changes made in this direction in IPC's as well as Cr.PC's old codes. The five phases may be-

Phase I When Death Penalty was a rule (1950-55)
Phase II Age of Judicial Discretion (1955-73)
Phase III When Life Imprisonment was a Rule (1973-80)
Phase IV Birth of the Doctrine: "Rarest of Rare Case"(1980-83)
Phase V Post Bachchan Singh's Case Era (1980-nwards)

The cases divided in these phases clearly indicate the trend of judicial mind during the last 50 years.
Phase I - When Death Penalty was a Rule (1950-55)

In our country under the Code of Criminal Procedure, 1898 death sentence was a rule and life imprisonment an exception in capital offences and whenever the court preferred to award a lesser sentence than death in such offences it was required under section 367(5) of Cr. PC., 1898 to record its reasons in writing).

Thus, in *Kirpal & others Vs. State of U.P.*\(^2^1\), the Supreme Court held.

The appellant's act may probably be said not to be premeditated in the sense that he preplanned or lay in wait to get an opportunity to kill the deceased Jairaj. But it is obvious that when he found him in a fallen and helpless position lying on the ground, he must have been actuated by the pre-existing enmity to finish the man. The nature of his stab was brutal and fatal and this throws light on his deliberate intention. In such case, we have no doubt to agree with the High Court, in awarding him the sentence of death".

Moreover, *In Sunderlal Vs. State of M.P.*\(^2^2\), where both the deceased and the accused went to a goldsmith with some ornaments. The Court found that the ornaments were established to be of deceased and the accused could not give any satisfactory explanation as to how he came in possession of the same. The Court held that "the circumstantial evidence, therefore, was sufficient to hold the accused responsible for murder of the deceased and the accused was rightly convicted of the offence under sec. 302 IPC and sentenced to death."\(^2^3\)

However, the Court, in order to award lesser punishment, had to state reasons, thus, in *Dilip Singh Vs. State of Punjab*\(^2^4\) the Supreme Court held:
"This is a case in which no one has been convicted for his own act but is being held vicariously responsible for the act of others. When there are no means of determining, who inflicted the fatal blow and who took in a lesser part, a judicial mind can legitimately decide to award the lesser penalty."

Phase II - Age of Judicial Discretion (1955-73)

Later on by an amendment in the year of 1955 section 367(5) of the Cr.P Code, 1898 was omitted and thus, thereafter the courts became free to award either death sentence or life imprisonment. The perusal of following cases indicate the judicial mind to deal with the death sentences.

Thus, in Jaghir Singh Vs. State of Punjab\(^{25}\) where a person is murdered in a cruel fashion. The dead body is taken in a procession on a mare by the accused persons for a distance of one mile. At the end of this horrid procession they chop away the head of the deceased. The Supreme Court deprecated such a dastardly act and observed:

"The murder was ruthless and cold-bloodied. There are no extenuating circumstances and Supreme Court found it just and proper to inflict death penalty.\(^{26}\)

But, in Mohan Singh Vs. State of Punjab\(^{27}\) - the Supreme Court observed that Session's Judge sentencing accused, who were vicariously liable but who did not give fatal blow, to imprisonment for life, while sentencing Mohan (appellant), who was believed to have given fatal blow, to death penalty. Supreme Court, however, held if the test applied by the session's judge was correct, then Mohan too should have given the benefit of that test and the circumstances, so imprisonment for life would more appropriate for him than death penalty.\(^{28}\)
The Supreme Court inspired by an expert study, was of the opinion in *Om Prakash vs. State of Haryana*\textsuperscript{29}, that imposition of death sentence on accused, a boy of 19 years, was excessive when two co-accused who were alleged to instigate the accused to fire the deceased, were given benefit of doubt.

Again *Hazara Singh vs. State of Punjab*\textsuperscript{30}, The Supreme Court held that where there was no pre-meditation and when the contending parties met accidentally and attacked each other, the conflict resulted in a sudden quarrel. The Court set aside conviction of death penalty under Sec. 302 IPC, but sentenced each one of them to imprisonment for ten years.

Similarly, weighing the facts and circumstances of the case, in *Sultan vs. State of Haryana*\textsuperscript{31}, Supreme Court observed that if death is caused by firing gun shots by two persons and it is found that the shots fired by one person were separately sufficient in the ordinary course of nature to cause death but the shot which the other accused hit was not sufficient to cause death, he can be awarded the extreme penalty of death even if he had fired the gun with the intention to kill.\textsuperscript{32}

But, in *Hukum Singh vs. State of U.P.*\textsuperscript{33} when the appellant was forcibly taking his cart through the crops, he was causing a struggle out of which the deceased lost his life. On appeal the Supreme Court held:

"When several persons are armed with lathis and one of them is armed with hatchets and are agreed to use these weapons in case they are thwarted in the achievement of their object, it is by no means incorrect to conclude that they are prepared to use violence in prosecution of their common object and that they knew that in the prosecution of such
common object it was likely that someone may be so injured as to die as a result of these injuries."  

(And also in Maghar Singh vs. State of Punjab\textsuperscript{35}, the deceased was murdered by his second wife, his son and his wife's paramour. On appeal the Supreme Court held:  

"It was a preplanned, cold-blooded and dastardly murder in which as many as seventeen injuries were caused on the deceased, most of which were on vital parts of his body. There are no extenuating circumstances to justify the giving of any lesser sentence by this court.\textsuperscript{36}

In certain clear cases where the offence is proved by circumstantial evidence, the Supreme Court had inflicted death penalty. As in Mohan Singh vs. State of UP\textsuperscript{37} the Supreme Court on the basis of evidence that shows that the accused gave the deceased three 'paras' and within half an hour he became ill and died within two hours, that the food which the deceased had taken did not contain any poison & that the chemical examination shows that he had died of arsenic poisoning, held the accused guilty of murder of deceased & confirmed the death punishment,  

**Phase III - Life Imprisonment as a Substitute of Death Sentence (1973-80)**

( Now the Code of Criminal Procedure 1973 in its Section 354 (3) provides that in case of death sentence special reasons are to be stated. *Now imprisonment for life was the rule and capital sentence was an exception,*

Thus, in Asgar vs. State of U.P.\textsuperscript{38} where Appellant Asgar has been convicted under Sec. 302 of IPC for intentionally causing the murder of one Ramswaroop Singh on account of an alleged dispute concurring the
repayment of debt. On appeal Supreme Court held (Justice UNITWALLIA):

"The High Court while confirming the death sentence does not seem to have clearly kept in view the change of law which was brought about by the 1955 amendment of the old code, when the High Court held":

"The murder was premeditated and we hardly find any extenuating circumstance in this case. He must, therefore, pay the extreme penalty of death".

But for giving extreme penalty *some case ought to have been made out by the High Court* as after the amendment, under the new code mere absence of extenuating circumstance in favour of accused is not enough for awarding extreme penalty."

Perhaps the social, economic and psychic conditions of the accused are one of the most conspicuous elements that persuade the Supreme Court for taking a lenient view of the criminals condemned to death. *Ediga Anamma vs. State of Andhra Pradesh,*\(^{39}\) is a striking example.

A woman ... and her child were murdered. The tragedy happened out of the jealousy of the appellant, a woman, beaten away by her husband and in-laws but finding solace in a middle-aged shepherd who had amorous clandestine relationship with both the deceased and the appellant. Reducing the death penalty on the appellant, the Supreme Court took account of the physical and psychic breakdown of the hopeless appellant in the following words:

"Here the criminal's social and personal factors are less harsh, her femininity and youth, her imbalanced sex and expulsion from the conjugal home and being the mother of a young boy these individually
inconclusive and communicatively marginal facts and circumstances tend
towards award of life imprisonment. We realise the speculative nature of
the correlation between crime and punishment in this case as in many
others, and conscious of fallibility, and the death penalty."

Some judgments also went for personalisation of punishment
taking into consideration both physical and mental state of accused in
reducing the extreme penalty. Thus, in Thanglah vs. State of Tamil
Nadu.\textsuperscript{40} The appellant was sentenced to death on the charge of
committing the murder of his wife, kothaiyaki. Justice Chandrachudh, for
Supreme Court, held that it is clear from the various facts and
circumstances of the case that he had committed the murder under the
grave stress of acute poverty for which he was taunted from time to time
by his wife and other relatives.

Considering that the appellant had led a happy married life with the
deceased for ten years and the fact that the couple has three small
children, \textit{the sentence may with some justification} be reduced to life
imprisonment.

However, in Suresh vs. State of Maharashtra\textsuperscript{41}, where the
accused was charged with murder of the deceased Manibai. The Supreme
Court found.

"That the evidence adduced by prosecution, that it was the
appellant alone who inflicted the stabs and thereby caused the death of
the deceased. The deceased was unarmed when the appellant came to the
room with the intention to kill her, although she tried to run away when
she received the first stab, the appellant pursued her and inflicted several
stabs on the vital parts of the body. There were as many as 13 injuries on
her body and seven among them were fatal. Thus, we see no mitigating factors and therefore, we confirm the sentence."

And to conclude, in **Rajendra Prasad vs. State of U.P.**\(^{42}\), the Supreme Court has observed that *capital sentence may be awarded where survival of the society is in danger*. The Court has expressed its fear that judicial discretion in awarding death sentence may turn out in judicial tyranny and thus, violate Art. 14 of the Constitution. In its opinion, section 302 IPC and Section 354(3) Cr.P.Code, 1973 have to be read in the humane light of part III and Part IV of the Constitution, further illuminated by the Preamble of the Constitution. Death sentence may be awarded in the case of planned motivation, white collar criminals, persons guilty of adulteration etc., hardened murderers beyond rehabilitation or where officers of law are killed by designers of murder. Further, special reasons stated by the Court in awarding death penalty must relate to criminal as well and not to crime alone.

**Phase IV: Birth of the Doctrine "Rarest of Rare Case" (1980-83)**

1973 to 1980, the legislative dictate has changed from death sentence being the norm to becoming an expection, and necessarily to be accompanied by reasons. **Bachan Singh vs. State of Punjab**\(^{43}\), was a landmark in the escalating debate on the question of the compatibility of the death sentence with Art. 21 of the Constitution. The Supreme Court while holding the validity of the death penalty expressed the opinion that a real and abiding concern for the dignity of human life postulates resistance for taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases, when the alternative option is unquestionably foreclosed.
However, the Court declined to formulate any aggravating or mitigating factors as it would fetter judicial discretion, but held that a murder "diabolically conceived and cruelly executed" may attract extreme penalty. It is not possible, the court opined, to feed numerous imponderable circumstances in an imperfect and undulating society.

But what are those rarest of rare occasions is the dilemma. What appears as brutal and gruesome, to one judge may not appear to be so to another. For example, in one case the murder of wife and two children with the motive of leading life with the paramour could not convince Krishna Iyer, J. for death penalty, while 'Sen, J. wondered what else could be a fit case for death penalty than the one at hand.

It is submitted that if the difference in perception is so glaring among two judges of the highest court in the country what is relative position among very large number of session's judges in the country.

It was, however, in Machchi Singh vs. State of Punjab\(^44\), where four men were awarded death sentence by the sessions court and the High Court for shooting down seventeen persons including men, women and children within their homes at night, in five incidents. The motive was a family feud. The Supreme Court upheld the death sentence of the three of the four persons. Justice Thakkar, speaking for the court, was impelled to attempt a definition of the 'rarest of rare' case\(^45\), thus:

1. When the murder is committed in any extremely brutal manner.
2. When the murder is committed for a motive which evinces total depravity and meanness.
3. Antisocial or socially abhorrent nature of the crime.
5. Personality of victim of murder eg. an innocent child or a helpless woman.

However, these are apparently the judicially evolved guidelines which are to assist the courts in determining sentence.

**Phase V: Post Bachchan Singh's Case Era (1983-Qwards) (A trial period to observe the post-effects of the doctrine)**

Marring rejected legislative prescription of existing guidelines, and have drawn up some frame work of reference for itself. Has the judicial hierarchy adhered to its own dicta? A perusal of the Supreme Court's decisions during the decade should, therefore, serve as pointers in understanding the judicial mind.

**Inconsistency**

**In Ujagar Singh vs. Union of India**[^46], where the accused was 17 years when the offence was committed. Taking into consideration the extreme young age of the petitioner, the Supreme Court set aside the sentence of death.

On the other hand, it may not be a relevant factor where the accused, "clearly shared the common intention of murder," the fact that he was between 18 and 20 years could not be an extenuating circumstance.[^47]

Similarly Dousing her for dowry, may be an offence worthy only of the death penalty in **Kailash Kaur vs. State of Punjab**[^48] or there may be factors external to the offence and the offender, like wrongful acquittal by the High Court, which may be forceful mitigating circumstance, even where it is a brutal bearing of a pregnant young wife (**Delhi Administration vs Laxman Kumar**)[^49]

[^46]: Page 209
[^47]: Page 209
[^48]: Page 209
[^49]: Page 209
Properly reasoned decisions are imperative, so that there is no mistake in understanding the judicial mind of all the powers of the courts. This power to deprive life naturally demands the most explicit exercise.

A term such as "terrific" murder has been considered too adjectival to fulfill the requirements of perceptible justice, for what murder is not terrific? (Muniappan vs. State of Tamil Nadu)\(^50\) & while the sessions court and the High Court had given "special reasons", the Supreme Court was not able to agree that this was a proper case for death sentence.

Till recently, it is very difficult to ascertain that what are exactly the rarest of rare cases and this criterion is still solely on the sweet will of the Judges. As in SK. Ishaque vs. State of Bihar\(^51\), murder of three persons by burning them with the help of kerosene inside a shop, absence of material on record showing which of the appellants actually sprinkled the kerosene and set the shop on fire or that they knew that there were three persons in the shop though appellants were armed with bombs and firearms but they did not use the same against the victims, the Supreme Court held that in such circumstances, death sentence is not justified.

Or, in Dharampal Singh vs. State of Rajasthan\(^52\), where accused intentionally causing injuries on chest of deceased by fire arms, civil, criminal and revenue cases pending between complainant party & the accused party prior to incident, it was held not a rarest of rare case.

Also in State of M.P. vs. Manohar Singh\(^53\), the accused, simply to gratify his greed, caused death of an old man and attempted to murder another old and helpless person, was not held as a rarest of rare case.

But in Panchi vs. State of U.P.\(^54\), accused persons armed with sharp edged weapons, entering house of deceased persons & butchering four persons to death including a five years old child and an old lady
mercilessly, the Supreme Court held that the appellants deserve nothing less than death sentence.

In an another case of *Duraiswamy Gounder vs. State*\textsuperscript{55}, in which accused attacking his wife and daughter with sickle in spur of moment without any premeditation, susequent conduct of accused in cutting himself by same weapon indicating his repentance for what he did, the court held that the circumstances are not one of the "rarest of rare cases" & thus imposing death penalty would deprive the accused of opportunity to reform himself & consequently taking care of his minor children.

But in *Suresh Chand Bahri vs. State of Bihar*\textsuperscript{56}, Conspiracy hatched by the husband with his two associates to kill his wife & two children simply to gain control over the property, murder of wife committed in an extremely brutal, gruesome, diabolical, revolting & dastardly manner as victim's body truncated into two parts in a most devilish style, the Court held such case as rarest of rare case & justified the High Court in confirming the death penalty.

Similarly in *Kanta Tiwari vs. State of M.P.*\textsuperscript{57}, the deceased was an innocent, helpless girl of 7 years of age, was kidnapped by the appellant, to whom she called her uncle. She was raped, strangulated to death and the dead body was thrown into a well. Holding the facts & circumstances, rarest of rare, the Supreme Court held that death sentence is eminently desirable not only to deter others from committing such atrocious crime but also to give emphatic expression to society's abhorrence of such crime.\textsuperscript{58}

**More Dimensions**

In these years the Supreme Court has had to decide on other death sentence related issues too.
1. With regard to the time factor in execution the attitude of the court is more than inconsistent. In *Ediga Annamma*\(^\text{59}\) Krishan Iyer, J. held that the prolonged agony has ameliorative impact according to the ruling of this court and in this case a delay of two years and two months was taken into account for commuting death sentence to life imprisonment. Similarly, in *Chawla vs State of Haryana*\(^\text{60}\) (1 year to 10 months), in *State of U.P. vs. La Ha Singh*\(^\text{61}\) (6 years) in *Bhagwan Bux Singh vs. State of U.P.*\(^\text{62}\) (3 years & 7 months) were considered by the court for commuting the sentence of death to life imprisonment. In *T.V. Vatheswaran vs. State of Tamil Nadu*\(^\text{63}\), the accused who was the architect of sensational, diabolical murders in Madras was sentenced to death in 1975 & was kept in solitary condemned cell for over 8 years awaiting to be executed. Justice Chiannappa Reddy frowned at this inhuman way of taking away life and quashed the sentence of death. The Court held that two years is the reasonable period and further delay is unconstitutional and violative of Art. 21.

This laudable decision of the court was, however, immediately overruled in *Sher Singh & Others vs. State of Punjab*\(^\text{64}\), and finally in *Triveniben vs. State of Gujrat*\(^\text{65}\), the court held that there can be no right for predetermined period for concluding that the delay in the execution of the death sentence is unconscionable and ought to be commuted to life imprisonment, the court retain the discretion to decide, thus there is a lot of inconsistency in deciding the time factor as a mitigating circumstance. In 1983, a three Judge Bench heard a challenge to execution of death sentence by hanging in *Deena alias Deen Dayal vs. Union of India*\(^\text{66}\).

The court, however, held that hanging is not unconstitutional. But in *Lachhmidive vs. State of Rajasthan*\(^\text{67}\), where a mother-in-law burnt her daughter-in-law for dowry, the Rajasthan High Court found her guilty
and in anger passed an order for execution of death sentence by public hanging. The case naturally caused a furore. The Supreme Court roundly condemned public hanging as a "barbaric practice" and a "revolting spectacle, harking back to earlier centuries".


*(Test of reasonableness of Capital Punishment in India)*

Protagonists of an "eye for an eye" philosophy demand "death for:

The Humanists, on the other hand, press for the other viz. death in no case. A synthesis has emerged in Bachan Singh v/s State of Punjab\(^6^8\) wherein the 'rarest of rare case'\(^1\), formula for imposing death sentence in a X murder case has been evolved by the Supreme Court. Identification of the guidelines spelled out in Bachan Singh in order to determine whether or not, death sentence should be imposed is one of the problems engaging our attention.

(A) **Significance and Extent**

The doctrine "rarest of the rare cases" is based on Gandhian theory, i.e., "hate the crime not the criminal". And thus, from this quotation, we can interpret the significance and extent of Death Penalty. And if we go through the deep study of it, we find that the court wants to say that the death-penalty should be awarded rarely and only in such cases which are heinous, affecting the humanity and are brutal.

The problem of Death Penalty is not very acute in respect of death sentences awarded by criminal courts in cases of general course of nature because death penalty is being awarded in very few cases of murder and in most of the cases of murder the alternative penalty of life imprisonment is awarded.
There is also one other characteristic of death penalty that is revealed by a study of the decided cases and it is that death penalty has a certain class complexion or class bias in as much it is largely the poor and the down-trodden who are the victims of this extreme penalty. We would hardly find a rich person going to the gallows whoever has money to hire the services of great talents, has a reasonable chance of escaping the gallows though he has really committed a murder. It is only the poor, the resourceless people who have nobody to support them, who usually go to the gallows. The death penalty in its operation is declaratory. Capital punishment Death penalty as pointed out by warden Duffly is a 'privilege of the poor.'

Keeping the above points in the view the Apex Court propounded the doctrine of "rarest of rare".

(B) Judicial Discretion and the Circumstances of the accused

In Jagmohan's case, the Supreme Court has held that the sentencing indiscretion is to be exercised judicially on "well recognised principles" after balancing all the aggravating and mitigating circumstances of the crime. By "Well recognised principles", the court meant the principles crystallised by judicial decisions, illustrating as to what are regarded as aggravating or mitigating circumstances. However, an exhaustive enumeration of aggravating or mitigating circumstances is not possible because every case has its own facts and circumstances and we can hardly find two cases having same facts and circumstances. Standardisation, thus, is impossible. Moreover, it may tend to defeat the very purpose of sentence and may produce opposite results too. So the exercise of judicial discretion on well recognised principles seems to be the safest possible safeguard for the accused. However, no doubt it is a
greater liability upon a judge, while dealing with the question of death penalty, to ponder over the case from all angles. He must take into consideration the nature of the offence, the circumstances of the crime, the degree of deliberation, the age, sex, character, education, family life and the antecedents of the criminal, and whether the accused is first offender or a habitual or a professional criminal, availability of different sentences i.e. alternative punishments and if all these things are taken into consideration then expect that a reasonable decision will come out.

The Indian Penal Code, Amendment Bill 1972 says, "The death sentence shall not be passed on a person convicted of a capital offence if at the time of committing the offence, he was under 18 years of age and death is not the only punishment provided for the offence. Thus the suggestion of Law Commission in it 35th report 1967 has been accepted in Penal Law of India.

In Raghubir Singh's Case72 Justice Krishna Iyer said, when the convict is in his 20's, it is not irrelevant in considering death sentence”. If an appeal is made against the death sentence for murder, to High Court and the judges agree on the question of guilt but differ on sentence, it is usual not to impose death penalty unless, there are compelling reasons for the extreme punishment. The Supreme Court has shown preference to life imprisonment in all cases except those which do not have extenuating circumstances at all.

In the Ediga Anamma73 and subsequently in Rajendra Prasad's Cases74, the Supreme Court by judicial legislation artificled "broad norms and essential principles", in respect of the sentencing choice under section 302 I.P.C. In the Ediga Anamma's case, the court said, where the murderer is too young or too old, the clemency of penal justice helps him,
where the offender suffers from socio-economic psychic, or penal compulsions insufficient extruciately long, may persuade the court to be compansionate. Likewise, if others involved in the crime and similarly situated, have received the benefits of life-imprisonment or if the offence is only constructive, or again, if the accused has acted suddenly under another’s investigation, without premeditation, perhaps the Court may humbly opt for life imprisonment even where a just cause or real suspicion of wife's infidelity pushed the criminal into the crime. On the other hand, the weapons used and the manner of their use, the horrendous features of the crime and helpless state of the victim and the like, steal the heart of the law for a sterner sentence”.

The court, thus, commended some sort of the principled pragmatism, and judicial liberalism, in the choice of the penal strategy. It emphasised that the consideration of dignity of man and a sublime value of human rights, penological humanisation must enter into judicial culturisation of the judges' choice in the matter of sentencing. It puts out the retributive idea from consideration of criminal justice.

The tangible guidelines and the relevant factors, which should in-articulately guide the court in its sentencing choice might include the degree of horrendous killing, individual and social motivation and psychological, social, cultural, spiritual, and secular norms. An instance and illustration of application of the articulated judicial legislation on the question was provided in the Shankaria's case.

In Shankaria's case\(^7^5\) he was accused for commission of a large number of crimes involving murders and attempted murders in certain areas of the state of Rajasthan, adjoining Haryana and Punjab. He made a clear confession of his guilt, the accused was convicted for double murder
on the basis of his confessional statement, which was retracted by him at the trial and on the basis of other circumstancial evidence, the crime was proved to be committed by him in a most brutal and dastardly fashion.

The court sentenced him to death, the High Court and Supreme Court dismissed the appeals and confirmed the Death Sentence. The Supreme Court observed "The grisly and gruesome nature of the murders, hapless and helpless state of the victims, the fiendish Modus operandi, of the accused killer (appellant) to kill and then steal, eat, smoke, and bathe himself mindless of the spectra of the slain and the groans and gasps of the dying, betrays an extreme depravity of character."

There are numerous other circumstances justifying the passing of the lighter sentence or the extreme punishment. None the less, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of Death Penalty must receive a liberal and expensive construction by the courts in accord with the sentencing policy - enshrined in section 354(3) Cr PC.

In Ranga-Billa case, Supreme Court upheld the Death Sentence of the accused on ground that murder was pre-planned, cold-blooded, and committed in most brutal manner, hence, there were no extenuating circumstances warranting mitigation of sentence.

In Chabil Prasad Agarwal's case the accused had been attempting to extract money from the unfortunate boy's father, even after the boy had been murdered by making the father to believe that the boy was alive and would be returned to him if he paid the ransam. This is one of the rarest of rare cases in which the extreme penalty of the death is called for, the Supreme Court confirmed the Death Sentence.
Chapter – 4

This rarest of rare yardstick does not in reality supply the specific criteria and what are those rarest of rare occasions, is the dilemma. It was, however, in *Macchi Singh vs. State of Punjab*\(^78\) that a division bench of the Supreme Court on July 21, 1983 made an attempt to define the 'rarest of rare cases'. Justice Thakkar speaking for the Court held that five categories of cases may be regarded as rarest of rare cases deserving extreme penalty. They are:

**Firstly: Manner of Commission of murder** - When the murder is committed in an extremely brutal manner so as to arouse intense and extreme indignation in the community, for instance, when the house of the victim is set a flame to roast him alive, when the body is cut to pieces or the victim is subjected to inhuman torture.

**Secondly: Motive** - When the murder is committed for a motive which evinces depravity and meanness eg. a hired assassin, a cold blooded murder to inherit property, or gain control over property of a ward, or a murder committed for betrayal of the motherland.

**Thirdly: Anti-social or socially abhorrent nature of the crime** - where a scheduled caste or minority community person is murdered in circumstances which arouse: social wrath; or bride burning for dowry, or for remarriage.

**Fourthly: Magnitude of the Crime** - Crimes of enormous proportion, like multiple murders of a family or persons of a particular caste, community or locality.

**Fifthly: Personality of victim of murder** - When the victim is an innocent child, a helpless woman, a public figure generally held and respected - whose murder is committed for political or similar reasons other than personal reasons.
In this background some propositions emerged from Bachan Singh's case should also be taken into consideration when the question of the imposition of death sentence arises:

(i) The extreme penalty need not to be inflicted except in the gravest cases of extreme culpability;

(ii) Before opting for the death penalty the circumstances of the ‘offender’ also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances; A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

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

(v) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?
These are apparently the judicially evolved guidelines which are to assist the courts in determining sentence. If taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that the death penalty is warranted, the court should proceed to do so.

**Jumman Khan vs. State of U.P.**

is a case of cardinal importance in the domain of capital punishment. The case is important mainly for three reasons: Firstly, it illustrates the strict application of the doctrine "rarest of rare cases".

Secondly, the constitutional effect of inordinate delay in the execution of death penalty is more clearly explained.

Thirdly, it removes the clouds of *doubts with* regard to the constitutionality of the death penalty.

The facts of the case assumes importance as the case was brought within the category of rarest of rare cases. Jumman Khan, the petitioner, went at the house of his neighbour Ausaf Khan on 22.6.1983 at around 4 P.M. He requested Ausaf Khan's wife to send her daughter, Sakina aged about 7 years with him for bringing ice from the market. Later on, the dead body of Sakina was recovered from the house of the petitioner. The postmortem report revealed that she had been raped and strangulated to death. The trial court sentenced him to life imprisonment under section 376 I.P.C. and to death under section 302 I.P.C. Thus, the conviction entirely rested upon strong circumstantial evidence. On appeal, the High Court also confirmed the conviction and sentenced him on the ground that the accused did not deserve to any leniency for committing the most gruesome and beastly act. His special leave petition was also rejected by
the Supreme Court on the ground that it was a crime against the society. The murder was committed with extreme brutality. While dismissing the SLP, the Court observed:

The only punishment which the appellant deserves for having committed the reprehensible and gruesome murder of the innocent child to satisfy his lust is nothing but death as a measure of social necessity and also as a means of deterring other potential offenders.\(^\text{80}\)

Having seen that there was no way to avoid death penalty, Jumman Khan made request for mercy. He presented a mercy-petition to the Governor on 12.4.1986 and it was rejected on 18.2.1988. Then, he filed a review petition against the order of rejection of his mercy petition. Initially, there was a stay on his execution which was vacated on 6/7th November, 1988. He also presented a petition to the President of India which was received by the Government on 28.3. 1988. And, it was also rejected on 10.6.1988. Another petition addressed to the President was also received through State Government and the same was also rejected in the month of October, 1988.

After failing to have presidential clemency, the petitioner challenged the death sentence on following grounds in the present writ petition:

(a) The Capital punishment should not be imposed solely on the basis of circumstantial evidence.
(b) There was substantial non-compliance with section 235(2) of the code of criminal procedure, 1973.
(c) In the light of strong dissenting opinion of Justice Bhagwati in Bachan Singh case, the Bachan Singh should be reviewed by a larger bench. The constitutionality of section 302 I.P.C. should be
re-examined in the light of all subsequent decisions rendered in the context of Article 21.

(d) The death sentence of the petitioner should be commuted to life imprisonment because of undue delay in the consideration of mercy petitions.

However, the constitutionality of death penalty was seriously argued. It was strongly contended that death penalty was not only outmoded, unreasonably cruel punishment but also defiled the dignity of the individual and violated the basic structure of the constitution. Thus, by and large, the views of abolitionists were advanced. The contention was further strengthened by three points:

(a) The question of death penalty could not be foreclosed forever on the doctrine of stare - decisis.
(b) The question needed reconsideration of the view of expanding horizons of Article 21.
(c) All the decisions upholding the constitutional validity of capital punishment had created confusion. Therefore, there was need to clear the confusion.

In rejecting the argument, the Court referred to Sher Singh's case and pointed out that:

Not even a single decision of this Court which has caused the slightest shadow of doubt on the constitutionality of capital punishment was brought to our notice.

Justice Pandian speaking for the Court asserted that on every occasion, it has been asserted affirmatively that "the constitution does not prohibit the death penalty."
The Court also pointed out that in Bachan Singh case, it has been held that death penalty did not violate Articles 14 and 21 of the constitution. In Triveni Ben V. State of Gujarat the constitutionality of death penalty was re-affirmed by the court and in Allauddin Mian V. State of Bihar, it was held that death penalty should be awarded only if there were special reasons for doing so. After Sher Singh, Bachan Singh and Allauddin, the Court in the instant case, held that "the death sentence is constitutionally valid" Bachan Singh's case needed no reconsideration. The entire actual position was explained by Justice Pandian in the following words:

"The sentence in every criminal case when confirmed by this court is justified and, therefore normally it is not open for review or reconsideration. However, this Court on several occasions in appropriate cases even after the imposition of sentence of death reached its finality, has commuted that sentence to one of life imprisonment, by exercising its extra ordinary powers when this Court felt that the execution of that sentence was not justified on account of the subsequent supervising circumstances, namely the undue delay which has elapsed since the confirmation of that sentence by this Court".

In a multiple murder case decided recently the accused Dharmapal was charged in earlier case for rape. In the said proceedings he had given a threat that if any body gives evidence in the proceeding then he will not be spared. Notwithstanding the threat the victim disposed in the court and ultimately he (the accused) was convicted. The accused preferred appeal against conviction. While he was released on bail during pendency of appeal, he along with his brother attacked the family members of the victim and caused death to all five members by inflicting brutal and merciless axe blows. Deciding the matter, the Supreme Court held that
such circumstance is rarest of rare cases and confirmed the death sentence.

In another multiple murder\textsuperscript{87} case where the accused a member of B.S.F. killed seven members of a family in pre-planned manner, the Supreme Court reasoned such cruel act as a result of human mind going astray because of constant harassment of the family members and altered the sentence of death to imprisonment for life.

In another case\textsuperscript{88} where two persons, a jail guard and a convict undergoing sentence in jail for kidnapping and rape, committed rape on a minor girl, daughter of an Assistant Jailor, in whose residence they were engaged as domestic helpers and stabbed her to death and disposed of the dead body in the septic tank of the house, the High Court of Madhya Pradesh confirmed the sentence of death. The reasoning advanced is - "The rape and murder was extremely abhorring and shocking to the conscience and to society. It has been committed in cold blood. There was no cause for provocation against the family or against the girl. Their action was abhorring, demonic, brutal, beastly, cruel and depicts abysmal depravity and murder in cold blood... we find no condoning and mitigating circumstances in favour of these accused persons.

[4] CAPITAL PUNISHMENT: JUSTICE OR REVENGE?

Ajmal Amir Kasab's death sentence has brought the issue of capital punishment again into the spotlight. There are already calls for his execution although the legal process is far from over. However, given the irreversible and final nature of capital punishment, a number of steps are required to be taken before any execution can take place.
The death sentence has to be confirmed by the High Court and time allowed for an appeal to be made to the Supreme Court. After the conclusion of the judicial process, mercy petitions take center stage. This is a two-tiered process. In Kasab's case, the first mercy petition will be sent to the Governor of Maharashtra. If that is rejected, a second and final petition will be sent to the President of India. Under India's constitutional system, the actual decisions are not made by the Governor or the President, but instead by the State and Central governments, as the constitutional heads are bound by the advice of their respective Cabinets.

Some Congress officials, including Union Law Minister M. Veerappa Moily and spokesperson Abhishek Manu Singhvi, have indicated that the judicial and mercy processes could be fast-tracked and the hanging carried out within a year. These views appear to be a populist attempt by the government to deflect growing pressure from victims' groups as also the Bharatiya Janata Party (BJP) and other right-wing political parties. Just before the death sentence was awarded to Kasab, the Union Home Minister P. Chidambaram had indicated that the regular procedure for mercy petitions would be followed in this case and no exception would be made.

Such inconsistency in messages is not unusual. An examination of the death penalty in India over the past 10-15 years will show a number of such inconsistencies. The most significant inconsistency is that despite the continual expansion of capital-eligible crimes and the scores of persons sentenced to death every year in India, hardly any executions take place. There has been only one execution in India after mid-1997: that of Dhananjay Chatterjee, on August 14, 2004, in Kolkata. How has this situation of a virtual end to executions come about? For a start, it has not
been a sudden move. As Table 1 -and in particular the last column – shows executions in India have been coming down steadily after Independence.

The early decline in executions appears to be a result of the amendment to criminal law in 1955-56 (that did away with the idea of death penalty being the obvious punishment for murder) along with an increase in the grant of commutation in mercy proceedings. The sharp decrease in the 1970s is likely to be because of the new Code of Criminal Procedure of 1973-74, which made the death penalty an exceptional punishment. The decline in the 1980s is a direct result of the judgment of the constitutional Bench of the Supreme Court in *Bachan Singh v. State of Punjab*, which limited the award of the death penalty to only the "rarest of rare" cases. With the number of people being sentenced to death itself reducing (as evident from the lack of disposal of mercy petitions), executions were bound to reduce as well.

The situation in the last two rows of Table 1 (post-1995) needs further clarification. The small number of petitions disposed" cannot be taken to mean that the courts were awarding fewer death sentences. Instead, post-1997, the number of petitions disposed is small since there have been a large number of mercy petitions that have been kept pending by the President and upon which no decision whatsoever has been made. At present, there are 29 files involving mercy petitions of 52 persons which are pending disposal at the Central level - between the Ministry of Home Affairs (MHA)" and the Rashtrapati Bhavan.
Table 1: Mercy Petitions commuted and rejected by the President

<table>
<thead>
<tr>
<th>Period</th>
<th>Total petitions disposed</th>
<th>Commuted</th>
<th>Rejected</th>
<th>Executions per year</th>
</tr>
</thead>
<tbody>
<tr>
<td>1948-54</td>
<td>1,430</td>
<td>341</td>
<td>1,069</td>
<td>152.7</td>
</tr>
<tr>
<td>1955-64</td>
<td>2,083</td>
<td>601</td>
<td>1,482</td>
<td>148.2</td>
</tr>
<tr>
<td>1965-74</td>
<td>1,034</td>
<td>543</td>
<td>491</td>
<td>49.1</td>
</tr>
<tr>
<td>1975-84</td>
<td>173</td>
<td>52</td>
<td>121</td>
<td>12.1</td>
</tr>
<tr>
<td>1985-94</td>
<td>45</td>
<td>4</td>
<td>41</td>
<td>4.1</td>
</tr>
<tr>
<td>1995-2004</td>
<td>8</td>
<td>1</td>
<td>7</td>
<td>0.7</td>
</tr>
<tr>
<td>2005-present</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Source: Information in rows 3-6 is from the annexure in the reply by S. Regupathy, Minister of State in the Ministry of Home Affairs, on November 29, 2006, to Unstarred Question No. 815, Rajya Sabha, by S.S. Ahluwalia. Information in rows 1-2 is collated by the author from his research at the National Archives of India. Column 5 is calculated by dividing the petitions rejected in the period by the number of years.

Further, if the period from 1995 to 2004 is broken down, six of the seven executions in this period took place during 1995-97- Thus after mid-1997, there has only been one execution in India, and none since 2004 - a virtual end to executions. Such a situation, however, is not the result of a policy decision to move away from the death penalty. On the contrary, through the past decade the Indian government has constantly rejected calls by various U.N. bodies and others seeking a moratorium on executions and death sentences.

**ROLE PLAYED BY PRESIDENTS**

India's virtual end to executions after 1997 owes much to the role played by Presidents K.R. Narayanan, A.P.J. Abdul Kalam and Pratibha Patil. With respect to mercy petitions, it is well known that the power of the President is limited. The Home Minister makes a recommendation on the mercy petition file and sends it to the President for signing. The President may return the file once for reconsideration, but must sign if the
file is returned to him or her. There is, however, no time-limit prescribed for this, allowing the President some room for maneuverability.

The role played by Narayanan -President of India from 1997-2002 was absolutely vital and deserves much greater study. A trickle of executions was continuing when Narayanan joined office in 1997. The first mercy petition forwarded to him was that of Piara Singh and others on November 11, 1997, with a recommendation from the Inder Kumar Gujral-led United Front government to reject it. This petition was sent back for reconsideration by President Narayanan. The next petition (G.V. Rao and S.V. Rao) forwarded in March 1998, came with the advice to commute and the President disposed it accordingly.

Subsequently, with the BJP-led National Democratic Alliance (NDA) forming the government and the pro-death penalty L.K. Advani heading the Home Ministry, many more petitions with recommendations to reject began to be forwarded to the President. In all, nine cases (including that of Piara Singh, which was re-sent) were placed before Narayanan from 1999 to 2001 with recommendations to reject the petitions. Eight of these were kept pending.

The only rejection allowed by Narayanan was that of Govind das swami from Tamil Nadu. The rejection of this mercy petition suggests that although he was opposed to the death penalty, Narayanan had not made any blanket decision to commute all sentences or keep petitions pending thereby forcing his own views on the government. This view is also shared by Gopal krishna Gandhi, the former Governor of West Bengal, who was Secretary to President Narayanan throughout the presidential tenure.
The one petition rejected by Narayanan did not lead to hanging as Govindasami's execution was stayed by the NDA government. Thus Narayanan's tenure ended in 2002 without a single execution. Given his own personal views on the death penalty Narayanan is likely to have welcomed this fact, but it would be simplistic and dishonest to ignore Govindasami's case and attribute the virtual end of executions to Narayanan alone.

This raises an obvious question: Why did the pro-death penalty NDA government choose to stay the execution of Govindasami soon after it recommended rejection of his petition? This was certainly an unusual case where the trial court had acquitted the accused but he was sentenced to death upon conviction on appeal in the High Court. In addition, it is possible that owing to a number of appeals, the M. Karunanidhi led Dravida Munnetra Kazhagam government in Tamil Nadu (then a constituent of the NDA) played a role in convincing the NDA to stay the execution. Various groups that sent a fact-finding team to gather more details about the crime and the social context in which it was committed certainly played a major role against the death penalty.

Active lobbying in Delhi was able to convince four Ministers in the NDA government to appeal to the MHA for commuting the sentence (Defense Minister George Fernandes, Power Minister Rangarajan Kumaramangalam, Parliamentary Affairs Minister Arun Jaitley and Law Minister Ram Jethmalani). Although the Advani-led MHA did not commute Govindasami's death sentence, it did not attempt to execute him either.

Abdul Kalam was the next President (2002-2007) and he inherited eight mercy petition files from his predecessor. In November 2003, he
received his first petition from Home Minister Advani. In the last days of the NDA term, four more petitions were forwarded to the President between April and May 2004. All these five petitions had recommendations to reject them and were kept pending. Kalam took no action on the (now) 13 mercy petition files pending with his office until the end of the NDA government’s term in mid-2004.

Table 2: Mercy Petitions pending before the President /MHA

<table>
<thead>
<tr>
<th>Names of condemned prisoners</th>
<th>No. of persons</th>
<th>State</th>
<th>Year in which file sent to MHA</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Shyam Manohar, Sheo Ram, Prakash, Suresh, Ravinder &amp; Harish</td>
<td>6</td>
<td>Uttar Pradesh</td>
<td>1998</td>
</tr>
<tr>
<td>3. Mohan &amp; Gopi</td>
<td>2</td>
<td>Tamil Nadu</td>
<td>1999</td>
</tr>
<tr>
<td>4. Murugah, Santhan, Arivu</td>
<td>3</td>
<td>Tamil Nadu</td>
<td>2000</td>
</tr>
<tr>
<td>5. Jai Kumar</td>
<td>1</td>
<td>Madhya Pradesh</td>
<td>1999</td>
</tr>
<tr>
<td>6. Mahender Nath Das</td>
<td>1</td>
<td>Assam</td>
<td>2000</td>
</tr>
<tr>
<td>7. Sheikh Meeran, Selvam &amp; Radhakrishnan</td>
<td>3</td>
<td>Tamil Nadu</td>
<td>2000</td>
</tr>
<tr>
<td>8. Shobhit Chamar</td>
<td>1</td>
<td>Bihar</td>
<td>1999</td>
</tr>
<tr>
<td>9. S.B. Pingale</td>
<td>1</td>
<td>Maharashtra</td>
<td>2001</td>
</tr>
<tr>
<td>10. Dharmender Kumar &amp; Narendra Yadav</td>
<td>2</td>
<td>Uttar Pradesh</td>
<td>1999</td>
</tr>
<tr>
<td>11. Dharam Pal</td>
<td>1</td>
<td>Haryana</td>
<td>1999</td>
</tr>
<tr>
<td>12. Molai Ram &amp; Santosh</td>
<td>2</td>
<td>Madhya Pradesh</td>
<td>2000</td>
</tr>
<tr>
<td>13. Suresh &amp; Ramji</td>
<td>2</td>
<td>Uttar Pradesh</td>
<td>2002</td>
</tr>
<tr>
<td>14. Devender Pal Singh</td>
<td>1</td>
<td>Delhi</td>
<td>2003</td>
</tr>
<tr>
<td>15. OmPrakash</td>
<td>1</td>
<td>Uttarakhand</td>
<td>2003*</td>
</tr>
<tr>
<td>16. Praveen Kumar</td>
<td>1</td>
<td>Karnataka</td>
<td>2004</td>
</tr>
<tr>
<td>17. Simon. Ghanapprakash, Madaiah &amp; Bilavendra</td>
<td>4</td>
<td>Karnataka</td>
<td>2004</td>
</tr>
<tr>
<td>18. Kunwar Bahadur Singh &amp; Karan Bahadur Singh</td>
<td>2</td>
<td>Uttar Pradesh</td>
<td>2005</td>
</tr>
<tr>
<td>19. Sushil Murmu</td>
<td>1</td>
<td>Jharkhand</td>
<td>2004</td>
</tr>
<tr>
<td>20. Lal Chand &amp; Shivilal</td>
<td>2</td>
<td>Rajasthan</td>
<td>2004</td>
</tr>
</tbody>
</table>
The first mercy petition that came up after the United Progressive Alliance (UPA) government took office was that of Dhananjoy Chatterjee. There were widespread press reports that Kalam was opposed to the death penalty in principle and that he also consulted the Attorney General to discuss the Chatterjee case to explore any possible commutation. There is, however, no indication in the MHA files relating to the Chatterjee mercy petition files that indicate any move by Kalam even to seek reconsideration of the MHA decision to reject the petition. The petition was rejected and Chatterjee was hanged a few days later - the first hanging since mid-1997. Following the norm of a new government providing fresh advice on pending appointments and other matters, the UPA government re-submitted all the previous 13 files to Kalam between April and August 2005. In addition, the MHA also sent the fresh mercy petition of Govindasami and the petition in the Rajiv Gandhi assassination case along with five more mercy petition files. By end September 2005 there were 20 files pending with the President, all of which carried the recommendation for rejection.

The first public indication that Kalam was dissatisfied with the existing system of death sentences and mercy petitions came during his lecture at the National Police Academy in Hyderabad on October 15,
2005, where he reportedly deviated from the official text and went into the issue of why there were only poor people on the death row.

After days later, on October 18, the President addressed a letter to the MHA asking for a review of the 20 pending mercy files on the basis of new yardsticks prepared by him.

The last of Kalam's public statements on the death penalty was on October 26, 2005, when, in response to a question about his letter to the MHA, he is reported to have called for a "comprehensive policy on the death penalty after all aspects relating to it and mercy petitions were discussed in Parliament".

These views did not appear to have much influence in the MHA or the Government since two more petitions was forwarded to him for rejection in 2006 and one in 2007 - taking the tally to 23 pending petitions. However, a rare petition advising commutation was also forwarded to him and Kalam authorised the commutation for Kheraj Ram on September 29, 2006.

Like his predecessor, Kalam rejected only one petition during his tenure. Unlike in the case of President Narayanan, however, this led to an execution. But like his predecessor, he too left a legacy of files behind for the next President. Pratibha Patil inherited these files. Unfortunately, the entire discussion on mercy petitions in the past few years has been limited to that around the case of Afzai Guru - a non-issue, as the mercy petition is still under consideration of the government and has not even been sent to the President yet.

Pratibha Patil's load was increased when the MHA forwarded another mercy petition file advising rejection in 2007 and two with recommendations to reject in 2008. None of these has yet been rejected by her. Although her personal position on capital punishment is not
known, in November 2007 the President returned one of the mercy petitions pending since 2004 to the MHA for reconsideration. Such a move augurs well for the future as it suggests that she does not see her role as President merely to rubber-stamp executive decisions on petitions and gives rise to the hope that she will exercise her limited powers to the fullest possible extent.

In 2009, it was reported that the Rashtrapati Bhavan and the MHA had come to an agreement by which the MHA would re-examine and re-submit all the 26 pending files to the President. Although the MHA is believed to have been keen on one file being disposed every month, the President has apparently made it clear that the responsibility to clear the entire backlog could not be placed on her and that such a time limit would not be acceptable to her.

The only petition she has since disposed of is that of Govindasami in November 2009 - his sentence was finally commuted upon the recommendation of the government. Recent reports indicate that the MHA has re-sent another file with the recommendation to commute two death sentences.

Three recent Presidents, including the incumbent, have shown initiative and leadership in preventing regular executions. Although some would disagree with their method, it is clear that they have stretched but not over. Stepped the boundaries of their limite powers with respect to mere petitions. A large number of cases (29 file involving 52 persons) are now lying between the MHA and the President' office for disposal. These will undoubtedly take a long time to clear as no President will want to send so many persons to the gallows without all avenues carefully explored. The fact that there has been only one execution in over 12 years also makes it difficult for the President and the government.
However, this situation also provides an opportunity for India to consider a criminal justice system without executions and the death penalty. Taking such a step requires conviction of mind and tremendous leadership. Fortunately, Sonia Gandhi - as the head of the Congress party - can provide such leadership on this issue. She has already shown her strength of character by not demanding the execution of those involved in the Rajiv Gandhi assassination case - their petitions have been pending for nearly a decade now. Her role in the commutation of Nalini's death sentence is also believed to have been significant.

Sonia Gandhi's views and convictions cannot be disregarded by the victims and family members of those who suffered in Mumbai or from other criminal acts. Like them, she too has directly suffered great personal loss. But unlike many other victims/survivors, she has not looked towards hanging as a solution or an act of closure. Undoubtedly, Kasab's case is as difficult an obstacle as any in opposing executions and the death penalty in general, but it is such tough times that call for inspirational leadership.

It is time for Sonia Gandhi to speak with the victims/survivors of the horrors of Mumbai. Justice must not become confused with vengeance.89
References:

2. Art. 21 of the Constitution.
5. Eighth Amendment prohibits infliction of "Cruel and Unusual Punishments".
7. Ibid. at. 196.
10. Supra note 7 at Page 196.
18. AIR, 1977 S.C. 1812
19. "... Judges must enforce the laws whatever they be, and decide according to the best of their lights, but laws are not always just and lights are not always luminous. Nor again, are judicial methods always adequate to secure justice. We are, bound by Penal Code and Cr. P.C., by the very oath of our office." Id, at 1813.
20. "Sentencing under the Indian Scheme is not yet redistically forward looking nor correctionally flexible but Parliament, in its wisdom, may examine this inadequacy". Shiv Mohan Singh Vs. State of Delhi, AIR 1977, SC 979,951.
22. AIR 1954 SC 28
24. AIR 1953 SC 364
25. AIR 1968 SC 43.
27. AIR 1971 SC 2519
28. Also in Brahma Singh vs. State of U.P., AIR 1972 SC 1229
29. AIR 1971 SC 1388
30. AIR 1957 SC 469
31. AIR 1972 SC 811
32. Also see Devendra Singh vs. State of U.P., AIR 1972 SC 1230
33. AIR 1961 SC. 1541
35. AIR 1975 SC. 1320
40. AIR 1977 SC 1777.
41. AIR 1975 SC 783.
42. AIR1979Cr.LJ.792
43. AIR 1980 SC 898
44. (1983) 3 SCC 470
45. A detailed discussion in Part B.
46. 1981 Supp. SCCS.
48. (1987) 2 SCC 631
49. (1985) 4 SCC 470
50. (1981)3 SCC 11
51. (1995) 3 SCC 392
52. (1998) Cr.L.J, 3372
53. (1998) Cr.LJ. 3630
54. (1998) Cr.LJ. 3305. Also in Govind Swami vs. State of Tamil Nadu
(1998) Cr.LJ. 2913
55. (1998) Cr.LJ. 1470 (Madras High Court)
57. AIR(1996)SC2800
59. Supra note, 22 p. 803
60. AIR 1974 SC. 1039
61. AIR1978SC. 1368.
62. AIR 1978 SC. 34
63. (1983)2SCR348
64. AIR 1983 SC 365
65. (1989) I SCC 678
66. (1983)4SCC645
67. (1988) 4 SCC 456
68. AIR 1980 SC 684.
69. RajyaSabha Debates, April 25,1958, Col. per Sh. B.B.B. Sinha.
71. AIR 1973 SC 947.
76. Ranga Billa vs. Union of India, Supreme Court, 1982.
77. Chabil Prasad Agarwal appellant vs. Sunil Chandra Biswas.
79. AIR 1991 SC 345.
80. Supra note, 11 at p. 346.
82. Supra note 11 at p. 348.
84. A.I.R. 1989 SC 1456.
85. Supra note 15.
87. OmPrakash vs State of Haryana 1999 Cr.L.J. 2044
89. Frontline, June 4, 2010, spotlight by Bikramjeet Batra.