Lethal Lottery: The Death Penalty in India

A study of Supreme Court judgments in death penalty cases 1950-2006

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and
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This Report is the product of the collaboration between PUCL-Tamil Nadu and Puducherry and Amnesty International and reflects the culmination of a need much felt by anti-death penalty activists.

The anti-capital punishment movement in India got re-galvanised in 1995 in the wake of the wholesale sentencing by the trial court of all the 26 accused in the Rajiv Gandhi assassination case to death sentence. In the years immediately thereafter, a number of imminent executions of death sentences had to be stopped by PUCL. As the battles raged inside and out of courts, the absence of a detailed study was acutely felt.
In response to the persistent questions in the law courts and from policy makers, PUCL-Tamil Nadu & Puducherry decided to embark on a study on Death Penalty. Very soon it became apparent that the absence of definite data was a major limitation to a multi-dimensional study. In the end it was decided to launch a study to critically analyse Supreme Court pronouncements on death penalty cases from the inception of the apex court in 1950 till date. The initial conceptualization and creation of analytical framework for study of the case laws was done by PUCL-TN following numerous meetings and brainstorming sessions. Thereafter when Amnesty International India office initiated a similar study, the collated material was shared with AI to continue the study.

Several batches of law students from the National Law School and other law schools were involved with the initial phases of the study. Though the list of students and activists who contributed is too long to enumerate, the contributions of four then-students (and now important professionals in their own right) Gopalakrishna Shenoy, Pradeep Nayak, Prashanth Venkatesh and Shailesh Rai in particular needs, to be recorded. K.G. Kannabiran, National President PUCL, not only encouraged but also helped to guide the study.

It is a matter of immense satisfaction that the study has been completed and the report is finally being released.

Dr. V. Suresh
President
PUCL-TN/Puducherry
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PREFACE

By **K. G. Kannabiran**
Senior Advocate
President – National Executive, People's Union for Civil Liberties

On the morning of 30th December 2006, those of us living in countries of the eastern hemisphere were startled to witness the unforgettably morbid and macabre sight of a very composed Saddam Hussein being prepared for his execution. Rarely, in recent memory, has the world been witness to an execution within minutes of the event. While the imminence of the execution was no secret, the turning of the entire world into a stage to endlessly replay the actual hanging has been an unparalleled event in recent memory. Continuous replay of the event provoked repugnance in many; it equally strongly stoked the voyeuristic in some, fed the morbid curiosity of others, and gave a diabolic twenty first century expressive form to the practice of revenge through 'blood letting', in a manner no fictional creation could as evocatively or forcefully ever have.

The sentence of death awarded to Saddam Hussein, the former President of Iraq by an interim Iraqi Government still under the supervision of US and allied forces was, like all judicial sentences of death, pure and simple pre-meditated judicial assassination. While political trials with international ramifications are a special case, it remains absolutely essential to contest the validity of all death sentences as a form of punishment. It is also important to recognise that the extent of power enjoyed by a state (and the extent of its fear of dissent) determines the character and conduct of state institutions entrusted with dispensing justice and thereby the harshness of punishments meted out.

The practice of executing felons for wrongs done to society has been with us for centuries and putting an end to this practice will be a Herculean task. Many of us in India have been fighting each death sentence as it arises but we have not succeeded in securing abolition as a matter of principle. The apex Court has ruled that courts should award the death sentence only in the 'rarest of rare' cases, but if every court trying a person for a capital offence finds that the case before it is the rarest, the progress of the abolitionists will be illusory. The study that follows should leave no one in any doubt about the arbitrary way in which the Supreme Court has upheld or commuted death sentences using the 'rarest of rare' formula and the judicial equivalents that preceded it.

The neutrality of law and the clinical detachment of professional members of the Bench and the legal profession has always been an opaque and invalid assumption in India. As Justice Holmes of the US Supreme Court pointed out over a century ago, the life of law is not logic. Any understanding of law and justice would comprehend "the felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed and unconscious even prejudices judges share with their fellow men… The decision will depend upon a

judgment, an intuition more subtle than any articulate major premise." In its unexpurgated sense, this applies to India now where examples of the partiality of rule of law institutions abound. Criminal cases such as those of Jessica Lal and Priyadarshini Mattoo in which the accused (with powerful connections) were acquitted at the trial stage are recent examples of the vulnerability of the criminal justice system to pressures unrelated to the legal system. Unless the police and investigative machinery are fully cleansed, it would be a crime to talk about deterrent or retributive sentencing and employ the death penalty as a form of punishment.

The current state of impunity enjoyed by the Indian state and its investigative agencies should make us pause to think whether those awaiting execution should at all be executed. The 1984 Sikh massacre in Delhi, the post Babri Masjid Mumbai killings, the death and destruction that followed the Coimbatore blasts and the killing of thousands of Muslims in Gujarat are all examples of the state's suspension of the rule of law during and following incidents of massive violence. Does this not itself undermine the credibility of the death sentence as a principle of rule of law? In the words of A S Zuckerman (1989)[1], "The willingness of the public to accept the authority of the criminal court as a dispenser of punishment depends on the extent to which public believes in the moral legitimacy of the system. The morality or fairness of a system of adjudication hinges on many factors, such as the impartiality and incorruptibility of the judiciary. Amongst these must also be numbered a publicly acceptable judicial attitude towards breaches of law. A judicial community that is seen to condone, or even encourage violations of the law can hardly demand compliance of its own edict."

In all scientific and social formulations there will always be irreducible uncertainty, the possibility of inevitable error leading to unavoidable injustice. That we provide for irreducible uncertainty is most evident in law itself. The entire law on evidence does not require establishment of truth but proof of facts leading to an event. Implied in this effort is only an approximation. The evolution of the concept of justice implies that an accused is presumed not to be guilty unless proved otherwise and that proof should be beyond all reasonable doubt. When the ruling principle in criminal jurisprudence for centuries has been to save an innocent even if it should mean that a hundred guilty escape, how can one be so dogmatic about the absolute guilt of the accused and with an air of finality award a death sentence? It is these principles of irreducible uncertainty and the indeterminism built into criminal jurisprudence that have been what I consider to be the civilizing agent of human thought and action.

With an imperfect tool to judge the guilt or otherwise of a person accused of a capital crime, what is being questioned is the certainty of the adjudicator who hands down a death sentence. To me it appears to be a subversion of the system of Rule of Law as it has evolved through the centuries. Justice Harry A Blackmun of the United States (*Callins vs. Collins*, 1994) put the objection succinctly in a death penalty case, declaring that the "death penalty experiment has failed." He went on to say "from this day forward I no longer shall tinker with the machinery of death… The inevitability of factual, legal, and moral error gives us a

[1] AAS Zuckerman, 'Principles of Criminal Evidence', pp. 344, Clarendon press, Oxford, 1989.

system that we know must wrongly kill some defendants… It seems whether a human being should live or die is so inherently subjective, rife with all of life's understandings, experiences, prejudices, and passions, that inevitably defies the rationality and consistency required by our Constitution."

The campaign against the death penalty in India must also be a campaign against the impunity sanctioned to the criminal justice system itself. It should be a campaign for the spread of a Rule of Law culture where the habit of legality is not a mere positivist response and a blind obedience to law as mere authority, but a discriminating response which disciplines those authorities that deal with the liberties of the people, including that most sacred: the right to life.

PART I

The need to re-examine the death penalty in India

An editorial in The Times of India on 1st November 2006 poignantly set out India's challenge by drawing attention to the fact that "a society consumed by outrage easily confuses punishment and revenge, justice and vendetta." The article appealed to the nation to "…rise above sentiments of the day and dissect issues with the cold scalpel of reason, a scalpel that does not kill. It is about time we had a public debate on capital punishment, shorn of righteous, judgmental overtones." The context of this call for a public debate on the death penalty was the case of Mohammad Afzal Guru, sentenced to death for his role in a conspiracy that led to an attack on the Indian Parliament on 13th December 2001.

The nationwide appeals by concerned citizens and members of the human rights community to commute the death sentence imposed on Mohammad Afzal Guru has been matched in equal measure by the demand of right wing political parties and groups allied to the Bharatiya Janata Party (BJP) for the immediate execution of Afzal without further delay. These demands have played on the fears of society about 'terrorist' violence, uncontrolled crime rates and the dangers that await society if the state is `soft' on criminals and abolishes the death penalty. Closely linked to the decision of the executive on the mercy petitions in Afzal's case, is the fate of numerous other death row inmates throughout the country who await decisions on their mercy petitions. With all legal possibilities for escaping the death sentence sealed, death row convicts spend every day not knowing if it will be their last. The challenge before the human rights community is therefore grim but compelling. At stake is not just the fate of numerous death row convicts; it is about our vision of society, about the sense of values and ethos we believe in and are committed to.

The present study is a critical analysis of all reported judgments delivered by the Supreme Court of India after 1950 (when the Indian Constitution came into effect, establishing the Supreme Court as the highest court of the land) in which death sentences have been considered. The study was initiated because of a vital gap that affected those campaigning against the death penalty: the absence of comprehensive analysis of various facts relating to the death penalty. While in the last 30 years the campaign has evolved copious literature on the ethical and moral arguments in favour of eliminating the death penalty, there exist woefully few researched studies on the subject; especially about the vagaries of judicial arbitrariness that makes the death penalty virtually a 'lethal lottery.'

This part of the report seeks to set the scene for this study by commenting on the global and national context in which the campaign to abolish the death penalty has developed in the past half decade in India.

1. A global move towards abolition

Through numerous mechanisms the international community has become increasingly clear about its rejection of the death penalty. In 1966 for the first time nations, of the world adopted an international Convention seeking to regulate the use of the death penalty via Article 6 of the International Covenant on Civil and Political Rights (ICCPR).

In its General Comment on Article 6 of the ICCPR, the UN Human Rights Committee has stated that Article 6 "refers generally to abolition [of the death penalty] in terms which strongly suggest... that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life…"[2] Since the adoption of the ICCPR, steps have been taken to develop a legally binding instrument that requires the abolition of the death penalty. Accordingly, the UN General Assembly adopted the Second Optional Protocol to the ICCPR[3] which entered into force in July 1991. Sixty-four States have ratified the Second Optional Protocol to date (as of November 2007). The omission of the death penalty as a punishment for crimes dealt with under the Rome Statute of the International Criminal Court, [4] despite the fact that the Court has jurisdiction over extremely grave crimes: crimes against humanity, genocide and war crimes, was yet another global signal that the death penalty was itself a grave crime.

In the past three decades, great strides have been made to realize a world free of executions. In 1980, only 25 countries had abolished the death penalty for all crimes. That figure now stands at 90, with a further 11 countries having abolished the death penalty for "ordinary" crimes (but retaining it for offences such as treason or offences under military law). Thirty-two countries are considered by Amnesty International to be "abolitionist in practice" in that they retain the death penalty for ordinary crimes such as murder but have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions, meaning that a total of 135 of the world's nations have turned their back on capital punishment in law or practice.

The vast majority of the world's executions today occur in China. Although death penalty statistics are not released by the Chinese government, based on its monitoring of public reports available, Amnesty International calculated that at least 1,010 people were executed during 2006, although the true figures were believed to be around 7,000 to 8,000.

[2] General Comment 6 on Article 6 of the ICCPR, adopted on 27th July 1982, para 6.
[3] UN General Assembly Resolution 44/128 of 15th December 1989. The Second Optional Protocol provides for the total abolition of the death penalty but allows state parties to retain the death penalty in times of war if they make a reservation to that effect at the time of ratifying or acceding to the Protocol.
[4] This reflected the framework established under the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda established by the UN Security Council in 1993 and 1994 respectively.

The trend towards abolition of the death penalty is clear. Outside China an execution is becoming an increasingly rare event. Amnesty International recorded around 500 executions worldwide during 2006 outside China. Vast swathes of the world are now execution-free. In Africa only six countries executed in 2006; Belarus is the only European country that continues to use the death penalty; and the USA is the sole state in the whole of the Americas to have carried out any executions since 2003. Only Asia and the Middle East remain largely unmoved by the worldwide trend away from the use of the death penalty.

There can be little doubt that our world is moving towards being execution-free. The question is when this will be achieved and how many more will have to die before then. Some of the leaders of countries that continue to execute talk about their desire to abolish capital punishment. In March 2007 a member of the Iraqi government told the media, "We are working at the present moment in order to pave the way to eliminate capital punishment in Iraq, after restricting it to the largest possible extent."

Even in China, progress is being made. On 1st January 2007 an amendment to the court system came into effect requiring all death sentences to be approved by the Supreme People's Court. Speaking in the UN Human Rights Council in March 2007, a Chinese delegate, La Yifan, said, "I am confident that with the development and the progress in my country, the application of the death penalty will be further reduced and it will be finally abolished."

India remains balanced between the global trend away from the death penalty and those countries that continue to execute. Despite priding itself on a highly evolved 'rule of law' system, India has steadfastly clung to the punishment even though it acceded to the ICCPR in 1979. Continuously refusing to enter into any form of debate or discussion with national or international bodies over abolition, the Indian state has shown an apparent disdain for world opinion by retaining a 'wall of silence', signalling its intention by failing to respond to the quinquennial UN surveys on the death penalty and more worryingly passing new laws that provide for the death penalty. Using the 1980 majority ruling of the Indian Supreme Court in *Bachan Singh v. State of Punjab* as cover and the final word on the subject, the Indian state has assumed a moralistic and conservative tone, arguing that the death penalty is required to instil fear as a means of deterring future criminals, and to safeguard society against rising crime and acts of terrorism.

Despite this, the present hiatus on executions would indicate a lack of official enthusiasm for the death penalty. The government must resist any pressure to resume executions and take a regional lead by educating the public as to the futility of capital punishment and the importance of human rights protection.

2. The Indian legislature and abolition of the death penalty

It is noteworthy that the Indian state has not only failed to sensitise the general public about the concerns of the world community over the arbitrariness and innate inhumanness of the death penalty; it has also failed to initiate any study to examine the concerns that Supreme Court judges like Justice Bhagwati have raised in the course of judicial pronouncements. To the contrary, the Indian Government has preferred to hide figures on the use of the death penalty while other institutions, including the National Human Rights Commission, have been either silent or ambivalent on the subject. The Law Commission of India – which prepared a report on the death penalty in 1967 and recommended its retention – has also not re-examined the issue some forty years on, preferring instead to focus on whether hanging is the most 'humane' way of executing prisoners.[5]

Few are aware of India's long history of anti-death penalty sentiments, stretching back to the pre-independence period. Way back in 1937, Mahatma Gandhi wrote, "I do regard death sentence as contrary to ahimsa. Only he takes it who gives it. All punishment is repugnant to ahimsa. Under a State governed according to the principles of ahimsa, therefore, a murderer would be sent to a penitentiary and there given a chance of reforming himself. All crime is a kind of disease and should be treated as such…"[6] In an equally powerful prose, the veteran freedom fighter Jayaprakash Narayan wrote (referred to by Justice Bhagwati in his *Bachan Singh* dissenting judgment, at para 22):

> *"To my mind, it is ultimately a question of respect for life and human approach to those who commit grievous hurts to others. Death sentence is no remedy for such crimes. A more humane and constructive remedy is to remove the culprit concerned from the normal milieu and treat him as a mental case. I am sure a large proportion of the murderers could be weaned away from their path and their mental condition be sufficiently improved to become useful citizens. In a minority of cases, this may not be possible. They may be kept in prison houses till they die a natural death. This may cast a heavier economic burden on society than hanging. But I have no doubt that a humane treatment even of a murderer will enhance man's dignity and make society more human"* (emphasis added)

The obduracy of the official establishment to enter into an open dialogue on the need to retain the death penalty has been matched by the calculated 'unconcern' exhibited by large sections of the political class. Apart from political parties that have taken clear positions on the retention of death penalty in the statute books, there are numerous others who refuse to be drawn into the larger debate, much less be seen to be espousing abolition. The campaign against the death penalty faces the challenging task of having to breach an 'iron curtain' of suspicion and hostility presented by an unsympathetic and conservative bureaucracy and a

[5] Report No.187 of the 17th Law Commission of India, 2003. 'Mode of Execution of Death Sentence and Incidental Matters.' The Report – in the section entitled 'incidental matters' - did however make some useful suggestions including a mandatory appeal to the Supreme Court in all capital cases.
[6] The Harijan, 19th March 1937, referred to in *Dalbir Singh v. State of Punjab*, see above.

disinterested political class, both using the language of 'constitutionality' of the death penalty to deny the need for debate.

Beyond the courts of law, the campaign for abolition will have to focus its energies to convince the common citizen, find friends amongst the political class and discover new methods to convincingly show that the essential arbitrariness of the death penalty, and the possibilities of mistakes occurring in the judicial process are as real, if not more potent today, than when such concerns were originally raised in the Supreme Court 27 years ago at the time of the *Bachan Singh* case.[7]

The urgency of the need to address the legislature was highlighted by Justice Y.K. Sabharwal just before he took office as the 36th Chief Justice of the Supreme Court of India in 2005, when in an interview he noted, "It [the death penalty] is a socio-political question and ultimately whether it is to be continued or not is a decision to be taken by the Indian Parliament." In the same interview he also stated that he was personally opposed to the death penalty, but as a judge was required to enforce it where the law required.[8] He made a similar statement just prior to his retirement as Chief Justice on 13th January 2007. The focus on the legislature as the target for abolition has also been clearly asserted by his successor, Chief Justice K.G. Balakrishnan.[9] In fact such assertions have been made previously by the Supreme Court, for example in *Dalbir Singh and Ors. v.State of Punjab* (1979 3 SCC 745), when Justice Krishna Iyer observed that 'the death sentence on death sentence' is Parliament's function.

The humanitarian ideal of abolishing the death penalty in independent India was articulated by a number of members of the Constituent Assembly during the drafting of the Indian Constitution between 1947 and 1949. Several members raised concerns about the arbitrariness inherent in retaining the death sentence when left to the vagaries of subjective satisfaction of individual judges, irrespective of the level of the courts hearing the cases. Interestingly, many members referred to their experiences as lawyers practising in criminal law that whatever the nature of procedural safeguards, there could never be any foolproof method to eliminate error. In a debate on 3rd June 1949 on the necessity of mandatory appeal to the Supreme Court, Pandit Thakur Das Bhargava spoke of his experience as a legal practitioner, arguing that in many criminal prosecutions there was a real possibility of innocents being prosecuted and sentenced. Another member, Frank Antony, experienced in handling numerous criminal murder trials, argued that, "any person who has handled criminal cases, particularly murder cases, will be able to testify from his personal knowledge to serious miscarriages of justice on account of misinterpretation of facts, tremendous diversity of conflict in the matter of legal interpretation. In India, in one High Court, in the case of two people where one inflicts a fatal injury while the other holds the deceased, both might be sentenced to death, while in another High Court, one might be sentenced for murder while the other may only be fined for having

[7] *Bachan Singh v. State of Punjab* (AIR 1980 SC 898). Hereafter referred to as *Bachan Singh*.
[8] 'Judicial Activism is a misnomer', Interviewed by J. Venkatesan, The Hindu, 25th October 2005.
[9] 'No confrontation, says CJI designate', The Tribune, 3rd January 2007.

committed simple hurt."[10] He went on to support the view of Pandit Thakurdas that it was well known to practising lawyers that the possibility that innocent people were convicted in capital cases and sentenced to death was not unknown. In these circumstances the members argued in favour of automatic appeal to the Supreme Court in all cases where a death sentence was handed down by a High Court. This was seen as a protective provision until such time as the death penalty was abolished.

One member of the Constituent Assembly, Prof. Shibbanlal Saksena, had been a death row convict himself. Sentenced to death for his role in the 1942 independence movement, he occupied a condemned cell for 26 months. As he explained in the Assembly, during this period he had seen 37 persons being hanged, amongst whom, he pointed out, he had reason to believe that seven persons were fully innocent of the crimes they were hanged for. Talking during the debate on the need to provide a constitutional provision providing for an inherent right to appeal to the Supreme Court in cases where the death penalty was imposed, he pointed out,

> *"I have seen people who are very poor, not being able to appeal as they cannot afford to pay the counsel. I see that Article 112 says that the Supreme Court may grant special leave to appeal from any judgment, but it will be open to people who are wealthy, who can move heaven and earth, but the common people who have no money and who are poor will not be able to avail themselves of the benefits of this section. Therefore,* ***in the name of those persons who are condemned to death and who though innocent were hanged in my presence****, I appeal to the House that either in this article or in any subsequent article there must be made a provision that those who are condemned to death shall have an inherent right of appeal to the Supreme Court* (emphasis added)."

Dr. Ambedkar concluded the debate by highlighting his personal opinion that,

> "*rather than have a provision for conferring appellate power upon the Supreme Court to whom appeals in cases of death sentence can be made, I would much rather support the abolition of the death sentence itself. That, I think, is the proper course to follow, so that it will end this controversy. After all, this country by and large believes in the principle of non-violence. It has been its ancient tradition, and although people may not be following it in actual practice, they certainly adhere to the principle of non-violence as a moral mandate which they ought to observe as far as they possibly can and I think that having regard to this fact, the proper thing for this country to do is to abolish the death sentence altogether.*"[11]

Dr. Ambedkar however suggested that the finer details of whether there should be a mandatory appeal to the Supreme Court in criminal cases involving the death penalty and

[10] Constituent Assembly of India, Vol. 8, 3rd June 1949.
[11] Constituent Assembly of India, Vol 8, 3rd June 1949.

other issues be left to a future Parliament to legislate. Dr Ambedkar's suggestion was taken up – despite the fact that many members had an unequivocal personal opinion about the need to abolish the death penalty entirely – and the Constituent Assembly collectively decided to leave the issue of abolition to a future Parliament to legislate on, if necessary. This stand was not ambivalent but one that implicitly validated the existence of the death penalty in criminal law. By consciously deciding not to restrict in any way, the death penalty provision, those framing the Constitution lent an aura of morality, respectability and legitimacy to capital punishment.

Various attempts to abolish the death penalty were made subsequently through the introduction of private members bills in both houses of Parliament. These included one introduced in 1956 by Mukund Lal Agrawal in the Lok Sabha, and another in 1958 by the actor-parliamentarian, Prithvi Raj Kapur in the Rajya Sabha. A couple more followed in 1961 and 1962 introduced by Savitry Devi Nigam (Rajya Sabha) and Raghunath Singh (Lok Sabha) respectively. However, positions against the death penalty voiced by Nehru or previously by Mahatma Gandhi did not translate into any official stand against the death penalty by either the Congress Party or the Congress government. Under pressure in Parliament, the government did however agree to forward transcripts of the constitutional debates to the Law Commission and seek its opinion.

The 1967 report of the Law Commission on Capital Punishment was eventually tabled in Parliament in November 1971. However, despite accepting that opposition to the death penalty was based on consistent and sound research, the Law Commission eventually concluded that due to the "conditions of India" including "disparity in the level of morality and education" and the "paramount need for maintaining law and order … India could not risk abolishing capital punishment."[12] The Law Commission's report effectively ended any possibility of an early legislative end to the death penalty.

In effect, the fact that those framing the Constitution and the Law Commission did not see it fit to abolish the death penalty became one of the most important moral foundations for the courts to uphold the validity of the death sentence in Indian law. In turn, the fact that the Supreme Court had not struck down the death sentence as unconstitutional became the rationale for the Indian state to deny any need to re-examine the relevance of death penalty provisions in Indian law, much less to actually abolish it. The manner in which the two pillars of the legislature and the judiciary have acted as an inter-locking barrier to abolition was highlighted in the judgment of the Supreme Court in *Jagmohan Singh v. The State of Uttar Pradesh* (AIR 1973 SC 947) which noted that if the legislature decides to retain capital punishment for murder it will be difficult for the court to question the propriety and wisdom of the legislature in retaining death sentences in the absence of objective evidence. The Court enumerated the different occasions when bills were moved in the Lok Sabha and Rajya Sabha and took the position that "all this goes to show that the representatives of the people do not welcome the prospect of abolishing capital punishment. In this state of affairs, we are not

[12] Law Commission of India, '35th Report on Capital Punishment' 1967.

prepared to conclude that capital punishment as such is either unreasonable or not in the public interest."

Breaking this moral and legal mutuality of interests in retaining the death penalty is thus one of the important tasks before all those who believe in the essential immorality of the death sentence.

3. The Constitutional challenge to the death penalty

The *Bachan Singh* case of 1980 is important not just for the fact that the majority ruling of the Constitution Bench of the Supreme Court about the constitutionality of the death penalty continues to determine the legality of the issue to date, with no challenge in sight. It is equally important to understand the context in which the case came up for hearing before a Constitution Bench. The 1970s was a period of ferment within the Indian Supreme Court. This period, that witnessed the Supreme Court's sanction of Indira Gandhi's declaration of Emergency – in the *ADM Jabalpur* judgment (*ADM v. Shivkant Shukla* AIR 1976 SC 1207) – also witnessed the emergence of 'Public Interest Litigation.'[13] In relation to the death penalty there were a number of judicial innovations by the Court which sought to reduce the harshness of the law. The issues framed in *Bachan Singh* unambiguously questioned these interpretations brought about by judges including Justices Krishna Iyer, Chinnappa Reddy, Bhagwati and Desai. A majority of the Bench in *Bachan Singh* chose to take a more conservative line in interpreting legal provisions relating to the death penalty.

The Supreme Court in *Bachan Singh* identified the issues as (i) whether the death penalty provided for in Section 302 IPC was unconstitutional, and (ii) whether the sentencing procedure provided for in Section 354(3) CrPC invested the court with unguided and untrammeled discretion and allowed death sentences to be arbitrarily or freakishly imposed. The majority ruling, written by Justice Sarkaria, dismissed the challenge that the death penalty was unconstitutional, in violation of Articles 14, 19 and 21, and found that the discretion of the courts, being subject to corrections and review, could not be said to be arbitrary or freakish.

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

> *"If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists,*

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

> *judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelised through the peoples representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware as we shall presently show they were of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent reports of the Law Commission suggest retention of death penalty ... it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest".*

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

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

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

[14] *Bachan Singh v. State of Punjab* (Minority Judgment) (AIR 1982 SC 1325).

Court appear to reflect such a tendency to seek revenge and retribution (see Section II.2.3.3 below).

On the issue of deterrence, Justice Bhagwati quoted the statement by the eminent US criminologist Professor Thorsten Sellin, cited by the Royal Commission on Capital Punishment, that "whether the death penalty is used or not and whether executions are frequent or not, both death penalty states and abolition states show [homicide] rates which suggest that these rates are conditioned by other factors than the death penalty", and the Royal Commission's own statement that "the general conclusion which we have reached is that there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase in the homicide rate, or that its reintroduction has led to a fall."[15] It is thus clear that we need to have a fresh assessment of the efficacy of the death penalty in deterring crime and criminals.

Arbitrariness and the judicial process: Justice Bhagwati held that not only was the death penalty against national and international norms and therefore unconstitutional, he also pointed out that in practice the death penalty process created a context of arbitrariness and that it was unsafe to provide powers to any set of judges since a fool-proof manner of administering criminal justice systems could never be developed. He also pointed to the dangers of depending on judges to administer laws and follow procedures providing for sentencing guidelines. As he explained, "It is, therefore, obvious that when a judge is called upon to exercise his discretion as to whether the accused shall be killed or shall be permitted to live, his conclusion would depend to a large extent on his approach and attitude, his predilections and preconceptions, his value system and social philosophy and his response to the evolving norms of decency and newly developing concepts and ideas in penological jurisprudence."

Expanding on the theme, Bhagwati highlighted the reality of different attitudes and responses of judges to issues that were brought before them. In his inimitable style, Bhagwati pointed out:

> *"One judge may have faith in the* Upanishad *doctrine that every human being is an embodiment of the divine and he may believe with Mahatma Gandhi that every offender can be reclaimed and transformed by love and it is immoral and unethical to kill him, while another judge may believe that it is necessary for social defence that the offender should be put out of way and that no mercy should be shown to him who did not show mercy to another. One judge may feel that the Naxalites, though guilty of murders, are dedicated souls totally different from ordinary criminals as they are motivated not by any self-interest but by a burning desire to bring about a revolution by eliminating vested interests and*

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

> *should not therefore be put out of corporal existence while another judge may take the view that the Naxalites being guilty of cold premeditated murders are a menace to the society and to innocent men and women and therefore deserve to be liquidated. The views of judges as to what may be regarded as special reasons are bound to differ from judge to judge depending upon his value system and social philosophy with the result that whether a person shall live or die depends very much upon the composition of the Bench which tries his case and this renders the imposition of death penalty arbitrary and capricious".*

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

> *"Our convictions are based largely on oral evidence of witnesses. Often, witnesses perjure themselves as they are motivated by caste, communal and factional considerations. Sometimes they are even got up by the police to prove what the police believes to be a true case. Sometimes there is also mistaken eyewitness identification and this evidence is almost always difficult to shake in cross-examination. Then there is also the possibility of a frame up of innocent men by their enemies. There are also cases where an overzealous prosecutor may fail to disclose evidence of innocence known to him but not known to the defence. The possibility of error in judgment cannot therefore be ruled out on any theoretical considerations. It is indeed a very live possibility …"*[16]

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

Justice Bhagwati warned:

> *"Howsoever careful may be the safeguards erected by the law before death penalty can be imposed, it is impossible to eliminate the chance of judicial murder… the possibility of error in judgment cannot therefore be ruled out on any theoretical considerations. It is indeed a very live possibility and it is not at all unlikely that so long as death penalty remains a constitutionally valid alternative, the court or the State acting through the instrumentality of the court may have on its conscience the blood of an innocent man"*

[16] Ibid. Para 24, pg.1344.

This was a clear recognition of the inherent problems within the administration of criminal justice that render the system of sentencing individuals to death arbitrary. Unfortunately the majority of the judges did not support this view and held the death penalty to be constitutional, directing instead that it should not be used except in the 'rarest of rare' cases. The study that follows only serves to highlight that despite this 'rarest of rare' formulation, these problems continue to render the process arbitrary.

4. The Supreme Court as guardian of justice

The subject of death penalty can arouse intense passion, vehemence and fervour. Just as intensely as anti-death penalty campaigners stress the inherently inhuman nature of the punishment and the real possibility of errors leading to the judicially mandated murder of an innocent person, there are numerous others – including Supreme Court judges – who firmly believe that the death penalty acts as a deterrent and protects society from the abhorrent actions of a few.

The Supreme Court has called the death penalty a "just desert" for particular crimes[17] and a punishment that reflects "society's *cry for justice* against the criminal."[18] This legally couched language found in many judgments is revealing about the perception amongst a number of judges that their role is not just as arbiters of just law but also as sentinels of morality and justice. The language used is explicit for often the above formulation is accompanied by the reminder that to commute will be yielding to "spasmodic sentiment, unmitigated benevolence and misplaced sympathy."[19] That a majority section of the community supports the death penalty is assumed and is seen to be a factor supportive of retaining the death penalty.

"Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats."[20] What is remarkable in such judgments is the apparent view that anything less than the death sentence would be a betrayal of social interests and would wreak severe damage on the fabric of trust and confidence in rule of law. This is apparent in the Supreme Court's judgment in *Jashubha Bharatsinh Gohil and ors. v. State of Gujarat* [(1994) 4 SCC 353] where the court reiterated that, "any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result wise counterproductive in the long run and against societal

[17] *State of M.P. v. Babbu Barkare* [(2005) 5 SCC 413].
[18] *Surja Ram v. State of Rajasthan* (AIR 1997 SC 18).
[19] *Govindasami v. State of Tamil Nadu* (AIR 1998 SC 2889).
[20] *State of M.P. v. Babbu Barkare*, (AIR 2005 SC 2846).

interest which needs to be cared for and strengthened by a string of deterrence inbuilt in the sentencing system."

The court continues to use these arguments. In *Union of India and ors. v. Devendra Nath Rai* [(2006) 2 SCC 243] the court reaffirmed the principles culled from *Bachan Singh* and refined in *Machhi Singh and ors. v. State of Punjab* [(1983) 3 SCC 470] and reiterated arguments in favour of imposing the death sentence set out in *Devender Pal Singh v. State, N.C.T. of Delhi and anr.* [(2002) 5 SCC 234] which ruled that when the collective conscience of the community is sufficiently shocked by a crime, it will expect the holders of judicial powers to inflict the death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty.

A marked feature of most Supreme Court rulings is the rigid positions that judges, especially in the lower judiciary, can take in cases involving capital crime. What has rarely been examined, despite Justice Bhagwati pointing to it, is the varying ways in which different judges have responded to crime in general. Justice Bhagwati's wry comments that what is a heinous, cruel and diabolical act to one judge is just one more incident of crime to another stands more true today than when made 25 years ago. The current study clearly shows that the determination of a crime as 'shocking the collective conscience' has many nuances and differences and is influenced in the ultimate analysis by the social and other perspectives of judges (see II.2.3.4 below).

The Death Penalty as Cruel, Inhuman and Degrading in South Africa

While the body of Supreme Court rulings in India reflect a call to be resolute and have the moral strength to award death sentences unimpeded by personal predilections, worldwide there has been a progression in the campaign for abolition of the death penalty. Perhaps one of the most significant judicial events in this regard is the judgment of the Constitutional Court of South Africa in 1995 declaring the death penalty for murder to be unconstitutional as it constitutes "cruel, inhuman or degrading treatment or punishment". One of the most comprehensive judgments considering worldwide positions on capital punishment, the unanimous ruling in *The State v Makwanyane and Machunu* offers a scholarly analysis of the different legal strands underlying the issue and a summary of the position taken by different national courts on the subject (Case No. CCT/3/94, judgment dated 6th June 1995).

The unanimous judgment saw the entire court of 11 judges adding their own opinions, expanding on different dimensions of the debate on the death penalty. One scholar writing about the judgement points out that the lengthy material constitutes a rich repository of judicial authority on the issue of capital punishment as well as "the interpretation to be accorded to such fundamental rights as the right to life, right to equality, the right to dignity

and protection against cruel, inhuman or degrading treatment or punishment."[21]

One of the strongest arguments put forward by the judges is on the issue of arbitrariness in the sentencing process. The President of the Constitutional Court, Justice Chaskalson, highlights the likelihood that indigent defendants represented by inexperienced and poorly paid counsel are more likely to receive death sentence compared to those who have the money to retain experienced attorneys and counsels who are paid to undertake the necessary investigation and research to defend their clients. Acknowledging that such arbitrariness is inherent in all criminal proceedings, Chaskalson points out that in view of the finality of the death sentence, the consequences of injustice become irrevocable. Justice Ackermann uses stronger language to stress, "for one person to receive the death sentence, where a similarly placed person does not, is in my assessment of values, cruel to the person receiving it. To allow a chance, in this way, to determine the life or death of a person, is to reduce the person to a cipher in a sophisticated judicial lottery. This is to treat the sentenced person as inhuman." (Para. 166)

Justice Sachs draws attention to the issue of emotional, moral and pragmatic contentiousness which the debate on death penalty generates. Elaborating on the theme of the death penalty in the context of `The Right to Life and Proportionality', he points out, "Decent people throughout the world are divided over which arouses the greatest horror: the thought of the state deliberately killing its citizens, or the idea of allowing cruel killers to co-exist with honest citizens. For some, the fact that we cold-bloodedly kill our own kind, taints the whole of our society and makes us all accomplices to the premeditated and solemn extinction of human life. For others, on the contrary, the disgrace is that we place a higher value on the life and dignity of the killer than on that of the victim" (Para 348). He further points to those pragmatists who emphasise not the moral issues but the "inordinate stress that capital punishment puts on the judicial process" and argues that from a practical point of view capital punishment offers an illusory solution to crime and actually detracts from truly effective measures to protect the public.

Perhaps the most articulate opinion that is particularly relevant to the current debate in India relates to the issue of the weight of public opinion favouring the death penalty. Citing the opinion of Justice Powell in the US judgement of *Furman v. State of Georgia*, Justice Chaskalson stresses that the assessment of popular opinion is essentially a legislative, and not a judicial function. Justice Ackermann points to the poignantly etched position on the subject put forwarded by Justice Blackmun in the US in *Callins v. Collins* when he stated in his dissenting judgement, "... although most of the public seems to desire, and the Constitution seems to permit, the penalty of death, it surely is beyond dispute that if the death penalty

[21] William A. Schabas, 'South Africa's New Constitutional Court Abolishes the Death Penalty', *Human Rights Law Journal*, Vol. 16, No. 4-6, page 133. Schabas provides an overview of the issues raised in the different opinions of the judges on the issue of cruel, inhuman and degrading treatment or punishment, including (i) international and comparative law, (ii) issue of arbitrariness, (iii) position on public opinion and evolving standards of justice, and (iv) the role of death sentence in terms of deterrence and retribution; the right to life, equality and dignity.

cannot be administered consistently and rationally, it must not be administered at all" (*Callins v. Collins*, cert. Denied, 114 S.Ct. 1127, 127 L.Ed. 435 1994).

5. 'Junking the Machinery of Death' – In conclusion

Justice Blackmun (referred to above) was in fact part of the minority that voted in favour of retaining the death penalty in the famous case of *Furman v. Georgia* (1972) in which a majority of the US Supreme Court concluded that the death penalty was cruel and unusual punishment under existing statutes because it was randomly applied. When the US Supreme Court reversed that decision in *Greg v. Georgia* (1976), Justice Blackmun was part of the majority. In that sense he had been a strong supporter of the death penalty. It is against this background that his comments in *Callins v. Collins* that the death penalty experiment has failed assumes significance.[22] The full observation of Justice Blackmun was:

> *"From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavoured – indeed, I have struggled--along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated to concede that the death penalty experiment has failed."*

Many Indian judges have arrived at similar conclusions. While Justice Krishna Iyer and Justice Bhagwati are well known for their opposition to the death penalty during their time on the Bench, even Chief Justice Chandrachud (who was part of the majority Bench in *Bachan Singh*) changed his mind about the efficacy of the death penalty after he had retired. In 1989 Justice Chandrachud said, "Life is never static. It moves on. I believe that the time is now ripe for asserting that the death penalty ought to be abolished… It would not be far from right to say that the death penalty neither deters the criminal who is determined to kill, nor does it act as a fear in the mind of a marginal criminal who is always optimistic that he will not be found and if found not be convicted of murder and if so convicted will not be sentenced to death …

[22] See '*Twenty Years of Capital Punishment: A Re-evaluation*' by Richard C. Dieter, Executive Director, Death Penalty Information Center, June 1996.

Since the death penalty has served no purpose, neither logic nor experience would justify its continuance on the statute book…The death sentence… must be discarded once and for all."[23]

However, the death penalty is not the concern of judges alone. The inefficiency of the investigative agencies of the state, the nefarious links between the police, bureaucracy, political class and mafia groups which has become stronger and more entrenched, all combine to create a socially regressive situation, which if not handled sensitively will push the country back in terms of progressive values and perspectives. The irony is that it is these structural problems – that lead to abuses within the criminal justice system and result in it being both ineffective and arbitrary – that are not being addressed. Instead, more stringent laws that provide for the death penalty are suggested as a means of addressing concerns about increases in crime and 'terrorist' violence.

The questions are these: How do we persuade a majority of our fellow citizens to support the call to join the 135 other nations of the world who have, either directly or indirectly, abolished the death penalty as an archaic, inhuman and cruel vestige of the past? How do we make people appreciate the sentiments that made Spain turn abolitionist in 1995 when it declared that "the death penalty has no place in the general penal system of advanced, civilized societies ... what more degrading or afflictive punishment can be imagined than to deprive a person of his life"? How do we impress upon people that abolishing the death penalty is not indicative of a weak state or based on impractical, romantic notions, but part of a consciously adopted stand by a particular society and people? How do we encourage people to respect the sentiments that echo in the declaration of Justice Chaskalson of the South African Constitutional Court, who stated that, "The rights of life and dignity are the most important of all human rights and this must be demonstrated by the State in everything it does, including the way it punishes criminals."

More information on the death penalty to assist an informed discussion is certainly one way forward. While there has been a lot of research on the subject outside India, this has not impressed the Supreme Court much. In upholding the constitutionality of the death penalty in *Jagmohan Singh v. The State of Uttar Pradesh* (AIR 1973 SC 947), the Supreme Court sharply observed, "There is a large volume of evidence compiled in the West by kindly social reformers and research workers to confound those who want to retain the capital punishment." Such language suggests a dismissive and condescending attitude towards excellent research on the part of the Court. That attitude is sadly reflected in the response of other institutions and officials and represents an obstacle to rational discussion. Yet the Supreme Court was correct in noting the absence of a study on the subject in India.

This report by Amnesty International India and People's Union for Civil Liberties, Tamil Nadu & Puducherry arose from a need to fill a vital gap in the campaign for abolition, notably the absence of any detailed study of the judicial process relating to death sentences.

[23] Statement in 1989 by former Chief Justice of India Y.V Chandrachud made available to Amnesty International, see Amnesty International, *India: The Death Penalty*, London: 1989, AI Index: ASA 20/13/89, pp. 5-6.

Interwoven into an analysis of all the available judgments delivered on the subject of the death penalty by the Indian Supreme Court from 1950 till late 2006, are the themes that have characterized the death penalty debate. It is our hope that this study, by clearly demonstrating the arbitrariness and ultimate unfairness of the death penalty in India, will help introduce greater objectivity into the debate and will help persuade many people that our society will be better off by outlawing the punishment than by retaining it.

The choice before us as a society is this: do we step backward, and accept still greater restraints on our liberties, thereby increasing the possibility of judicial errors and judicially mandated murders, or do we step forward and join the company of other nations, who have accepted the vision of a humane legal system in which the death penalty is anathema, a vestige of the past? Are we, as a nation of over a billion people, going to join the majority of nations of the world in outlawing the death penalty, or are we going to continue legally murdering our citizens?

PART II.

The Judicial Award of the Death Penalty in India: A Study of Supreme Court Judgments 1950 – 2006

1. Introduction

Despite the death penalty being a subject of intermittent topical interest in India, largely focused around a particular high-profile case, there is little known on the subject. Basic information such as the number of persons presently under sentence of death is not available. The latest official figures are 273 persons under sentence of death, as of 31st December 2005.[24] However, the National Crime Records Bureau (NCRB) does not clarify whether these figures refer to sentences passed by a trial court or those whose sentences have been upheld by a High Court or the Supreme Court, or those whose mercy petitions are pending or have been rejected. In November 2006 the Minister of Home Affairs reported to Parliament that at present mercy petitions of 44 persons were pending before the President of India, a number of which had been pending since 1998 and 1999 (for a description of the legal and executive processes relating to the death penalty, see Section 1.2 below).

Similar confusion abounds with respect to the number of persons who have been executed in India. The NCRB only provides figures of 25 executions for the period between 1995 and 2004.[25] There are no collated figures available for executions before 1995 and the NCRB has informed Amnesty International India that it does not have any statistics relating to the death penalty prior to this date.[26] Some available information however suggests that the number of those executed between 1950 and 2006 may be large and may run to several thousand. A civil liberties group – the People's Union for Democratic Rights (PUDR) – has stated that as per a 1967 Law Commission report, at least 1422 people were executed between 1954 and 1963 alone.[27] In 1989 the Attorney General informed the Supreme Court that between 1974

[24] Prison Statistics 2005, NCRB, Ministry of Home Affairs.
[25] With 24 of the 25 executions taking place between 1995 and 1998, it is clear that executions have decreased in the past decade. This information is available from the Prison Statistics – an annual publication of NCRB that began in 1995. Doubts however remain about the accuracy of even this NCRB data.
[26] This is peculiar given the depth of information that is available in the 'Crime in India' series, also published by the NCRB since 1953 on a huge range of matters related to crime.
[27] Bisakha De Sarkar, 'So, what was the death count at the hangman's?' The Telegraph, 23 March 2005 at http://www.telegraphindia.com/1050323/asp/atleisure/story_4524114.asp

and 1978, 29 persons were executed.[28] The government announced in Parliament that 35 executions had been carried out in the three years between 1982 and 1985.[29] And in 1997 the Attorney General of India informed the UN Human Rights Committee that between 1991 and 1995, 17 executions had been carried out.[30] While information about the number of executions should be available with individual Home or Jail/ Prison departments within each state, there appears to be a reluctance to share such information, despite the existence of the Right to Information Act, 2005.[31]

Thus, while the last execution in India – of Dhananjoy Chatterjee on 14th August 2004 – is well documented, along with a handful of others, this is not the case for the large number of persons who have been sentenced to death and executed in India previously. While it is believed that the last execution prior to 2004 took place in 1997, even the name of the person executed in 1997 is not confirmed, as material released by the NCRB only provides state-wise numbers and no names or other indicators. Similarly, information is also difficult to obtain through judgments as they are often unreported. The case of Sukumar Barman, executed in Calcutta in 1991 is illuminating. There is virtually no information available on his case, the sole available judgment is a dismissal of a writ petition seeking stay of execution that was entertained on the basis of a postal communication sent by a fellow prisoner (*Sukumar Barman alias Sulku and anr. through Chander Kumar Banik v. State of West Bengal*, [1994 SCC (Cri) 36]). The special leave petition and review petition that were previously dismissed are unreported**.**

This then is the context within which public and policy discussions on the death penalty take place.

The absence of locally researched material and information on the death penalty has been noted by the Supreme Court itself. Thus, while upholding the constitutionality of the death penalty in 1991 [*Smt. Shashi Nayar v. Union of India and ors.* (AIR 1992 SC 395)], the Supreme Court relied on the 1967 Report of the Law Commission of India on the death penalty. The same report was relied on by the court in previous rounds of constitutional challenge in *Jagmohan Singh v. The State of Uttar Pradesh* (AIR 1973 SC 947) and *Bachan*

[28] *Kehar Singh v. Union of India*, [(1989) 1 SCC 204], at 218.
[29] Amnesty International, *India: the Death Penalty*, 1989, pg. 11.
[30] Four in 1991; six in 1992; four in 1993; one in 1994 and two in 1995. Taken from an unofficial transcript of proceedings of the UN Human Rights Committee hearing India's third periodic report on implementation of the ICCPR, Geneva, 24-25 July 1997, recorded with official permission by Amnesty International.
[31] An application under the Right to Information Act by the People's Union for Democratic Rights seeking details of persons executed in Delhi's Tihar Jail was initially rejected by the Prison authorities who claimed that release of such information would not be in the interest of the public and would endanger the state. See Bikram Jeet Batra, 'Silent and secret executions', *Seminar* Vol. 551 July 2005, at http://www.india-seminar.com/2005/551/551%20comment.htm. However the information was subsequently given after an appeal tribunal ruled in favour of the applicants.

Singh. In *Bishnu Deo Shaw v. State of West Bengal* [(1979) 3 SCC 714] the Court observed that in India, "no systematic study of the problem whether the death penalty is a greater deterrent to murder than the penalty of life imprisonment has yet been undertaken." Similar references to the lack of any in depth sociological or statistical study on the subject of capital punishment in India were also made in *Ediga Anamma v. State of Andhra Pradesh* (AIR 1974 SC 799) and *Jagmohan Singh v. The State of Uttar Pradesh* (AIR 1973 SC 947).

Ignoring clear International standards

In resolution 1989/64, adopted on 24th May 1989, the UN Economic and Social Council urged UN member states "to publish, for each category of offence for which the death penalty is authorized, and if possible on an annual basis, information about the use of the death penalty, including the number of persons sentenced to death, the number of executions actually carried out, the number of persons under sentence of death, the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted, and to include information on the extent to which the safeguards referred to above [the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty] are incorporated in national law."

The UN Human Rights Committee has called on states parties to the ICCPR to provide information on the use of the death penalty including the number of death sentences imposed over the past 10 years, the types of offence for which the death penalty has been imposed, the grounds for the sentences imposed, the number of executions carried out, the manner of execution and the identity of the prisoners executed.[32]

In resolution 2005/59, adopted on 20th April 2005, the UN Commission on Human Rights called upon all states that still maintain the death penalty "to make available to the public, information with regard to the imposition of the death penalty and to any scheduled execution."

In his report *Transparency and the Imposition of the Death Penalty* dated 24th March 2006 submitted to the 62nd Session of the UN Commission on Human Rights, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has noted the reluctance of Indian authorities to disclose information and has observed that, "significant gaps in information on past and present death sentences and executions remain." [33]

1.1 The parameters of the present study and its methodology

[32] Concluding observations of the Human Rights Committee: Libyan Arab Jamahiriya, UN Doc. CCPR/C/79/Add.101, 6th November 1998, para. 8; Concluding observations of the Human Rights Committee: Syrian Arab Republic, UN Doc. CCPR/CO/71/SYR, 24th April 2001, para. 8.
[33] UN Doc. E/CN.4/2006/53/Add.3, para. 24.

In the context of an absence of official material on the imposition of the death penalty, the present report is based on judgments of the Indian Supreme Court given between 1950 and 2006, where the Court considered the award of the death penalty or adjudicated on a particular aspect of capital punishment. The research for this report involved the study of over 700 judgments given during the period and that were reported in law reporters (journals).[34]

Given that the study relied on reported judgments of the Supreme Court it is bound by the consequent limitations. First, despite virtually all recent judgments of the Supreme Court being reported in these journals, this has not always been the case and a large number of judgments prior to the last two decades may have never been reported at all. In some cases Courts may have marked certain cases as 'not to be reported' for various reasons. Contrary to popular belief, not all cases involving the death penalty are granted leave to appeal by the Supreme Court and orders for dismissal of Special Leave Petitions are almost never reported (see Section 7.2 below). Finally, while in the recent past most condemned prisoners have been able to access the Supreme Court either through assistance from prison authorities or through the Supreme Court Legal Services and Legal Aid Committee, this was not always the case and therefore it cannot be assumed that all cases in the period studied will have reached the Supreme Court. The absence of a case from reported judgments of the Supreme Court cannot lead to an obvious conclusion about which of the above-mentioned reasons might be responsible.

A good example of this is the case of the well-known Kashmiri separatist Mohammed Maqbool Butt who was executed in New Delhi in February 1984. No Court judgments in his case are available. Since his trial took place under the Enemy Agents Ordinance, 1943, there was no scope for appeal. Although some miscellaneous petitions were reportedly filed in the Delhi High Court, the Srinagar High Court and the Supreme Court regarding his case, no records of these petitions have been found as part of this study. A further intriguing example is that of Bachan Singh, whose name is inextricably linked with the death penalty in India (for it is in the case of *Bachan Singh v. State of Punjab* (AIR 1980 SC 898) that the Supreme Court in 1980 developed the 'rarest of rare' test). The famous decision was taken by a Constitutional Bench of the Supreme Court, but there is no further reference to the individual case of Bachan Singh and it is therefore unclear whether he lived on as his name did.

Despite the fact that Supreme Court judgments are often fairly lengthy, they provide scant information on the facts of individual cases.[35] Judgments of only a few paragraphs are also

[34] The reporters used were The All India Reporter (AIR), Supreme Court Cases (SCC) and an online legal research resource www.manupatra.com. A complete list of the judgments studied is available from Amnesty International India.

[35] Most capital cases come to the Supreme Court by way of 'special leave' vide Article 136 of the Constitution of India. 'Leave' is generally granted on particular questions of law and the Court's judgments often cover only the relevant facts relating to those questions and do not include detailed facts of the case.

obviously scant on detail. Importantly, judicial practice in India avoids references to caste, community, religion and other socio-economic factors relevant to the victim or the accused, unless seen to be of direct relevance to the adjudication of the case. It is therefore almost impossible to analyse the impact of the application of the death penalty on members of particular religions or caste groups through a study of such judgments.

This introductory chapter of the study provides background information about legislations that contains the death penalty as well as the judicial and executive processes relating to the death penalty in India.

1.2 Relevant law and procedure

There are two broad categories of laws that provide for death sentences in India: the Indian Penal Code, 1860 (IPC); and special or local legislation.

The source of the power to award death sentences arises from Section 53 of the IPC. This is a general provision on punishment. The IPC provides for capital punishment for the following offences, or for criminal conspiracy to commit any of the following offences (Section 120-B):

(1) Treason, for waging war against the Government of India (Section 121);
(2) Abetment of mutiny actually committed (Section 132);
(3) Perjury resulting in the conviction and death of an innocent person (Section 194);
(4) Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person (Section 195A);
(5) Murder (Section 302) and murder committed by a life convict (Section 303). Though the latter was struck down by the Supreme Court, it still remains in the IPC (see 5.1 below);
(6) Abetment of a suicide by a minor, insane person or intoxicated person (Section 305);
(7) Attempted murder by a serving life convict (Section 307(2));
(8) Kidnapping for ransom (Section 364A); and
(9) Dacoity [armed robbery or banditry] with murder (Section 396).

The IPC provides a definition of crimes and prescribes the punishment to be imposed when the commission of a crime is established through a trial process in a court of law in which evidence is placed before the court and the accused is provided with an opportunity not only to test the evidence of the prosecution but to also lead their own evidence, if so desired.

The Criminal Procedure Code, 1973 (CrPC) is a comprehensive law that sets out procedural rules for the administration of criminal justice. The 1973 Code was the result of a major overhaul of the previous Code of 1898. The Code covers procedures from the registration of an offence, to the powers, duties and responsibilities of various authorities involved in investigation as well as procedural safeguards, provisions relating to bail and so on. The Code

India violating Article 6 of the ICCPR

Article 6(2) of the ICCPR states: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the ***most serious crimes***..." In its General Comment on Article 6, the UN Human Rights Committee has elaborated: "The Committee is of the opinion that the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure." Similar recognition has also been provided in Safeguard 1 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council in 1984, which requires that capital punishment should be imposed "only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences."

India's expansion of the use of the death penalty in recent years appears to violate the spirit of Article 6(2) in this regard. In 1993 India introduced the death penalty for cases of kidnapping for ransom (Section 364A IPC). The UN Human Rights Committee has explicitly stated that **abduction not resulting in death** cannot be characterized as the "most serious crimes" under Article 6(2) of the ICCPR and that the imposition of the death penalty for these offences therefore violates that article.[36] The provision of the death penalty under the Narcotics, Drugs and Psychotropic Substances (Prevention) Act, 1995, is similarly flawed. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stated that, "the death penalty should be eliminated for crimes such as economic crimes and **drug-related offences**." [37]

The UN Special Rapporteur has also stated that the restrictions set out in Safeguard 1 of the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty "exclude the possibility of imposing death sentences for economic and other so-called victimless offences, or activities of a religious or political nature – including acts of treason, espionage and other vaguely defined acts usually described as '**crimes against the State**' or 'disloyalty'."[38] India awards the death penalty for 'waging war against the state' (Section 121 IPC).

A large number of the special laws that provide for the death penalty (see below) were either passed [(Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989] or amended [NDPS Act, Arms Act etc.] after India acceded to the ICCPR in 1979. Notably, resolution 32/61 adopted on 8th December 1977 by the UN General Assembly stated, "...the main objective to be pursued in the field of capital punishment is that of progressively ***restricting*** the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment..." (emphasis added).

[36] Concluding observations of the Human Rights Committee: Guatemala, UN Doc. CCPR/CO/72/GTM, 27th August 2001, para. 17 (emphasis added).
[37] UN Doc. E/CN.4/1997/60, 24th December 1996, para. 91 (emphasis added).
[38] UN Doc. E/CN.4/1999/39, 6th January 1999, para. 63 (emphasis added).

also elaborates on the principles and procedures governing the conduct of trials, the manner of admission of evidence and related issues, culminating in provisions that govern the handing down of a judgment at the end of a trial in a criminal prosecution. The Code also contains provisions relating to the right of convicted persons to file revision petitions and appeals in higher courts of law.

1.2.1 Special Legislations providing for the death penalty

There are a number of other special legislations that also provide for the death penalty. In some cases the offences provide for mandatory death sentences (see Section 5 below):

1. Laws relating to the Armed Forces, for example the Air Force Act, 1950, the Army Act, 1950 the Navy Act, 1950 and the Indo-Tibetan Border Police Force Act, 1992
2. Defence and Internal Security of India Act, 1971
3. Defence of India Act, 1971 (Section 5)
4. Commission of Sati (Prevention) Act, 1987 (Section 4(1))
5. Narcotic Drugs and Psychotropic Substances (Prevention) Act 1985, as amended in 1988 (Section 31A)
6. Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) (Section 3(2)(i))
7. Prevention of Terrorism Act, 2002 (POTA) (Section 3(2)(a))
8. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Section 3(2)(i))
9. Explosive Substances Act, 1908, as amended in 2001 (Section 3(b))
10. Arms Act, 1959, as amended in 1988 (Section 27)
11. Unlawful Activities Prevention Act, 1967, as amended in 2004 (Section 16(1))
12. A number of state laws, including: Maharashtra Control of Organised Crime Act, 1999 (Section 3(1)(i)), Karnataka Control of Organised Crime Act, 2000 (Section 3(1)(i)), The Andhra Pradesh Control of Organised Crime Act, 2001(Section 3(1)(i)), The Arunachal Pradesh Control of Organised Crime Act, 2002 (Section 3(1)(i))

Unless special provisions are contained within the above-mentioned laws, the procedure set out in the CrPC are followed in relation to the investigation and prosecution of crimes under these laws.

Crucially, a number of these laws include changes to the rules relating to the appreciation of evidence at trial stage. For example, a number of laws relating to alleged acts of "terrorism" have permitted the use of confessions made by an accused to a police officer as evidence. Under ordinary criminal law, such confessions are inadmissible and of no evidentiary value largely because of concerns about the use of torture by police to extract confessions. Similarly, while admissions made by one accused about another co-accused are not admissible under the ordinary criminal law, in some of the special laws such as TADA and POTA, the law has allowed for certain presumptions to be drawn implicating other accused. While the constitutionality of many such dangerous provisions has been challenged and upheld by the Supreme Court of India, in practice there is clear evidence that the

implementation of many of these laws has been characterised by misuse and abuse; this only heightens concern for those sentenced to death under such legislations (see Section 7.3 below).

1.2.2 Three possible stages of judicial process in death penalty cases

The CrPC provides for the possibility of a three-stage judicial process. Since all death penalty cases involve a charge of murder or similar other serious offences, all initial trials under the ordinary criminal law are held before a District and Sessions Court in a particular state. In the event of the trial court awarding a death sentence, it is mandatory for the respective High Court of that state to confirm the sentence (Section 366 CrPC). The High Court has the power to direct further inquiry to be made or additional evidence to be taken upon any point bearing on the guilt or innocence of the accused at this stage (Section 367 CrPC). Based on its assessment of the evidence on record, the High Court may: (i) confirm or pass any other sentence, or (ii) annul the conviction and convict for any other offence that the Sessions Court might have convicted the accused of or order a new trial on the basis of the amended charge, or (iii) acquit the accused person. The High Court is also the first appellate court for a person sentenced to death. At the third level is the Supreme Court of India. There is no automatic right of appeal from the order of the High Court to the Supreme Court in death penalty cases except in a situation in which the High Court has imposed a death sentence while quashing a trial court acquittal. 'Special Leave' to file an appeal with the Supreme Court has to be granted by the High Court or the Supreme Court has to give leave to file an appeal before it.

In the case of some special legislations such as the Terrorist and Disruptive Activities (Prevention) Act 1987, the law provides that appeals against the ruling of the trial court should automatically lie only with the Supreme Court (though this Act lapsed in 1995, trials under the Act continue to this day).

1.2.3 The process of appeal

Under the CrPC, as part of the mandatory confirmation by the High Court of a death sentence handed down by a trial court, a High Court bench of a minimum of two judges must, on appreciation of the facts, come to its own conclusion on guilt and award a sentence as deemed fit in the circumstances of the case. As indicated above, if the High Court confirms the death sentence, no automatic appeal is provided to the Supreme Court.

In the event that a trial court acquits an accused in a case involving a crime punishable by death or other offences, the state alone can file an appeal against acquittal before the High Court (Section 378 CrPC). The High Court can either confirm the acquittal or set aside the acquittal and convict the accused for the alleged crimes and impose sentence. If the acquittal is set aside and a death sentence imposed, Section 379 of the CrPC provides for an automatic appeal to the Supreme Court. Appeals may also be filed by the state for enhancement of

sentence imposed by the trial court or the High Court if it feels that the sentence imposed is inadequate (Section 377 CrPC). Ordinarily, relatives of the victims of the crime can file revision petitions (but not appeals) seeking enhancement of the punishment in the High Court or Supreme Court. Notably, while in the event that a High Court overturns an acquittal and awards a death sentence there is an automatic right to appeal to the Supreme Court, there is no such right in the event that a High Court enhances a trial court's sentence to that of death.

As noted above, access to the Supreme Court for appeal can only be granted if the High Court grants special leave or if special leave is granted by the Supreme Court itself. The Supreme Court can dismiss a death sentence case *in limine*, i.e. at the threshold stage itself without even admitting the appeal for consideration (see also Section 7.2 below).

Public Intervention in capital cases

While the Supreme Court had entertained a petition filed in the public interest by a social activist seeking commutation of a death sentence on the grounds of delay in *Madhu Mehta v. Union of India and ors.* (AIR 1989 SC 2299), the Court has subsequently refused to entertain such public interest petitions despite similar (if not more serious) grounds in *Ashok Kumar Pandey v. The State of West Bengal and ors.* (AIR 2004 SC 280). Though the Supreme Court had previously also dismissed third-party petitions in *Simranjit Singh Mann v. Union of India and anr.* (AIR 1991 SC 280) and *Karamjeet Singh v. Union of India* (AIR 1993 SC 284), in these two cases the condemned prisoners had themselves given oral and written instructions that no petitions should be filed in the courts or for mercy on their behalf.

The restriction on third party intervention was extended even to the National Commission for Women, which sought to intervene in the case of *Panchi and ors v. State of Uttar Pradesh* (AIR 1998 SC 2726), where one of the accused was a woman with a suckling child. The Supreme Court observed that, "under the Code of Criminal Procedure, National Commission for Women or any other organisation cannot have *locus standi* in this murder case."

Where petitions have been filed by fellow prisoners, the Supreme Court has been more open. Thus in *Daya Singh v. Union of India and ors.* (AIR 1991 SC 1548), a letter sent by a prisoner incarcerated in Calcutta who read a reference to the delay on death row in Daya Singh's case was converted into a petition by the Court. Similarly in *Sukumar Barman alias Sulku and anr. through Chander Kumar Banik v. State of West Bengal* (1994 SCC (Cri) 36)**,** the Supreme Court accepted a postal communication filed by a fellow death row prisoner, Chandra Kumar Banik, as a petition.

1.2.4 On Commutations and Clemency

The judicial process comes to an end once the highest courts – either the High Court (in cases where no appeal has been filed in the Supreme Court or where special leave petitions have

been dismissed) or the Supreme Court (if special leave has been given) – have confirmed the death sentence. The law provides that in such a situation the convict shall be 'hanged by the neck till he is dead' (Section 354(5) CrPC).

There are two ways in which a convict can at this stage avoid execution. The first is a 'commutation' of the death sentence by the appropriate government under provisions of the IPC and CrPC.[39] The second is a commutation or pardon granted by the President of India or the Governor of the relevant state under Articles 72 and 161 of the Constitution of India.[40] However the President and Governor can exercise this power only on the 'aid and advice' of the Council of Ministers. Article 72(3) of the Constitution clarifies that the power of the President of India to grant pardon and commutation in Article 72(1) should not curtail the exercise of similar power to commute death sentences given to the Governor of the States concerned under Article 161. This provision is of critical importance as the Constitution implicitly provides a two-tier process of seeking pardon and commutation from Constitutional functionaries, and also provides for the theoretical possibility of a difference in opinion between the Governor of the State exercising power under Article 161 and the President of India under Article 72.

There is of course a fundamental difference between the powers exercised by judicial bodies and those exercised by executive/constitutional authorities. An appeal to higher judicial fora is based on a challenge to the legal evidence heard at trial that has a bearing on the guilt of the accused and to the sentence imposed. The process focuses on the appreciation of evidence placed before the courts and is therefore circumscribed both by the nature of the evidence as also the rules relating to assessment of the evidence. The commutation powers of the government and the President/Governors are not limited by the evidence permitted before the

[39] Section 54 of the IPC provides that the appropriate government may, in cases where a death sentence has been imposed, commute the punishment for any other punishment provided in the Code without the consent of the offender. This power to commute death sentences is given effect through Section 432, 433 and 433A of the CrPC. Section 432 CrPC grants powers to the appropriate government to suspend the execution of the sentence or to remit the whole or any part of the punishment imposed by the trial court without conditions or upon conditions which the accused accepts. Section 433 grants powers to the appropriate government to commute the death sentence to any other punishment provided under the IPC, without the consent of the convicted person. However in the event that a state government has exercised powers under Section 433 CrPC to commute the death sentence to life imprisonment, Section 433A stipulates that such person shall not be released from prison unless he has served at least 14 years imprisonment.

[40] Article 72 of the Constitution of India empowers the President of India to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence including in all cases where the sentence is a sentence of death (Article 72(1)(c)). Article 161 similarly provides that the Governor of a state shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the state extends.

courts. In the exercise of executive powers to grant pardons and commutations, they have the authority and the moral justification to go beyond the legal position. Appeals to the executive are therefore often based on background – personal and social factors that explain the conduct of the convicted person, their psychological and cultural background and other special features including material that could not be placed before the courts (for more on executive clemency, see Section 8.2 below).

2. The award of the death penalty in India: sentencing policy

> *"What would constitute a rarest of rare case must be determined in the fact situation [sic] obtaining in each case. We have also noticed hereinbefore that different criteria have been adopted by different benches of this Court, although the offences are similar in nature … No sentencing policy in clear cut terms has been evolved by the Supreme Court. What should we do?"*
>
> Justice S.B. Sinha in *Aloke Nath Dutta and ors. v. State of West Bengal* (MANU/SC/8774/2006)

This chapter traces the development of sentencing policy in capital cases, including both legislative amendments and jurisprudence. In doing so, it highlights the inconsistencies and arbitrariness in sentencing throughout the period of study, drawing on numerous Supreme Court judgments to demonstrate. Specific issues relating to sentencing, such as factors of age and types of crime as well as errors and inconsistencies in the sentencing process, are dealt with in subsequent chapters.

Following independence, India retained the majority of legal statutes put in place by the colonial British Government of India. This included the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1898. As per these statutes the death sentence was the 'ordinary' and normal punishment for murder and judges were required to state the reason if a sentence of death was not handed down after a conviction in a capital trial. These 'reasons' for not imposing the death penalty came to be referred to in case law as 'extenuating circumstances.' The legal position did not change even when the Constitution of India came into force in 1950 since it provided that the deprivation of life and liberty was a permissible exception to the 'Right to Life' in Article 21 when carried out under 'procedure established by law.'

With Courts interpreting law strictly and procedure rigidly it comes as little surprise that there are few reported Supreme Court judgments on death penalty cases during this early period of the Republic. Most appeals to the Supreme Court following confirmation of a death sentence by the High Court are likely to have been refused. This is well illustrated by the Court's judgment in *Pritam Singh v. The State* (AIR 1950 SC 169), where it discussed the exceptional nature of appeals admitted by the Supreme Court. The bulk of the judgments on death penalty cases in the Supreme Court reported between 1950 and 1955 therefore largely deal with questions of constitutional law or special legislation [*Janardan Reddy and ors. v. The State* (AIR 1951 SC 124), *Habeeb Mohammad v. State of Hyderabad* (AIR 1954 SC 51) and *Thaivalappil Kunjuvaru Vareed v. The State of Travancore-Cochin* (AIR 1956 SC 142)]. The remainder include judgments directing acquittals in cases of gross error by lower courts [*Hate Singh, Bhagat Singh v. State of Madhya Bharat* (AIR 1953 SC 468), *Pangambam Kalanjoy Singh v. State of Manipur* (AIR 1956 SC 9), *Machander v. State of Hyderabad* (AIR 1955 SC 792)] while judgments commuting or confirming death sentences are few.

2.1 The Amending Act XXVI (1956 – 1975)

> *"... it is unfortunate that there are no penological guidelines in the statute for preferring the lesser sentence, it being left to ad-hoc forensic impressionism to decide for life or for death."*
>
> Justice V.R. Krishna Iyer, while discussing the 'judicial hunch in imposing or avoiding capital sentence' in *Ediga Anamma v. State of Andhra Pradesh* (AIR 1974 SC 799)

The Amending Act XXVI of 1955, which came into effect from 1st January 1956, made a number of changes to the CrPC. One was to delete Section 367(5) which required judges to give reasons for awarding any alternative punishment to death after conviction in a capital case. With this deletion, the special status accorded to the death penalty was done away with and judges now had the discretion to award any of the punishments allowed by the law. In the case of murder, the choice available to the judge was a death sentence or life imprisonment.

This change in the law led to some confusion and in a large number of capital cases the courts continued to use the old practice of providing 'extenuating circumstances' when awarding prison terms (see also Section 6.2.4 below). Along with increased discretion given to the judiciary, came an increase in the arbitrary use of that discretion. Thus, while in *Wazir Singh v. State of Punjab* (AIR 1956 SC 754), the Supreme Court commuted the sentence of the accused on grounds of 'parity' (the evidence did not show whose gunshot killed the deceased and the co-accused had already had his death sentence commuted), another bench of the Court took the opposite position in *Brij Bhukhan and ors v. The State of Uttar Pradesh* (AIR 1957 SC 474), and refused to commute the death sentence awarded to the accused who instigated the assault even though those who had committed the murder had received the lesser sentence. The Court argued, "merely because leniency had been shown to the other appellants in the matter of sentence, it is not ground for reducing sentence passed on Brij Bhukhan."

In *Kundan Singh & ors. v. The State of Punjab* [(1971) 3 SCC 900], the trial court had sentenced Karam Singh to death and Shavinder Singh to life imprisonment on the grounds that having been shot during the attack, the latter would realise that "his uninhibited aggression is not free from peril." Even though the High Court did not agree with this distinction, it upheld the death sentence against Karam Singh "as it could not say that the discretion exercised by the Sessions Judge in passing the order of sentence against Shavinder Singh was either arbitrary or capricious." The Supreme Court however observed that both the accused had used the same kind of weapon and struck the deceased on vital parts of the body. Despite failing to find "any logical ground for making a distinction between appellants Shavinder Singh and Karam Singh," the Supreme Court refused to commute Karam Singh's death sentence stating, "…the fact that the Sessions Judge drew such a distinction on a ground which cannot be said to be either logical or in consonance with the evidence on record can hardly be a reason for us to interfere with the sentence imposed on appellant Karam Singh,

confirmed as it is by the High Court after a full reappraisal of all the facts and circumstances of the case."

In the bulk of Supreme Court judgments in this era however, there is no discussion of sentencing and Courts appear to have continued to award and uphold the death sentence without applying their mind to the change in law e.g. *Ram Prakash v. The State of Punjab* (AIR 1959 SC 1), *Subramania Goundan v. The State of Madras* (AIR 1958 SC 66), *Sewa Singh v. State of Punjab* [(1963) 2 SCR 545], *Gurcharan Singh v. State of Punjab* (AIR 1963 SC 340), *Sahoo v. State of Uttar Pradesh* (AIR 1966 SC 40), *Ram Prakash and ors. v. The State of Uttar Pradesh* [(1969) 1 SCC 48] and *Tufail (Alias) Simmi v. State of Uttar Pradesh* [(1969) 3 SCC 198]. Even in cases where there appears to have been more than sufficient reason for the Supreme Court to consider awarding a lesser sentence, the judgments suggest that the death sentence was upheld virtually mechanically. Thus in both Bakshish *Singh v. The State of Punjab* (AIR 1957 SC 904) and *Shambhoo v. State of Uttar Pradesh* [(1962) Supp (3) SCR 334], even though the Supreme Court heard appeals in cases where death sentences were awarded by High Courts while overturning acquittals by trial courts, it did not enter into the domain of sentencing but merely upheld the death sentences awarded. Some of the judgments make extremely uncomfortable reading, appearing to ignore suspect prosecution evidence and failing to discuss the merits of the death sentence.

Towards the end of this period, in the absence of any other guideline on the award of the death sentence or otherwise, judgments appeared to rely on a rather abstract phrase – 'ends of justice' – to disguise the arbitrariness in the use of judicial discretion in sentencing. Thus judgments regularly concluded with the mere assertion that the death sentence was being commuted or confirmed "to meet the ends of justice." In *Raghubir Singh v. State of Uttar Pradesh* [(1972) 3 SCC 79], even though the Supreme Court could find nothing to support the accused's plea for a lesser sentence and the trial court had observed that the victim was unarmed and that the murder was "pre-planned, cold blooded, motivated by a deep sense of revenge," the Supreme Court relied on the change in the law post-1955 and concluded, "in view of the peculiar facts and circumstances of this case, we consider that the sentence of imprisonment for life would seem to meet the ends of justice…" While the commutation in the case must be welcomed, the use of ambiguous terms such as 'peculiar facts' and 'ends of justice' without even noting what these facts were, only served to demonstrate how whimsical and arbitrary sentencing in capital cases had become. Had this case been before a different bench, they could have easily argued that the 'peculiar facts' of the case and the 'ends of justice' required the death sentence to be upheld.

Even though the Supreme Court in *Jagmohan Singh* upheld the constitutionality of the death penalty (see box) and asserted that the exercise of judicial discretion on well-recognised principles was the safest possible safeguard for the accused, a glance at the cases that immediately followed this judgment reveals that the Constitutional Bench was far off the mark with respect to its own fellow judges.

The judgment in *Jagmohan Singh* was delivered on 3rd October 1972. Yet in four other capital cases where the Supreme Court delivered judgments in the weeks between 6th November and 6th December 1972, different benches of the Court did not discuss the issue of sentencing at all. Trial courts and the Supreme Court itself continued to refer to 'extenuating circumstances' or the lack of them in sentencing, despite the 1956 amendment to the CrPC and the *Jagmohan Singh* judgment [see *Abdul Ghani v. State of Uttar Pradesh* (AIR 1973 SC 264), *Atmaduddin v. State of Uttar Pradesh* (AIR 1974 SC 1901) and *Vijai Bahadur v. The State of Uttar Pradesh* [(1973) 4 SCC 8]].

In April 1973 a Supreme Court judge chastised the trial court judge while delivering a judgment in *Neti Sreeramulu v. State of Andhra Pradesh* [(1974) 3 SCC 314]. While awarding the death sentence the trial court had stated that there were "absolutely no extenuating circumstances to justify imposition of lesser sentence." The learned Supreme Court judge observed that it appeared that the trial judge was not fully conscious of the amendment in the law and his approach suggests that he was looking for some mitigating circumstance to justify the imposition of lesser penalty. The judge further went on to clarify, "apart from the question of what sentence should have been imposed by the trial court, in our opinion, it is open to this Court under Article 136 of the Constitution to see what sentence permissible under the law would meet the ends of justice when it is called upon to consider that question."

In *Ediga Anamma v. State of Andhra Pradesh* (AIR 1974 SC 799), the Supreme Court voiced the need for a post-conviction sentencing hearing, observing that, "to personalise the punishment so that the reformatory component is as much operative as the deterrent element, it is essential that facts of a social and personal nature, sometimes altogether irrelevant if not injurious at the stage of fixing the guilt, may have to be brought to the notice of the Court when the actual sentence is determined." In this particular case, the bench found material on record to commute the death sentence awarded. This material included the fact that the appellant was a young woman with a young boy to look after. Further, after lamenting the lack of clear guidelines on sentencing, the Court proceeded to suggest a few: "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 compulsion insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible. Other general social pressures, warranting judicial notice, with an extenuating impact, may, in special cases, induce the lesser penalty. Extraordinary features in the judicial process, such as that the death sentence has hung over the head of the culprit excruciatingly long, may persuade the Court to be compassionate. Likewise, if others involved in the crime and similarly situated have received the benefit of life imprisonment or if the offence is only constructive, being under Section 302, read with Section 149, or again the accused has acted suddenly under another's instigation, without premeditation, perhaps the Court may humanely opt for life, like a just cause or real suspicion of wifely 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 hapless, helpless state of the victim and the like, steel the heart of the law for a sterner sentence."

Constitutionality of the Death Penalty Round I – *Jagmohan Singh v. The State of Uttar Pradesh*

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

In the absence of sociological data from India on deterrence, the Supreme Court relied on the 35th Report of the Law Commission of India (1967) as authoritative. Relying on the Law Commission's conclusion that "India cannot risk the experiment of abolition of capital punishment," the Court concluded, "it will be difficult to hold that capital punishment as such is unreasonable or not required in the public interest." The Court then referred to the various failed legislative attempts at abolition and argued, "If the legislature decides to retain capital punishment for murder, it will be difficult for this Court in the absence of objective evidence regarding its unreasonableness to question the wisdom and propriety of the Legislature in retaining it." Furthermore, the Court noted that the fact that "representatives of the people do not welcome the prospect of abolishing capital punishment" did not assist the argument that the death penalty is either unreasonable or not in the public interest.

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

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

The Supreme Court also dismissed the plea of discrimination, arguing that such a claim could not be made as the facts and circumstances in each case were themselves different and a judgment in one case could not be compared with another. The Court also summarily dismissed the argument that the lack of sentencing procedure in awarding death sentences fell foul of Article 21 of the Indian Constitution as the deprivation of the right to life was only

possible as per the procedure established by law. The Court noted that the accused was well aware of the possibility of the sentence during trial and also had an opportunity to address the Court as also examine himself as a witness and give evidence on material facts. In fact soon after this judgment, a formal sentencing procedure was introduced in the new Code of Criminal Procedure, 1973, a possible legacy of the 1972 challenge to the constitutionality of the death penalty.

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

In *Suresh v. State of U.P.* [(1981) 2 SCC 569] (a case where the original trial was conducted under the old CrPC – see below), the Supreme Court observed that the trial court should have given the accused a hearing on sentencing even though it was not required to, as this would have furnished useful data on the question of sentence. The Court commuted the sentence on cumulative grounds as it found that the accused was only 21 years old, there was no established motive (though robbery or sexual assault was claimed by the prosecution), that the accused did not even try to run away even though not injured, and that though not insane, "he was somewhat unhinged" at the time of the offence. Lastly, the Supreme Court also considered the fact that the main witness for the prosecution was a child of five. The Court concluded, "the extreme sentence cannot seek its main support from evidence of this kind which, even if true, is not safe enough to act upon for putting out a life."

2.1.1 The inter-regnum: old & new Codes of Criminal Procedure (1974 – 75)

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

A number of Supreme Court benches continued to follow the pre-1956 sentencing practice of citing 'extenuating circumstances,' for why the death penalty should not be imposed. In *Mangal Singh v. State of Uttar Pradesh* [(1975) 3 SCC 290] the Supreme Court upheld the death sentence as no extenuating circumstances were referred to it; in *Maghar Singh v. State of Punjab* (AIR 1975 SC 1320) none could be inferred; and in *Suresh @ Surya Sitaram v. State of Maharashtra* (AIR 1975 SC 783) none could be found. In other cases, the Supreme Court often fell back on not discussing sentencing at all [*Bhagwan Dass v. State of Rajasthan* [(1974) 4 SCC 781], *Lalai @ Dindoo and Anr. v. State of U.P.* (AIR 1974 SC 2118), *Shri Ram v. The State of U.P.* (AIR 1975 SC 175), *Mahadeo Dnyamu Jadav v. State of Maharashtra* (AIR 1976 SC 2327), and *Harbajan Singh v. State of Jammu & Kashmir* (AIR 1975 SC 1814)].

Other benches, in the meantime, continued their innovations, notably by hinting that mercy should be shown by the executive towards the appellants in the absence of the Court's ability to commute under the current legal guidelines. In *Nachhattar Singh and Ors. v. The State of Punjab* (AIR 1976 SC 951)**,** even though the judges could not find any factual grounds or circumstances in the case to commute the sentence, the Supreme Court stated that, **"**we may however add that if there are any commiserative factors which can be taken into consideration by the executive government in the exercise of its prerogative of mercy it is for the Government to do so." Similarly in *Bishan Dass v. State of Punjab* (AIR 1975 SC 573)**,** the clearly abolitionist Justice Krishna Iyer and Justice Sarkaria reluctantly upheld the death sentence for the cruel and inhuman killings of a young woman and child by the accused who had thrown a grenade in the house. However while doing so they referred to their own judgment in *Ediga Anamma v. State of Andhra Pradesh* (AIR 1974 SC 799) as also the "general trends in courts and among juristic and penal codes in this country and in other countries […] towards abolition of capital punishment." They further hinted: "It is entirely a matter for the clemency of the Governor or the President, if appropriately moved to commute or not to commute." Again in the same month, the same bench in *Shanker v. State of U.P.* (AIR 1975 SC 757) found that while delay in the judicial process alone, set against the suffering of the accused's family cannot be taken into account by the Court for commutation, "Nevertheless these are compassionate matters which can be, and we are sure, will be considered by the Executive Government while exercising its powers of clemency." Other accused whose cases went before different benches were perhaps unfortunate not to receive similar support from the Court.

Innovations were also visible in *Carlose John and Anr v. State of Kerala* [(1975) 3 SCC 53] where the Supreme Court commuted the death sentence on a new ground – that the accused were under 'emotional stress' when they committed the murder. Similarly in *Vasant Laxman More v. State of Maharashtra* [(1974) 4 SCC 778], the Court commuted the sentence citing the 'mental distress' of the appellant who suspected his paramour of infidelity. In *Faquira v. State of U.P.* (AIR 1976 SC 915), the appellant received the benefit of commutation on the grounds that the circumstances indicated that the deceased had said something which strongly disturbed the mental balance of Faquira and his companions. Similarly in *Nemu Ram Bora v. The State of Assam and Nagaland* (AIR 1975 SC 762), the Bench went as far as to say that

whether the claim of the accused that he was suffering from a mental disorder after suffering a dog bite "may be correct or not but *we think* that the triple murder was committed by the appellant as result of some mental imbalance." (For detailed analysis of insanity and mental health as a factor in sentencing see Section 3.4 below).

A reading of a number of judgments during this period establishes the lack of any clear systematic principles governing sentencing and reiterates the judicial lottery that was and is the death penalty. A leading scholar who examined seventy judgments of the Indian Supreme Court between 1972 and 1976 in which judges had to decide on whether to uphold the death sentence or commute it to life imprisonment, concluded that part of the problem was that different judges had different attitudes to capital cases. Of the sample cases studied between November 1972 and January 1973, the Professor noted that the large number of death sentences upheld may have been partly due to the misfortune of their appeals being heard by the Bench of Justices Vaidialingam, Dua and Alagiriswami.[41] While many argued that the requirement of 'special reasons' and the introduction of a formal sentencing procedure in the new CrPC (see below) would avoid such a situation, as this report illustrates, there was only marginal improvement in the years to follow.

2.2 The new Code of Criminal Procedure (1975 – 2006)

> *"It seems to me absurd that laws which are an expression of the public will, which detest and punish homicide, should themselves commit it."*
>
> Justice Krishna Iyer in *Shiv Mohan Singh v. The State (Delhi Administration)* (AIR 1977 SC 949)

Though some judges in the Supreme Court had already stated so in *Ediga Anamma v. State of Andhra Pradesh* (AIR 1974 SC 799), the amended CrPC of 1973 was the first time the legislature laid down that the death penalty was an exceptional punishment under the IPC. Section 354(3) of the Code required judges to note 'special reasons' when awarding sentences of death. Importantly the new CrPC also required a mandatory pre-sentencing hearing in the trial court under section 235(2) (for more on this, see Section 6.2.1 below). This was a complete 180 degree turn from the pre-1955 position when the death sentence was the preferred punishment, and a "gradual swing against the imposition of such penalty" as the Court noted in *Balwant Singh v. State of Punjab* (AIR 1976 SC 230). This judgment, delivered on 11th November 1975, was the first capital case where the new CrPC came into play in the Supreme Court. Though the murder itself had taken place after the new CrPC came into operation, the Supreme Court noted that the High Court judgment had erroneously continued to apply the pre-1974 law on sentencing. Noting that the killing was intentional and the appellant had a motive, the Court argued, "but the facts found were not such as to enable the court to say that there were special reasons for passing the sentence in this case." The

[41] A.R Blackshield, 'Capital Punishment in India', Vol. 21(2), *Journal of the Indian Law Institute*, 1979.

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

Despite the change in the law, lower courts appeared to continue to use the outdated practice of providing 'extenuating circumstances' if not awarding death sentences. Rather than pointing to the error in sentencing practice, in a number of cases the Supreme Court upheld the sentences, finding their own 'special reasons' for doing so [for example in *Sarveshwar Prasad Sharma v. State of Madhya Pradesh* (AIR 1977 SC 2423)]. While in some cases the Bench attempted to disguise the old approach to fit the new, in other cases Benches did not even make the effort and merely continued applying the previous law on sentencing. Thus in *Gopal Singh v. State of U.P.* (AIR 1979 SC 1822), the Supreme Court noted, **"**There is no extenuating circumstance. The appellant was rightly awarded the capital sentence." Similarly in *Nathu Garam v. State of Uttar Pradesh* [(1979) 3 SCC 366], the Court was unable to find any 'extenuating or mitigating circumstances' and therefore agreed with the views of the lower courts. Just to highlight that nothing had really changed, in *Baiju alias Bharosa v. State of Madhya Pradesh* (AIR 1978 SC 522), *Tehal Singh and Ors. v. State of Punjab* (AIR 1979 SC 1347) and *Ramanathan v. The State of Tamil Nadu* (AIR 1978 SC 1204), there was little or no discussion of sentence even though the Supreme Court upheld the death sentence in all these cases.

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

His abolitionist agenda no secret, in both *Shiv Mohan Singh v. The State (Delhi Administration)* and *Joseph Peter v. State of Goa, Daman and Diu* [(1977) 3 SCC 280], Justice Krishna Iyer attempted to reconcile his personal views on the subject with his professional duties as a judge. In the former case, a special leave petition had previously been rejected as had a motion for rehearing of the petition. A first review petition was not admitted, a second modified review petition was dismissed and another application for resending the matter to the trial court was also dismissed. This third review petition was surprisingly admitted, with the Bench stating, "we have desisted from a dramatic rejection of the petition outright, anxious to see if there be some tenable ground which reasonably warrants judicial interdicts to halt the hangman's halter." With little in the facts to support any change, the learned judge embarked on an assault on capital punishment, cleverly suggesting that these could be campaign points for abolitionists, commenting, "Moreover, the irreversible step of

extinguishing the offender's life leaves society with no opportunity to retrieve him if the conviction and punishment be found later to be founded on flawsome (*sic*) evidence or the sentence is discovered to be induced by some phoney aggravation, except the poor consolation of posthumous rehabilitation as has been done in a few other countries for which there is no procedure in our system." Even after considering all the factors, unable to find sufficient cause to reduce the sentence and weighed down by the large number of previous legal failures of the accused, the bench attempted to influence the President's clemency decision stating, "The judicial fate notwithstanding, there are some circumstances suggestive of a claim to Presidential clemency. The two jurisdictions are different, although some considerations may overlap. We particularly mention this because it may still be open to the petitioner to invoke the mercy power of the President and his success or failure in that endeavour may decide the arrival or otherwise of his doomsday." Similarly, in a rarely reported refusal to admit the special leave petition itself in *Joseph Peter v. State of Goa, Daman and Diu*, a reluctant Justice Iyer, again unable to overrule the law resorted to suggesting a possible recourse to a clemency petition observing that "Presidential power is wider."

While none can grudge this brave and lonely battle being waged in the Supreme Court, it is obvious that all those whose appeals were heard by a Bench in which Justice Krishna Iyer featured were more likely to receive a sympathetic hearing and even perhaps a suggestion of presidential pardon, if not their sentence commuted. This merely reconfirms Professor Blackshield's previous observation that a key factor in determining a question of life or death was which judges heard the appeal. The features of the new CrPC could do little to limit this arbitrariness, even though they perhaps ensured that the overall number of persons sentenced to death was reduced.

2.2.1 Battles on the Bench

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

In the majority judgment – which resembles an academic essay replete with headings – even though the Bench clarified that they would not enter into questions of constitutionality, on the issue of sentencing discretion they observed: "the latter is in critical need of tangible guidelines, at once constitutional and functional. The law reports reveal the impressionistic and unpredictable notes struck by some decisions and the occasional vocabulary of horror and terror, of extenuation and misericordia, used in the sentencing tailpiece of judgments. Therefore this jurisprudential exploration, within the framework of Section 302 IPC has become necessitous, both because of the awesome 'either/or' of the Section spells out no specific indicators and law in this fatal area cannot afford to be conjectural. Guided missiles, with lethal potential in unguided hands, even judicial, is (*sic*) a grave risk where the peril is

mortal though tempered by the appellate process." The learned judges made this observation after quoting approvingly from Professor Blackshield's analysis which had also concluded that the inconsistencies in sentencing led to the conclusion that "arbitrariness and uneven incidence are inherent and inevitable" in the system of capital punishment in contemporary India.

The majority judgment was critical of its 'brother judges' on the Bench: "Law must be honest to itself. Is it not true that some judges count the number of fatal wounds, some the nature of the weapons used, others count the corpses or the degree of horror and yet others look into the age or sex of the offender or even the lapse of time between the trial court's award of death sentence and the final disposal of the appeal. With some judges, motives, provocations, primary or constructive guilt, mental disturbance and old feuds, the savagery of the murderous moment or the plan which has preceded the killing, the social milieu, the sublimated class complex and other odd factors enter the sentencing calculus."

The Court therefore concluded: "If we go only by the nature of the crime, we get derailed by subjective paroxysm. 'Special reasons' must vindicate the sentence and so must be related to why the murderer should be hanged and why life imprisonment will not suffice … A paranoid preoccupation with the horror of the particular crime oblivious to other social and individual aspects is an error. The fact that a man has been guilty of barbaric killing hardly means that his head must roll in the absence of proof of his murderous recidivism, of curable criminal violence, of a mafia holding society in ransom and of incompatibility of peaceful co-existence between the man who did the murder and society and its members."

Justice Krishna Iyer went further to argue that Article 14 of the Constitution requires that principled sentences of death, not arbitrary or indignant capital penalty, should be imposed. "The judge who sits to decide between death penalty and life sentence must ask himself: Is it 'reasonably' necessary to extinguish his freedom of speech of assembly and association, of free movement, by putting out finally the very flame of life? It is constitutionally permissible to swing a criminal out of corporeal existence only if the security of State and society, public order and the interests of the general public compel that course as provided in Article 19(2) to (6). These are the special reasons which Section 354(3) speaks of."

Following this interpretation of 'special reasons' as relating to the criminal rather than the crime, the majority judgment went on to commute the sentences in all three cases that were before it, including in the case of Rajendra Prasad who had been sentenced to death for a second murder after completing a life-term for one. In his dissenting judgment, Justice A.P. Sen noted that the death sentence was appropriate in all three cases and with respect to Kunjukunju's case observed, **"**If the death sentence was not to be awarded in a case like this, I do not see the type of offence which calls for a death sentence."

Such an eventuality was a key objection of Justice A.P. Sen who noted that the interpretation of 'special reasons' suggested by the majority virtually abolished the death sentence. He further argued that it was not permissible for the Court to re-structure Section 302 of the IPC or Section 354(3) of the CrPC so as to limit the scope of the death sentence while hearing an

appeal under Article 136 of the Constitution. According to the learned judge, this was a question for Parliament and not the Supreme Court to resolve.

Despite Justice A.P. Sen's protests, *Rajendra Prasad v. State of Uttar Pradesh* (AIR 1979 SC 916) was the 'law of the land' and two weeks later, a bench of Justice Iyer and O. Chinappa Reddy followed the precedent and commuted a death sentence in *Bishnu Deo Shaw v. State of West Bengal* [(1979) 3 SCC 714]. Justice Reddy, delivering the judgment, continued from where *Rajendra Prasad v. State of Uttar Pradesh* had left off: "Special reasons, we may therefore say, are reasons which are special with reference to the offender, with reference to constitutional and legislative directives and with reference to the times, that is, with reference to contemporary ideas in the fields of criminology and connected sciences. Special reasons are those which lead inevitably to the conclusion that the offender is beyond redemption, having due regard to his personality and proclivity, to the legislative policy of reformation of the offender and to the advances made in the methods of treatment etc." The Court however did not attempt to catalogue 'special reasons.'

On 4th May 1979 the Bench of Krishna Iyer, Desai and Justice A.P. Sen resumed their 'private' war in *Dalbir Singh and Ors. v. State of Punjab* [(1979) 3 SCC 745] – a judgment where once again the commutation was ordered by majority, with Justice A.P. Sen's dissenting opinion becoming even more critical. The majority judgment delivered by Justice Krishna Iyer quoted extensively from Mahatma Gandhi and other Indian leaders including Acharya Kripalani and the Lok Nayak, condemning the death penalty. Justice A.P. Sen in his dissent raised much of the same arguments as he did in *Rajendra Prasad v. State of Uttar Pradesh*. He concluded, "I have no sympathy for these trigger-happy gentlemen and the sentence imposed on them is well-merited."

In *Dalbir Singh and Ors. v. State of Punjab*, Justice Krishna Iyer had referred to *Ediga Anamma v. State of Andhra Pradesh*, *Rajendra Prasad v. State of Uttar Pradesh* and *Bishnu Deo Shaw v. State of West Bengal*, observing that they "indubitably laid down the normative cynosure and until overruled by a larger bench of this Court, that is the law of the land under Article 141." Perhaps this was a premonition, for the same day another bench of the Court (Justices Kailasam and Sarkaria) delivered a judgment in *Bachan Singh s/o Saudagar Singh v. State of Punjab* [(1979) 3 SCC 727] highlighting the conflict between the judgments in *Rajendra Prasad v. State of Uttar Pradesh* and *Jagmohan Singh v. The State of Uttar Pradesh* (AIR 1973 SC 947) (the latter ruling that it was impossible to lay down guidelines) and thereby referring the matter to the Chief Justice for constitution of a larger Bench to hear the case. Justice Kailasam in fact argued that in light of the constitutional bench decision in *Jagmohan Singh v. The State of Uttar Pradesh*, *Rajendra Prasad v. State of Uttar Pradesh* was not binding, but he left the matter to be adjudicated upon by a larger bench. The result was the 1980 judgment of a five-judge Constitutional Bench of the Supreme Court in *Bachan Singh v. State of Punjab*.

Constitutionality Round II – *Bachan Singh v. State of Punjab* (AIR 1980 SC 898)

With amendments to the CrPC indicating legislative backing for the death sentence becoming an exceptional punishment, followed by India's accession to the International Covenant on Civil and Political Rights in 1976, the stage was set for a renewed challenge to the constitutionality of the death penalty for murder.

Three main grounds were raised in the challenge by the abolitionists:
1) The irreversibility of the sentence and the execution of innocent persons.
2) The lack of penological purpose – deterrence was not proven, retribution was no longer an acceptable end and the primary purpose of punishment - reformation - was nullified by the sentence.
3) Execution by all modes was a cruel, inhuman and degrading punishment.

By a majority (4:1), the Supreme Court upheld the constitutionality of the death penalty (Justice Bhagwati's detailed dissenting opinion was written and reported two years later in *Bachan Singh v. State of Punjab* (Minority Judgment) (AIR 1982 SC 1325).

As in *Jagmohan Singh v. The State of Uttar Pradesh*, in this case too the Supreme Court relied heavily on the 35th Report of the Law Commission published in 1967 and the argument that the death penalty acted as a deterrent and served a penological purpose. The absence of any clinching evidence on lack of deterrence allowed the Court to conclude: "It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue is a ground among others, for rejecting the petitioner's argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose." Further the Court concluded that execution by hanging could not be seen to be unreasonable, cruel or unusual punishment.

On the dangers of irreversibility and innocence, the Court noted that there were ample safeguards "which almost eliminate the chances of an innocent person being convicted and executed for a capital offence." These safeguards included the mandatory pre-sentencing hearing introduced by Section 235(2) CrPC as also the requirement for 'special reasons' in Section 354(3) CrPC along with mandatory confirmation of the sentence by the High Court. The court however rejected the reading of 'special reasons' set out in *Rajendra Prasad v. State of Uttar Pradesh*, observing that although the legislative policy required courts not to confine their consideration of sentence "principally" or merely to the circumstances connected with the particular crime but also give due consideration to the circumstances of the criminal, this could not be taken to mean aspects of the crime could be completely ignored in sentencing.

The Constitutional Bench also rejected the argument that Section 354(3) CrPC allowed imposition of the death sentence in an arbitrary and whimsical manner, and it rejected the notion of laying down standards or norms, arguing that such "standardisation is well-nigh impossible." The Court instead suggested that such a task was better done by the legislature.

"In this sensitive, highly controversial area of death penalty, with all its complexity, vast implications and manifold ramifications, even all the judges cloistered in this Court and acting unanimously, cannot assume the role which properly belongs to the chosen representatives of the people in Parliament."

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

"Aggravating Circumstances – A court may however in the following cases impose the penalty of death in its discretion:

(a) If the murder has been committed after previous planning and involves extreme brutality; or
(b) If the murder involves exceptional depravity; or
(c) If the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed:
  (i) While such member or public servant was on duty; or
  (ii) In consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or
(d) If the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

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

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.
(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.
(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
(6) That the accused acted under the duress or domination of another person,
(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

The Supreme Court also clarified that the mitigating circumstances should receive a "liberal and expansive construction" with scrupulous care and humane concern and "judges should never be blood-thirsty." In such a vein, the Court concluded: "*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 cases when the alternative option is unquestionably foreclosed."

2.3 'Rarest of Rare' (1980 – present)

"*The question may well be asked by the accused: Am I to live or die depending upon the way in which the Benches are constituted from time to time? Is that not clearly violative of the fundamental guarantees enshrined in Articles 14 and 21?*"

Justice Bhagwati in his dissenting judgment
Bachan Singh v. State of Punjab (AIR 1982 SC 1325)

The concluding paragraph in the majority opinion in *Bachan Singh v. State of Punjab* (AIR 1980 SC 898) limiting the death sentence to the 'rarest of rare' cases reinforced the exceptional nature of the death penalty that Parliament had secured within the new CrPC in 1973. The aggravating and mitigating factors added a new element in the sentencing process, coming as they did from a Constitutional Bench of five judges of the Supreme Court. Even though the *Rajendra Prasad v. State of Uttar Pradesh* reading of 'special reasons' was rejected, the specific reference in the mitigating factors to the fact that the state had to establish – with evidence – that the accused was likely to commit crime again and could not be reformed, before the death sentence could be awarded, continued with the reformist approach that *Rajendra Prasad* had sought.

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

In *Machhi Singh and Others v. State of Punjab* [(1983) 3 SCC 470], the Bench upheld three death sentences in a complex case that involved five different incidents over one night in which 17 persons in all were killed by the accused Machhi Singh and 11 of his accomplices. This judgment is best known for its discussion of the 'rarest of rare' formulation and the guidelines set out in the *Bachan Singh* judgment. The judgment was, in fact, seen by many as

supporting the death penalty, as it appeared to expand the 'rarest of rare' formulation beyond the aggravating factors listed in *Bachan Singh* to cases where the 'collective conscience' of a community may be shocked. The judgment further illustrated cases where such sentiment may arise:

a) "When the murder was committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community e.g. when the victim is sought to be put on fire by burning of his house; where the victim is subject to inhuman torture and cruelty to cause death and where the body of the victim is dismembered in a fiendish manner.
b) When the murder is committed for a motive which evinces total depravity and meanness e.g. a hired assassin killing for profit; a cold-blooded murder for property or of someone with whom the murderer is in a position of trust; murder committed in the 'course of betrayal of the motherland.'
c) Anti social or socially abhorrent murder – dowry deaths or killing due to infatuation with another woman, of a member of a scheduled tribe or scheduled caste on grounds of his caste/tribe; offences to terrorize people to give up property and other benefits in order to reverse past injustices and to restore the social balance.
d) In cases of multiple murders of a members of a particular family, caste, community or locality.
e) Where the victim is an innocent child, helpless woman, aged or infirm person, a public figure whose murder is committed other than for personal reasons."

The judges therefore argued that the *Bachan Singh* guidelines would have to be read in the above context and, "a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised." The Bench also suggested two questions for judges to consider in awarding the death sentence:

a) "Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

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

2.3.1 Applying, ignoring, misunderstanding the 'rarest of rare' test

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

The impact of the judgment and its guidelines in the mid-1980s and thereafter however, is less impressive. In fact in a number of judgments where the Supreme Court upheld the death sentence, there was no discussion of the 'rarest of rare' formulation or of the *Bachan Singh* guidelines. Thus in *Lok Pal Singh v. State of M.P.* (AIR 1985 SC 891), the Bench merely stated, "This was a cruel and heinous murder and once the offence is proved then there can be no other sentence except the death sentence that can be imposed." In fact the particular bench of Justices Fazal Ali, Varadarajan and Ranganath Misra appeared to turn the clock back by arguing that there were "no extenuating circumstance" and therefore no reason to show leniency. References were also conspicuously missing in *Mahesh s/o Ram Narain and ors. v. State of Madhya Pradesh* [(1987) 3 SCC 80], *Darshan Singh and anr. v. State of Punjab* [(1988) 1 SCC 618] and *Ranjeet Singh and anr. v. State of Rajasthan* (AIR 1988 SC 672).

Even where references were made to 'rarest of rare', there was little in the judgment to explain why the Court found the case fitted within or falling outside the formulation. In *Mukund alias Kundu Mishra and anr. v. State of Madhya Pradesh* (AIR 1997 SC 2622), the Supreme Court commuted the death sentence despite the fact that the trial court had sentenced the accused to death on the grounds that the victims were helpless and innocent and the gruesome murders were committed for gain. The sentence was upheld by the High Court but the Supreme Court, agreeing that the murders were ghastly and that in committing them the accused betrayed his trust, yet "[*did*] *not think* this case to be one of the 'rarest of rare cases' as exemplified in Bachan Singh v. State of Punjab and Machhi Singh v. State of Punjab."

[42] S. Muralidhar, 'Hang them now, Hang them not: India's Travails with the Death Penalty', Vol. 40, *Journal of the Indian Law Institute*, 1998.

Public pressure and the Supreme Court

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

The case of Billa and Ranga involved the kidnapping and murder of two young children of a naval officer in Delhi. The incident led to widespread protests and pressure upon the judiciary to punish the offenders severely. Surprisingly, the judgment of the Supreme Court in dismissing the special leave petitions (dated 8th December 1980) of both the accused are not reported and it is not clear whether the Court dismissed these summarily or whether they heard the entire matter and upheld the death sentences, finding the case to be the 'rarest of rare.' However in *Kuljeet Singh alias Ranga v. Union of India and anr.* [(1981) 3 SCC 324] (the judgment on a writ petition filed subsequently by one of the accused), the Supreme Court rejected the argument for mitigation of sentence and despite not providing any evidence, noted that the accused were professional murderers and deserved no sympathy "even in terms of the evolving standards of decency of a maturing society." The Court observed that, "The survival of an orderly society demands the extinction of the life of persons like Ranga and Billa who are a menace to social order and security." The Supreme Court went even further and stated, "We hope that the President will dispose of the mercy petition stated to have been filed by the petitioner as expeditiously as he find his convenience." This appears to be a bold step indeed, perhaps by a Court that was being pushed into a corner.

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

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

The effect of public pressure is also apparent in the Supreme Court's judgment on a writ petition in *Munawar Harun Shah v. State of Maharashtra* (AIR 1983 SC 585) (more famous as the 'Joshi-Abhyankar case' from Pune). In this case too, with the special leave petitions dismissed in 1980 unreported, it is not clear how much impact *Bachan Singh* had on the sentencing process. Furthermore, review petitions were dismissed in February 1981 and one batch of writ petitions dismissed in February 1982. A second review was also dismissed in April 1982 but none of these orders/judgments are reported in the regular journals.

The case involved multiple murders, robbery and dacoity, in which the accused were held to have been involved in at least seven murders. The Supreme Court observed that the case was the 'rarest of rare', "having regard to the magnitude, the gruesome nature of offences and the manners perpetrating them." In a possible reaction to the public attention and opinion on this case, the Court interestingly argued that, "any leniency shown in the matter of sentence would not only be misplaced but will certainly give rise to and foster a feeling of private revenge among the people leading to destabilisation of the society." Not content with rejecting petitions from the accused, in this case too the Court called for an early execution.

In *Ashok Kumar Pandey v. State of Delhi* (AIR 2002 SC 1468), the Supreme Court commuted the sentence of the accused convicted for killing his wife and one-and-a-half-year-old child stating, "In the facts and circumstances of the present case, it is not possible to come to the conclusion that the present case would fall within the category of rarest of rare one." The judgment did not suggest what these relevant facts and circumstances were. The same bench of Justices M.B. Shah and B.N. Aggarwal had also arrived at a similar conclusion in *Farooq @ Karatta Farooq and ors. v. State of Kerala* (AIR 2002 SC 1826) where the accused threw a bomb at an under-trial prisoner while returning from court, killing him and injuring a number of policemen.

Similarly, the Court in *Acharaparambath Pradeepan and anr. v. State of Kerala* (MANU/SC/8785/2006) commuted the sentence of an activist of the CPI(M) for the murder of a political rival while he was teaching in a school, observing, "[i]*n the peculiar facts and circumstances of this case* we are of the opinion that it cannot be said to be a rarest of rare case." Again there was no indication as to what these 'peculiar' facts may have been. Earlier in the year too the same bench had commuted the sentence in *Major Singh and anr. v. State of Punjab* (MANU/SC/8569/2006), concluding: **"**In the facts and circumstances of the case and considering the fact that there was probably some enmity due to suspicion about Sukhwinder Kaur's death two years after her marriage to Kashmir Singh which could have been a motive for the crime, we reduce the sentence awarded to both the accused from death sentence to life sentence."

In most of the above-mentioned cases, questions of motive, scope for reformation and other mitigating or even aggravating circumstances and 'special reasons' were not given due attention and decisions of life and death were made with no major reasons given in the judgment. While in many of the above cases, the Courts commuted the death sentences, the misunderstanding of the 'rarest of rare' formulation cannot be ignored, particularly given that such a trend also allowed other judges who favoured the death penalty to equally pay lip-service to 'rarest of rare' and continue to award the death sentence, merely mentioning the existence of aggravating circumstances and lack of mitigating circumstances without actually noting what these were.

General confusion about the need for 'special reasons' was evident in *Muniappan v. State of Tamil Nadu* [(1981) 3 SCC 11]. The Supreme Court commuted the sentence of death observing that the judgments of the High Court and the Sessions Court left much to be desired. In this case the trial court had awarded the death sentence observing that it was a "terrific murder." The Supreme Court rightly noted that all murders were 'terrific' and death sentences for such murders would defeat the very object of Section 354(3).

In other cases, it was clear the Courts had wrongly interpreted the 'rarest of rare' literally. *Allauddin Mian and ors., Sharif Mian and anr. v. State of Bihar* [(1989) 3 SCC 5] involved the murder of two infants. The Supreme Court (rightly) observed that this fact alone would not make the case 'rarest of rare' especially since other factors including motive did not indicate the same. While the conclusion is valid, the Supreme Court commuted the death sentence on the ground that there was nothing *uncommon* enough in the case to make it an exception and to therefore allow the death sentence to be awarded.

An extreme example of the same approach is visible in *Ravindra Trimbak Chouthmal v. State of Maharashtra* [(1996) 4 SCC 148], where the Supreme Court commuted the sentence after the trial court had awarded and High Court confirmed the death sentence. The Supreme Court itself had noted that this was a "murder most foul" where an eight-month pregnant woman was killed for dowry. However, the Supreme Court did not uphold the death sentence, arguing that dowry deaths had ceased to be 'rarest of rare' as they had become too frequent. Though welcome as far as the commutation goes, this literal understanding of 'rarest of rare' is far from the intent in *Bachan Singh*. In fact *Machhi Singh and Others v. State of Punjab* [(1983) 3 SCC 470] had specifically noted that dowry-deaths could be seen as exceptional cases where death sentences could be awarded and *Allauddin Mian and ors., Sharif Mian and anr. v. State of Bihar* [(1989) 3 SCC 5] and other judgments had reiterated the same (see Section 3.1 below).

Similarly, in both *State of Himachal Pradesh v. Shri Manohar Singh Thakur* (AIR 1998 SC 2941) and *Sheikh Abdul Hamid and anr. v. State of Madhya Pradesh* [(1998) 3 SCC 188], the Supreme Court judges appeared to reveal a poor understanding of the law on sentencing when they stressed the manner of the killings and ignored all the other factors. In the former, the Supreme Court commuted the sentence arguing that there was "nothing exceptionally gruesome about the manner of committing this crime. A murder by its very nature is

shocking. But that per se does not justify death penalty." In the latter, the Court commuted the sentence in a case where the motive of the killings (including of a child) was to steal property, arguing that, "There is nothing on record to show how the murder has taken place."

2.3.2 Lip service to Bachan Singh

A number of other benches made the mandatory references to the *Bachan Singh* judgment but showed no real understanding either of the sentiment of 'the rarest of rare' or of the obligation placed upon judges to compare aggravating and mitigating circumstances. Thus in *Suresh Chandra Bahri v. State of Bihar* (AIR 1994 SC 2420), the Court found a number of aggravating factors as described in *Bachan Singh* and *Machhi Singh and Others v. State of Punjab*, but there was no apparent attempt made to examine the mitigating circumstances and none are mentioned in the Supreme Court judgment. Similarly, in *Suresh and anr. v. State of Uttar Pradesh* (AIR 2001 SC 1344), the Supreme Court judgment is largely focussed on discussion of a particular point of law but scant on sentencing. The judgment merely records the defence counsel argument that the case did not fall within the 'rarest of rare' requirement of *Bachan Singh* and further states that the Court does not agree with this argument.

In *Gentela Vijayavardhan Rao and anr. v. State of Andhra Pradesh* (AIR 1996 SC 2791), a case where a large number of persons were burnt alive in a bus in a failed robbery attempt, the Court rejected the various mitigating circumstances put forward (that the accused were young at the time of the offence; that the killings were unplanned as the prime motive was robbery; and that the accused did not try to prevent persons from escaping) finding these "too slender" and arguing that even if accepted they were "eclipsed by the many aggravating circumstances." In fact, despite evidence to the contrary, the Supreme Court appeared to go out of its way to argue that the bus was intentionally burnt, referring to the incident as a "planned pogrom … executed with extreme depravity" and a rarest of rare case due to the "inhuman manner in which they plotted the scheme and executed it."[43]

In *Mohan and ors. v. State of Tamil Nadu* [(1998) 5 SCC 336], the Supreme Court upheld the death sentence of two of the four accused sentenced to death by the High Court. In commuting the two sentences the Court noted that this was done on the basis that they did not play a role in the killing but only in the kidnapping of the 10-year-old boy. In appealing to the Supreme Court, the defence argued that the lower courts, while awarding and confirming the death sentences, had merely stated that the case was diabolical and shocking and must be treated as one of the rarest of rare cases, but had not provided any justification for this. The Supreme Court failed to address this defence argument, stating that it found sufficient aggravating circumstances to uphold the two sentences. The Court observed that, "On the very face of it, the incident appears to be a gruesome one and indicates the brutality with

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

which the accused persons committed the murder of a young boy and in furtherance of the said plan, they tried to cause disappearance of the dead body itself." Here again the Court did not state what the 'sufficient aggravating circumstances' were.

Constitutionality Round III – *Smt. Shashi Nayar v. Union of India and ors.*

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

The Constitutional Bench did not go into the merits of the argument against constitutionality, as they noted that the same grounds had been dealt with in *Bachan Singh* and *Deena v. State of U.P.* [(1978) 3 SCC 540] and since they fully agreed with the position taken, it was not necessary to reiterate the same. The petitioner sought that the matter be heard by a larger bench than *Bachan Singh*, on the basis that that decision was based largely on the Law Commission's 35th Report which was now very old and in the absence of an empirical study to show that the circumstances of 1965 were still relevant. The Supreme Court however found no merit in these claims, asserting: "The death penalty has a deterrent effect and it does serve a social purpose. The majority opinion in Bachan Singh's case held that having regard to the social conditions in our country the stage was not ripe for taking a risk of abolishing it. No material has been placed before us to show that the view taken in Bachan Singh's case requires reconsideration." Further the Court also took judicial notice of the fact that the law and order situation in the country had not improved since 1967, had deteriorated and was worsening. The Court therefore concluded that it was the most inopportune time to reconsider the constitutionality of the death penalty.

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

that had taken place in the ten years between his acquittal by the trial court and the award of the death sentence by the High Court that, would have countered the High Court's logic that he was a threat to society. The fact that the Supreme Court restricted itself to the facts on record rather than seeking details about the conduct of the accused following his acquittal only suggests that the Court was more interested in the offence rather than the offender.[44]

2.3.3 'Social Necessity' and 'Cry for Justice': The fading impact of the *Bachan Singh* test

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

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

Machhi Singh and Others v. State of Punjab was seen by Justice A.P. Sen in *Amrik Singh v. State of Punjab* (1988 Supp SCC 685) as "retrieving" the virtually abolitionist situation created by *Bachan Singh*. Not only did *Amrik Singh* reiterate the concern of the retentionists on the bench about the impact of *Bachan Singh* on sentencing, but it also warned of its consequences: **"**We had indicated in *Earabhadrappa alias Krishnappa v. State of Karnataka*, the unfortunate result of the decision in *Bachan Singh* case is that capital punishment is seldom employed even though it may be a crime against society and the brutality of the crime shocks the judicial conscience. We wish to reiterate that a sentence or pattern of sentences which fails to take due account of the gravity of the offence can seriously undermine respect for law…"

Though the principle was enunciated in 1983, it was only in 1987 – when the impact of the *Bachan Singh* judgment had reduced considerably – that another bench of the apex Court put

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

forward the deterrence and social necessity argument in *Mahesh s/o Ram Narain and others v. State of Madhya Pradesh* (AIR 1987 SC 1346). In this oft-quoted judgment, Justices Khalid and Oza upheld the death sentences handed down to both the accused who committed five murders during a dispute over caste. The judgment is scant on facts and does not refer to the role of either of the accused, focussing instead on the 'the evil of untouchability.' Sharing the High Court's observation that the act of one of the appellants "was extremely brutal, revolting and gruesome which shocks the judicial conscience … in such shocking nature of crime as the one before us which is so cruel, barbaric and revolting, it is necessary to impose such maximum punishment under the law as a measure of social necessity which work as a deterrent to other potential offenders," the Supreme Court concluded: "We also feel that it will be a *mockery of justice* to permit these appellants to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the appellants would be to render the justicing [*sic*] system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon" (emphasis added). Though the Supreme Court did acknowledge the need to take a reformative approach in general, it asserted that the Court had no alternative in the present case. There was no discussion of mitigating circumstances and it was evident that *Bachan Singh's* influence on sentencing was already severely reduced.

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

In *Sevaka Perumal etc. v. State of Tamil Nadu* (AIR 1991 SC 1463), a bench of Justices Ray and Ramaswamy referred extensively to *Mahesh* and argued that, "protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentences." By now it had become clear that the reformative approach was being discarded and deterrence and the protection of society from 'criminals' was the focus. The Supreme Court continued, "undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine public confidence in the efficacy of law and society could not long ensure under serious threats." The Supreme Court also argued that the death sentence was required because "if the court did not protect the injured, the injured would then resort to private vengeance." A similar warning was also evident in *Gentela Vijayavardhan Rao and anr. v. State of Andhra Pradesh* (AIR 1996 SC 2791) (see above) where the Supreme Court argued that, "if this type of persons are allowed to escape death penalty, it would result in miscarriage of justice and common man would lose faith in justice system." The High Court in this case had earlier noted that the death sentence was imperative to avoid any private vengeance against the accused persons.

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

same bench once again upheld the death sentence in *Surja Ram v. State of Rajasthan* (AIR 1997 SC 18) where the accused had killed his brother's entire family, observing: "Such murders and attempt to commit murders in a cool and calculated manner without provocation cannot but shock the conscience of the society which must abhor such heinous crime committed on helpless innocent persons. Punishment must also respond to society's cry for justice against the criminal. While considering the punishment to be given to the accused, the Court should be alive not only to the right of the criminal to be awarded just and fair punishment by administering justice tempered with such mercy as the criminal may justly deserve, but also to the rights of the victims of the crime to have the assailant appropriately punished and the society's reasonable expectation from the court for the appropriate deterrent punishment conforming to the gravity of the offence and consistent with the public abhorrence for the heinous crime committed by the accused."

In *Ram Deo Chauhan and anr. v. State of Assam* (AIR 2000 SC 2679), the bench of Justices Thomas and Sethi took the argument of protection of society to a new low, arguing that, "… when a man becomes a beast and menace to the society, he can be deprived of his life…" The Supreme Court reasoned that for an accused guilty of a pre-planned, cold-blooded, brutal quadruple murder, life imprisonment would be inadequate and the death penalty was necessary to protect the community and deter others. Similarly in *Narayan Chetanram Chaudhary and anr. v. State of Maharashtra* [(2000) 8 SCC 457], the same bench upheld the death sentence of the accused found guilty of five murders as part of a robbery plot. The Supreme Court observed that the accused were "so self-centered on the idea of self preservation that doing away with all inmates of the house was settled upon them as an important part of the plan from the beginning" and therefore did not deserve sympathy from the law and society.

In *Sushil Murmu v. State of Jharkhand* (AIR 2004 SC 394), Justices Raju and Pasayat upheld the death sentence handed down to a man who had sacrificed a 9-year-old child to the gods. The Supreme Court observed that "the appellant was not possessed by the basic humanness and he completely lacks the psyche or mind set which can be amenable to any reformation … The brutality of the act is amplified by the grotesque and revolting manner in which the helpless child's head was severed … the nonchalant way in which he carried the severed head in a gunny bag and threw it in the pond unerringly shows that the act was diabolic of most superlative degree in conception and cruel in execution." The Court even referred to the offence as bordering on a "*crime against humanity* indicative of greatest depravity, shocking the conscience of not only any right thinking person but of the courts of law as well."

In *Gurdev Singh and anr. v. State of Punjab* (AIR 2003 SC 4187), the Supreme Court bench of Justices Balakrishnan and Srikrishna upheld the sentence of death handed down to two men for their involvement in an incident in which thirteen persons were killed. The Court referred to the "extremely revolting" incident, which "shocked the collective conscience of the community." Even though the Court observed that the appellants had no previous criminal record and there was nothing to indicate that they would be a threat to society in the future, the bench awarded the death sentence, as "the acts of murder committed by the appellants are

so gruesome, merciless and brutal that the aggravating circumstances far outweigh the mitigating circumstances."

In a number of other cases also discussed above, the Supreme Court did not seriously examine the issue of mitigating circumstances or scope for reform and rehabilitation. In *Ravji alias Ram Chandra v. State of Rajasthan* (AIR 1996 SC 787) for example, there was no discussion of mitigating factors at all and the Court ignored doubts about the mental health of the accused. Similarly there was virtually no discussion in *Narayan Chetanram Chaudhary and anr. v. State of Maharashtra* [(2000) 8 SCC 457], while mitigating factors raised by the defence counsel in *Surja Ram v. State of Rajasthan* (AIR 1997 SC 18) and *Sevaka Perumal etc. v. State of Tamil Nadu* (AIR 1991 SC 1463) were dismissed outright.

Despite the long list of cases in which the Court has been outraged by the depravity of the killings or the cruel or brutal methods of killing, a number of other benches of the Supreme Court have commuted sentences in equally gruesome cases. Thus in *Panchi and ors v. State of Uttar Pradesh* (AIR 1998 SC 2726), four members of one family murdered four members of a neighbour's family over ongoing petty quarrels. Here the bench of Chief Justice Punchhi and Justices Thomas and Quadri argued that while there was no doubt that the attacks were brutal, that could not be the sole criteria for the award of the death sentence as every murder was brutal. In this case the Supreme Court used the bitterness of the dispute as also the past quarrels as a mitigating factor.

In *Om Prakash v. State of Haryana* [(1999) 3 SCC 19], Justices Thomas and Shah commuted the sentence of a soldier, finding the murder a result of "the human mind going astray because of constant harassment." The Court observed that the appellant would not be a menace to society and that there was no reason to believe that he could not be reformed or rehabilitated as he was young at the time and had no criminal record. Similarly in *Nemai Mandal and anr. v State of West Bengal* [(2001) 9 SCC 239], Justices Thomas and Mohapatra too commuted the sentence of a man who had committed a double murder in a crowded market in broad daylight with premeditated preparation. The High Court had noted that there was no altercation or provocation and cruelty was implicit in the murders, calling it "ruthless butchery with aggravated cruelty" as the accused chopped off the hand of one victim and threw it away. The Supreme Court however found that the political rivalry that led to the incident as well as the criminal past of the deceased along with the young age (eighteen) of the appellant, were sufficient to commute the sentence.

What these cases demonstrate is the inconsistency with which the Supreme Court has dealt with death penalty cases over this period. While in one case age could be a mitigating factor sufficient to commute, in another it could be dismissed as a mitigating factor; while in one case the gruesome nature of the crime could be sufficient for the Court to ignore mitigating factors, in another it was clearly not gruesome enough.

2.3.4. The current situation: 'rarest of rare' lost in translation

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

On the same day however, another bench of Justices Arijit Pasayat and S.H. Kapadia delivered a judgment in *Bablu @ Mubarik Hussain v. State of Rajasthan* (AIR 2007 SC 697). In this case the Court upheld the death sentence of the appellant who had murdered his wife and four children. The judgment did not discuss a motive for the killing. After referring to the importance of reformation and rehabilitation of offenders as among the foremost objectives of the administration of criminal justice in the country, the judgment merely referred to the declaration of the murders by the accused as evidence of his lack of remorse. No discussion about the specific situation of the appellant or the possibility of reform in his case was undertaken.

The fact that both these judgments were delivered on the same day in the Supreme Court not only highlights the whimsical nature of the benches but also further reiterates the point made by the bench in *Aloke Nath Dutta and ors. v. State of West Bengal* (MANU/SC/8774/2006) about the lack of sentencing policy, leaving the decisions to the particular views of the judges of the day. Despite legislative reform and reform-minded jurisprudence over a number of years, the death penalty has continued to be a lethal lottery.

3. Factors affecting sentencing and review of sentencing

This chapter looks in detail at a number of factors that have affected the considerations of courts when undertaking the sentencing process and of the Supreme Court in reviewing those sentences. Most of these have been viewed by some benches as 'mitigating factors' (although certainly not by all as the study shows). However, as demonstrated previously in relation to

sentencing, the inconsistencies in attitude towards these factors are glaring. The issue of delay in trial as a factor affecting sentencing is dealt with in the subsequent chapter.

3.1 Gender-based violence

3.1.1 Dowry Murders

The 1980s witnessed the success of the women's movement in India in bringing issues of gender-based violence, especially dowry-related violence, into the national spotlight. Dowry murders[45] were incorporated by the Supreme Court into the expanded understanding of 'rarest of rare' in *Machhi Singh 1983* (see Section 2.3 above).

State (Delhi Administration) v. Laxman Kumar and ors. (AIR 1986 SC 250) was among the first of the dowry-related cases to come before the Supreme Court for adjudication on the death sentence awarded. The trial court had sentenced three persons to death, considering the killing to be an atrocious "dowry death," but the High Court subsequently acquitted the accused. The State – along with the Indian Federation of Women Lawyers – appealed against the decision of the High Court. While the Supreme Court bench of Justices A.N. Sen and Misra reinstated the conviction, it did not award the death sentence on the grounds that two years had passed since the acquittal by the High Court, along with "other facts and circumstances," which it did not go into.

Interestingly, the High Court judgment contained a 'conclusion' to its acquittal, noting that the verdict was likely to "cause flutter in the public mind more particularly amongst women's social bodies and organisations" and explaining that judges had to rely on the evidence before them. Clearly worried about the impact of their judgment, the court attempted to cover the acquittal with rhetoric against dowry and its evils.

In *Kailash Kaur v. State of Punjab* [(1987) 2 SCC 631], the Supreme Court Bench of Justices A.P. Sen and Eradi demonstrated its disappointment that the death penalty had not been invoked in a case of dowry murder. The Court began by stating, "This is yet another unfortunate instance of gruesome murder of a young wife by the barbaric process of pouring kerosene oil over the body and setting her on fire as the culmination of a long process of physical and mental harassment for extraction of more dowry. Whenever such cases come

[45] The term "dowry murders" is used here to distinguish these crimes (tried under Section 302 IPC) from "dowry deaths" which are covered by Section 304B IPC ("Where the death of a woman is caused by any burns or bodily injury occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death," and such husband or relative shall be deemed to have caused her death"), introduced in 1986 and which does not carry the death penalty. The accused in these cases are often charged under both sections of the IPC and in case a charge of murder under Section 302 cannot be proved, are convicted under Section 304B. Readers should note that the Supreme Court has on occasion used the terms "dowry murders" and "dowry deaths" interchangeably.

before the court and the offence is brought home to the accused beyond reasonable doubt, it is the duty of the court to deal with it in the most severe and strict manner and it may award the maximum penalty prescribed by the law in order that it may operate as a deterrent to other persons from committing such anti-social crimes." In this particular case however, the trial court had convicted two accused but sentenced them to life imprisonment and acquitted another. The High Court had further acquitted another, leaving only one accused sentenced to imprisonment for life. The Supreme Court entertained grave doubts about the legality, propriety and correctness of the decision of the High Court to acquit one of the accused. However, the Court took no action to reverse the decision, using the excuse that the state had not filed an appeal on this issue. While upholding the life sentence of the appellant, the Supreme Court commented, "we only express our regret that the Sessions Judge did not treat this as a fit case for awarding the maximum penalty under the law and that no steps were taken by the State Government before the High Court for enhancement of the sentence."

Yet over this period the Supreme Court attempted to show that it was not directly affected by growing outrage and public pressure over the issue of dowry murders. Some High Courts were not that careful and in an appeal by the Attorney General of India [*Attorney General of India v. Lachma Devi and others*, (AIR 1986 SC 467)], a direction by the Rajasthan High Court that the accused in a dowry murder case be hanged publicly after giving due information to the public, was struck down by the Supreme Court as unconstitutional. Not only did the Supreme Court strike it down, but it further chastised the High Court for being led by emotion. In fact when an appeal in the same case came before another bench of the Supreme Court in *Licchamadevi v. State of Rajasthan* (AIR 1988 SC 1785), Justices Oza and Shetty commuted the sentence even though they agreed that this was a "dastardly and diabolic murder" and that award of the death sentence in such a case would not be improper. Commuting the sentence the Supreme Court observed that, "it is apparent that the decision to award death sentence is more out of anger than on reasons. The judicial discretion should not be allowed to be swayed by emotions and indignation." The Court also claimed to be unconvinced by evidence against the accused and had procedural concerns about the trial and appeal process.

Though the Supreme Court has not been short on rhetoric on the evils of dowry as also on the need for maximum penalties for dowry murders, in practice it has not upheld the death sentence in any dowry murder case brought before it. However the variety of reasons behind each commutation makes it impossible to draw any conclusions about this situation.

3.1.2 Rape and Murder Cases

In cases of rape and murder of women too, despite the rhetoric around the issue, it is striking that the Supreme Court has not upheld a death sentence in any case of rape and murder of an adult woman, while it has done so in a number of cases where the victim was a child (see below). In a few cases the lower courts have sentenced the accused to death and the Supreme Court has acquitted them on the grounds that the factual position has not been proved (see for instance *Prakash Mahadeo Godse v. State of Maharashtra* [(1969) 3 SCC 741]). There are

also a few cases of rape and murder where the Supreme Court has reversed acquittals by the High Court, but not awarded the death sentence as a matter of practice (*State of Maharashtra v. Manglya Dhavu Kongil* (AIR 1972 SC 1797), *Dharma v. Nirmal Singh Bittu and anr.* (AIR 1996 SC 1136), *State of Tamil Nadu v. Suresh and anr.* [(1998) 2 SCC 372], see Section 6.2.3 below).

In *Kumudi Lal v. State of Uttar Pradesh* (AIR 1999 SC 1699), despite the High Court warning that sparing the accused from the gallows "would be nothing short of letting loose a sex maniac on prowl," the Supreme Court bench of Justices Nanavati and Kurdukar commuted the death sentence of the appellant, raising doubts about the rape. The Supreme Court also cited other evidence to suggest that there may have been a degree of consent. The Court concluded that the death occurred due to strangulation because the appellant tied the Salwar (pyjamas) around the neck of the deceased to prevent her from raising shouts, resulting in her death. Similarly in *Raju v. State of Haryana* (AIR 2001 SC 2043), the Supreme Court Bench of Justices Shah and Brijesh Kumar commuted the sentence of death, arguing that, "On the spur of the moment without there being any premeditation, he gave two brick blows which caused her death." However in the same judgment, the Court also noted that the accused caused injury to the deceased by giving two brick blows as she stated that she would disclose the incident. In this particular case the apex Court also noted the lack of criminal record of the appellant and concluded that he would not be a threat to society at large.

The apparent weakness in the reasoning of the Supreme Court benches in *Kumudi Lal v. State of Uttar Pradesh* and *Raju v. State of Haryana* are of particular concern given that doubts raised about the evidence appear to be largely speculative. Yet even a glance at some of the rape-murder cases of minors discussed below illustrates how the Supreme Court in those cases was not even willing to consider the possibility of alternatives to the guilt of the accused. A detailed comparison of the appreciation of evidence in the above two cases with those of *Dhananjoy Chatterjee alias Dhana v. State of West Bengal* [(1994) 2 SCC 220] and *Laxman Naik v. State of Orissa* (AIR 1995 SC 1387) (see below) might prove to be particularly revealing.

Rape and murder of minor girls

Judgments of the Supreme Court in cases of rape and murder involving children were rarely reported before the 1990s. The rare references to them prior to that have been in cases of acquittals. Thus in both *Shankarlal Gyarasilal Dixit v. State of Maharashtra* [(1981) 2 SCC 35] and *Jaharlal Das v. State of Orissa* [(1991) 3 SCC 27], despite local hysteria around the cases, the Supreme Court acquitted the accused. However, virtually all the reported judgments in this category of crimes between 1990 and 1999 have resulted in death sentences being upheld by the Supreme Court, with a significant number of executions carried out.

In *Jumman Khan v. State of U.P.* (AIR 1991 SC 345), Justices Pandian and Reddy dismissed a writ petition and upheld the death sentence handed down to the accused for the rape and murder of a child of six years, considering the offence "most gruesome and beastly." A

Special Leave Petition had previously been rejected in 1986 with the Supreme Court using the argument of social necessity and deterrence.

In *Dhananjoy Chatterjee alias Dhana v. State of West Bengal* [(1994) 2 SCC 220], the Bench of Justices Anand and N.P. Singh upheld the death sentence in a case of rape and murder of a young girl by a security guard who lived in the same building. The Court referred to 'society's cry for justice.' A further aggravating factor recorded by the Court in this case was the fact that the offence was committed by the security guard whose duty it was to protect. The Court therefore lamented, "If the security guards behave in this manner, who will guard the guards?"

Heads you hang, Tails you live

After a prolonged period of approximately 13 years under sentence of death, Dhananjoy Chatterjee was executed on 14th August 2004. He was the first person to be hanged in India in over six years, ending an apparent *de-facto* moratorium on executions. Three days after his execution however, a similar case of rape and murder of a minor was heard on appeal by the Supreme Court in *Rahul alias Raosaheb v. State of Maharashtra* [(2005) 10 SCC 322]. While Dhananjoy Chatterjee was 27, Rahul was 24. The victim in the former case was thirteen years old, in the latter she was four-and-a-half. Neither accused had a previous criminal record and in both cases there was no report of any misconduct while in prison. Yet in the case of Dhananjoy Chatterjee he was deemed a menace to society and not only was the sentence upheld but he was subsequently hanged. In Rahul's case, he was not deemed a menace and his sentence was commuted to life imprisonment by the Court.

Though the Court argued in the Dhananjoy Chatterjee judgment that he had special responsibility as a guard, the Rahul judgment does not provide any information about the victim, the accused and their relationship, which would help in making a comparison. Lest we forget, in response to a number of last minute petitions, the Supreme Court refused to go into the issue that Dhananjoy Chatterjee had spent 13 years on death row (see Section 4 below). Would Rahul's fate have been different had his case been heard by another bench instead of Justices Balakrishnan and Lakshmanan who chose to commute the sentence? Would Dhananjoy Chatterjee's fate have been different had these two judges heard his case?

It is ironic that while upholding Chatterjee's death sentence in 1994, Justice Anand accepted that there were huge disparities in sentencing. He noted that, "Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby weakening the system's credibility." Two completely contradictory events over three days show that a decade later the inconsistencies still remain and reiterate the arbitrariness of the death penalty in India. (For more on the case of Dhananjoy Chatterjee, see Section 4.1 below.)

A month after the Supreme Court's judgment in relation to Dhananjoy Chatterjee, the Court was again focusing on the position of authority of the offender as an aggravating factor leading them to uphold a sentence of death. In *Laxman Naik v. State of Orissa* (AIR 1995 SC 1387), Justices Anand and Faizanuddin upheld the death sentence in a case where a seven-year-old was raped and murdered by her paternal uncle. The Bench observed that such a case "sends shocking waves not only to the judicial conscience but to everyone having slightest sense of human values and particularly to the blood relations and the society at large." In *Kamta Tiwari v. State of Madhya Pradesh* (AIR 1996 SC 2800), a Bench of Justices Mukharji and Kurdukar too upheld the death sentence in a similar case where the deceased girl aged seven years was kidnapped, raped and murdered by the accused who was a close friend of the family and was known as 'Tiwari Uncle' to the deceased. The issues of trust and control also emerged in this case as did societal abhorrence of such crimes along with the goal of deterrence.

1999 appeared to herald a new trend and it is noticeable that between 1999 and 2006, all rape and murder cases involving minors that came before the Supreme Court resulted in commutations.

In *Akhtar v. State of Uttar Pradesh* [(1999) 6 SCC 60], despite the fact that both the lower courts had relied on the judgments of the Supreme Court in *Dhananjoy Chatterjee alias Dhana v. State of West Bengal* and *Kamta Tiwari v. State of Madhya Pradesh* (AIR 1996 SC 2800), Justices Pattanaik and Rajendra Babu commuted the sentence of death, finding that the death was unintentional and without premeditation as the deceased died by gagging while the rape was being committed. A similar approach was followed in *Amrit Singh v. State of Punjab* (MANU/SC/8642/2006 and AIR 2007 SC 132) where Justices S.B. Sinha and Bhandari expressed doubt about the cause of death being strangulation and noted instead that it appeared to be bleeding from the injuries suffered during the rape. The Court therefore held that the death occurred as a consequence of and not because of any specific overt act by the accused.

Curiously however, the Court in *Amrit Singh v. State of Punjab* (MANU/SC/8642/2006 and AIR 2007 SC 132) further noted: "Even otherwise, it cannot be said to be a rarest of rare cases. The manner in which the deceased was raped may be brutal but it could have been a momentary lapse on the part of appellant, seeing a lonely girl at a secluded place. He had no pre-meditation for commission of the offence. The offence may look a heinous [*sic*], but under no circumstances, it can be said to be a rarest of rare cases."

Similarly in *Mohd. Chaman v. State (NCT of Delhi)* [(2001) 2 SCC 28], the Court commuted the death sentence awarded to the appellant for the sexual assault and murder of a one-and-a-half-year-old child, stating that it could not be a 'rarest of rare' case, although providing no rationale or argument for the same. In *State of Maharashtra v. Suresh* [(2000) 1 SCC 471] – a case involving the rape and murder of a four-year-old – Justices Nanavati and Thomas

awarded life imprisonment to the appellant noting that, "as the accused was *once acquitted* by the High Court we refrain from imposing that extreme penalty inspite of the fact that this case is perilously near the region of 'rarest of rare' cases."

The age of the accused and the potential for reform appear to have saved many of those accused of rape and murder of minors from the gallows. In *Bantu @ Naresh Giri v. State of Madhya Pradesh* (AIR 2002 SC 70), Justices Shah and Raju commuted the sentence noting that the accused was less than 22 years old and there was "nothing on record to indicate that the appellant was having any criminal record nor can it be said that he will be a grave danger to the society at large." A similar approach was also followed in *Amit alias Ammu v. State of Maharashtra* [(2003) 8 SCC 93] by Justices Sabharwal and Brijesh Kumar where the Supreme Court noted that the appellant was a young man – a student of 20 at the time of the offence – and there was no record of any previous heinous crime and no evidence that he would be a danger to society if a death sentence was not awarded.

There has been one recent exception. In *State of U.P. v. Satish* (AIR 2005 SC 1000), the trial court had found the accused guilty of the rape and murder of a six-year-old girl and sentenced him to death. The High Court however acquitted him on the grounds that there was insufficient evidence. The Supreme Court Bench of Justices Pasayat and Kapadia overturned the acquittal and found the case to be 'rarest of rare', sentencing the accused to death. In overturning an acquittal and sentencing a person to death, the Supreme Court Bench appeared to ignore over three decades of judicial caution (see also Section 6.2.3 below).

3.1.3 Infidelity and Jealousy

While dowry and rape with murder cases form the bulk of gender-based violence cases resulting in the death penalty, there have been a few capital cases involving sexual jealousy or infidelity dealt with by the Supreme Court that are of some interest. In almost all such cases the Court has shown a disinclination to uphold death sentences. In *Amruta v. State of Maharastra* [(1983) 3 SCC 50] for example, the factor of sexual jealousy was cited as a mitigating factor in the Court's decision to commute the sentence of death.

Similarly, in *Moorthy v. State of Tamil Nadu* [(1988) 3 SCC 207], the Court found mitigating circumstances in the "disappointment of a discarded lover. We do not suggest that the erring wife should not have corrected herself nor can the persistence of the appellant in the situation be appreciated, but we are trying to analyse his psychology." The Court further observed that the mental agitation of the accused was fuelled by a violent movie which he had watched the same night before the murder and therefore "society cannot be completely absolved from sharing the responsibility of the resulting tragedy." The Supreme Court therefore decided to commute the sentence.

In *Shaikh Ayub v. State of Maharashtra* (AIR 1998 SC 1285), the Supreme Court Bench of Justices Nanavati and Khare commuted the death sentence awarded to a man for killing his wife and five children, finding that the appellant had suspicions regarding the "character of

his wife" and that therefore the murders were "because of unhappiness and frustration and not because of any criminal tendency." A similar argument is also seen in *Dharmendrasinh @ Mansing Ratansinh v. State of Gujarat* [(2002) 4 SCC 679] where the Bench of Justices Raju and Brijesh Kumar commuted the sentence of an accused who killed his children as he suspected his wife's 'character' and believed that the children might have been illegitimate. Here again the Supreme Court noted the "painful belief" and "strain" of suspicion under which the accused was labouring "whether rightly or wrongly … Obviously he would have been brooding under that idea, which perhaps he could not contain any more."

Yet again, there are exceptions. In *Bheru Singh s/o Kalyan Singh v. State of Maharashtra* [(1994) 2 SCC 467], the Supreme Court upheld the death sentence of a man found guilty of the murder of his wife and five children, again after fearing his wife's infidelity. The Bench observed that it was a "most heinous, cold-blooded and gruesome murder" that "sends a chill down our spine and shocks our judicial conscience."

A comparison between the judgments in *Shaikh Ayub v. State of Maharashtra* and *Dharmendrasinh @ Mansing Ratansinh v. State of Gujarat* and that of *Bheru Singh s/o Kalyan Singh v. State of Maharashtra* illustrates well the arbitrariness of capital sentencing. The motives and circumstances in all the cases were virtually identical. In *Dharmendrasinh @ Mansing Ratansinh v. State of Gujarat* the Supreme Court relied heavily in its decision to commute on the grounds that there was little danger of a repeat offence. In *Bheru Singh s/o Kalyan Singh v. State of Maharashtra* however, despite clear evidence of the appellant's remorse, the bench nevertheless upheld the death sentence.

The impression given from a study of judgments relating to gender-based violence is that the Supreme Court has gone out of its way to find cause to commute death sentences in cases of dowry murder and rape and murder cases in contrast to its eagerness – during the 1990s at least – to uphold death sentences in cases of the rape and murder of minors. It is impossible to draw firm conclusions from this, but if nothing else it simply underlines the manner in which the Supreme Court has been able to manoeuvre within the framework under which the death penalty operates according to its own attitudes towards crime.

3.2 The issue of age in sentencing

In *Bachan Singh*, the Supreme Court had specifically stated that where the accused was "young or old", the death sentence was not appropriate. Because it did not want to set rigid standards, the Court did not specify what amounted to 'too young' or 'too old'.

Prior to *Bachan Singh*, it appeared that the Supreme Court had not developed a clear understanding of how to deal with cases involving youth and juveniles. While the Court did often consider the question of age, it was never cited as a reason for commuting a death sentence. Thus in *Tori Singh and anr v. State of Uttar Pradesh* (AIR 1962 SC 399), the Supreme Court refused to commute the sentence awarded to the appellant – "a mature man of 25" – even though it noted that Tori Singh shot at the deceased at the instigation of his father,

it also noted that at 25, the accused was no longer a young boy in his teens who would be completely under the influence of his father. Yet in *Masalti and ors. v. State of Uttar Pradesh* (AIR 1965 SC 202), the Supreme Court commuted the sentence of three of the appellants who were aged 18, 23 and 24 respectively, noting that they would have joined the unlawful assembly under pressure and influence of the elders of their respective families. In *Dharampal v. State of Uttar Pradesh* [(1970) 1 SCC 429], the age-bar was reduced further by the Supreme Court which accepted the age of the accused as only 22 years old but noted, "There is nothing to show that the appellant was in any way goaded or induced to act in the manner he did, by his father and brothers." Again in *Bhagwan Swarup v The State of U.P.* (AIR 1971 SC 429), the trial court had noted that the accused did not appear more than 19 years of age but awarded the death sentence, further adding that age alone could not be a sufficient judicial ground for awarding lesser punishment. Yet in *Om Parkash alias Omla v. State of Delhi* [(1971) 3 SCC 413] even though the 19-year-old appellant fired the gun at the deceased, the Supreme Court commuted the sentence as he was exhorted to fire by his father and uncle.

In *Mohd. Aslam v State of Uttar Pradesh* (AIR 1974 SC 678), the Supreme Court referred to the fact that the trial court had awarded a death sentence despite the appellant being young, observing that "well-established law" was clear that age would not come into consideration. The Supreme Court did not address this issue despite the recent judgment in *Ediga Anamma v. State of Andhra Pradesh* (AIR 1974 SC 799) that "too young" offenders should not be sentenced to death, but instead commuted the sentence on other grounds. Yet a few years later, in *Dalip Singh and Ors. v. State of Punjab* [(1979) 4 SCC 332], the Court commuted a death sentence on the ground that one of the appellants was a young man in his twenties at the time of the incident.

Following the *Bachan Singh* judgment, in *Ujjagar Singh and Anr. v. Union of India and Ors.* (AIR 1981 SC 2009), the Court commuted the sentence of one appellant (Lal Singh) who was of the "extreme young age" of 17 years at the time of the offence. Similarly in *Dharma v. Nirmal Singh Bittu and anr.* (AIR 1996 SC 1136), the Supreme Court observed that the accused was only 19 years at the time of the offence and therefore did not sentence him to death. While in *Bantu @ Naresh Giri v. State of Madhya Pradesh* (AIR 2002 SC 70) the Supreme Court commuted the sentence of the appellant who was aged less than 22 years, observing that there was nothing on record to indicate that the appellant had any criminal record or that he would be a danger to society, in other cases youth was rejected as a mitigating factor. Thus in *Javed Ahmed Abdulhamid Pawala v. State of Maharashtra* (AIR 1983 SC 594), the Supreme Court upheld the death sentence awarded to a 22-year-old appellant arguing that the Court could show him no mercy. Similarly in *Sunil Baban Pingale v. State of Maharashtra* [(1999) 5 SCC 702], the Supreme Court upheld the death sentence awarded to the appellant aged 26, holding that the offence was premeditated. In *Om Prakash v. State of Uttaranchal* [(2003) 1 SCC 648], the Supreme Court again held that "mere young age of the accused is not a ground to desist from imposing death penalty."

In *Darshan Singh alias Bhasuri and Ors. v. State of Punjab* [(1983) 2 SCC 411], the trial court had not imposed the death sentence on one of the accused because he was about 20-22 years of age. The Supreme Court then commuted the sentences of death awarded to three other appellants whom it found were aged 18-19 years at the time of the offence. Curiously however the Supreme Court also commuted the sentence of the last remaining appellant, stating, "Accused 5 was about 35 years of age but it makes no sense to sentence him to death for the reason merely that he is older than the others." While such an approach may be welcome to abolitionists, it leaves the observer wondering if the Court is as whimsical in its practices of upholding death sentences?

3.2.1 Juvenile offenders

The idea of a prohibition against the award of death sentences to juveniles was first introduced in 1967 by the Law Commission in its 35th Report on Capital Punishment. Its position against the death penalty for juveniles was reiterated in its 42nd Report on reform of the Indian Penal Code published in 1971. On the basis of this position, an amendment to the IPC was drafted as part of the Indian Penal Code (Amendment) Bill, 1972. While the Bill never saw the light of day, India's international human rights obligations required it to legislate in this regard 14 years later (see below).

At the same time, the Constitutional Bench of the Supreme Court had suggested that the minority age of an offender should be a mitigating factor in *Jagmohan Singh v. The State of Uttar Pradesh* (AIR 1973 SC 947). In *Harnam v. State of U.P.* [(1976) 1 SCC 163], the Supreme Court took note of these and other developments relating to the death penalty and observed that the tender age (16 years) of the accused could be a mitigating factor. The Bench of Justices Bhagwati and Sarkaria observed that in such circumstances, "it would be legitimate for the Court to refuse to impose death sentence on an accused convicted of murder, if it finds that at the time of commission of the offence, he was under 18 years of age." This decision was followed by *Raisul v. State of U.P.* (AIR 1977 SC 1822), where the Supreme Court commuted the sentence on the basis of the statement of the accused in the trial court where he claimed to be under 18 (the Supreme Court observed that no material relating to the age of the offender had been provided by the prosecution and both the lower courts had estimated his age from his appearance). Interestingly, in *Bachchey Lal v. State of Uttar Pradesh* (AIR 1977 SC 2094), although the Supreme Court commuted the sentence of the accused who was aged under 18 years, referring to the *Harnam v. State of U.P.* [(1976) 1 SCC 163] judgment and modern trends in penology, it did so with a disclaimer that there was no specific rule for all cases but it was merely an important factor to be considered in sentencing.

However, with India's accession to the ICCPR in 1979, it was obliged to adhere to Article 6(5) which states that the sentence of death shall not be imposed for crimes committed by persons below eighteen years of age. India's accession to the UN Convention on the Rights of the Child in 1982 further reiterated this prohibition as Article 37(a) of the Convention states, "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age." This exclusion of

juvenile offenders from the scope of the death penalty has also been referred to by the UN Human Rights Committee as a rule of customary international law.[46]

The Juvenile Justice Act of 1986 subsequently prohibited the death sentence for juveniles. However, Section 2(h) of that law defined a juvenile as a boy who had not attained the age of sixteen years or a girl who has not attained the age of eighteen years. The Juvenile Justice (Care and Protection of Children) Act, 2000, subsequently amended the definition of a juvenile boy to one under the age of 18 and Section 16(1) of this Act also prohibited the award of the death sentence to juveniles. Despite the current legal clarity in relation to the death penalty and juveniles in India, there have been a number of cases where it appears that juveniles have been sentenced to death, some executed or awaiting execution due to the failure of the courts to properly appreciate evidence of age.

In *Amrutlal Someshwar Joshi v. State of Maharashtra II* [(1994) 6 SCC 200], the Supreme Court heard a review petition focusing largely on the question of age (the Supreme Court had previously rejected an appeal). While in no doubt about the law prohibiting the death sentence to juveniles, the Supreme Court observed that there was an inconsistency on the question of the offender's age as the statement made by the accused in Court gave his age as 17 at the time of offence, while the prosecution – relying on a 'true copy' of the school leaving certificate – argued that the accused was 20 at the time of the offence. The prosecution evidence had been accepted by the trial court and the Supreme Court dismissed the plea of the defence counsel that a medical examination be carried out to determine age, arguing that, "Under the above circumstances, we do not think that this exercise has to be undertaken by this Court at this stage when the authenticity of the school-leaving certificate has never been in doubt." Amrutlal Someshwar Joshi was executed in Pune Central Jail on 12th July 1995.

In the case of *Ram Deo Chauhan @ Raj Nath v. State of Assam* (AIR 2001 SC 2231), the question of age had not been addressed by any of the lower courts as it was not raised by various defence counsels representing him who were all legal-aid lawyers appointed by the state (see Section 7.1 below). In fact the defence lawyer in the High Court confirmation proceedings, had even accepted that the accused was over the age of 20. The plea that the offender was a juvenile at the time of the offence was only raised in a review petition before the Supreme Court when he hired his own lawyer. In the review before the Supreme Court it was argued that a doctor examined as a court witness (sought by the court and not by the defence or prosecution) had ascertained that the age of the accused would have been 15-16 at the time of the incident. A school register was also referred to which showed that the accused was less than 16 at the time of the incident. While one of the three judges (Justice Thomas) hearing the review petition found that the sentence should be commuted on the grounds that there was evidence that he was a juvenile, another judge (Justice Sethi) argued that, "too much of reliance could not be placed on text books, on medical jurisprudence and toxicology

[46] General Comment 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, adopted in 1994, para. 8.

when determining the age of an accused," and therefore dismissed the review petition. The third judge, Justice Phukan, agreed with the rejection of the petition but added that the accused was not remediless as the power to commute the sentence also lay with the executive. While the Governor of the relevant state did subsequently commute the sentence after a sustained lobbying effort that included appeals from the National Human Rights Commission as also the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the decision of the Governor is currently being challenged by the family of the victims in the Supreme Court.

In *Om Prakash v. State of Uttaranchal* [(2003) 1 SCC 648], the Supreme Court Bench of Justices Rajendra Babu and Venkatrama Reddi upheld the death sentence awarded to the appellant who as a domestic servant had been accused of the murder of three members of the family in whose house he worked in November 1994. Though in the 'statement of the accused' made in the trial court in 2001, he stated that he was 20 years of age (making him only 13 years old at the time of the offence in 1994), the Supreme Court disregarded this, observing that, "apart from the fact that no proof was adduced regarding his age, the High Court noted that he admittedly opened the bank account in Punjab National Bank at Dehradun on 9.3.94. Pass book and cheque book were exhibited in trial. The High Court observed that the appellant would not have been in a position to open the account unless he was a major and declared himself to be so. That was also the view taken by the trial court." To sentence a juvenile to death on the basis of such a presumption raises concern, especially in circumstances where the procedure required to open a bank account is not particularly rigorous in terms of evidence and if he wanted to open an account he would not have admitted his true age.

A Review Petition (Crl. No. 273 of 2003) was dismissed by the Supreme Court on 4th March 2003 and is unreported. A subsequent writ petition was filed by the father of the accused (*Zakarius Lakra and ors. v. Union of India and anr*. [(2005) 3 SCC 161]) seeking the quashing of the death sentence on the grounds that his son was a juvenile on the date of the offence. A school certificate was produced as evidence of his age (showing his date of birth as 4th January 1980) and the Supreme Court noted that the petitioner merely sought that the document be subject to inquiry and the death sentence commuted. The Supreme Court however did not pass judgment as it observed that the appropriate remedy was not a writ petition but a curative petition. At the same time, the bench of Justices Venkatrama Reddi and A.K. Mathur noted that the previous Bench of the Court did not have this school certificate before them. They also expressed concern that even though the appellant did file two certificates dated 28.04.2001 and 02.08.2002 issued by school authorities in West Bengal with the previous appeal, these were not brought to the notice of the Bench at the time of hearing of the appeal.

Curative Petition No. 20 of 2005 was thereafter filed in the Supreme Court and despite the reply filed by the State of Uttaranchal not challenging the genuineness of the school certificate, the bench of Chief Justice Sabharwal and Justices Ruma Pal and K.G. Balakrishnan dismissed the curative petition on 6th February 2006 in a cryptic order – "The

curative petition is dismissed" (unreported). Thus, despite a Supreme Court Bench acknowledging that there had been a gross error in the certificates themselves not being produced before the previous Bench, the curative petition was dismissed without stating reasons. The dismissal of this petition means that a juvenile is currently awaiting execution in violation of Indian law as also India's international obligations and commitments.

3.3 The possibility of reform and rehabilitation of offenders

Moves to limit the use of the death penalty and the requirement to provide 'special reasons' for awarding death sentences contained in Section 354(3) of the new CrPC in 1973, demonstrated the legislature's regard for the concept of reform of offenders. In *Lehna v. State of Haryana* [(2002) 3 SCC 76], the Supreme Court observed that the term 'special reasons' was also used in Section 360 and 361 of the CrPC where the Court was required to give the accused the advantage of probation unless the facts were "such as to compel the Court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed." Observing that all these changes were brought together in the new CrPC 1973 and were "part of the emerging picture of acceptance by the legislature of the new trends in criminology," it was clear from the legislature that "reformation and rehabilitation of offenders and not mere deterrence, are now among the foremost objectives of the administration of criminal justice in our country."

The emphasis placed on the reform of offenders in the *Bachan Singh* formulation of 'rarest of rare' put the question beyond doubt. The judgment stated that the potential for the accused to be reformed and rehabilitated would be presumed unless the state proved the opposite with evidence and that this would be taken as a mitigating factor in deciding whether to uphold a sentence of death. This led to the commutation of a number of death sentences.

For example in *Bachhitar Singh and anr. v. State of Punjab* (AIR 2002 SC 3473), the Court commuted the death sentence awarded to the appellants who had hired two persons to eliminate the entire families of their brothers in order to grab their property. The Court noted that there was no evidence that the accused were a menace to society and that there was no reason to believe that they could not be reformed or rehabilitated. The Court therefore commuted the sentence to give them a chance to "repent that what they have done is neither approved by the law or by the society and be reformed or rehabilitated and become good and law abiding citizens."

Similarly in *Surendra Pal Shivbalakpal v. State of Gujarat* [(2005) 3 SCC 127], the Supreme Court commuted the sentence of the accused who was convicted for the rape and murder of the minor daughter of his neighbour, apparently after his advances were rejected by the neighbour. The Supreme Court however commuted the sentence observing, "The appellant was aged 36 years at the time of the occurrence and there is no evidence that the appellant was involved in any other criminal activity previously and the appellant was a migrant labour from UP and was living in impecunious circumstances and it cannot be said that he would be

a menace to the society in future and no materials are placed before us to draw such a conclusion."

While the judgment of the Court commuting the death sentence in the above case must be welcomed, it leaves observers wondering what differentiated this case from the many other cases of rape and murder of minors where an outraged Court awarded the death penalty – did the social standing of the victim and the victim's family play a crucial role, especially since in the instant case the victim and her family were likely to have been migrant labourers themselves.[47]

Yet even though reform and rehabilitation and an absence of threat to society has played a role in sentencing in a few cases, in a large number of other cases these factors have simply been ignored by various benches or been summarily dismissed. Thus in *Munawar Harun Shah v. State of Maharashtra* (AIR 1983 SC 585), it was pointed out to the Court that Shah was a minor participant who did not take part in the actual killing and had the potential for reform (it was cited that since his conviction he had been writing the Koran in Marathi and was also learning Arabic and homeopathy). The Court was also informed that another accused – Shantaram Jagtap – had written one book in Marathi and translated another from English into Marathi and was presently studying Buddhism and translating another book into Marathi. Instead of recognising such indicators as suggesting potential for reform, the Supreme Court instead rebutted them observing that such work required a composed mind and concentrated attention and therefore there could be no spectre of the death penalty hovering over their minds while in prison.

Similarly in *Dayanidhi Bisoi v. State of Orissa* (AIR 2003 SC 3915) and many other cases [see *Holirom Bordoloi v. State of Assam* (AIR 2005 SC 2059), *Karan Singh v. State of U.P.* [(2005) 6 SCC 342] and *Renuka Bai @ Rinku @ Ratan and anr. v. State of Maharashtra* (AIR 2006 SC 3056) for example], the Supreme Court appears to have rejected the possibility of reform and rehabilitation despite the fact that there was no evidence to the contrary put forward by the state. This is clearly contrary to the spirit of the Court's wishes in *Bachan Singh* where the presumption was to be in favour of reform.

The Supreme Court has on a number of occasions made a direct link between apparent lack of remorse of an offender and the impossibility of reform and rehabilitation. In cases where remorse did seem apparent – including a number of cases in which offenders surrendered to the police voluntarily or confessed to their crimes – the Supreme Court has upheld sentences of death [see *Sri Mahendra Nath Das @ Sri Gobinda Das v. State of Assam* (AIR 1999 SC 1926), *Muniappan v. State of Madras* (AIR 1962 SC 1252), *Bheru Singh s/o Kalyan Singh v. State of Maharashtra* [(1994) 2 SCC 467] and *Jai Kumar v. State of Madhya Pradesh* (AIR 1999 SC 1860)], but it has also commuted a number of sentences (although the grounds for commutation have not included reference to such demonstrations of remorse).

[47] Unfortunately there are no details of the victim given in the judgment. Surprisingly even the age of the victim is not mentioned and the sole reference is to a minor.

3.4 Mental Health

The question of the mental health of offenders has been addressed by the Supreme Court in capital cases in a number of ways. While insanity as a legal defence has its own place in criminal law, the Supreme Court has also looked at various other facets of mental health as a factor in adjudicating on sentencing and in particular on whether or not to award the death penalty.

As early as 1961, a trial court and High Court had accepted a plea of unsoundness of mind in awarding a reduced sentence of life imprisonment in *State of Madhya Pradesh v. Ahmadullah* (AIR 1961 SC 998) (this plea was subsequently rejected by the Supreme Court on merit, but the sentence was commuted on other grounds). In *Gopalan Nair v. The State of Kerala* [(1973) 1 SCC 469], the accused had previous mental problems and had been admitted to a mental hospital in the past. The trial court had rejected an insanity defence despite the prosecution failing to put forward a clear alternative motive. The Supreme Court commuted the sentence of death awarded by the trial court, observing that the sentence of death should never have been awarded at all in this case especially since he had mental health problems prior to the date of the incident and there was "nothing to show that he was not suffering from a mental obsession which may not amount to insanity but which may affect a person's mind in a way quite different from that of a normal person."

In another case, *Vivian Rodrick v. The State of West Bengal* [(1969) 3 SCC 176], the accused showed signs of unsound mind during the trial, which was postponed till he was declared fit to stand trial. During the appeal too there was a recurrence of unsoundness of mind but this did not stop the High Court from continuing the proceedings. The Supreme Court subsequently found that the High Court judgment should be set aside as prejudiced against the accused and sent the case back to the High Court for a fresh hearing of the appeal.[48] In *State of Maharashtra v. Sindhi alias Raman* [(1975) 1 SCC 647], the Supreme Court rejected an appeal by the State challenging the decision of the Maharashtra High Court to postpone confirmation hearings in a case where even though the accused had been found fit by the trial court, the legal-aid counsel appointed to the accused for the confirmation proceedings reported that he was unintelligible. With subsequent decisions in this case unreported, his fate is unclear.

Shortly thereafter in *Amrit Bhushan Gupta v. Union of India and Ors.* [(1977) 1 SCC 180], the Supreme Court observed that the Court had no powers to prevent the execution of a death sentence that had been legally ordered, on the grounds that the appellant was of unsound mind (see box below). However, the Supreme Court did commute a number of sentences, referring in the grounds to "emotional stress" (*Carlose John and Anr v. State of Kerala* [(1975) 3 SCC 53], "mental imbalance" (*Nemu Ram Bora v. State of Assam and Nagaland* (AIR 1975 SC 762), *Faquira v. State of U.P.* (AIR 1976 SC 915) and *Vashram Narshibhai Rajpara v. State*

[48] The sentence was ultimately commuted by the Supreme Court on the grounds of delay (see Section 4 below). This case is also referred to in the section on Legal Aid (see Section 7.1 below).

of Gujarat (AIR 2002 SC 2211), "hallucination" (*Ashok Laxman Sohoni and Anr. v. State of Maharashtra* [(1977) 2 SCC 103], "mental distress" (*Vasant Laxman More v. State of Maharashtra* [(1974) 4 SCC 778], "mental disturbance" (*Balraj v. State of U.P.* (AIR 1995 SC 1935)) and "mental case" (*Janki Dass v. The State (Delhi Adminstration)* (AIR 1995 SC 1002)) as mitigating factors.

In an odd judgment (*Francis alias Ponnan v. State of Kerala* and *Bhagwanta v. State of Maharashtra* [(1975) 3 SCC 825], the Supreme Court decided to take up two completely unrelated criminal appeals and award judgment together in them. In the former, inspired by the judgment in *Ediga Anamma v. State of Andhra Pradesh* (AIR 1974 SC 799), the Supreme Court commuted the sentence of the appellant, Francis, after observing that the brother-in-law of the appellant had been attacked by the deceased and some others one day before their murders and, "It is evident that the appellant's mental balance had become seriously disturbed." The Supreme Court disregarded the findings of the High Court that the murder was a "revengeful and merciless attack" – cold blooded, pre-meditated without any sudden provocation.

In the latter case, the Court noted that Bhagwanta was tried for over three separate murders and accused of another three. The Court refused to commute the sentence, holding, "It is possible that the appellant Bhagwanta had the diseased mind of a paranoiac. No evidence was, however, given to show that he suffered from mental ill health of any type." The Court further argued: "It is not possible for courts to attempt, on the slender evidence there generally is on this aspect, to explore the murky depths of a warped and twisted mind so as to discover whether an offender is capable of reformation of redemption, and if so, in what way."

How then did the same bench 'explore the murky depths' of Francis' 'warped and twisted mind' and arrive at the conclusion that his mental balance was disturbed? Though the bench claimed that "there is a vast difference between the two cases - the difference between the case of a scared human being, with a weak control over his feelings, carried away by what was too strong and too long lasting a gust of passion against another who had given him genuine cause for anger and that of a person whose conduct in carrying out cold blooded and calculated murders of several relatives, who had apparently done nothing to provoke him, discloses nothing short of a fiendish callousness and cruelty," there is little in the judgment that suggests that such perceptions of the Court were backed by evidence. In fact the absence of proper evidence of mental imbalance or disturbance is clear in both cases; yet the decision of the Court in both is different.

Professor Blackshield, in his study of capital punishment published in 1979,[49] calls this contrasting of two cases a brave experiment by the Bench to show how the *Ediga Anamma v. State of Andhra Pradesh* judgment could be understood and used. The contrast however ends up revealing more than the Bench bargained for – the arbitrariness of capital sentencing in the Supreme Court, reliant more on perceptions than on evidence or fact.

[49] See Blackshield 1979 (refer to footnote 40), JILI supra.

In recent years there have been a handful of cases where the Supreme Court has been unsure about the exact nature of the mental condition of the accused and wisely relied on expert opinion. Thus in *Ram Deo Chauhan and anr. v. State of Assam* (AIR 2000 SC 2679), the Supreme Court upheld the death sentence only after requesting a report from the Mental Hospital (*sic*), Tejpur, which found no infirmity in the mental health of the accused. Similarly in *Durga Domar v. State of M.P.* [(2002) 10 SCC 193], the accused was convicted for killing five children in a very ferocious manner without any known motive. Yet with doubts about the mental condition of the appellant, the Supreme Court sought reports from the Government Medical College which was to keep the appellant under observation and report on his mental condition.

However, in other cases the Supreme Court has failed to investigate the issue of the mental well-being of appellants. It is of course impossible to argue that there were medical concerns in these cases without detailed evidence, but in a number of cases where the motive was unclear and the behaviour of the offender might have indicated signs of mental imbalance, these signs were ignored by the Supreme Court [see for example *Jai Kumar v. State of Madhya Pradesh* (AIR 1999 SC 1860) and *Sri Mahendra Nath Das @ Sri Gobinda Das v. State of Assam* (AIR 1999 SC 1926)].[50] The handful of cases referred to above are the only ones in which the Court is known to have ordered medical experts to examine the appellants. Such measures if used more often could play a vital role in preventing the sentencing to death and execution of mentally ill or insane prisoners.

The position taken by the Court in *Amrit Bhushan Gupta v. Union of India and Ors.* [(1977) 1 SCC 180] raises grave concerns about the willingness of the judiciary to allow the execution of a person who is mentally ill, especially since that judgment has not been expressly overruled subsequently. There is an internationally observed principle of sparing "insane" (at the time of the crime or of the execution) persons from execution as such people are understood to be not responsible for their crime because severe mental illness impaired their

[50] In *Jai Kumar v. State of Madhya Pradesh* (AIR 1999 SC 1860), the Supreme Court upheld a death sentence in the case of a man who had killed his sister-in-law and niece in a particularly brutal manner. The Supreme Court found that there were no mitigating circumstances but that aggravating circumstances were plenty. The Court did not entertain the notion of mental imbalance, illness or mental distress that may have led to the murders, despite the accused admitting to the murder. In *Sri Mahendra Nath Das @ Sri Gobinda Das v. State of Assam* (AIR 1999 SC 1926), the accused severed the head of the victim and took it and the bloody weapon with him to the police station. The Supreme Court observed that reports indicated that the accused was largely silent during the trial and failed to suggest mitigating circumstances and that the trial court had therefore concluded that the accused was being uncooperative. Despite cryptically noting that "[the accused] was also not well at the time of occurrence," the Supreme Court failed to consider the question of unsoundness of mind or seek any expert evidence for the same as had been done in other cases.

judgment or their ability to exercise self-control at the time of their offence or caused a lack of understanding of the reason for their punishment.

Executed despite being schizophrenic

In August 1975 the Delhi High Court dismissed a writ petition filed by Amrit Bhushan Gupta, a prisoner who was due to be executed shortly, pleading insanity. The High Court found that, "we have no doubt in our minds that if the petitioner is really insane, as stated in the petition, the appropriate authorities will take necessary action." A previous Bench of the Supreme Court had requested that the prisoner be observed by experts who after observation had stated that the prisoner was suffering from schizophrenia and was of unsound mind. However, the Court in its judgment on the writ petition (*Amrit Bhushan Gupta v. Union of India and Ors.* [(1977) 1 SCC 180]) stated that as the appeals concerning conviction and sentence had not been placed before them, "We *assume* that, at the time of the trial of the appellant, he was given proper legal aid and assistance and that he did not suffer from legal insanity either during his trial or at the time of the commission of the offence."

The Supreme Court dismissed the petition as a gross abuse of the legal process seeking to delay the execution and reiterated that the appropriate remedy lay with the appropriate authorities since the Court did not have the power to prevent an execution on the grounds that the condemned prisoner was of unsound mind. The Court further noted that as mercy petitions had already been rejected by the President, the Court presumed that all the relevant facts had received "due consideration in appropriate quarters." Amrit Bhushan Gupta was eventually hanged in Delhi on 18th January 1977 despite suffering from schizophrenia.

The UN *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, adopted by the UN Economic and Social Council (ECOSOC) in 1984, specifically sought protection for the "insane" from execution.[51] ECOSOC resolution 1989/64, adopted in 1989, further recommended that UN member states eliminate the death penalty "for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution." Similar positions on the issue have also been taken by the UN Commission on Human Rights in 2005 (resolution 2005/59), as also the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary executions who further called upon retentionist governments to "bring their domestic legislation into conformity with international legal standards" with respect to the mentally ill.[52]

The need for such amendment in India is crucial. The lack of explicit evidence that persons suffering from mental illnesses are awaiting execution or have been executed in India does

[51] Safeguard 3 of the UN Safeguards states that "the death sentence [shall not] be carried out....on persons who have become insane".
[52] *Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur*, UN Doc. E/CN.4/1998/68, 23rd December 1997, para.117.

not mean that they do not exist as access to mental health professionals by condemned prisoners (as also the accused at trial stage) is extremely limited and there is no current research on the subject.

3.5 Other Factors

As pointed out earlier, Supreme Court judgments give little away about the socio-economic profile of appellants, as well as their caste and religion, and it is therefore extremely difficult to draw any conclusions about what might be subliminal factors at work within the judicial process and the sentencing process more specifically. This section briefly refers to those cases in which caste, religion and political affiliation have been an overt factor in the sentencing process.

Caste

Despite being a major factor in various facets of Indian life, the issue of caste has not been a dominant feature in discussions on sentencing in capital cases in India. This is largely because in most cases involving individual crimes of murder, there is little record of caste being a factor in the factual matrix leading to the offence. The few capital cases that have been informed by the caste question have often concerned mass caste-based killings where the Court has been unable to ignore the issue.

In *Subbiah Thevar v. State of Tamil Nadu* [(1973) 3 SCC 480], the Supreme Court commuted the death sentence on the grounds that the accused who belonged to the Thevar community felt humiliated by a woman of the higher-caste Vellala community beating one of the accused with a broomstick and the deceased made a sarcastic remark about the attack. The Court noted that in such a case the death sentence was not called for. In *Mahesh s/o Ram Narain and ors. v. State of Madhya Pradesh* [(1987) 3 SCC 80] however, where the accused killed five persons of one family in an attack apparently driven by considerations of the 'evils of untouchability', the Supreme Court used the logic of 'social necessity' and 'mockery of justice' to uphold the death penalty. In *Raja Ram Yadav and ors. v. State of Bihar* [(1996) 9 SCC 287], eight accused were sentenced to death by the trial court, confirmed by the High Court, for the murder of 26 persons in one attack of whom 25 were from the same caste and 20 from the same family (although this case emerges from the political context in Bihar and the accused were activists of the Maoist Communist Centre, there is no reference to such facts in the judgment). The Supreme Court commuted the sentences for this "gruesome and cruel incident" as the sole eyewitness was a child and the evidence was therefore insufficient to award the death sentence.

In two cases involving group attacks on 'harijan' (a term formerly used for the 'untouchable' community) colonies in *Kannan and ors. v. State of Tamil Nadu* (AIR 1989 SC 396) and *Baddi Venkata Narasayya and ors. v. State of A.P.* [(1998) 2 SCC 329], the Supreme Court did not resort to the death sentence. In the former the Court commuted the sentence of three of the attackers on grounds of 'parity' (i.e. all those involved in the attack should receive the

same sentence). In the latter the Supreme Court upheld the commutation of the death sentence of the main accused by the High Court.

Religion

Very few crimes associated with religious riots or communal clashes have led to death sentences and therefore they have rarely come up before the Supreme Court. In *Dharma Rama Bhagare v. The State of Maharashtra* [(1973) 1 SCC 537], the Court upheld the death sentence awarded to the accused for killing unarmed members of one family who were attempting to escape a mob during communal riots in Gujarat. The Court concluded that such killings were "not only destructive of our basic traditional social order founded on toleration in recognition of the dignity of the individual and of other cherished human values, but also have a tendency to mar our national solidarity." Similar anguish was evident in *Dilaver Hussain s/o Mohammadbhai Laliwala etc v. State of Gujarat and anr.* (AIR 1991 SC 56) where even though the Supreme Court acquitted the accused for their role in a communal riot in March 1985 in Gujarat, it noted, "We however hope that our order shall bring good sense to members of both communities in Dhabargad and make them realise the disaster which such senseless riots result in and they shall in future take steps to avoid recurrence of such incidents…"

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

Politics

The Supreme Court was also lenient with political parties in *Apren Joseph alias Current Kunjukunju and ors. v. the State of Kerala* (AIR 1973 SC 1) where even though five persons were killed, the Court commuted the sentence arguing that the accused in "excessive zeal for their party … felt unduly provoked by the success of the meeting organised by the Karshak Sangham and being misguided by political intolerance and cult of violence they committed the offences in question soon after the said meeting." The Supreme Court in this case appears to have found attacks motivated by political zeal as a mitigating factor and commuted the sentence in the 'interest of justice'. The Court did however clarify that they were not laying down any general rule with regard to cases of political murders. This was proved by the Supreme Court in *Balak Ram v. State of Uttar Pradesh* (AIR 1974 SC 2165) where the Supreme Court upheld the death sentence for killings that emerged from rivalry between the Congress (O), Congress (R) and *Bhartiya Jan Sangh* during local town elections.

4. Delay: A ground for commutation?

This chapter looks at how the Supreme Court has dealt with the issue of delay in judicial and executive proceedings as a factor to be taken into account when deciding on sentence. As the following narrative shows, in this as with so many other factors, the court has been, and continues to be, inconsistent. While jurisprudence has developed, as is to be expected in a common law context, glaring anomalies exist which highlight death row and the death penalty itself as cruel, inhuman and degrading punishment. Perhaps not surprisingly, the Supreme Court – which sits at the apex of a criminal justice system that allows individuals to languish in jails awaiting trial for many years (in many cases longer than their sentences would be) because of the huge backlog of cases – has gradually moved to a position in which it currently refuses to consider judicial delay as a ground for commutation. However in doing so, it ignores a crucial fair trial standard that individuals should be tried without undue delay set out in Article 14(3)(c) of the ICCPR to which India is a party.

In *Mohinder Singh v. The State* (AIR 1953 SC 415), finding that the accused had not received a fair trial, the Supreme Court acquitted him, holding that though it would ordinarily order a retrial, this would "be unfair to ordinary and settled practice seeing that the appellant has been in a state of suspense over his sentence of death for more than a year." This judgment shows not only that executions were being carried out soon after court verdicts but also that a period of one year spent on death row was considered a ground for commutation. In *Habeeb Mohammad v. State of Hyderabad* (AIR 1954 SC 51) too, an acquittal was directed in place of a retrial as six years had passed since the offence with the accused imprisoned throughout, part of the time on death row, as also in *Abdul Khader and ors. v. State of Mysore* (AIR 1953 SC 355), where the sentence was commuted on the grounds that three years had elapsed since conviction. In contrast to these early cases, the last person to be executed in India - Dhananjoy Chatterjee – had completed over 14 years in prison, most of them under the sentence of death

and in solitary confinement, before he was eventually executed in August 2004. Yet this was not considered a ground for commutation by the Supreme Court, which refused to be drawn into on the issue of delay (see box below).

Interestingly, in *Nawab Singh v. State of Uttar Pradesh* (AIR 1954 SC 278), a Supreme Court Bench clarified that while delay may be a factor, it was no rule of law and was a factor primarily to be considered by the executive in its decision on clemency. Subsequently, a Constitutional Bench in *Babu and 3 others v. State of Uttar Pradesh* (AIR 1965 SC 1467) rejected the ground of delay for commutation without giving any reasons why it was doing so. A change was visible however in *Vivian Rodrick v. The State of West Bengal* [(1971) 1 SCC 468] where a five judge Bench of the Supreme Court commuted the sentence as the accused had been "under the fear of sentence of death" for over six years. The bench ruled that, "extremely excessive delay in the disposal of the case of the appellant would *by itself* be sufficient for imposing a lesser sentence." In this case the High Court had noted the delay even when it confirmed the death sentence in 1967 but stated that since the law was clear that delay alone could not be a ground for commutation, it had to reject this plea. With the case again before it after being remanded by the Supreme Court on another ground (*Vivian Rodrick v. The State of West Bengal* [(1969) 3 SCC 176], the High Court repeated its previous position but also suggested that the state government could examine the delay.

The Court's judgment in *Vivian Rodrick v. The State of West Bengal* [(1971) 1 SCC 468] remained the legal position for some time [the issue of delay was not addressed in detail in *Jagmohan Singh v. The State of Uttar Pradesh* (AIR 1973 SC 947)] although in practice the Court was inconsistent. The long lapse of time between being sentenced to death by the trial court and an appeal hearing before the Supreme Court was a key factor guiding the Court in commuting the sentence in *Neti Sreeramulu v. State of Andhra Pradesh* [(1974) 3 SCC 314] for example, yet in *Ediga Anamma v. State of Andhra Pradesh* (AIR 1974 SC 799)**,** even though delay was included as a factor, it was just one of several other factors. In *Shanker v. State of U.P.* (AIR 1975 SC 757), the bench of Justices Krishna Iyer and Sarkaria curiously observed that delay in hearing in conjunction with other circumstances may be sufficient for commutation but this was not an absolute rule. The Bench however reiterated the position that delay was a relevant factor for consideration by the executive in deciding on clemency. Justice Krishna Iyer was also on the bench in *Mohinder Singh v. State of Punjab* (AIR 1976 SC 2299) where the Court observed that the accused had been under sentence of death in this case for around six years but that the Court could not intervene at this stage (his appeal and various writ petitions were previously disposed of) especially since a mercy petition was pending before the President. The ambiguity around the impact of delay in commutations continued with the judgment in *Lajar Masih v. State of Uttar Pradesh* (AIR 1976 SC 653), where the Court upheld the death sentence, clearly rejecting the argument that there had been a delay of 18 months and noting that delay was not an absolute factor but one to be viewed with the circumstances of the crime itself (in this case the crime was pre-meditated and pre-planned and the conduct of the accused "immoral").

The ambiguity in law unsurprisingly led to an increase in the arbitrary way in which the Supreme Court dealt with capital cases. In *Hardayal v. State of U.P.* (AIR 1976 SC 2055), a delay of 21 months taken in conjunction with the fact that the Court was unable to clearly establish that the intent was to murder and not merely kidnap was held sufficient to commute. In *Balak Ram v. State of U.P.* (AIR 1977 SC 1095), the delay of approximately six years since the death sentence was awarded by the trial court, was not considered sufficient for commutation. In *Joseph Peter v. State of Goa, Daman and Diu* [(1977) 3 SCC 280], an appeal to the Supreme Court itself was not admitted despite the accused being a young man who had already been under sentence of death for six years, though Justice Iyer did suggest again that the executive may be more receptive to such a plea. Yet in *Bhagwan Bux Singh and anr v. State of Uttar Pradesh* [(1978) 1 SCC 214], the Court argued that it was commuting the sentences "in the peculiar circumstances of the case and having regard, particularly, to the fact that the said appellant was sentenced to death 2 ½ years ago" but gave no other indication, beyond delay, of other factors relevant to its decision. In *Sadhu Singh alias Surya Pratap Singh v. State of U.P.* (AIR 1978 SC 1506) and *Guruswamy v. State of Tamil Nadu* (AIR 1979 SC 1177) too, delay of over three-and-a-half and six years respectively was given as part of the reason for commutation while in *Ram Adhar v. State of U.P.* [(1979) 3 SCC 774], delay of over six years was the only reason given by the Court for commutation.

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

Another two weeks later the judgment in *T.V. Vatheeswaran v. The State of Tamil Nadu* was over-ruled by a Bench of Chief Justice Chandrachud and Justices Tulzapulkar and Varadarajan in *Sher Singh and Ors. v. State of Punjab* (AIR 1983 SC 465). In this case the accused had been sentenced to death in November 1977 and the sentence was confirmed by the High Court in July 1978. The appeal before the Supreme Court was dismissed in March 1979, a writ petition challenging constitutionality of the death sentence was dismissed in January 1981, a review petition was dismissed in March 1981 and another writ petition dismissed in April 1981 (all unreported). The Bench in its 1983 judgment noted that the *Vatheeswaran* rule of two years was unrealistic and no hard and fast rule could be laid down

given the present statistics on disposal of cases as also that no priority was given to mercy petitions by the President. The Court also argued that the cause of the delay too was relevant and the object would be defeated if the accused benefited from such a rule after resorting to frivolous litigation.

This judgment was followed by *Munawar Harun Shah v. State of Maharashtra* (AIR 1983 SC 585) where a delay of five years was rejected as a ground for commutation. However, in *Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra* [(1985) 1 SCC 275], a Bench of Justices Chinappa Reddy and Venkataramiah questioned the technical correctness of a three-judge Bench in *Sher Singh* over-ruling the decision of a two-judge Bench in *Vatheeswaran*. With respect to the case at hand however, the bench did commute the sentence on an "overall view of all the circumstances" after discussing the issue of delay of two years and nine months as also reformation of the prisoner. Similarly, in *Chandra Nath Banik and anr. v. State of West Bengal* (1987 Supp SCC 468), Justices Chinappa Reddy and Shetty too commuted the sentence but did not specify delay as the ground, preferring to argue that the appellant's culpability was unclear and it was "safer" to set aside the death sentence in such cases.

4.1 The current legal position

With the position on delay still largely unclear, a five-judge Constitutional Bench gave a judgment in *Smt. Triveniben v. State of Gujarat* (with 4 other cases) [(1988) 4 SCC 574], which effectively overruled the two-year rule set by *T.V. Vatheeswaran v. The State of Tamil Nadu*. The Constitution Bench ruled that an unduly long delay in execution of the sentence of death would entitle an approach to the court but only delay after the conclusion of the judicial process would be relevant and the period could not be fixed. The Bench specified that a Bench hearing a delay matter would have no jurisdiction to re-open the conclusions reached while sentencing the person to death but could take into account all the circumstances of the case to decide on whether sentence should be commuted or not. The judgment in *Smt. Triveniben v. State of Gujarat* effectively moved the entire focus of the question of delay away from the judicial process to that of the executive process of clemency.

The focus on the executive delay in disposing of mercy petitions was maintained in *Madhu Mehta v. Union of India and Ors.* (AIR 1989 SC 2299). This was a judgment in response to a petition filed in the public interest by an activist seeking commutation of a sentence of death imposed on Gayasi Ram by a trial court in 1978. Gayasi Ram's appeal was dismissed by the Supreme Court in 1981 and in the same year a mercy petition was sent to the Governor of the state which was also rejected. Eight years later, Gayasi Ram was still awaiting a decision on his petition to the President. In the meantime, following the appearance of a number of press reports about the case, the District and Sessions Judge, Jhansi, visited the prisoner and sent a report to the Prisons Department stating, "Gayasi's mental state is such that he might commit suicide by banging his head on the iron grill of his cell if a decision on his petition is not taken soon." Before the Supreme Court in 1989 it was revealed that the Union Ministry of Home Affairs had not taken a decision in his case as they were awaiting the decision of the

Governor in the case of the co-accused Daya Ram. The Union Government therefore claimed that the delay was the fault of the State administration. The Supreme Court however concluded that there was no justifiable reason for keeping the mercy petitions of Daya Ram and Gayasi Ram pending for such a long time resulting in mental pain and agony to the prisoners. Their sentences were commuted.

In *Daya Singh v. Union of India and ors.* (AIR 1991 SC 1548), a Bench of Justices Sharma and Varma of the Supreme Court directed the commutation of a sentence of death awarded on conviction in 1978 for the murder of the former Chief Minister of Punjab in 1965. The death sentence was confirmed by the High Court in 1980 and upheld by the Supreme Court in August 1980 (a review petition was rejected by the Supreme Court in September 1981). Mercy petitions had been rejected by the Governor and the President and another writ petition filed by the brother of the accused was heard by the Supreme Court along with *Smt. Triveniben v. State of Gujarat* [(1988) 4 SCC 574] in 1988 and rejected. Another mercy petition had been filed before the President in 1988 and was still pending. The Supreme Court noted in its 1991 judgment that the prisoner had been in prison since 1972 and therefore commuted the sentence, noting that no rule was being laid down and the sentence was being commuted on 'cumulative grounds.' A similar period of 17 years was also taken note of as a mitigating factor by Justices Hegde and B.P. Singh in commuting a death sentence in *Ram Pal v. State of Uttar Pradesh* [(2003) 7 SCC 141].

Despite the judgment in *Daya Singh v. Union of India and ors.* (AIR 1991 SC 1548), the law on delay since *Smt. Triveniben v. State of Gujarat* [(1988) 4 SCC 574] is relatively clear that only delay after completion of the judicial process can be considered as a ground for commutation. Importantly, a reading of the judgment of the Constitutional Bench in *Smt. Triveniben v. State of Gujarat* reveals that the rationale for the Court's position was to avoid a rush through the judicial process, which might jeopardise procedural safeguards and lead to challenges based on the fairness of the trial. The intention of the Bench in *Smt. Triveniben v. State of Gujarat* then was clearly not to exclude cases like Dhananjoy Chatterjee where the judicial process was stalled for years on end as a result of the negligence of officials of the state.

Dhananjoy Chatterjee's is not the only case where negligence of judicial or executive officials has led to significant delays in the judicial process, and there are no doubt many others. What is of concern of course is that as a result of the *Smt. Triveniben* judgment, the Supreme Court has failed to consider appeals for commutation in such cases because strictly speaking the delay was in the judicial process. In *Gurmeet Singh v. State of Uttar Pradesh* (AIR 2005 SC 3611), the Supreme Court refused to take into account a delay of seven years in the judicial process caused by the negligence of staff of the High Court of Allahabad. In this particular case the accused sought leave from the High Court to appeal to the Supreme Court (as per Article 134A of the Constitution) in March 1996 after the High Court had confirmed his death sentence on 29th February 1996. Despite several reminders sent by the jail authorities, there was no response from the High Court and eventually, years later, the accused preferred a Special Leave Petition in the Supreme Court in August 2003. On inquiry by the Supreme

Court, it was found that officials of the High Court had been negligent and action was initiated against the erring officers. However, the Court refused to commute the sentence on the ground of delay, relying on the current legal position that only delays in mercy petitions before the executive authorities would be material for consideration. Gurmeet Singh is currently on death row in a jail in Uttar Pradesh.

Even if delay as a ground for commutation is restricted to the period when 'mercy petitions' are under consideration by the executive, a number of questions arise. On 29th November 2006, in a response to a question in the Rajya Sabha (Upper House) of the Parliament, the Minister of Home Affairs reported that at present mercy petitions of 44 persons were pending before the President of India, a number of which had been pending since 1998 and 1999. On 13th December 2006, responding to the clamour by members of the Opposition for rejection of the mercy petition in the case of Mohd. Afzal Guru, who had been found guilty of involvement in the conspiracy to attack the Indian Parliament and sentenced to death in December 2002, the Minister of Home Affairs announced that the government would rush through the process in this particular case and added that, "no mercy petition has been decided before six or seven years." In July 2007 the Supreme Court dismissed a petition filed 'in the public interest' which challenged the delayed decisions on mercy petitions and sought the fixing of a time-period for such decisions. The Court however dismissed the petition on the grounds that it was not a matter fit for public interest litigation, leaving the possibility open for a future Bench to entertain a petition on this question.

Hanged after serving a life-term!

Dhananjoy Chatterjee was arrested on 12th May 1990 for the rape and murder of a schoolgirl in the apartment building where he worked as a security guard (see Section 3.1.2 above). He was sentenced to death by a trial court on 12th August 1991 and the High Court confirmed the sentence on 7th August 1992. The Supreme Court upheld his death sentence on 11th January 1994 (*Dhananjoy Chatterjee alias Dhana v. State of West Bengal* [(1994) 2 SCC 220] and a review petition was dismissed on 20th January 1994 (unreported). He was executed on 14th August 2004, a period of over 14 years since his arrest, and over ten years after the Supreme Court upheld his sentence. No clear explanation was given for this delay by the Supreme Court when this fact was brought to its attention in 2004.

After the dismissal of his petitions before the Supreme Court and upon being informed by the prison authorities that the Governor of West Bengal had rejected his mercy petition, Dhananjoy Chatterjee filed a writ petition in the Calcutta High Court in 1994 challenging the rejection of the mercy petition. The High Court stayed the execution. However (as the state later informed the Supreme Court in 2004) at the time when Chatterjee filed the petition in the Calcutta High Court in 1994, the Governor had in fact not rejected the mercy petition and his decision was pending. Irrespective, it is clear that when the petition by the Governor was eventually rejected, this was not brought to the attention of the High Court by the State of West Bengal and therefore the stay of execution ordered by the High Court remained in place

for nine years until November 2003, when it was finally vacated by the High Court upon an application by the State of West Bengal which moved into action after a newspaper reported on the plight of the condemned prisoner and the official inaction. Another writ that brought to light these facts about the delay and confusion and sought commutation of his death sentence, was dismissed by a larger bench of the Calcutta High Court in January 2004.

Though the question of delay was raised in a public interest litigation where the commutation of Chatterjee's sentence was sought on the ground of delay itself, the Supreme Court did not enter into the merits of the petition and dismissed it, holding that the petitioner had no locus to be heard as he was an uninvolved third party [*Ashok Kumar Pandey v. The State of West Bengal and ors.* (AIR 2004 SC 280)]. However, the facts concerning delay were noted by the Supreme Court Bench of Justices Balakrishnan and Srikrishna in their judgment dismissing an appeal filed by Chatterjee in the Supreme Court in March 2004 (*Dhananjoy Chatterjee @ Dhana v. State of West Bengal and others* [(2004) 9 SCC 751]). While the Supreme Court did not take any action on the delay, it noted that in this particular case, from the affidavit of the Deputy Secretary, Judicial Department, Government of West Bengal, it was clear that all the mitigating material was not placed before the Governor and therefore the Supreme Court directed that the Governor's rejection of the petition dated 16th February 1994 be put up before him again with all the relevant facts. The Supreme Court also added that the delay caused due to filing of the present appeal shall not be taken as ground for commutation in any judicial fora but did not make any reference to the delay caused previously in the Calcutta High Court proceedings.

With a second rejection by the Governor of West Bengal and the State of West Bengal setting the execution date, a writ petition was filed in the Supreme Court to stay the execution and to bring before the Supreme Court the circumstances of the 'delay' in this particular case. However the Court did not enter into any of the issues as the execution had already been stayed by the President pending his decision on the mercy petition (*Bikas Chatterjee and Another v. State of W.B and Another* [(2004) 13 SCC 711]). With the Supreme Court refusing to entertain a challenge to the subsequent rejection of the mercy petition by the President filed on 12th August 2004 (*Bikas Chatterjee v. Union of India and Others* [(2004) 7 SCC 634]), the execution was carried out two days later.

The Constitutional Bench of the Supreme Court which dealt with the review of the presidential rejection did not touch upon the question of delay and whether material concerning the delay had been placed before the President or whether there was an attempt to somehow cover up or blame the prisoner for the delay. Unfortunately, the Supreme Court did not call for the material placed before the President to be brought before it in order to verify such facts, instead presuming that all relevant facts and aspects *must* have been placed before the President. The refusal by the Constitutional Bench to enter into the question of delay is curious, especially since all these facts were recorded in the Supreme Court judgment in March 2004. Was this a case of the Court giving in to pressure or would the situation have been the same had one of the judges who sat on the Bench in March also sat on the Constitutional Bench? Why did the Supreme Court not make a finding on the cause of the

delay of over nine years in the stay on execution being vacated in the Calcutta High Court? These questions remain unanswered.

4.2 'Death row' – cruel and inhuman punishment?

"Living Death …"

Chief Justice Chandrachud, describing the time spent by a condemned prisoner on death row, in *Sher Singh and Ors. v. State of Punjab* (AIR 1983 SC 465)

The prospect of losing one's life to the state leads to unique mental anguish and suffering, whether the execution takes place within days or years of conviction. Prolonged periods under sentence of death, added to periods of de-facto solitary confinement and poor prison conditions further place the condemned prisoner under tremendous strain. Given the extremely slow moving legal process in India, and the estimated six to seven years it takes to decide on a mercy petition, it is no surprise that condemned prisoners spend many years awaiting execution.

The impact of extended periods of time under sentence of death have been recognised by the Supreme Court. In *Vivian Rodrick v. The State of West Bengal* [(1971) 1 SCC 468], the Court found that six years since the trial sentence had caused "unimaginable mental agony", while *Ediga Anamma v. State of Andhra Pradesh* (AIR 1974 SC 799) and *Bhoor Singh and Anr v. State of Punjab* [(1974) 4 SCC 754] referred to the "brooding horror of hanging" haunting the prisoners. In *Neti Sreeramulu v. State of Andhra Pradesh* [(1974) 3 SCC 314], the Supreme Court referred to the "agonising consciousness and feeling of being under the sentence of death [that] must have constantly haunted the appellant." In *Rajendra Prasad v. State of Uttar Pradesh* (AIR 1979 SC 916), Justice Iyer referred to the six year period under sentence of death virtually making the prisoner a vegetable and argued, "the excruciation of long pendency of the death sentence with the prisoner languishing near-solitary suffering all the time, may make the death sentence unconstitutionally cruel and agonising." In his minority judgment in *Bachan Singh v. State of Punjab* (AIR 1982 SC 1325), Justice Bhagwati found the death penalty "barbaric and inhuman in its effect, mental and physical, upon the condemned man and is positively cruel." He quoted extensively from wide-ranging literature before concluding that the cruelty in the process itself also led to the utter depravity and inhumanity of the death penalty.

There has also been a recognition that protracted periods on death row can make inmates suicidal, delusional and insane, evident in the case of Gayasi Ram [*Madhu Mehta v. Union of India and Ors.* (AIR 1989 SC 2299)] (see above). This has been referred to by psychologists in the United States as "death row phenomenon," leading to "death row syndrome." This was also recognised by the European Court of Human Rights in 1989 when it rejected the extradition of Jens Soering, a German citizen arrested in the UK on charges of murder in Virginia (USA) in 1985. The Court forbade his extradition to any jurisdiction that could sentence him to death citing not the death penalty itself, but rather the "death row

phenomenon" by which convicts spent years awaiting execution. The prolonged detention of prisoners under sentence of death has also been found to constitute cruel, inhuman and degrading punishment by other courts including the Privy Council in the Jamaican case of *Pratt and Morgan.*[53] Here the Judicial Committee of the Privy Council, sitting in London, ruled that executing a person after a prolonged period under sentence of death would constitute inhuman or degrading treatment or punishment. In practice, the court has found anything over five years from the imposition of a death sentence to be 'prolonged.' The UN Committee against Torture (established to monitor implementation of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) has stated that the uncertainty of many people under sentence of death amounts to "cruel and inhuman treatment in breach of Article 16 of the Convention" and that the death penalty should therefore be abolished as soon as possible.[54]

Though the Supreme Court of India has not yet referred explicitly to delays in execution amounting to cruel, inhuman and degrading treatment, in *Deena alias Deen Dayal and ors. v. Union of India and ors.* (with 4 other cases) (AIR 1983 SC 1155), the Court observed, "If a prisoner is sentenced to death, it is lawful to execute that punishment and that only. He cannot be subjected to humiliation, torture or degradation before the execution of that sentence, not even as necessary steps in the execution of that sentence." While in that case the particular context was the mode of execution, it is undeniable that extended periods of time *may* also amount to torture or cruel, inhuman or degrading treatment in itself. This is not however an argument for hastening executions, as that reduces the possibility of adequate appeal or for evidence of possible innocence of the prisoner to emerge, and may even violate international fair trial standards. Amnesty International India and People's Union for Civil Liberties, Tamil Nadu & Puducherry do not believe that there is an "appropriate" length of time a prisoner should be held before execution.

5. Mandatory death sentences

Under current Indian law, mandatory death sentences are prescribed in Section 27 of the Arms Act 1959; Section 31A of the Narcotic Drugs and Psychotropic Substances Act 1985 (NDPS); and Section 3(2)(i) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989. Previously however, mandatory death sentences were also prescribed in Section 303 of the Indian Penal Code (struck down as unconstitutional in 1982 – see below) and also in Section 3(2)(i) of the Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA). This section was amended in 1987 to permit alternative punishment.

[53] Privy Council Appeal No. 10 of 1993.
[54] UN Doc. CAT/C/XXV/Concl/1, 17th November 2000, para. 7(g), referring to Armenia. Armenia abolished the death penalty in 2003.

When is a person on death row?

The question of when a person is said to be on death row or under sentence of death has been the subject of unnecessary controversy in India. In terms of the CrPC, no sentence of death can be executed unless it has been confirmed by the High Court (Section 366). However in *Sunil Batra v. Delhi Administration and ors.* (AIR 1978 SC 1675), the Supreme Court observed that even though Section 366 CrPC provides that a sentence of death is inexecutable unless confirmed by a High Court, a person could not be said to be under the 'sentence of death' until the capital sentence "inexorably operates by the automatic process of the law without any slip between the cup and the lip." Thus the Supreme Court clarified, *a person was only under 'sentence of death' after the first mercy petition sent to the President and Governor was rejected*. The Court also added that once the first mercy petition was rejected, the prisoner would fall within the meaning of Section 30(2) of the Prisons Act 1884 and filing of subsequent mercy petitions would not take him out of the category unless of course the sentence was commuted by the President or Governor. With no overruling of this particular point of law, this remains the present legal position according to the Constitution; Supreme Court judgments are binding on all courts and authorities.

What follows from this is that no person can, prior to a confirmation of sentence by the High Court, be kept on 'death row' or away from other convicts or in solitary confinement merely because he has been sentenced to death by a trial court. In fact, even after rejection of a mercy petition when the prisoner can be said to be 'under sentence of death', the Supreme Court in *Sunil Batra v. Delhi Administration and ors.* (AIR 1978 SC 1675) stated that Section 30(2) of the Prisons Act only referred to being placed alone in a cell and not de-facto solitary confinement with no access to other prisoners at all times.

The *Sunil Batra* ruling appears to have made little difference in practice. For example Rule 912 of the Bihar Prison Manual (1999 edition) states, "Every prisoner sentenced to death shall from the date of his sentence and without waiting for the sentence to be confirmed by the High Court, be confined in some safe place, a cell if possible, within the jail, apart from all other prisoners." In a number of judgments of the Supreme Court too there is a reference to the prisoners being in "death cells" or solitary confinement (see *T.V. Vatheeswaran v. The State of Tamil Nadu* (AIR 1983 SC 361), *Vinayak Shivajirao Pol v. State of Maharashtra* [(1998) 2 SCC 233] and *State of U.P. v. Dharmendra Singh and anr.* [(1999) 8 SCC 325)]). In *State of U.P. v. Dharmendra Singh and anr.*, the High Court commuted the sentence arguing that the accused were placed in the 'death cell' for three years. The Supreme Court reinstated the death sentence and even doubted whether the accused were actually in a 'death cell'. For its part the state argued that the accused could not have been in a 'death cell' as the High Court had not confirmed the sentence – a presumption that few would agree with. Unfortunately the state failed to put forward any evidence to show where the prisoners were kept and nor did the Supreme Court demand it.

International legal position on mandatory death sentences
The UN Human Rights Committee has stated that "the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of Article 6, paragraph 1, of the [International] Covenant [on Civil and Political Rights], in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence."[55] In resolution 2005/59, adopted on 20th April 2005, the UN Commission on Human Rights urged all states that still maintain the death penalty "to ensure… that the death penalty is not imposed… as a mandatory sentence." The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stated that the death penalty should under no circumstances be mandatory by law, regardless of the charges involved.[56] More recently, the Special Rapporteur has in fact even argued that mandatory punishments would also be inconsistent with the prohibition of cruel, inhuman or degrading treatment or punishment.[57] A similar position was also arrived at in respect to the mandatory death penalty for murder in the Bahamas by the Judicial Committee of the Privy Council which found it "inhuman and degrading" and therefore unconstitutional.[58]

5.1 Section 303, Indian Penal Code

Section 303 of the IPC provided for a mandatory death sentence in cases where a murder was committed by a person already undergoing a sentence of life imprisonment. In *Mahabir Gope v. State of Bihar* (AIR 1963 SC 118), it was applied in the case of an accused who was part of a mob in the prison that assaulted and killed some jail officials. The Supreme Court observed that even being partly involved in the unlawful assembly that led to the murder or having common intention to commit the murder would be sufficient to bring the charge of Section 303 in the case of an accused already undergoing life imprisonment. In other similar cases, even though the particular benches did not always approve of it, they upheld sentences of death. In *Oyami Ayatu v. The State of Madhya Pradesh* [(1974) 3 SCC 299], the accused was a 'lifer' and even admitted to the killing in the trial court. With a last resort plea of insanity being rejected, the Supreme Court observed that there was little option but to uphold the sentence of death as the law provided only a mandatory sentence.

[55] *Pagdayawon Rolando v. Philippines*, Views of the Human Rights Committee. Communication No. 1110/2002, UN Doc. CCPR/C/82/D/1110/2002, 8th December 2004, para. 5.2. Article 6(1) of the ICCPR proclaims the right to life and forbids the arbitrary deprivation of life.
[56] *Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur*., UN Doc. E/CN.4/1999/39, 6th January 1999, para. 63.
[57] *Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur*., UN Doc. E/CN.4/2005/7, 22nd December 2004, para. 80.
[58] *Forrester Bowe and Trono Davis v. The Queen*, Judgment of the Lords of The Judicial Committee of the Privy Council (from the Court of Appeal of the Bahamas), delivered on 8th March 2006, (2006) UKPC 10.

The mandatory provision had also received attention elsewhere. While the Law Commission's 35th report (1967) had rejected any changes to Section 303, arguing that in acute cases of hardship, powers under the CrPC of commutation could be exercised by the executive, the 42nd report of the Law Commission (1971) did recommend that Section 303 should be restricted only to those individuals actually physically serving their term in prison. The IPC Amendment Bill 1972, went further and sought the deletion of the mandatory death sentence.

The scope of Section 303 had been set out by the Supreme Court in *Pratap v. State of Uttar Pradesh and Ors.* [(1973) 3 SCC 690] where a convicted prisoner had committed a second murder while on parole. This judgment clarified that the mandatory sentence would be applied not only in cases where the killing occurred inside prison but also where the killing took place when the accused was on parole as the individual on parole was still under the sentence (for a discussion on other aspects of the case see also Sections 6.2.5 and 7.1.2). However in *Dilip Kumar Sharma and Ors. v. State of Madhya Pradesh* (AIR 1976 SC 133) the Supreme Court set aside the mandatory sentence, observing that Section 303 required "an operative, executable sentence of imprisonment for life" and where the individual's previous life sentence was on appeal it could not be considered that the accused was 'under sentence of life imprisonment' (see also Section 6.2.4 regarding the High Court's error in the same case). In *Shaikh Abdul Azees v. State of Karnataka* (AIR 1977 SC 1485), the Supreme Court further clarified the legal position and stated that the mandatory sentence would not be applicable where a person had been released on remission, as he could not be said to be under a life sentence.

In *Dilip Kumar Sharma and Ors. v. State of Madhya Pradesh* (AIR 1976 SC 133), Justice Sarkaria had observed that due to Section 303, "the Court has no discretion but to award the sentence of death, notwithstanding mitigating circumstances which by normal judicial standards and modern notions of penology do not justify the imposition of the capital penalty. Viewed from this aspect, the section is draconian in severity, relentless and inexorable in operation." The opinion voiced in this judgment reflected an apparent growing consensus that the existence of Section 303 as a mandatory sentence of death was no longer tenable, itself reflected in proposed amendments to the IPC (IPC Amendment Bill 1972). However the proposed legislative amendments were left to gather dust and it was not until *Mithu v. State of Punjab* (with 4 other cases) (AIR 1983 SC 473) that a Constitutional Bench of the Supreme Court finally struck down the mandatory death sentence prescribed by Section 303.

In *Mithu v. State of Punjab* (AIR 1983 SC 473), the Court observed that when Section 303 was introduced, the severity of the punishment reflected deterrent and retributive theories of punishment which were then prevalent, and that after the judgments of the Supreme Court in *Maneka Gandhi v. Union of India* (AIR 1978 SC 597) and *R.C. Cooper v. Union of India* (AIR 1970 SC 564), 'law' must be right, just and fair, and not arbitrary, fanciful or oppressive. The Court also clarified that the judgment in *Bachan Singh* upholding the death penalty would not apply here as that case upheld only the death penalty as an alternative sentence for murder. The Supreme Court further noted that in its drafting of Section 303, the legislature appeared to have only one type of case in mind: the murder of a jail official by a

life convict. The Court observed that a mandatory death sentence was unreasonable both for murders committed by life convicts within prison and those on parole or bail. The Court argued that there was little statistical data on the behaviour of life convicts released on bail or parole and there was therefore no reason to believe that the incidence would be higher in their case. "Indeed if there is no scientific investigation on this point in our country, there is no basis for treating such persons differently from others who commit murders." This was indeed a strong statement by the Court given that the absence of similar scientific data showing the deterrent value of the death penalty in general did not deter the *Bachan Singh* Bench from upholding the constitutionality of the death sentence.

The Supreme Court also pointed out that Section 303 also reduced Section 235(2) of the IPC (the judicial process of awarding sentence) to a farce as there was no choice left to a judge in terms of awarding sentence. The Court observed, "A standardized mandatory sentence and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case." The Court further remarked that, "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 on the question of sentence."

The impact of *Mithu v. State of Punjab* was immediate and in the few cases that followed the same year, the Supreme Court struck down the convictions of the individuals on this charge [see *Bhagwan Bax Singh and anr. v. State of U.P.* [(1984) 1 SCC 278] and *Surjit Singh and ors. v. State of Punjab* (AIR 1983 SC 838)]. Despite Section 303 being struck down by the Supreme Court in 1983, it remains to this day a formal part of the IPC, leading to a ridiculous situation in 2005 where a trial judge in *Saibanna v. State of Karnataka* [(2005) 4 SCC 165] convicted an accused under this section before it dawned on the defence and the court during sentencing that the provision had been declared unconstitutional over two decades previously.

5.2 The current legal position on mandatory death sentences

The judgment in *Mithu v. State of Punjab* has been read by many as striking down mandatory death sentences *per se*. This view was perhaps supported by the fact that at the time of the judgment, no other statute in India prescribed a mandatory death sentence. Yet the approval of a mandatory death sentence in TADA 1985 (see box) by Parliament barely two years later suggests that it may be optimistic to read *Mithu v. State of Punjab*) as a general bar on all mandatory death sentences.

When in doubt, re-interpret

In *State through CBI, Delhi v. Gian Singh* [(1999) 9 SCC 312], the Supreme Court found itself in an awkward situation in which an accused was sentenced under Section 3(2)(i) of TADA 1985 which provided for a mandatory sentence of death, for his role in the assassination of a leading political figure (this section of TADA was amended in the new TADA 1987). Though the Supreme Court, here sitting as a court of first appeal, had no doubt about the guilt of the accused, it observed that even though TADA 1985 had expired in 1987, ongoing prosecutions were required to continue under the same statute. However, with the subsequent enactment of TADA 1987, there were overlapping provisions with differing sentences. In fact the only difference between Section 3(2)(i) of TADA 1985 and the corresponding provision in TADA 1987 was that the former had a mandatory death sentence while the latter provided an alternative to the death sentence. The Supreme Court therefore relied on the over-riding effect specified in Section 25 of TADA 1987 to harmonise the section and stated that the mandatory sentence would be superseded by the alternative one. The Supreme Court therefore gave itself the possibility of an alternative sentence in this case even though none existed in the original statute. While such a humane approach must be welcomed, it certainly leaves unanswered questions as to why the Court did not take a leaf out of *Mithu* and directly do away with the mandatory sentence when it had the chance.

As the cases discussed here show all too clearly, the Supreme Court is not comfortable with mandatory death sentences. However, rather than tackling them head on, various benches of the Court have resorted to ingenious attempts to either side-step the particular charge or set aside the conviction on merits, or simply escape making a call on its constitutionality on technical grounds. While *State through CBI, Delhi v. Gian Singh* [(1999) 9 SCC 312] (see box) is an excellent example of the contortionist approach, *Jos. Peter D'Souza v. Union of India* (unreported Judgment Dated 9th March 1998 of High Court of Bombay, Goa Bench in W.P. No. 80/98) is an example of the escapist approach. In this petition the mandatory death sentence in Section 31A of the NDPS Act was challenged, but the Bombay High Court rejected the petition, arguing that there was no known instance of a court having awarded the death penalty under such a provision. However The Indian Express has reported that a NDPS Special Court at Sirsa, Haryana had awarded the death sentence to one Neki Ram Kacha Ram on 18th February 1997 for a second conviction of drug trafficking under Section 31A.[59] The authors of this study are also aware of other instances where similar death sentence have been awarded. On 6th October 2002 the City Sessions Court in Mumbai sentenced a Nigerian national – Prince Ojiji Chocko – to death under the NDPS Act [unreported judgment dated S.C. No. 92/99]. He was subsequently acquitted by the Bombay High Court [Cri. Appeal No. 46/2002, unreported judgment]. In another instance The Telegraph reported the case of Anwar Alam who had been sentenced to death by a special court in Calcutta in 2001.[60] Curiously the report refers to the commutation of the sentence by the Calcutta High Court on 28th August

[59] 'Cops plan drive on drug case,' Indian Express, 11th July 1998.
[60] 'Death Sentence Commuted,' The Telegraph, 29th August 2006.

2006. Given the mandatory nature of the sentence, it is likely instead that the High Court may have altered the charge to a lesser one.

The constitutionality of other similar mandatory provisions has not yet been challenged. Although the entire SC/ST Act (less one section on bail) was upheld as constitutional by the Madhya Pradesh High Court in *Dr. Ram Krishna Balothia v. Union of India and Ors* (AIR 1994 MP 143), given that there was no specific discussion on the mandatory death sentence contained in Section 3(2)(i) of the SC/ST Act, it is not clear whether this can be considered a binding precedent on this point. The authors of this study are furthermore unaware of the actual award of any sentence of death under this law.

The Supreme Court has demonstrated its aversion to mandatory death sentences in relation to the mandatory sentence contained in the Arms Act although rather than addressing the issue directly and striking down the section, to date it has repeatedly side-stepped the issue. In *Subhash Ramkumar Bind @ Vakil and anr. v. State of Maharashtra* (AIR 2003 SC 269), the trial court awarded the mandatory death sentence under Section 27(3) of the Arms Act and the death sentence under Sections 302/34 IPC. With the High Court upholding the sentence, it placed the Supreme Court in a quandary. The response of the Supreme Court was to set aside the conviction under the Arms Act on the grounds that the administrative note issued by the government and relied upon by the prosecution which placed the weapon under the category of 'prohibited arms' cannot be equated with the official gazette notification required by the statute. Similarly in *Gyasuddin Khan @ Md. Gyasuddin Khan v. The State of Bihar* (AIR 2004 SC 210), a case in which a policeman killed three colleagues in a firing spree, the trial court convicted the accused under Section 302 IPC and also under Section 27(3) Arms Act and sentenced him to death and the High Court confirmed the sentence. Here again the Supreme Court resorted to a technical approach, arguing that no evidence was led to prove that the sten-gun and self-loading rifle used for the killings were 'prohibited arms' as per Section 2(1)(i) of the Arms Act. Perhaps embarrassed by its approach, the Court accepted that there was nothing on the record, even though it was likely that these weapons were prohibited weapons, and concluded, "We are *not inclined* at this stage to probe further and address th[is] question." In another case the Supreme Court was spared the blushes as the High Court itself set aside the conviction under the Arms Act [*Surendra Singh Rautela @ Surendra Singh Bengali v. State of Bihar (Now State of Jharkhand)* (AIR 2002 SC 260)].

6. Concerns about the judicial process

> *"It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief, for the wrong resulting from the unmerited conviction is irretrievable."*

Justice H.R. Khanna, Supreme Court of India
Kali Ram v. State of Himachal Pradesh [(1973) 2 SCC 808]

In *Kashmira Singh v. State of Madhya Pradesh* (AIR 1952 SC 159), during an era when the death sentence was the prescribed and ordinary punishment for murder, the Supreme Court noted the need for extreme caution in capital cases, observing, "[t]he murder was a particularly cruel and revolting one and for that reason it will be necessary to examine the evidence with more than ordinary care lest the shocking nature of the crime induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law." In this particular case the Supreme Court ultimately acquitted the appellant after the High Court had confirmed the death sentence awarded by the trial court, finding that there was insufficient evidence to convict for murder. More recently in *Chandran alias Surendran and anr. v. State of Kerala* (AIR 1990 SC 2148), the Supreme Court acquitted the accused while casting doubt on the evidence against them (see below), stating that, "The fact that these two murders, which are cruel and revolting, had been perpetrated in a very shocking nature should not be allowed in any way to influence the mind of the court while examining the alleged involvement of the appellants."

The caution demanded by the Supreme Court in the above cases was warranted. The following chapter focuses on evidence in a large number of capital cases that the judicial process has failed to be thorough, accurate, impartial, and rigorous, not to mention accountable. Travelling through the processes of arrest and detention, investigation, prosecution (including the sentencing process) and appeal, the chapter refers to numerous Supreme Court judgments that have pointed to errors and abuses during each of these stages. These are on top of the inconsistencies in the manner in which the Supreme Court itself has dealt with capital cases that have been referred to previously in this study. Coupled with ongoing concerns about the state of the criminal justice system in India more generally, particularly the manner in which poor and vulnerable individuals are dealt with, that have been voiced within the judiciary as well as the executive, the guarantee of a fair trial seems an uncertain prospect. While no criminal justice system can be entirely devoid of error, concerns about the operation of the criminal justice system in India should make all those who believe in justice pause for thought in relation to the death penalty. Cases of judicial error in capital trials illustrate starkly the human failings of the criminal justice system and reiterate the lethal judicial lottery that is the death penalty in India.

The chapter is structured under three broad headings: Evidence; Sentencing and Confirmation. The first section on evidence focuses on examples of poor judicial consideration of evidence, but begins with concerns about how evidence is collected prior to the trial process even beginning. The second section on sentencing starts by looking at the way in which the safeguard of the pre-sentencing hearing has been eroded. Also examined are the issues of improper enhancement of sentence by both High Courts and the Supreme Court itself and clear mistakes in law and sentencing that have been highlighted by the Supreme Court in its judgments. The section also looks at inconsistencies in Supreme Court practice with regard to the awarding of death sentences on reversing acquittals and the issue of non-

unanimous court decisions on guilt and sentence. The third section on confirmation looks at a range of cases which demonstrate a lack of rigour by the courts when carrying out the procedures for confirming death sentences.

It is pertinent to keep in mind that the cases discussed here are cases in which errors have been uncovered by the Supreme Court: the number of acquittals on appeal to the Supreme Court are a clear demonstration of the fact that police, prosecutors and judges have failed to scrupulously follow procedures designed to avoid wrongful conviction. However, given the large number of special leave petitions that have been dismissed summarily by the Supreme Court and the absence of a mandatory appeal to the Supreme Court (see Section 7.2 below), it is difficult to quantify the number of capital cases in which errors may have slipped through the system. Similarly, it is impossible to quantify those errors that the Supreme Court may have missed, despite examining the material available to them. And as this section of the study shows, the Supreme Court itself has ignored evidence that lawful procedures have been bypassed, and upheld death sentences that may have been founded on wrongful convictions. Given the absence of a higher judicial forum and the rarity of review proceedings of Supreme Court judgments, the vagaries of these cases hardly ever come to light.

The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stated that, "Because it is impossible to ensure that wrongful executions do not occur, countries applying the death penalty should undertake **regular, independent, periodic reviews** of the extent to which international standards have been complied with and to consider any evidence of wrongful execution (emphasis added)." [61] Unfortunately no such studies have been undertaken by the Indian government and therefore there is little information available publicly on wrongful executions that may have taken place. Furthermore, there appears to have been no attempt by the state to examine why there has been such a high percentage of acquittals: whether because of the inability of the prosecution to secure adequate evidence, or as a result of deliberately unlawful actions on the part of the executive, or other factors. In this regard the state is arguably failing in its responsibility to ensure justice to both the victims and perpetrators of crime.

6.1 Evidence

Safeguard 4 of the nine Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty adopted by the UN Economic and Social Council in 1984 [62] requires that "capital punishment may be imposed only when the guilt of the person charged is based on clear and convincing evidence leaving no room for an alternative explanation of the facts."

[61] *Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur*., UN Doc. E/CN.4/2005/7, 22nd December 2004, para. 88.
[62] Economic and Social Council Resolution 1984/50, annex. General Assembly Resolution 29/118, 1984.

The Supreme Court has often expressed the need for the highest standards of evidence in capital cases. In *Jagta v. State of Haryana* [(1974) 4 SCC 747] for example, the Court even suggested a higher standard of proof for conviction in capital cases. In *Dalip Singh and Others v. State of Punjab* (AIR 1953 SC 364), the Court commented that, "men cannot be hanged on vacillating and vaguely uncertain conclusions", and in *Bihari Singh Madho Singh v. State of Bihar* (AIR 1965 SC 692), having found the conduct of the lower courts "impossible", that, "men cannot be convicted and hanged on this sort of evidence."

6.1.1 Concerns about pre-trial investigations/collection of evidence

Fabrication and manipulation of investigation

False implication, fabrication of evidence, perjury and biased, manipulated investigations are common in the Indian criminal justice system. Confessions and witness testimonies play an even more vital role than in many other countries given that forensic and other scientific evidence is rare in most Indian courts at first instance. Most death sentences are awarded on circumstantial evidence alone.

The use of 'stock' or 'professional' witnesses by the police is commonly believed to take place. Such practices were recently referred to by the Supreme Court in *Major Singh and anr. v. State of Punjab* (MANU/SC/8569/2006/ and 2006 (10) SCALE 354) where the accused were acquitted even though both the trial court and the High Court had preferred the death sentence. In this judgment the court also observed, "It is a well known fact that in our country very often the prosecution implicates not only real assailants but also implicates innocent persons so as to spread the net wide."

Professor Blackshield's study of Supreme Court judgments in capital cases between 1972 and 1976 found that the most common defence put forward in these cases was that of false implication. He further observed that the reason this defence was so common was that it was very often true.[63] In fact the seriousness with which the legislature has viewed the issue of false evidence is evident from the fact that Section 194 of the IPC even provides for a death sentence where a person gives or fabricates false evidence as a result of which an innocent person is convicted and executed. This provision was made even more stringent by making the death sentence mandatory in Section 3(2)(i) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, which relates to a person not a member of a Scheduled Caste or a Scheduled Tribe giving or fabricating false evidence leading to the execution of any member of a Scheduled Caste or a Scheduled Tribe.

The following cases provide an illustration of how innocent persons have been sentenced to death on the basis of false and fabricated evidence, often used in manipulated investigations

[63] Blackshield 1979 (refer to footnote 40).

and prosecutions with investigating and prosecuting agencies in collusion, often to protect influential offenders.

In *Rampal Pithwa Rahidas v. State of Maharashtra* [(1994 Supp(2) SCC 478], the Supreme Court observed, 'The quality of a nation's civilisation,' it is said, 'can be largely measured by the methods it used in the enforcement of criminal law' and going by the manner in which the investigating agency acted in this case causes concern to us. In every civilised country the police force is invested with the powers of investigation of the crime to secure punishment for the criminal and it is in the interest of society that the investigating agency must act honestly and fairly and not resort to fabricating false evidence or creating false clues only with a view to secure conviction because such acts shake the confidence of the common man not only in the investigating agency but in the ultimate analysis in the system of dispensation of criminal justice."

In this case, the trial court had awarded the death sentence to eight persons. The High Court upheld the sentence of death against five of them, but the Supreme Court acquitted them all, noting that the main evidence against them (i.e. the approver's [64] evidence) was not trustworthy. In fact the Supreme Court sarcastically noted that the approver's memory constantly improved with time (his testimony at the trial three years after the incident was observed to be far more detailed than his confessional statement recorded a few days after the incident). The Supreme Court concluded that the approver was pressured by the police to turn approver because "the investigation had drawn a blank and admittedly the District Police of Chandrapur was under constant attack from the media and the public."

In *Arjun Marik and ors. v. State of Bihar* [(1994 Supp (2) SCC 372)], even though the trial court awarded the death sentence and the High Court upheld the sentence, the Supreme Court found their findings erroneous and unsustainable as the lower courts "did not advert to the inherent improbabilities in the prosecution evidence." The Supreme Court found the entire police raid and recovery from the house of the accused suspicious, particularly in light of the extremely detailed paperwork prepared by the police at the house which went so far as to provide the weight of the gold jewellery recovered at the scene. The two-day delay by the police in bringing the incident to the notice of the relevant magistrate (as required in law) was also regarded by the Supreme Court with suspicion, and the appellant was acquitted.

In *Kahan Singh and Ors. v. State of Haryana* [(1971) 3 SCC 226], allegations of police collusion in an investigation were raised by a witness. The Supreme Court found that the allegations of collusion were not frivolous and that the police, via a "curious final report," had recommended that the person identified by the witnesses as the attacker be discharged and one Rattan Lal be included as an accused. In another recent case, *Acharaparambath Pradeepan and anr. v. State of Kerala* (MANU/SC/8785/2006/ and 2006 (13) SCALE 600), the nature of the police investigation caught the attention of the courts. The trial court had

[64] An approver is an accused person who enters into a deal with the prosecution and then gives evidence against the other accused.

recorded evidence of illegalities by police in the holding of the identification parade, delay in launching an investigation into the crime and delay in arresting the accused, but ultimately found the accused guilty and sentenced them to death. The High Court also confirmed the death sentences. The Supreme Court observed that, "Investigation for whatever reason had not been conducted properly. The slipshod manner in which the investigation was carried out is amply borne out from the records," and acquitted five of the six appellants.

In a curious case – *State of U.P. v. Vad Narain* (AIR 1993 SC 265) – the trial court had earlier noted the attempts of the police officer investigating the case to secure a conviction by producing witnesses whom it found "absolutely fabricated and therefore unacceptable." The trial court suggested that the police officer's enthusiasm to achieve a conviction was in fact leading to an acquittal. The trial court however eventually convicted and sentenced the accused to death based on the evidence of another investigating officer. The High Court and the Supreme Court however found that there was insufficient evidence to sustain the conviction, and acquitted the accused.

In *State of U.P and Another v. Jaggo alias Jagdish and Others* [(1971) 2 SCC 42], the Supreme Court agreed with the High Court that of the five persons put forward by the prosecution as 'eyewitnesses', two were not named in the First Information Report and were not even at the scene of the crime and others who were present were not asked to testify. The High Court also observed that the alleged eyewitnesses were previously also involved in other legal proceedings relating to the accused. Both the appellate courts found that the trial court erred in allowing such evidence and sentencing the accused to death based on such flimsy and false testimony. Similarly in *Karunakaran v. State of Tamil Nadu* (AIR 1976 SC 383), taking note of the history of a bitter feud between the family of the accused and that of the deceased, the High Court referred to four alleged eye witnesses as "a bunch of liars" and "unashamed liars and perjurers." Yet the High Court confirmed the death sentence on the testimony of one solitary remaining witness. The Supreme Court however ruled that in these circumstances and in the absence of any corroborating evidence, the accused should be acquitted.

In *State of U.P. v. Moti Ram and anr.* (AIR 1990 SC 1709), the Supreme Court noted that three persons who were in jail at the time that the crime (the murder of 13 people) was committed, had been falsely implicated by the complainant and convicted and sentenced to life by the trial court along with 13 others of whom two were sentenced to death. All except one accused, who admitted to being present in the attack, were subsequently acquitted by the High Court and the Supreme Court upheld the acquittal asserting, "the Court when satisfied that the evidence adduced by the prosecution is not only unworthy of credence, but also manifestly and inextricably mixed up with falsehoods cannot be carried away merely on the fact of multiplicity of victims and on the basis of speculations and suppositions..."

In *Ashish Batham v. State of Madhya Pradesh* (AIR 2002 SC 3206), the Supreme Court acquitted the accused, observing that, "we could not resist but place on record that the appellant seems to have been roped in merely on suspicion and the story of the prosecution built on the materials placed seems to be neither the truth nor wholly the truth and the

findings of the courts below, though seem to be concurrent, do not deserve the merit of acceptance or approval in our hands having regard to the glaring infirmities and illegalities vitiating them and patent errors on the face of the record, resulting in serious and grave miscarriage of justice to the appellant."

In *Subash Chander etc. v. Krishan Lal and ors.* (AIR 2001 SC 1903), the initial charge-sheet filed by the prosecution had included only accused Krishan Lal and four others, all of whom were not named in the First Information Report or any previous statements recorded by the police. It was only after the intervention of the magistrate in the case that the prosecution filed a charge-sheet against eight more persons. The trial court acquitted one person and sentenced the other eleven to death. The High Court subsequently acquitted seven more persons and commuted the sentence of the remaining four. The Supreme Court noted that the police made no attempt to trace the real offenders after the incident and instead charge-sheeted four persons who had nothing to do with the case. The Court observed, "We have noticed with pain that the aforesaid four accused persons were implicated not only to mislead the court but also to provide protection to the real persons, being sure that ultimately no court could convict and sentence any of the aforesaid accused persons." However the Supreme Court failed to comment on the fact that three of the four innocent persons were not only convicted, but sentenced to death by the trial court and spent nearly six years in jail under sentence of death (see Section 7.4 below).

In *Anil Sharma and ors v. State of Jharkhand* (AIR 2004 SC 2294), the Supreme Court appears to have ignored defence claims of fabricated evidence and upheld the death sentence awarded by the lower courts. A key eyewitness (PW6) put forward by the prosecution was claimed not even to be in jail (where the offence was committed) at the time of the offence, but despite appeals for this eyewitness to be recalled and despite an application made by PW6 himself stating that he was being pressured to depose falsely (including a reference to 'third-degree treatment'), the Supreme Court dismissed the defence claims.

Persons implicated in 'Political' Trials

While the case of *Kehar Singh and ors. v. State (Delhi Administration)* [(1988) 3 SCC 609] is better known for the dubious conviction and execution of Kehar Singh (see Section 6.4 below), it is also notable for the fabrication of evidence by police and false implication of Balbir Singh, then a serving member of the Delhi Police. Following the assassination of Prime Minister Indira Gandhi by two of her Sikh bodyguards from the Delhi Police, one of the two assassins was killed in cold-blood but the other assassin – Satwant Singh – and alleged conspirators Kehar Singh and Balbir Singh were sentenced to death by a special court set up to try the case within the premises of Tihar Jail in Delhi. The Delhi High Court confirmed their death sentences but the Supreme Court acquitted Balbir Singh, holding that the only reason Balbir Singh was implicated was because he was a Sikh and also known to the assassins. The Court disbelieved the police version of the arrest of Balbir Singh and found that he had been illegally detained in 'de-facto' custody for over one month before being officially arrested. The apex Court further noted that "so far as this accused is concerned there

is no evidence at all on the basis of which his conviction could be justified." It even criticised the High Court in relation to its consideration of evidence allegedly recovered from Balbir Singh, commenting that, "It appears that the High Court read in this document what was suggested by the prosecution without considering whether it could be accepted or not in the absence of evidence on record."

Similarly in another more recent 'political' case, Delhi University Professor S.A.R Geelani was sentenced to death by a special anti-terrorist court for his alleged involvement in a conspiracy that led to the attack on the Parliament in 2001. Geelani was subsequently acquitted by the Delhi High Court, which dismissed most of the evidence against him as being fabricated. The court, in no uncertain terms, noted, "We are, therefore, left with only one piece of evidence against accused S.A.R. Geelani being the record of telephone calls between him and accused Mohd. Afzal and Shaukat. This circumstance, in our opinion, does not even remotely, far less definitely and unerringly point towards the guilt of accused S.A.R. Geelani." [*State v. Mohd. Afzal and Ors* (2003 VII AD (Delhi)1)] (for more on these cases, see Section 7.3 below).

Use of Torture and 'confessions'

Article 14(3)(g) of the ICCPR requires that in the determination of a criminal charge, no one should be compelled to testify against himself or to confess guilt. Article 15 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) requires state parties "to ensure that any statement that is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."[65]

Reflecting these international human rights standards and Article 20(3) of the Indian Constitution, confessions made to the police are not admissible as evidence in the ordinary criminal law in India (see Section 7.3 for special legislations under which such confessions have been admissable). This is in recognition of the varied forms of torture, threats and inducements that precede confessions. Instead, where an accused person wishes to make a confession, under Section 167 CrPC the police are required to produce him or her before a judicial magistrate who records a statement after confirming that the confession is being made voluntarily. In practice however, this procedural safeguard of judicial scrutiny is often followed in an extremely perfunctory manner sufficient to render it virtually meaningless, and given that torture by the police is believed to be endemic in India, and illegal detention widespread, confessions made under torture, duress and inducement regularly become key pieces of evidence, even in capital trials.[66] A key procedural safeguard of criminal law, and even more vital in capital trials, is thus eroded.

[65] Although India signed CAT in 1997 – thereby indicating its intention to ratify – it has still failed to ratify it.
[66] See for example Amnesty International, *India: Words into action: recommendations for the prevention of torture*, AI Index: ASA 20/003/2001, January 2001.

In *Nathu v. State of Uttar Pradesh* (AIR 1956 SC 56), the Supreme Court found that the trial court and High Court had upheld a conviction and death sentence largely on a confession that it considered involuntary. The Court therefore acquitted the accused. Similarly many years later in *Babubhai Udesinh Parmar v. State of Gujarat* (MANU/SC/8722/2006/ and AIR 2007 SC 420), the Court found material inconsistencies in the confession that had been relied upon by the trial court and the High Court in sentencing the accused to death, and had doubts about its voluntariness. In fact the Supreme Court noted that the magistrate had not physically examined the body of the accused and ignored the fact that the accused was in the custody of the police prior to, during and after the confession.

In a few other cases, the Supreme Court has also rejected confessions on various technical grounds – largely cases in which the magistrate did not follow proper procedure in recording the confession (for example *Aghnoo Nagesia v. State of Bihar* (AIR 1966 SC 119) and *Babu Singh v. State of Punjab* [(1963) 3 SCR 749]). In *Chandran v. The State of Tamil Nadu* [(1978) 4 SCC 90], the Supreme Court observed that the magistrate who recorded the confession had "hoped" that it was voluntary rather than believed it was voluntary, and found that the confession was therefore invalid.

In a large number of capital cases, accused persons who have made confessions have subsequently retracted them in Court. These retractions suggest either the use of torture or inducement to obtain the initial confession, or a lack of access to legal counsel during the initial period of arrest (see 7.1 below). While in *Muthuswami v. State of Madras* (AIR 1954 SC 4), *Ram Chandra and anr. v. State of Uttar Pradesh* (AIR 1957 SC 381) and *Sarwan Singh, Rattan Singh v. State of Punjab* (AIR 1957 SC 637), the Supreme Court had held that retracted confessions should not be relied on, this principle appears to have been regularly overlooked in the recent past.

In *Parmananda Pegu v. State of Assam* [(2004) 7 SCC 779], the Supreme Court noted that the confessions were involuntary and even the medical evidence and cause of death did not match the confessions made. The accused had retracted their confessions and informed the trial court of the torture that they suffered when they made their statements in the court under Section 313 CrPC. Even though the Supreme Court found that the facts suggested that the police had made the accused adhere to their version of facts and acquitted the appellant, the Court did not seek an investigation, much less initiate action against those who may have tortured the accused.

In some capital cases the Courts have made overt observations and findings relating to the use of torture in obtaining confessions. Thus in *Tulsiram Kanu v. The State* (AIR 1954 SC 1), the Supreme Court rejected the reliance on the confession as it observed that even the magistrate had noted allegations of torture. The fact that the High Court accepted the confession was also not missed by the Supreme Court, which acquitted the accused. Similarly in *Bharat v. State of Uttar Pradesh* [(1971) 3 SCC 950], the accused had claimed in the High Court that he was beaten by police the night before he was produced for confession before the magistrate, and

the High Court had even noted that this was probably true. However, the High Court disregarded the beating, arguing that "the effect of the beating would have passed when the accused made the confession" as he had been removed from police custody and taken to judicial custody in jail before the confession was recorded. The Supreme Court also argued that there was insufficient evidence of torture and used the retracted confession in upholding the death sentence.

Perhaps nothing epitomises the Supreme Court's attitude towards allegations of torture better than the case of *Devinder Pal Singh* (see Scetion 7.3 below) where rejecting contentions concerning the fact that procedural requirements and safeguards were ignored in the recording of the confession, Justice Pasayat asserted, "Procedure is handmaiden and not mistress of law." The Supreme Court's acceptance of evidence about which there are question marks over whether it was voluntarily given in a number of cases tried under the Terrorist and Disruptive Activities (Prevention) Act, 1987, is a matter of huge concern. In a dissenting judgment in *Devender Pal Singh v. State, N.C.T. of Delhi and anr.* [(2002) 5 SCC 234], where the Supreme Court was sitting as a court of first appeal under TADA, Justice Shah recommended acquittal of the accused, doubting the truthfulness and voluntariness of a confessional statement made to a police officer. The majority Bench, upholding the sentence of death, shockingly suggested that these concerns could be taken into account during the decision on clemency taken by the executive.

Such a blinkered approach was also evident in *Dagdu and Ors. v. State of Maharashtra* (AIR 1977 SC 1579) where even the Supreme Court acknowledged that torture had taken place but yet allowed the evidence to be admissible in Court: "Ganpat, the approver, was driven to admit that he was tortured while in the lock-up and we have serious doubts whether the injury caused on his head was, as alleged by the police, self-inflicted. A witness called Ramachandra also admitted that while under interrogation, the police pulled out his pig-tail. We have resisted the failing which tempts even judicially trained minds to revolt against such methods and throw the entire case out of hang. But we must, with hopes for the future, utter a word of warning that just as crimes does not pay, so shall it not pay for resort to torture of suspects and witnesses during the course of investigation … The police, with their wide powers, are apt to overstep their zeal to detect crimes and are tempted to use the strong arm against those who happen to gall under their secluded jurisdiction. That tendency and that temptation must, in the larger interest of justice, be nipped in the bud."

In *Chandran alias Surendran and anr. v. State of Kerala* (AIR 1990 SC 2148), too the Supreme Court rejected the fingerprint evidence as the accused had alleged that they were forced to handle items after being tortured in custody. The Court stated that the lack of explanation provided for briefly returning the accused to police custody long after their arrest and detention in judicial custody, added substance to the claim of torture. Here again while the Court acquitted the accused, they did not go as far as to initiate any investigation into the actions of the police.

It is striking that while condemning torture in a number of capital cases, the Supreme Court has failed to use its powers either to order investigations into incidents of torture or to initiate action not only against those responsible for the torture, but those executive and judicial officials who turned a blind eye to it. The court's lack of vigilance in this regard sends a worrying signal to those agencies involved in torture and ill-treatment that they will not be held to account for such practices.

6.1.2 Differing appreciation of evidence

> *"The award of death sentence as against life turns on a plurality of imponderables. Indeed, not infrequently on the same or similar facts judges disagree on the award of death sentence. If the trial court awards death sentence, the Jail Superintendent holds him dangerous enough to be cribbed day and night. If the High Court converts it to a life-term the convict, according to prison masters, must undergo a change and become sociable, and if the Supreme Court enhances the sentence, he reverts to wild life. Too absurd to be good."*
>
> Justice Krishna Iyer in *Sunil Batra v. Delhi Administration and ors.* (AIR 1978 SC 1675)

As many of the cases referred to above have already shown, different courts and different judges can have entirely different opinions about evidence placed before them. While it is obvious that in any hierarchy of courts, there will be appeals against the decisions of lower courts heard in the higher courts, and that some of these lower court decisions will subsequently be overturned, the sheer number of the cases referred to below in which the trial court, High Court and the Supreme Court have all come to conclusions different from the other cannot be easily ignored. In one out of eight of all the Supreme Court cases studied (86 out of 726 cases), the three levels of courts have reached three different conclusions, with at least one court awarding the death sentence. Even if this indication of differing appreciation of evidence may be deemed acceptable in normal circumstances, where courts are literally adjudicating upon questions of life and death, such a vast number of incidents of differing interpretations and conclusions raises difficult questions. They represent a very visible symbol of the human failures of the criminal justice system; one that cannot be reconciled with the irrevocability of the death penalty.

In a small number of cases where the accused have been awarded life imprisonment by the trial court and the sentence has been enhanced by the High Court, the Supreme Court has acquitted the accused.[67] These are perhaps the most blatant examples of the arbitrary and

[67] *Hari Charan Kurmi and Jogia Hajam v. State of Bihar* (AIR 1964 SC 1184), *Digendra Kumar Dey v. State of Assam* (1968 SCD 887), *Dagdu and Ors v. State of Maharashtra* (AIR 1977 SC 1765), *Gambhir v. State of Maharashtra* [(1982) 2 SCC 351], *K.V. Chacko @ Kunju v. State of Kerala* [(2001) 9 SCC 277].

deadly potential of the criminal justice system. These cases illustrate how trial courts and High Courts can completely misread evidence and/or apply law erroneously with potentially fatal consequences.

In a considerably larger number of cases the accused were sentenced to death by the trial court, had their sentence commuted by the High Court and were acquitted of the capital charge by the Supreme Court.[68] While it may be tempting to use these and the above cases as illustrations of the benefits of a hierarchy of courts where errors are ultimately corrected, the reality reveals a number of extremely uncomfortable features. First, in all such cases *both* the lower courts have been in error. Second, such errors may have been corrected only after a considerable period of time in which the convicted person has spent a very long time in prison, with a substantial part of it under sentence of death. In a number of cases those convicted had served over ten years in prison before being acquitted. Third, no compensation or assistance is offered to such persons when released after incarceration under sentence of death (see Section 7.4 below).

Besides the stark cases where judicial error is obvious or apparent, there are a large number of cases where convictions and death sentences have been awarded by lower courts but the accused has been acquitted by the Supreme Court on the basis that the evidence is insufficient to convict, let alone award the death sentence. Of the 728 cases researched for this study, over 175 were found to have resulted in acquittals by the Supreme Court. These also include cases where the Supreme Court has confirmed the acquittal by the High Court after the trial court sentenced the accused to death.

6.1.3 Errors in appreciation of evidence

In a number of cases errors in appreciation of evidence have been stark, and have thankfully been picked up by the apex Court on appeal. In *Antu v. State of Haryana* [(1970) 3 SCC 937], a case in which murders were committed over possession of a plot of land, the Supreme Court

[68] *Sanwat Khan and anr. v. State of Rajasthan* (AIR 1956 SC 54) , *Ram Nath Madhoprasad and ors. v. State of Madhya Pradesh* (AIR 1953 SC 420), *Zabar Singh v. State of Uttar Pradesh* (AIR 1957 SC 465), *Bhiva Doulu Patil v. State of Maharashtra* (AIR 1963 SC 599), *Balkrushna Swain v. State of Orissa* [(1971) 3 SCC 192], *Jagat Singh v. State of Haryana* (AIR 1976 SC 2619), *Abdul Sattar v. Union Territory, Chandigarh* (AIR 1986 SC 1438), *Anguswamy and anr. v. State of Tamil Nadu* [(1989) 3 SCC 33], *Sundaramurthy v. State of Tamil Nadu* (AIR 1990 SC 2007), *Bejoy Singh and Vijay Narain Singh and ors. v. State of West Bengal* (AIR 1990 SC 814), *Bishan Dayal and ors. v. State (Delhi Administration)* [(1992) 1 SCC 504], *Babuda v. State of Rajasthan* (AIR 1992 SC 2091), *Kagen Bera v. State of West Bengal* (AIR 1994 SC 1511), *Mahabir Biswas v. State of W.B*. [(1995) 2 SCC 25], *Net Raj Singh v. State of U.P*. [(1997) 3 SCC 525], *Gopal and ors. and Lallu v State of Uttar Pradesh and ors.* [(2002) 9 SCC 744], *Subhash Chand v. State of Rajasthan* [(2002) 1 SCC 702], *Sudama Pandey and ors. v. State of Bihar* (AIR 2002 SC 293), *Kanwarlal and anr. v. State of M.P* (AIR 2002 SC 3690), *Deepak Kumar v. Ravi Virmani and anr.* [(2002) 2 SCC 737], *Ashish Batham v. State of Madhya Pradesh* (AIR 2002 SC 3206).

acquitted the accused after observing that the trial court and High Court had made an erroneous finding on the factual question of possession of land and had ignored weaknesses in the eye witness evidence. Both these errors had led to a distorted view of events and ultimately a wrongful conviction and death sentence in the view of the Court.

In *Ram Narain Singh v. State of Punjab* (AIR 1975 SC 1727), the Supreme Court found that the prosecution story was weak and inconsistent with the medical and ballistic evidence. Not only did the Supreme Court find guilt not proved beyond reasonable doubt, but it also noted that the High Court appears to have overlooked most of the evidence damaging to the prosecution case. The Supreme Court observed, "In view of these striking circumstances, we should have expected the High Court to have approached this case with much more care and caution than it has, particularly when a death sentence was involved."

In *Sudama Pandey and ors. v. State of Bihar* (AIR 2002 SC 293), the trial court had sentenced five persons to death for the attempted rape and murder of a 12-year-old child. Though the High Court commuted the sentence, the Supreme Court noted that it was unfortunate that the High Court also did not properly review the evidence. Acquitting the accused, the Supreme Court noted that both the trial court and the High Court had committed a serious error by appreciating circumstantial evidence, resulting in a miscarriage of justice. In a telling indictment of the lower judiciary, the Supreme Court remarked, "The learned Sessions Judge found the appellants guilty on fanciful reasons based purely on conjectures and surmises … It is all the more painful to note that the learned Sessions Judge, on the basis of the scanty, discrepant and fragile evidence, found the appellants guilty and had chosen to impose capital punishment on the appellants."

In a number of other cases listed below, the Supreme Court pointed out a variety of problems with the evidence as also failings of the High Court and trial courts, which completely ignored these problems, and at times committed errors.[69]

Prakash Mahadeo Godse v. State of Maharashtra [(1969) 3 SCC 741] – The Supreme Court acquitted the accused in a rape-murder trial after finding that most of the circumstantial evidence heard against him by the lower courts was insufficient and innocuous, rather than incriminating. A similar finding was also made in *Prem Thakur v. State of Punjab* [(1982) 3 SCC 462].

[69] The following cases also saw acquittals by the Supreme Court on grounds of insufficient evidence, despite death sentences having been passed by lower courts: *Mohinder Singh v. State of Punjab* (AIR 1955 SC 762) , *Bhusai (alias) Mohammad Mian and Anr. v. State of Uttar Pradesh* [(1970) 3 SCC 460], *Thulia Kali v. The State of Tamil Nadu* [(1972) 3 SCC 393], Rahim *Beg and anr. v. State of Uttar Pradesh* [(1972) 3 SCC 759], *Ishwar Singh v. State of U.P.* [(1976) 4 SCC 355], *Selveraj v. The State of Tamil Nadu* (AIR 1976 SC 1970), *Bishan Singh v. State of Punjab* (AIR 1983 SC 748), *Palanisamy and Raju v. State of Tamil Nadu* [(1986) 1 SCC 693], *Makhan Singh v. State of Punjab* (AIR 1988 SC 1705), *Anjlus Dungdung v. State of Jharkhand* [(2005) 9 SCC 765].

Chanan Singh Son of Kartar Singh v. State of Haryana [(1971) 3 SCC 466] – The Supreme Court acquitted the appellant after observing that not only was there reasonable doubt but also "inherent improbabilities and infirmities" in the testimony of key witnesses in the case as also the version of the prosecution previously accepted by the Courts. Similarly in *Nachhattar Singh and Ors. v. The State of Punjab* (AIR 1976 SC 951), the Supreme Court observed that the prosecution case was "very shaky and doubtful because of some inherent defects and improbabilities running through its entire story." In *Nirmal Kumar v. State of U.P.* (AIR 1992 SC 1131), the Court found the prosecution case "wholly insufficient."

Duvvur Dasratharammareddy v. State of Andhra Pradesh [(1971) 3 SCC 247] – The Supreme Court cast doubt on the facts of the case on the basis of questionable witness testimony, observing that, "We are of the opinion that although there may be a very strong suspicion against the appellant, it cannot be stated, in the circumstances of this cases, that the prosecution has proved the crime as against the appellant beyond all reasonable doubt."

Ram Gopal v. State of Maharashtra [(1972) 4 SCC 625] – The Supreme Court acquitted the accused (who had been sentenced to death by the trial court and had this conviction and sentence upheld by the High Court), observing that they weren't convinced of motive. The Court noted that the prosecution had not established that the accused had possession of the poison that had killed the victim, that deceiving the victim into swallowing it would have been almost impossible and that medical evidence suggested that the poison was more usually used in cases of suicide. The Court further noted that while the conduct of the accused had been suspicious, "this conduct cannot be taken as an incriminating circumstance against the appellant, since the prosecution itself has failed to establish the case properly."

Kali Ram v. State of Himachal Pradesh [(1973) 2 SCC 808] – The Court was forced to reiterate the guiding principle of presumption of innocence, pointing out that, "if a reasonable doubt arises regarding the guilt of the accused, the benefit of that cannot be withheld to the accused. The Courts would not be justified in withholding that benefit because the acquittal might have an impact upon the law and order situation or create adverse reaction in society or amongst those members of the society who believe the accused to be guilty."

Datar Singh v. State of Punjab (AIR 1974 SC 1193) – The Supreme Court found that the motive suggested by the prosecution was not credible and that the witnesses had been discredited. Overruling the lower courts, the Supreme Court observed that the conviction could not be maintained.

Shiv Singh v. State of Madhya Pradesh [(1974) 4 SCC 785] – The prosecution had alleged that the accused had escaped from jail in 1946 while serving a life sentence for murder and had shot a policeman 14 years later because he had identified him. He received a mandatory death sentence after his trial and arrest in 1972. Overturning the High Court conviction, the Supreme Court acquitted him, doubting the identification of the appellant by a witness who only had a fleeting glance of the offender when he was escaping.

Sharad Birdichand Sarda v. State of Maharashtra (AIR 1984 SC 1622) – In acquitting the accused the Supreme Court observed that "though this case superficially viewed bears an ugly look so as to prima facie shock the conscience of any Court, yet suspicion, however great it may be, cannot take the place of legal proof. A moral conviction, however strong or genuine, cannot amount to a legal conviction supportable in law." The Court also reiterated the well-established rule of criminal law – 'the fouler the crime, the higher the proof.' "In the instant case, the life and liberty of a subject was at stake. As the accused was given a capital sentence, a very careful, cautious and meticulous approach was necessary to be made." In a concurring judgment, one of the judges noted that the accused needed to receive the benefit of the doubt as the guilt was not proved beyond all reasonable doubt.

Abdul Sattar v. Union Territory, Chandigarh (AIR 1986 SC 1438) – In this case the prosecution relied largely on the evidence of an approver who the Supreme Court noted was brought to the court in handcuffs. The Court noted that when he was examined, police and jail officials were also present. This cast a shadow of doubt upon the voluntariness of the evidence and given the lack of corroboration, the Supreme Court acquitted the accused who was released after serving over 10 years in prison.

Madhumoy Madhusudan Boul v. State of West Bengal [(1992 Supp (2) SCC 247] – The Supreme Court acquitted the appellant after finding that the prosecution case virtually rested on the testimony of only one alleged eyewitness, which was given long after the incident and which was contradicted by the medical evidence.

Net Raj Singh v. State of U.P. [(1997) 3 SCC 525] – The Supreme Court acquitted the appellant of the conviction of dacoity with murder as the only proof against the accused was recovery of some silver goods two days after the dacoity. The Court noted that the lower courts had presumed the worst case of dacoity and murder against the accused, ignoring the principle of the presumption of innocence. The Supreme Court therefore set aside the conviction and replaced it with a sentence of three years imprisonment under Section 411 IPC, for dishonest receipt of stolen property.

Subhash Chand v. State of Rajasthan [(2002) 1 SCC 702] – While the trial court had awarded a sentence of death for rape and murder, a divided High Court bench had led to an award of life imprisonment after the judges could not agree on guilt. The Supreme Court found that none of the evidence said to be incriminating could be used against the appellant and therefore acquitted him, observing, "Though the offence is gruesome and revolts the human conscience but an accused can be convicted only on legal evidence and if only a chain of circumstantial evidence has been so forged as to rule out the possibility of any other reasonable hypothesis excepting the guilt of the accused."

Kalpana Mazumdar v. State of Orissa (AIR 2002 SC 2826) – The Supreme Court acquitted three persons and commuted the sentence of one after finding that the testimony of the key witness could not be relied on.

6.2 Sentencing

In addition to concerns about the arbitrariness of the sentencing process in capital cases which have been amply illustrated in Section II.2 above, the courts have also made errors in sentencing that have had life-threatening consequences. Some of these errors have already been referred to: notably the application of some outdated jurisprudence and legislation by courts and the oversight of others (see chapter 2 above).

6.2.1. Ignoring the mandatory pre-sentencing hearing

Among the changes made in the new CrPC in 1973 was the addition of Section 235(2) requiring a mandatory pre-sentencing hearing in the trial court. The requirement of such a hearing was obvious, as it would assist the judge in concluding whether the facts indicated any 'special reasons' – as required by Section 354(3) – to impose the death penalty.

The absence of such a provision had previously been highlighted by the Law Commission in its 48th Report,[70] but in *Jagmohan Singh v. The State of Uttar Pradesh* (AIR 1973 SC 947) in 1972, the Supreme Court had rejected the argument that the absence of such a hearing made the award of the death penalty unconstitutional. Even though the new CrPC had not yet come into force, reference to a pre-sentencing hearing was made in *Ediga Anamma v. State of Andhra Pradesh* (AIR 1974 SC 799) as an improvement over the "judicial hunch in imposing or avoiding capital sentence." Justice Krishna Iyer noted the importance of the pre-sentencing hearing, "to personalise the punishment so that the reformatory component is as much operative as the deterrent element, it is essential that facts of a social and personal nature, sometimes altogether irrelevant if not injurious at the stage of fixing the guilt, may have to be brought to the notice of the Court when the actual sentence is determined." Similarly, in *Suresh v. State of U.P.* [(1981) 2 SCC 569], the Supreme Court observed that the trial court had not taken note of the various mitigating circumstances as it had not given the accused a hearing on sentencing and even though the law applicable at the time of trial did not require it, the judge should have been furnished with useful information on the question of sentence.

In *Santa Singh v. The State of Punjab* [(1976) 4 SCC 190], the Supreme Court noted that the mandatory pre-sentencing hearing of Section 235(2) CrPC was "in consonance with the modern trends in penology and sentencing procedures" and remanded the case back to the trial court for hearing on sentence as it noted that the trial court had previously sentenced the accused to death without even hearing his lawyer on sentencing, thereby denying the opportunity to produce material and make submissions with regard to the sentence. On what the hearing on sentencing was meant to achieve, the Supreme Court observed, "a proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances – extenuating or aggravating – of the offence, the prior criminal record, if any, of the

[70] 'Some Questions under the Code of Criminal Procedure Bill, 1970' published in 1972 by the Sixth Law Commission.

offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home, life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to a normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such deterrent in respect to the particular type of sentence." Similarly, in *Nirpal Singh and Ors. v. State of Haryana* (AIR 1977 SC 1066), the Supreme Court sent the matter back to the trial court because of the lack of a pre-sentencing hearing. Given that in both these cases the High Court had also confirmed the death sentence before the cases came before the Supreme Court, it is not clear whether the second sentencing hearing at the trial court was designed to merely fulfil procedural requirements or whether it actually served a purpose. With neither case being reported again, this remains unknown.

In *Dagdu and Ors. v. State of Maharashtra* (AIR 1977 SC 1579), the Supreme Court clarified that where a mandatory pre-sentencing hearing had not taken place in the trial court, this would not mean that the case needed to be sent back to the trial court, but a higher court could hear the accused on the question of sentence. This was again reiterated by the Court in *Tarlok Singh v. State of Punjab* (AIR 1977 SC 1747) where it noted that the appellate court should allow the parties to produce materials on sentencing rather than sending the case back to the trial court. While this did have a positive effect in some cases – for example in *Keram Ali v. State of Uttar Pradesh* (AIR 1978 SC 35) the Supreme Court commuted the sentence on a review of the circumstances – it led to odd situations in other cases. Thus in *Kuruvi alias Muthu v. State of Tamil Nadu* (AIR 1978 SC 1397), the Supreme Court sought an affidavit from the prisoner listing mitigating factors that could be taken into account when considering sentence. In the absence of legal aid and an obvious lack of knowledge of what might be accepted by the Court as mitigating factors, the prisoner only raised the plea of poverty and this was rejected by the Supreme Court as insufficient.

In *Rajendra Prasad v. State of Uttar Pradesh* (AIR 1979 SC 916), the Supreme Court noted with concern that the mandatory pre-sentencing hearing had become nothing more than a repeat of the facts of the case. The Bench hoped, "that the Bar will assist the Bench in fully using the resources of the new provision to ensure socio-personal justice, instead of ritualising the submissions on sentencing by reference only to materials brought on record for proof or disproof of guilt." The extent to which lip service was being paid to this important provision was evident in *Muniappan v. State of Tamil Nadu* [(1981) 3 SCC 11] where the Supreme Court noted that the trial court had sentenced the accused to death stating that when the accused was asked to speak on the question of sentence, he did not say anything. In such a case the Supreme Court noted that the requirement of Section 235(2) was not discharged by merely putting a formal question to the accused, and that the court must make genuine efforts. The Court observed, "It is the bounden duty of the judge to cast aside the formalities of the court scene and approach the question of sentence from a broad, sociological point of view."

The question of providing sufficient time for the pre-sentencing hearing was dealt with by the Court in *Allauddin Mian and ors., Sharif Mian and anr. v. State of Bihar* [(1989) 3 SCC 5]. The Supreme Court observed that the trial court had not provided sufficient time to the accused for hearing on sentencing and the antecedents of the accused, their socio-economic conditions, and the impact of their crime on the community had not come on record, and in the absence of such information deciding on punishment was difficult. The Supreme Court therefore recommended, "We think as a general rule the trial courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing upon the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender." This was also reiterated in *Malkiat Singh and ors. v. State of Punjab* [(1991) 4 SCC 341]. In *Sevaka Perumal etc. v. State of Tamil Nadu* (AIR 1991 SC 1463) however, the Supreme Court upheld the death sentence even though it was argued that no time had been given to raise grounds on sentencing by the trial court. The Supreme Court observed that during the appeal, the defence counsel had been unable to provide any additional grounds on sentence and therefore no prejudice had been caused to the accused.

In *State of Maharashtra v. Sukhdeo Singh and anr.* [(1992) 3 SCC 700], the Supreme Court clarified that while Section 309 of the CrPC prescribed no power for adjournment of sentencing hearings, these should be provided where the accused sought to produce materials and must be provided in capital cases. In *Jai Kumar v. State of Madhya Pradesh* (AIR 1999 SC 1860), the Supreme Court observed that the trial court had given an opportunity to the defence to produce materials which they chose not to do, and had considered the mitigating circumstances raised by them. In such circumstances according to the Supreme Court, it was not a miscarriage of justice that the judge did not adjourn the hearing.

In *Anshad and ors. v. State of Karnataka* [(1994) 4 SCC 381], the Court disapprovingly noted that the trial judge had dealt with sentencing cryptically in one paragraph and this defeated the very object of Section 235(2), exposing a "lack of sensitiveness on his part while dealing with the question of sentence." Commuting the sentences of the appellants, the Supreme Court observed that both the lower courts had not appreciated the aggravating and mitigating circumstances and therefore their entire approach to sentencing was incorrect. Despite this judgment however, it is clear that courts have virtually relegated the requirement of a mandatory hearing on sentence in the trial court to a curable defect. Given the dangers of subjective judicial decision-making, the erosion of this safeguard raises serious concern.

Crucially, in all the judgments referred to above, the reference has been to the need for defence counsel to bring forward mitigating circumstances. However, according to the CrPC, 'special reasons' need to be established before the Court can award a death sentence and in *Bachan Singh*, the Court clearly required that the lack of potential for reform of the convicted person had to be proved by the state with evidence, in the absence of which the case would not fall within the 'rarest of rare.' The onus on the state in relation to this procedure has rarely, if ever, been pursued despite the fact that this is supposed to be a key safeguard against arbitrariness.

A 'judicial massacre'

In the Rajiv Gandhi assassination case [unreported Judgment dated 28th January 1998 by Judge Navaneetham, Designated Court – I, Poonamalee in Calendar Case no. 3 of 1992], the Special TADA Judge heard 26 accused persons on sentencing within a period of a few hours, obviously reducing the hearing to a farce. Unsurprisingly all 26 were sentenced to death for conspiracy in the murder of the former Prime Minister and a number of others, with the judge giving common 'special reasons' for all the death sentences. This unprecedented judgment has often been referred to as a 'judicial massacre' even though on appeal, the Supreme Court acquitted 19 of the accused and commuted the sentence of another three to life imprisonment.[71]

6.2.2. Improper Enhancement of Sentence

The power of the High Court to enhance the sentence passed by a trial court even where the state has not appealed is part of its revisional power which it can exercise on its own will under Section 397 read with section 401 CrPC. Similarly the Supreme Court has the power to enhance a sentence either suo-moto or upon appeal [*E.K. Chandrasenan v. State of Kerala* (AIR 1995 SC 1066)].

However, as early as *Dalip Singh and ors. v. The State of Punjab* (AIR 1953 SC 364), even when the death sentence was the normal punishment for murder, the Supreme Court had warned that enhancement of sentence by a High Court would not be proper unless there was a gross error by the trial court in sentencing. In *Ram Narain and ors. v. State of Uttar Pradesh* [(1970) 3 SCC 493], the Supreme Court reiterated that the High Court should only enhance the sentence where reasons given by the trial court for the lower sentence were either contrary to well-established principles or so erroneous that life imprisonment was manifestly inadequate. The Supreme Court has also observed that before enhancing the sentence the High Court has to give a hearing to the convict (*Surjit Singh v. State of Punjab*, AIR 1984 SC 1910). As a result in *Surendra Singh Rautela @ Surendra Singh Bengali v. State of Bihar (Now State of Jharkhand)* (AIR 2002 SC 260), the Supreme Court commuted the sentence of the accused whose sentence was *suo-moto* enhanced to death by the High Court without even giving a hearing to the accused. The Supreme Court has also cautioned that courts should not be too moved by the desire for vengeance of complainants.

In *Jashubha Bharatsinh Gohil and ors. v. State of Gujarat* [(1994) 4 SCC 353], the Supreme Court rejected the enhancement of the sentence of one accused by the High Court, arguing that the trial court which had the benefit of examining the demeanour of the witnesses chose not to inflict the extreme penalty of death on any of the accused. The Supreme Court also

[71] See People's Union for Democratic Rights, *Judicial Terror: Death Penalty, TADA and the Rajiv Gandhi Assassination Case*, New Delhi: August 1998.

added that while the High Court had the power of enhancement it was to be sparingly exercised and not unless the view of the trial court was shown to be perverse or so unreasonable that no court would have arrived at such a view. Only a few days later in *Anshad and ors. v. State of Karnataka* [(1994) 4 SCC 381], the Supreme Court was critical of the High Court which enhanced the sentence of two of the accused without taking into account mitigating factors. The Supreme Court correctly observed that, "Courts are expected to exhibit sensitiveness in the matter of award of sentence, particularly, the sentence of death because life once lost cannot be brought back."

A similar approach is also visible in *Sardar Khan v. State of Karnataka* [(2004) 2 SCC 242] where the High Court had *suo-moto* enhanced the punishment. The Supreme Court observed that where the trial judge had not found it fit to award a death sentence and the state did not appeal for enhancement and also did not raise any such arguments during the appeal, it would not be appropriate for the Supreme Court to exercise such powers.

Despite such caution directed by the Supreme Court, there are a number of cases in which High Courts have found it fit to enhance sentences to death, even when overturning acquittals, and in which on further appeal the Supreme Court has found there has been insufficient evidence to even convict the accused (see *Puran s/o Sri Ram v. The State of Punjab* (AIR 1953 SC 459), *Habeeb Mohammad v. State of Hyderabad* (AIR 1954 SC 51), *Sharnappa Mutyappa Halke v. State of Maharashtra* (AIR 1964 SC 1357), *Moti Singh and Anr. v. State of Uttar Pradesh* (AIR 1964 SC 900), *Digendra Kumar Dey v. State of Assam* (1968 SCD 887) and *Bhusai (alias) Mohammad Mian and Anr. v. State of Uttar Pradesh* [(1970) 3 SCC 460], *Jagdish v. State of Rajasthan* (1989 Supp SCC 20), *K.V. Chacko @ Kunju v. State of Kerala* [(2001) 9 SCC 277]).

In a few cases the Supreme Court has upheld enhanced sentences of death, despite the facts pointing to such enhancement being improper. In *Kodavandi Moidean alias Baputty v. The State of Kerala* [(1973) 3 SCC 469], the trial court had awarded life imprisonment, finding no reasonable motive and concluding that the accused was in a disturbed state of mind. The High Court however enhanced the sentence to death, arguing that even though there was no known motive, the sudden attack on the deceased clearly showed that the act of the appellant was deliberate. The Supreme Court accepted this logic, despite the fact that the trial court, upon engaging directly with the accused, had awarded life imprisonment citing mental health reasons.

Enhancement by the Supreme Court

In cases where the Supreme Court enhances the punishment to death, there is no further forum to appeal the enhancement, as the revision jurisdiction of the Supreme Court is highly limited. It was for this reason that the Law Commission's 187th report recommended that where the Supreme Court hearing a particular case came to the opinion that an acquittal by the High Court needed to be overturned and the accused sentenced to death (see 6.2.3 below), or where

it found that the punishment should be enhanced from life imprisonment to death, such a case should be transferred by the Chief Justice to a Bench of at least five judges.

It is pertinent to note however, that the Supreme Court has rarely exercised such powers of enhancement given their vast implications. In a recent case [*Gagan Kanojia and Anr. v. State of Punjab* (MANU/SC/8726/2006/ and 2006 (12) SCALE 479)], the Supreme Court has clarified that enhancement of punishment to a death sentence is an extraordinary jurisdiction. This was also recognised by the Bench of Justices Pattanaik and Santosh Hegde in *Ramji Rai and ors. v. State of Bihar* [(1999) 8 SCC 389] where even though *suo-moto* notices for enhancement of punishment were initially issued, the Court did not enhance the punishment on considering the merits of the case.

In *State of U.P. v. Dharmendra Singh and anr.* [(1999) 8 SCC 325] however, the Bench of Justices Quadri and Santosh Hegde was not as cautious. In this case the High Court had commuted the death sentence on the ground that the two accused had been languishing in the death cell for a period of three years. The state however argued that the period was only approximately 21 months, and that they could not be said to be on death row as the sentence had not been confirmed by the High Court. The state also argued for enhancement of the sentence on the merits of the case and the gruesome killings of five innocent persons for purposes of sadistic revenge. The Supreme Court rejected the ground of delay, arguing that firstly commutation on this ground was not automatic and that secondly the delay to be considered was delay in execution of the sentence (see chapter 4 above). Arguing that it was clear from the High Court judgment that these were the sole grounds for commutation, the Supreme Court enhanced the sentence to death. The Bench also rejected the argument that as the High Court had refused to confirm the death sentence, there was a 'just expectation of survival' and no interference should take place, stating that there was no legal basis for such an argument given that in a tiered judicial system, reversal of judgments was an obvious possibility and this could not be seen to be a mitigating factor.

Even though the enhancement of sentence in the above case was perhaps arguable on grounds of error by the High Court, there was no such fig-leaf available to the Court in *Simon and ors. v. State of Karnataka* [(2004) 2 SCC 694]. In a high-profile case where the accused were alleged to be members of a gang of smugglers and poachers, they were found guilty by a special TADA court for their role in the killing of 22 persons – largely police personnel, forest watchers and informers – in a landmine blast in 1993. The special court sentenced them to life imprisonment as it found that the accused were not hardcore criminals but instead local persons who had been terrorised by the leader Veerappan into joining the gang.

To demonstrate the difficulty of the locals in the region, the defence had also argued that the entire civil administration had collapsed in that region. However, rather than appreciate the difficulties and vulnerability of the local population, including the accused, the Supreme Court argued instead that the collapse of the administration was an aggravating rather than a mitigating factor as it showed the extent of the lawlessness and the brutal nature of the crimes committed. The Court observed that, "as a result of criminal activities, the normal life of those

living in the area has been totally shattered. It would be mockery of justice if extreme punishment is not imposed." Even though the state appeal for enhancement had previously been dismissed by the Supreme Court as it was beyond limitation (being filed later than allowed by the rules) and the accused had been previously acquitted in other similar cases by the Supreme Court (*Simon and ors. v. State of Karnataka* [(2004) 1 SCC 74]), the Bench of Justices Sabharwal and B.N. Aggarwal enhanced the sentence to death, concluding, "there can hardly be a more appropriate case than the present to award maximum sentence. We have to perform this onerous duty for self-preservation i.e. preservation of persons who are living and working in the area where appellants and their group operate."

6.2.3 Death sentences awarded upon reversal of acquittal

> *"Where there are two opinions as to the guilt of the accused, by the two courts, ordinarily the proper sentence would be not death but imprisonment for life."*
>
> Justice Jagannatha Shetty
> *Licchamadevi v. State of Rajasthan* (AIR 1988 SC 1785)

Article 134(1)(a) of the Constitution provides that an automatic appeal shall lie to the Supreme Court from any judgment where a High Court reverses an order of acquittal of an accused person and sentences him to death. This is also recognised in Section 379 of the CrPC. Thus in all cases where the High Court awards a death sentence overturning the acquittal of the trial court, the Supreme Court hears the matter. The rationale behind such a rule is that there is a need for the death sentence to be considered again by a higher forum as a safeguard against arbitrariness and error. However, there is no such forum in cases where the Supreme Court overturns an acquittal and awards a sentence of death. It was perhaps for this reason that for a long period of over three decades, the Supreme Court followed a general practice of not awarding the death sentence upon overturning an acquittal. In a large number of cases, following an appeal by the state or victim's family the Supreme Court has quashed an acquittal and sentenced individuals to life imprisonment.[72]

[72] *Om Prakash v. State of Haryana* [(1971) 3 SCC 277], *State of Maharashtra v. Manglya Dhavu Kongil* (AIR 1972 SC 1797), *State of Uttar Pradesh v. Samman Dass* (AIR 1972 SC 677), *State of Uttar Pradesh v. Paras Nath Singh and Ors* [(1973) 3 SCC 647], *State of Uttar Pradesh v. Iftikhar Khan and Ors.* (AIR 1973 SC 863), *The State of Punjab v. Jagir Singh, Baljit Singh and Karam Singh* [(1974) 3 SCC 277], *State of Bihar v. Pashupati Singh And Anr*. [(1974) 3 SCC 376], *State of U.P. v. Harihar Bux Singh and Anr.* [(1975) 3 SCC 167], *State of U.P v. Ram Swarup and Anr* [(1974) 4 SCC 764], *State of Punjab v. Ramji Das* (AIR 1977 SC 1085), *State of U.P. v. Mohammad Musheer Khan and Ors.* (AIR 1977 SC 2226), *State of Uttar Pradesh v. Lalla Singh and Ors* [(1978) 1 SCC 142], *State of Uttar Pradesh v. Sughar Singh and Ors* (AIR 1978 SC 191), *State of Haryana v. Harpal Singh and Ors.* (AIR 1978 SC 1530), *State of Uttar Pradesh v. Boota Singh and Ors* (AIR 1979 SC 564), *State of U.P. v. Hakim Singh and Ors.* (AIR 1980 SC 184), *Gurnam Kaur v. Bakshish Singh and Ors.* (AIR 1981 SC 631), *Public Prosecutor, Andhra Pradesh v. Boya Jaggapuram Venkateswarlu and Ors.* (AIR 1980 SC 1876), *State of U.P. v. Shanker* (AIR 1981 SC 897), *State of Punjab v. Wassan Singh and Ors.* [(1981) 2 SCC 1], *State of Haryana v. Sher Singh and Ors.* [(1981) 2 SCC 300], *State of Uttar*

The Supreme Court's practice of not awarding the death sentence in these situations is understandable and must be welcomed, particularly given the usual time-lapse between acquittal by the High Court and the decision of the Supreme Court (given the workload in the courts, appeals against acquittals are treated with less urgency than appeals against convictions where the accused will often be in prison and on death row). During this period the accused has often settled down to normal life and thus shown more than sufficient reason for the Court to conclude that reform is likely and the death sentence inappropriate.

In *State of Madhya Pradesh v. Ahmadullah* (AIR 1961 SC 998), the Supreme Court did not award the death sentence to an accused in a case where both the trial court and the High Court had acquitted him largely on a plea of unsoundness of mind. Even though it recognised the heinous and premeditated crime committed with inhuman brutality, the Supreme Court did not award the death sentence arguing that the 'ends of justice' would be met by life imprisonment. A similar approach is also evident in cases where the Supreme Court overturned High Court acquittals but was uncomfortable in awarding the death sentence. However rather than clearly laying down law, the Court preferred instead to base its decisions on facts of the particular case. Thus in *State of Maharashtra v. Manglya Dhavu Kongil* (AIR 1972 SC 1797)**,** even though the Supreme Court reversed the acquittal by the High Court and restored the original conviction of the trial court, it did not award the sentence of death

Pradesh v. Sahai and Ors. [(1982) 1 SCC 352], *Suresh v. State of U.P.* [(1981) 2 SCC 569], *State of Uttar Pradesh v. Pussu alias Ram Kishore* (AIR 1983 SC 867), *Abdul Razaq v. Nanhey and Ors.* (AIR 1985 SC 131), *State of U.P. v. M.K. Anthony* (AIR 1985 SC 48), *State of U.P. v. Ballabh Das and ors.* [(1985) 3 SCC 703], *State of Uttar Pradesh v. Lalloo and ors.* (AIR 1986 SC 576), *State (Delhi Administration) v. Laxman Kumar and ors.* (AIR 1986 SC 250), *State of Kerala v. Bahuleyan* [(1986) 4 SCC 124], *State of Uttar Pradesh v. Ranjha Ram and ors.* (AIR 1986 SC 1959), *State of U.P. v. Brahma Das* [(1986) 4 SCC 93], *Subedar Tewari v. State of Uttar Pradesh and ors.* (AIR 1989 SC 733), *Smt. Dharamwati v. Jaibir and anr.* [(1990) Supp SCC 275], *State of U.P. v Vinod Kumar* (dead) *and Udai Bhan Singh* (AIR 1992 SC 1011), *State of U.P. v. Jamshed and anr.* [(1994) Supp (1) SCC 610], *State of Punjab v. Karnail Singh* (AIR 1995 SC 1970), *State of Uttar Pradesh v. Ramesh Prasad Misra and anr.* (AIR 1996 SC 2766), *State of Madhya Pradesh v. Dhirendra Kumar* (AIR 1997 SC 318), *Mahendra Rai v. Mithilesh Rai and ors.* [(1997) 10 SCC 605], *Satbir v. Surat Singh and ors.* (AIR 1997 SC 1160), *State of Uttar Pradesh v. Abdul and ors.* (AIR 1997 SC 2512*), State of U.P. v. Bhoora and ors.* (AIR 1997 SC 4224), *Vikram Singh v. Raj Singh and ors.* [(1998) SCC (Cri) 578], *State of Tamil Nadu v. Suresh and anr.* [(1998) 2 SCC 372], *State of Uttar Pradesh v. Sikander Ali and ors* (AIR 1998 SC 1862), *State of Bihar v. Ram Padarath Singh and ors.* (AIR 1998 SC 2606), *State of Himachal Pradesh v. Shri Manohar Singh Thakur* (AIR 1998 SC 2941), *State of Tamil Nadu v. Rajendran* [(1999) 8 SCC 679], *State of Uttar Pradesh v. Prem Singh* [(2000) 10 SCC 110], *State of Maharashtra v. Suresh* [(2000) 1 SCC 471], *State of U.P. v. Babu Ram* [(2000) 4 SCC 515], *State of Maharashtra v. Damu s/o Gopinath Shinde and ors.* [(2000) 6 SCC 269], *State of Maharashtra v. Bharat Fakira Dhiwar* (AIR 2002 SC 16), *State of Himachal Pradesh v. Prem Chand* (AIR 2003 SC 708), *Babu s/o Raveendran v. Babu s/o Bahuleyan and anr.* [(2003) 7 SCC 37], *Prithvi (minor) v Mam Raj and ors.* (MANU/SC/0143/2004/ and 2004 (2) SCALE 580), *State of Maharashtra v. Mansingh* [(2005) 3 SCC 131].

observing that the death sentence had been awarded over four years previously and in the period in between, the accused had been freed from prison.

In *State of Uttar Pradesh v. Samman Dass* (AIR 1972 SC 677), the Supreme Court explained its rationale for not awarding the death sentence after reversal of an acquittal on cumulative grounds that the occurrence took place more than three years ago and the accused was aged 19 years at the time of the trial. A cumulative approach was also visible in *State of Uttar Pradesh v. Paras Nath Singh and Ors* [(1973) 3 SCC 647] where the Court did not award a death sentence, observing that the offence was committed in 1968 and following conviction in September 1969 the accused had been on death row till acquittal in May 1970 and "the shadow of death because of the capital sentence must have haunted them." This along with the fact that it was not possible to assign the fatal blows to any particular individual, argued the Court, meant that the ends of justice would be met by all being sentenced to life imprisonment. On the same day a similar order on similar logic was passed in *State of Uttar Pradesh v. Iftikhar Khan and Ors.* (AIR 1973 SC 863). This was also true for a number of other judgments in the same year – *State of Bihar v. Pashupati Singh And Anr.* [(1974) 3 SCC 376], *The State of Punjab v. Jagir Singh, Baljit Singh and Karam Singh* [(1974) 3 SCC 277] – suggesting that by 1973 a clear practice of not awarding the death sentence upon overturning acquittals had developed in the Supreme Court.

Such a trend is clearly suggested by *The State of Punjab v. Hari Singh and Anr* [(1974) 4 SCC 552], where now the Supreme Court even slipped its cover and did not award the death sentence simply noting, "As however, the occurrence took place several years ago, we refrain from awarding a death sentence in this case." The Court did not even attempt to show how long had passed since the sentence was passed or the impact it had on the accused. Of course keeping in mind the low priority accorded to appeals against acquittals and the resultant delays, it is no surprise that the Court considered this an important factor in not awarding the death sentence.

It was perhaps in *State of Uttar Pradesh v. Sughar Singh and Ors* (AIR 1978 SC 191) that for the first time the Supreme Court openly acknowledged its own practice, albeit linked clearly to the argument of time-lapse. The Court awarded life imprisonment stating, "having regard to the considerable time that has elapsed since the date of the occurrence and having regard to the fact that the High Court's decision of acquittal in their favour is being set aside by us, the extreme penalty of death ought not to be imposed…"

The practice appears to have been followed without stating reasons in: *State of Haryana v. Harpal Singh and Ors.* (AIR 1978 SC 1530), *Public Prosecutor, Andhra Pradesh v. Boya Jaggapuram Venkateswarlu and Ors.* (AIR 1980 SC 1876), and *State of U.P. v. Shanker* (AIR 1981 SC 897). Reasons were given in: *State of Haryana v. Sher Singh and Ors.* [(1981) 2 SCC 300] (a time-lapse of six years since High Court acquittal), *State of U.P. v. Hakim Singh and Ors.* (AIR 1980 SC 184) (a time-lapse and not "proper nor expedient" to impose capital punishment), *Gurnam Kaur v. Bakshish Singh and Ors.* (AIR 1981 SC 631) (a long time lapse), *State of Uttar Pradesh v. Sahai and Ors.* [(1982) 1 SCC 352] (incident took place

more than eight years previously and appeal pending for five years in Supreme Court) and *State of Uttar Pradesh v. Suresh alias Chhavan and Ors.* [(1981) 3 SCC 635] (incident took place seven years previously).

In a large number of cases in the 1980s and 1990s the Court again relied on delay to justify sentences of life imprisonment (the wording in brackets reflect the wording of the Supreme Court itself):

- *State of Uttar Pradesh v. Lalloo and ors.* (AIR 1986 SC 576) (occurrence took place years ago)
- *State of Kerala v. Bahuleyan* [(1986) 4 SCC 124] (the extreme penalty of law is not called for)
- *State of Uttar Pradesh v. Ranjha Ram and ors.* (AIR 1986 SC 1959) (distance of time)
- *Subedar Tewari v. State of Uttar Pradesh and ors.* (AIR 1989 SC 733) (ends of justice)
- *State of U.P. v Vinod Kumar (dead) and Udai Bhan Singh* (AIR 1992 SC 1011) (length of time)
- *State of Uttar Pradesh v. Ramesh Prasad Misra and anr.* (AIR 1996 SC 2766) (long passage of time)
- *State of Madhya Pradesh v. Dhirendra Kumar* (AIR 1997 SC 318) (acquittal 14 years ago)
- *State of U.P. v. Bhoora and ors.* (AIR 1997 SC 4224) (long lapse of time and facts and circumstances of the case)
- *State of Tamil Nadu v. Suresh and anr.* [(1998) 2 SCC 372] (distance of time)
- *State of Uttar Pradesh v. Prem Singh* [(2000) 10 SCC 110] (lapse of many years)

In a few other cases the Court relied on facts and circumstances or other similarly vague rationale. Perhaps these judgments can be read as cases where the Supreme Court (unlike the trial court) did not find the cases to fit the 'rarest of rare' criteria, while in yet others no rationale at all was given, leaving the observer to ponder the reasons:

- *Abdul Razaq v. Nanhey and Ors.* (AIR 1985 SC 131) (circumstances of the case)
- *State of U.P. v. Ballabh Das and ors.* [(1985) 3 SCC 703] (in the facts and circumstances…)
- *State of Punjab v. Karnail Singh* (AIR 1995 SC 1970) (facts of the case)
- *State of Uttar Pradesh v. Sikander Ali and ors* (AIR 1998 SC 1862) (merits of the case)
- *State of Bihar v. Ram Padarath Singh and ors.* (AIR 1998 SC 2606) (this is not a fit case …)
- *State of Tamil Nadu v. Rajendran* [(1999) 8 SCC 679] (not "rarest of rare")
- *Smt. Dharamwati v. Jaibir and anr.* [(1990) Supp SCC 275] (no reasons)
- *State of U.P. v. Jamshed and anr.* [(1994) Supp (1) SCC 610] (no reasons)
- *Mahendra Rai v. Mithilesh Rai and ors.* [(1997) 10 SCC 605] (no reasons)
- *State of Uttar Pradesh v. Abdul and ors.* (AIR 1997 SC 2512) (no reasons)

Despite the suggestion by Justice Shetty in *Licchamadevi v. State of Rajasthan* (AIR 1988 SC 1785) that it would not be proper to award the death sentence where the two lower courts disagreed on conviction, it was eventually in 1999 (*State of Maharashtra v. Suresh* [(2000) 1 SCC 471]) that the Supreme Court finally stated directly that, "regarding sentence we would have concurred with the Sessions Court's view that the extreme penalty of death can be chosen for such a crime, but as the accused was *once acquitted* by the High Court we refrain from imposing that extreme penalty in spite of the fact that this case is perilously near the region of 'rarest of rare' cases." The 'rule' was followed in *State of U.P. v. Babu Ram* [(2000) 4 SCC 515], *State of Maharashtra v. Damu s/o Gopinath Shinde and ors.* [(2000) 6 SCC 269] and virtually repeated verbatim in *State of Maharashtra v. Bharat Fakira Dhiwar* (AIR 2002 SC 16).

All the more strange then that this 'rule' that has been in unacknowledged existence for over three decades, has been broken by the Supreme Court in a few recent judgments.

In *State of Rajasthan v. Kheraj Ram* [(2003) 8 SCC 224], the accused had killed his wife, two children and brother-in-law suspecting infidelity on the part of his wife as also the paternity of the children. Despite the High Court expressing doubts about insufficient evidence and thereby acquitting the accused, the Supreme Court set aside the acquittal and restored the death sentence awarded by the trial court on the grounds that it was a 'rarest of rare' case.

It is pertinent to note that the same judge who delivered the judgment in this case also deliberated upon the point in another context in a judgment a few months previously. Thus in *Devender Pal Singh v. State, N.C.T. of Delhi and anr. (with Krishna Mochi)* (AIR 2003 SC 886), Justice Pasayat had observed that while there was a practice of not sentencing to death upon reversal of an acquittal, a practice could be departed from for "good and compelling reasons." The judge in fact argued that where a case was found to be 'rarest of rare' on the grounds of nature of the offence and impact on society, an acquittal or sentence of life awarded by lower courts would not be seen as mitigating factors.

Although it was reported in October 2006 that the death sentence of Kheraj Ram had been commuted to life imprisonment by the President of India, the judgment in the case set a poor precedent which was followed shortly thereafter by the same judge on 8th February 2005. Justice Pasayat again delivered a judgment in *State of U.P. v. Satish* (AIR 2005 SC 1000) where the Supreme Court awarded the death sentence after the accused had been acquitted by the High Court. While the trial court had sentenced the accused to death for rape and murder of a six-year-old girl, the High Court had found the circumstantial evidence insufficient. Even though the Supreme Court noted that, "generally the order of acquittal is not interfered with because the presumption of innocence of the accused is further strengthened by acquittal by a court," the Court found it be a 'rarest of rare' case.

When compared to the large number of 'brutal', 'heinous' cases in which the Supreme Court has not awarded the death sentence following acquittal in the lower court – including in a case tried under TADA involving the murder of a sitting member of the legislative assembly [*State*

of Gujarat v. Anirudhsingh and anr. (AIR 1997 SC 2780)], the judgments of the Court in *Kheraj Ram and U.P. v. Satish* remain puzzling.

Given that both prior to and following the *Kheraj Ram* judgment, other benches have continued to follow the practice of not awarding a death sentence on reversing an acquittal (\[albeit on the grounds that they were not 'rarest of rare' cases, e.g. *Prithvi (minor) v Mam Raj and ors.* (MANU/SC/0143/2004/ and 2004 (2) SCALE 580), *State of Rajasthan v. Kashi Ram* (AIR 2007 SC 144)], the exceptions raise uneasy questions about the arbitrariness of the impact of views of particular judges. Would the fate of Satish be different had his case been heard by a different Bench? The fact that in another similar case of rape and murder only a few months before, another Bench did not impose the death sentence after acquittal (*State of Maharashtra v. Mansingh* [(2005) 3 SCC 131]) would certainly suggest so. Satish is presently on death row in Meerut Jail in Uttar Pradesh.

As mentioned previously, the Law Commission in its 187th Report has recommended that in cases where the Supreme Court Bench hearing a particular case finds that an acquittal by a High Court should be overturned and the accused be sentenced to death, or where it finds that the punishment should be enhanced from life imprisonment to death, such cases should be transferred by the Chief Justice to a Bench of at least five judges.[73]

6.2.4 Mistakes in Law and Sentencing

Many of the cases referred to in the previous section on evidence involved errors in sentencing by lower courts and subsequent acquittals or commutations by the Supreme Court. While mistakes in appreciating evidence are perhaps understandable, mistakes made in reading of the law and procedure cannot be easily condoned. Even though resource constraints and pressures upon the judiciary (in particular the lower judiciary) are a reality, there is no place for such errors in capital cases. In *Santa Singh v. The State of Punjab* [(1976) 4 SCC 190], the Supreme Court had observed, "It is unfortunate that in our country there is no system of continuing education for judges so that judges can remain fully informed about the latest developments in the law and acquire familiarity with modern methods and techniques of judicial decision-making." The conviction by a trial court judge of an accused under a provision (requiring a mandatory sentence of death) declared unconstitutional over a decade previously[74] illustrates the dire need for such continuing education.

In *Naveen Chandra v. State of Uttaranchal* (MANU/SC/8604/2006/ and AIR 2007 SC 363), the Supreme Court observed that due to errors in appreciation of the facts, the lower court had sentenced the accused to death wrongly under Section 302 IPC when they should have been convicted under Section 304 (culpable homicide not amounting to murder – similar to the charge of 'manslaughter' – which is punishable with a maximum of life imprisonment). The

[73] 'Mode of Execution of Death Sentence and Incidental Matters' published in 2003 by the Seventeenth Law Commission.
[74] *Saibanna v. State of Karnataka* [(2005) 4 SCC 165] discussed below.

Supreme Court thus altered the sentence, convicting the accused under Section 304, after finding that the accused had merely exceeded his right to private defence, a fact which had been misread by the trial court.

In *Dilip Kumar Sharma and Ors. v. State of Madhya Pradesh* (AIR 1976 SC 133), the trial court had awarded a mandatory death sentence under Section 303 IPC to one of the accused (Section 303 provides a mandatory death sentence for a person who commits murder while "under sentence of imprisonment for life" – see Section II.5 above). This sentence was confirmed by the High Court. Unfortunately the High Court misunderstood the operation of Section 303 and applied it even though just prior to confirming the sentence in this case, it had acquitted the same accused in the case in which he was serving a term of life-imprisonment. On appeal, the Supreme Court pointed out that at the time the High Court pronounced its judgment in this case, the accused was not under sentence of life imprisonment and therefore Section 303 was not applicable at all as it required "an operative, executable sentence of imprisonment for life."

Even though Section 303 was subsequently struck down as unconstitutional by the Supreme Court in 1983, over two decades later, in *Saibanna v. State of Karnataka***,** [(2005) 4 SCC 165], the Supreme Court found that the trial court had convicted the accused under Section 303 even though the offence took place in August 1994 – over ten years after the offence was struck off the books. The judgment observed that it was only at the stage of sentencing after the conviction that it was brought to the attention of the court that the said provision had been struck down as unconstitutional in 1983. This particular case is a telling example of the state of trials in the courts of first instance where it appears that the police, prosecution, defence counsel and the judge were unaware of the law itself.

Changes in law appear to have taken other courts by surprise as well. In a number of cases, courts have applied the wrong law on sentencing. In *Khushal Rao v. The State of Bombay* (AIR 1958 SC 22), the murder took place in February 1956 after the CrPC was amended (from 1st January 1956) to make the death sentence no longer the 'normal' or 'ordinary' punishment for murder (see Section 2.2 above). The amendment had deleted the requirement that trial courts give reasons when awarding the lesser punishment, yet the trial court sentenced the appellant to death, observing that there were no 'extenuating circumstances.' Even the Supreme Court made the same mistake when rejecting the appeal. In *Iman Ali and Anr. v. State of Assam* (AIR 1968 SC 1464), over a decade after the law had changed, it was the High Court which *suo-moto* enhanced the sentence of the accused from life imprisonment to death stating, "The trial court awarded the sentence of imprisonment for life without giving any reasons at all for adopting that course." Unfortunately here too, the Supreme Court did not appreciate the error committed and refused to overturn the enhancement.

In *Mohan Singh v. State of Punjab* [(1970) 3 SCC 496] too, the Supreme Court and High Court completely ignored the trial court's sentencing of the accused to **"**normal penalty i.e death." Curiously however, exactly one week later, in *Ram Narain and Ors v. State of Uttar Pradesh*, [(1970) 3 SCC 493], the very same three judges clarified the exact position of the

law on sentencing in capital cases post 1956 and asserted that the trial judge had the discretion to choose either punishment.

In *Asgar v. State of Uttar Pradesh* [(1977) 3 SCC 283], the Supreme Court did correct the High Court which had confirmed the death penalty on the basis that no extenuating circumstances were found. The apex Court noted that the High Court clearly did not keep in mind the change of law brought about by the 1955 amendment of the old Code, and therefore commuted the sentence. Yet less than one month later, another Bench of the Supreme Court itself referred to the lack of "extenuating circumstance to justify the lesser sentence" [*Natthu Singh and Ors. v. State of Uttar Pradesh* (AIR 1977 SC 2096)].

The erroneous use of lower standards of proof, akin to civil law, by the lower courts emerged in the recent case of *Vikramjit Singh @ Vicky v. State of Punjab* (MANU/SC/8721/2006/ and 2006 (12) SCALE 321). The Supreme Court acquitted the accused observing that, "In the instant case, there are two versions. The learned Sessions Judge proceeded to weigh the probability of both of them and opined that the appellant having not been able to prove its case; the prosecution case should be accepted. In our opinion, the approach of the learned Sessions Judge was not correct. The High Court also appeared to have fallen into the same error." Clarifying the correct procedure in criminal law, the Supreme Court further stated that it was beyond doubt that "where two views of a story appear to be probable, the one that was contended by the accused should be accepted."

6.2.5 Non-unanimous/ majority decisions

Where judges reach different opinions on sentencing, Section 392 of the CrPC provides that the rule of the majority should be followed. It further states that if judges of a criminal court are equally divided in their opinion, the case is to be laid before another judge of the same court, the decision of this judge becoming the final decision of the court. In practice, courts have often followed the common law custom of not imposing the death penalty when appellate judges agree on the question of guilt but differ on that of sentence, unless there are compelling reasons. The rationale behind this custom appears to be the final and irreversible nature of the death penalty, especially since reasonable doubt can be said to have been established when despite the evidence put forward, one or more members of the Bench is not convinced of either the guilt of the accused or the necessity of the death sentence in that particular case.

Till the judgment of the Supreme Court in *Aftab Ahmed Khan v. The State of Hyderabad* (AIR 1954 SC 436) in May 1954, there was no explicit bar on death sentences being awarded even where judges did not agree on guilt or punishment and the decision was therefore non-unanimous. In this case however, the death sentence awarded to the accused was confirmed by a third judge in the High Court who was brought in after the two judge Bench failed to agree on the guilt of the accused. The Supreme Court upheld the conviction but commuted the death sentence even though the death penalty was at that time the 'normal' punishment for murder. The three judge Bench of the Supreme Court observed that in such a situation where

judges disagreed on guilt "as a matter of convention though not as a matter of strict law", it was desirable that the death penalty not be imposed.

Two of the same three judges also sat on the Supreme Court Bench in *Pandurang and others v. State of Hyderabad* (AIR 1956 SC 216) in December 1954, where the sentence was commuted because of the difference of opinion in the High Court (see box below). Here however, the Court specified further that even when appellate judges agreed on guilt but differed on sentence, it was usual not to impose the death penalty unless there were compelling reasons to do otherwise. This guideline was followed in March 1956 in *Vemireddy Satyanarayan Reddy and others v. State of Hyderabad* (AIR 1956 SC 379) where the Supreme Court Bench observed that the appellants should be grateful for the difference of opinion that arose in the High Court Bench because of which they received life imprisonment for this "gruesome and revolting murder."

In *Babu and Others v. State of Uttar Pradesh* (AIR 1965 SC 1467) however, a five-judge Bench of the Supreme Court overruled the *Pandurang* judgment and upheld the death sentence even though the High Court Bench disagreed on the guilt of the accused. The Supreme Court Bench observed that, "This cannot be raised to the pedestal of a rule for that would leave the sentence to the determination of one judge to the exclusion of the other." It is regrettable that the Supreme Court chose to view the matter from the perspective of one judge's view being given more importance than others rather than appreciating these as cases where the evidence was insufficient to establish the guilt beyond reasonable doubt in all the judges' minds.[75]

In *Saravanabhavan and Govindaswamy v. State of Madras* (AIR 1966 SC 1278), in which two of the five judges on the Supreme Court Bench disagreed on guilt, there was no reference to *Babu and Others v. State of Uttar Pradesh* or to *Pandurang and others v. State of Hyderabad* (AIR 1956 SC 216). The majority of judges confirmed the death sentence and it was therefore upheld. Following the *Babu* decision, the Supreme Court did not enter into the question of sentencing in either *Raghunath Singh alias Manna and others v. State of Uttar Pradesh* [(1969) 3 SCC 188] or *Husaina v. The State of U.P* (AIR 1971 SC 260) despite non-unanimous decisions on the guilt of the accused by the High Court benches in both these cases.

[75] Interestingly, the judges of the Supreme Court in this case also erroneously referred to the death penalty as the 'normal' punishment despite the legal position having changed in 1955.

Same facts, three judges and three different opinions

In *Pandurang and others v. State of Hyderabad*, the Supreme Court heard a case in which five persons had been sentenced to death by the trial court. Of the two judges on the original High Court Bench, one decided to uphold the conviction of all five accused but award life imprisonment, while the second judge directed the acquittal of all five. As per the law a third judge was brought in and his decision was to be final. The third judge decided to uphold the conviction of all five and further sentenced three of the accused to death. As mentioned above, the Supreme Court subsequently commuted the sentences of death. This is a classic example of how different judges see the same facts and reach different conclusions on questions literally of life and death.

When it came to differences of opinion in the Supreme Court Bench however, the Court completely ignored the wisdom or the rationale of the judgments in *Aftab Ahmed Khan v. The State of Hyderabad* (AIR 1954 SC 436) and *Pandurang and others v. State of Hyderabad*. Thus in *Anant Chintaman Lagu v. The State of Bombay* (AIR 1960 SC 500), the Supreme Court upheld the conviction by majority and further sentenced the accused to death by the same 2:1 majority. In *State of Uttar Pradesh v. Deoman Upadhyay* (AIR 1960 SC 1125), a five judge Bench of the Supreme Court went one step further and not only restored the death sentence awarded to the accused after the High Court had acquitted him but did so with one judge dissenting on guilt itself. Again there was no reference to the previous cases. In *Tarachand Damu Sutar v. The State of Maharashtra* (AIR 1962 SC 130), again a five-judge Bench disagreed on guilt. The death sentence was awarded nevertheless by a 3:2 majority. It is a sobering thought that had these non-unanimous or split sentences been awarded by High Court judges, the "*Pandurang*" rule would have ensured that the sentences would have been commuted.

Despite there being no express bar, there appear to have been no split/majority or non-unanimous decisions involving award of the death penalty in the Supreme Court over the next two decades. It is not far-fetched to view this development alongside the impact of the new CrPC and moves to limit the use of the death penalty in both the legislature and Supreme Court (as seen in the *Bachan Singh* judgment). In fact the need for unanimity was noted in the minority dissenting opinion by Justice Bhagwati in *Bachan Singh v. State of Punjab* (AIR 1982 SC 1325) who noted that this was one of the requirements necessary to remove the "vice of arbitrariness in the imposition of death penalty."

"Justice has quite clearly failed here"
Justice I.D. Dua in his dissenting opinion in *Pratap v. State of Uttar Pradesh and Others* [(1973) 3 SCC 690]

The judgment of the Supreme Court in *Pratap v. State of Uttar Pradesh and Others* is a good example of the need for safeguards to prevent the award of a death sentence unless all the judges on the Bench agree on guilt and sentence. In this case, the accused was sentenced to life imprisonment under Sectionq302 IPC by the trial court judge who found that the murder was not premeditated but committed in the heat of passion during a sudden fight. However during the trial, an application was made by the state seeking permission to demonstrate that the accused had been on probation at the time of the current murder from a life sentence for a previous conviction under Section 302 for murder (and that therefore he should be sentenced to a mandatory death sentence under Section 303 IPC). This application was effectively refused by the trial court. However, the brother of the deceased filed revision petitions in the High Court, calling for a conviction under Section 303 IPC. The High Court confirmed the conviction of the trial court but questioned the decision of the court to refuse the application regarding the accused's previous conviction and probationary status and directed a sessions judge to enquire into the matter. The enquiry concluded that the accused had been convicted of a previous murder and the High Court, using its revisional jurisdiction, enhanced the sentence to death under the mandatory provision of Section 303 IPC.

While the Supreme Court upheld the conviction and sentence under Section 303 IPC, a dissenting judge directed restoration of the trial court sentence (under Section 302 IPC) as he was of the opinion that the matter should ideally be remanded back to the trial court for a retrial under Section 303 but that since over eight years had passed since the offence that was not feasible. The dissenting judge raised a number of important concerns about the judicial process that effectively led to the accused being unaware of the charge (Section 303 IPC) under which he was being tried, as well as the lack of legal assistance provided to the accused during the legal processes (see also Section 7.1 below).

Such procedural safeguards were however ignored in the judgment of the Supreme Court in *State through Superintendent of Police, CBI/SIT v. Nalini and Others* [(1999) 5 SCC 253] where the Supreme Court sat as a court of first appeal in a case under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter TADA 1987). In this case a special trial court had awarded the death sentence to all 26 persons found guilty of involvement in the conspiracy that led to the assassination of Rajiv Gandhi, the former Prime Minister of India. While the death sentences of 22 of the appellants were commuted, the death sentences against the four remaining were upheld, three unanimously. However, it was the death sentence imposed upon one of the accused – Nalini – that divided the Bench. Justice Thomas commuted the sentence while the other two judges confirmed the death sentence. The main area of disagreement was the award of the death sentence to a woman who had a young child and who may have been led into the conspiracy. When a review petition came before the Supreme Court in the same case (*Suthendraraja alias Santhan and Others v. State through*

DSP/CBI, SIT Chennai [(1999) 9 SCC 323]), once again the same judges could not agree on the award of the death sentence to Nalini. The minority opinion given by Justice Thomas observed that, "In a case where a Bench of three judges delivered judgment in which the opinion of at least one judge is in favour of preferring imprisonment for life to death penalty as for any particular accused, I think it would be a proper premise for the Bench to review the order of sentence of death in respect of that accused." The judge argued that it would be a sound proposition to make a precedent that where one judge "on stated reasons" prefers a lesser sentence, "that fact should be regarded as sufficient to treat the case as not falling within the narrowed ambit of 'rarest of rare' cases when the alternative option is unquestionably foreclosed," as required by *Bachan Singh*. Justice Thomas also specifically clarified that this was not to mean that a minority view could supersede the majority view but that this was a special situation where one of the three judges hearing a case believed that life imprisonment was sufficient or appropriate and therefore it would be a "relevant consideration" for the court to consider.[76]

Since 1999, there have been a number of non-unanimous Supreme Court judgments in capital cases. Justice Thomas was again the dissenting voice in *Ram Deo Chauhan @ Raj Nath v. State of Assam* (AIR 2001 SC 2231) where he accepted the serious doubts raised about the age of the accused (see Section 3.2.1 above). Despite his dissenting judgment, the sentence of death was upheld by the majority Bench. A perusal of the judgments of the majority judges in this case however, suggests a divergence in views and approaches. Justice Sethi argued that the juvenile plea was only introduced to delay the execution and therefore rejected the petition. In a judgment which hints at doubt, Justice Phukan agreed with Justice Sethi in the rejection, adding however that the accused could nonetheless apply for executive clemency and was therefore not remediless.

In *Devender Pal Singh v. State, N.C.T. of Delhi and anr.* [(2002) 5 SCC 234], the accused had been convicted by a special TADA Court and sentenced to death for 'terrorist offences' as also for murder. The Supreme Court Bench, sitting as a court of first appeal, was unable to uphold the death sentence unanimously, with the senior of the three judges, Justice Shah, recommending acquittal of the accused. The majority opinion of Justices Pasayat and B.N. Agarwal however confirmed the death sentence (see Section 7.3 below).

In another "terrorism" case – *Krishna Mochi and ors. v. State of Bihar* [(2002) 6 SCC 81] - the same three judges disagreed on the sentence imposed on one of the appellants, although this time around they agreed on conviction and upheld the death sentence awarded to three other appellants. Justice Shah's dissenting judgment argued that the shortcomings in the investigation and the evidence that only proved the presence of the accused at the scene of the offence, meant that this could not be a fit case for imposing the death penalty. On the other hand, he observed, "this case illustrates how faulty, delayed, casual, unscientific investigation

[76] Nalini's death sentence was subsequently commuted by the Governor of Tamil Nadu, reportedly after the intervention of Sonia Gandhi, the widow of the former Prime Minister. The other three accused remain on death row.

and lapse of long period in trial affects the administration of justice which in turn shakes the public confidence in the system." His plea that it was settled law that where accused were charged with heinous murders punishable by death, the judicial approach had to be "cautious, circumspect and careful", was also lost on the majority.

Review petitions in both the above cases were heard together by the same Bench of the Court in *Devender Pal Singh v. State, N.C.T. of Delhi and anr. (with Krishna Mochi)* (AIR 2003 SC 886). Once again by the same majority (Justice Shah dissenting) the previous decisions were upheld and the question of whether imposition of a death sentence would be proper when one of three Supreme Court judges disagreed was answered in the affirmative. The majority judgment in this case also argued that non-award of a death sentence in cases where the Bench was split had been only a matter of practice and although prevalent, not a matter of law and could therefore be departed from "for good and compelling reasons." Justice Pasayat suggested that the mere fact that the review petitions being heard were cases tried under TADA or those that related to caste killings would be sufficient to show compelling reasons in this case.

In response to a writ petition filed in the public interest, another Bench of the Supreme Court of Justices Pattanaik and Balakrishnan also refused to lay down any guidelines with respect to the non-award of death sentences in the event of non-unanimous judgments, observing that judicial discretion could be curtailed in such a manner [*V. Mohini Giri v. Union of India* (AIR 2002 SC 642)]. With the dismissal of this petition alongside the abovementioned judgments, it appears that this question of law is currently settled. Moreover, in a few recent cases where the High Courts have been divided on sentence, the Supreme Court has not found this to be a mitigating factor against upholding a sentence of death. In *Saibanna v. State of Karnataka* [(2005) 4 SCC 165], the High Court judges could not agree on sentence, while in *Gurmeet Singh v. State of Uttar Pradesh* (AIR 2005 SC 3611), the judges of the High Court disagreed on conviction itself. In both cases the Supreme Court upheld the sentences of death.

Even a brief glance at the list of cases since 1999 where death sentences have been upheld by non-unanimous benches of the Supreme Court indicates that dissenting voices have been raised largely because of concerns that the evidence on record is insufficient to prove guilt or that there are other errors fatal to the prosecution case. The number of cases where death sentences have been awarded but appeals have ultimately led to acquittals only serves to strengthen these dissenting arguments. In this respect it may be pertinent to note that even Military Courts in India, not otherwise known for their stringent procedural requirements, have higher safeguards. While the Army's General Court Martials do not go as far as requiring unanimity, they require a two-thirds majority for the award of a death sentence (Section 132 of the Army Act, 1950). A similar provision is found under Section 131 of the Air Force Act, 1950. In other forms of court martial (summary court martial etc.), an absolute concurrence of members trying the case is required in order to pass the death sentence. The 1950 Navy Act (Section 124) requires four of a five-member panel to concur for a death sentence to be passed (where the panel exceeds five members, at least two thirds must concur).

With growing international consensus towards abolition of the death penalty, India's continuation of awarding non-unanimous death sentences is a step backwards. Fair and reasonable procedures are vital safeguards for the enjoyment of human rights – more so where people are charged with crimes punishable by death. Under international human rights standards, accused persons are entitled to the strictest observance of all fair trial guarantees and to certain additional safeguards. The requirement of unanimity of judges in imposing death sentences could act as one such additional safeguard.

6.3 Confirmation and appeal

6.3.1 Shoddy and Casual Adjudication

> *"If 10 persons could be acquitted on mere assumption, there is a fear that 10, who are not guilty, could be convicted by the same indifferent process."*
>
> Chief Justice Y.V. Chandrachud, Supreme Court of India
> *State of Uttar Pradesh v. Jageshwar and Others* [(1983) 2 SCC 305]

Dissatisfaction with the manner in which High Courts have conducted their confirmation and appeal processes has been expressed by the Supreme Court in a number of cases. This goes beyond those cases highlighted in the previous sections of this chapter in which the Supreme Court may have made differing findings on guilt and sentence, and speaks to the perfunctory manner in which the process of confirmation has in some cases been carried out. Thus in *Sadhu Singh alias Surya Pratap Singh v. State of U.P.* (AIR 1978 SC 1506), the Supreme Court commuted the death sentence after noting that the High Court, while appreciating the evidence, spoke in two voices in relation to different accused individuals. Similarly in *State of Uttar Pradesh v. Jageshwar and Ors.* [(1983) 2 SCC 305], the Supreme Court chastised the High Court as its judgment did "not contain any analysis or discussion of the evidence which it was the plain and bounden duty of the High Court to do," instead compressing the confirmation into a few brief pages.

The Supreme Court also found fault with the High Court for its shoddy work in *Charan Singh v. State of Punjab* (AIR 1975 SC 246) where the death sentences of four persons were confirmed by the High Court, which merely held that there were no grounds for interfering with the sentences. The Supreme Court clarified that, "as the High Court was dealing with not only an appeal filed by the appellants but also a reference … for confirming the death sentence, it was, in our opinion, essential for the High Court to have reappraised the evidence adduced in this case and come to an independent conclusion as to whether the guilt of the accused had been proved or not." The Supreme Court further acquitted two of the accused, observing that, "we find that there was hardly any discussion worth its name of the evidence of the eye-witnesses in the judgment of the High Court. The High Court has made only a general reference to the evidence of the eye witnesses and observed that all the witnesses examined by the prosecution inspire full confidence."

Similarly in *Subhash and Anr v. State of U.P.* (AIR 1976 SC 1924), the Supreme Court directed acquittal of the accused finding that "[t]he High Court has failed to show due regard to this well-established position in law. It did not undertake a full and independent examination of the evidence led in the case and it mainly contented itself with finding out whether the Sessions Court had in any manner erred in reaching the conclusion that the charge of murder levelled against the appellant was established beyond a reasonable doubt."

In *Gurcharan Singh v. State of Punjab* (AIR 1963 SC 340), the Supreme Court observed that the trial judge had made completely different findings on the same question of fact in two different trials on the same day. While he acquitted the accused for possession of one particular gun in a case under the Arms Act, just prior to that, the judge had accepted the evidence that the accused had in fact possessed the very same gun in the murder case. The Supreme Court reappraised the entire evidence as it found that even the High Court judgment suffered from infirmities. It concluded that, "some of the reasons given by the High Court are erroneous and apparently some of the arguments urged before it have not been duly considered."

In *Subbaiah Ambalam v. State of Tamil Nadu* (AIR 1977 SC 2046), the "distressed" Supreme Court referred the case back to the High Court for rehearing of the appeal and confirmation. The Court observed that the statutory requirements were not complied with and a capital case was "disposed of in a casual manner." In this particular case, the High Court judgment confirming the death sentence was less than one page and the entire evidence was appreciated in only two sentences.

More recently the Supreme Court was harsh in its criticism of the failure of the High Court to apply its mind in *State of Uttar Pradesh v. Ramesh Prasad Misra and anr.* (AIR 1996 SC 2766), finding that the judges "betrayed their duty of final court of fact, to subject the evidence to close and critical scrutiny. They either have no knowledge of the elementary principles of criminal law or adopted casual approach… In either case, miscarriage of justice is the inevitable result at their hands in criminal cases." The Court went so far as to request the Chief Justice of the Allahabad High Court to bring the judgment to the notice of the two particular judges who heard the appeal "with a view to see that the learned judges would be more careful in future in deciding criminal matters assigned to them so that miscarriage of justice would not result."

In *Parmananda Pegu v. State of Assam* [(2004) 7 SCC 779], the Supreme Court noted that, "the High Court fell into a serious error in not considering the case of the appellant separately. The High Court applied the evidence relating to the other accused to the appellant. This mix-up has led to miscarriage of justice." The Supreme Court acquitted the two accused after they had spent over five years in prison, including nearly three under sentence of death.

Perhaps the best known case of negligence is that relating to the judgment in *Harbans Singh v. State of Uttar Pradesh* [(1982) 2 SCC 101] where the Supreme Court was itself at fault. In

this case, three persons – Jeeta Singh, Kashmira Singh and Harbans Singh – were sentenced to death for a crime in which they played similar roles. Jeeta Singh's petition was rejected by the Supreme Court while another Bench admitted the petition of Kashmira Singh and commuted his death sentence. Harbans Singh's special leave petition and review petition were rejected even though the Supreme Court registry had mentioned in its office report that Kashmira Singh's death sentence was commuted. With their mercy petitions also rejected, Harbans Singh and Jeeta Singh were to be executed on 6th October 1981. However, a last resort writ petition filed by Harbans Singh brought out the inconsistency of the sentences and with the petition admitted, his execution was stayed. Unfortunately, as Jeeta Singh had not filed a similar petition, his execution was carried out. The Supreme Court did recognise that "[T]he fate of Jeeta Singh has a posthumous moral to tell" and it recommended that the President commute the sentence of Harbans Singh and further directed Jail Superintendents to personally ascertain prior to any executions, if the death sentences of any co-accused had been commuted. In his minority judgment in the Bachan Singh case, Justice Bhagwati referred to this as a "classic case which illustrates the judicial vagaries in the imposition of death penalty and demonstrates vividly in all its cruel and stark reality, how the infliction of death penalty is influenced by the composition of the Bench."

6.4 Judicial bias

The possibility of judicial bias will always be present in any judicial system and many of the cases referred to in this study illustrate elements of judicial bias – whether biased on grounds of gender or class, politics or religion, or even pro or anti-death penalty. In some cases however, the Supreme Court has referred directly to the negative impact of apparent judicial bias.

In *Ram Lakhan Singh and Ors. v. State of Uttar Pradesh* (AIR 1977 SC 1936), the Supreme Court acquitted the accused as there was little evidence of their participation in the crime and noted that the Sessions judge appeared to be biased in favour of the family of the deceased and had even prefaced his judgment by observing that the family of the accused was a "family… of law breakers" in the absence of any proof for such a claim. The Supreme Court observed that the trial court judgment was not free of prejudice against the accused. Further the Court observed that even the High Court did not closely examine the case, which contained several extraordinary features and infirmities. Yet a similar bias against the accused is also evident in the Supreme Court's own judgment in *Sushil Murmu v. State of Jharkhand* (AIR 2004 SC 394) where it notes that the "criminal propensities" of the accused are revealed by the fact that he is also facing another trial for a similar offence. This, despite the judgment clearly stating that the result of the other trial was not brought on record.

In *Omwati (Smt.) and ors v. Mahendra Singh and ors.* [(1998) 9 SCC 81], the Supreme Court observed that the trial judge had "allowed his imagination to run riot" and virtually argued for the prosecution. The Court stated that while discussing the contention of the defence with reference to certain evidence, the "trial judge somewhat exceeded his limits and had taken for

himself the task of explaining some of the circumstances in rejecting the contentions of the defence." The Supreme Court therefore upheld the acquittal directed by the High Court.

The dangers of judges exceeding their brief are also visible in *Shankarlal Gyarasilal Dixit v. State of Maharashtra* [(1981) 2 SCC 35] where the High Court, incensed with the rape and murder of a minor, also noted that the accused had beaten his mother and brother and that his wife was living separately from him. The High Court therefore confirmed the death sentence, observing, "in our opinion, such a person could neither be an asset to his wife and children nor entitled to live in the society." The Supreme Court however found little evidence against the accused and acquitted him and warned the lower courts of their tremendous responsibility in capital cases, "Unfaithful husbands, unchaste wives and unruly children are not for that reason to be sentenced to death if they commit murders unconnected with the state of their equation with their family and friends. The passing of the sentence of death must elicit the greatest concern and solicitude of the judge because, that is one sentence that cannot be recalled."

In a number of other cases, judgments record the human failings of judges who tend to jump to conclusions. Thus in *Jagga Singh v. State of Punjab* (AIR 1995 SC 135), the Supreme Court was so shocked with the nature of the prosecution case and the decision of the High Court not to impose the death penalty, that it suo-moto issued a notice of enhancement. However, after examining the evidence on its merits, the Supreme Court decided to restore the acquittal as directed by the trial court. Similarly in *Sabal Singh and Others v. State of Rajasthan* [(1978) 4 SCC 448], the judgment honestly records: "At first flush, on seeing only the number of persons who lost their lives at the hands of the appellants, our instinctive reaction was to reject summarily at the threshold, all arguments sought to be advanced for commutation of the death sentence awarded to the appellants. But after hearing fully the Counsel on both sides and taking into consideration all the circumstances of the case, we have reached the conclusion that the death sentence … should be commuted."

In these cases the particular judges recognised their errors and presumptions before the end of the proceedings, perhaps making it easier to be honest. However the number of cases in which recognition of error might have come with the distance of time are not known. If judges who turn abolitionist after their term on the Bench are any indicator, it would certainly be a worrying sign for the Indian criminal justice system given the number of statements made by former judges about the need to abolish capital punishment.

The 'judicial murder' of Kehar Singh

The assassination of the then Prime Minister of India, Indira Gandhi on 31st October 1984 by two of her bodyguards from the Delhi Police was the backdrop to a judgment of the Supreme Court in *Kehar Singh and ors. v. State (Delhi Administration)* [(1988) 3 SCC 609]. The killing was linked to her decision to use military force to remove a separatist leader and a number of his armed followers from the Golden Temple at Amritsar – the most sacred temple of the Sikhs. The trial of those accused of her assassination took place in a special court inside the jail premises and all three accused were sentenced to death.

The Supreme Court judgment in *Kehar Singh and ors. State (Delhi Administration)* records that two of the assassins – Beant Singh and Satwant Singh – immediately laid down their weapons and surrendered after shooting Mrs. Gandhi and that they were then taken away by paramilitary personnel to a guard room where they were both shot. Beant Singh died of bullet injuries while Satwant Singh survived. He was subsequently sentenced to death and executed in Delhi's Tihar Jail on 6th January 1989.

Executed along with him was Kehar Singh, who was convicted for being a conspirator in the attack. The evidence against him was scant: that he was related to and frequently visited Beant Singh. A 'vital' piece of evidence relied on by the Courts was the testimony of Beant Singh's wife Bimla Khalsa as to a 'secret conversation' between Kehar Singh, Satwant Singh and Beant Singh on the roof of Beant Singh's house that lasted 15-18 minutes on 17th October 1984. While the content of the conversation itself was not known, the Supreme Court observed, "This kind of secret talk with Beant Singh which Kehar Singh had, is a very significant circumstance … These talks as proved by Bimla Khalsa go a long way in establishing Kehar Singh being a party to the conspiracy." The Supreme Court also relied heavily on a trip made by both these accused with their families to the Golden Temple at Amritsar, noting, "The attempt of these two persons to keep themselves away from the company of their wives and children (for about 3-4 hours) speaks volumes about their sinister designs." The Supreme Court also found the conduct of Kehar Singh after the assassination important. A witness testified that when Kehar Singh was informed about the news of Mrs. Gandhi's assassination in his office he replied, "Whosoever would take confrontation with the Panth, he would meet the same fate." According to the Supreme Court, "This remark shows his guilty mind with that of Beant Singh."

It is arguable whether the circumstances mentioned above formed a "chain of evidence so complete as to not leave any reasonable ground for the conclusion consistent with the innocence of the accused" and showing "that in all human probability the act must have been done by the accused."

The Court however concluded that, "The manner in which she was mercilessly attacked by these two persons on whom the confidence was reposed to give her protection repels any consideration of reduction of sentence. In this view of the matter, even the conspirator who

inspired the person who actually acted does not deserve any leniency in the matter of sentence."

While a fourth accused – Balbir Singh – was saved from the gallows by the Supreme Court (see 6.1.1 above), Kehar Singh's execution was described by most in the Indian press as 'judicial murder.' Former Justice V.M. Tarkunde of the Bombay High Court said, "the evidence against him was so meagre that it would not support, as the saying goes, the hanging of even a dog." Lord Gifford, a Queen's Counsel and member of the House of Lords in Britain issued a statement observing, "It is particularly shocking that a man should be executed on the basis of such evidence, which is at its highest, ambiguous and speculative" (Amnesty International, *India: The Death Penalty*, London: 1989).

7. Additional concerns about the fairness of trials

Article 14 of the ICCPR sets out a range of rights relating to the right to fair trial. These include the right to be presumed innocent until proved guilty in accordance with law; the right to be informed promptly of the nature and cause of the charge against you; the right to be tried without undue delay; and the right to have the assistance of an interpreter where necessary, amongst others. With the exception of special anti-terrorist legislations, Indian law largely reflects the rights set out in international law. This study does not go into detail about whether all these rights have been provided in the capital cases examined. Given that the study is based on Supreme Court judgments and not a detailed examination of the trial processes of the various cases, it would be impossible to make an assessment as to whether all the rights to a fair trial have been adhered to – for example whether adequate time and facilities had been provided to prepare a defence [Article 14(3)(b)]. Such a study would be invaluable. However, the Supreme Court judgments themselves point to the manner in which some of these rights have been denied. The right not to be compelled to testify against yourself or confess guilt has been dealt with elsewhere in this study (see 6.1.1 above), as have issues around the presumption of innocence (see 6.2 above). This chapter deals with the right to legal assistance [Article 14(3)(d), and the right to have conviction and sentence reviewed by a higher tribunal (Article 14(5)] as well as the manner in which rights to fair trial have been eroded through provisions in special anti-terrorist legislation. In addition, it comments on the right set out in Article 14(6) to compensation in the event that a miscarriage of justice is found to have occurred.

7.1 Legal Representation

Article 14(3)(d) of the ICCPR requires that as a minimum guarantee, individuals should be entitled to have legal assistance assigned to them, without payment if necessary. Safeguard 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council in 1984, states, "Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those

contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to **adequate legal assistance at all stages of the proceedings** (emphasis added)." In 1996 the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary executions stated, "All defendants facing the imposition of capital punishment must benefit from the services of a **competent defence counsel** at every stage of the proceedings (emphasis added)."[77] Similarly, in resolution 1989/64, adopted on 24th May 1989, the UN Economic and Social Council recommended that UN member states strengthen further the rights of those facing the death penalty by "(a)ffording special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defence, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases."

It should not be necessary to underline the importance of adequate legal representation for those facing trial in capital cases, particularly at the earliest stages. For them it can literally be a matter of life or death. Crucially, the higher judicial fora hearing appeals are constrained by being able to consider only the evidence brought before the trial court. Though there are provisions before the High Court to issue directions for fresh evidence to be introduced, these are rarely used. Hence the quality of defence evidence at the trial stage is of utmost importance. If evidence has not been brought before the trial court, either due to poor legal defence or the lack of resources of the accused or for other reasons, it is almost impossible to rectify the situation when the case reaches higher judicial fora. It is not just evidence relating to the innocence or culpability of the accused which can be vital; equally, evidence with relevance to the court's consideration of mitigating factors when deliberating on sentence – i.e. social, personal, psychological or cultural information that provides context to the crime and demonstrates the character of the accused. The absence of such evidence in the sentencing process can seriously prejudice the way in which the case is dealt with through the remaining judicial process.

It is precisely the danger of poor legal defence seriously prejudicing the cases of persons accused of capital offences and resulting in the real possibility of unsound convictions and executions, that members of the Constituent Assembly pointed to when the Constitution was being drafted in 1949. This issue remains as germane today at the beginning of the twenty first century, as it was real then in the late 1940's.

Even before the 1973 CrPC codified the provision of legal aid in all Sessions Court cases (Section 304 CrPC), it has been reported that persons being tried for capital offences were often provided with lawyers by the Courts, though this was not as of right. In *Janardan Reddy and ors. v. The State* (AIR 1951 SC 124), the Supreme Court observed that though it appeared that the accused had no legal representation in the capital trial, there was no evidence that the accused had sought a lawyer and that the state had denied counsel. Nonetheless the Court

[77] *Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur.*, UN Doc. E/CN.4/1997/60, 24th December 1996, para.81.

stated that the court conducting the trial "should have taken some positive steps to assign a lawyer to aid the accused in their defence". However the Supreme Court also pointed out that the mere absence of legal representation would not amount to a vitiated trial unless the Court of appeal found that the accused was handicapped for want of legal aid.

No lawyer, No problem … Sentenced to death

In 1996/97 [exact date not known], four persons were sentenced to death by a trial court in Tamil Nadu for the kidnapping and murder of a ten-year old boy. The legal aid lawyer who was appointed to represent two of the accused (Mohan and Gopi) did not even meet them or attend the court proceedings and subsequently the accused opted to conduct their own defence. A private lawyer was hired by Mohan but he too did not appear on a single day of the trial since the Court dismissed an application that he should be remunerated at par with Public Prosecutor. With even the lawyer for the fourth accused not appearing in court, only one accused had a lawyer during the proceedings in the capital trial. After the examination of three prosecution witnesses, the accused Mohan and Gopi found themselves unable to conduct the cross-examination and wrote to the High Court seeking adjournment of the trial till they were able to engage lawyers. However, on the basis of a report by the trial judge, the High Court observed that this was merely an attempt at "wantonly putting spokes in the expeditious conduct of the trial" and "trial can be proceeded with since accused are defending themselves. They have thwarted the legal aid offered at their risk." The trial continued and the accused themselves cross-examined the prosecution witnesses. Of a total of 59 prosecution witnesses, three turned 'hostile' while the accused found themselves unable to examine many others – these included the doctors who conducted the cross-examination and therefore supported vital medical evidence. The trial court sentenced all the four accused to death. The High Court refused to intervene, rejecting the argument that they had not received a fair trial on the basis that the accused had rejected their lawyers and "full and adequate opportunity had been given to the accused to defend themselves in the case."[78]

On its part the Supreme Court refused to even go into the question of a fair trial, admitting the special leave petition on the issue of sentence alone. The judgment in *Mohan and ors. v. State of Tamil Nadu* [(1998) 5 SCC 336] contains no discussion of the absence of a lawyer. Even though the Supreme Court commuted the sentence of two of the accused on the grounds that they played no role in the killing, the death sentences of Mohan and Gopi were upheld and both are presently on death row.

In *Ram Sarup v. The Union of India and Anr.* (AIR 1965 SC 247), where the petitioner had been sentenced to death by a military court martial, he alleged that he was not given permission to engage a civilian lawyer to represent him at the trial. The Supreme Court rejected the petition, observing that it could not find any record of such a plea being made by the petitioner and therefore there could have been no refusal and no denial of rights. In

[78] *Re Mohan and ors*, unreported Judgment of the Madras High Court in RT No. 9/96 and Cr. Appeal No. 55-58 and 64/97 discussed in S. Muralidhar, *Law, Poverty and Legal Aid*, LexisNexis Butterworths, Delhi: 2004 at 202.

rejecting the petition, the Court appeared unconcerned by the fact that the military court martial under which Ram Sarup had been tried only provided a non-law trained military officer as defence counsel.

In *Bashira v. State of Uttar Pradesh* (AIR 1968 SC 1313), where an accused was found to have been sentenced to death without effective counsel (counsel had been appointed on the morning that key witnesses were examined), the Supreme Court sent the case back to the trial court. Rejecting the state's plea that no prejudice had been caused to the accused, the Court stated that, "In our opinion, in such a case, the question of prejudice does not arise when a citizen is deprived of his life without complying with the procedure prescribed by law." Yet in other similar cases the Court subsequently refused to accept similar pleas, finding that no prejudice had been caused (for example in *Husaina v. The State of Uttar Pradesh* (AIR 1971 SC 260), the Court rejected the plea that the lawyer was appointed on the morning that the first few witnesses were examined, noting that these were merely formal witnesses).

7.1.1 Adequate legal representation

With a large number of the accused in capital trials poor and illiterate (reflecting the general picture for the criminal justice system as a whole), even where individuals may be able to afford legal representation, the quality and ability, let alone experience of the counsel in capital cases is an unknown variable. This is particularly true for legal-aid counsels.[79] The lottery that is the death penalty is thus not restricted to prosecution and sentencing alone, but is vitally influenced by the competence of legal counsel.

The cases discussed below reveal the poor representation that accused persons in capital trials have been provided. These range from lawyers ignoring key facts of mental incompetence, omitting to provide any arguments on sentencing or even accepting the majority age of the accused despite evidence to the contrary. Here too these facts have come to light only because they have been observed by the Supreme Court in their judgments. As demonstrated by the case of Mohan and Gopi (see box above), the Supreme Court may itself have chosen to disregard evidence of the absence or ineffectiveness of counsel, leading the authors of this

[79] It is widely understood that due to poor remuneration, the majority of legal aid counsels are inexperienced and/or unsuccessful lawyers (the Supreme Court Legal Services Committee is perhaps the rare exception). The Legal Services Authorities Act, 1987 which entitles a person in custody to avail of legal aid was not enforced by the government until November 1995 and its effectiveness has to date been limited. There is no system of legal counselling in police stations or prisons and the legal aid rules do not give the accused the choice of a lawyer or provide for a change of lawyer if the accused is not satisfied. The fees provided for by most states are extremely low and never attract competent lawyers to offer their services (Though fees vary from one High Court to another, they are largely inadequate. For example the fee prescribed by the Calcutta High Court is Rs. 60 per day for a senior lawyer and Rs. 30 per day to the junior for appearing in the sessions court. For districts outside Calcutta the fee is reduced to Rs. 40/ Rs. 20. It is also pertinent that the stated fees are for a 'full day' – where the case is heard for more than 3 hours. Where a hearing falls short of 3 hours, half the fee is paid).

study to conclude that the number of accused in capital trials who may have been served by inadequate counsel is probably high but remains unknown.

In the case of *Vivian Rodrick v. The State of West Bengal* [(1969) 3 SCC 176], the accused had shown signs of an unsound mind during the trial and it had been postponed temporarily. His condition deteriorated again during the hearing of his appeal before the High Court but (as noted by the Supreme Court), his defence lawyers urged that his mental state should not be taken into account by the Court and that the appeal should be heard and dismissed on merits. The Supreme Court subsequently accepted the plea that the counsel appointed by the state had not interviewed or communicated with the accused and therefore had no information about his mental condition, while the accused himself had been given no information about the appeal which had taken place without his knowledge and without any instruction from him. The Court observed, "the hearing of the appeal, in which sentence of death was challenged, when admittedly the accused-appellant was of unsound mind, must be considered to have caused serious prejudice to the accused resulting in failure of justice" (see also Section II.3.4 above). Thirty years later, the Supreme Court again raised concerns about the mental health of the accused and legal counsel's failure to address this issue during the trial or appeal proceedings. In *Durga Domar v. State of M.P.* [(2002) 10 SCC 193], the Court noted that the accused relied on legal aid counsel in both the lower courts and that therefore, "he would not have had occasion to even communicate to his counsel and consequently the counsel who had defended the case would not have had any occasion to ascertain the mental disposition of the accused whether at the relevant time or during the succeeding periods." Given such facts, the Supreme Court itself directed that the accused be kept under observation in a hospital and a report on his mental condition be submitted. This assumption by the Supreme Court that because the accused was relying on legal aid counsel he would not have had an opportunity to communicate in person with them is in itself shocking.

In *Sheikh Ishaque and ors. v. State of Bihar* [(1995) 3 SCC 392], the Supreme Court observed that the High Court had upheld the death sentences stating that, "No argument was made by the learned counsel for the appellants with regard to the sentence." While the Supreme Court did chastise the High Court on failing in its duty to appreciate the factors independent of the arguments led, it did not reflect on the question of poor legal representation.

A number of the cases referred to in II.6 raise questions about the quality of defence counsel as much as concerns about judicial fallibility. The case of *Harbans Singh v. State of Uttar Pradesh* [(1982) 2 SCC 101] for example raises questions about the defence counsel's competence in failing to bring to the court's attention the inconsistency with which the sentences of three different accused were dealt with (see Section 6.3 above). In the case of *Ram Deo Chauhan @ Raj Nath v. State of Assam* (AIR 2001 SC 2231), the failure of the defendant's state-appointed counsel to raise the issue of his young age prior to the review petition being heard by the Supreme Court calls into question counsel's competence. In the Court's minority judgment recommending commutation, it was observed that, "It is reasonable to presume, in such circumstances, the amicus curiae or the advocate appointed on State brief, would not have been able even to see the petitioner, much less to collect

instructions, from him." The Court also observed that a doctor examined as a court witness in the trial had ascertained the age of the accused to be 15-16 years at the time of incident and there was also a school register showing his minority. It was also noted that the High Court had avoided the question of age as the counsel appointed on state brief conceded that the petitioner was above the age of 20. "How could he have conceded on such a very crucial aspect, particularly when that counsel was not engaged by the party himself," lamented the Supreme Court, observing that even the amicus curiae appointed by the Supreme Court did not raise this ground in the appeal. Some years earlier, in *Suresh v. State of U.P.* [(1981) 2 SCC 569], the Supreme Court had dismissed the plea that the accused had been 13 years old at the time of the crime, arguing that "Sessions Court would not have failed to notice that fact and it would be amazing that the appellant's advocates in the courts below should not advert to it though the minutest contentions were raised in arguments and subtle suggestions were made to prosecution witnesses in their cross-examination."

The apparent lack of interest of legal counsel even in capital cases is a serious concern. In *Ranadhir Basu v. State of West Bengal* [(2000) 3 SCC 161], the cross-examination of a key witness-approver was not attended by the accused's counsel and therefore the vital testimony of the approver went unchallenged. In *Bhagwan Swarup v The State of U.P.* (AIR 1971 SC 429), the Supreme Court was informed that the petitioner had not been represented in the appeal before the High Court as his lawyer was busy in another court and arrived too late to make his arguments. In *State of U.P. v. Brahma Das* [(1986) 4 SCC 93], one of the respondents applied for a review of a previous order of the Court in the same case (*State of U.P. v. Ballabh Das and ors.* [(1985) 3 SCC 703]) on the grounds that the counsel who had appeared on his behalf and argued the matter in the Supreme Court had not been authorised to appear and had no authority to argue the matter on his behalf.

Even though the question of whether an accused has the right to choose counsel was debated as far back as the Constituent Assembly Debates when Dr. Ambedkar (credited as the chief architect of the Constitution of India) argued for the need to recognise the issue of choice, the current law does not give the accused any choice with regard to legal-aid counsel. Even in the recent high-profile case in which the accused were charged on various counts of terrorism, waging war and murder etc related to the attack on the Indian Parliament in 2001 (*State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru* [(2005) 11 SCC 600]), the question of choice as also that of legal representation has been raised.

In the special designated anti-terrorist court trying the case, a lawyer was appointed to represent Mohd. Afzal Guru but he refused to take up the case. Another lawyer was appointed but after framing of charges she too withdrew, stating that she was now representing another of the accused. A third lawyer who was previously assisting the second lawyer as "her junior" was continued as amicus counsel by the Court which also observed that four other lawyers whom the accused requested were not available to take up the case. Though the Supreme Court noted in its judgment that the junior lawyer was continued with, "especially in view of the fact that he had experience of dealing with TADA cases," it does not refer to any such cases and ignores the relevance of the 'junior' position. In fact the lawyer who represented

Mohd Afzal Guru in the trial court had merely assisted in TADA trials and never actually conducted a defence in any anti-terrorist trial, much less one of this unprecedented significance.

Prisoners executed, lawyer disbarred

The judgment of the Supreme Court in *Vikas Deshpande v. Bar Council of India and ors.* (AIR 2003 SC 308) tells a tragic tale indeed.

Ramrao Chandoba Jadhav, Vidyadhar Ramrao Jadhav, and Chandrakant Ramdeo Jadhav were tried for the murder of six persons. They were represented by amicus curiae lawyers appointed by the Court but were sentenced to death by the trial court on 30th August 1991. While in prison the accused were contacted by a lawyer who offered to represent them in the appeal without a fee, stating that this case would build his reputation. Upon their agreement, the lawyer obtained their thumb impression and signatures on the 'vakalatnama' (authorisation to represent). On 10th October 1991 the lawyer again obtained their signatures on some stamp papers which the accused signed in good faith as they had no information on the contents. Their death sentence was confirmed by the High Court in January 1992 and on 16th February 1992 the lawyer informed the accused that their lands had been sold on the basis of the documents authorising him to do so and that he had kept the money towards the fees due to him for the appeal.

A complaint of professional misconduct was made to the Bar Council of Maharashtra and Goa by the accused and this was eventually transferred to the Bar Council of India. While this matter was being heard, the complainants were executed on 16th April 1993 (it is not clear whether they appealed to the Supreme Court or the Court dismissed the appeal summarily as the judgment of the Court is unreported). The above facts came before the Supreme Court when the lawyer challenged the decision of the Bar Council that found him guilty of gross professional misconduct. While the Supreme Court was duly outraged and upheld the decision to bar the lawyer from further practice as also to award Rs. 25,000 as compensation, it was largely silent on the question of legal representation and conflict of interest, which may have played a vital role in the failure of the appeal before the High Court.

While such an extreme case cannot be said to represent the profession in its entirety, given the execution of three persons who were represented by counsel who was found guilty of cheating them, it might be enlightening to examine the proceedings in the High Court to determine whether the accused received an adequate and competent defence, and even if they were innocent of the charges of murder.

Discussing the cross-examination of the witnesses, the High Court noted that the records reveal that the cross-examination of three of the accused was done by accused Afzal himself and he was further given an opportunity to personally cross-examine all the accused from PW 20 – 80. Even though the High Court observed that "from hindsight it is easy to pick holes in

the cross-examination conducted," it concluded that, "applying the test in Strickland's case [whether the counsel's representation fell below an objective standard of reasonableness], it cannot be said that it is a case of constructive denial of counsel to accused Mohd. Afzal" [*State v. Mohd. Afzal and Ors.* (2003 VII AD (Delhi) 1)]. The Supreme Court too observed that even though the accused had reiterated dissatisfaction with his counsel in the middle of the trial (after PW15 was cross-examined), "we do not think that the Court should dislodge the counsel and go on searching for some other counsel to the liking of the accused. The right to legal aid cannot be taken thus far."

While arguably a black-letter reading of the present position of Indian law may exclude the issue of choice of legal-aid counsel, it is regrettable that even in a trial as politically charged and sensitive as the Parliament Attack case, it was not found fit to ensure legal representation of the accused's choice or of the highest quality. That Mohd. Afzal Guru was sentenced to death after being represented by a lawyer who had previously never defended a person accused of a charge of terrorism and whom the accused expressed dissatisfaction with during the trial itself, raises doubts about the seriousness of the state in upholding the substance of the right to legal counsel and the right to a fair trial.

7.1.2 Legal Aid at all stages

Another issue is the question of whether access to legal aid should not just be provided at the trial stage and at initial appeal. The presence of legal representation and legal aid immediately after arrest and during remand and bail proceedings can play a vital role in preventing torture and ill-treatment and thereby illegal confessions (particularly in cases where detainees are detained under particular anti-terrorism legislations where the law allows for long periods in police detention and confessions made to a police officer to be used as evidence). Furthermore, the need for legal representation and legal aid during the process of preparation of mercy petitions and in filing writ petitions in the Supreme Court or the High Courts (after completion of the appeals stage) has not been adequately addressed, either by the state – which has responsibility for ensuring provision of such services – or by the Supreme Court in its adjudication of individual cases. The Supreme Court's dismissal of an affidavit filed by a prisoner in response to the Court's request for information relevant to sentencing in *Kuruvi alias Muthu v. State of Tamil Nadu* (AIR 1978 SC 1397) (after the Court had found that there had been no pre-sentencing hearing at trial stage) ignored the fact that the prisoner would have been given no legal aid or assistance in preparing the affidavit. The Court found that the sole ground raised of poverty and the prisoner being the sole provider of the family was insufficient to warrant commutation and upheld the sentence of death.

In *Pratap v. State of Uttar Pradesh and Ors.* [(1973) 3 SCC 690], the trial court had sentenced the accused to life imprisonment for murder under Section 302. However, on appeal, the High Court enhanced the conviction and sentence to one of death under Section 303 after finding that the accused had been on parole under a life sentence at the time of the murder (which crime invited a mandatory sentence of death at the time). The Supreme Court majority agreed with the High Court's conclusion and upheld the sentence. Besides various

other serious objections, the dissenting judge on the Supreme Court Bench pointed out that the accused did not have legal advice or assistance during the enquiry by the Sessions Judge into whether he had been on parole and that the judge had in fact relied heavily upon the admission of the accused in arriving at his conclusion. The minority judge pointed out that given the mandatory death sentence required by Section 303 which was bound to follow subsequent to a positive finding in the enquiry, the Sessions Judge's enquiry was effectively deciding upon a question of life and death in the absence of legal counsel to the accused (see also Section 6.2.5 above).

In *Babubhai Udesinh Parmar v. State of Gujarat* (MANU/SC/8722/2006/ and AIR 2007 SC 420), a Supreme Court Bench observed that the accused was convicted of rape and murder largely on the basis of a judicial confession. The Supreme Court commuted the sentence of death, finding the confession involuntary and untrue and noted that no legal aid had been provided to the accused until long after the confession had been made. The Court observed, "He had no opportunity to have independent advice. We may, however, hasten to add that it does not mean that such legal assistance must be provided in each and every case but in a case of this nature where the appellant is said to have confessed in a large number of cases at the same time, the state could not have denied legal aid to him for a period of three years."

Though the Supreme Court deliberately stopped short of arguing that legal aid should be provided immediately after arrest for crimes for which the death penalty could be imposed, it is hoped that this might be a step in the right direction towards fairer trial processes. In this regard the UN Human Rights Committee has stated, "The assistance of counsel should be ensured, through legal aid as necessary, **immediately on arrest and throughout all subsequent proceedings** to persons accused of serious crimes, in particular in cases of offences carrying the death penalty (emphasis added)."[80]

7.2 The right to appeal – the absence of automatic appeal to the Supreme Court

There is no automatic right of an accused to appeal to the Supreme Court in capital cases. This is so even where the trial court may have awarded life imprisonment but the High Court has enhanced the sentence to death [see Section 1.2 above]. The sole exception in law is made for cases where the High Court overturns an acquittal and awards the death penalty, where Section 379 CrPC provides for mandatory appeal to the Supreme Court.

The issue of whether the law should provide for a mandatory right to appeal to the Supreme Court in all capital cases was a subject of discussion as early as the Constituent Assembly Debates in 1949 (see Part I above for an account of some of the debates). However, it was not provided for in the Constitution or in the later amended CrPC of 1973. In his dissenting judgment in *Bachan Singh v. State of Punjab* (AIR 1982 SC 1325), Justice Bhagwati stressed

[80] Concluding observations of the Human Rights Committee: Trinidad and Tobago, UN Doc. CCPR/CO/70/TTO, 3rd November 2000, para. 7.

the need for an automatic review of death sentences by the Supreme Court in all cases where the death sentence was confirmed or awarded by High Courts.

Given the number and nature of cases discussed in Chapter 6 above which indicate errors made in the judicial handling of capital cases, the present denial of the right to appeal to the Supreme Court in capital cases raises serious concern. Of particular concern of course are cases where the High Court has enhanced the sentence to death since there is no automatic judicial review of the decision to award this final sentence.

In its 14th Report, the Law Commission of India had rejected the idea of mandatory appeal to the Supreme Court, arguing that a High Court's power to grant leave to appeal and the Supreme Court's wide powers of entertaining special leave petitions were sufficient safeguards.[81] However, crucially, the Law Commission's position has changed, and in its 187th Report in 2003 it recognised the need for a mandatory appeal as it noted that the death penalty "is qualitatively different from any other punishment and is irreversible and there is scope for correcting an error."[82] In fact, along with recommending the statutory right of appeal, the Law Commission's report even recommended that in all cases where the death sentence had been awarded, the Supreme Court Bench should consist of at least five judges. While this does not go as far as Justice Bhagwati's call (made in his dissenting judgment in *Bachan Singh*) for the whole court to sit on a death sentence case, the recommendations of the Law Commission on these points must be welcomed as providing higher safeguards and therefore decreasing the likelihood of arbitrariness.

The Law Commission's previous position of trust in the power of the Supreme Court to entertain special leave petitions was arguably misplaced; it is perhaps little wonder that it has changed its position since. Of course it is impossible to know how many petitions have been summarily rejected by the Supreme Court: given the standard one-line orders, dismissals of special leave petitions are largely unreported. A number of subsequent Supreme Court judgments note that previous appeals have been rejected 'in limine' by the Court [see *Hate Singh, Bhagat Singh v. State of Madhya Bharat* (AIR 1953 SC 468), *Kartar Singh v. State of Punjab* (AIR 1977 SC 349), *Shivaji Jaising Babar v. State of Maharashtra* (AIR 1991 SC 2147) and *Gurdev Singh and anr. v. State of Punjab* (AIR 2003 SC 4187)]. Given the gap between the number of reported judgments found for this study and the estimated thousands of persons who have been executed in India since 1950, it is likely that a large number of petitions have been dismissed *in limine* over the period covered by this study.

[81] 'Reform of Judicial Administration,' report of the First Law Commission, 1958.
[82] 'Mode of Execution of Death Sentence and Incidental Matters', report of the 187th Law Commission, 2003. The report records that approximately 88% of the responses in a survey conducted by the Law Commission were in favour of appeals as of right to the Supreme Court in cases where the accused was awarded the death sentence

The case of Sheikh Meeran, Selvam and Radhakrishnan is revealing.[83] In this case a Special Leave Petition was filed by the accused during the summer recess of the Supreme Court as the date of execution had been set for 15th July 1999. A vacation Bench however dismissed the petition on a preliminary hearing of a few minutes on 21st June 1999, observing that the murder was brutal and there was no justification in the applications. A subsequent review petition against the order was also dismissed.[84]

Rare exceptions of dismissed petitions that are reported are *Joseph Peter v. State of Goa, Daman and Diu* [(1977) 3 SCC 280], *Paras Ram and ors. v. State of Punjab* [(1981) 2 SCC 508] and *Ujagar Singh and Anr. v. State (Delhi Administration)* [(1979) 4 SCC 530]. Notably, in the latter judgment, the Supreme Court itself observed (while dismissing the petitions) that, "no question of law of general public importance is involved in these petitions. It is time that it was realised that the jurisdiction of this Court to grant special leave to appeal can be invoked in very exceptional circumstances."

While the Supreme Court does of course hear appeals in a large number of capital cases where a mandatory right to appeal has not been provided in law, this is a discretionary jurisdiction and what is therefore of concern is those few that might slip the net for whatever reason. This is why the recommendation to make appeal to the Supreme Court in all capital cases mandatory in law warrants serious and urgent consideration.

Military 'injustice'

The death sentence can be awarded by a General Court Martial constituted under various laws relating to the military and para-military forces (see 1.2 above). These sentences are required to be confirmed by the central government or by other executive authorities only and there is no provision for appeals to be filed. Even the right to special leave to appeal to the Supreme Court (under Article 136(1) of the Constitution) is prevented by Article 136(2) of the Constitution. As of now the few cases relating to Court Martials that have come up before High Courts and the Supreme Court have been brought under the writ jurisdiction of these courts. The need for automatic review of death sentences handed down by Court Martials or of a mandatory right to appeal is obvious, particularly given the even lower procedural safeguards that operate in such Courts. The 187th Report of the Law Commission (2003) has recommended that a right of appeal to the Supreme Court be provided for in all legislation governing military and para-military trial proceedings in which the death penalty can be awarded.

7.3 Special Anti-Terrorist Legislation

[83] Unreported Order dated June 21, 1999 in S.L.P. (Crl) No.1990-91/99 – *Sheik Meeran & 2 Ors. V. State of Tamil Nadu.*

[84] For a discussion of this case, see S. Muralidhar, 'Hang them now, hang them not: India's travails with the death penalty, 40th Journal of the Indian Law Institute, 1998.

In all the special anti-terror laws promulgated over the past three decades, a common feature has been trial in special courts with procedural safeguards relaxed. Of major concern in terms of the fairness of trials have been: the broad definition of 'terrorist acts' for which the death penalty can be imposed; insufficient safeguards on arrest; provisions allowing for confessions made to police to be admissible as evidence; obstacles to confidential communication with counsel; insufficient independence of special courts from executive power; insufficient safeguards for the principles of presumption of innocence; provisions for discretionary *in camera* trial; provisions for secrecy of witnesse'' identity; and limits to appeal (in the case of the Terrorist Affected Areas Act and TADA, appeal was only to the Supreme Court).[85] The relaxed safeguards may explain why a number of cases that have been tried under TADA were high-profile high-pressure cases that have had nothing at all to do with 'terrorism' (see below). Though the Prevention of Terrorism Act (POTA) 2002 was a marginal improvement upon TADA (which lapsed in 1995) and the amended Unlawful Activities (Prevention) Act[86] is perhaps less draconian compared to POTA, there is little doubt that the use of such statutes places a heavy pressure on the independence of the judiciary and raises serious questions about the fairness of trials.

The cases referred to below not only represent capital trials in which safeguards for fair trial have been inadequate, but they also highlight concerns that the suspension of safeguards has been resorted to far too broadly, encompassing cases that should not have been tried under special legislation at all. The fact that the death penalty is involved only serves to increase this concern.

The Terrorist Affected Areas Act 1984, in force in parts of Punjab in the 1980s, limited rights to a fair trial to those detained in designated areas. Yet the cases in which capital punishment was awarded by Special Courts under this Act reveal how the statute had little to do with 'terrorism.' Thus in *Malkiat Singh and ors. v. State of Punjab* [(1991) 4 SCC 341], the Supreme Court dealt with a death sentence awarded by a special court for a murder that took place as a result of a fight at a liquor store over payment and credit. The Supreme Court was able to commute the sentence on a technical ground: violation of the mandatory provision of Section 235(2) CrPC, as the sentence and conviction had been awarded on the same day. The Court did not remand the case back to the trial court, arguing that such remand would delay the proceedings further, observing that the accused had already spent over six years under sentence of death. Similarly in *Teja Singh v. Mukhtiar Singh and ors.* (AIR 1995 SC 2411), another case tried under the Terrorist Affected Areas Act, the Supreme Court refused to enhance the punishment to death – rejecting an appeal by the complainant – on the grounds

[85] See for example, Amnesty International, *India: The Terrorist and Disruptive Activities (Prevention) Act: The lack of 'scrupulous care'*, November 1994, AI Index: ASA 20/39/94; People's Union for Democratic Rights (PUDR), Lawless Roads: A report on TADA 1985-1993 (September 1993). Amnesty International, *India: Briefing on the Prevention of Terrorism Ordinance*, November 2001, AI Index: ASA 20/049/2001.

[86] The Unlawful Activities (Prevention) Act of 1967 underwent wide-ranging changes in 2004, shortly after POTA was repealed.

that this was not a 'rarest of rare' case. Here too the case had nothing to do with 'terrorism' but involved an ongoing dispute between two families.

Even after the enactment of a countrywide Terrorist and Disruptive Activities (Prevention) Act in 1985, a number of cases that came before the Supreme Court did not involve the acts of 'terrorists' as the legislature had envisaged. In the earliest case before the Supreme Court – *Dilave Hussain s/o Mohammadbhai Laliwala etc v. State of Gujarat and anr.* (AIR 1991 SC 56) - a Special Court had sentenced five persons to death for their role in the communal riots that occurred in March 1985 in Gujarat. All five were acquitted by the Supreme Court, which instead of highlighting the dangers of using draconian legislation in such cases instead preferred to counsel the communities of the area to avoid 'senseless riots.' In *Girdhari Parmanand Vadhava v. State of Maharashtra* [(1996) 11 SCC 179], a Special Court had convicted the accused for murder and 'terrorist offences' for the kidnapping and holding to ransom of a young boy in Deolali – Nasik in Maharashtra. The state of Maharashtra appealed to the Supreme Court for enhancement of the sentence to death. While the Supreme Court refused to enhance the sentence on the grounds that this was not a 'rarest of rare' case, here again the Court did not question the use of special anti-terrorist legislation for what appeared to be 'ordinary' kidnapping and murder.

Arguably the first capital trial involving 'terrorism' that came before the Supreme Court was in *State of Maharashtra v. Sukhdeo Singh and anr.* [(1992) 3 SCC 700]. The accused had been convicted and sentenced to death by a Special Court for the assassination of a former Chief of the Army Staff (one of the accused had made oral and written statements admitting the killing while the other accused made some incriminating statements in Court). Though the Special Court did not find them guilty of 'terrorist' offences under TADA, it did convict them of murder. The Supreme Court did not enter into the question of whether the offences were 'terrorist' since it upheld the death sentence for murder alone, observing that there was no sign of remorse or repentance in this case and on the contrary the killers appeared to be proud of having killed the retired General. Similarly in another TADA case – *State of Gujarat v. Anirudhsingh and anr.* (AIR 1997 SC 2780) – The Supreme Court overturned the acquittal of an accused for the killing of a sitting member of the legislative assembly. The Court did not however sentence him to death, despite commenting that the killing was a 'heinous and gruesome offence,' on the grounds that more than nine years had elapsed since the commission of the crime.

The Special TADA Court hearing the Rajiv Gandhi assassination case [unreported Judgment dated 28th January 1998 by Judge Navaneetham, Designated Court – I, Poonamalee in Calendar Case no. 3 of 1992] sentenced all 26 accused persons to death for committing terrorist acts as also for conspiracy in the murder of the former Prime Minister and a number of others. The judge, giving common 'special reasons' for all the death sentences, referred to the brutal killing by a highly organised foreign terrorist organisation (LTTE) which brought the Indian democratic process to a grinding halt as the general election had to be postponed. On appeal however, the Supreme Court acquitted nineteen of the accused of the murder and terrorist charges and convicted them of minor charges. Of the seven remaining found guilty of

murder, four were sentenced to death, including one by a non-unanimous decision (*State through Superintendent of Police CBI/SIT v. Nalini and ors.* [(1999) 5 SCC 253], see also Section 6.2.5 above).

Even though the convictions of seven for the murder of the former Prime Minister of India were upheld by the Supreme Court, the Court acquitted them of all charges of terrorism, finding it impossible to conclude that this was part of any plan to overthrow or overawe the Government of India. During the hearing of the review petitions (*Suthendraraja alias Suthenthira Raja alias Santhan and ors v. State through DSP/CBI, SIT Chennai* [(1999) 9 SCC 323]), the state appealed, seeking the reinstatement of convictions under TADA, but this appeal was once again rejected by the Court. While obviously welcome, the inconsistency with which TADA has been imposed is glaring.

In *State through CBI, Delhi v. Gian Singh* [(1999) 9 SCC 312], the accused had been convicted by the designated court under Section 302 IPC as well as Section 3(2)(i) of TADA 1985 and awarded the mandatory death sentence under the latter in a case relating to the assassination of a prominent Sikh leader, Sant Longowal, in 1985. The Supreme Court commuted the death sentence of the accused in this case, even though it had to jump through a number of hoops to avoid the mandatory death sentence under TADA 1985 (see also Section 5.2 above). In this case the accused had already spent 14 years in prison under sentence of death and the Supreme Court Bench of Justices Pattanaik, Kurdukar and Thomas was clearly uncomfortable about confirming such a sentence.

No such doubts entered the mind of the majority judges in *Devender Pal Singh v. State, N.C.T. of Delhi and anr.* [(2002) 5 SCC 234]. In a case where the prosecution relied virtually solely on a retracted confession by the accused, the majority Bench of Justices Pasayat and B.N Agarwal confirmed the death sentence imposed under Section 3(2)(i) of TADA, ignoring a number of key procedural safeguards that were not followed in the recording of the confession. Prof. Devinder Pal Singh Bhullar was sentenced to death by a designated Court in 2001 after being found guilty of involvement in the 1993 bombing of the Youth Congress Office in the capital, New Delhi which led to the deaths of many persons. He was arrested in 1995 at New Delhi's international airport for a minor passport offence after being deported from Germany where he had sought political asylum and it was the prosecution's case that he voluntarily confessed to his role in the bombing to the police. The various failings of the prosecution evidence were pointed out in a detailed dissenting judgment by the senior judge of the Supreme Court when hearing his petition. Justice M.B. Shah concluded that there was no evidence whatsoever to even convict Bhullar and that a dubious confession could not be the basis for awarding the death sentence.

Such concerns did not trouble the majority judges who waxed eloquent about the need to combat the "menace of terrorism" which was a matter of "international concern." The judgment refers to the attacks in the United States of 11th September 2001 and the attack on the Indian Parliament on 13th December 2001 (which took place while the Court was hearing the appeal) to show how grim the situation was. Amnesty International has previously pointed

out that observers believe that the heightened rhetoric about the threat of "terrorism" in India following that attack and a hardening of government policies may have influenced the decision of the Supreme Court. A review petition was dismissed by the same Bench, still split on the question of guilt (see 6.2.5 above). Devinder Pal Singh Bhullar's mercy petition remains pending before the President and he is presently on death row in Tihar Jail, Delhi.

The Parliament Attack Case and POTA

On 13th December 2001 five armed men attacked the Indian Parliament complex in New Delhi. Besides the attackers, nine others, including eight security personnel, were killed and another 16 others injured. On 18th December 2002, Syed Abdur Rahman Geelani, Mohammad Afzal and Shaukat Hussain Guru received death sentences for conspiring, planning and abetting the attack, while Afsan Guru alias Navjot Sandhu was sentenced to five years' rigorous imprisonment. The men were sentenced by a special court designated under the Prevention of Terrorism Act. This Act – which falls considerably short of international fair trial standards – was subsequently repealed by the Government of India in September 2004 on the grounds that it had been misused. In October 2003 the Delhi High Court acquitted SAR Geelani and Afsan Guru/Navjot Sandhu of all charges for lack of evidence, but upheld the other death sentences under POTA and conspiracy to murder. The Delhi High Court also enhanced the sentence for 'waging war' (Section 121 IPC) to the death penalty. On 4th August 2005 the Supreme Court altered the sentence of Shaukat Hussain Guru to ten years imprisonment and confirmed the acquittals of both Afsan Guru/Najvot Sandhu and SAR Geelani. With respect to Mohammad Afzal, the Supreme Court upheld the death sentence for conspiracy in the attack as also for 'waging war' but set aside his conviction for terrorist acts or membership of a terrorist organisation. Finding the case to be 'rarest of rare', the judgment asserted that, "The collective conscience of the society will be satisfied only if death penalty is awarded to Mohammad Afzal."

In an open letter to the Law Minister, Amnesty International had raised concerns about the fairness of the trial before its start.[87] Afzal had been forced by the police to "confess" during a press conference and a documentary supposedly showing his guilt and role in the attack was also screened on television during the trial. The trial itself was politically charged and it was reported that a large crowd of lawyers and activists of some political parties were chanting "Hang them, Hang them" outside the courtroom when the special judge was delivering his verdict on sentence. Questions of the adequacy of the state legal-aid representation available to Afzal have also been raised (see 7.1 above). Afzal's hanging was scheduled for 20th October 2006 but was not carried out, as his mercy petition is still pending for decision before the President. He remains on death row in Delhi's Tihar Jail.

[87] *India: Open Letter to Law Minister Jana Krishnamurthi about the forthcoming trial of Abdul Rehman Geelani and three others*, July 2002, AI Index: ASA 20/010/2002.

Even though TADA was allowed to lapse by Parliament in 1995 due to the large number of cases in which it was used against political opponents and other innocent persons, cases under TADA continue to be heard. Indeed the trial of one person accused in the Youth Congress office Blast case (with Devinder Pal Singh Bhullar) began only in 2006 after he was arrested by the Delhi Police.[88] Similarly, even though POTA has expired, cases under POTA continue in the courts and a large number of persons face the possibility of the death sentence under section 3(2)(a) of POTA. There is no known instance of a death sentence being awarded under the Unlawful Activities (Prevention) Act, 1967 following its amendment in 2004, although a few high-profile and politically charged trials where death sentences are a possibility are presently underway.

7.4 The right to compensation

In carrying out the current study of Supreme Court judgments, a large number of cases emerged in which acquittals were ordered by the Supreme Court following appeal. As highlighted above (see 6.1.2 above), of the 728 cases researched for this study, over 100 were found to have resulted in acquittals by the Supreme Court. What is striking about the judgments in these cases is that while the Supreme Court may have expressed its dismay at the wrongful conviction of individuals in acquitting them, it has never referred to the length of time that those individuals have spent in prison, some of that time on death row where solitary confinement is the norm.

Many of the cases have been referred to above in section II.6. In *Gambhir v. State of Maharashtra* [(1982) 2 SCC 351], the accused was acquitted after over seven years in prison of which he was under sentence of death for nearly three years. In *Abdul Sattar v. Union Territory, Chandigarh* (AIR 1986 SC 1438), the appellant was acquitted (on the grounds that his confession may not have been voluntary and there was little other evidence against him) after serving over ten years in prison. In *Rampal Pithwa Rahidas v. State of Maharashtra* [(1994) Supp (2) SCC 478], the Supreme Court acquitted five persons, severely criticising the police, but failing to refer to the fact that the innocent persons had spent ten years in prison – five of them under sentence of death, all in aid of the local police's attempts to avoid pressure to solve the case. Similarly, there was no reference to any need for any investigation or action to be taken against the erring police officers. In *Ravindra @ Ravi Bansi Gohar v. The State of Maharashtra and ors.* (AIR 1998 SC 3031), the appellants were acquitted by the Supreme Court for lack of evidence after spending eleven years under sentence of death. More recently, in *Parmananda Pegu v. State of Assam* [(2004) 7 SCC 779], the Supreme Court acquitted two accused, referring to a "miscarriage of justice," but failing to mention that they had spent more than five years in prison including nearly three under sentence of death.

Article 14(6) of the ICCPR requires that "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that

[88] 'Charges framed against accused in Bitta case', The Hindu, 24th September 2006.

there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him." There is no provision for compensation for miscarriages of justice in Indian law and it is clear that those acquitted in capital cases are simply released with no provision for their rehabilitation or other care.

8. Concerns about executive handling of capital cases

While focusing mainly on the consideration of mercy petitions in capital cases by the executive (powers of clemency), this chapter starts by briefly examining the role and impact of the executive in the judicial appeal process.

8.1 The role of the State in the appeal process

Given the tiered nature of the legal system, appeals play a crucial role in bringing to light infirmities in the judgments of the lower courts and allowing an opportunity for errors to be corrected. The decision of the state to appeal a judgment by a court obviously takes into account a large number of factors. One unofficial factor that appears to play a vital role however is the standing of the victim and the public profile of the case. While the appeal filed by the state in the Supreme Court against the acquittal by the High Court of two of the accused in *State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru* (AIR 2005 SC 3820) (Parliament Attack case) is perhaps understandable given the nature of the case itself, in a large number of cases where the state has appealed, connections between the victim and political leaders or parties often appear to have affected the state's decision rather than the merits of the case (see *Shamshul Kanwar v. State of U.P.* (AIR 1995 SC 1748) where the victim's family had close links with the state Labour Minister; *State of Jammu and Kashmir v. Hazara Singh and Anr.* (AIR 1981 SC 451) where the relatives managed to secure the intervention of the Chief Minister of the state).

In *Nidhan Singh and Ors. v. State of Punjab* (AIR 1981 SC 376), an accused was sentenced to death and his two sons were sentenced to life imprisonment by the trial court. The state of Punjab however sought enhancement of the sentence of the two sons in the High Court. The High Court however commuted the existing death sentence and in response the state again sought enhancement of the sentences in the Supreme Court. The Court observed that "certain important members of a political party" were interested in the case, indicating that this was behind the state's appeals for enhancement, and noting that the Counsel for the State did not even press for the enhancement of the sentence of the two sons thereby acknowledging the absence of any real merits in the appeal.

8.1.1 Impact of the State's failure to appeal

In *Kanauji v. State of Uttar Pradesh* [(1971) 3 SCC 58], two accused persons were acquitted by the trial court. However the High Court overturned the acquittal of one and sentenced him to death. The Supreme Court stated that it would not remark on the acquittal of the other accused as the state had not appealed her acquittal. This case indicates that whether or not an accused goes free, or is sentenced to life or to death, could be dramatically affected by the decision made by the state on whether to appeal the decision or not. The fact that such decisions of the state are often influenced by unofficial factors and there is no public record of how such decisions are reached leads to some concern. An opaque prosecutorial and departmental discretion at the appellate stage merely adds another layer of freakishness to an already arbitrary system of judicial sentencing.

On occasion, the Supreme Court has raised concern about the failure of the state to appeal. In *Kailash Kaur v. State of Punjab* [(1987) 2 SCC 631], a case in which a young wife was set on fire for dowry, the trial court convicted two of the accused and sentenced them to life imprisonment and acquitted another accused. The High Court subsequently acquitted another of the accused. The Supreme Court stated that as the state had not preferred an appeal concerning the High Court acquittal, they could not proceed with the issue even though they had "grave doubts about the legality, propriety and correctness of the decision of the High Court." Similarly in *Dharma v. Nirmal Singh Bittu and anr.* (AIR 1996 SC 1136), a rape and murder case where the trial court and High Court had both acquitted the accused, the Supreme Court observed that it was the complainant's persistence that had kept the appeals going while the state had chosen not to file an appeal at all. The Supreme Court ultimately sentenced the accused to life imprisonment.

8.1.2 Appeals for enhancement of sentence

The Supreme Court has on occasion taken a dim view of the apparent willingness on the part of the state and the lower courts to bow to public pressure for enhancing sentences to that of the death penalty. In *Ram Narain and ors. v. State of Uttar Pradesh* [(1970) 3 SCC 493], the Supreme Court chastised the High Court which had enhanced the sentence "moved by private complainant who was apparently inspired by considerations of private vengeance." More recently in *State of Andhra Pradesh v. T. Prasanna Kumar* (MANU/SC/0906/2002/ and JT 2002 (7) SC 635), the trial court awarded a death sentence for the rape and murder of a 16-year-old girl, but the sentence was commuted by the High Court. The state appealed for enhancement of the punishment but the Supreme Court found that the High Court arguments and sentence had been correct and proper and therefore upheld the sentence. The Supreme Court also noted the state's plea for relaxing the law in this case and awarding a death sentence, noting that, "Mr. G Prabhakar, learned counsel appearing in support of the appeal … contended that while strict letters of law may… to some extent relieve the respondent herein, but *society would be better off without these elements* (emphasis added)." In *Deepak Kumar v. Ravi Virmani and anr.* [(2002) 2 SCC 737], the Supreme Court observed that, "state's anxiety to put a man in the gallows is however not plainly understandable neither it is understandable as to the state's attitude being eye for an eye and tooth for a tooth – it is true that it has the responsibility to maintain law and order but the State on the other hand also

maintains reformatory schools and if the state has failed to bring the accused to book in a court of law can the state's failure be countenanced by the apex court?"

8.2 Executive Clemency

As set out in 1.2.4 above, once the judicial process has come to an end, there are two ways in which a convict can avoid execution by appealing to the executive. The first is a 'commutation'; an appropriate government can commute a death sentence under provisions of the IPC and CrPC. The second is a commutation or pardon granted by the President of India or the Governor of the relevant state under Articles 72 and 161 of the Constitution of India. This section of the current study looks at executive clemency through the lens of the Supreme Court which has on occasion referred to executive powers while emphasising the clear separation of powers between judiciary and executive.

With clear separation of powers emphasised in the Constitution of India, the scope for judicial review of executive action is limited. Where constitutional powers of clemency are involved, the extent of judicial review is limited further to extreme cases. This has been the position taken by the Supreme Court in a number of cases in which it has observed that the Court should rarely intervene in the exercise of the power of clemency by the Governor or the President. Though in a recent judgment in *Epuru Sudhakar and Anr. v. Govt. of A.P. and Ors* (AIR 2006 SC 3385), the Supreme Court referred to the large number of petitions challenging the grant of pardon or remission to prisoners, Amnesty International India and People's Union for Civil Liberties, Tamil Nadu & Puducherry are unaware of any case in which the Supreme Court has quashed the decision of the President/Governor granting clemency. However it has been reported that the Court has admitted and is presently hearing a petition by family members of the victim challenging the commutation of the death sentence of Ram Deo Chauhan by the Governor of Assam.

In *G. Krishta Goud and J. Bhoomaiah v. State of Andhra Pradesh and Ors.* [(1976) 1 SCC 157], the Court rejected a petition seeking review of the rejection of the clemency petition by the President, observing that with respect to actions of the President, the Court "makes an almost extreme presumption in favour of bona fide exercise" and that the petitioners had shown no reason for the court to consider the rejection of their application "as motivated by malignity or degraded by abuse of power." Even while rejecting the writ petition, the Court however sounded a note of caution and stated that the Court would intervene where there was "absolute, arbitrary, law-unto-themselves malafide execution of public power" and gave an example of the President gripped by communal frenzy and directing commutation on religious or community consideration alone. These parameters for judicial review were reiterated again in *Maru Ram v. Union of India and others* [(1981) 1 SCC 107] where the Constitutional Bench further asserted that the Courts would intervene in cases where political vendetta or party favouritism was evident or where capricious and irrelevant criteria like religion, caste and race had affected the decision-making process.

Another Constitution Bench of the Supreme Court in *Kehar Singh and Another v. Union of India and Another* [(1989) 1 SCC 204] reiterated that the order of the President and Governor could not be subjected to review on merits except within the limitations prescribed in *Maru Ram v. Union of India and others*. In a recent decision referred to above [*Epuru Sudhakar and Anr. v. Govt. of A.P. and Ors* (AIR 2006 SC 3385)], the Supreme Court has again clarified that the orders of the President or Governor can be impugned on the following grounds alone: that the order was passed without application of mind; malafide; passed on extraneous or wholly irrelevant considerations; that relevant materials have been kept out of consideration or that the order suffers from arbitrariness.

The Bench in *Maru Ram v. Union of India and others* had also suggested that it would be proper for the government to make rules for its own guidance in the exercise of these constitutional powers "keeping a large residuary power to meet special situations or sudden developments." The absence of such guidelines was challenged by the petitioners in *Kuljeet Singh alias Ranga v. Lt. Governor, Delhi and another* (AIR 1981 SC 2239) and though the Supreme Court Bench stayed all executions and sought a reply from the government on this point, barely two months later it appears to have changed its mind and noted that this broader question would have to await an 'appropriate occasion' [*Kuljeet Singh alias Ranga and another v. Lt. Governor of Delhi and others*, (1982)1 SCC 417; see 2.3 above]. In *Kehar Singh and Another v. Union of India and Another* [(1989) 1 SCC 204] however, the Court observed that, "it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines."

The present position with respect to government guidelines is evident from a reply to a question in Parliament on 29th November 2006 given by the Union Ministry of Home Affairs that, "no specific guidelines can be framed for examining the mercy petitions as the power under Article 72 of the Constitution is of the widest amplitude, can contemplate myriad kinds and categories of cases with facts and situations varying from case to case. However, the broad guidelines generally considered while examining the mercy petitions are personality of the accused such as age, sex or mental deficiency or circumstances of the case, conduct of the offender, medical abnormality falling short of legal insanity and so on."[89] Notably in *Maru Ram v. Union of India and others* the Court had also recommended that in the absence of any guidelines on exercise of clemency powers, the statutory limitation prescribed by Section 433A of the Criminal Procedure Code (that prisoners sentenced to life for specified grave offences or those who had their sentences from death commuted serve at least 14 years in prison) should also guide the constitutional powers of clemency.

In addition to the various factors above, in *Kehar Singh and Another v. Union of India and Another* [(1989) 1 SCC 204] a Constitution Bench of the Supreme Court asserted that the President could make a decision based on the facts of the case and even arrive at a different

[89] Reply by the Ministry of Home Affairs to unstarred question no. 815 on 29th November 2006 in the Rajya Sabha, See 'No specific guidelines for mercy pleas: MHA', The Times of India, 5th December 2006, at http://timesofindia.indiatimes.com/articleshow/712846.cms

conclusion from that recorded by the Court with respect to guilt or sentence. In the particular case of Kehar Singh who had pleaded innocence (see box in Section 6.4 above), the Court observed that the President had rejected the petition under the impression that he did not have powers to review the conviction and the Court directed that the mercy petition should be deemed to be pending and required renewed consideration.

Judicial Interventions in cases of delay in Mercy Petitions

Though the Supreme Court has been extremely careful in intervening in the exercise of executive clemency, it has intervened more easily in cases where there has been delay in decision-making on mercy petitions by either the President or Governors. In both *K.P. Mohammed v. State of Kerala* (1984 Supp SCC 684) and *Sher Singh and Ors. v. State of Punjab* (AIR 1983 SC 465), Chief Justice Chandrachud led the Supreme Court benches in suggesting that the state accept a self-imposed rule and decide on mercy petitions within three months. In response to delays caused by the executive considering mercy petitions the Court commuted the sentences of the condemned prisoners in both *Madhu Mehta v. Union of India and Ors.* (AIR 1989 SC 2299) and *Daya Singh v. Union of India and ors.* (AIR 1991 SC 1548) as also in *Shivaji Jaising Babar v. State of Maharashtra* (AIR 1991 SC 2147) (see Section 4 above).

These were strong statements from the Court indeed since, as a general rule, the Supreme Court had in the past preferred to restrict itself to 'recommending' that the President commuted the sentence rather than actually taking this on itself. It is likely that the shift happened after the remarkable case of *Harbans Singh* (see Section 6.3 above). A lesser known fact about this case however is that despite the Supreme Court recommending to the President that he commute the sentence, this did not happen and it was only upon a review petition filed before the Court again that the Supreme Court eventually commuted the sentence, concluding, "It cannot be too eloquently and emphatically emphasised that there is imperative urgency in matters concerning life and death. We would have been happier and the petitioner Harbans Singh could have been spared the pangs of the death cell if the government had responded to our recommendation within a reasonable time. That time has passed by any test. Accordingly, we reduce the sentence of death imposed upon the petitioner to imprisonment for life" [Unreported Order, referred in *Khem Chand v. The State* (1990 Cr.L.J 2314 (Del)].

The recent indication by the executive that decisions on mercy petitions were currently taking at least six to seven years, suggests scope for future Supreme Court intervention.[90]

Despite asserting in *Maru Ram v. Union of India and others* that the President and Governor were bound by the aid and advice of the Council of Ministers and therefore the real decision making role was with the executive, the fine legal fiction was maintained by the Court in *Dhananjoy Chatterjee @ Dhana v. State of West Bengal and others* [(2004) 9 SCC 751]. The

[90] Announcement by the Ministry of Home Affairs on 13th December 2006 referred to Section 4.1 above.

Bench of Justices Balakrishnan and Srikrishna noted that an affidavit sworn by the Deputy Secretary of the Judicial Department, Government of West Bengal stated, "After examining and considering the prayer the state government rejected it, thereafter it was communicated to the Governor only because it was addressed to him, and therefore the Governor in his turn, rejected the convict's prayer which was duly communicated to the convict." The Supreme Court concluded that it was clear that the Governor was deprived of the opportunity to exercise his power in a fair and just manner since all material facts of the case – including the mitigating circumstances – were not placed before him. According to the Court, even though the Governor was to exercise the constitutional power on the basis of the aid and advice of the state government, he had to consider all the relevant facts while doing so. The Court therefore directed that the mercy petition be resent to the Governor with all relevant facts for an appropriate decision.

Another question of procedure – whether the condemned prisoner or representatives on their behalf were entitled to a personal hearing – came up before the Court in *Kehar Singh and Another v. Union of India and Another*. The petitioner had sought a meeting of his representative with the President but this was rejected by the President's office citing "well established practice." Though the Supreme Court did not address this point, in the recent past President Kalam (2002-2007) has not only granted personal meetings to representatives of the accused in the case of Mohd. Afzal Guru, but also to delegations seeking rejection of the mercy petition.

8.2.1 The politics of mercy

In *Rajendra Prasad v. State of Uttar Pradesh* (AIR 1979 SC 916), the majority Bench of the Supreme Court had observed that courts could not be complacent and rely on executive clemency powers in case they erred, pointing out that, "for one thing, the uneven politics of executive clemency is not an unreality when we remember it is often the violent dissenters, patriotic terrorists, desperadoes nurtured by the sub-culture of poverty and neurotics hardened by social neglect and not the members of the establishment or conformist class, who get executed through judicial and clemency processes."

Despite such a warning however, as the cases cited in the box below indicate, the courts continue to rely on the executive powers of clemency to correct wrongs where they feel that their judicial powers are restricted. Thus in *Ram Deo Chauhan @ Raj Nath v. State of Assam* (AIR 2001 SC 2231), while two judges took opposing views on whether to accept the claims that the accused was a juvenile and commute the sentence, the third (and therefore decisive) judge agreed to reject the petition, arguing that the accused had the remaining remedy of executive clemency. Similarly, the majority Bench in *Devender Pal Singh v. State, N.C.T. of Delhi and anr. (with Krishna Mochi)* (AIR 2003 SC 886) also relied on this safety-net when upholding the death sentence after the three judges were completely divided on questions of guilt as also of sentence.

Nudge, wink, hint…

In a number of cases, many of which have been referred to previously in this study, the Supreme Court has felt unable to reduce the sentence and unwillingly upheld sentences of death, but in its judgments has included hints to the executive which it clearly hoped would inform the executive's decision-making on clemency.

Thus in *Bissu Mahgoo v. State of Uttar Pradesh* (AIR 1954 SC 714), the Court recommended that the appellant file an application for clemency with the central government, citing the "good grounds" of delay and the High Court enhancement to death which were not sufficient for judicial commutation in those days. Similarly, based on the existing law at that time, in *Bhagwan Swarup v The State of U.P.* (AIR 1971 SC 429) the trial court observed that the accused did not appear more than 19 years of age but observed that age alone was an insufficient ground for lesser punishment, though this could be used as a relevant consideration in a mercy petition. Such hints have been used by judges, particularly Justice Krishna Iyer, as a means of reconciling their personal objections to the death penalty and their duty to observe the law. Thus even while refusing to admit a special leave petition in *Joseph Peter v. State of Goa, Daman and Diu* [(1977) 3 SCC 280], Justice Krishna Iyer stated that while the Court could not consider the young age of the accused and the fact that he had been under sentence of death for six years, presidential power was broader than judicial power.

Even in cases where the executive had already exercised its powers of clemency, Justice Iyer stretched the limits where he could. In *G. Krishta Goud and J. Bhoomaiah v. State of Andhra Pradesh and Ors.* [(1976) 1 SCC 157], while rejecting a writ petition challenging the presidential rejection of a mercy petition, he added, "The rejection of one clemency petition does not exhaust the power of the President or the Governor." Further, he virtually rewrote the mercy petition, stating, "The circumstances pressed before us about the political nature of the offence, the undoubted decline in capital punishment in most countries of the world, the prospective change in the law bearing on that penalty in the new Penal Code Bill, the later declaration of law in tune with modern penology with its correctional and rehabilitative bias emphasized by this Court in *Ediga Anamma*, the circumstance that the Damocles' sword of death sentence had been hanging over the head of the convicts for around 4 years and like factors may, perhaps, be urged before the President." Similarly in *Shiv Mohan Singh v. The State (Delhi Administration)* (AIR 1977 SC 949), where the President had already rejected the mercy petition once and there was no judicial remedy, Justice Iyer attempted to give the accused a final chance by clarifying the legal position, "The judicial fate notwithstanding, there are some circumstances suggestive of a claim to Presidential clemency. The two jurisdictions are different, although some considerations may overlap. We particularly mention this because it may *still* be open to the petitioner to invoke the mercy power of the President and his success or failure in that endeavour may decide the arrival or otherwise of his doomsday."

A rare instance where the Supreme Court appeared to hint towards a rejection of a mercy petition was in *Kuljeet Singh alias Ranga v. Union of India and anr.* [(1981) 3 SCC 324] where the Bench observed, "We hope that the President will dispose of the mercy petition stated to have been filed by the petitioner as expeditiously as he find his convenience."

In practice, the exercise of clemency by the executive has more potential than the courts to be arbitrary, especially since there is no requirement placed on the executive to give reasons for either accepting or rejecting mercy petitions and decisions are neither reported widely nor published. In fact it was reported that the eventual decision by the Governor of Orissa to commute the sentence of Dayinidhi Bisoi in 2003 was influenced by the absence of hangmen in the State.[91] The absence of any transparency in the process of executive clemency is a serious concern, especially since the government may be subject to a large number of other electoral pressures extraneous to the case. It is a moot point whether the execution of Dhananjoy Chatterjee would have taken place in August 2004 (after a period of approximately seven years in which no executions had been carried out in India) had the ruling Central Government not been reliant on the political support of its coalition partner – the Communist Party of India (Marxist) – which was the ruling party in West Bengal (from where the prisoner hailed) and a strong advocate in favour of carrying out his execution.

In the year 2005, in view of the mounting number of mercy petitions before him, the President of India, Dr. A.P.J. Kalam put together a list of approximately 44 persons under sentence of death. Addressing a note to the Ministry of Home Affairs, the President reportedly sought a review of the cases of these persons based on the following guidelines:

1. The Home Ministry, before recommending any action on a petition, should consider the sociological aspect of the cases;
2. Besides the legal aspects, the Ministry should examine the humanist and compassionate grounds in each case; these grounds include the age of the convict and his physical and mental condition;
3. The Ministry should examine the scope for recidivism in case a death sentence is commuted to life imprisonment through the President's action; and
4. The Ministry should examine the financial liabilities of the convict's family.

This Presidential note and the reported response of the Ministry that while the government ought to consider the socio-economic factors and the age and health of each convict before advising the President on the mercy petitions, it was equally crucial for the Home Ministry to take into account the gravity of the offence, whether the offence was premeditated or not, and the conduct of the convict in jail,[92] highlights tension within the executive itself on this issue.

[91] 'Non-availability of hangman delays execution in Orissa,' Hindustan Times.com, 15th August 2003.
[92] See Frontline, 'Death Penalty: The Presidential Dilemma', S. Venkatesan, Volume 22 – Issue 23, Nov. 5-18 2005.

The politicisation of clemency powers is inevitable in cases involving alleged 'terrorists.' Mohammed Maqbool Butt, the founder and former leader of the separatist Jammu and Kashmir Liberation Front was executed on 11th February 1984. This execution took place less than one week after the abduction and killing of an Indian diplomat in Britain by a group which called itself the 'Kashmir Liberation Army' and which had sought the release of Butt in return for the diplomat. The mercy petition before the President had been pending since 1976/7. Butt had previously been sentenced to death under the Enemy Agents Ordinance, 1943 (in use in the state of Jammu and Kashmir with no provision for appeal) for killing a policeman in 1968. Other highly politicised cases where mercy petitions are presently pending are those of Murugan, Santhan and Arivu (sentenced to death for their part in the conspiracy to kill former Prime Minister and leader of the Congress Party Rajiv Gandhi) as also Mohammed Afzal Guru (sentenced to death for conspiracy in the attack on the Indian Parliament).

The opaqueness of the process of clemency permits the executive to wield considerable power over the life or death of convicts in an arbitrary and largely unaccountable manner. Such arbitrariness in matters of life and death is completely unacceptable. However, the power of judicial review means that arbitrary executive actions *can* be corrected by an alert Supreme Court. The refusal of the Supreme Court to intervene on occasion in the face of clear evidence of executive negligence (as in the cases of Kuljeet Singh and Dhananjoy Chatterjee) demonstrates that the problem is less simple however; not one merely of where the Court can intervene but one where the Court chooses to intervene, thereby once again introducing arbitrariness not only to the executive but also to the judicial process.

9 Conclusions and recommendations

This report has referred to a large number of cases that place it beyond doubt that whether an accused is ultimately sentenced to death or not is an arbitrary matter, a decision reliant on a number of extremely variable and often subjective factors – ranging from the competence of legal representation (in particular at the trial court stage) to the interest of the state in the case (whether to appeal or not) to the personal views and even idiosyncrasies of the judges who sit on the various benches hearing the case.

Furthermore, the report shows that contrary to the majority Bench's views and intentions in *Bachan Singh*, errors and arbitrariness have not been checked by the safeguards in place, and no small role in this has been played by judges themselves who have rarely adhered to the requirements laid down in *Bachan Singh*, making it clear that it is commonly the judge's subjective discretion that eventually decides the fate of the accused-appellant.

The arbitrariness is fatal, but it is also selective and discriminatory. The randomness of the lethal lottery that is the death penalty in India is perhaps not so random. It goes without saying that the less wealth and influence a person has, the more likely they are to be sentenced to death. This is implicit in the concerns expressed in Part II of this report about access to

effective legal representation (Section 7.1) as well as about pre-trial investigations and collection of evidence (Section 6.1.1). The Supreme Court itself has acknowledged the class bias in death sentences. In his dissenting judgment in *Bachan Singh*, Justice Bhagwati commented, "death penalty has a certain class complexion or class bias inasmuch as it is largely the poor and the down-trodden who are the victims of this extreme penalty. We would hardly find a rich or affluent person going to the gallows". The judge concluded: "There can be no doubt that the death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived section of the community … this circumstance also adds to the arbitrary and capricious nature of the death penalty and renders it unconstitutional."

Two decades later, the Supreme Court chastised the lower courts and the investigative agencies in a case in which a man charged with murdering his wife would have succeeded in avoiding arrest if it hadn't been for the persistence of the father of the deceased in writing to the authorities and petitioning the courts, leading to the Supreme Court's cancellation of orders granting him bail.[93] At the other end of the scale, thousands of disadvantaged undertrials languish in jails awaiting trial for periods longer than the maximum punishment permissible upon conviction, with absent or inadequate legal representation. The absence of detailed studies that track discrimination within the criminal justice system more generally and the implementation of the death penalty more specifically, should not be an excuse for ignoring this terrible injustice. The question asked of the Home Ministry in 2005 by President Kalam – why all those on death row were the poorest of the poor, remains well known but officially unacknowledged.[94]

Amnesty International India and the People's Union for Civil Liberties (Tamil Nadu & Puducherry) believe that there is ample evidence in this report to show that the death penalty in India has been an arbitrary, imprecise and abusive means of dealing with crime and criminals. The findings should give more than sufficient grounds for civil society to demand further investigation on the subject, the immediate publication of information on implementation of the death penalty so that an informed debate can ensue, and while this is ongoing, a moratorium on executions. In the longer term, abolition of the death penalty is essential if India is serious in its commitment to guarantee the full range of human rights to all its citizens without discrimination.

Recommendations

Amnesty International India and People's Union for Civil Liberties (Tamil Nadu & Puducherry) urge the Government of India to abolish the death penalty and thereby open the way to accession to the Second Optional Protocol to the International Covenant on Civil and Political Rights (which commits nations to the permanent abolition of the death penalty).

[93] *Prahlad Singh Bhati v. N.C.T Delhi and anr.* (AIR 2001 SC 1444).
[94] 'Why only poor on death row?' The Times of India, 18th October 2005.

In the immediate interim, we believe that there are a number of steps that can and should be taken:

- Impose an immediate moratorium on executions pending abolition of the death penalty.
- Ensure that the death penalty is not imposed or carried out on anyone suffering from a mental disability – either permanent or temporary; remove anyone suffering from a mental disability from death row and provide them with appropriate medical treatment.
- Ensure that cases of persons suspected to have been juveniles at the time of the offence and presently on death row are examined without further delay.
- Abolish all provisions in legislation which provide for mandatory death sentences.
- Initiate an urgent independent study into the extent to which national law and international standards for fair trial and other relevant international standards have been complied with in capital cases in at least the last two decades (as per the recommendation of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions).
- Provide compensation and care to those found to have been the victims of miscarriages of justice in capital cases.

Ensure openness, transparency and informed debate

- End the secrecy surrounding application of the death penalty by making all information regarding the past use of the death penalty, and the total number of persons presently on death row with details of their cases, publicly available.
- Having made available such statistical information and having carried out an independent study of capital cases and their conformity to national and international law, initiate a parliamentary debate on abolition of the death penalty.

Improve Procedural Safeguards

- Provide a mandatory appeal to the Supreme Court in all cases where a death sentence has been awarded (including by any military court) as previously recommended by the Law Commission of India;
- Implement the Law Commission's recommendation that a Bench of five judges decides any capital case in the Supreme Court;
- Recognise the requirement of unanimity of judges as a procedural safeguard in the award of the death penalty;
- Disallow the award of the death sentence or enhancement of a sentence to death by the High Court or Supreme Court, in any case where a trial court has directed an acquittal or awarded any other sentence.

End torture, ill-treatment and coerced confessions

- Order an investigation into the cases of prisoners on death row who were reported to have been tortured, ill-treated or denied access to legal counsel during police questioning;
- Ensure that 'confessions' obtained under duress are never invoked by state prosecutors in legal proceedings against criminal suspects;
- Ensure that anyone who faces the death penalty has an effective right to competent state appointed legal counsel of the defendant's choice during the entire legal process, including appeals and mercy petitions;
- Ratify the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment as also its Optional Protocol.