Death Penalty in India: An Examination of the Legal and Political Discourse

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DOCTOR OF PHILOSOPHY

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under the supervision of

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DECLARATION

I hereby declare that the thesis titled, "**Death Penalty in India: An Examination of the Legal and Political Discourse**" submitted by me to the Centre for Political Studies, School of Social Sciences, Jawaharlal Nehru University, New Delhi, for the award of the degree of **Doctor Of Philosophy** is my original work. The thesis has not been submitted in part or in full for this or any other degree to this University or any other University.

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CERTIFICATE

We recommend that this thesis be placed before examiners for the award of the degree of Doctor of Philosophy in this University.

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Contents

Introduction

> *The Commission accordingly recommends that the death penalty be abolished for all crimes other than terrorism related offences and waging war.*
>
> — Law Commission of India, *Report No. 262: The Death Penalty* (2015)

> *[E]xtremely uneven application of Bachan Singh has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle.*
>
> — Supreme Court of India, *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009)

The Problematic

This thesis is situated at the intersection of political science, legal studies and history. It proposes to critically discern antinomies within the legal and political discourses on death penalty in India, mainly since Independence, and to discern through them the wider ideological evolution of the state as such. At the heart of this thesis lies a quest to understand how the modern state power instills discipline through punishment or its threat. It attempts to understand antinomies arising within the legal and political discourses on death penalty and its practice by comparing and extrapolating them with each other and by subjecting them to historical analysis.

A preliminary investigation reveals that several antinomies are contained in both the political and legal discourses. The Constitution As-

sembly Debates are testimony to the fact that the retention of the death penalty in independent India was not a foregone conclusion. It had to fly in the face of the stated position of the nationalist movement which had principally opposed the death penalty until then. Why and in what circumstances this principled position was revoked sould be a matter of investigation. Similarly, the legal discourse, which seems to have acknowledged the death penalty most famously through the *Jagmohan Singh v. State of Uttar Pradesh* (1973) and *Bachan Singh v. State of Punjab* (1980) cases (the latter having a minority note left by Justice Bhagwati, who opined that the death penalty was unconstitutional) has several antinomies within its fold. Although prior to the Bachan Singh case death penalties were being awarded discretely, these case recognized and acknowledged capital punishment as such, and enabled the judiciary to award it in suitable—'rarest of the rare'—cases. It was soon felt that the notion of the 'rarest of the rare' was a very vague one, and had to be redefined. This opportunity came with the *Macchi Singh & ors. v. State of Punjab* (1983). However, then it was linked with morality—an *ideological* notion par excellence.

The political discourse, on the other hand, suffers from a lack of principled position (except for one party: CPI(M), which opposes death penalty in principle). However, rightwing political parties often openly advocate death penalty for individuals accused of 'terrorism' (Yakub Menon, Afzal Guru) in order to vilify the 'Other' and render their position as *homo sacer*. The question is: when individuals like Afzal Guru are hanged amidst questions raised about the due procedure and their hangings are celebrated in a carnivalesque fashion (in the strictly Bakthinian sense of the term), do their flirtations with the highest form of punishment—a form of terror—inspire more obedience (or less) among citizens?[1] Often it has been seen that the rightwing parties call for revocation of death penalties where the victim is ethnically from a majoritarian identity (Maya Kodnani) or in a foreign country (Kulbhushan Jadhav). On the other hand, even leftwing parties like CPI(M) seem to waver from their own principled position against the death penalty, when the victim is from a minority community (afzal Guru). Are not, what Prabhat Patnaik calls

[1] Aijaz Ahmad, "Terror, War, Culture," *Frontline* 44 (2005), https://frontline.thehindu.com/the-nation/article30207407.ece.

as, the 'culture of cruelty' and the 'culture of compassion' two sides of the same coin, two ways of ensuring the same task of disciplining?[2] How could these positions be problematized from the point of the view of the interests of the state? This is the problematic before this thesis.

Research Questions

Our problematic originates from several questions that could be summarized as follows:

1. What *ideological* role does death penalty play within the specificities of the legal and political discourses in India? In the Constitution Assembly Debates, it seems that an understanding against the death penalty widely pervaded, given how much the Indians themselves had suffered at the hands of colonial violence. Nonetheless, death penalty was persisted with and first applied in the case of the assassination of Mahatma Gandhi, the father of the nation.

2. What kind of *shifts* can be seen in the legal and political discourses with regard to death penalty, and what causal links could they have with larger historical shifts in Indian society and political economy? Is there any recognition within the legal and political circles of the limits of death penalty as a form of retribution, and what steps are taken to limit its extent? It has been argued by many that the judicial pronouncements of death penalty are often 'arbitrary' and 'judge-centric'. Can we alternatively think of this 'arbitrariness' not as a loophole but as a deliberate strategy on part of the state?

3. Does the death penalty acquire any specific ideological role within the neoliberal setup? How does it relate, on the one hand, to the developmentalism fostered by neoliberalism (the ideological conception of economic development, human rights) and, on the other hand, notions of national security as informed by dominant political discourses such as Hindutva?

[2]Prabhat Patnaik, "On the Question of Capital Punishment," *Alternatives International*, June 2, 2013, accessed December 10, 2019, https://www.alterinter.org/?On-the-Question-of-Capital-Punishment; Slavoj Žižek, "From Politics to Biopolitics…and Back," *South Atlantic Quarterly* 103, nos. 2-3 (2004): 501–521.

4. What is the role of the key supplements to death penalty, like clemency, life imprisonment, encounter killings, etc.? What could data tell us about the growing or decreasing use of death penalty in a different kind of accumulation regime such as neoliberalism, as compared to the dirigiste state ('Nehruvian state')?

Our hypothesis rests on the assumption that a modern state like that of India would have to rely upon a specific combination of ideological and repressive state apparatuses, and a discourse regarding the repressive apparatus would reveal the degree to which its ideological state apparatuses have been successful.[3] Inversely, it might imply that writing an account of death penalty in India (as a repressive apparatus) would be tantamount to writing an alternative history of the Indian state as such. To hypothesize further, it can be said perhaps that the nascent Indian state after Independence was too weak, including in its own self-perception, to have discarded the death penalty altogether, despite a theoretical understanding against the death penalty being common within the Constitution Assembly. However, as it consolidated itself, the state still retained the death penalty, though its usage was attempted restricted, because the state still had to rely upon some kind of repression of the last resort. Clemency and pardoning could be brought into the picture once the use of death penalty was apparently systematized (though it never happened in practice).

What happens in the neoliberal times appears somewhat more complicated. Retributive violence by the state gradually drops out of ideological discussions unlike before, or at least is not acknowledged as such, while its actuality is added to by new phenomena like encounter killings, torture, mob lynchings, mass violence and even wars (like Operation Green Hunt); in other words, what Žižek calls as the ever widening 'parallax gap between between the public Law and its superego obscene supplement', i.e. the unwritten and unacknowledged obverse of the public form of ideology.[4] Even the actual number of victims of death penalty becomes mired in heavy confusion and uncertainty. Therefore, to understand state

[3] In his classic formulation, Louis Althusser regarded both the ideological and repressive state apparatuses employing each other to some extent. Louis Althusser, "Ideology and Ideological State Apparatuses: Notes towards an Investigation," in *Lenin and Philosophy and Other Essays*, trans. Ben Brewster (New York: Monthly Review, 1971), 145.

[4] Slavoj Žižek, *The Parallax View* (Massachusetts: MIT, 2006), 10, 306–308.

violence in this and the preceding periods properly, we suggest looking somewhere else in history: the period of emergence of capitalism in England towards the late eighteenth and early nineteenth century.

Historical Analogies

To look at this phase in the European context is not to draw simplistic parallelisms but analogies and contrasts enabling us to frame the Indian context properly. This exercise is needed perhaps to not just add a historical resonance to our thesis but to help us ask certain questions that would otherwise be difficult to put across. Here we rely upon the historical scholarship of the 1970s, especially the one undertaken by Michel Foucault on the one hand and the British Marxist historians on the other.

First published in 1975, Foucault's *Discipline and Punish* is concerned with 'a certain political economy of the body'.[5] Therefore, from the outset Foucault's concern is to dispel a Marxian sounding 'critique of political economy'. He is rather interested in how the body is disciplined through tecniques of surveillance and torture. He delves into the 'micro-physics' that disciplines the body more subtly than the brute violence that was historically seen in the form of hangings, guillotining, etc. Although Foucault begins with an account of capital punishment, he is immediately led away from it towards more subtle but 'more efficient' forms of biopower. Specifically, though, Foucault describes in great detail the working out of asylums, clinics, army, schools and prisons, though he significantly bypasses the factory. Despite death penalty being his point of departure, Foucault posits the question of discipline via the strengthening of state power and institutions, which is also the concern of this thesis, than the resistance displayed by the lower classes, especially as depicted in Peter Linebaugh's work (discussed below). Foucault, therefore, is concerned with the self-aggrandizement of modern state's power as such, than its historical evolution across modes of productions.

One of the most important responses to Foucault's work from the point of view of Marxist social history was *Albion's Fatal Tree*, published

[5]Michel Foucault, *Discipline and Punish: The Birth of the Prison*, 2nd ed., trans. Alan Sheridan (London: Vintage, 2012), 25.

in 1975.[6] The opening essay by Douglas Hay, titled 'Property, Authority and the Criminal Law', provides an analysis of the death penalty and legal complex in Britain towards the end of the eighteenth century.[7] Hay's contention is that the British justice system, operating without any police and a large army, was 'the climactic moment in a system of criminal law based on terror', whose basis lay in a series of legislations passed regarding crimes against property.[8] Despite an unprecedented number of legislations being passed in a relatively short time, sanctioning death penalty for the smallest offences against property, the actual number of executions remained stable because death penalty got increasingly substituted by clemency via deportation and other means. This puzzle, Hay argues, can be explained if terror exercised through the use of the death penalty is seen as only one factor of the overall strategy with which to command obedience which, according to Hay, rested upon the triad of justice, terror and mercy. As he summarizes:

> The law thereby became something more than the creature of a ruling class— it became a power with its own claims, higher than those of prosecutor, lawyers, and even the great scarlet-robed assize judge himself. To them, too, of course, the law was The Law. The fact that they reified it, that they shut their eyes to its daily enactment in Parliament by men of their own class, heightened the illusion. When the ruling class acquitted men on technicalities they helped instil a belief in the disembodied justice of the law in the minds of all who watched. *In short, its very inefficiency, its absurd formalism, was part of its strength as ideology.*[9]

Instead of simply writing off the British penal system as a form of class rule, Hay's sophisticated analysis confers relative autonomy upon the legal procedure. Hay sees the legal discourse treading a very fine thread: not betraying the class nature of its organization and function and simultaneously ensuring that it still appeared 'just' and acceptable to all classes. This is especially important if we keep in mind that this system functioned without any police and a large army. The disciplining effect of the modern state seems to have been internalized by the subjects

[6] Douglas Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-century England* (London: Peregrine, 1975).

[7] E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Penguin, 1975); Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-century England*; Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century* (Cambridge: Cambridge University Press, 1992).

[8] Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-century England*, 18.

[9] Ibid., 33; emphasis added.

early on, which is also what Foucault sought to emphasize in *Discipline and Punish*.[10] Being arbitrary and carnivalesque were important strategies in this regard.[11]

The 'arbitrariness' of the British justice system as narrated in *Albion's Fatal Tree* appears to have important ramifications for the Indian context. Thus, Hay writes that the judges of the late eighteenth century Britian went to extremes in order to come across as arbitrary: in cases concerning the 'picaresque proletariat' they often either did not award death sentences even where it was applicable, or they awarded death sentences (in rare cases, of course) to the members of privileged classes. So when Hay writes that the '...judicial mercy in London was more often a bureaucratic lottery than a convincing expression of paternalism,'[12] he touches upon the important question whether there was any deliberate strategy on part of the propertied classes. Hay's answer is that the judicial system worked more like Adam Smith's invisible hand, i.e., much of the ideological structure surrounding the criminal law was the product of countless short-term decisions. It was often a question of intuition, and of trial and error, and not some 'class conspiracy' chalked out out by a small group.[13]

Thus, arbitrariness was induced into the judicial system so as to magnify the threat of terror, even if its quantitative usage went down. Hay seems to making the argument that threat of power is more effective than the actual usage of power: 'The impact of sentencing and hanging could only be diminished if it became too common.'[14] The moment power exercises itself beyond its threatening gesture, it is rendered superfluous. Clemency or pardoning, therefore, formed an equally important part of the strategy as inflicting deadly punishment:

> The pardon is important because it often put the principal instrument of legal terror—the gallows—directly in the hands of those who held power. In this it was simply the clearest example of the prevailing custom at all levels of criminal justice. Here was the peculiar genius of the law. It allowed the rulers of England to make the courts a selective instrument

[10] Foucault, *Discipline and Punish*.

[11] Boris Groys, "Between Stalin and Dionysus: Bakhtin's Theory of the Carnival," *Dialogic Pedagogy: An International Online Journal* 5 (2017).

[12] Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-century England*, 55.

[13] Ibid., 53.

[14] Ibid., 56.

> of class justice, yet simultaneously to proclaim the law's incorruptible impartiality, and absolute determinacy.[15]

It shows that the punitive system was far from being a simplistic application of terror to instill respect for private property. This last theme is also taken up by Peter Linebaugh in his *The London Hanged*, which begins by drawing attention to, but seldom noted, the double meaning of the word 'capital':

> In criminology as in economics there is scarcely a more powerful word than 'capital'. In the former discipline it denotes death: in the latter it has designated the 'substance' or the 'stock' of life: apparently opposite meanings. Just why the word, 'capital', has come to mean both crimes punishable by death and the accumulation of wealth founded on the produce of previous (or dead) labour might be left to the etymologists were not the association so striking, so contradictory and so exact in expressing the theme of this book. For this book explores the relationship between the organized death of living labour (capital punishment) and the oppression of the living by dead labour (the punishment of capital).[16]

In contrast to Foucault, who, according to Sumit Sarkar, is positioned as 'the implicit interlocutor of much of *The London Hanged*, Linebaugh is concerned with the emergence of the modern state and (via disciplining processes described by Foucault) the factory, defined as 'a place where the principles of production and punishment can be united…'[17] Carrying forward E. P. Thompson's 'history from below', Linebaugh registers the growing conflict between customary rights ('moral economy") to absolute property rights. Hence, the mercantile interest in plugging the many holes in the long distance trade led to a rapid criminalization of customary rights, punishable with death penalty. The growing privatization and criminalization was met by a growing resistance on part of the 'picaresque proletariat" — the pre-industrial working class. This fact necessitates foraying into global history, as Linebaugh certainly does, when Atlantic trade between the handicrafts of India, the plantations in America and the manufacturers in brought into picture while analysing the criminalization within the shipping industry. Though Edward Said, inspired by Foucault, makes racism an almost transhistorical phenomenon, Linebaugh locates this racism to the strategies employed by the propertied classes to divide

[15]Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-century England*, 48.

[16]Linebaugh, *The London Hanged*, xv.

[17]Sumit Sarkar, "A Marxian Social Hstory beyond the Foucaultian Turn," *Economic and Political Weekly* 30, no. 30 (1995): 1916. Linebaugh, *The London Hanged*, 285.

the united resistance by the picaresque proletariat of all ethnicities and origins (including by Afro-American slaves). Unlike Foucault, who locates the Benthamite panoptican as social power's self-aggrandizement, Linebaugh locates the need for such techniques in limiting customary rights. In sum, what Foucault displaces as external and distracting is resuscitated by Linebaugh as the very central question — the question of political economy.

Sources and Method

For the purpose of this thesis, we can draw several useful conclusions from both Foucault and his Marxist critiques. Unlike the latter, this thesis is not a work of social history but an analysis of the legal and political discourses. It's method would be, therefore, more deductive than inductive. From Foucault, however, we can borrow the idea of punishement as a form of state's self-aggrandizement, and the problematic of institutions as a network of power, though we do not regard power as an end in itself, as perhaps did Foucault. The Marxist historians' holistic incorporation of political economic processes lends greater weight to their analysis than Foucault's, hence, this thesis would regard political economy as a crucial factor in India's transition towards neoliberalism. Secondly, the distinction made early in *Albion's Fatal Tree* between what it calls as 'social crime' and 'deviance' or 'sub-culture', is also not important for this work, as that volume itself acknowledges blurring out of such distinctions in its research.[18] The sources for our work would be Constitution Assembly Debates, private papers, judiciary's self-reflections and injunctions, important court cases and judicial observations and directions made therein, various reports prepared by government institutions (however 'autonomous' they be). These sources will be subjected to detailed hermeneutic analysis. The political discourse, inadequate and mystifying as ever, would be judged through both its utterances and silences, statements and pre-suppositions.

On the other hand, we will also register the response to the judicial and political discourse civil society groups and NGOs, reports prepared

[18] 'Preface', Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-century England*, 13–14.

as a means to problematize measures seen as state's unjust doings, etc. Several important activists must also be critiquing or opposing judicial-political discourses. Their arguments will be registered and given due weightage. Finally, the international context and arguments made in secondary works will be considered.

Chapterization

The thesis will be divided in four chapters as follows:

Chapter 1: Anti-Colonialism and the Legal-Political Debate on Capital Punishment: 1931 to 1967

The opening chapter would begin with a historical outline of the discourse on death penalty in India. The colonial practice of death penalty as a form of terror will be contrasted with the views in the anti-colonial movement. Subsequently, Constitution Assembly Debates will be explored around the question why the death penalty was continued with after Independence.

Chapter 2: Legal Discourse after 1970s

In chapter two, the thesis moves on to historicizing the discourse on the death penalty against the background of socio-political changes in India. This chapter will explore what forced the the judicial discourse to bring in important guidelines and changes regarding death penalty, and what possible connection these changes might have with the overall socio-political situation.

A preliminary subdivision of phases would include: (a) death penalty as a rule (1950-1955); (b) judicial restrictions on death penalty (1955-73); (c) Life imprisonment as a substitute for death sentence (1973-1980), and; (d) 'rarest of the rare doctrine' later (1980 onwards).

Chapter 3: 'States of Exception'

In chapter 3, we argue how Giorgio Agamben's notion of 'states of exception' is a powerful way of looking at not only the death penalty in the Indian context, but also the other forms of violence that are overtermined as a result of the coming together of the neoliberal polity and the security state. When combined with the inherent forms of cruelty in the Indian subcontinent, the net effect prabbly resulting into of a permanent emergency whose biopolitical expression further demands the usage of death penalty and other legal or non-legal means of violence.

Chapter 4: The Political Discourse and the Death Penalty

In chapter four, we look at the how the security state that unleashes repressive measures is further tilted towards using repression as a tool of political control. One of the most important ways to achieve this is the increasing hold of rightwing ideology in pubic sphere which demands violence as described by Agamben's notion of *homo sacer*. The net effect would be a cause-effect cycle in which legal and non-legal means of state violence could be increasingly resorted in the name of national security, etc.

Literature Review

To investigate these very basic questions, I looked at a set of literature. Now the thing with death penalty material in India is that most of it limits itself to support or rejection of the death penalty. Similarly, maximum debates on the death penalty limit themselves to outlining reasons for its continued support or abolition. Another issue is that most of the literature does not represent the status and operation of death penalty in India. The information it contains has changed or is outdated. For a preliminary understanding of the globally pertinent issue of death penalty, I looked at a wide range of literature originating in the American and European contexts. Let me begin by presenting the most valuable of that literature here and then move towards the writings emerging from the Indian context.

Mary K. Newcomer argues that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.[19] The basic question-does the system accurately and consistently determine which defendants 'deserve' to die? cannot be answered in the affirmative. The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.

Michael L. Radelet and Marian J. Borg, focusing on the last twenty five years of debate, examine the changing nature of death penalty arguments in six specific areas: deterrence, incapacitation, caprice and bias, cost, innocence, and retribution.[20] After reviewing recent changes in public opinion regarding the death penalty, they have reviewed the findings of social science research pertinent to each of these issues. Their analysis suggests that social science scholarship is changing the way Americans debate the death penalty. Particularly when viewed within a historical and world-wide context, these changes suggest a gradual movement toward the eventual abolition of capital punishment in America.

Bikram Jeet Batra suggests that by going so far as using the defence of national sovereignty and impact on international relations to deny information relating to judicial executions, the Indian state is completely disregarding its clear international obligation to make such knowledge public.[21] Batra's pint is crucial because the need for information on the death penalty is not limited to the question of abolition. It is crucial for it enables citizens to properly to debate the core issue in question: the real effectiveness of the death penalty in present day India.

Michel Guesdon in his 1997 *EPW* paper on India suggests that while in principle it is committed to the principle of justice and equality for all, the system decides with arbitrariness who will receive the Death Penalty and it is generally bestowed on those least able to defend themselves in

[19]Mary K. Newcomer, "Arbitrariness and the Death Penalty in an International Context," *Duke Law Journal*, 1995, 611–649.

[20]Michael L. Radelet and Marian J. Borg, "The Changing Nature of Death Penalty Debates," *Annual Review of Sociology* 26, no. 1 (2000): 43–61.

[21]Bikram Jeet Batra, "Information on Death Penalty," *Economic and Political Weekly* 40, no. 42 (October 15, 2015); Bikramjeet Batra, "A Knotty Tale: Understanding the Death Penalty in India," *Capital Punishment: A Hazard to a Sustainable Criminal Justice System?*, 2016, 213.

the system.[22]

Steven Stack studying the Furman and Gregg case in the United States contends that courts play a crucial role in determining the future of death penalty in almost all the cases.[23] Mark S. Hurwitz suggests that while most modern courts invest in semblances of fair trial and due process, eventually people are hanged on the basis of whims and arbitrariness.[24]

Sakhrani and Maharukh Adenwalla suggest that India has retained the death penalty on the ground that it will be awarded only in the 'rarest of rare cases' and 'for special reasons'.[25] In fact, India is one of 78 retentionist countries and has even retained the death penalty for political offences. The Supreme Court also has refused to lay down a clear distinction of what constitutes 'rarest of rare cases' and left it to the discretion of judges hearing the case; this makes the administration of death penalty in the Indian context largely erratic and judge-centric.

Supporting the retention of death penalty, Xiaohua Zhu argues that while it may seem regrettable that the Death Penalty is conferred upon a handful of felons who may truly want to turn a new leaf by the time of their death, it would be far more regrettable to abolish this measure and put in danger the life of most citizens who are law abiding and peace loving.[26] With this perspective, death sentences can stay on the legal statutes in good conscience.

Corinna Barrett Lain suggested that when the Supreme Court is deciding death, the majoritarian discourse does not drive the Court's decisions in this area.[27] In her examination of 'evolving standards', she believes that death penalty decisions are always based on the required legal justification. According to her, the Court's change of position or reversal of judgments goes to show that the Courts are not blinded by majoritarianism and review this irreversible punishment from time to time.

[22]Michel Guesdon, "On Death Penalty," *Economic and Political Weekly* 32, no. 39 (1997): 2430.

[23]Steven Stack, "Authoritarianism and Support for the Death Penalty: A Multivariate Analysis," *Sociological Focus* 36, no. 4 (2003): 333–352.

[24]Mark S Hurwitz, "Give Him a Fair Trial, Then Hang Him: The Supreme Court's Modern Death Penalty Jurisprudence," *Justice System Journal* 29, no. 3 (2008): 243–256.

[25]Monica Sakhrani and Maharukh Adenwalla, "Death Penalty: Case for Its Abolition," *Economic and Political Weekly* 40, no. 11 (2005): 1023–1026.

[26]Xiaohua Zhu, "Death Penalty: Another View," *Economic and Political Weekly* 33, no. 19 (1998): 1071.

[27]Corinna Barrett Lain, "Furman Fundamentals," *Washington Law Review* 82 (2007): 1.

The number of countries to abolish capital punishment has increased remarkably since the end of 1988. A 'new dynamic' has emerged that recognizes capital punishment as a denial of the universal human rights to life and to freedom from tortuous, cruel, and inhuman punishment, and international human rights treaties and institutions that embody the abolition of capital punishment as a universal goal have developed. In this background, a lot of work has been done in support or rejection of death penalty. These works have originated in a diversity of contexts. Some even deal with a comparative analysis between different countries. A good example of such comparative work is David T. Johnson and Franklin E. Zimring's *The Next Frontier*.[28] Johnson's 2011 essay further emphasises upon this point, wherein he dismantles many popular assumptions about the nature of governments that support capital punishment.[29] For instance, while it has been abolished in many authoritarian regimes, it continues to dominate the scene in many self-proclaimed democratic nations of the world. Johnson argues that one of the major issues with this final punishment is that it lacks a clear pattern and superseded ideological concerns across many variations.

Another comparative piece of work comes from David F. Greenberg and Valerie West, where data drawn from 193 nations is studied to test theories of punishment.[30] They found the death penalty to be rooted in a country's legal and political systems, and to be influenced by its religious traditions. A country's level of economic development, its educational attainment, and its religious composition shape its political institutions and practices, were seen indirectly affecting its use of the death penalty.

Charles J. Hynes suggests that this problem of not being able to identify uniformity in patterns of capital punishment or in trying to identify the one ideological component that provides support to the death penalty (irrespective of which retentionist group/nation is being looked at) exists because our approach is at fault; instead of trying to established forced patterns we need to study and analyze something so crucial by looking

[28]David T. Johnson and Franklin E. Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (Oxford University Press, 2009).

[29]David T. Johnson, "American Capital Punishment in Comparative Perspective," *Law & Social Inquiry* 36, no. 4 (2011): 1033–1061.

[30]David F. Greenberg and Valerie West, "Siting the Death Penalty Internationally," *Law & Social Inquiry* 33, no. 2 (2008): 295–343.

at a case by case approach.[31] He suggests that this is needed because in a punishment so intense, the magnitude of crime involved is equally stupefying and therefore one must not try to forcibly align the singular aspects of various cases.

Richard O. Lempert looks at the notions of Desert and Deterrence while assessing the moral bases of the Case for capital punishment.[32] He argues that the controversy over the death penalty exists at two levels. The first argument appeals to moral intuitions and second concerns deterrence. Although both types of arguments speak to the morality of systems of capital punishment, the first has largely been dominated by moral philosophers and the second by social scientists.

The deterrent effect of capital punishment is also studied by scholars such as David P. Phillips in his 1980 work and Dezhbakhsh and Rubin.[33] Phillips opines that the appropriateness of capital punishment has been intensely debated for many years in many countries. He suggests that until now no such deterrent effect has been found. Arguments on this topic have often been phrased in terms of whether capital punishment has a deterrent effect on homicide.[34] The U.S. National Academy of Sciences commissioned a panel to review the scientific literature on deterrence.

Isaac Ehrlich, on the other hand, has claimed that capital punishment deters homicides.[35] But Ehrlich's methodology has been widely criticized and his claims have not been generally accepted.[36] The failure to detect a

[31]Charles J Hynes, "Choosing the Death Penalty," *Litigation* 24 (1997): 25.

[32]Richard O. Lempert, "Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment," *Michigan Law Review* 79, no. 6 (1981): 1177–1231.

[33]David P. Phillips, "The Deterrent Effect of Capital Punishment: New Evidence on an Old Controversy," *American Journal of Sociology* 86, no. 1 (1980): 139–148; Hashem Dezhbakhsh, Paul H. Rubin, and Joanna M. Shepherd, "Does Capital Punishment have a Deterrent Effect? New Evidence from Postmoratorium Panel Data," *American Law and Economics Review* 5, no. 2 (2003): 344–376.

[34]Great Britain, "Royal Commission on Capital Punishment Report," *R. Gerstein, Punishment, Journal of Criminal Law, Criminology, and Police Science* 51 (1953): 254; William J. Bowers, Andrea Carr, and Glenn L. Pierce, *Executions in America* (Lexington Books Lexington, MA, 1974); Hugo Adam Bedau, "A Social Philosopher looks at the Death Penalty," *American Journal of Psychiatry* 123, no. 11 (1967): 1361–1370.

[35]Isaac Ehrlich, "Deterrence: Evidence and Inference," *Yale Law Journal* 85 (1975): 209; Isaac Ehrlich, "Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence," *Journal of Political Economy* 85, no. 4 (1977): 741–788.

[36]William J. Bowers and Glenn L. Pierce, "The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment," *Yale Law Journal* 85 (1975): 187; Peter Passell, "The Deterrent Effect of the Death Penalty: A Statistical Test," *Stanford Law Review* 28 (1975):

deterrent effect of capital punishment is somewhat puzzling for two reasons: (1) psychological experiments show that people are often deterred from exhibiting aggression when they see someone else punished for it; (2) as pointed by Bentham, it infact inspires future terrorists who think that dying is the ultimate aim of their sacrifice.[37] Despite many researches proving the futility or otherwise of deterrence as a penological goal, it continues to be the most popular defense for grant of capital punishment globally.

Another study by Eric P. Baumer and Richard Rosenfeld probes the interconnections among distrust of government, the historical context, and public support for the death penalty in the United States with survey data compiled based on responses by white and black respondents.[38] The most important finding of this book relates to the presence of a 'vigilante tradition', which, as per the authors provides a readymade breeding ground for support of capital punishment. However, as I will argue in the final chapters, the causal links between ideological support to mob lynchings and death penalty respectively, needs to be investigated thoroughly and not presumed simply as an uncritical synonym of each other. Baumer and Rosenfield's work also underscores the importance of attending to racial differences in the analysis of punitive attitudes. The 2004 work by Franklin E. Zimring that discusses the contradictions of the American capital punishment system brings home a similar point.[39]

A 2008 study titled *Lethal Lottery: The Death Penalty in India*, compiled by thee People's Union of Civil Liberties, Puducherry argues strongly that the administration of death penalty jurisprudence in the Indian context is rife with arbitrariness, lack of uniformity, a disdain for the socio-economically incapable sections as well as rampant judge-centrism

61; Peter Passell and John B. Taylor, "The deterrent effect of capital punishment: Another view," *The American Economic Review* 67, no. 3 (1977): 445–451.

[37]Albert Bandura, *Aggression: A Social Learning Analysis* (Prentice-Hall, 1973); Chad Flanders, "What Makes the Death Penalty Arbitrary? (And Does It Matter If It Is?)," *Wisconsin Law Review* 55 (2019): 55–122; Robert M Liebert and Neala S Schwartzberg, "Effects of Mass Media," *Annual Review of Psychology* 28, no. 1 (1977): 141–173; Law Commission of India, *Report No. 262: The Death Penalty*.

[38]Steven F. Messner, Eric P. Baumer, and Richard Rosenfeld, "Distrust of Government, the Vigilante Tradition, and Support for Capital Punishment," *Law & Society Review* 40, no. 3 (2006): 559–590.

[39]Franklin E. Zimring, *The Contradictions of American Capital Punishment* (Oxford University Press, 2004).

amongst others.[40]

In a similar vein, questioning the ethical basis for capital punishment, Nalini Rajan contends that the issue does not merely involve the right state policy, it involves the deeper question of moral values in civil society.[41] Given the intrinsic alienation, heterogeneity, and individualism of modern society, it is hard to imagine that we can have a common culture of shared values, and that there will be on ideological justification for this punishment that will work as a binding agent for all of us. From this I have developed an adjunct question of my own in this thesis: if the cultural and socio-economic composition of aa society is this diverse, what is the ideological base of the state, in supporting the continuation of the death penalty? Can we develop an alternative theory of the nature of our Indian state, in trying to ascertain the ideational grounds that support state's usages of this extreme punishment?

Another range of support for capital punishment comes from Jacques Barzun who argues that requesting cancellation of this punishment on the legal statutes on the following grounds of punishment for crime being a primitive idea; capital punishment not being able to deter; appalling risks involved in this irreversible punishment; a civilization holding true to humanity be getting rid of extreme and inhuman punishments, are all immature arguments.[42] According to Barzun, a real civilization is identified by its ability to identify and punish those who transgress the larger civilizational norms and codes of conduct. Those who take the first step in striking a blow for the sanctity of human life therefore, must be met with an equally intense method of correction. Interestingly, in all challenges to the constitutionality of the death penalty in India (in cases of *Jagmohan Singh or Smt. Shashi Nayyar vs. the Union of India*) the Supreme court too gave a similar argument: by taking another person's life and violating Article 21, the criminal forgoes the right to his own life and liberty.[43]

[40]Bikram Jeet Batra et al., *Lethal Lottery: The Death Penalty in India, A Study of Supreme Court Judgments in Death Penalty Cases 1950-2006* (Amnesty International India and People's Union for Civil Liberties (Tamil Nadu & Puducherry), 2008).

[41]Nalini Rajan, "Is There an Ethical Basis for Capital Punishment?," *Economic and Political Weekly* 33, no. 13 (1998): 701–704.

[42]Jacques Barzun, "In Favor of Capital Punishment," *The American Scholar* 31, no. 2 (1962): 181–191.

[43]Law Commission of India, *Law Commission of India: Arrears and Backlog-creating*

Scholars like William Berry, Ferrell *et al.* have further argued that in many cases rejecting death penalty is an uncritical rejection of death, but it fails to adequately take into account the entire episode that leads to such a final punishment.[44] They further express faith that no judge willingly sits there trying to deprive people of life unless the situation categorically demands so. David C. Nice in a similar argument suggests that controlling deviant behavior is one of the oldest responsibilities of societies.[45] Despite all manner of control mechanisms, criminal behavior remains a major problem. Coping with that problem has been frustrating. One of the most widely discussed remedies for the crime problem is capital punishment, controversies abound regarding its moral propriety, its effectiveness in controlling crime, and its racial fairness, among other things. When the Supreme Court struck down state death penalty laws in 1972, state officials faced the daunting prospect of dealing with an issue with the unappealing combination of public interest and abundant disagreement.[46]

Another study examining the social factors related to use of the death penalty is traceable in the work of Michael Mitchell and Jim Sidanius, where (in Study 1) the number of executions in each of the 50 states of the United States since 1976 was predicted from: (1) degree of social hierarchy, (2) Old Confederacy status, (3) political conservatism, (4) degree of violent crime, (5) income, (6) population size, (7) population density, (8) degree of education, (9) proportion of population which is white, and (10) proportion of whites murdered. Social hierarchy and conservatism were consistently and significantly related to use of executions. Study 2 predicted execution use in 147 countries from: (1) degree of social hierarchy, (2) number of murders, (3) size of government, (4) area, (5) education, (6) gross national product, and (7) population size. The degree of social hierarchy and number of murders were significantly related to execution use. While some of these results were predicted by the symbolic motives

Additional Judicial Manpower (2015).

[44]William W. Berry III, "More Different than Life, Less Different than Death-The Argument for According Life without Parole Its Own Category of Heightened Review under the Eighth Amendment after *Graham v. Florida*," *Ohio St. LJ* 71 (2010): 1109; Jeff Ferrell et al., *Cultural Criminology Unleashed* (GlassHouse London, 2004).

[45]David C. Nice, "The States and the Death Penalty," *Western Political Quarterly* 45, no. 4 (1992): 1037–1048.

[46]Ibid.

model or the deterrence model, it is argued that social dominance theory offers a more comprehensive explanation of the results.[47] They opine that in a context of high public interest and substantial uncertainty regarding the effectiveness of a policy, officials have a strong incentive to respond to public desires. Even if the policy is not particularly effective in resolving the problem, officials have at least made a symbolic response. Doing otherwise risks handing potential opponents a readily usable campaign issue.

Peter P. Lejin contends that the main issue with regard to the Death Penalty in the world today is the conflict between the humanitarian abolitionist movement, with a corresponding actual trend to limit or give up altogether the use of Capital Punishment, and the tremendous increase in outright executions and veiled, slower methods of exterminating persons for political offenses and divergent political views.[48] Incidentally, what branches out from this is similar to Peter Linebaugh's argument in *The London Hanged*, where 'capital' punishment was used by the state to address problems lying at an interesting intersection of money and crimes.[49] What it means is that in eighteenth century Britain, most victims of capital punishment were hanged for property crimes, some as petty as the pilfering of spoons. In brutal and benighted age, we like to think, but to the author of this social history (originally published in 1991), the gallows were an indispensable tool in inculcating the primary lesson, 'Respect Private Property' of a modern capitalist economy. Historian Linebaugh, explores how the disruption of a traditional economy of regulated guilds and agricultural commons by a capitalism built on cash wages and competitive markets worked itself out as crime and punishment. Customary forms of payment-in-kind, in which workers took part of the wood they sawed, the silk they wove, or the cargo their ship ferried as wages, were criminalized as theft of the owner's property; capitalists developed new methods of workplace control to circumvent workers' attempts to appropriate the fruits of their labor; and romantic criminal figures like the highwayman expressed working-class resentment at the

[47]Michael Mitchell and Jim Sidanius, "Social Hierarchy and the Death Penalty: A Social Dominance Perspective," *Political Psychology* 16, no. 3 (1995): 591–619.

[48]Peter P. Lejins, "The Death Penalty Abroad," *The Annals of the American Academy of Political and Social Science* 284, no. 1 (1952): 137–146.

[49]Linebaugh, *The London Hanged*.

economic transformations that forced them to steal to live. Linebaugh draws on diverse sources, including judicial archives, family budgets, dietary customs and the writings of Locke and Milton to paint both micro-historical character studies of condemned souls and a panorama of class struggle in proto-industrial Britain.

In his thirty-year retrospective analysis of the death penalty, Stephen F. Hanlon suggests that while this severe punishment has deployed various philosophical and penological tools and worked with multiple ideational practices and ideologies, making the identification of a common pattern illusory.[50] He argues that multiple factors influence the decision to grant or restrict the death penalty and it cannot be predicted accurately for all times to come. One thing however, that remains true for all variations of death penalty is that there is always the possibility of error in the sentencing policy as well as the jurisprudence associated with the death penalty.

Another study that seeks to establish the role of political influence in the grant of both death penalty as well as mercy comes through the writings of Melinda Gann Hall and Paul Brace.[51] They have argued that our model of death penalty decision making presents a striking challenge to the notion that political considerations have been removed from the process of assigning the death penalty. Clearly there are characteristics of crimes and of victims that increase the probability of justices voting to uphold death sentences. Murders of police officers, murders accompanied by sexual assaults or robberies, attacks on women and the elderly, and crimes involving multiple victims influence justices to support capital punishment, a pattern precisely intended by state statutes governing such decisions.

However, what may be surprising is the distinct partisan dimension to voting on the death penalty. Democrats are significantly less likely than Republicans to support death sentences. Similarly, there is a strong age cohort effect in death penalty cases. Older state supreme court justices are significantly more likely to support the death penalty than their younger

[50]Stephen F. Hanlon, "Introduction: A Thirty-Year Retrospective of the Death Penalty," *Human Rights*, 2007, 24–24.

[51]Hall Melinda Gann and Miluaukee Paul Brace, "The Vicissitudes of Death by Decree: Forces Influencing Capital Punishment Decision Making in State Supreme Courts," *Social Science Quarterly* 75, no. 1 (1994).

associates. Also, justices with previous prosecutorial experience are more likely to uphold death sentences than their counterparts who lack such experience. In essence, who reviews a death sentence quite literally can mean the difference between life and death for a defendant convicted of a capital crime. This pattern is remarkable and seemingly not what was intended by legislatures writing capital punishment statutes. Indeed, it is rather chilling to recognize that decisions about executions as a punishment continue to depend to some extent upon partisan preferences and other such political factors.

Stated broadly, legal rules, no matter how detailed, seemingly do not remove discretion from the process of judicial decision making. Moreover, this discretion, inherent in the system, is exercised predictably according to the judges' preferences and other political calculations, within sets of institutional constraints. More basically, irrespective of the constraints of the law, judicial decisions intrinsically are political in nature. Given this empirical reality, whether death is acceptable as a punishment should remain a matter of vigorous public debate.

Similarly, in India too, the political discourse, in its own turn, suffers from a lack of principled position (except for one party: CPI(M), which opposes death penalty in principle). Right-wing political parties often openly advocate death penalty for individuals accused of 'terrorism' (Yakub Menon, Afzal Guru) in order to vilify the 'Other' and render their position as *homo sacer*. The question is: when individuals like Afzal Guru are hanged amidst questions raised about the due procedure and their hangings are celebrated in a carnivalesque fashion (in the strictly Bakhtinian sense of the term), do their flirtations with the highest form of punishment—a form of terror—inspire more obedience (or less) among citizens?[52] Often it has been seen that the rightwing parties call for revocation of death penalties where the victim is ethnically from a majoritarian identity (Maya Kodnani) or in a foreign country (Kulbhushan Jadhav).

Moreover, even left-wing parties like CPI(M) seem to waver from their own principled position against the death penalty, when the victim is from a minority community (Afzal Guru). Are not, what Prabhat Patnaik calls as the 'culture of cruelty' and the 'culture of compassion' two sides of

[52]Groys, "Between Stalin and Dionysus: Bakhtin's Theory of the Carnival."

the same coin, two ways of ensuring the same basic task of disciplining?[53] It has been argued that political leaders have remained in two minds on the issue. While being inclined towards abolition in theory they have nevertheless recognized the existence of extremely heinous cases, which, in their view, deserve death penalty.[54]

The idea forwarded by Mark S. Hurwitz about the attempt to balance aggravating and mitigating circumstances, was interestingly addressed by the Indian courts too in cases such as *Jagmohan Singh*, *Bachan Singh v. State of Punjab* (AIR 1980; 2 SCC 684), *Shatrughan Chauhan v. Union of India* (AIR, 2014; 3 SCC 1).[55]

Capital punishment continues to be one of the most highly debated and polarizing public policies issues globally. Social science research often enters the capital punishment debate through studies examining the influence of legal and extralegal characteristics on prosecutorial decisions to seek the death penalty, jury death sentence decision-making, and societal attitudes regarding the use of the death penalty as well as other related topics.[56]

As discussed, many articles focus on the influence of extralegal and legal variables on capital punishment. Bedau uses propensity score matching and a near population of capital murder trials in North Carolina to analyze whether defendant sex impacts sentence decision-making

[53]Prabhat Patnaik, "Modern India sans the Impact of Capitalism: *The Indian Ideology* by Perry Anderson," *Economic and Political Weekly* 48, no. 36 (2013).

[54]S. Muralidhar, "Hang Them Now, and Hang Them Not: India's Travails with the Death Penalty," *Journal of the Indian Law Institute* 40, nos. 1/4 (1998): 143–173.

[55]Hurwitz, "Give Him a Fair Trial."

[56]For the first type, see, Raymond Paternoster, "Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-based Racial Discrimination," *Law & Society Review* 18 (1984): 437; Raymond Paternoster et al., *An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction* (University of Maryland, College Park, 2003); for the second type, see, Wesley G Jennings et al., "A Critical Examination of the "White Victim Effect" and Death Penalty Decision-making from a Propensity Score Matching Approach: The North Carolina Experience," *Journal of Criminal Justice* 42, no. 5 (2014): 384–398; Marian R. Williams, Stephen Demuth, and Jefferson E. Holcomb, "Understanding the Influence of Victim Gender in Death Penalty Cases: The Importance of Victim Race, Sex-related Victimization, and Jury Decision-making," *Criminology* 45, no. 4 (2007): 865–891; and, for the third type, see Mitchell B. Chamlin and John K. Cochran, "Ascribed Economic Inequality and Homicide Among Modern Societies: Toward the Development of a Cross-National Theory," *Homicide Studies* 9, no. 1 (2005): 3–29; Cedric Michel and John K. Cochran, "The Effects of Information on Change in Death Penalty Support: Race- and Gender-Specific Extensions of the Marshall Hypotheses," *Journal of Ethnicity in Criminal Justice* 9, no. 4 (2011): 291–313

among capital juries, a topic rarely explored in the literature.[57] Bedau *et al.* demonstrate that prior to matching, cases with female defendants appear to be significantly different than cases with male defendants across both legal and extralegal factors and that differences exist in the likelihood of receiving the death penalty based on defendants' sex. After matching, however, sex-based differences in likelihood of the jury assessing death are not observed, and further examination identifies divergent "paths" to capital punishment for female versus male defendants. Their results provide key information regarding the legal variables, most importantly, aggravating, and mitigating factors, present in capital trials involving female versus male defendants, and the ways in which these differences may, at first blush, be perceived as a defendant "sex effect" regarding jury sentencing decision-making.

Further, Gillespie *et al.* analyse the influence of five mitigators relevant to the mental health and mental capacity of defendants regarding whether juries assess the death penalty.[58] The results provide important information regarding the impact of specific mitigators pertaining to proximate culpability, especially whether jury's acceptance or rejection of mitigators are important in sentencing decision-making. As an example, their findings demonstrate that a jury's acceptance of defendants' impaired capacity to appreciate the criminality of their conduct and/or a defendant's young age at the time of the crime is significantly associated with a reduction in the probability of a death sentence. On the other hand, a jury's rejection that the defendant was mentally or emotionally disturbed at the time of the crime or that the defendant suffered from a specific mental illness or disorder was significantly associated with an increase in the probability of a death sentence. Consequently, Gillespie et al. conclude that mental health mitigation, if introduced, must be managed very carefully at the sentencing phase of capital murder trials.

Using content analysis, Zaykaowski *et al.* examine the population of capital cases in Delaware from 2001 to 2011 to determine judges' constructions of victims given the victim impact evidence submitted as sworn

[57]Hugo Adam Bedau, ed., *The Death Penalty in America* (Oxford: Oxford University Press, 1982).

[58]Lane Kirkland Gillespie et al., "Exploring the Role of Victim Sex, Victim Conduct, and Victim–Defendant Relationship in Capital Punishment Sentencing," *Homicide Studies* 18, no. 2 (2014): 175–195.

evidence at trial.[59] Findings from this study suggest that judges do perceive some victims as more 'worthy' than others, that victims described in ideal ways are more likely to be white and female, and that cases involving "ideal victims" are more likely to result in death sentences than cases including victims perceived as deviant.

Tomsich *et al.* provides an in-depth review of the growing body of research focused on the influence of sex/gender on capital punishment.[60] This study demonstrates that prior research shows that the sex of some death penalty actors such as jurors and attorneys are inconsistently related to the likelihood of death sentencing while research more conclusively suggests that the sex of other actors, such as victims, impacts death penalty sentencing; however, Tomsich and colleagues present research suggesting that this effect may be moderated by additional legal variables such victim involvement in illegal behavior and the presence of aggravating factors.

On the concept of 'Desert', Patrick Lenta and Douglas Farland argue that one must raise procedural objections to capital punishment, even against those who argue that it remains morally acceptable punishment for at least some murderers.[61] Here, Lenta and Farland reject the view propounded by Thomas Hurka and Michael Cholbi respectively that 'proportionality' is a guiding principle in the grant of death penalty and that any criminal is given a punishment he/she morally does not deserve in view of the crime they might have committed.[62] It is interesting to note that the Indian supreme court too has used the concept of proportionality as a defense in the grant of death penalty. An example could be *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009, 6 SCC 498).

In a related argument, Matthew Kramer channels the discussion to the 'purgative rationale' and argues that the eventual goal of any philosophy of punishment should be the reduction of evil and purging society of all

[59]Tara N. Richards and M. Dwayne Smith, "Current Issues and Controversies in Capital Punishment," *American Journal of Criminal Justice* 40, no. 1 (2015): 199–203.

[60]Ibid.

[61]Patrick Lenta and Douglas Farland, "Desert, Justice and Capital Punishment," *Criminal Law and Philosophy* 2, no. 3 (2008): 273–290.

[62]Thomas Hurka, "Desert: Individualistic and holistic," 2003, Michael Cholbi and Alex Madva, "Black Lives Matter and the Call for Death Penalty Abolition," *Ethics* 128, no. 3 (2018): 517–544.

the evil.[63] Matthew Kramer opens his erudite and engaging book on the ethics of capital punishment with a personal preface that motivates his account. Kramer explains that upon learning about the Holocaust as an eight-year-old child, he began to develop in an inchoate way what he now defends as a 'purgative' rationale for the use of the death penalty— -the claim that capital punishment is a morally required response to certain extreme evils. He remembers thinking that 'it would have been morally grotesque if the trials of some of the major Nazi leaders had ended with sentences that would involve the devotion of resources to sustaining the lives of those leaders'.

Carol Steiker, however, presenting a challenge to Kramer, suggests that granting death to someone committing extreme crimes eliminates the violent criminals from society but falls short of doing much from ridding the larger society of violence per se.[64] In such a situation, the penological goal remains unfulfilled and the theory of punishments get subsumed under judicial or societal revenge.

An interesting variety of literature also exists on the gender gap in capital punishment attitudes, both in terms of support and opposition. There are several explanations for gender differences in attitudes about political issues. By way of example and for constraints of space, let us look at the operations of gender in the death penalty discourse in the USA of 1970s and 1980s. It must be reiterated that by presenting these examples I do not suggest that these are the only gender based death penalty studies that have emerged, there are many more such works. However, the current set of readings have been given space in this literature review to present a flavor of what such a debate looks like. Moving on, one viewpoint particularly germane to the inquiry apropos of gender is Gilligan's position that men and women have dissimilar conceptions of justice.[65] Men are more oriented toward rights, while women are more concerned with responsiveness and caring. This starting point suggests men tend to favor capital punishment out of concern

[63]Matthew H. Kramer, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* (Oxford: Oxford University Press, 2014).

[64]Carol S. Steiker, "Capital PUnishment and Contingency," *Harvard Law Review* 125, no. 3 (2012): 760–787.

[65]Owen Flanagan and Kathryn Jackson, "Justice, Care, and Gender: The Kohlberg-Gilligan Debate Revisited," *Ethics* 97, no. 3 (1987): 622–637.

for rights and accountability. In contrast, women are less supportive of capital punishment because of their sense of compassion. Gilligan also argues women are more likely to stress connectedness with others and men are more likely to emphasize separateness.

Along the lines of Gilligan's reasoning, it appears that women did show greater empathy in one study by giving higher estimates of the pain condemned murderers suffer during their executions.[66] Paradoxically, this empathy did not change their belief in capital punishment. A study of attitudes toward crime and punishment in Kentucky also found support for Gilligan's argument that women have an ethic of care and nurturing. '[F]or women, preventing crime appears to be part of a larger concern for protecting the vulnerable and making sure that no one is hurt'.[67] A more concrete explanation would be that women are more fearful of street crime, which makes them favor punitive and/or incapacitative measures. Hence, just as women support longer sentences and oppose early release on parole out of fear of crime, they also support capital punishment.[68]

Research on fear of crime offers additional insights on what attitudes women might express about capital punishment. Such research has come to the paradoxical conclusion that women are more fearful of crime despite lower levels of victimization.[69] The feminist explanation for this paradox is that many women are victimized by intimates (fathers, boyfriends, and husbands), but not all such experiences are reported to the police. Related research suggests women perceive street criminals as lower-class African Americans and victims as white middle-class women. Criminals are also seen as 'weird, dirty, tall, and big', while victims are seen as 'normal, small, and tiny'. Such 'dehumanized images of criminals' may have the consequence of restricting 'any type of public empathy toward those who break the law'.[70] This line of research implies that

[66]Marc E. Pratarelli and Jeffrey L. Bishop, "Perceptions of Estimated Pain Experienced during Execution: Effects of Gender and Belief in Capital Punishment," *OMEGA-Journal of Death and Dying* 38, no. 2 (1999): 103–111.

[67]Jon Hurwitz and Shannon Smithey, "Gender Differences on Crime and Punishment," *Political Research Quarterly* 51, no. 1 (1998): 89–115.

[68]Bahram Haghighi and Alma Lopez, "Gender and perception of prisons and prisoners," *Journal of Criminal Justice* 26, no. 6 (1998): 453–464.

[69]Kenneth F. Ferraro, *Fear of Crime: Interpreting Victimization Risk* (1995); Robert H. Langworthy and John T. Whitehead, "Liberalism and Fear as Explanations of Punitiveness," *Criminology* 24, no. 3 (1986): 575–591.

[70]Esther I. Madriz, "Images of Criminals and Victims: A Study on Women's Fear and

female support for capital punishment is predicated on women's images of the murderer. Arguably, if these images of murderers were to change, then female support for the death penalty would decrease.

Another take on this area is that gender per se may not be so critical. Instead, economic inequalities, situational constraints, and underlying political beliefs might explain why women differ from men on issues like capital punishment. Studlar *et al.*, for example, analyzed voting in Australia, Britain, and the United States.[71] They found that such factors reduced 'the bivariate gender gap to insignificance in all three countries'. More specifically, the critical element in the United States was political orientation. Concretely, more women than men have identified themselves as Democrats in every presidential election year since 1952, with only two exceptions.[72]

A somewhat provisional explanation may also lie in socialization practices. Girls are brought up to be caring and nurturing. Boys are raised to be competitive, aggressive, and rights oriented. Hurwitz and Smithey argued that women's political orientation is responsible for their voting behavior.[73] But they also caution that it may well be socialization which explains political orientation. Hurwitz and Smithey suggest that women are channeled into what Gilligan (1982) calls the 'ethics of care', while men are socialized to approve of force.

Another allied explanation is adult socialization. Becoming a mother, for example, can reinforce childhood socialization experiences, influencing these women to be more family-oriented than women who are in other arrangements. Since the Democratic party has often been associated, rightly or wrongly, with individual and familial welfare and the Republican Party with business and military interests, one might expect that women with their nurturing values will favor a Democratic affiliation.[74] Such a framework helps to explain male-female differences on

Social Control," *Gender & Society* 11, no. 3 (1997): 342–356.

[71]John T. Whitehead and Michael B. Blankenship, "The Gender Gap in Capital Punishment Attitudes: An Analysis of Support and Opposition," *American Journal of Criminal Justice* 25, no. 1 (2000): 1–13.

[72]Margaret C Trevor, "Political Socialization, Party Identification, and the Gender Gap," *Public Opinion Quarterly*, 1999, 62–89.

[73]Hurwitz and Smithey, "Gender Differences on Crime and Punishment."

[74]Jeff Manza and Clem Brooks, "The Gender Gap in US Presidential Elections: When? Why? Implications?," *American Journal of Sociology* 103, no. 5 (1998): 1235–1266.

such issues as the military draft, nuclear weapons, the environment, and capital punishment.[75]

In the context of Asia, David T. Johnson and Franklin E. Zimring propound that although Asia is the most important region of the world when it comes to capital punishment, it is also one of the most understudied.[76] Their article identifies four research questions that deserve attention from students and scholars who believe taking capital punishment seriously requires studying Asia seriously too. What are the empirical contours of capital punishment in contemporary Asia? What are the histories of capital punishment in Asia? Can Western theories of capital punishment explain patterns and changes in Asia? And what is the future of capital punishment in Asia? If researchers take the trouble to explore these questions, the death penalty will not only become an interesting window into law and society in Asia, but Asia will prove to be an instructive window into the death penalty— -the gravest real-life problem in the law.

Hood and Doyle argue that the modern movement to abolish capital punishment was 'spawned by the enlightenment in Europe at the end of the eighteenth century'.[77] Two-hundred years later that movement may have reached a tipping point, with the number of nations choosing to abolish the death penalty almost tripling in 25 years, from 37 in 1980 to nearly 100 in 2005. As a result, nearly two-thirds of the world's nations no longer use the ultimate criminal sanction. But there remain three major exceptions to the trend toward abolition: the USA, Islamic countries and cultures, and Asia (home to nearly 60% of the world's population). Johnson and Miao argue that about 95% of the residents of Asia live in states that retain capital punishment, and at least 90% of the world's executions are performed there, the vast majority in China.[78]

[75]Jean Bethke Elshtain, "The Relationship between Political Language and Political Reality," *Political Science & Politics* 18, no. 1 (1985): 20–27.

[76]David T. Johnson and Franklin E. Zimring, "Taking capital punishment seriously," *Asian Journal of Criminology* 1, no. 1 (2006): 89–95; Franklin E. Zimring and David T. Johnson, "Public Opinion and the Governance of Punishment in Democratic Political Systems," *The Annals of the American Academy of Political and Social Science* 605, no. 1 (2006): 265–280.

[77]Roger Hood and Carolyn Hoyle, "Abolishing the Death Penalty Worldwide: The Impact of a 'New Dynamic'," *Crime and Justice* 38, no. 1 (2009): 1–63.

[78]David T. Johnson and Michelle Miao, "Chinese Capital Punishment in Comparative Perspective," chap. 11 in *The Death Penalty in China: Policy, Practice, and Reform* (Columbia University Press, 2015), 300–326.

Zimring writes that in the developed world, Japan and the USA are the only two democracies that still use capital punishment on a regular basis. In Europe, by contrast, a stand against the death penalty has become an orthodoxy: a moral imperative believed necessary to the status of any "civilized" modern state and that morality is being exported to the rest of the world with 'missionary vigor'.[79]

The articles in Austin Sarat's *The Killing State* represent an important and wide-ranging cross-section of current debates about the death penalty.[80] Coming from the varied perspectives of moral and political philosophy, legal theory, cultural criticism and what might be called political anthropology, the approaches taken range from mainstream to Nietzschean to deconstructionist. Neither is the collection univocally against the death penalty. Regardless of the threat to its sovereignty posed by multinational corporations and the widely perceived problem of its legitimacy, the nation-state still holds the awesome power of life or death over us, its citizens. Thus, in his introduction, Austin Sarat argues that in such a state of affairs, the death penalty comes to have a crucial political weight: 'If the sovereignty of the people is to be genuine, it has to mimic the sovereign power and prerogatives of the monarchical forms it displaced and about whose sovereignty there could be few doubts'.[81]

The connection between democracy and violence is a theme considered in one of the most striking essays in the volume, namely Anne Norton's 'After the Terror'.[82] Quoting Nietzsche to the effect that violence does not merely destroy but establishes, Norton looks at the role of violence in the establishment of democratic regimes, both in the English and French revolutions (focusing particularly on the use of the death penalty) and in the Algerian war of liberation. Drawing on Fanon, she makes some interesting remarks about the seemingly necessary but unpalatable fact that those engaged in a war of liberation be prepared to do things that they themselves take to be awful and which scar their lives. Julie Taylor explores another aspect of the 'killing state' though one in which

[79]Franklin E. Zimring and David T. Johnson, "Law, Society, and Capital Punishment in Asia," *Punishment & Society* 10, no. 2 (2008): 103–115.

[80]Austin Sarat, ed., *The Killing State: Capital Punishment in Law, Politics, and Culture* (Oxford: Oxford University Press, 2001).

[81]Ibid., 5.

[82]Anne Norton, "After the Terror: Mortality, Equality, Fraternity," chap. 1 in Sarat, *The Killing State: Capital Punishment in Law, Politics, and Culture*, 27–39.

repression is a leftover from a dictatorial regime rather than an essential part of democracy in a piece on the role of the police in Argentina in dealing out informal justice (or simply killing at will).[83] This police power derives, Taylor says, from the war of the Procesco dictatorial regime against its political opponents. Here state violence is not the awesome and necessarily rare expulsion of a recalcitrant member of society from the catalogue of the living, but rather the power of life and death in the hands of a brutal and now more or less autonomous police force.

William E. Connolly gives an account of the development of the concept of the will and its intertwining with the project of making human beings accountable. He then goes on to look at how the debate between those who defend freedom of the will (or take it for granted as a metaphysical given) and those who are skeptical of it plays out as part of the wider 'cultural war' in the USA between liberals and conservatives. From this background, I have developed the following argument in my thesis: not just that the notion of the rational, autonomous agent is a dubious one on which to find a legal system, but also that defining the nature of the action performed by any agent is always a somewhat arbitrary, post hoc construction, is worth consideration by anyone interested in how law performs in the underbelly of a democratic nation.[84]

Peter Fitzpatrick argues against the death penalty from a Derridean standpoint, invoking the essential indeterminacy of legal standards. His key point is that the death penalty involves a finality that is in fundamental contradiction with the point that there is 'always more to do' to decide whether the defendant ought to live or die. If legal judgement can never be final, how can we justify inflicting a punishment that is irrevocable in the way the sentence of death is?[85]

From a more analytical philosophical perspective, Hugo Adam Bedau draws out some of the difficulties of finding a moral philosophical basis for total opposition to the death penalty. Rejecting such grounds as the right to life, utility, and the view that the death penalty is a 'cruel and

[83]Julie M. Taylor, "A Juridical Frankenstein, Or Death in the Hands of the State," chap. 2 in Sarat, *The Killing State: Capital Punishment in Law, Politics, and Culture*, 60–80.

[84]William E. Connolly, "The Will, Capital Punishment, and Cultural War," chap. 8 in Sarat, *The Killing State: Capital Punishment in Law, Politics, and Culture*, 187–205.

[85]Peter Fitzpatrick, "'Gods would be needed…': American Empire and the Rule of (International) Law," *Leiden Journal of International Law* 16, no. 3 (2003): 429–466.

unusual' punishment, he concludes with the rather flimsy sounding claim that, although punishment is a valid social objective (or furthers such objectives), the death penalty is more severe, less remediable, and more violent than the alternatives, and is anyway 'never necessary to achieve valid social objectives' because the alternatives are sufficient.[86]

In the Indian context, there is a sufficient amount of data present on the crimes for which the death penalty is given, the manner of sentencing as well the manner of execution. Capital punishment in India has a long history. The execution of offenders was common in ancient India and the legal system was influenced by the Hindu concept of dharma, or the rules of right conduct.[87] India's contemporary government and legal system are also heavily influenced by its more recent past as a British colony. In 1947, India obtained independence and became a sovereign nation, but the current criminal justice system is still based mainly on the English common law system, which allowed for capital punishment.[88] For the crime of murder, Indian judges in the early twentieth century could impose a sentence of death or of life in prison. A written justification was required for sentences of life in prison, but not for death sentences; hence, death sentences were more commonly imposed.[89] In 1955, the 26th Amending Act changed this requirement. In 1973, the India Supreme Court ruled in *Jagmohan Singh v. State of U.P.* (1973, 1 SCC 20) to further narrow the use of capital punishment, and it reaffirmed in *Asgar v. State of U.P.* (AIR 1977 SC 2000) that the death penalty, though constitutional, should be used only in exceptional cases.[90] In 1980, the India Supreme Court further ruled in *Bachan Singh v. State of Punjab* (AIR 1980 SC 898) that capital punishment should be restricted to the rarest of rare cases. Although current law permits judges to interpret these rulings, it also requires them to explain in the record why a person was sentenced to death rather than to life in prison.[91]

[86]Paul G. Cassell Hugo Adam Bedau, ed., *Debating the Death Penalty: Should America Have Capital Punishment? The Experts on Both Sides Make Their Best Case*, 1st ed. (Oxford University Press, 2004).

[87]Eric G. Lambert et al., "Views on the Death Penalty among College Students in India," *Punishment & Society* 10, no. 2 (2008): 207–218.

[88]R. K. Raghavan, "World Factbook of Criminal Justice Systems: India," 1997, accessed May 19, 2018, https://www.bjs.gov/content/pub/pdf/wfbcjsin.pdf.

[89]Bikram Jeet et al. Batra, *Crime and Punishment: An Analysis of Death Penalty* (2006).

[90]Ibid.

[91]Vineet Gupta, Ashish Goel, and Sanjeev Bhoi, "Opposing the Death Penalty," *The*

Both the Indian Constitution and the current Indian Penal Code authorize the use of capital punishment. Article 21 of the Constitution provides that a person shall be deprived of life or personal liberty only in accordance with legally established procedures and Section 53 of the Penal Code permits capital punishment as a form of punishment. In India, the death penalty can be imposed for the following crimes: murder; waging of war against the State (including terrorism); mutiny; sacrificial killing of widows; a second conviction for drug-trafficking; abetting of the suicide of a child, or of a person who is insane, incompetent, or intoxicated; and attempted murder while serving a life sentence.[92] In India, murder is punishable by either death or a life sentence; however, after 14 years, a person sentenced to life can be released. Persons 16 or older can be sentenced to death— -in spite of the International Covenant on Civil and Political Rights, which India ratified in 1979, and which prohibits the death sentence for persons under 18. Persons sentenced to death are allowed different levels of appellate review, which in many cases results in the commuting of the death sentence to life imprisonment or release.

Additionally, the President has the power to issue pardons.[93] Hanging is the sole method of execution. Unlike the USA, India does not release official death penalty statistics, such as the numbers of those executed and those awaiting execution.[94] In response to demands for such figures, the Deputy Director of the Prisons recently stated that the release of such information was not in the public interest.[95] However, it has been estimated that 3000 to 4000 executions occurred between 1950 and 1980.[96] Information on the numbers of persons sentenced to death and executed from 1980 to the mid-1990s is harder to estimate. According to Raghavan, two

Lancet 369, no. 9566 (2007): 991.

[92]Commission of Sati Prevention Act 1987; Sudershan Pasupuleti et al., "Crime, Criminals, Treatment, and Punishment: An Exploratory Study of Views among College Students in India and the United States," *Journal of Contemporary Criminal Justice* 25, no. 2 (2009): 131–147.

[93]Hands Off Cain, "India—Retentionist," *Retrieved on February* 16 (2006): 2006.

[94]Ibid.

[95]Amnesty International, *Death Sentences and Executions* (Amnesty International, 2008), accessed April 6, 2019, https://www.amnesty.org/en/documents/act50/002/2006/en/.

[96]Bikram Jeet Batra, "Information on Death Penalty: India Flouting International Obligations," *Economic and Political Weekly*, 2005, 4506–4508.

or three persons are hanged per year.[97] Since 2000, the number of death sentences appears to have increased.[98] In March of 2004, an estimated 160 individuals were on death row in India.[99]

Like many retentionist countries, India has been the site of much death penalty-related controversy, which has led to several unsuccessful attempts to outlaw capital punishment.[100] Additionally, as in the USA, perceptions exist among Indian citizens that the death penalty is unfairly administered. Indeed, most of those executed in India are 'illiterate, poor, and vulnerable'.[101] Caste status and economic status, which are closely interrelated, are probably important factors in death penalty decisions in India. Dhananjoy Chatterjee, prior to his recent execution in India, remarked: 'I would like to be reborn as a rich man as justice favours only the rich'.[102]. In particular, the death penalty debate has been affected by the case of Mohammad Afzal, a Muslim, who received the death sentence after his conviction for conspiracy in the December 2001 attack on the Indian Parliament. His execution had been postponed due to allegations that he did not receive a fair trial, as well as due to the social and political ramifications that might have resulted from his death.[103]

Religion and race based studies have been carried out in the USA; Such a situation exists in the USA, where Black persons are less supportive of capital punishment than are White persons.[104] A similar study has not been organised in the Indian context. Many researches in the US have concluded that the wealthy and politically connected receive a different form of justice than the poor and disenfranchised. in the Indian context,

[97] R. Raghavan, "India. World Factbook of Criminal Justice Systems," 2004, accessed November 11, 2022, http://nicic.org/Library/019426.

[98] S. Majumder, "India and the Death Penalty," *BBC News* 4 (2005).

[99] Austin Sarat and Christian Boulanger, *The Cultural Lives of Capital Punishment: Comparative Perspectives*, The Cultural Lives of Law (California: Stanford University Press, 2005).

[100] A. R. Blackshield, "Capital Punishment in India," *Journal of the Indian Law Institute* 21, no. 2 (1979): 137–226.

[101] Gupta, Goel, and Bhoi, "Opposing the Death Penalty."

[102] K. P. Kannan, "For a Fair Globalisation," *Economic and Political Weekly*, 2004, 4217–4219.

[103] Srinibas Nayak and Sibasis Pattnaik, "Capital Punishment in India: An Analysis," *PalArch's Journal of Archaeology of Egypt/Egyptology* 17, no. 6 (2020): 5059–5065.

[104] Alan W. Clarke et al., "Does the Rest of the World Matter? Sovereignty, International Human Rights Law and the American Death Penalty," *Queen's Law Journal* 30 (2004): 260.

Amnesty International and the Asian Centre For Human Rights make a similar claim.[105]

It has been argued by some that religious affiliations may also influence levels of death penalty support. Since the vast majority of Indians are Hindus, it is conceivable that non-Hindu minority members of Indian society may feel subject to unfair treatment by government institutions and, as such, may be more likely to oppose the death penalty. Such a situation exists in the USA, where Black persons are less supportive of capital punishment than are White persons.[106] At this time, it is not known if Hindus are more supportive of the death penalty than are non-Hindus; however, there is an intensifying debate in India over whether law enforcement institutions exhibit bias along socio-economic lines, particularly in imposing the death penalty. The perception exists among Indians that the wealthy and politically connected receive a different form of justice than the poor and disenfranchised.[107] No known research to date, though, has specifically investigated the major rationales invoked for supporting or opposing the death penalty in India. The bulk of such research has focused on western nations, particularly the USA.

As seen above, in the USA, the four major reasons for support cited by death penalty proponents are retribution, deterrence, an instrumental perspective, and incapacitation.[108] Retribution, the most commonly cited rationale, is arguably also the most emotionally based and tends to represent a desire for vengeance.[109] Deterrence is invoked by some death penalty proponents who argue that executing criminals may prevent others from committing serious offenses.[110] According to the instrumental perspective, the death penalty is necessary to ensure law and order in society; without it, violence would proliferate and lead to chaos.[111]

[105]Amnesty International, *Death Sentences and Executions*.

[106]Clarke et al., "Does the Rest of the World Matter? Sovereignty, International Human Rights Law and the American Death Penalty."

[107]Amnesty International, *Death Sentences and Executions*.

[108]Eric Lambert and Alan Clarke, "The Impact of Information on an Individual's Support of the Death Penalty: A Partial Test of the Marshall Hypothesis among College Students," *Criminal Justice Policy Review* 12, no. 3 (2001): 215–234.

[109]Radelet and Borg, "The Changing Nature of Death Penalty Debates."

[110]John T. Whitehead and Michael B. Blankenship, "The Gender Gap in Capital Punishment Attitudes: An Analysis of Support and Opposition," *American Journal of Criminal Justice* 25, no. 1 (2000): 1–13.

[111]Sheila Royo Maxwell and Omara Rivera-Vazquez, "Assessing the Instrumental and

The last major reason cited is incapacitation: execution is seen as the ultimate way to curtail a person's ability to commit further violence.[112] In western societies, including the USA, major reasons cited by abolitionists for opposing capital punishment are morality/mercy, the need to avoid promoting violence (i.e., via the brutalization effect), life imprisonment without parole (LWOP) as an effective deterrent, and the risk of executing innocent persons.

Many abolitionists contend that the death penalty is immoral, uncivilized, and cruel, for instance, it violates civilized standards of human dignity and undermines society's moral claim that killing is wrong.[113] Some argue that capital punishment does not deter violence but rather leads to increased violence, that is, it has a brutalization effect.[114] Additionally, it is sometimes argued that LWOP is an effective deterrent of serious violent crimes, including murder. Finally, some oppose capital punishment based on the real risk of executing innocent persons. As abolitionists may emphasize, many innocent persons have been sentenced to death and then exonerated in the USA. Generally, death penalty support in the USA has been correlated with gender, age, educational level, and religion. Support tends to be higher among men, older persons, less educated individuals, frequent church attendees, and persons who rank religion as highly important to their lives (i.e. persons who report high religious salience) than among women, younger individuals, more highly educated persons, persons who do not attend church frequently, and persons reporting lower religious salience.[115]

Data problems present themselves in the Indian context when one tries to dig a little deeper, by asking the exact number of executions that may have taken place in Independent India or the specific number of

Symbolic Elements in Attitudes toward the Death Penalty using a Sample of Puerto Rican Students," *International Journal of Comparative and Applied Criminal Justice* 22, no. 2 (1998): 329–339.

[112]Clarke et al., "Does the Rest of the World Matter? Sovereignty, International Human Rights Law and the American Death Penalty."

[113]Radelet and Borg, "The Changing Nature of Death Penalty Debates."

[114]Ernie Thomson, "Deterrence Versus Brutalization: The Case of Arizona," *Homicide Studies* 1, no. 2 (1997): 110–128.

[115]Robert M. Bohm, *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States* (Routledge, 2016); Harold G. Grasmick and Anne L. McGill, "Religion, Attribution Style, and Punitiveness toward Juvenile Offenders," *Criminology* 32, no. 1 (1994): 23–46.

clemency petitions that have been approved by the office of the president. The paucity of this data has also been lamented in some seminal texts analyzing the situation of death penalty in India; information on the numbers of persons sentenced to death and executed from 1980 to the mid-1990s is harder to estimate. According to Raghavan, two or three persons are hanged per year.[116] Since 2000, the number of death sentences appears to have increased.[117] In response to demands for such figures, the Deputy Director of the Prisons stated that the release of such information was not in the public interest.[118] However, it has been estimated that 3000 to 4000 executions occurred between 1950 and 1980.[119] A good amount of data is also present on clemency petitions but just like there is no clarity on the number of people executed there is also some debate around the number of people pardoned.[120]

Apurva Prabhakar has written that keeping one person alive at the cost of the lives of numerous members or potential victims in the society is unimaginable and in fact, that is immoral. As against the common belief that an innocent person may be sent to the gallows by false conviction, she goes on to explain the various checks and balances available that ensure that no innocent person is condemned while at the same time ensuring that no person who is guilty of the most heinous crimes is allowed to go scot-free.[121] Similarly, the punitive theory of punishment suggests that capital punishment must continue to exist so long as the possibility of heinous crimes continues to exist in society. It has been opined that the state cannot put the larger society at risk by not punishing the one criminal who is no longer fit to be a part of that same society.[122]

[116]Raghavan, "India. World Factbook of Criminal Justice Systems."

[117]Sanjoy Majumder, "India and the Death Penalty," August 4, 2005, accessed September 15, 2016, http://news.bbc.co.uk/2/hi/south_asia/2586611.stm; Eric G. Lambert et al., "Views on the Death Penalty among College Students in India," *Punishment & Society* 10 (2 2008): 207–218.

[118]Amnesty International, *Death Sentences and Executions*.

[119]Muralidhar, "Hang Them Now, and Hang Them Not: India's Travails with the Death Penalty."

[120]Shruti Bedi, "Dawdling on Clemency: A Ground for Commuting Death Penalty in India"; Andrew Novak, *Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective* (Routledge, 2015).

[121]Apurva Prabhakar, "Why Must Death Penalty Continue To Exist?," *International Journal of Humanities and Social Science Invention* 2, no. 51 (2013): 32–36.

[122]Jeremy C. Baron, "The "Monstrous Heresy" of Punitive Damages: A Comparison to the Death Penalty and Suggestions for Reform," *University of Pennsylvania Law Review*

Anindya Mishra and Avanish Bhai Patel looking at crimes on the elderly in India (which remains an important kind of crime for which Retentionists have called for death penalty) suggest that the elderly have been victimized, in many cases, at their own homes. The different forms of elder abuse involved in their study such as murder, attempt to murder, injury/ hurt, theft, kidnapping and mistreatment highlight the social vulnerability experienced by the elderly. They also call for Community policing that can reduce the fear of crime among the senior citizens.[123]

Sahni and Junnarkar contend that the present state of deteriorating law and order in India, demands a retention of the death penalty in India. Perhaps if threats posed from terrorism or to national security, became any less compelling one could imagine a system without capital punishment. But the current situation clearly demands a continuation of the same.[124] Alternatively, Prabhat Patnaik argues that reasons of national security and integrity are often used in neo-liberal times as part of the state's culture of cruelty and compassion; the state wants to maintain a simultaneous soft and hard arm to constantly convince the larger populations that massive allegiance must always be owed to the state as it protects us against the 'ever threatening other'.[125]

Sandhu has written about the loopholes in the criminal justice system.[126]. Adherence to the mandatory procedural requirement presentencing hearing, the real possibility of the wrong being convicted, the uncertainty brought about by long period of imprisonment without conviction are some of the primary factors behind the abolitionists calling for the abolition of death penalty. In a related argument, Payal Lamba and Akanksha Seth argue that the possibilities of mistrial are ever present in the criminal justice system.[127]

Raghavan has argued that in 1947, India obtained independence and became a sovereign nation but the current criminal justice system is

159, no. 3 (2011): 853–891.

[123]Avanish Bhai Patel and Anindya J. Mishra, "An Empirical Study of Elder Abuse in the State of Uttar Pradesh of India," *Quality in Ageing and Older Adults*, 2018,

[124]Sanjeev P. Sahni and Mohita Junnarkar, "Death Penalty: An Indian Context," in *The Death Penalty: Perspectives from India and Beyond* (Springer, 2020), 17–30.

[125]Prabhat Patnaik, "The Economic Crisis and Contemporary Capitalism," *Economic and Political Weekly*, 2009, 47–54.

[126]Amardeep Singh Sandhu, "Legislative Lethargy in Criminal Law," 2018,

[127]As quoted in, Sahni and Junnarkar, "Death Penalty: An Indian Context."

still based mainly on the English common law system, which allowed for capital punishment.[128] Relatedly, Batra talks about how till 1973, for the crime of murder, Indian judges in the early twentieth century could impose a sentence of death or of life in prison. A written justification was required for sentences of life in prison, but not for death sentences.[129] Hence, death sentences were more commonly imposed. This point is also made in *Lethal Lottery*, a report on Supreme Court judgements by the PUCL (2008).[130] Amongst the limited literature in India regarding death penalty, this is an important study on death penalty that analyses Supreme Court judgments. It looks at Supreme Court judgments in death penalty cases from 1950 to 2006 concluded that it is an abusive and inconsistent process, hanging people on the basis of shockingly inadequate evidence. The research describes the death penalty system as a lethal lottery claiming that, The fate of these death row prisoners is ultimately a lottery.

It further critiques the arbitrariness of death penalty jurisdiction in India. It argues that the death penalty was not limited to the rarest of rare cases as claimed by politicians and courts, on the contrary, there is ample evidence to show that the death penalty has been an arbitrary, imprecise and abusive means of dealing with defendants. The main findings of this analysis were that firstly, there were errors in consideration of evidence. Most death sentences handed down in India are based on circumstantial evidence alone.

As discussed earlier, there are studies that provide evidence on the deterrent effect of capital punishment. This particular study examined the deterrent hypothesis by using county-level, post moratorium panel data and a system of simultaneous equation. The procedure they employed overcame common aggregation problems, eliminated the bias arising from unobserved heterogeneity, and provided evidence relevant for current conditions. The results suggested that capital punishment has a strong deterrent effect; each execution results, on average, in eighteen fewer murders with a margin of error of plus or minus ten and further

[128]Raghavan, "India. World Factbook of Criminal Justice Systems."

[129]Bikram Jeet Batra, "Information on Death Penalty: India Flouting International Obligations," *Economic and Political Weekly* 40, no. 42 (2005): 4506–4508.

[130]Batra et al., *Lethal Lottery: The Death Penalty in India, A Study of Supreme Court Judgments in Death Penalty Cases 1950-2006*.

tests showed that results were not driven by tougher sentencing.[131]

In another study that supports the deterrence effect, Sunstein and Vermeule argue that, if recent empirical studies findings that capital punishment has a substantial deterrent effect are valid, consequentialists and deontologists alike should conclude that capital punishment is not merely morally permissible but actually morally required.[132] Sunstein and Vermeule 's moral argument is critiqued by Steiker.[133] Acknowledging that the government has special moral duties does not render inadequately deterred private murders the moral equivalent of government executions. Rather, executions constitute a distinctive moral wrong which is purposeful as opposed to non-purposeful killing and a distinctive kind of injustice which is unjustified punishment. The 2015 Law commission report on the status of the death penalty in India, quoting Bentham, talks about the lack of deterrence; it looks at how terrorists come to be treated as martyrs.[134] Batra makes a similar argument of violation of right to life here[135]

In sum then, all of this data then largely deals with support or rejection of the death penalty. Some studies focus on the lack of clarity on the number of executions as well as clemency petitions. How the death penalty jurisprudence, however, derives support from the ideological apparatus of the state, or how the ideology of coercion comes to play a role in strengthening the larger logic of death penalty, remains to be explored. The troubling point for us— -and this is something that no literature has been able to expand on substantially— -is that it is increasingly becoming difficult to explain the stubborn persistence of death penalty in democracies, globally. There are strong moral-philosophical arguments

[131]H. Naci Mocan and R. Kaj Gittings, "Getting off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment," *The Journal of Law & Economics* 46, no. 2 (2003): 453–478, accessed August 19, 2016, https://doi.org/https://doi.org/10.1086/382603; John Donohue and Justin J. Wolfers, "The Death Penalty: No Evidence for Deterrence," *The Economists' Voice* 3, no. 5 (2006).

[132]Cass R. Sunstein and Adrian Vermeule, "Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs," *Stanford Law Review* 58 (2005): 703.

[133]Carol S Steiker, "No, Capital Punishment is not Morally Required: Deterrence, Deontology and the Death Penalty," *Stanford Law Review* 58 (2005): 751.

[134]Law Commission of India, *Law Commission of India: Arrears and Backlog-creating Additional Judicial Manpower*.

[135]As quoted in Lill Scherdin, *Capital Punishment: A Hazard to a Sustainable Criminal Justice System?* (Ashgate, 2014).

against it, a jurisprudence to ground its abolition, and evidence-based empirical research that shows the ineffectiveness of death penalty, and yet, it persists. We need to understand why is the death penalty continuing despite no evidence present for its deterrent effect- as pointed out in the law commission report itself? Beyond this set of literature, far more research is needed. How is it finding support in a liberal democratic setting. Is it as Agamben argues, a result of states naturalizing states of exception or because democratization has failed to take strong roots in most regimes that claim to be liberal and democratic?[136]. This, along with a few more questions form the backdrop of our study on capital punishment in India.

[136]Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: The University Of Chicago Press, 2005); Christopher Hobson, "Democracy: Trap, Tragedy or Crisis?," *Political Studies Review* 16, no. 1 (2018): 38–45.

Chapter 1

Anti-Colonial Movement and the Legal-Political Debate on Capital Punishment: 1931 to 1967

1.1 Introduction

It would appear that political discourse on death penalty in India can be framed with reference to two homicides: the execution of Bhagat Singh and his comrades in 1931, which prompted the Karachi resolution on fundamental rights; and, the assassination of M. K. Gandhi by Nathuram Godse in 1948, which enabled the Constitution Assembly to retain the death penalty. It was only between these two events that the bulk of the anti-colonial movement adopted an openly abolitionist position *vis-à-vis* the death penalty. What led to its stunning reversal after Independence? Did the political leaders make any unstated distinction between 'good' and 'bad' homicides in the Constitution Assembly, or did they simply acquire the mantle of sovereignty from the British rule, and thereby its penal logic? This chapter attempts to answer these questions by looking at some historical literature and by revisting the Constitution Assembly Debates. In cojunction with this problematic, this chapter looks at the discussion within judiciary in ascertaining the constitutionality of the death penalty and its attempts to regulate its awarding in the immediate aftermath of Independence.

The colonial state in India practised death penalty on an unprece-

dented level. Until 1862, when the Indian Penal Code (IPC) came into force, the colonial state inherited a mélange of Islamic law and its own modifications into it, called as 'Anglo-Muhammadan construct'.[1] Traditional Indian laws seldom awarded death penalty even in cases involving murder.[2] However, once the IPC came into force (in 1862, though Macaulay had helped draft it in 1830s), capital punishment rates rose dramatically. For example, in 1908, 504 individuals were sentenced to death.[3] To set this in context, after the rebellion of 1857 the British hanged and blew from cannon a large number of suspect mutineers without much of a trial, apparently to make a spectacle of their deaths even long after the rebellion had died. At the same time they claimed that such punishment was only usual and traditional in India.[4] The violence of the colonial rule was not just on the subjective level (hangings, torture, surveillance, police firings, etc.) but on objective level (economic exploitation, famines, etc.) too, which had been articulated from the very beginning of the anti-colonial movement by people like Dadabhai Naoroji and R. C. Dutt.[5]

It is said that the colonial state used death penalty to not simply punish the 'guilty' and ensure in a utilitarian fashion 'the greatest amount of good for the greatest number'; it rather employed punishment to assert its sovereignty over its subjects, though it was never stated as such.[6] A

[1] R. W. Wilson, *An Introduction to the Study of Anglo-Muhammadan Law* (London: W. Thacker / Co., 1894).

[2] Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (New Delhi: Oxford University Press, 1998), 9.

[3] Deana Heath, *Colonial Terror: Torture and State Violence in Colonial India* (New Delhi: Oxford University Press, 2021), 46 n., 52.

[4] Rudrangshu Mukherjee, *Spectre of Violence: The 1857 Kanpur Massacres* (New Delhi: Penguin Books, 2007), 41–45, Dierk Walter, *Colonial Violence: European Empires and the Use of Force* (Oxford: Oxford University Press, 2017), ch. 3.

[5] The distinction between subjective and objective violence is borrowed from Žižek. See Slavoj Žižek, *Violence: Six Sideways Reflections* (New York: Picador, 2008).

[6] Singha, *A Despotism of Law: Crime and Justice in Early Colonial India*, See also, Barry Wright, "Macaulay's Indian Penal Code: Historical Context and Originating Principles," chap. 2 in *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform*, ed. Stanley Yeo Wing-Cheong Chan Barry Wright (New York: Routledge, 2011), Wright rather naively claims that the IPC was 'meant to displace more arbitrary forms of discretionary authority with a more credible rule of law-based authority and the routine administration of justice' and that 'Macaulay's originating principles of comprehensiveness, consistency and accessibility are durable, have in many respects stood the test of time and remain progressive law reform aims in the twenty-first century.' 28 and 23. Neil Morgan, "The Fault Elements of Offences," chap. 2 in Wing-Cheong Chan, *Codification, Macaulay and the Indian Penal Code: The*

political corollary of this relationship could be that challenging laws made by the colonial state in general and death penalty in particular would constitute a political strategy in challenging its sovereignty, much like Gandhi tried by violating the salt tax (1930).

However, the anti-colonial movement took some time to adopt this as a principled position and it required a concession on part of the leadership to the left wing of the movement in order to challenge the right of the state to impose the highest punishment it could, i.e. the death penalty, though it is not clear what led to the abandoning of this position in the Constitution Assembly. Immediately after the execution of Bhagat Singh and his comrades, the Congress Party moved in a resolution at its Karachi Congress (1931) in which it resolved to abolish capital punishment after independence.[7] In the Clause XIII on Fundamental Rights and Duties, it was declared that '[t]here shall be no capital punishment'. This clause probably prevented a split within the Congress.

Afterwards, opposition to colonial state's right to punish came in the form of popular opposition to the Indian National Army trials (of which the Royal Indian Navy mutiny was an important event, though it received no support from national leadership), in which at least 600 out of 20,000 INA prisoners were publicly court-martialled at the Red Fort in New Delhi. In normal circumstances the high ranking officers of the Indian National Army would have certainly been awarded with high level of punishment. However, due to the changing political climate and aggressive opposition by a large number of people outside of the traditional political parties, the sentences of deportation were never carried out and the sentenced individuals were simply discharged.[8] Despite this, the Mountbatten took assurance from Nehru that none of those who

Legacies and Modern Challenges of Criminal Law Reform, 59–86.

[7]Kama Maclean, *A Revolutionary History of Interwar India: Violence, Image, Voice and Text* (London: C. Hurst & Co., 2015), 'The revolutionaries were not engaged in the drafting of the resolution, but their politics and fate helped to create the conditions for its acceptance by the Congress in the face of some determined opposition. The resolution not only injected a socialist tinge to Congress objectives, but 'served to provide a powerful stimulus to the growth of the socialist movement in the country'. This was an outcome that was consistent with the HSRA's own objectives.' Ch. 7. Sumit Sarkar, *Modern India*, 2nd ed. (London: Macmillan, 1989), '...the Karachi session is significant mainly as revealing the weaknesses of the Left critics of Gandhi.' 267.

[8]Sumit Sarkar, "Popular Movements and National Leadership, 1945-47," *Economic and Political Weekly* 17, nos. 14/16 (1982): 679–ii.

worked for INA would ever be inducted into independent India's army.

1.2 The Constitution Assembly Debates on Death Penalty

The real and most important decision to abolish the death penalty was, however, to be taken in the Constitution Assembly. It appears that it was there that the Assembly seems to have displayed, at best, an ad hoc attitude towards the death penalty, neither supporting nor opposing it in principle but allowing it to continue in practice at least for the time being. The Assembly seems to have had no concern in implementing a promise made in the Karachi Resolution. However, its tactical silence on this issue and the decision to pass the power of abolishing death penalty to Parliament appears to have introduced the litany of judicial reviews and several reports by Law Commissions to come. Whatever little discussion transpired in the Constitution Assembly on this matter was enunciated in tropes and rhetorics of principles. The same, however simultaneously made impossible the adoption of a principled position itself.

1.2.1 Z. H. Lari's Premature Amendment

On 20th November, 1948, a member of the Muslim League, Z. H. Lari (who was to later migrate to Pakistan in 1950), put forward an amendment for abolishing death penalty, it was met with silence. The house was abandoned until next morning, and after a short speech arguing against its abolition, the motion was summarily rejected by B. R. Ambedkar and then by house voting. No reason was provided whatsoever.

One reason why Lari's amendment was with silence that day could have been that it seemed rather awfully out of sync with the discussion taking place on Draft Article 11, later to be Article 15 of Constitution. The Assembly had been deliberating about untouchability, which was to be 'abolished', and about the structurally weaker strata of the society than about life v. death and right to appeal to Supreme Court in this matter. While Lari's amendment saw itself as adding to the fundamental rights (of life), it must have sounded rather abruptly introduced. However, the near

silent reaction and the adjourning of the house after his introduction of the amendment also signified the unease of the Assembly in accepting the same logic that many of its members had advocated nearly two decades back in the Karachi Resolution, as it became clearer the next day. Let us, however, reproduce Lari's arguments about the death penalty in full, which was a standard liberal-humanist argument against death penalty:

> The first consideration is that human judgment is not infallible. Every judge, every tribunal is liable to err. But capital punishment is irrevocable. Once you decide to award the sentence, the result is that the man is gone... The second consideration is that human life is sacred and its sanctity is, I think, accepted by all... A man's life is taken away if there is no other way to prevent the loss of other human lives. But the question is whether capital punishment is necessary for the sake of preventing crimes which result in such loss of human lives. I venture to submit that at least thirty countries have come to the conclusion that they can do without it and they have been going on in this way for at least ten years, or twenty years, without any ostensible or appreciable increase in crimes... The third consideration is that this is a punishment which is really shocking and brutal and does not correspond with the sentiments which prevail now in the present century.[9]

Lari concluded his speech by calling for the 'reformative element in punishment' rather than opting for retributive justice. When the Assembly resumed next day, Zari's resolution was resolutely opposed by Amiyo Kumar Ghosh and K. Hanumanthaiya of the Congress. Ghosh's opposition to Lari's amendment was based on the contingent requirement of death penalty. For all purposes, he was willing to see this punishment being done away (perhaps, in a long future) but not at that historical moment. His biggest concern was that the state might be tied down for all time to come if this punishment was abolished. Ghosh eventually suggested that later on the death penalty could be done away with through a revision of the Indian Penal Code.[10]

Hanumanthaiya's argument was passionate if not coherent, and reflected the distance that the Constitution Assembly had travelled since the days of Karachi Resolution and Gandhi's assassination. Hanumanthaiya's argument was twofold: like Ghosh, he agreed 'principally' about

[9] "Constituent Assembly Debates," 7, no. 29 November, 1948, accessed July 7, 2018, https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29.

[10] "Constituent Assembly Debates," 7, no. 30 November, 1948, accessed July 7, 2018, https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-30.

the abolution of death penalty, but he was also concerned whether the state would lose its power to punish if this amendment was accepted. More generally, he would have preferred the viewpoint of the state to the viewpoint of the individual who was going to be subjected to capital punishment:

> . . . from the point of view of the State, a man who has no consideration for human lives does not deserve any consideration for his own life. Society is based not merely on reformation, but also on the fear instinct principle. To forget all other considerations except the question of reforming the convict does not hold the field and it has never held the field. If every man who takes away the life of another is assured that his life would be left untouched and it is a question of merely being imprisoned, probably the deterrent nature of the punishment will lose its value. The practice in prisons today is if a man is sentenced to life, he will be released, after concessions and remissions now and then given, in the course of about seven and a half years. Therefore, if a man who kills another is assured that he has a chance of being released after seven or eight or ten years, as the case may be, then everybody would get encouragement to pursue the method of revenge, if he has got any. For example, let us take this Godse incident.

As soon as he cited Godse's name, the Speaker reprimanded him for doing so. However, now that the name was uttered, Hanumanthaiya went on to explain how individuals like Godse would feel empowered to repeat their deeds if death penalty was done away with. At this, the Speaker simply asked Ambedkar whether he accepted the amendment. Ambedkar's short reply was 'I do not accept the amendment.' And with this the amendment was subjected to a voted, and rejected.

Statist arguments like those by Ghosh and Hanumanthaiya were not out of sync from the general attitude in the Constitution Assembly. As Granville Austin writes, the Assembly—which overwhelmingly belonged to the Congress Party—understood from the beginning that it was working from the beginning to ensure that independent India had a strong Centre, despite lip services to its federal character. So much had also been explicitly recommended by Sapru Committee and Cabinet Mission Plan too.[11] The presence of communal violence not far from the confines of the Constitution Assembly encouraged further this empowering Centre, and through that, the newly emerging Indian state. In fact, Gandhi himself

[11]Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, 2nd ed. (1966; New Delhi: Oxford University Press, 1999), 50, 236–238.

knew that the newly independent India would not look like as he had envisioned it:

> Congressmen themselves are not of one mind even on the contents of independence. I do not know how many swear by non-violence or the charkha or, believing in decentralization, regard the village as the nucleus. I know on the contrary that many would have India become a first-class military power and wish for India to have a strong centre and build the whole structure round it.[12]

Even outside the Assembly debates, the Indian state was carrying forward with its agenda of territorial aggrandizement and consolidation, which required the employment of brutal force.[13] It is, therefore, no surprise that the Assembly resolved not to abolish the ultimate punishment.

The next series of debate on the issue of death penalty was to take place more than half a year later in June, 1949.

1.2.2 The Final Debate in the Constitution Assembly

A matter of right to appeal to the Supreme Court arose in the Constitution Assembly on 3rd June, 1949, when the discussion on Draft Article 110 (later Article 132 of the adopted Constitution) took place. It pertained to the general right of appeal to the Supreme Court, but subject to a clearance issued by the High Courts that the Constitution has been violated. Naziruddin Ahmad's concern was that there could be possible cases where the right to appeal to the Supreme Court could be withheld simply because those cases would not bear upon the interpretation of the Constitution. In that situation, the High Courts could simply veto an individual's right to appeal to the Supreme Court. In this, he was supported by Rohini Kumar Chaudhuri who supplemented the arguments put forward by Naziruddin Ahmad with those relating to death penalty convicts. His argument was that death penalty convicts should have been given the right to appeal over those affected by property disputes (with a ceiling of Rs. 2000.)

[12] M. K. Gandhi, *Harijan*, 28 July, 1946. Quoted from Austin, *The Indian Constitution: Cornerstone of a Nation*, 50.

[13] Asim Roy, "The High Politics of India's Partition," *Modern Asian Studies* 24, no. 2 (1990): 385–408, https://doi.org/10.1017/S0026749X00010362; A. G. Noorani, *The Destruction of Hyderabad* (New Delhi: Tulika, 2014); Perry Anderson, *The Indian Ideology* (London: Verso, 2013).

Shibban Lal Saksena too opposed the Draft Article, and his primary concern was those sentenced with death penalty. He, however, supported the property ceiling for any right to appeal. P. K. Sen, without opposing the Draft Articles 110, 111 and 112, made observations about the use of death penalty in other countries, and specifically pointed out the example of Britain where death penalty was given in cases not involving homicide

> . . . [in] the time of Henary VIII, when there were 263 cases of crime to be met by capital sentence. When we come to 1797, even then there were 160 offences which used to be capitally punished. Then in 1833, there was a more for removing certain offences from the list of Capital offences. Take for instance, shop-lifting, petty cases of theft, etc. The offenders used to be sentenced to death-there is a recorded case of a boy sixteen who had not been able to resist the temptation to lift a little doll from the shop-window and he was hanged for it. British opinion was so obdurate that it refused to recognise that in these cases there was any other way possible-either punishment or correction or segregation. In 1833, when this question again arose of removing certain of these offences from the capital sentence list, Lord Ellen borough in the House of Lords gave a solemn warning: 'Your Lordships', said he, 'will pause before giving assent to a Bill of this character which will endanger private property for all time'.[14]

Some members were anxious that allowing appeals in death penalty case would burden the Supreme Court because such cases were expected to be in large numbers. Sen's contention was not whether death sentences were justified. What he sought was safeguards and the right to appeal, and in his view these things should not have been impeded because of lack of funds. K. M. Munshi then pointed out that the number of death penalty cases was very large ('in one province it could not be less than 100 or 150') and ensuring the right to appeal would mean hundreds of judges in the Supreme Court. Some other members too supported this contention, while some wanted the right of appeal to be ensured within the Constitution. Answering all these concerns, Ambedkar said that the right to appeal be better left for the Parliament to decide. Apropos the death penalty, he tried to simply cut the Gordian knot by suggesting that the death penalty be abolished:

> My other view is 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

[14] "Constituent Assembly Debates," 8, no. 3 June, 1949, accessed July 7, 2018, http://parliamentofindia.nic.in/ls/debates/vol8p15b.htm.

> end this controversy. After all, this country by and large believe 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.

Further debate on the question of death penalty resumed on 13th June. A number of members suggested amendments with largely three scenarios of providing the right to appeal in Supreme Court: (a) if the High Court allows so; (b) in case of death sentences; and, (c) if the Parliament allows it (Naziruddin Ahmad).[15] After going through a lengthy and tedious debate between those who favoured the right to appeal and those who opposed it, Ambedkar came to the general conclusions that the individual who has been awarded death sentence must have at least one right to appeal. With this idea in mind he proposed an amendment (14th June) which allowed the right to appeal in death sentences where the High Court had either reversed the judgement of a lower court, or it had taken a case away from a lower court and awarded death penalty or where it simply allowed the aggrieved person to appeal to Supreme Court. In addition Ambedkar also moved a sub-clause empowering the Parliament to pass further laws allowing the unconditional right to appeal before the Supreme Court. This was adopted by the Assembly and that was the end of debate on death penalty in the Constitution Assembly.

Within a space of ten days, Ambedkar's idea of abolishing the death penalty turned into the right of appeal to the Supreme Court, and it was left to the Parliament whether the death penalty should be retained or abolished. From there on, the question of death penalty passed into the hands of the judiciary for it to contemplate its constitutionality and limit its usage.

1.3 Judicial Interpretations

When the Indian constitution came into effect in 1950, it did not do much to change the existing legal position. This was because it allowed

[15] "Constituent Assembly Debates," 8, no. 13 June, 1949, accessed July 7, 2018, https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-06-13#8.103.225.

limitations on Article 21, under 'procedure established by law.' The Right to Life was thus established with permissible limitations on life and liberty. During the early period of Independence, there are very few reported Court judgements on death penalty cases. During this period, the Courts read the law quite strictly, doing exactly what the written word prescribed. Similarly, the procedure was interpreted very rigidly. Appeals to the Supreme Court for commutation were generally refused. The judgement in *Pritam Singh v. State*, reflects the extraordinary nature of appeals that came to it.[16] Between 1950-1955, majority of the judgements, reported in the Supreme Court, dealt with issues of constitutional law or special legislations. *Janardan Reddy & ors. v. State*, *Thaivalappil Kunjuvaru Vareed v. State of Travancore-Cochin*, *Habeeb Mohanammad v. State of Hyderabad* are a few such examples.[17] In another set of cases like, *Pangambam Kalanjoy Singh v. State of Manipur*; *Machander v. State of Hyderabad*, and *Hate Singh, Bhagat Singh v. State of Madhya Bharat*, the Court simply corrected the lower courts' errors by granting acquittals.[18] In very few cases, the Court actually commuted or confirmed the death sentences.

Amending Act XXXVI (1956-1975) states that:

> ...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.[19]

A number of changes were made to the existing CrPC through the Amending Act XXXVI of 1955. It came into effect on 1st January 1956. As per Section 367(5), the judges had to give clear reasons for awarding any punishment other than death in a capital case. This section was deleted via the Amending Act. This took away the special significance bestowed on death penalty. The judges were granted discretion in awarding any punishment within the ambit of law. Even in crimes like murder, the judges could choose between granting a death sentence or a life one.

[16] *Pritam Singh v. State* (1950), AIR 1950 SC 169.

[17] *Janardan Reddy & ors. v. State* (1950), AIR 1951 SC 124, *Thaivalappil Kunjuvaru Vareed v. State of Travancore-Cochin* (), AIR 1951 SC 124, *Habeeb Mohammad v. State of Hyderabad* (1958), AIR 1954 SC 51.

[18] *Pangambam Kalanjoy Singh v. State of Manipur* (1952), AIR 1956 SC 9, *Machander v. State of Hyderabad* (1955), AIR 1955 SC 792, *Hate Singh, Bhagat Singh v. State of Madhya Bharat* (1951), AIR 1953 SC 468.

[19] Justice V. R. Krishna Iyer, while discussing the 'judicial hunch in imposing or avoiding capital sentence' in *Ediga Anamma v. State of Andhra Pradesh* (1974), AIR 1974 SC 799.

Sudden changes led to massive confusion among judges and courts of various tiers. What ensued from this confusion was that the sentencing courts kept turning to 'extenuating circumstances' while deciding suitable punishments for crimes. As the discretion to the judiciary increased, so did the arbitrary usage of that discretion. For instance, In *Wazir Singh v. State of Punjab*, the sentence to the accused was commuted on the grounds of 'parity'.[20] It meant that the sentence of the co-accused was already commuted. Moreover, the evidence could not show whose firing had killed the deceased. However, an opposite position was taken up in *Brij Bhukhan & ors. v. State of Uttar Pradesh*.[21] Here the Court rejected commutation of the accused even though his co-accused had received the lesser sentence. The Court held: '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'.[22]

In *Kundan Singh & ors. v. State of Punjab*, contradictions in the sentencing by different courts came to the fore.[23] The trial court imposed death sentence on Karam Singh and life imprisonment on Shavinder Singh. The court argued that since the latter had himself been shot during the crime, he must have realised that 'his uninhibited aggression is not free from peril.' While the High Court did not lend support to this distinction it upheld the death sentence awarded to Karam Singh. The High Court's decision rested on the fact that 'the discretion exercised by the Sessions Judge in passing the order of sentence against Shavinder Singh was either arbitrary or capricious.' Later it was observed by the Supreme Court that both the accused used the same weapon while striking the deceased. The Court did not find 'any logical ground for making a distinction between appellants Shavinder Singh and Karam Singh.' Despite this, however, Karam Singh's commutation was denied 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'.

[20] *Wazir Singh v. State of Punjab* (1956), AIR 1956 SC 754.
[21] *Brij Bhukhan & ors. v. State of Uttar Pradesh* (1950).
[22] Ibid., AIR 1958 SC 66.
[23] *Kundan Singh & ors. v. State of Punjab* (2008), (1971) 3 SCC 900.

As mentioned earlier, the Court did not pay sufficient attention to the new changes in law. Hence most of the Supreme Court judgements from this period did not really discuss sentencing and the reasons involved in it. Cases such as *Subramania Goundan v. State of Madras*, *Sewa Singh v. State of Punjab*, *Sahoo v. State of Uttar Pradesh*, *Tufail (Alias) Simmi v. State of Uttar Pradesh*, *Gurcharan Singh v. State of Punjab*, *Ram Prakash v. State of Punjab*, *Ram Prakash & ors. v. State of Uttar Pradesh* bear testimony to this fact.[24] Moreover, there have been cases where the Court upheld the death penalty, more out of practice than a consideration of the circumstances of that particular case. Even when there were sufficient reasons for the award of a lesser sentence, the judgements were given seemingly in a mechanical way. Therefore in both *Shambhoo v. State of Uttar Pradesh* and *Bakshish Singh v. State of Punjab*, the Supreme Court refrained from entering into the domain of sentencing and simply upheld the sentence of the High Courts.[25] It did not get into why the lower courts had granted acquittals. The individual merits of each case were not duly discussed and the Court exhibited indolence in dealing with the nuances of the various cases.

Even towards the end of this first phase, there was a lack of guidelines for the upholding or withholding of the death penalty. Judgements came to be based on abstract principles such as, 'the ends of justice.' It did not do much by way of limiting the judicial arbitrariness that ailed (and still does) the sentencing procedures. Several judgements, without discussing the circumstances and facts of a case in detail, simply confirmed or commuted the death sentences in order 'to meet the ends of justice'. For instance, in *Raghubir Singh v. State of Uttar Pradesh*, while there were no facts to support the grant of a lesser sentence, the Supreme Court relied on the post-1955 changes in the law and argued, '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

[24] *Subramania Goundan v. State of Madras* (1957), AIR 1958 SC 66, *Sewa Singh v. State of Punjab* (1962), *Sahoo v. State of Uttar Pradesh* (1965), AIR 1966 SC 40, *Tufail alias Simmi v. State of Uttar Pradesh* (1967), (1969)3 SCC 198, *Gurcharan Singh v. State of Punjab* (2020), AIR 1963 SC 340, *Ram Prakash v. State of Punjab* (1958), AIR 1959 SC 1. *Ram Prakash & ors. v. State of Uttar Pradesh* (), (1969) 1 SCC 48.

[25] *Shambhoo v. State of Uttar Pradesh* (), (1962) SCR 334. *Bakshish Singh v. State of Punjab* (1972), AIR 1957 SC 904.

justice...'[26] This must be read in relation to the trial court's conclusion that the crime in question was 'pre-planned, cold-blooded, motivated by a deep sense of revenge.' The use of ambiguous terms such as 'peculiar facts' and 'ends of justice' does not do much by way of explaining the court's reasoning behind the commutation. There is no guarantee that another bench would not have used the same 'peculiar facts' and 'ends of justice' argument to confirm the death sentence.

The CrPC was re-enacted in 1973. several changes were introduced via this amendment, particularly to Section 354(3):

> When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

This was a momentous shift from the situation that followed from the 1955 amendment, under which life imprisonment and death penalty were equally possible in a death penalty case. This also reversed the 1898 law in which death sentences were the norm and reasons had to be stated for granting any other punishment. Under the latest law, judges had to clearly record their reasoning behind imposing the death penalty. These amendments set in motion some other important changes, most notably the possibility of a post conviction. This was noted in Section 235(2):

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

During the course of death penalty jurisprudence in India, its constitutionality was challenged on three important occasions. The most important charge it levied was that in its absolute denunciation of life, the death penalty clearly violated Articles 14 and 21. It was challenged for the first time in 1973. This was just before the CrPC was amended to make way for the death penalty as an exceptional punishment, making life imprisonment the rule for capital crimes.

[26] *Raghubir Singh v. State of Uttar Pradesh* (1971), (1972) 3 SCC 79.

1.4 Constitutionality of the Death Penalty: Part One

1.4.1 *Jagmohan Singh v. State of Uttar Pradesh*

The very first challenge to the constitutionality of the death penalty, as a form of state punishment, came via the Jagmohan case,[27] in 1973. In this case, it was petitioned that the death penalty limits the scope of Articles 14, 19 and 21 of the Indian Constitution. It was argued that the death penalty terminated life and with it all the freedoms provided for under Article 19(1) (a) to (g). Thus the death penalty was unreasonable as it denied the freedoms inherent in these articles, thereby ignoring the larger public interest. The petitioners also argued that the uncontrolled and unchecked discretion endowed on the judges in awarding death sentences was violative of Article 14. Further it mentioned that because the provisions in law did not say anything on the consideration of those circumstances that were key in deciding between life and death, it also derided Article 21. In *Furman v. Georgia*, the US Supreme Court had declared the death penalty to be unconstitutional as it was a brutal and an unusual punishment. This case was also added to the petition for the Constitution Bench to consider.

In the *Jagmohan Singh* case, a five judge Bench of the Supreme Court, rejected the challenge to constitutionality. Responding to the *Furman v. Georgia* part of the petition, the Court said that the Indian situation differed from that in the United States. The Court advised against imitating the western example. This echoed the reasoning outlined by the 35th Report of the Law Commission, that came out in 1967, against abolition of the death penalty. The Commission had recommended that owing to the peculiar socio-economic conditions of India, it could not risk abolishing capital punishment.

Acknowledging the lack of sufficient data on the adequacy of deterrence, the Court turned to the 35th Law Commission Report, as authoritative. Referring to the various failed attempts at abolition, the Court argued 'it will be difficult to hold that capital punishment as such is unreasonable or not required in the public interest...If the legislature

[27] *Jagmohan Singh v. State of Uttar Pradesh*, 1 SCC 20.

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..' The Court was of the view that if elected representatives did not favour abolition, it could not be assumed that death penalty was unreasonable or that it went against the public interest.

The Jagmohan case was decided before the re- enactment of the CrPC in 1973. It was with this re-enactment that the death penalty was made an exceptional punishment. In Jagmohan the court ruled that the death penalty was very much within the limits of the constitution and therefore an allowable punishment. The court reasoned that:

> 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. That discretion in the matter of sentences as already pointed out, is 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.[28]

Rejecting the view that too much discretion on part of the courts had made death penalty arbitrary and unconstitutional, the court suggested that judicial discretion in fact served as a means of safeguarding the rights of the accused. This was because it provided an opportunity for the correction of errors made by the lower courts. The presence of different judicial tiers was taken as a guarantee for eliminating all errors in the final analysis by the Supreme Court. Moreover, the discretion to be exercised by the courts, was to be in tandem with the legal statutes in place and not the personal preferences of the judges. The judges were supposed to look at the facts and circumstances of the case, before arriving at a suitable punishment for the crime in question. The court observed:

> If the law has given to the judge a wide discretion in the matter of sentence to be exercised by him after balancing all the aggravating and mitigating circumstances of the crime, it will be impossible to say that there would be at all any discrimination, since facts and circumstances of one case can hardly be the same as the facts and circumstances of another.[29]

The analysis of aggravating and mitigating factors of the crime was advanced as a way of eliminating any discrimination in death penalty cases. Since each case presented its own peculiar aggregation of facts, it was not possible for judges or courts to discriminate on the basis of the

[28] *Jagmohan Singh v. State of Uttar Pradesh*, 1 SCC 20, at para 26.
[29] Ibid., 1 SCC 20, at para 27.

various elements constituting a case. It is also significant that while the court emphasised an analysis of the circumstances of the crime, it did not mention anything about the circumstances of the criminal.

In 1955, section 367(5) of the CrPC was omitted through an amendment. Thereafter the Courts became free to award the death sentence or life imprisonment in capital cases. The changes introduced by the 1955 amendment were often cited as the reason behind the increased arbitrariness displayed by the courts in death penalty adjudication. It was also argued that excessive discretion diluted the content of Article 14 because the same offences often elicited varied responses from the judges. To this, the Supreme Court responded by relying upon the 1953 Report of the UK Royal Commission on Capital Punishment. The Court observed that discretion could not be kept in check by dividing murder into categories. Moreover, the Court noted that in the Indian Scenario people expected that only judges decide on a sentence. Justice in popular perception was not independent of what the judges thought.

The Court, in Jagmohan, decided against strictly identifying crimes deserving of the extreme penalty. That decision was left to the individual judges dealing with subsequent cases. The reasoning behind this was that the Court could not have anticipated all the facts and circumstances of all the cases, for all times to come. Moreover, since analysing the particular facts and circumstances of any case, before giving the due punishment, was made mandatory under Jagmohan, it was only logical that discretion was left to the judges.

Thus the plea of discrimination was dismissed by the Supreme Court. The Court argued that since the circumstances and facts of one case differed from the next, hence the judgement in each case was different. The plea also put forward the charge that the lack of sentencing procedures diminished Article 21. This was so because the deprivation of right to life was only allowed within the limits set by law. In response, the Court argued that the accused was fully aware of any sentencing possibility. He also had the chance to examine himself as a witness. Further he could provide evidence on some material facts if he so chose. In this background, it was not correct to assume that the sentencing procedures were problematic.

In *Jagmohan Singh v. State of Uttar Pradesh* (*Jagmohan / Jagmohan Singh*),

the Court upheld the constitutionality of the death penalty. It was suggested that exercising judicial discretion on the basis of well-recognised principles would provide a safeguard for the accused. Immediately after Jagmohan however, this guideline receded into the background in a number of cases. The Jagmohan judgement was delivered on the third of October, 1972. Four other death penalty cases were heard between the sixth of November and sixth of December, 1972. Here the different benches of the Court, did not engage in any discussion on the issue of sentencing. In cases such as *Atmaduddin v. State of Uttar Pradesh* ()[30], *Abdul Ghani v. State of Uttar Pradesh* (1972)[31] and *Vijai Bahadur v. State of Uttar Pradesh* ()[32] both trial courts and the Supreme Court focussed on 'extenuating circumstances' or rather a lack of them. This was the approach despite the 1956 CrPC amendment as well as the *Jagmohan Singh* judgement.

In 1973, before the CrPC became law, the significance of post-conviction hearing was highlighted in the case of *Ediga Anamma v. State of Andhra Pradesh*.[33] The need for a post conviction hearing was further emphasised in *Ediga Anamma v. State of Andhra Pradesh*.[34] The Court looked at the particular facts and circumstances of the case, where the appellant was a young woman with a dependent child. The Court also highlighted the lack of clear guidelines regarding sentencing. In light of this, the Court sought to establish some guidelines:

> 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,

[30] *Atmaduddin v. State of Uttar Pradesh*.
[31] *Abdul Ghani v. State of Uttar Pradesh*, AIR 1974 SC 1901.
[32] *Vijai Bahadur v. State of Uttar Pradesh*, AIR 1973 SC 264.
[33] *Ediga Anamma v. State of Andhra Pradesh*, (1974) 4 SCC 443.
[34] Ibid., AIR 1974 SC 799.

> 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.

In this case, the court had commuted the death sentence to life and argued:

> In any scientific system which turns the focus, at the sentencing stage, not only on the crime but also the criminal, and seeks 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.[35]

As early as the *Ediga Anamma* case, the Court expressed the need for a post-conviction hearing. The focus here was both on deterrence and reformation. It also said however that even though personal facts from the life of the criminal were inconsequential, they must still be discussed at the time of sentencing. It seems that the real focus was still to be on the crime itself. A discussion on the circumstances of the criminal had no real influence on the magnitude of the punishment.

The way the Court responded to these challenges had an immediate effect on other cases. Borrowing from the intent and content of Jagmohan (mandatory discussion of the facts and circumstances of the crime in question) the Court heralded some new innovations. More precisely, the Jagmohan directive of looking at the facts and circumstances of the case, led to some concomitant innovations by the Court. In *Chawla & anr. v. State of Haryana*[36] the idea of 'cumulative commutation' was developed. This meant that a sentence could be reduced not just on the basis of one particular fact but rather a totality of circumstances. In Chawla's case, cumulative commutation derived from the considerable period spent by the accused on death row (nearly two years), his young age, the part played by the deceased in the crime and the fact that other co-accused, while having inflicted greater harm, had received the lesser punishment of life sentence. The Court stated 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

[35] *Ediga Anamma v. State of Andhra Pradesh*, 4 SCC 443, at para 14.
[36] *Chawla & anr. v. State of Haryana* (1974), AIR 1974 SC 1039.

favour of life rather than putting it out.'[37]Taken individually, none of the circumstances could have justified a commutation of the death sentence, but the aggregate of the various facts involved in the case, led to a legally justified commutation as the Court argued. Following the cumulative approach, another Bench commuted the sentence in *Raghubir Singh v. State of Haryana*.[38]

In *Suresh v. State of U.P.* (Suresh)[39], the original trial had been conducted under the old CrPC. Here the Court observed that had the trail court allowed for a hearing in sentencing (even though it was not required to under the old laws), it would have helped gather some useful data on the matter of sentence. In a way, this echoed the sentiment of *Ediga Anamma* Judgement. In the latter, the court had argued that even though circumstances of the case were not to be central in deciding a sentence, they must still be discussed at the time of sentencing. The idea of cumulative commutation could be studied as a progression of this very sentiment. Cumulative Commutation sought to study the various factors involved in a case and then deciding upon a sentence. The sentence in Suresh, was commuted on cumulative basis as an established motive was absent, the accused had not run away after the crime, despite not being wounded or 'insane', and was only twenty one years old. Moreover, the prosecution's main witness was a young 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.'[40] It is important to note that like the judgement in Jagmohan, Chawla's judgement of cumulative commutation too focussed only on the circumstances of the crime. Yet again, there was no discussion over the circumstances of the criminal.

1.4.2 In the Interim: Old and New CrPC (1974-75)

Soon after the Jagmohan judgement, in the CrPC OF 1973, a formal sentencing procedure was introduced. The court hoped that these changes in law expressed a tendency 'towards cautious, partial abolition and a

[37] *Chawla & anr. v. State of Haryana*, (1974) SC 1039.
[38] *Raghubir Singh v. State of Haryana* (1974), AIR 1974 SC 677.
[39] *Suresh v. State of U.P.* (1981), (1981) 2 SCC 569.
[40] *Raghubir Singh v. State of Uttar Pradesh*, AIR 1974 SC 677.

retreat from total retention.'[41] At this stage the court decided against the wholescale abandonment of the death penalty. It was to be achieved gradually, if at all. The court expressed caution towards excessive focus on either retribution or deterrence or the whims of individual judges. This was an important step away from the unbridled importance given to judicial discretion under Jagmohan. Earlier the Court did not express any real concern with discretion going out of control. It publicised discretion as a tool to correct judicial errors even. At this stage however, the Court did recognise the dangers inherent in subjective propensities of the judges. In this context, the court said:

> a legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accenting the trend against the extreme and irrevocable penalty of putting out life.[42]

The court had hoped that making the death penalty non-mandatory would channel attention towards the fact that it is an irrevocable punishment. Further it hoped to induce a degree of objectivity in decisions regarding the imposition of death sentences. One such method by which the court introduced some objectivity was by outlining 'special reasons' in *Rajendra Prasad v. State of Uttar Pradesh* (Rajendra Prasad).[43] These special reasons were to guide the judges in deciding whether or not a particular case merited the award of death penalty. It is important to note that here the court was faced not with the constitutionality of death sentences but with sentencing discretion. In *Rajendra Prasad*, the majority opinion said, 'special reasons necessary for imposing death penalty must relate, not to the crime as such but to the criminal.'[44] The distinction between the circumstances of the crime and those of the criminal is significant. The nature of the crime in itself was not be a subsuming factor in the sentencing process.

Further, the judges in *Rajendra Prasad* case made reformation as the central point of sentencing. The court here stated that, 'the retributive theory has had its day and is no longer valid. Deterrence and reformation

[41] *Ediga Anamma v. State of Andhra Pradesh*, 4 SCC 443, at para 21.
[42] Ibid., (1974) 4 SCC 443, at para 26.
[43] *Rajendra Prasad et al v. State of Uttar Pradesh* (1979), 3 SCC 646, at para 88.
[44] Ibid.

are the primary social goals which make deprivation of life and liberty reasonable as penal panacea.'[45] After *Ediga Anamma*, once again the Court stressed on deterrence and reformation as the ultimate punitive objectives. Many contemporary debates around the death penalty, that relate to its discriminatory imposition, were ushered in by the Court when it asked, 'Who, by and large, are the men whom the gallows swallow? ... (it is) the feuding villager ... the striking workers ... the political dissenter... the waifs and strays whom society has hardened by neglect into street toughs, or the poor householder-husband or wife driven by necessity of burst of tantrums'.[46] This was in accordance with the Rajendra Prasad mandate that special reasons had to relate to the criminal and not the crime per se.

The new Code of Criminal Procedure, when it came into effect in 1974, clearly stated that all the trials that were already in process would be finished under the 1898 code. This implied that all appeals from trials that had begun prior to the new code would also be dealt with under the old law. It was almost as if two parallel systems were being made to function side by side. Different benches of the Supreme Court however, were not much impacted by this second system.

Quite a few Supreme Court benches still followed the pre-1956 practice of citing the 'extenuating circumstances', regarding why the death sentence should not be imposed. In *Neti Sreeramulu v. State of Andhra Pradesh*[47] the trial court stated that there exist 'absolutely no extenuating circumstances to justify imposition of lesser sentence.' The Supreme Court reprimanded the trial court for not taking cognizance of the amendment in the law. The Court further said, '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.'[48] In *Mangal Singh v. State of Uttar Pradesh*[49], when the Court found no extenuating circumstances, it upheld the death sentence. In *Suresh Surya Sitaram v. State of Maharashtra*[50]

[45] *Rajendra Prasad et al v. State of Uttar Pradesh*, (1979) 3 SCC 646, at para 88.
[46] Ibid., 3 SCC 646, at para 77.
[47] *Neti Sreeramulu v. State of Andhra Pradesh* (1973), (1974) 3 SCC 314.
[48] Ibid.
[49] *Mangal Singh v. State of Uttar Pradesh* (1974), (1975) 3 SCC 290.
[50] *Suresh Surya Sitaram & ors. v. State of Maharashtra* (1975), AIR 1975 SC 783.

too, no extenuating circumstances could be identified. It goes unsaid that the identification as well as the definition of what these extenuating circumstances were, continued to depend on the subjective understanding of various judges and courts. There were also cases in which no such circumstances could be inferred, for example in *Maghar Singh v. State of Punjab*.[51] In yet another variation, the Court continued to fall back upon not discussing the sentencing at all. Cases such as *Shri Ram v. State of U.P.*[52], *Lalai Dindoo and anr. v. State of U.P.*[53] *Mahadeo Dnyamu Jadav v. State of Maharashtra*[54], *Bhagwan Dass v. State of Rajasthan*[55] and *Harbajan Singh v. State of Jammu and Kashmir*[56] are examples of this variation.

Meanwhile, other Benches continued with their own variations. Some hinted that in the absence of the Court's prerogative to commute under the new guidelines, the executive should show mercy towards the appellants. In *Nachhattar Singh & Ors. v. State of Punjab*,[57] while there were no circumstances or facts to facilitate commutation, the Supreme Court noted 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.' In its own place, the Court tried to not let law take a second place to emotions. In the same breath however, it asked the executive to take a sympathetic view of the mercy petitions it received.

In *Bishan Dass v. State of Punjab*, Justices Iyer and Sarkaria upheld the death sentence in the cruel killing of a woman and her young child.[58] Here they referred to the *Ediga Anamma* case and to the 'general trends in courts and among juristic and penal codes in this country and in other countries... towards abolition of capital punishment... (and) it is entirely a matter for the clemency of the Governor or the President, if appropriately moved to commute or not to commute.'[59] The same Bench

[51] *Maghar Singh v. State of Punjab* (1975), AIR 1975 SC 1320.
[52] *Shri Ram v. State of U.P.* (1974), AIR 1975 SC 175.
[53] *Lalai Dindoo & anr. v. State of U.P* (1974), AIR 1974 SC 2118.
[54] *Mahadeo Dnyamu Jadav v. State of Maharashtra* (1975), AIR 1976 SC 2327.
[55] *Bhagwan Dass v. State of Rajasthan* (1974), (1974) 4 SCC 781.
[56] *Harbajan Singh v. State of Jammu & Kashmir* (1975), AIR 1975 SC 1814.
[57] *Nachhattar Singh & ors. v. State of Punjab* (1975), AIR 1976 SC 951.
[58] *Bishan Dass v. State of Punjab* (1961), AIR 1975 SC 573.
[59] *Ediga Anamma v. State of Andhra Pradesh*, AIR 1974 SC 799.

in *Shankar v. State of U.P.*[60] noted that while delays in the judicial process and their effect on the appellant's family were not enough grounds 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'.[61]

In *Carlose John and Anr. v. State of Kerala*, the Court commuted the death sentence on the novel ground of 'emotional stress'.[62] In *Vasant Laxman More v. State of Maharashtra*, the sentence was commuted on grounds of 'mental distress' suffered by the accused in view of her husband's infidelity.[63] In *Faquira v. State of U.P.*, the Court commuted the sentence in light of the fact that the deceased had said something to upset the appellant's mental balance.[64] In *Nemu Ram Bora v. State of Assam and Nagaland*, once again commutation was granted on the basis of 'mental imbalance'.[65]

There appears to be a lack of common principle in granting or denying commutation by the Court, during this period. The court used a lot of novel factors to grant commutation, ranging from emotional stress to mental distress. It even went so far as to holding the deceased responsible, to a certain extent, in the crime committed against him. A.R. Blackshield who examined nearly seventy judgements of the Supreme Court between 1972-1976, concluded that there was such a vast difference between the fate of different cases because different judges exhibited different attitudes to the death penalty cases. Blackshield studied sample cases between November 1972 and January 1973, and pointed to the Bench-centric nature of commutations. He wrote that the reason behind a large number of death sentences being upheld is owed to the fact that their appeals were heard by Justices Vaidialingam, Dua and Alagiriswami.[66] In this era, with additions to the law, it was hoped that with the requirement of 'special reasons' and the inclusion of a formal sentencing procedure in the new Criminal Procedure Code, arbitrariness would be somewhat

[60] *Shankar v. State of U.P.* (1975), AIR 1975 SC 757.
[61] Ibid.
[62] *Carlose John & anr. v. State of Kerala* (1974), (1975) 3 SCC 53.
[63] *Vasant Laxman More & ors. v. State of Maharashtra* (1974), (1974) 4 SCC 778.
[64] *Faquira v. State of Uttar Pradesh* (1976), AIR 1976 SC 91.
[65] *Nemu Ram Bora & ors. v. State of Assam and Nagaland* (1974), AIR 1975 SC 762.
[66] A. R. Blackshield, "Capital Punishment in India," *Journal of the Indian Law Institute* 21, no. 2 (1979): 137–226.

checked. However, in the years that followed, there was only a marginal improvement.

1.4.3 The New CrPC (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.[67]

Through the 1973 amendment, for the first time, the legislature clearly categorised the death penalty as an extraordinary punishment under the Indian Penal Code. As per Section 354(3), the judges had to note 'special reasons' while imposing death sentences. Under section 235(2), the trial courts had to mandatorily undertake pre-sentencing hearing. It is significant to note that this requirement was a complete shift away from the pre-1955 position. As per the latter, death penalty was the ordinary punishment. As the Court noted in *Balwant Singh v. State of Punjab*, this marked a 'gradual swing against the imposition of such penalty'.[68] This was the first case where the new code came into play. While the crime took place post the new CrPC came into effect, the High Court had erroneously applied the pre-1974 law on sentencing. The Court argued that the facts in this case did not form any special reasons under which the death sentence could be imposed. The court noted, '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'. Hence the Court decided against enlisting the exact reasons that could justify the imposition of the death penalty. It did however, mention a few such grounds, viz. the criminal's prior records, the nature of the crime and the circumstances of the victim.

Despite this second round of change, the courts still continued using the outmoded practice of focussing on 'extenuating circumstances,' even if not always awarding death sentences. When the appeals reached the Supreme Court, instead of finding errors in the lower courts' sentencing

[67] Justice Krishna Iyer in *Shiv Mohan Singh v. State* (1977), AIR 1977 SC 949.
[68] *Balwant Singh v. State of Punjab* (1975), AIR 1976 SC 230.

processes, the Court identified its own 'special reasons' for upholding the death sentence. The Sarveshwar Prasad Sharma case is an example of this approach.[69] In some other cases, the Court simply kept applying the older law on sentencing. For instance, in *Gopal Singh v. State of U.P.*, the Court noted, 'There is no extenuating circumstance. The appellant was rightly awarded the capital sentence.' In *Nathu Garam v. State of Uttar Pradesh* too the Court could not identify any 'aggravating or mitigating circumstances.'[70] It so appeared that nothing had really changed because the courts discussed the circumstances or avoided that discussion purely on the basis of discretion. In cases such as *Tehal Singh & Ors. v. State of Punjab*, Baiju alias Bharosa v. State of Madhya Pradesh and Ramanathan v. State of Tamil Nadu, the Court did not engage in any discussion and simply upheld the death sentence in all the above cases. [71]

In *Srirangan v. State of Tamil Nadu*, while the Court identified the murder as brutal, it noted 'the catena of clement facts, personal, social, and other, persuade us to hold that... the lesser penalty of life imprisonment will be more appropriate.'[72] No facts were stated in this judgement. The cases of *Joseph Peter v. State of Goa, Daman and Diu* and *Shiv Mohan Singh v. State (Delhi Administration)* are important in this regard. [73]

In the latter case, both a special leave petition and a motion for re-hearing the petition, were rejected. Two review petitions were dismissed and a third was later admitted. With its admission, the bench stated, '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...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

[69] *Sarveshwar Prasad Sharma v. State of Madhya Pradesh* (1977), AIR 1977 SC 2423.

[70] *Nathu Garam v. State of Uttar Pradesh* (1978), (1979) 3 SCC 366.

[71] *Tehal Singh & ors. v. State of Punjab* (1978), AIR 1979 SC 1347, *Baiju alias Bharosa v. State of Madhya Pradesh* (1978), AIR 1978 SC 522, *Ramanathan v. State of Tamil Nadu* (), AIR 1978 SC 1204.

[72] *Srirangan v. State of Tamil Nadu* (), AIR 1978 SC 274.

[73] *Joseph Peter v. State of Goa, Daman and Diu* (1977), *Shiv Mohan Singh v. State*, (1977) 3 SCC 280.

which there is no procedure in our system.' The Court however could not find any special reasons even after considering all the facts and circumstances of the case. In the end the Court resorted to an appeal for executive clemency. It stated: '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.' Once again in *Joseph Peter v. State of Goa, Daman and Diu*, Justice Iyer observed that 'Presidential power is wider,' after having refused to admit the special leave petition.

1.4.4 Disagreements within the Bench

With the new legal provisions marking a shift away from mandatory death penalty, a sharp divide in the Court itself became apparent. The disagreements between the judges reached a new level in *Rajendra Prasad v. State of Uttar Pradesh*.[74] Here the majority decision of Justices Desai and Iyer was stringently opposed by Justice A.P. Sen.

In this case, the judges in the majority bench said that they would not get into the issue of constitutionality. On the matter of sentencing discretion however, they observed that, '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 '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.'

Blackshield's analysis fits well here. Different judges and courts have made different elements central to their sentencing process. Sometimes

[74] *Rajendra Prasad et al v. State of Uttar Pradesh*, AIR 1979 SC 916.

they looked at extenuating circumstances, at other times they didn't even discuss the case in full detail. Arbitrariness thus emerges as a strong feature of the criminal justice jurisprudence in India. The majority judgement further noted:

> 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 also stated:

> 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 went a step further in arguing that Article 14 is better protected if principled sentences of death are imposed, as opposed to arbitrary or whimsical ones. He wrote:

> 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.

Here the special reasons were interpreted as relating to the criminal and not to the crime. Following this, death sentences in all three cases before it, were commuted by the majority. Even in *Rajendra Prasad*, where the accused had been given the death penalty, the sentence was changed to life. Justice A.P. Sen, dissented in all three cases. In Kunjukunju's case, he wrote: '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.'

Justice Sen wrote that the majority interpretations of 'special reasons' had led to a virtual abolition of the death sentence. Moreover, he argued that when judges heard any case under Article 136 of the constitution, they did not have the authority to modify Section 302 of the Indian Penal Code or Section 354(3) of the Criminal Procedure Code in order to limit the scope and application of the death penalty. Sen argued that amendment on statutes was the perquisite of the Parliament and not the Court.

In spite of Sen's protests, however, *Rajendra Prasad* judgement[75] was treated as the 'law of the land.' Around two weeks later, following the precedent set up in *Rajendra Prasad*, the Court commuted the death penalty in *Bishnu Deo Shaw v. State of West Bengal*.[76] Picking up from where *Rajendra Prasad* judgement had left off, Justice Reddy held:

> 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.

However, the Court did not identify these 'special reasons.' In *Dalbir Singh & ors. v. State of Punjab*, the majority judgement once again was for commutation.[77] Justice Sen, in his dissenting judgement, concluded, 'I have no sympathy for these trigger-happy gentlemen and the sentence imposed on them is well-merited.' Referring to *Ediga Anamma*, *Rajendra Prasad* and *Bishnu Deo*, the majority judgement stated 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.' On that very day, another Bench heard the case of *Bachan Singh s/o Saudagar Singh v. State of Punjab*.[78] Here the conflict between the judgements in *Rajendra Prasad* and *Jagmohan Singh*[79] was highlighted by the Court. In Jagmohan the Court stressed the impossibility of laying down strict guidelines. In

[75] *Rajendra Prasad et al v. State of Uttar Pradesh*, AIR 1979 SC 916.
[76] *Bishnu Deo Shaw & ors. v. State of West Bengal* (1979), (1979) 3 SCC 714.
[77] *Dalbir Singh & ors. v. State of Punjab* (1962), (1979) 3 SCC 745.
[78] *Bachan Singh v. State of Punjab*, (1979) 3 SCC 727.
[79] *Jagmohan Singh v. State of Uttar Pradesh*, AIR 1973 SC 947.

Bachan Singh judgement, the Court referred the matter to the Chief Justice, asking for constitution of a larger Bench. In light of the decision in *Jagmohan Singh* case, Justice Kailasam argued that the decision in *Rajendra Prasad* was not binding. However, he left the issue to be decided by a larger bench. This resulted in a five judge Constitutional Bench declaring the *Bachan Singh* judgement in 1980.

It is clear that judges interpreted the changes in law as per their own discretion. The same set of circumstances were read very differently by different judges. Even when life sentence became the rule, the Courts presented any reason as a special reason to deny commutation. The lack of any clear sentencing issue, the absence of clear categories of crimes deserving of the death penalty, are just a few problems that resulted from lack of concrete principles. Many inconsistencies were visible in the way death penalty has been dealt with by the various judges and courts. Moreover, these inconsistencies have been present through all the phases of death penalty jurisprudence in India.

1.5 Constitutionality of the Death Penalty: Part Two

1.5.1 *Bachan Singh v. State of Punjab*

In the *Bachan Singh* case, the court had to deal with two main issues vis-à-vis the death penalty: first, if death penalty, as provided for capital offences in Section 302 of the Indian Penal Code is within the ambit of the constitution.[80]

Secondly, if the answer to the first part is negative, whether the sentencing procedure as envisaged in Section 354(3) of the Criminal Procedure Code (1973) is unconstitutional. The ground for challenge here emerged from the unchecked discretion allowed to courts in determining the culpability of the offender in a capital offence, thereby awarding him with life or death.

Before we delve into what *Bachan Singh* represents, it is important to understand the context in which the case came up. The 1970s were a

[80] *Bachan Singh v. State of Punjab*, 2 SCC 684.

period of turmoil for the Indian Supreme Court. Apart from witnessing the Emergency, following the ADM Jabalpur judgment, this period was also saw the emergence of 'Public Interest Litigations'.[81]. 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.

Under the tutelage of the Supreme Court, several judicial innovations vis-à-vis the death penalty took place. The issues in *Bachan Singh* case set to question these interpretations set in motion by judges such as Chinnappa Reddy, Bhagwati, Desai and Justice Krishna Iyer. The majority in *Bachan Singh* adopted a conservative approach in unravelling the legal provisions regarding the death penalty. Justice Sarkaria led the majority ruling which dismissed the challenge of the death penalty being unconstitutional and violative of Articles 14, 19 and 21. He argued that the courts' discretion was subject to review as well as corrections. Thus he denied the charge that the death penalty was 'freakishly' imposed. The Majority observed:

> If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe 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.[82]

Different Benches of the Supreme Court heard the case of *Dalbir Singh v. State of Punjab* and *Bachan Singh v. State of Punjab*.[83] In the former, the decision was reached by borrowing from *Rajendra Prasad*. In *Bachan Singh*

[81] *ADM v. Shivkant Shukla* (1976), 1976 SC 1207.

[82] *Bachan Singh v. State of Punjab*, AIR 1982 SC 1325).

[83] *Dalbir Singh & ors. v. State of Punjab*, (1979) 3 SCC 745, *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684.

however, the Bench noted that the *Rajendra Prasad* judgement contradicted the decision in Jagmohan, referring it to another Constitutional Bench. This culminated in the landmark decision in the *Bachan Singh* case.[84]

The new CrPC classified the death penalty as an exceptional punishment. Further in 1976, India acceded to the International Covenant on Civil and Political Rights. This set the stage where the challenge to the constitutionality of the death penalty was revived. Three main issues were raised by those seeking to abolish the death penalty:

1. The irreversibility of the death penalty and the possibility of innocent persons getting executed;.

2. The lack of a proven penological motive of deterrence; retribution was rejected as an acceptable end of punishment and the third purpose of reformation was naturally nullified by a death sentence.

3. Execution by any method would still be a cruel, inhuman and a degrading punishment.

The Supreme Court upheld the constitutionality of the death penalty by a majority. Justice Bhagwati dissented from the majority judgement and his opinion led to *Bachan Singh v. State of Punjab*, Minority Judgement.[85] In *Jagmohan Singh*, the Court had turned to the 35th Report of the Law Commission. It borrowed from the report's conclusion that the death penalty served the important penological goal of deterrence. In *Bachan Singh* once again the court looked at the 35th report. The Court observed: '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.' The Court also rejected the charge that death penalty was a cruel, inhuman and degrading punishment.

The Court noted that there were sufficient safeguards 'which almost eliminate the chances of an innocent person being convicted and executed for a capital offence.' The mandatory pre-sentencing hearing requirement

[84] *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684.
[85] Ibid., AIR 1982 SC 1325.

brought in by Section 235(2) along with the requirement of 'special reasons' necessitated by Section 354(3) were two of the most important safeguards. The Court proceeded to denigrate the particular reading of 'special reasons' as established in the *Rajendra Prasad* case. It was observed by the Court that while the legislative policy mandated courts to look at the circumstances of the criminal along with those of the crime, it should not be interpreted to mean that the circumstances of the crime could be left completely unnoticed in sentencing.

In the *Bachan Singh* case, the importance of pre-sentencing hearing in Section 235(2) was emphasised. This was supposed to assist the courts in assessing the adequate punishment for a crime by determining the presence/absence of mitigating circumstances in that particular case. The court stated:

> Section 235(2) provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354(3), a bearing on the choice of sentence. The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302, Penal Code, the Court should not confine its consideration principally or merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal.[86]

Thus in its approach regarding sentencing, *Bachan Singh* marked a clear break from earlier cases. It held:

> The expression 'special reasons' in the context of this provision, obviously means 'exceptional reasons' founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal.[87]

In *Rajendra Prasad* the special reasons to be considered by the court, had to relate mainly to the criminal and not the crime per se. However, in *Bachan Singh* the court went a step further in suggesting that the special reasons had to do with both the crime and the criminal. The Court said

[86] *Bachan Singh v. State of Punjab*, 2 SCC 684, at para 209. See also *Allauddin Mian v. State of Bihar* (1989), 3 SCC 5, ('All trial courts, after pronouncing an accused guilty, must adjourn the hearing on quantum of sentence to another day to enable both the convict and the prosecution to present material in support of the quantum of sentence').

[87] *Bachan Singh v. State of Punjab*, 2 SCC 684, at para 161.

that the crime and the criminal cannot be studied in separate watertight compartments. Only when the death penalty seems to be most suitable for a crime, should it be awarded. It should be the last resort in a capital crime. The court stated:

> It cannot be overemphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in section 354 (3). Judges should never be blood-thirsty...It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the high-road of legislative policy outlined in section 354 (3), viz, that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.[88]

To the charge that Section 354(3) led to the imposition of the death penalty in a whimsical and arbitrary manner, the Court argued that 'standardisation is well-nigh impossible.' Outlining the impossibility of laying down norms or standards, the Court said that such a task was more suited to the legislature. In this regard, it stated: '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.'

The Court refrained from strictly categorising offences that mandated the death sentence. It did however, outline some 'aggravating' and 'mitigating' circumstances, that had to be read as relevant indicators in determination of sentence:

Aggravating circumstances

Under this category, the death sentence may be imposed if:

1. the murder is exceptionally deprave.
2. the murder is pre-planned and particularly brutal.
3. any member of the police or armed forces or any public servant is murdered:

[88] *Bachan Singh v. State of Punjab*, 2 SCC 684, at para 209.

(a) while that officer was on duty

(b) if that officer was performing some duty under lawful discharge of his functions; this is applicable even after he has ceased to be an officer or a public servant.

4. the person murdered was lawfully discharging his duty under Section 43 of the CrPC 1973 or someone who was assisting a police officer or a Magistrate under Section 37 and Section 129 of the Criminal Procedure Code.

Mitigating Circumstances

The circumstances to be considered by the Court included the following:

1. if the accused is too young or too old.
2. if the offence is committed under extreme mental or emotional stress.
3. if the accused does not pose a continuing threat to society in that the likelihood of him committing the crime again is minimal.
4. the possibility of the accused being reformed and rehabilitated; State would have provide evidence to prove (3) and (4).
5. in light of the circumstances and facts of the case the accused felt morally justified in committing the crime.
6. if the accused was under duress or another person's domination.
7. if there is proven to be some mental defect with the accused to an extent that he could not properly assess the criminality of his actions.

The mitigating circumstances, the Supreme Court said, must be read with a 'liberal and expansive construction…and judges should never be blood-thirsty…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.'

Two sets of facts had to be considered against each other. In the first, the aggravating circumstances had to be measured up against the mitigating circumstances; in the second the probability of imposing the death penalty had to be compared with that of awarding life imprisonment, in terms of which appeared to be a more suitable punishment.

1.6 The 'Rarest of Rare' Doctrine

> 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?[89]

In *Bachan Singh*, the strongest challenge to the death penalty was based, amongst other things on the grounds of it being irreversible, fallible, cruel and inhuman. It was critiqued for not fulfilling the given penological motive of deterrence, at least not in a way that could be proven. Instead it was suggested that the purpose of punishment should rather be reformation and rehabilitation. The majority of the judges dealing with the case rejected the contestation that the death penalty was unconstitutional. During *Bachan Singh* case, *Rajendra Prasad* was overruled and *Jagmohan Singh* was reaffirmed. The court strongly held that the handing out of death sentences could not just be limited to cases where the security of State and society, public order or the interests of the public at large were adversely affected. The Court held that imposition of death penalty was not irrevocable as such. Both possible and actual errors could be rectified by the higher courts. Certain mechanisms had been put in place by the Court to limit the possibility of errors, viz. Pre-sentencing hearing, confirmation by higher courts and so on.

The punishment of death penalty had to be protected from falling prey to arbitrariness. It had to restrict judicial discretion from becoming too much as well as too limited. This is because both the scenarios had the ability to cause discretional and arbitrary sentencing. The court was of the opinion that it was 'neither practicable nor desirable' to build a concrete list of formulae or categories for the award of the extreme punishment.[90] Since no two cases are ever exactly the same and there remain

[89] Justice Bhagwati, Dissenting judgement; AIR 1982 SC 1325

[90] *Bachan Singh v. State of Punjab*, 2 SCC 684, at para 195.

'infinite, unpredictable and unforeseeable variations…countless permutations and combinations', the court decided against a pre-defined set of markers that call for the death penalty.[91] Too mechanical an approach would not be able to take into account 'the variations in culpability.'[92] A mechanistic standardization, the court suggested, would undoubtedly 'sacrifice justice at the altar of blind uniformity' and might dissolve into 'a bed of procrustean cruelty.'[93]

In effect, the 'Rarest of rare' promulgation seemed to install a case-by-case approach. A pre-defined set of markers would force the judges and courts to wrongly fit the circumstances of the case, into the given framework. This may lead to an obfuscation of the individual characteristics of a case. Following from this, if all aspects of a case are not dealt with in a detailed way, there runs the risk of justice being misdirected. It was to avoid these kind of scenarios that the Court refrained from concretising the exact situations that warranted the death penalty. Moreover, this would have involved predicting what kind of cases would come before the courts for a long time to come. For obvious reasons, such an exercise was not possible.

Further, the court looked at the legislative policy and unearthed some principles from it, that were supposed to help in determining the proper punishment for murder:

1. Against the crime of murder, life imprisonment was the rule and death penalty an exception. This was in line with the 1973 CrPC amendment.

2. The exceptional penalty was to be imposed in the most extreme cases only. If after paying due attention to the aggravating and mitigating circumstances of a case, death penalty appeared most suitable, only then was it to be given to an offender. The courts and judges had to look into both circumstances and fact of the crime as well as the criminal.

3. The aggravating and mitigating circumstances were to be determined on the basis of 'well-recognised principles…crystallised by

[91] *Bachan Singh v. State of Punjab*, 2 SCC 684, at para 172.
[92] Ibid., 2 SCC 684, at para 173.
[93] Ibid., 2 SCC 684, at para 173.

judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases.'[94] Here the court developed a concept of principled sentencing. This implied that the identification of aggravating and mitigating circumstances would derive from a strict set of standards emerging from judicial precedents.

4. Death penalty would be justified only if the resultant investigation of aggravating and mitigating circumstances necessitated 'exceptional reasons' for death. This was so because '[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.'[95]

To the charge that the death penalty violates Article 21, the Court, in *Bachan Singh*, stated:

> By no stretch of imagination can it be said that death penalty under Section 302 of the Penal Code, either per se or because of its execution by hanging, constitutes an unreasonable, cruel or unusual punishment. By reason of the same constitutional postulates, it cannot be said that the framers of the Constitution considered death sentence for murder or the prescribed traditional mode of its execution as a degrading punishment which would defile 'the dignity of the individual' within the contemplation of the preamble to the Constitution. On parity of reasoning, it cannot be said that death penalty for the offence of murder violates the basic structure of the Constitution.[96]

Post 1967, the interpretation of Article 21 has been expanded to bring in a notion of dignity as well as substantive and due process. In the *Maneka Gandhi v. Union of India* case, it was stated that procedures prescribed by law had to be 'fair, just and reasonable, not fanciful, oppressive or arbitrary.'[97]

The notion of due process emerged once again in the *Bachan Singh* case. In *Bachan Singh* it was observed by the Court that Section 354(3) of the CrPC, 1973, forms part of the due process framework relating to the death penalty. The court held:

[94] *Bachan Singh v. State of Punjab*, 2 SCC 684, at para 165.
[95] Ibid., 2 SCC 684, at para 209.
[96] Ibid., 2 SCC 684.
[97] *Maneka Gandhi v. Union of India* (1978), 1 SCC 248, at para 48.

> There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society. Nonetheless, it cannot be over- emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. *A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed*.[98] (emphasis added)

In this judgement, the court advised future courts and judges to take into account the judicial precedents as well as legislative provision of the time. This was to help the courts in arriving at a more suitable punishment which was also in accordance with the legal and legislative mandates. Moreover, the court also placed restriction on the free imposition of the death penalty. It had to be given out only in the 'rarest of rare cases.' It had to be the rarest in the sense of not allowing any other punishment other than death to be the most appropriate for the crime it entailed. Only those cases where death sentence appeared to be the only and most justified method of punishment, were to be included in this framework.

The rarest of rare guideline issued by the Court was a novel step. Here the court made a significant change wherein death penalty cases had to necessarily involve the circumstances of the crime as well as the those of the criminal. This was an important step. Before this the Court had only looked at the facts and circumstances of the crime. In *Ediga Anamma*, the circumstances of the criminal at to be looked into at the time of sentencing (post-conviction sentencing) even if it would have no direct effect in the actual sentencing; in *Rajendra Prasad* the 'special reasons' had to relate to the circumstances of the criminal. That said, up until *Bachan Singh*, the

[98] *Bachan Singh v. State of Punjab*, 2 SCC 684, at para 209.

Court displayed no real intent to limit the number of cases that received the death penalty; in *Bachan Singh*, however, the Court sought to limit this imposition by bringing in the 'rarest of rare' guideline.

Of the five judge bench in *Bachan Singh*, Justice Bhagwati dissented from the majority. He found death penalty to be arbitrary, discriminatory and unpredictable. He reasoned:

> The death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape, from its clutches. This circumstance also adds to the arbitrary and capricious nature of the death penalty and renders it unconstitutional as being violative of Articles 14 and 21.[99]

The emphasis on 'rarest of rare' circumstances served to reiterate the exceptional nature of the punishment, in line with the new CrPC of 1973. While the 'special reasons' approach of *Rajendra Prasad* was rejected, the Court was still supposed to refer to mitigating factors. State had to produce evidence that the accused had a marked propensity for criminal acts and was beyond the scope of reformation. Through this the Court could expand on the reformist approach sought by *Rajendra Prasad*. This made a strong impact on the cases to follow. In almost all appeals that came to the Supreme Court, the sentence was commuted. This owed to the understanding that the rarest of rare dictum restricted death sentences for the most extraordinary cases only. For example, this approach of the Court is reflected in the case of *Shidagouda Ningappa Ghandavar v. State of Karnataka*.[100] In *Earabhadrappa alias Krishnappa v. State of Karnataka*, the judge recognised that 'the test laid down in *Bachan Singh*'s case is unfortunately not fulfilled in the instant case.'[101]

In some other cases, different Benches imposed the death penalty without analysing the aggravating and mitigating circumstances. The Court did not even mention any 'special reasons' for its decision. In *Mehar Chand v. State of Rajasthan*, *Gayasi v. State of U.P.*, the Court did not mention the 'rarest of rare' formula or the *Bachan Singh* judgment at all.[102]

[99] *Bachan Singh v. State of Punjab*, 3 SCC 24, (J. Bhagwati, dissenting), at para 81.

[100] *Shidagouda Ningappa Ghandavar v. State of Karnataka* (1980), (1981) 1 SCC 164.

[101] *Earabhadrappa alias Krishnappa v. State of Karnataka* (1983), (1983) 2 SCC 330.

[102] *Mehar Chand v. State of Rajasthan* (2018), (1982) 3 SCC 373. *Gayasi v. State of U.P.* (1981), (1981) 2 SCC 712.

1.7 On Deterrence and Retribution

The issue of deterrence and retribution was discussed both in the majority and the minority judgements in *Bachan Singh*. It aimed to highlight the deterrent aspect of the death penalty. Both these judgements looked at three broad categories that justify the punishment of death: (a) reformation; (b) rehabilitation; and, (c) deterrence.

Here, Justice Bhagwati brought in the *UK Royal Commission on Capital Punishment 1949-1953* and Arthur Koestler's treatise entitled *Reflections on Hanging*.[103] The Royal Commission had stated 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.'[104] Justice Bhagwati emphasised that at times when we think of justice we are actually thinking of revenge and hoping for 'an eye for an eye'. Justice Bhagwati noted that this method of thinking should not be dictating law. However, a large number of judgements reflect the proneness to seek revenge and retribution.

He also quoted Thorsten Sellin who argued '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.'

1.7.1 Arbitrariness and Judicial Process

Justice Bhagwati argued that the death penalty was violative of national as well as international norms and by this token it was unconstitutional. In its application, death penalty tends to become arbitrary. Moreover, since a completely unbiased system of criminal justice has not yet been developed, it is not advisable to provide untrammelled power to judges in imposing the death penalty. Explaining the dangers of extreme dependence on judges for sentencing laws and procedures, he wrote:

> It is, therefore, obvious that when a judge is called upon to exercise his

[103] *Report of the Royal Commission on Capital Punishment 1949-1953* (1953), Arthur Koestler, *Reflections on Hanging* (University of Georgia Press, 2019).

[104] *Bachan Singh v. State of Punjab*, (Minority Judgment) (AIR 1982 SC 1325, para 47, 1362), *Report of the Royal Commission on Capital Punishment 1949-1953*, 64–65.

> 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.[105]

He also brought attention to the fact that different judges respond very differently to the issues presented to them. He observed:

> 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 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.[106]

He further identified a number of other problems in death penalty jurisdiction namely crude investigation methods, lack of proper sample collection kits, various limitations facing the police including lack of technological advances amongst others.

> 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…[107]

Echoing a concern similar to that of the constituent assembly debates, he further warned:

[105] *Bachan Singh v. State of Punjab*, AIR 1982 SC 1325.
[106] Ibid.
[107] Ibid., AIR 1982 SC 1325; para 24, 1344.

> 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 State acting through the instrumentality of the court may have on its conscience the blood of an innocent man.

Justice Bhagwati expressed grave concerns over the way death penalty had been functioning in the Indian context. However, his views were in the minority and the death penalty was allowed to continue for the rarest of rare cases. An analysis of the cases following *Bachan Singh* shows that the rarest of rare formulation has not been able to save the death penalty from turning arbitrary. Around three years after the *Bachan Singh* case, there was another case called *Machhi Singh v. State of Punjab* (Machhi Singh).[108] Here the Bench awarded three death sentences in a case where seventeen people were killed by the main accused along with eleven other accomplices. This case discussed the 'rarest of rare' formulation in detail. The *Machhi Singh* case expanded the 'rarest of rare' criteria to include some aggravating factors, other than the ones already listed in *Bachan Singh*. While *Bachan Singh* had refrained from enumerating the exact type of cases that would warrant the death penalty, it seems that *Machhi Singh* did just that. It sought to expand it to cases where the 'collective conscience' of society had been shocked. In *Machhi Singh*, the court defined five types of cases that would necessitate the death penalty as a suitable punishment. These were:

1. The manner in which the crime is committed. If the manner of committing the murder is brutal, diabolical and ghastly to an extent that it enrages the pubic at large- (i) if the victim's house is set on fire with the intent of burning him alive(ii) when the victim's death is a result of torture or extreme cruelty of any kind(iii) if the victim's body is chopped off in a peculiarly vicious manner.

2. The motive for which murder is committed. (i) someone hires an assassin to kill someone else, promising some reward or incentive; (ii) when someone is murdered with an intent to acquire his property; especially if the victim is dominated by the offender in some

[108] *Macchi Singh & ors. v. State of Punjab*, 3 SCC 470.

manner; this also involves those cases where a betrayal of victim's trust takes place for the same motive; (iii) if a crime/murder is committed for a reason that it betrays the motherland.

3. If the crime is anti-social or socially abhorrent. (i) when a person from a Scheduled Caste or minority community is murdered. When such a murder is not committed for personal motives but rather out of some other circumstance thatarouses social wrath. For example, when a crime is committed to terrorise or deprive someone into leaving a place or not being able to realise their right. The aim of justice here should be to correct historical injustices and restore social balance. (ii) In cases of 'dowry deaths' or 'bride burning' where the motive is remarry in order to gain more dowry or on account of infatuation;

4. The magnitude of the crime committed i.e. when the crime is of grave proportions. Examples include killing of entire families or almost all members of them, especially if they belong to a particular caste, community or locality.

5. Personality of the murder victim, i.e. when the victim is (i) an innocent child who in no way, could have given the murderer any excuse or reason to commit murder; (ii) a helpless woman or and old person or a sick person; (iii) when the murderer takes advantage of his trust, acquaintance or domination vis-à-vis the murdered victim; (iv) when the murder is committed for political reasons in that the victim is a figure held in high regards by the community.

The court's reasoning included the focus on 'collective conscience.'[109] It suggested that the death penalty had to be imposed in instances of extreme shock to society's collective conscience. The shock value should be such that 'the holders of the judicial power (are expected to) to inflict death penalty.'[110] The court observed, '[t]he community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime.'[111]

[109] *Macchi Singh & ors. v. State of Punjab*, 3 SCC 470, at para 32.
[110] Ibid.
[111] Ibid., 3 SCC 470, at paras 33-37.

The *Machhi Singh* case differed from *Bachan Singh* in two main ways. Firstly, while *Bachan Singh* had refrained from concretising the exact circumstances that paved the way for death penalty, *Machhi Singh* went a step further and laid out five distinct categories that mandated the death sentence. Secondly, whereas in *Bachan Singh* the Court asked for equal attention towards the circumstances of the crime and the circumstances of the criminal, in *Machhi Singh*, the categories developed by the Court dealt only with the nature of the crime. Later, in Swamy Shradhananda, the court noticed that the categories espoused in the *Machhi Singh* case, 'considerably enlarged the scope for imposing death penalty.'[112]

The categories espoused in *Machhi Singh*, dealt only with the circumstances of the crime. The Court had stated that the judge dealing with a grievous crime must take into account the mitigating circumstances. However, this was not paid due attention to by the various Benches and courts. Several judges simply brought in the *Machhi Singh* categories, assuming that the moment a case fell under those categories, it automatically became a rarest of rare case, meriting the death penalty. The case of Devender Pal Singh v. National Capital Territory[113] is pertinent here. *Machhi Singh* was cited in this judgement by the majority opinion. The majority opinion looked only at the circumstances of the crime without paying any attention to the circumstances of the criminal. The former was considered enough to grant the death penalty. Although the dissenting opinion was for acquitting the accused, yet this was not taken into consideration while deciding if the case fit the 'rarest of rare' profile. So a lot of cases following *Machhi Singh* relied only on the crime and ignored the criminal as mandated by *Bachan Singh*. The potential for reformation was also similarly ignored by the judges.[114] Quite a few cases, after *Machhi*

[112] *Swamy Shraddananda (2) v. State of Karnataka* (2008), 13 SCC 767.

[113] *Devender Pal Singh v. National Capital Territory* (2002), 5 SCC 234.

[114] For example, see *Prajeet Kumar Singh v. State of Bihar* (2008), 4 SCC 434, where the Court cited the *Machhi Singh* factors and then held that in the present case, '[t]he enormity of the crime is writ large. The accused-appellant caused multiple murders and attacked three witnesses... The brutality of the act is amplified by the manner in which the attacks have been made on all the inmates of the house in which the helpless victims have been murdered, which is indicative of the fact that the act was diabolic of the superlative degree in conception and cruel in execution and does not fall within any comprehension of the basic humanness which indicates the mindset which cannot be said to be amenable for any reformation.' Here, the quality of the crime is taken to be an indication that the person is beyond the scope of reformation.

Singh were decided on the basis of the crime being so grievous and brutal that it shook 'the collective conscience of the community.'[115]

It is useful to look at the balance of aggravating and mitigating circumstances, and ask the above questions while awarding a sentence, it is still arguable whether Machi Singh was an expansion of the *Bachan Singh* guidelines because the former was a five judge Bench decision and the latter a three judge bench decision. In spite of this, a lot of subsequent decisions upheld death sentences following from *Machhi Singh*.

1.8 Constitutionality of the Death Penalty: Part Three

1.8.1 *Smt. Shashi Nayar & ors. v. Union of India*

[116]

Over a decade after *Bachan Singh*, the issue of constitutionality was raised once again before the Supreme Court in Smt. Shashi Nayar v. Union of India & Ors.[117] Two days before the accused was to be hanged, his wife filed a petition. The Special Leave petition and a Review Petition had already been rejected by the Court. Mercy petitions had also been rejected by the Governor and the President. Previous writs too were rejected both by the High courts and the Supreme Court. None of the reasons, for rejecting any of the petitions however were reported leaving the details about the merits of the case unknown.

Noting that the same issues had already been discussed in *Bachan Singh* and *Deena v. State of U.P.*, the Constitutional Bench did not discuss the merits of the arguments against constitutionality.[118] Expressing

[115] One example is *Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra* (2017) 7 SCC 125, at para 22, where the accused was convicted for killing a woman and four children. The Court noted that the crime was pre-meditated and held that the facts show that 'the crime has been committed in a beastly, extremely brutal, barbaric and grotesque manner. It has resulted into intense and extreme indignation of the community and shocked the collective conscience of the society. We are of the opinion that the appellant is a menace to the society who cannot be reformed. Lesser punishment in our opinion shall be fraught with danger as it may expose the society to peril once again at the hands of the appellant.' The Court made no mention of any mitigating circumstances.

[116] *Smt. Shashi Nayar v. Union of India & ors.* (), SC 395.

[117] Ibid., AIR 1992 SC 395.

[118] *Deena v. State of U.P.* (1983), (1978) 3 SCC 540.

agreement with those views they did not think it necessary to revisit the constitutionality debate. The petition argued that since the earlier Bench had relied mostly on the 35th report of the Law Commission, the matter must be heard by a larger Bench. The petition raised doubts about the relevance of a 1967 Report during the time the said case was heard. Rejecting these issues, the Court argued, 'The death penalty has a deterrent effect and it does serve a social purpose. The majority opinion in *Bachan Singh* 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.' The Court also said that the law and order situation had not improved but deteriorated since 1967 and hence the report was fully relevant. Therefore the Court did not think that the time was conducive to reconsider the issue of the constitutionality of the death penalty.

In *Govindasami v. State of Tamil Nadu*, the High Court overturned the convict's acquittal and imposed the death sentence on him ten years after the trial court proceedings ended.[119] Thus the case reached the Supreme Court via a mandatory appeal. The convict had killed five of his family members without any provocation in a pre-meditated killing spree, as the High Court discovered. It argued, 'the killings were gruesome, calculated, heinous, atrocious and cold-blooded... (and)... 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.' It is important to note that the accused had already been in prison for ten years. Some rehabilitation may or may not have occurred during that time. But no court took this into consideration and went on to consider him a threat on the basis of a decade old behavioural analysis. The Supreme Court too relied on the arguments given by the other courts and did not engage in any investigation itself. Yet again the circumstances of the crime were given

[119] *Govindasami v. State of Tamil Nadu* (1998), AIR 1998 SC 2889.

more attention over the circumstances of the criminal.[120] This trend was to become most prominent during the 1980s and 90s.

The judges argued that the directives forwarded in *Bachan Singh* should be read in the context of these guidelines and 'a balance sheet of aggravating and mitigating circumstances' must be drawn up. The Bench said that while awarding the death sentence the judges must ask two main questions:

1. Is there something so uncommon about the crime in question that life imprisonment is rendered inadequate and death sentence appears more suitable?

2. Do the circumstances of the crime especially call for the death sentence even after an examination of the mitigating circumstances?

The rarest of rare formula limited the absolute denunciation of life. It is one of the most unique innovations of the Court in trying to minimise the unrestricted imposition of the death penalty in India. This is because after its introduction, death sentences were to be meted out only if the 'alternative option [was] unquestionably foreclosed.[121] Whether or not this formulation has been understood and followed in subsequent cases is something that the next chapter will look at. There were a lot of cases in which this test was applied, ignored or misinterpreted.

In the years following *Bachan Singh*, courts made some more innovations in death penalty jurisprudence. The judges over time felt that the 'rarest of rare' failed to provide space for a lot of brutal crimes. Sometimes it was due to the frequency with which rare/brutal crimes were committed; at other times it was owed to the public perception of what was rare and their resultant response to the same. What it meant was that sometimes while the case did not exactly fulfil the rarest of rare criterion and was awarded with life; the punishment completely went against societal expectations of the same. Sometimes the Court made their own combinations out of the different reasons advanced by the courts before

[120] In this case too, it was 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.

[121] *Bachan Singh v. State of Punjab*, 2 SCC 684, at para 209.

them for imposing the death penalty. They brought in the categories of public outrage, threat to society, social necessity or society's cry for justice and so on. What were these principles and how did they perform in the larger death penalty framework, forms the scope of the next chapter.

Chapter 2

Legal Discourse after 1970s

2.1 Introduction

In the previous chapter we looked at two main issues: the evolution of legal provisions regarding the death penalty and the questions raised about the constitutionality of the death penalty jurisprudence in India. In the former we saw how death penalty has evolved from a state of rule to a state of exception. We looked at three major situations where the death penalty has been challenged on various grounds. In its response to these challenges, the Supreme Court (alternatively, Court) construed certain principles of its own, for instance, collective commutation, society's abhorrence of particular crimes and rarest of rare as promulgated in the *Bachan Singh v. State of Punjab* case[1]. In this context, it is important to analyse if the Court, in subsequent cases, has adhered to its own dicta? There is a need to see if 'rarest of rare' has been understood in a uniform manner across judges and Benches. In years following Bachan Singh, did the Court expand or diminish the intent and content of rarest of rare dictum. This will help us understand (a) if the Court evolved some more principles as a way of expanding on the rarest of rare? and (b) Were there pressures that the Court had to conform to? In this background, this chapter will analyse the fate of the rarest of rare dictum.

The rarest of rare stipulation placed value of the importance of life by restricting its absolute denunciation. It also placed value on the notions of dignity and human life by instituting some safeguards against an

[1] *Bachan Singh v. State of Punjab*, 2 SCC 684.

irrevocable punishment. This test was one of the most unique innovations of the Court in trying to minimise the unrestricted imposition of the death penalty in India. With its introduction, death sentences were to be meted out only if the 'alternative option [was] unquestionably foreclosed'.[2] Whether or not this formulation has been understood and followed in subsequent cases is the focus of this chapter.

2.2 Competing Understandings of the 'Rarest of Rare'

In an effort to explain the intent of *Bachan Singh*, the Court in *Bariyar* stated that, '[T]he conclusion that the case belongs to rarest of rare category must conform to highest standards of judicial rigour and thoroughness'.[3] The whole point of a principle like rarest of rare is to make the award of death penalty a thoroughly thought-out act. The idea behind introducing rigour in terms of looking at the facts and the circumstances of the case along with those of the criminal, is to be absolutely sure that no one is awarded a death sentence, simply because it seems to be the most obvious punishment. Instead, death penalty must be granted only when it is most fitting and fair. In *Bachan Singh*, the court strongly suggested that:

> Judges should not take upon themselves the responsibility of becoming oracles or spokesmen of public opinion... When Judges take upon themselves the responsibility of setting down social norms of conduct, there is every danger, despite their effort to make a rational guess of the notions of right and wrong prevailing in the community at large... that they might write their own peculiar view or personal predilection into the law, sincerely mistaking that changeling for what they perceive to be the Community ethic. The perception of 'community' standards or ethics may vary from Judge to Judge... Judges have no divining rod to divine accurately the will of the people.[4]

Here the court recognised the danger of the personal opinions of judges making their way into the law. It is also possible that the judges may wrongly presume their own views to be reflective of a larger public sentiment or ethic. Naturally different judges may presume different norms to be the defining feature of society. A better way then is to have

[2] *Bachan Singh v. State of Punjab*, 2 SCC 684, at para 209.
[3] *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, 6 SCC 498, at para 61.
[4] *Bachan Singh v. State of Punjab*, 2 SCC 684, at para 126.

one uniform legal principle so that such variations could be avoided. This is what the Court pointed towards in *Bachan Singh*. However, these guidelines have been variously interpreted and misinterpreted.

In the period following *Bachan Singh*, several variations of the judgement emerged. These variations served to follow or reject the intent and content of the 'rarest of rare' formulation. An analysis of the cases in this period, calls attention to the inconsistency that runs through the Supreme Court decisions in death penalty cases over this period. Sometimes age was a mitigating factor and at other times it was not. Similarly, while at times gruesomeness of the crime led to the obfuscation of mitigating factors, at other times, it did not. In some cases the pre-sentencing requirement from *Bachan Singh* was paid attention to, whereas at other times the court operated as if there was no mandatory pre-sentencing requirement at all.

In *Bachan Singh v. State of Punjab*, the Court expressed optimism that the 'rarest of rare' reasoning it had outlined would minimise the chances of arbitrary award of the death penalty. In this judgement, future judges and courts were advised to analyse the aggravating and mitigating circumstances relating to the case and the criminal. This was supposed to be crucial in determining the adequate punishment. It would also provide a method to assess the possibility of reform and rehabilitation of the offender. However, as 'rarest of rare' gradually receded into the background, so did the concerns of reform and rehabilitation. The court shifted focus on newer conceptions like 'public opinion', 'social necessity', 'cry for justice', etc. These new principles exemplified the fading impact of the *Bachan Singh* test. In another variation, the Court kept doing a back and forth between arguments of reform and public opinion. Hence, the concerns about the death penalty being 'arbitrarily or freakishly imposed' were still present.[5]

The immediate impact of *Bachan Singh* had been a decline in the judicial award of death sentences. In the early 1980s, the Supreme Court upheld the death sentence in very few judgements. The *Bachan Singh* judgement placed emphasis on the reform of offenders in its 'rarest of rare' formulation. In the judgement it was stated that the offender's ability to reform was to be necessarily presumed unless the state could prove

[5]Phrase borrowed from *Bachan Singh v. State of Punjab*, 2 SCC 684, at para 15.

the opposite with the help of evidence. This was to become a mitigating factor in ascertaining whether or not the case deserved the death penalty. Such a guideline led to commutation in a number of cases. In *Mukund alias Kundu Mishra & anr. v. State of Madhya Pradesh*,[6] the Supreme Court commuted the death sentence where the trial court had stressed upon the helplessness of the victims and the greed motive of the crime. While the Court agreed about the heinousness of the crime it still '[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*.' In Muniappan v. State of Tamil Nadu, the Supreme Court overturned the lower court's argument that the murder was 'terrific' and thereby deserving of the death penalty.[7] Instead the Court argued that all murders were terrific and if all of them were punished with death, it would defeat the very intent of Section 354(3).

In some other cases, the courts misinterpreted the 'rarest of rare' dictum and interpreted it literally. In the case of Allauddin Mian & ors., Sharif Mian & anr. v. State of Bihar,that involved the killing of two infants, the Supreme Court noted that since motive could not be established, it could not be decided if this was a rarest of rare case.[8] The Court said that the other elements of the case were not sufficiently uncommon so as to make it a rarest of rare situation. Ravindra Trimbak Chouthmal's case provides an extreme example of this approach.[9] The case involved the brutal killing of an eight month pregnant woman, for dowry. While noting that the crime was 'most foul' the Court said that such cases had stopped being 'rarest of rare.' It was specifically noted in Machhi Singh that dowry deaths were to be seen as extraordinary and worthy of the death penalty.[10] However, as we will see later in this chapter, this dictum was not followed very sincerely. While commutation may be welcome in effect, the literal understanding of the *Bachan Singh* test took it far from its original intent. In Suresh & anr. v. State of Uttar Pradesh, the accused had hacked the deceased and his entire family to pieces, over a piece of

[6] *Mukund alias Kundu Mishra & anr. v. State of Madhya Pradesh* (1997), AIR 1997 SC 2622.

[7] *Muniappan v. State of Tamil Nadu* (1981), 3 SCC 11.

[8] *Allauddin & ors., Sharif Mian & anr. v. State of Bihar* (1989), (1989) 3 SCC 5.

[9] *Ravindra Trimbak Chouthmal v. State of Maharashtra* (1996), 4 SCC 14.

[10] *Macchi Singh & ors. v. State of Punjab*, 3 SCC 470.

land.[11] The Court observed that the case was not part of the rarest of rare category and that it did not agree with the argument inherent in it.

In some other cases, the Benches made mandatory references to the *Bachan Singh* doctrine. However, it lacked any real understanding of both rarest of rare dictum as well as the necessity of comparing the aggravating and mitigating circumstances. In Mohan and ors. v. State of Tamil Nadu,[12] the Court upheld the death sentence of two of the four convicts who were given the death sentence by the High Court. These two sentences were commuted as the Court did not find the two accused to have played any role in the killing of the ten year old victim. In its appeal to the Supreme Court, the defence stated that the lower courts had categorised the case as 'rarest of rare' but did not provide any explanation for it. The Court observed that, 'On the very face of it, the incident appears to be a gruesome one and indicates the brutality with 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.' The Court found sufficient evidence to uphold the death penalty for two convicts but did not explain what these proofs were. In *Suresh Chandra Bahri v. The State of Bihar*, the Court identified a list of aggravating factors following from *Bachan Singh* and Machhi Singh but did not try to determine the mitigating circumstances.[13]

Some argued that the decline in death penalty cases had caused a virtually abolitionist situation. In *Amrik Singh v. State of Punjab*, Justice A.P. Sen argued that this seemingly abolitionist situation heralded by *Bachan Singh* was retrieved slightly by Machhi Singh.[14] Those judges on the bench who sought to retain the death penalty found a voice in Amrik Singh's case. In this case, the Court argued, '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

[11] *Suresh & anr. v. State of Uttar Pradesh* (2001), AIR 2001 SC 1344.

[12] *Mohan & ors. v. State of Tamil Nadu* (1998), 5 SCC 336.

[13] *Suresh Chandra Bahri v. The State of Bihar* (1994), AIR 1994 SC 2420.

[14] *Amrik Singh v. State of Punjab* (1988), Supp SCC 685. *Macchi Singh & ors. v. State of Punjab*.

the gravity of the offence can seriously undermine respect for law…' In *Earbhadrappa*, acting under the guidelines of the *Bachan Singh* judgement, the Court commuted the sentence. However it also warned 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 (IPC)'. S. Muralidhar has argued that the *Bachan Singh* case 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.'[15] However, it is not possible to verify such a claim for a number of reasons. First, there is a lack of data from trial court judgements that could help assess the direct impact of the judgement. Second, there is no way to know exactly how many cases were confirmed or commuted, following from *Bachan Singh*.

In the mid 1980's, the impact of *Bachan Singh* and 'rarest of rare' guideline had started declining. In quite a few cases, there was no reference to the 'rarest of rare' test or to the *Bachan Singh* directions. So in *Lok Pal Singh v. State of M.P.* the Bench simply 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.'[16] The judges argued that there were no extenuating circumstances and thus there was no need to show leniency. References to rarest of rare or other identifiable guidelines were also missing in cases such as *Mahesh s/o Ram Narain & ors. v. State of Madhya Pradesh*, *Darshan Singh and anr. v. State of Punjab* and *Ranjeet Singh & anr. v. State of Rajasthan* among others.[17]

In Satish v. State of U.P., the accused was tried for raping and murdering a minor. On the issue of sentencing, the court simply stated that it experienced 'no hesitation in holding that the case at hand falls in rarest of rare category and death sentence awarded by the trial Court was appropriate.'[18] There was no discussion, however, on the aggravating or the mitigating circumstances of the case. It also did not discuss precisely

[15]Muralidhar, "Hang Them Now, and Hang Them Not: India's Travails with the Death Penalty."

[16]*Lok Pal Singh v. State of M.P.* (1985), AIR 1985 SC 891.

[17]*Mahesh s/o Ram Narain & ors. v. State of Madhya Pradesh* (1987), 3 SCC 80, *Darshan Singh & anr. v. State of Punjab* (1988), (1988) 1 SCC 618. *Ranjeet Singh & anr. v. State of Rajasthan* (1988), AIR 1988 SC 672.

[18]*Satish v. State of U.P.* (2005), 3 SCC 114.

what made the case 'rarest of rare' and thereby deserving of the extreme penalty. In a lot of other cases too after *Bachan Singh*, the death sentence was upheld by the Court without discussing the rarest of rare framework in any degree.[19] In another set of cases, namely, Farooq v. State of Kerala, Mukund v. State of M.P.,Ashok Kumar Pandey v. State of Delhi, the court simply paid lip service to *Bachan Singh*. It mentioned the rarest of rare formulation but never really used it while upholding/commuting the sentence.[20] Even when references were made, there was little attempt to show, through arguments, how the particular case was within or outside the rarest of rare framework. It so appeared that other factors had started playing a central role in decisions of sentencing. In many instances the Court seemed to bow down to public pressure. Is it that the concept of 'social necessity' was evolved by the Court as a response to this? Because in a lot of cases the court used this reasoning. Another interesting thing here is that when it came to dowry cases, the Court did not bow down to public pressure.

Till now we have seen the various interpretations that rarest of rare was subjected to. The fate of 'rarest of rare' changed with every judge, Bench and period. The reason why rarest of rare was arbitrarily interpreted is because the factors that were supposed to be analysed for identifying if a case fit the rarest of rare paradigm, were themselves interpreted arbitrarily. These factors were 'aggravating and mitigating circumstances' which can be broadly divided between 'nature of crime' and 'possibility of reform'. The latter can be further subdivided into 'evidence of reform', 'age of the accused', 'previous criminal record of the accused'.

2.3 Deciding the Quantum of Punishment

The rarest of rare test is not the only criteria that was misinterpreted in later years. Other elements of the *Bachan Singh* judgement like aggravating and mitigating circumstances as well as mandatory pre-sentencing requirements have been variously interpreted and misapplied in later

[19]For details on these cases, see *Lok Pal Singh v. State of M.P.*, A.I.R. 1985 SC 891; *Darshan Singh & anr. v. State of Punjab*, 1 SCC 618, cite[][(1980) 1 SCC 683]ranjeet1988.

[20]For details see, *Farooq v. State of Kerala* (2002), 4 SCC 697, *Mukund v. State of M.P.* (1997), (1997) 10 SCC 130, *Ashok Kumar Pandey v. State of Delhi* (2002), 4 SCC 76.

cases. It must be noted here that the idea of aggravating and mitigating factors did not come up for the first time in *Bachan Singh* judgement. But it was in *Bachan Singh* that future courts and judges were advised to engage in a thorough analysis of the facts and circumstances of the crime along with the facts and circumstances relating to the criminal. Before this point, the judges and courts were either looking at the crime or the criminal. With the new development, the aim was to make the procedures so stringent and nuanced that no judge or court or Bench would take the effortless way out of simply granting a death sentence in capital crimes. By engaging into a detailed investigation of what were the circumstances of the case along with those of the criminal, the death penalty would only be imposed in the surest of circumstances. Even if there was a small iota of doubt, the court was to side with the alternative of life sentence.

In a lot of cases following *Bachan Singh*, there was an arbitrary engagement with the notion of aggravating and mitigating circumstances. Sometimes they were looked at, other times they were not. There were cases in which they were mentioned but not discussed at all. In some variations what seemed aggravating to some, appeared mitigating to others. In yet another version, something was not mitigating enough for a judge or a court. Too many variations of this are visible.. For instance, In *Surja Ram v. State of Rajasthan*, mitigating factors highlighted by the defence counsel were outrightly rejected by the Court, without giving any reasoning behind it.[21]

In *Nemai Mandal & anr. v. State of West Bengal*, Justices Mohapatra and Thomas commuted a death sentence where the offender had murdered two people. The high court called his act 'ruthless butchery with aggravated cruelty' for he had chopped off one of the victim's hand and thrown it away. On appeal, the Supreme Court noted the presence of certain mitigating factors namely, the young age of the accused, political rivalry between the accused and the deceased along with the latter's criminal record. The Court believed that these factors justified commutation. In *Ashok Kumar Pandey v. State of Delhi*, the accused was granted commutation despite him murdering his wife and a year old child.[22] The Court noted that, 'In the facts and circumstances of the present case, it

[21] *Surja Ram v. State of Rajasthan* (1997), AIR 1997 SC 18.
[22] *Ashok Kumar Pandey v. State of Delhi*, AIR 2002 SC 1468.

is not possible to come to the conclusion that the present case would fall within the category of rarest of rare one.' The judgement did not discuss the facts and circumstances of this case.

In *Acharaparambath Pradeepan & anr. v. State of Kerala*, the accused had hit the deceased with an iron rod fracturing his skull and gravely injuring several other parts of his body.[23] The Court commuted the sentence of the CPI(M) activist, 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.' Yet again, the Court did not clearly specify or discuss what exactly these 'peculiar' circumstances were. On this particular occasion, citing *Satbir v. Surat Singh*, the Court observed that no court was bound to admit any evidence that came before it.[24] No mention of aggravating or mitigating was made but casting aspersions over the way evidence and testimonies had been collected, the accused were given benefit of doubt.

In *Major Singh & anr. v. State of Punjab*, the Court once again commuted the sentence, concluding that, '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.'[25] The Court used previous enmity as a mitigating factor even though the murder had been committed violently. It is tough to say what the Court itself was looking for while trying to identify if a case fit the rarest of rare profile. From the vast multitude of factors that constitute a crime or a criminal, the Court selectively picked some elements and ignored others. In *Bariyar* the Court recognised this when it argued that, 'The balance sheet of aggravating and mitigating circumstances approach invoked on a case-by-case basis has not worked sufficiently well so as to remove the vice of arbitrariness from our capital sentencing system'.[26]

[23] *Acharaparambath Pradeepan & anr. v. State of Kerala* (2006), MANU/SC/8785/2006.
[24] *Satbir & The State Of Haryana v. Surat Singh & Ors.* (1997).
[25] *Major Singh & anr. v. State of Punjab* (2006), MANU/SC/8569/2006.
[26] *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, 6 SCC 498, at para 109.

2.4 Determining the Category of Offence

Under 'nature of offence', the Court looked at the primary motive of the crime and ignored all other consequences that resulted from that one motive, including murder. In *Santosh Bariyar*, the court argued that judges organise limited 'objective discussion on aggravating and mitigating circumstances. In most such cases, courts have only been considering the brutality of crime index.'[27] In practice, the Court worked with a hierarchy of crimes generally and heinous crimes particularly. So in effect, murder had to be the primary motive and not a secondary outcome of any crime, for the Court to administer the death sentence. Moreover, even within the set of heinous crimes that merited the death sentence, it was to be given out only for the most heinous crimes.

Those cases in which the Supreme Court looked only at the nature of the crime, it ignored all the other aspects of the case, for instance, in *Sheikh Abdul Hamid & anr. v. State of Madhya Pradesh*, the Court identified the motive of the crime as stealing property and argued, 'There is nothing on record to show how the murder has taken place.'[28] In State of Himachal Pradesh v. Shri Manohar Singh Thakur,the Court commuted the sentence stating that there was 'nothing exceptionally gruesome about the manner of committing this crime.[29] A murder by its very nature is shocking. But that per se does not justify death penalty.'

A comparison between two separate cases of similar nature further highlights this point. These were the cases of *State of Maharashtra v. Damu* and *Sushil Murmu v. State of Jharkhand*.[30] In the former, the accused had allegedly sacrificed three children under greed for some hidden treasure. While the court held that the act was so horrendous that it 'made an extremely rare case', it did not award the death penalty. The Court, in this case classified ignorance and superstition as mitigating factors, thereby making the case suitable for life imprisonment.

In the second case *Sushil Murmu v. State of Jharkhand*, however, where the defendant had sacrificed a young child for superstitious reasons, the

[27] *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, 6 SCC 498, at para 71.
[28] *Sheikh Abdul Hamid & anr. v. State of Madhya Pradesh* (1998), 3 SCC 188.
[29] *State of Himachal Pradesh v. Shri Manohar Singh Thakur* (1998), AIR 1998 SC 2941.
[30] *State of Maharashtra v. Damu* (2008), 6 SCC 269. *Sushil Murmu v. State of Jharkhand* (2004), 2 SCC 338.

court lay focus on the nature of the crime and stated that the convict 'was not possessed of the basic humanness and he completely lacks the psyche or mind set which can be amenable for any reformation to be beyond reform.'[31] The court categorised it as 'border(ing) 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.'[32] In contrast to Damu, here the court did not identify superstition based crimes/ actions as a motivating factor. The court stated that such a case 'is an illustrative and most exemplary case to be treated as the 'rarest of rare cases' in which death sentence is and should be the rule, with no exception whatsoever.'[33] It is significant that the court deemed to make death sentence a rule for crimes of this nature. So in one case while the murder of three children did not motivate the court to impose the death sentence, in another the court found the killing of one child, for the exact same reasons, to be cause enough for imposing the death penalty, almost as a rule.

In *Sushil Murmu*, the 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... (this was) 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.' Herein the Court did not look into the possibility of reform or rehabilitation of the accused. The requirement in *Bachan Singh* of balancing the aggravating circumstances with the mitigating ones was also not adhered to. The Court seemed to be giving greater attention to what could be the society's cry for justice. While a large number of cases were given the death penalty due to the gruesome nature of the crimes they dealt with, in another set of cases, the sentences were commuted despite the equally gruesome nature

[31] *Sushil Murmu v. State of Jharkhand*, 2 SCC 338, at para 22.
[32] Ibid.
[33] Ibid., 2 SCC 338, at para 23.

of the crimes. For instance, in *Panchi & ors. v. State of Uttar Pradesh*, four members of one family murdered four members of another family over petty quarrels.[34] Justices Punchhi, Thomas and Quadri stated that while this was a brutal crime, it was not enough to permit the death penalty as all murders were brutal. The Court used past disputes between the two families as a mitigating factor.

In *Sangeet v. State of Haryana*, the court lamented the undue focus on the nature of the crime. It noted, '[d]espite *Bachan Singh*, primacy still seems to be given to the nature of the crime. The circumstances of the criminal, referred to in *Bachan Singh* appear to have taken a bit of a back seat in the sentencing process.'[35] In the same vein, the court identified three more cases where *Bachan Singh*'s mandate to discuss both aggravating and mitigating circumstances was not followed. These were the cases of *Shivu v. Registrar General, High Court of Karnataka*, *Rajendra Pralhadrao Wasnik v. State of Maharashtra*, and *Mohd. Mannan v. State of Bihar*.[3637] The court argued (in *Shankar Khade*) that while similar circumstances in a set of similar cases, shocked the judicial conscience in some instances, they did not, in some others. For instance, the court swayed against the death penalty in *Bantu v. State of M.P.* (involving the rape and killing of of a six year old child)[38]; *Haresh Mohandas v. State of Maharashtra* (rape and murder of a ten year old child)[39]; *Mohd. Chaman v. State* (rape and murder of a one and a half year old child.[40] Here the Court identified a possibility of reform suggesting that it was a significant mitigating factor. The Court argued that while their crimes were heinous, they themselves were not any danger to society at large and hence capable of reform.

In another set of cases like, *Jumman Khan v. State of U.P.* (rape and murder of a six year old)[41]; *Kamta Tiwari v. State of M.P.* (rape and killing

[34] *Panchi & ors. v. State of Uttar Pradesh* (1998), AIR 1998 SC 2726.
[35] *Sangeet v. State of Haryana* (2013), 2 SCC 452, at para 34.
[36] .
[37] *Shivu & anr. v. Registrar General, High Court of Karnataka* (2007), 4 SCC 713, *Rajendra Pralhadrao Wasnik v. State of Maharashtra* (2012), 4 SCC 37, *Mohd. Mannan v. State of Bihar* (2011), 5 SCC 317.
[38] *Bantu v. State of M. P.* (2001), 9 SCC 615.
[39] *Haresh Mohandas Rajput v. State of Maharashtra* (2011), 12 SCC 56.
[40] *Mohd. Chaman v. State (NCT of Delhi)* (2001), 2 SCC 28.
[41] *Jumman Khan v. State of U.P.* (1991), 1 SCC 752.

of a seven year old)[42]; *Bantu v. State of U.P.* (rape and murder of a five year old[43]; *Shivji @ Dadya Shankar Ahlat v. State of Maharashtra* (rape and murder of a nine year old)[44], the court categorised the crimes as being depraved, gruesome and extremely brutal, thereby warranting the death penalty. The Court did not go into whether or not these offenders had any potential to reform.

2.5 The Scope of Rehabilitation

The *Bachan Singh* judgement aimed to install a humanitarian conception of punishment towards the accused. An analysis of the offender's situation was supposed to help the courts reach a justified punishment. This investigation of the aggravating and mitigating circumstances of the accused was to guide the Court in determining his potential for reform and rehabilitation. So the state is supposed to present evidence in a manner that shows that the convict being dealt with is beyond the scope of reformation or rehabilitation.

In cases like *Birju v. State of M.P.*[45]; *Anil @ Anthony Arikswamy Joseph v. State of Maharashtra*[46] and *Shankar Kisanrao Khade v. State of Maharashtra*,[47] the Court stressed upon the need for evidence related appraisal of whether or not a particular offender could reform. In Anil @ Anthony Arikswamy Joseph v. State Of Maharashtra, the Court observed that '[m]any-a-times, while determining the sentence, the Courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation..'[48] *Mohd. Mannan v. State* is one such example, where the court said that the convict remains 'a menace to the society and shall continue to be so and he cannot be reformed.'[49] The Supreme Court referenced this case in *Sangeet*, pointing out that the Court did not present any

[42] *Kamta Tiwari v. State of M. P.* (1996), 6 SCC 250.
[43] *Bantu v. State of U.P.* (2008), 11 SCC 113.
[44] *Shivji @ Dadya Shankar Ahlat v. State of Maharashtra* (2008), 15 SCC 269.
[45] *Birju v. State of M.P.* (2014), 3 SCC 421.
[46] *Anil @ Anthony Arikswamy Joseph v. State of Maharashtra* (2014), 4 SCC 69.
[47] *Shankar Kisanrao Khade v. State of Maharashtra* (2013), 5 SCC 546.
[48] *Anil @ Anthony Arikswamy Joseph v. State of Maharashtra*, 4 SCC 69, at para 33. See also, *Birju v. State of M.P.*, 3 SCC 421.
[49] *Mohd. Mannan v. State of Bihar*, 8 S.C.C 65, at para 18.

evidence on whose basis it could be concluded that the convict, being a danger to society will 'continue to be so. . . and cannot be reformed.'[50]

While there are cases where the court rejected the possibility of rehabilitation or reformation, without any evidence, there are also cases, where the possibility to reform or rehabilitate was presumed in absence of expert evidence. The former set includes cases like B.A. Umesh v. Registrar General, High Court of Karnataka;[51] *Jai Kumar v. State of Madhya Pradesh*;[52] *Mohd. Mannan v. State of Bihar*[53] while the latter includes cases like *Surendra Pal Shivbalakpal v. State of Gujarat*[54], *Raju v. State of Haryana*[55], *Amit v. State of U.P.*[56], *Bantu v. State of Madhya Pradesh*;[57]*Rahul v. State of Maharashtra*;[58] *Mohd. Chaman v. State (NCT of Delhi)*;[59]*Nirmal Singh v. State of Haryana*[60] and so on. It so appears that the court has not been able to follow its own standards that well. The result of this has been a rise of inconsistent principles and themes in death penalty cases. The Court kept relying on its own hunches of whether or not an offender was going to re-offend, disregarding the principles that had been put in place.

In *Bachhitar Singh & anr. v. State of Punjab*,[61] the accused had hired two people to quash whole families of their brother to acquire his property. The court commuted their death sentence. It observed that there was not sufficient evidence against their reform or rehabilitation. The court wanted to provide them an opportunity 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.' In *Dayanidhi Bisoi v. State of Orissa*,[62] the state could not present any evidence that diminished the possibility of reform and rehabilitation of offenders but they were given the death penalty. This contradicted the spirit of *Bachan*

[50] *Sangeet v. State of Haryana*, 2 SCC 452, at para 38.
[51] *B.A. Umesh v. Registrar General, High Court of Karnataka* (2011), 3 SCC 85.
[52] *Jai Kumar v. State of Madhya Pradesh* (1999), 5 SCC 1.
[53] *Mohd. Mannan v. State of Bihar*, 5 SCC 317.
[54] *Surendra Pal Shivbalakpal v. State of Gujarat* (), 3 SCC 127.
[55] *Raju v. State of Haryana* (2001), 9 SCC 50.
[56] *Amit v. State of U.P.* (2012), 4 SCC 107.
[57] *Bantu v. State of M. P.*, 9 SCC 615.
[58] *Rahul v. State of Maharashtra* (2005), 10 SCC 322.
[59] *Mohd. Chaman v. State (NCT of Delhi)*, 2 SCC 28.
[60] *Nirmal Singh v. State of Haryana* (1999), 3 SCC 670.
[61] *Bachhitar Singh & anr. v. State of Punjab* (2002), AIR 2002 SC 3473.
[62] *Dayanidhi Bisoi v. State of Orissa* (2003), AIR 2003 SC 3915.

Singh wherein the presumption had to automatically favour reform and rehabilitation. Other such cases include *Karan Singh v. State of U. P.*,[63], *Holirom Bordoloi v. State of Assam*,[64], *Renuka Bai @ Rinku @ Ratan & anr. v. State of Maharashtra*.[65]

On several occasions the Court made direct linkages between the lack of remorse on the part of an offender and the subsequent chances of his reform. In cases of apparent remorse, including those where offenders had surrendered willingly or confessed to their offences, the Court upheld their death sentences. This includes the cases of *Muniappan v. State of Madras*[66], *Sri Mahendra Nath Das @ Jai Kumar v. State of Madhya Pradesh*[67], *Sri Gobinda Das v. State of Assam*[68], *Bheru Singh s/o Kalyan Singh v. State of Maharashtra*.[69]

2.5.1 Assessing Prior Criminal Records

Generally, the Court considers the prior criminal record of the accused in trying to assess his potential to reform. There have been situations where the Court has taken into account pending cases, that were not finally decided. For instance, *Shivu. v. Registrar General, High Court of Karnataka*[70]; *B.A. Umesh v. Registrar General*[71]; *Sushil Murmu v. State of Jharkhand*[72] and some others.[73] This was noted by the Court in *Sangeet* and *Shankar Khade*. The court observed that if the decision to impose the death sentence derived directly from pending cases, it is tantamount to outrightly rejecting the rule of presumption of innocence. It goes against the very principle that nobody is an offender under the eyes of law, unless proven so. The Supreme Court explicitly admitted error in these cases.[74]

In *B.A. Umesh v. Registrar General*, High Court of Karnataka, the

[63] *Karan Singh v. State of U.P.* (2005), 6 SCC 342.
[64] *Holirom Bordoloi v. State of Assam* (2005), AIR 2005 SC 2059.
[65] *Renuka Bai @ Rinku @ Ratan & anr. v. State of Maharashtra* (2006), AIR 2006 SC 3056.
[66] *Muniappan v. State of Madras* (1962), AIR 2006 SC 3056.
[67] *Sri Mahendra Nath Das @ Jai Kumar v. State of Madhya Pradesh* (), AIR 1999 SC 1860.
[68] *Sri Gobinda Das v. State of Assam* (1999), AIR 1999 SC 1926.
[69] *Bheru Singh s/o Kalyan Singh v. State of Maharashtra* (1994), 2 SCC 467.
[70] *Shivu & anr. v. Registrar General, High Court of Karnataka*, 4 SCC 713.
[71] *B.A. Umesh v. Registrar General, High Court of Karnataka*, 3 SCC 85.
[72] *Sushil Murmu v. State of Jharkhand*, 2 SCC 338.
[73] *Gurmukh Singh v. State of Haryana* (2009), 15 SCC 635.
[74] *Sangeet v. State of Haryana*, 2 SCC 452.

Supreme Court awarded the death penalty to the accused, in light of the fact that he had been involved in similar activities before. Two days after the incident (for which he was under trial) he had been caught while trying to commit another crime. 'The antecedents of the appellant and his subsequent conduct indicates that he is a menace to society and is incapable of rehabilitation,'[75] the Court observed. It must be mentioned that the accusations against Umesh, relating to other supposed offences, were never actually proven in court or brought on record. The court itself noted this in Sangeet.[76] Quite surprisingly, once the review petition came before the court, it was rejected on the grounds of the same allegation 'that far from showing any remorse, he was caught within two days of the incident by the local public while committing an offence of a similar type in the house of one Seeba.'[77] Once again, the accused received the death sentence for having shown no potential to reform.

2.6 Does Age Play any Role in Concerns of Reformation?

Like most other concepts evolved in the death penalty discourse, age too has been subject to varying interpretations. It was acknowledged in *Bachan Singh* that the accused receiving the death sentence should not be 'too young or too old.' In *Bachan Singh v. State of Punjab*, the Court suggested that the death penalty was not to be given if the accused was too young or too old. However, trying not to set fixed standards, the Court did not define what exactly was too young or how old was too old. Before this case, the Court had not dealt with issues regarding the sentencing of youth and juveniles. Age has been treated arbitrarily as a factor in sentencing, even in pre-*Bachan Singh* era.[78] The rarest of rare test did not do much to change arbitrariness regarding age but following from

[75] *B.A. Umesh v. Registrar General, High Court of Karnataka*, 3 SCC 85, at para 84.

[76] *Sangeet v. State of Haryana*, 2 SCC 452.

[77] *B.A. Umesh v. Registrar General, High Court of Karnataka*, Review Petition (Criminal.) No (S).135-136 of 2011 in Criminal. Appeal Nos. 285-286 of 2011.

[78] *Tori Singh & anr v. State of Uttar Pradesh* (1962), AIR 1962 SC 399, *Masalti & ors. v. State of Uttar Pradesh* (1965), AIR 1965 SC 202, *Dharampal v. State of Uttar Pradesh* (1970), 1 SCC429, *Bhagwan Swarup v. The State of U.P.* (1971), AIR 1971 SC 429, *Om Parkash alias Omla v. State of Delhi* (1971), 3 SCC 413.

it some sentences were commuted on the basis of age. Post *Bachan Singh* judgement, in *Ujjagar Singh & anr. v. Union of India & Ors.*[79], the death sentence of an appellant was commuted as he was seventeen years old. In *Dharma v. Nirmal Singh Bittu & anr.*[80] the court commuted the death sentence of the accused, arguing that he was only nineteen at the time of the commission of offence. In *Bantu @ Naresh Giri v. State of Madhya Pradesh*,[81] the appellant's sentence was commuted as he was less than twenty two years. Moreover, he had no prior criminal record and it could not be proven that he was a continued threat to society. In other cases, young age was rejected as a mitigating factor.

Time and again the court has argued that if a perpetrator commits a crime at a very young age, there always exists the chance that he might reform himself at a later stage. In *Ramnaresh v. State of Chhattisgarh*[82] the court sentenced the convicts (21-30 years old) to life, despite the fact that they were guilty of a brutal gang rape and murder. The sentence of life here, instead of death pointed towards a possibility of reform that the court expressed faith in. In *Ramesh v. State of Rajasthan*[83] the court once again upheld the life sentence on the basis of the convict's age. The Court argued that he was very young and could always be reformed. Once again, in *Surendra Mahto v. State of Bihar*,[84] offender's age (30 years) was considered a primary mitigating factor. Here again the Court did not give him the death sentence expressing faith in his ability to reform.

In *Javed Ahmed Abdulhamid Pawala v. State of Maharashtra*[85] a twenty two year old received the death sentence. The court argued that age was no factor for showing mercy. In a similar manner, in *Sunil Baban Pingale v. State of Maharashtra*[86] the Court awarded death to a twenty six year old offender. The court's argument was that the crime was preplanned. The inconsistency regarding age as a mitigating factor is visible even a decade after *Bachan Singh*. In *Dhananjoy Chatterjee v. State of Bengal*,[87] for instance,

[79] *Ujjagar Singh & anr. v. Union of India & Ors* (1981), AIR 1981 SC 2009.
[80] *Dharma v. Nirmal Singh Bittu & anr.* (1996), AIR 1996 SC 1136.
[81] *Bantu @ Naresh Giri v. State of Madhya Pradesh* (2002), AIR 2002 SC 70.
[82] Ibid., 4 SCC 257.
[83] *Ramesh v. State of Rajasthan* (2011), 3 SCC 685.
[84] *Surendra Mahto v. State of Bihar* (2009), Criminal Appeal No. 211/2009.
[85] *Javed Ahmed Abdulhamid Pawala v. State of Maharashtra* (1983), AIR 1983 SC 594.
[86] *Sunil Baban Pingale v. State of Maharashtra* (1999), 5 SCC 702.
[87] *Dhananjoy Chatterjee v. State of Bengal* (1994), 2 SCC 220.

the court punished the offender with a death sentence for raping and killing an eighteen year old girl. This case was referenced in *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat*[88] which (the court said) dealt with pretty much the same facts except in this case rape and murder had been inflicted on a child. The two judge bench could not arrive at a joint decision and hence it was referred to a larger bench. The larger bench noticed the similarities to the *Dhananjoy* Case, but suggested that since the perpetrator was only 28 years of age, life sentence was more suited as a punishment. Thus, in light of a 'similar fact situation', Rameshbhai Rathod was given life imprisonment as he was 28 years old. Dhananjoy Chatterjee, when executed in 2004, was only 27.

A 'similar fact situation' involving rape and subsequent killing occurred once again in *Purushottam Dashrath Borate v. State of Maharashtra*.[89] Once again the court highlighted its similarities to the Dhananjoy case and following from the latter, it awarded both the offenders with the death sentence. Here the court did not bring in the decision of Rameshbhai Rathod. Interestingly, it did not even reference the Shankar Khade case that expressed doubts about the award of the death sentence in Dhananjoy Chatterjee. The court skipped over the mitigating factors here as well.

In *Shankar Khade*, the Supreme Court highlighted that similar looking cases of rape and murder were met with distinct outcomes because of how inconsistently age was used as a mitigating factor. For instance the perpetrators in *Amit v. State of Uttar Pradesh* (aged 28 years)[90], *Santosh Kumar Singh v. State* (aged 24 years)[91], *Amit v. State of Maharashtra* (aged 20 years)[92], *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat* (aged 24 years)[93], *Rahul v. State of Maharashtra* (aged 24 years)[94] did not receive the death penalty as their age played a mitigating factor. In other cases like,

[88] *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat* (2011), 2 SCC 764.

[89] *State of Maharashtra v. Purushottam Dashrath Borate* (2012), Criminal Appeal No. 632/2012 (Bom), 25.09.2012, *Purushottam Dashrath Borate v. State of Maharashtra* (2015), A.I.R. 2015 SC 2170. The age of the offenders in Purushottam Dashrath Borate was 26 years and 20 years respectively. The age of the accused is taken from the High Court judgment in this case.

[90] *Amit v. State of U.P.*, 4 SCC 107.

[91] *Santosh Kumar Singh v. State* (2010), 9 SCC 747.

[92] *Amit alias Ammu v. State of Maharashtra* (2003), 8 SCC 93.

[93] *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat*, 2 SCC 764.

[94] *Rahul v. State of Maharashtra*, 10 SCC 322.

Jai Kumar v. State of Madhya Pradesh (22 years)[95], *Shivu & Anr. v. Registrar General*, High Court of Karnataka (aged 20 and 22 years)[96], Dhananjoy Chatterjee (aged 27 years)[97], however, the age of the offenders was either not considered at all or considered inconsequential.

The mitigating factors of 'age of the accused' and 'potential to reform and rehabilitate' saved several offenders who were responsible for raping and murdering minors. In *Bantu @ Naresh Giri v. State of Madhya Pradesh*[98], Justices Raju and Shah granted life to the accused noting that he was less than twenty two years of age. The court argued that 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.' Justices Sabharwal and Brijesh Kumar also followed this approach in *Amit alias Ammu v. State of Maharashtra*[99]. The Court noted that the offender was a student, less than twenty years old. The court also mentioned that the convict did not have any previous record so he was not a threat to society. Thus the death sentence was not awarded. By way of exception, the case of *State of U.P. v. Satish*[100], is pertinent. An accused had raped and murdered a six year old for which the trial court sentenced him to death. On grounds of insufficient evidence, he was acquitted by the High Court. However, Justices Pasayat and Kapadia, switched the acquittal to confirmation and found it to be rarest of rare.

2.7 Juvenile Offenders

The Law Commission was the first to advance the idea of no death sentences to juveniles. It was in 1967 in its 35th report on capital punishment. This position was reiterated in 1971, in its 42nd report on the reform of the IPC(Indian Penal Code). This formed the basis for the Indian Penal Code (Amendment) Bill, 1972. This bill however, never got passed. International human rights obligations mandated India to legislate in this area more than a decade after this amendment bill.

[95] *Jai Kumar v. State of Madhya Pradesh*, 5 SCC 1.
[96] *Shivu & anr. v. Registrar General, High Court of Karnataka*, 4 SCC 713.
[97] *Dhananjoy Chatterjee v. State of Bengal*, 2 SCC 220.
[98] *Bantu @ Naresh Giri v. State of Madhya Pradesh*, AIR 2002 SC 70.
[99] *Amit alias Ammu v. State of Maharashtra*, 8 SCC 93.
[100] *Satish v. State of U.P.*, AIR 2005 SC 1000.

Around the same time, in *Jagmohan Singh v. The State of Uttar Pradesh*,[101] the Bench suggested that the young age of the offender must be considered a mitigating factor. In *Harnam v. State of U.P.*,[102] the Court took this judgement into account and suggested that the offender's tender age of sixteen, was a mitigating factor. Justices Sarkaria and Bhagwati observed 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.'

Post this decision, in *Raisul v. State of U.P.*,[103] the convict's sentence was commuted on the basis of his own statement in the trial court that he was under eighteen. The Court observed that no evidence relating to the age of the offender was provided and his age was simply guessed from how he looked. Further, in *Bachchey Lal v. State of Uttar Pradesh*[104], the Supreme Court referred to *Harnam v. State of U.P.*[105] and commuted the sentence of the eighteen year old appellant. Interestingly, in this case the Court also suggested that there were no concrete rules regarding age in penology, it was a significant factor in matters of sentencing.

In 1979, India acceded to the ICCPR. This meant adherence to its Article 6(5). The latter states that offenders under eighteen must not be awarded capital punishment. This prohibition was further reiterated by the United Nations Convention on the Rights of the Child that India acceded to in 1982. Article 37(a) of this Convention states that 'Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.' The UNHRC (United Nations Human Rights Committee) also referred to this provision of keeping juvenile offenders outside the scope of the death penalty.[106]

In addition to these requirements, death penalty was also prohibited for young offenders under the Juvenile Justice Act, 1986. *Juvenile* was defined as a boy who was under sixteen years and a girl who was un-

[101] *Jagmohan Singh v. State of Uttar Pradesh*, AIR 1973 SC 947.
[102] *Harnam v. State of U.P.* (1976), 1 SCC 163.
[103] *Raisul v. State of U.P.* (1977), AIR 1977 SC 1822.
[104] *Bachchey Lal v. State of Uttar Pradesh* (1977), AIR 1977 SC 2094.
[105] 1 SCC 163
[106] 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.

der eighteen. Subsequently, the Juvenile Justice (Care and Protection of Children) Act, 2000, amended this definition. The juvenile boy was now someone under eighteen. Death sentence to juveniles was once again prohibited under Section 16(1) of this Act. Inspite of this legal clarity with regards to the death sentences to juveniles in India, they have been sentenced to death or executed or are awaiting execution in a number of cases. In *Amrutlal Someshwar Joshi v. State of Maharashtra II*,[107] after rejecting an appeal the Court allowed a review petition that dealt with the issue of age. The Court stated that there was some inconsistency in the offender's age. While he himself claimed to be seventeen, the prosecution claiming that they had a 'true copy' of his certificate, argued that he was twenty years old. The trial court accepted this evidence. The Supreme Court dismissed the defence counsel's plea for a medical examination to determine the age of the accused. The Court argued '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.' The accused, Amrutlal Someshwar Joshi was thus executed in Pune's Central Jail on 12th of July 1995.

In *Ram Deo Chauhan @ Raj Nath v. State of Assam*,[108] the trial court did not deal with age of the accused as the question was not raised by any of the state-appointed legal aid lawyers who were representing him. In fact, during the confirmation proceedings in the High Court, the defence lawyer acknowledged that the accused was above twenty years of age. In a review petition filed by another lawyer that the accused had hired for himself, the issue of age gained prominence. It was argued that the appellant was a juvenile when the crime was committed. During review, it also emerged that the doctor called in for examining his age had confirmed that the accused was only fifteen-sixteen at the time of the offence. The school register, brought in as evidence, further confirmed that the accused could not have been more than sixteen when the crime occurred. One of the judges in the bench, Justice Thomas believed that the evidence was enough to grant commutation. However, Justice Sethi argued that 'too much of reliance could not be placed on text books, on medical jurisprudence and toxicology when determining the age of an ac-

[107] *Amrutlal Someshwar Joshi v. State of Maharashtra II* (1994), 6 SCC 200.
[108] *Ram Deo Chauhan @ Raj Nath v. State of Assam* (2001), AIR 2001 SC 2231.

cused'. The review petition was dismissed. The third judge on the Bench, Justice Phukan, expressed agreement with the dismissal. Responding to the concern that he was not well represented by state appointed defence lawyers, he argued that the accused was not really remediless, because he could still be granted commutation by the Executive. The Governor of the concerned state eventually commuted the sentence. This was followed by intense lobbying efforts including appeals from from the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions as also the National Human Rights Commission. The Governor's decision has been challenged by the victim's family in the Supreme Court.

In *Om Prakash v. State of Uttaranchal*[109] once again the Court argued that 'mere young age of the accused is not a ground to desist from imposing death penalty.' The apex Court upheld the death sentence of an accused who had murdered three members of the family he was working for in November 1994. in his statement, the accused suggested that he was only thirteen when the offence was committed. The Court disregarded this and observed 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.' it is concerning that possibly a juvenile was awarded death on the basis of presumption. This is particularly so because this was when opening a bank account was not dependent on the most rigorous of requirements. Moreover, he would not have admitted his real age if he was trying to open that bank account.

In 2003, the Court dismissed a Review Petition[110] which remains unreported. Father of the accused filed another writ petition.[111] The petition sought a deletion of the death sentence on the basis of the offender being a juvenile when the crime took place. A school certificate was produced as evidence, marking his birth on the fourth of January, 1980. The Court observed that the appropriate recourse was to file a curative

[109] *Om Prakash v. State of Uttaranchal* (2003), 1 SCC 648.
[110] Crl. No. 273 OF 2003.
[111] *Zakarius Lakra & ors. v. Union of India & anr.* (2005), 3 SCC 161.

petition and not a writ petition. Justices Reddi and Mathur also noted that the earlier Bench that had given the judgement was not shown this evidence. In 2005, Curative petition No. 20 was filed in the Court. This too was dismissed in a cryptic order. Even though the State of Uttaranchal filed a response stating that they were not questioning the authenticity of the school certificate, Justices Pal and Balakrishnan simply stated 'The curative petition is dismissed'. Surprisingly, although a Bench of the Supreme Court accepted error in the absence of certificates at the time of original sentencing, eventually the curative petition was rejected without any reasons given for the same. Dismissing this petition meant two things, (a) a juvenile was kept awaiting execution in violation of Indian law; and, (b) in violation of India's international commitments and obligations.

The numerous cases mentioned here point to contrary judgements. This is so despite these different cases exhibiting some similar characteristics and facts. It is not clear from a reading of these judgements how the extent and degree of shock to the 'collective conscience' is measured or analysed. The court itself noticed and highlighted the presence of such inconsistencies in *Shankar Khade*. It observed that, 'there is a very thin line on facts which separates the award of a capital sentence from a life sentence in the case of rape and murder of a young child by a young man and the subjective opinion of individual Judges as to the morality, efficacy or otherwise of a death sentence cannot entirely be ruled out.'[112]

The general feeling had grown that death penalty had led to an abolitionist situation and hence the court installed new approach like the one focussed on public outrage or social justice. It is tough to say whether court led to social justice argument or increasing public pressure demanded court's attention to it? In sum, two simultaneous things happened, first, general perception that abolition was on rise; and second, increasing public pressure on some cases. Court had to respond to both. The principle of 'public opinion worked in more than one way; there was the assumption of public outrage if the judgement did not meet their expectations, there was actual outrage; then the fact that court said violent criminals could further harm society. They had harmed moral fibre once, let them not harm it another time. This merged with the court's logic of deterrence. While we will see some cases where the Court men-

[112] *Rameshbhai Rathod (2) v. State of Gujarat* (2011), 2 SCC 764, at para 8.

tioned 'deterrence' as an outcome in this chapter, we will deal with it as a penological goal in the next chapter.

2.8 Did a 'Public Opinion' Approach Ever Exist?

Starting in mid-1980s and covering the 90s, the Supreme Court turned its attention towards the notion of 'public outrage' over the nature of the offences committed. The 'threat to society' argument subsumed considerations of reform and rehabilitation of offenders. It went against the very narrative that a punishment like the death penalty should be meted out only in exceptional circumstances. The 'social necessity' argument was first propounded in *Earabhadrappa alias Krishnappa v. State of Karnataka*.[113] In this case, Justice A.P. Sen argued, '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.'[114] The Court suggested that the provision of death sentences in the IPC emerged from the need to protect the society at large. Those crimes which threatened societal interests definitely deserved the extreme penalty of death. Exceptional circumstances and social necessity had to be analysed side by side. Cases were not just 'rarest of rare' in terms of the particular facts and circumstances they exhibited. Instead they became rarest of rare in terms of the peculiar threat they posed to the public at large. Similarly, the grant or otherwise of death sentence was not be based solely on the basis of circumstances of the criminal. It had to derive from an investigation of what those circumstances meant for the larger society.

With 'rarest of rare' receding into the background, public opinion/outrage played a massive role in Court's denial of commutation. The *Billa-Ranga (Kuljeet Singh alias Ranga v. Union of India and anr.)*[115] and *Munawar Harun Shah (Munawar Harun Shah v. State of Maharashtra)* cases,[116] are good examples of this. In the former, two young children were kidnapped and murdered, leading to widespread protests and de-

[113] *Earabhadrappa alias Krishnappa v. State of Karnataka*, 2 SCC 330.

[114] Ibid.

[115] *Kuljeet Singh alias Ranga v. Union of India and anr.* (1981), 3 SCC 324, famously known as the 'Billa-Ranga case'.

[116] *Munawar Harun Shah v. State of Maharashtra* (1983), AIR 1983 SC 585.

mands for severe punishment. The reason for dismissing the leave petition and other related details were not recorded by the Court. Later the accused Kuljeet Singh (Ranga) filed a separate writ petition.[117] The Court rejected the plea for commutation. It also did not provide any evidence and argued that the offenders did not deserve any sympathy 'even in terms of the evolving standards of decency of a maturing society.' The Court observed, '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...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.'

The later judgements in this case also reflect the growing pressure on the Court. A second writ petition[118] was filed challenging the arbitrariness of the President's Clemency powers. The Court tried to find details from the government regarding what was the standard or basis applied by the executive in dealing with mercy petitions. It did not receive any response and hence decided to dismiss the petition.[119] The Court held that the analysis of the President's mercy power may have to be left for another occasion. It held: '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.' This was strange because earlier the Supreme Court accepted the petition because it had 'far-reaching importance.' Kannabiran has written that this owed more to public opposition regarding commutation than to the merits or demerits of the petition per se.[120]

In *Munawar Harun Shah* case,[121] once again the effect of popular pressure on the matter of writ petition became visible. The special leave

[117] *Kuljeet Singh alias Ranga v. Union of India and anr.*, 3 SCC 324.
[118] *Kuljeet Singh alias Ranga v. Lt. Governor, Delhi and anr.* (1982), 1 SCC 11.
[119] Ibid., 1 SCC 417.
[120] *Munawar Harun Shah v. State of Maharashtra*, For Details, see Lethal lottery Report (details).
[121] Ibid., AIR 1983 SC 585. (more famous as the 'Joshi-Abhyankar case' from Pune).

petitions dismissed in 1980 remain unreported in this case as well. *Bachan Singh* judgement had stressed the importance of pre-sentencing hearing. Although in *Munawar*, the Court did not conform to this hearing requirement. The review petitions were dismissed twice in 1981 and 1982. The Court did not offer any reason for the same. Further, none of these petitions or rejections were reported in the Court's regular journals. This case involved seven murders, and 'having regard to the magnitude, the gruesome nature of offences and the manners perpetrating them'[122] the Supreme Court categorised it as 'rarest of rare'. The Court, anticipating a negative public opinion in case of a softer judgement argued, '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 only did the Court reject the petitions, it also called for early execution of the accused. Before this, in *Sevaka Perumal* too, the Court spoke of 'private vengeance' in the event that the judgement failed to fulfil the victim's expectation of justice.[123]

In 1987, another Bench of the Supreme Court gave the social necessity and deterrence argument. This was the case of *Mahesh s/o Ram Narain & others v. State of Madhya Pradesh* ('Mahesh')[124]. Here Justices Khalid and Oza upheld the death sentences of two accused in caste-based killings of five people. The judgement talks about 'the evil of Untouchability' but

[122] *Munawar Harun Shah v. State of Maharashtra*, AIR 1983 SC 585.

[123] Ibid., AIR 1983 SC 585. he Court observed that Shah was merely a minor participant and did not have a significant role in the actual crime. Hence he had the potential for reform. It was also mentioned during sentencing that since his conviction, he had been translating the Koran to Marathi. He was also devoting time to learn Arabic and homeopathy. Here the court was introduced to the case of Shantaram Jagtap as well. Another accused by the name of Jagtap had translated a book from English into Marathi and had even written another book in English. He had been spending time in learning about Buddhism. However, these factors were not enough for commutation. (a point about REFORM here).he Court observed that Shah was merely a minor participant and did not have a significant role in the actual crime. Hence he had the potential for reform. It was also mentioned during sentencing that since his conviction, he had been translating the Koran to Marathi. He was also devoting time to learn Arabic and homeopathy. Here the court was introduced to the case of Shantaram Jagtap as well. Another accused by the name of Jagtap had translated a book from English into Marathi and had even written another book in English. He had been spending time in learning about Buddhism. However, these factors were not enough for commutation. (a point about REFORM here).

[124] *Mahesh s/o Ram Narain & others v. State of Madhya Pradesh* (1987), AIR 1987 SC 1346.

not about the role of the accused. The High Court stated that the act '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.' In this case, 'social necessity', was placed along side the conception of 'judicial conscience.' It is difficult to say if the Court imposed its own understanding of moral/immoral on the society or if it changed its own understanding in face of pressure from society. In either case, the lines between judicial understanding of a perpetual threat to society and societal understandings of the same, seemed to blur.

Further, in *Mahesh* the Court observed, '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 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.' The Court acknowledged the need to focus on reformation in general. In this particular instance however, the Court imposed the death sentence. Moreover, no mitigating circumstances were discussed in this judgement. It seemed as if concerns of 'rarest' easily gave way to societal expectations of the judiciary. In entire judgements, Court stressed mainly on what the society expects of it, and how the commissioning of certain offences went against the society. There was no detailed discussion on what it was about the facts and circumstances of the case at hand, that made it 'rarest of rare'. As we saw above, in *Earbhadrappa*, the Court (taking cue from *Bachan Singh*) argued that 'exceptional circumstances and social necessity had to be analysed simultaneously. In *Mahesh*, the Court further added deterrence to the mix. The Court suggested that it is necessary for society to keep certain criminals locked up, to minimise the possibility of a repeat offence. With social necessity arguments gaining prominence, deterrence logically became another significant part of this package. Criminals who had already harmed social interests, had to be incapacitated to an extent that they could not shock the moral fibre twice. In these early cases, instead of

investigating whether or not a criminal showed any potential to reform, the Court set to investigate his propensity to violence, to an extent that he would engage in shocking the collective conscience again. In *Bachan Singh*, the Courts were advised to present evidence that the offender could not be reformed. Starting mid-1980s however, the Court simply presented evidence that the accused had a marked proclivity to violence. The rationale for awarding death was altered.

Like *Mahesh*, in *Asharfi Lal & ors. v. State of Uttar Pradesh*[125] too, arguments based on 'social necessity' came to the fore. Yet again, mitigating circumstances received no mention. There was no analysis of the specific positioning of the criminal vis-a-vis the crime he had committed. Factors of age, poverty, illiteracy did not receive any mention as the majority of the attention was focussed on how the particular crime had ongoing implications for the public at large. To begin with, at any given time, it is not possible to accurately assess societal opinion towards any crime/criminal. In making something as abstract and fleeting as public opinion, the basis of granting life or death, the Court was giving in to emotions at best. Deterrence and protection of society from criminals was given priority over the reformative approach. The Court argued, '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.... if the court did not protect the injured, the injured would then resort to private vengeance.' Several judgements came to rest on assumed fears of how society would react and not on the facts of the case or the circumstances of the criminal. Potential of victims avenging the wrongs done to them was placed against the potential of an offender to reform. In Court's presumption of what the society expected of it, there was an innate assumption that an offender was going to reoffend. This was coupled with the fact that the Court, in many cases, chose to skip over a detailed discussion of those facts that may/may not have made a case 'rarest of rare'.

In 1996 again the court again noted the possibility of public revenge. In *Gentela Vijayavardhan Rao & anr. v. State of Andhra Pradesh*[126], a bus was set to fire with a large number of people in it, following a failed

[125] *Asharfi Lal & ors. v. State of Uttar Pradesh* (1989), AIR 1989 SC 1721.
[126] *Gentela Vijayavardhan Rao & anr. v. State of Andhra Pradesh* (1996), AIR 1996 SC 2791.

robbery attempt. The Court rejected the mitigating circumstances like the young age of the accused, the primary motive being robbery, lack of a prior planning in the killings as well as the fact that those who could, were allowed to escape. The Court stated that these were 'eclipsed by many aggravating circumstances…(and) planned pogrom…executed with extreme depravity and…the inhuman manner in which they plotted the scheme and executed it.'[127] The Court also stated 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.' Earlier in this case, the High Court had argued that the death penalty was required to diminish any possibility of retaliation by the public against the offenders. Once again there was no analysis of the circumstances of the criminal, in the judgement. In Sevaka Perumal too the Court had expressed fear of public outrage if the decision did not meet societal expectations.

In *Ram Deo Chauhan & anr. v. State of Assam* ('Ram Deo Chauhan'), Justices Thomas and Sethi, while advancing the argument of society's well-being and protection argued that, 'when a man becomes a beast and menace to the society, he can be deprived of his life.'[128] The Court's reasoning revolved around the fact that anybody who performs a pre-planned quadruple murder does not deserve to be shown any sympathy. Such criminals, the Court argued, must be given the death sentence in order to protect the society while simultaneously deterring others. The same Bench in *Narayan Chetanram Chaudhary & anr. v. State of Maharashtra*,[129] upheld the death sentence of the convicts, who were found guilty of robbery and five murders. The Court concluded that these convicts were 'so self-centred 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.' In this case, pre-meditation was translated as a deep intent to cause harm at large. Those persons who had already exhibited extreme selfishness by engaging in a pre planned crime that

[127] *Gentela Vijayavardhan Rao & anr. v. State of Andhra Pradesh*, 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.

[128] *Ram Deo Chauhan @ Raj Nath v. State of Assam*, AIR 2000 SC 2679.

[129] *Narayan Chetanram Chaudhary & anr. v. State of Maharashtra* (2000), 8 SCC 457.

harmed societal interests did not deserve a second chance.

In *Gurdev Singh & anr. v. State of Punjab*,[130] Justices Srikrishna and Balakrishna upheld the death sentence of two offenders who had assisted in killing thirteen people. The Court argued that the case 'shocked the collective conscience of the community.' While there were no previous offences in their name, the Court believed the convicts to be permanent threats to society. It argued: 'the acts of murder committed by the appellants are so gruesome, merciless and brutal that the aggravating circumstances far outweigh the mitigating circumstances.'

2.9 The Tripartite Test

The Court, in *Mohd. Farooq Abdul Gafur v. State of Maharashtra* (Mohd. Farooq)[131] noted that the 'disparity in sentencing by [the] court flowing out of varied interpretations to the rarest of rare expression.'[132] A word of caution was also inserted by the Court where it said that an inconsistent and random understanding of the rarest of rare test might end up violating Article 14.[133] A look at the cases above make it clear that different judges interpreted the content and intent of the rarest of rare principle differently. Too many important decisions in death penalty cases came to rely upon the individual judges. This seemed to install a heterogeneous as well as a 'judge-centric' system of determining cases while simultaneously dealing with the rarest of rare criteria. In effect, the arbitrary and subjective application of the rarest of rare formulation converted 'principled sentencing' into 'judge-centric sentencing'.[134] Sentencing appeared to have become a factor of subjective understanding of the various judges.

This challenge was recognised by the court itself in *Sangeet v. State of Haryana* ('Sangeet')[135], Swami Shradhhananda[136] and *Khade*. In *Sangeet v. State of Haryana* ('Sangeet'), the Court observed that the *Bachan Singh*

[130] *Gurdev Singh & anr. v. State of Punjab* (2003), AIR 2003 SC 4187.
[131] *Mohd. Farooq Abdul Gafur v. State of Maharashtra* (2010), 14 SCC 641.
[132] Ibid., 14 SCC 641, at para 165.
[133] Ibid., 14 SCC 641.
[134] *Sangeet v. State of Haryana*, 2 SCC 452.
[135] Ibid.
[136] *Swamy Shraddananda (2) v. State of Karnataka*, 13 SCC 767.

dictum was somewhere 'lost in translation.'[137] In *Bariyar* the court suggested that 'there is no uniformity of precedents, to say the least. In most cases, the death penalty has been affirmed or refused to be affirmed by us, without laying down any legal principle.'[138] In a lot of other instances as well, the Supreme Court mentioned that the 'rarest of rare' doctrine developed in the *Bachan Singh* case has been arbitrarily used. The observations of the Supreme Court in Khade,[139] *Swamy Shraddhananda v. State of Karnataka* ('Swamy Shraddhananda'),[140], *Farooq Abdul Gafur v. State of Maharashtra* (*'Gafur'*),[141], *Aloke Nath Dutta v. State of West Bengal*[142] are relevant here. The court responded to this by improvising on the *Bachan Singh* framework and the 'public opinion' approach. In the case of *Gurvail Singh @ Gala v. State of Punjab*,[143] the Supreme Court put forward three more conditions that had to be fulfilled before awarding the death penalty. These tests were:

1. The crime test (dealt with the aggravating circumstances of any case)

2. The criminal test (it means that there should not be any mitigating circumstances that favour of accused)

3. If both these tests are fulfilled, then the 'rarest of rare cases test'. Instead of being 'judge-centric', this test would derive from society's attitude towards a particular crime.

The Supreme Court observed, 'While applying this test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes.'[144] Once again, the Court stressed the need to consider public opinion. It seemed as if the Court kept alternating between public opinion to reformation, back to public opinion, so on and so forth.[145]

[137] *Sangeet v. State of Haryana*, 2 SCC 452, at para 33.
[138] *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, 6 SCC 498, at para 104.
[139] *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546.
[140] *Swamy Shraddananda (2) v. State of Karnataka*, 13 SCC 767.
[141] *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641.
[142] *Aloke Nath Dutta v. State of West Bengal* (2007), 12 SCC 230.
[143] *Gurvail Singh @ Gala v. State of Punjab* (2013), 2 SCC 713.
[144] Ibid., 2 SCC 713, at para 19.
[145] Ibid., The third part of the 'triple test' is somewhat reminiscent of the 'similar fact

The Court had to analyse what type of crimes produced the strongest reactions from the public at large. This was to help determine what cases were so rare in their core, that they absolutely shook the society's moral fibre. Such an analysis was to guide the courts in assessing whether or not to award the death sentence in the case before it. This test was further elaborated upon in Mofil Khan v. State of Jharkhand,[146]. Here the court said that the real purpose behind this test is to 'basically examine whether the society abhors such crimes and whether such crimes shook the conscience of the society and attract intense and extreme indignation of the community.'[147]

In the triple test system, the so-called 'judge-centrism' can be dealt with by bringing in the society's response to any particular crime. This is important because, as acknowledged in *Bachan Singh* and later reiterated in *Bariyar*, judges end up considering their own presumptions and predilections as against those of society. This is so because even if we were to assume the existence of a clearly quantifiable public opinion, the judges do not have any means of accessing that particular opinion.

While *Bachan Singh* did not name the exact crimes that warranted the death penalty, the triple test analysis aimed to do exactly that by advancing the 'Rarest of Rare Cases test'. Under this test, the courts had to engage in an in-depth study of those cases where the death sentence had been imposed, by virtue of the rarest of rare principle. If the circumstances of the case at hand matched the circumstances of those that had to be studied, death penalty was to be the obvious choice of punishment. This clearly went against the spirit of *Bachan Singh* judgement that hoped to set up a case-by-case system of analysis. Instead of rigorously analysing the attributes of the case before it, the court had to see if it aligned with the attributes of some other cases that had already received the death penalty. This led to another problem. In their enthusiasm to use the 'rarest of rare' lens to understand the case before them or just use the phrase the Court many a times ignored those facts that made a case singular. This is problematic because while cases were similar, they were certainly not

situation' that we talked looked into above. It talked about matching similar cases and assessing if the case in question matched with other similar cases that had received the death penalty, under purview of rarest of rare.

[146] *Mofil Khan v. State of Jharkhand* (2015), 1 SCC 67.

[147] Ibid., 1 SCC 67, at para 46.

the same. Further, the similarity index applied only to the gruesomeness of the crimes and sometimes the motive for which these crimes were committed. For logical reasons it could not hold true for differential positioning of different criminals that committed different crimes.

Another way in which the latter test moved away from *Bachan Singh* was by separating the aggravating circumstances and the mitigating circumstances from the rarest of rare circumstances. The triple test mechanism creates a separate list of circumstances, relating to the crime and to the criminal respectively. It then proceeds to analyse them separately. This strictly ignores the theory propounded in *Bachan Singh* that the circumstances associated with the crime and the criminal do not exist in different water-tight compartments.[148]

The Supreme Court itself noticed this issue with the triple test analysis in Mahesh Dhanaji Shinde v. State of Maharashtra,[149] contending that this test 'may create situations which may well go beyond what was laid down in *Bachan Singh*.'[150] Despite this observation by the Court in Mahesh Shinde however, the test continues to be in application by the Supreme Court itself. In cases like, *Dharam Deo Yadav v. State of U.P.*, *Ashok Debbarma @ Achak Debbarma v. State of Tripura*, *Lalit Kumar Yadav*, the Court imposed the sentence of death, with triple test as the basis for it.[151]

The departure from *Bachan Singh* was made both in terms of the analytical framework and the pertinent factors to be thought about (particularly public opinion). The three tier test thereby contributed to the conceptual confusion surrounding the rarest of rare criterion. The benefit of this triple test is that it minimises the chances of death penalty imposition to those cases that fully lack any mitigating circumstances. In a way then this three-fold criteria is also in line with the intent of the *Bachan Singh* guidelines, wherein only the most exceptional cases deserved the death penalty. It further nuanced the notion of 'rarity' that had to be looked at

[148]For a critique of this test, see generally Aparna Chandra, "A Capricious Noose: A Comment on the Trial Court Sentencing Order in the December 16 Gang Rape Case," *Journal of National Law University, Delhi* 2, no. 1 (2014): 124–139.

[149]*Mahesh Dhanaji Shinde v. State of Maharashtra* (2014), 4 SCC 292.

[150]Ibid., 4 SCC 292, at para. 24.

[151]*Dharam Deo Yadav v. State of U.P.* (2014), 5 SCC 509, *Ashok Debbarma @ Achak Debbarma v. State Of Tripura* (2014), 4 SCC 747, *Lalit Kumar Yadav @ Kuri v. State Of U.P.* (2014), 11 SCC 129.

by the courts in dealing with capital cases.

Like the 'public opinion' approach, the triple test also involves an examination of society's perspective towards a particular issue/crime. Unsurprisingly then it also suffers from the problems of the former approach. It falsely assumes that a society is one identifiable grouping with clearly discernible set of opinions. It does not give due regard to the fact that society's opinion does not emerge from a full knowledge of the facts of the case or what would be the most justified way of dealing with a crime. Rather it is a mere feeling. Law, on the other hand cannot be based on feelings. How people understand crime or identify guilt is not something that is based on objective facts. It is very much a factor of their subjective understanding of the world. Generally speaking, the courts lack the means to acquire and thoroughly examine public opinion in all cases that come to it for consideration of the death sentence. Moreover, there is no one clearly discernible box of public opinion that can present all the relevant information on any particular case. Society, in itself may be divided between those who favour reformation and those who presume the end of justice to be revenge or retribution. In such situations, how will the Court be able to choose the relevant public opinion. Once again, which side is chosen comes to depend on the subjective predilection of judges. And once again, the outcome of death penalty cases comes to depend not on objective criterion but subjective interpretations of those criterion.

In *Bariyar*, the Court itself acknowledged this limitation when it stated that 'how people understand any crime is neither an objective circumstance relating to crime nor to the criminal.'[152] Here the Court emphasised the difficulty of quantifying public opinion. Further in Bariyar, it was recommended that courts must give due attention to constitutional safeguards. These safeguards 'introduce values of institutional propriety, in terms of fairness, reasonableness and equal treatment challenge with respect to procedure to be invoked by the state in its dealings with people in various capacities, including as a convict.'[153] In Bariyar the Court acknowledged that involving public opinion as against invoking constitutional proviso would subsume the model enshrined by the *Bachan Singh*

[152] *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, 6 SCC 498, at para 80.
[153] Ibid., 6 SCC 498, at para 82.

judgement. This implies that the court has to play a counter-majoritarian role. It must save individual interest against majoritarian tendencies. There may also be versions of public opinion that go against constitutionalism or rule of law. The courts, however must function within the bounds of constitutionalism as well as rule of law.

Giving too much importance to public opinion or giving in to public pressure can be problematic. A court has to be an institution of law and not merely public opinion. Courts do not always have to exactly represent or work as per the public opinion. Judges certainly form part of the society. Undoubtedly, they may express views that sometimes coincide with the larger public opinion. There may also be cases when it goes completely against the said opinion. In either scenario, the law must be given primacy over any opinion. There should not be any pressure on the judges, Benches or courts to infuse public opinion into the formal framework of law, especially when it comes to an irrevocable punishment like the death penalty. If one simply has to worry about satisfying public expectations of a trial, then there is not much point in bringing any case to the courts. As Aparna Chandra has written, 'If the opinion of the public matters to questions of sentencing, then courts are the wrong institutions to be determining sentence. Parliament or lynch mobs are more apposite.'[154]

Concentrating excessively on public opinion also entails the danger of death penalty 'becoming a spectacle in media. If media trial is a possibility, sentencing by media cannot be ruled out.'[155] The point made by K.G.Kannabiran is relevant here. He has noted that modern states retain the death penalty on their statutes in order to turn the sentence into a spectacle. He writes,

> 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

[154]Chandra, "A Capricious Noose: A Comment on the Trial Court Sentencing Order in the December 16 Gang Rape Case," 136.

[155]*Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, 6 SCC 498, at para 87.

> 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.[156]

This is also what justice as revenge can lead to. To feel vindicated at someone's death should not be the objective of any justice system. This is the limit of retribution as revenge model of punishment. We shall deal with it in detail in the next chapter, under retribution as a penological objective.

2.10 Did Public Pressure Influence the Court's Opinion?

It is important to note that the Court did not give in to public pressure for all kinds of cases, particularly cases dealing with 'gender based violence'. During the 1980s, women's movement in India succeeded in highlighting instances of gender centric violence, particularly dowry related violence or dowry murders.[157] In *Machhi Singh* judgement (1983), the Court expanded the notion of 'rarest of rare' to include dowry murders in that framework.

One of the first dowry related cases to reach the Supreme Court was State (Delhi Administration) v. Laxman Kumar and ors.[158] In this case, three people had been sentenced to death by the trial court on account of an 'atrocious dowry death'. Subsequently the accused were acquitted by the High Court. This decision was challenged by the State and the IFWL (i.e. the Indian Federation of Women Lawyers) Justices Sen and Misra reinstated the original conviction but did not award the death penalty. They argued that two years had lapsed since the High Court's acquittal and 'other facts and circumstances' of the case had also changed. However, it did not go into what exactly those changed facts and circumstances were. The High Court judgement, in the 'conclusion' part, noted that the verdict

[156] Batra et al., *Lethal Lottery: The Death Penalty in India, A Study of Supreme Court Judgments in Death Penalty Cases 1950-2006*.

[157] 'Dowry murders' refer to crimes that are tried under Section 302 of the Indian Penal Code. This is different from 'dowry deaths' that are covered by Section 304 B of the IPC. It should be noted that the Supreme Court has used these terms interchangeably on some occasions.

[158] *State (Delhi Administration) v. Laxman Kumar and ors.* (1986), AIR 1986 SC 250.

would likely 'cause flutter in the public mind more particularly amongst women's social bodies and organisations'. It further emphasised that the judges needed to take into account the evidence placed before them. This reflected the court's worry about the impact of its judgement on the public. However, in spite of this the death penalty was not awarded in this case.

In the case of *Kailash Kaur v. State of Punjab*,[159] Justices Sen and Eradi expressed disappointment over the fact that the death penalty had been awarded in a situation of dowry murder. The Supreme Court stated: '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 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.'

When it came to 'dowry murders', the Supreme Court tried to establish that it was not influenced by the rising public pressure regarding. There were of course variations to it: some high courts installed their own approaches; the Rajasthan High Court in Lachma Devi and ors.[160] stated

[159] *Kailash Kaur v. State of Punjab* (1987), (1987) 2 SCC 631.
[160] *Lachma Devi and ors.* (1986), AIR 1986 SC 467.

that the offenders in dowry cases could be hung publicly once the public had been duly informed. This was struck down as unconstitutional by the Supreme Court in an appeal to the Attorney General of India.[161] The Court also reprimanded the High Court for giving in to emotions. In *Lichhamadevi v. State of Rajasthan* (AIR 1988 SC 1785),[162] another appeal was filed in the same case. It was heard by another Bench of the Supreme Court. While Justices Oza and Shetty agreed that the murder was 'dastardly and diabolic', the sentence was commuted. The court argued 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 further expressed issue with the procedural part of the trial as well as the way in which evidence had been collected against him. In practice, the supreme court did not uphold the death sentence in many dowry cases brought before it. That said the court did spend a considerable time in expounding rhetoric about the evils of dowry system and how dowry murders must attract the ultimate penalties.

2.11 Crimes of Rape and Murder

Before the 1990s, supreme court judgements in cases of rape and murder of children were seldom reported. The few references that are present relate to cases of acquittals. Therefore in both Jawaharlal Das v. State of Orissa[163] and *Shankarlal Gyarasilal Dixit v. State of Maharashtra*,[164] despite public hysteria demanding otherwise, the Court acquitted the convicts. It must be noted that the reported judgements in the period between 1990-1999, point towards death sentences being invoked by the Supreme Court. Quite a few executions were carried out in this period in these type of cases.

In the case of *Jumman Khan v. State of U.P.*,[165] Justices Reddy and Pandian confirmed the death sentence of the appellant after rejecting a writ petition. In this case, the accused had raped and murdered a

[161] *Attorney General of India v. Lachma Devi & ors.* (1986), AIR 1986 SC 467.
[162] *Lichhamadevi v. State of Rajasthan* (1988), AIR 1988 SC 1785.
[163] *Jawaharlal Das v. State of Orissa* (1991), 3 SCC 27.
[164] *Shankarlal Gyarasilal Dixit v. State of Maharashtra* (1981), 2 SCC 35.
[165] *Jumman Khan v. State of U.P.*, AIR 1991 SC 345.

six year old child. Before this, in 1986, the Supreme Court had rejected a Special Leave Petition in this case, citing reasons of deterrence and Social necessity. In *Dhananjoy Chatterjee* case[166], Justices Anand and Singh upheld the death penalty against the guard who had raped and murdered a young girl in the same building that he was supposed to guard. The court considered it a specifically aggravating factor and deploying the argument of 'society's cry for justice', argued that nothing short of a death sentence would do justice to the victim. Another aggravating factor recorded by the court that the crime was committed by somebody who was supposed to protect people from crimes. The court asked 'If the security guards behave in this manner, who will guard the guards?'

The late 90s heralded a new trend. Between 1999 and 2006, all those rape and murder cases involving minors that reached the Supreme Court were commuted. In *Akhtar v. State of Uttar Pradesh*[167], both the lower courts relied on Supreme Court's decision in *Dhananjoy Chatterjee alias Dhana v. State of West Bengal* as well as *Kamta Tiwari v. State of Madhya Pradesh*[168], to grant death. However, on appeal, Justices Rajendra Babu and Pattanaik commuted the death sentence. The court reasoned that the victim's death was not premeditated. It was not intentional in that the victim died by gagging while being raped.

In *Amrit Singh v. State of Punjab*[169] too, the court exhibited a similar reasoning. Justices Sinha and Bhandari were doubtful of strangulation being the cause of death. Instead they suggested that death occurred as a result of injuries caused from the rape. Hence the Court argued that death in this case was a consequence and not the primary motive. In Amrit the Court also noted that '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.'

In *Mohd. Chaman v. State* (NCT of Delhi)[170], the Court commuted the

[166] *Dhananjoy Chatterjee v. State of Bengal*, 2 SCC 220.
[167] *Akhtar v. State of Uttar Pradesh* (1999), 6 SCC 60.
[168] *Kamta Tiwari v. State of Madhya Pradesh* (1996), AIR 1996 SC 2800.
[169] *Amrit Singh v. State of Punjab* (2007), MANU/SC/8642/2006 and AIR 2007 SC 132.
[170] *Mohd. Chaman v. State (NCT of Delhi)*, 2 SCC 28.

sentence of an accused who had sexually assaulted and murdered a one and a half year old child. The court argued that it could not be a 'rarest of rare' case. However it did not provide any explanation or justification for this argument. In another case that involved the rape and murder of a child, justices Nanavati and Thomas awarded life to the appellant arguing 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.' This was the case of *State of Maharashtra v. Suresh*.[171]

In *Surendra Pal Shivbalakpal v. State of Gujarat*,[172] the accused raped and murdered the daughter of their neighbour who was a minor. The Supreme Court commuted his sentence arguing that, '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. He was a migrant labour from Uttar Pradesh 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.'

2.12 The Criminal's Position *vis-à-vis* the Victim

The Supreme Court, on some occasions, used the offender's position of authority as well as familiarity with regards to the victim, as an aggravating factor. The case of *Dhananjoy Chatterjee v. State of Bengal* is one such example. Dhananjoy Chatterjee was on death row for thirteen years. Official reports say that for six years, before his execution, there was not a single execution in India. Three days following his execution, a case reached the Supreme Court about the rape and murder involving a minor. This was the case of *Rahul alias Raosaheb v. State of Maharashtra*[173]. Dhananjoy was 27 and Rahul was 24. The victim in former was a thirteen year old and in the latter a four and a half year old. Neither of the accused

[171] *State of Maharashtra v. Suresh* (2000), 1 SCC 471.
[172] *Surendra Pal Shivbalakpal v. State of Gujarat*, 3 SCC 127.
[173] *Rahul alias Raosaheb v. State of Maharashtra* (2005), 10 SCC 322.

held any previous criminal record. In both cases, there was no report of any misconduct during their prison term. In *Dhananjoy* however, he was considered a continuing threat to society; his sentence was approved and he was actually hanged. Whereas Rahul was not considered dangerous and his sentence was commuted to life by the Court.

The court in *Dhananjoy* had argued that the offender had a special role to perform as a guard. However, in *Rahul*, no mention was made of the victim, the latter's relationship with the accused, that could help draw an informative comparison. In a number of petitions, the Court refused to discuss why Dhananjoy had spent thirteen years on death row. The question remains: if Rahul's case had been heard by another bench, and not Justices Lakshmanan and Balakrishnan would the result be different? Ironically, while confirming Dhananjoy's death in 1994, it was acknowledged by Justice Anand that there existed massive disparities in sentencing. He stated, '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.' Over a matter of just three days, the Court managed to give completely contradictory judgements.

About a month after *Dhananjoy Chatterjee*, once again the Court focussed on the positioning of the accused as an aggravating factor. Again it led them to impose the death penalty. This was the case of Laxman Naik v. State of Orissa,[174] wherein a seven year old had been subject to rape and murder by her paternal uncle. Justices Anand and Faizanuddin observed that such cases sent '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*, Justices Mukherjee and Kurdukar upheld the death penalty against the accused who had kidnapped, raped and killed a seven year old.[175] The accused had been a close friend of the victim's family and was known to her as 'Tiwari uncle'. The Court took serious consideration over violation of trust and familiarity. Issues of 'societal abhorrence of such crimes' also emerged along with the aim of deterrence.

The study of judgements regarding gender-based violence shows that

[174] *Laxman Naik v. State of Orissa* (1995), AIR 1995 SC 1387.
[175] *Kamta Tiwari v. State of M. P.*, AIR 1996 SC 2800.

the Court has made visible efforts to commute sentences in dowry, rape and murder cases. This can be placed in contrast to its enthusiasm to uphold death penalty (in 1990s) in cases that involved rape and murder of young girls. While no concrete conclusions can be drawn from this, it is clear that the Court has been able to take liberties within the statutory framework that deals with the death penalty and has operated as per its own attitudes towards various crimes.

2.13 Conclusion

This chapter deals with two main aspects: the first deals with how rarest of rare test was broken down into various factors and analysed whimsically. The second deals with what was the reasoning of the Court behind this whimsical engagement. Here the Court advanced the principles of 'public opinion' and triple test. The problem with these approaches is that it completely defeats the entire purpose of the rarest of rare guideline. Without sufficient discussion about the facts and circumstances of the case and the criminal, the idea of arriving at the most suitable punishment received a short thrift. Looking only at the crime or the criminal would not present a full picture. Any punishment that was meted out by looking only at either would leave some lacunae in the sentencing process. *Bachan Singh* restricted the death penalty to rarest of rare cases. Bariyar further advised the judges to analyse a set of similar cases to be able to determine if the case being heard was rarest of rare. *Gurvail Singh* established certain crimes as particularly deserving of the death penalty. In *Shankar Khade*, the Court emphasised the need for evidence to guide death sentences. Unless the courts received evidence, they could not decide if a case at any given point, was 'rarer' than a comparative block of other similar/rare cases. With such data being hard to locate, the court expressed concern that the rarest of rare criteria had become 'subjective' and 'extremely delicate.'[176] In most of these aforementioned cases, the Court arbitrarily looked into the issues of motive, potential to reform, aggravating and mitigating circumstances, or 'special reasons'. Moreover, the Court made decisions of life and death without giving clear reasons in its judgements.

[176]Terms borrowed from the judgement of *Shivu & anr. v. Registrar General, High Court of Karnataka*, 4 SCC 713, at paras 2-3.

While in some cases the Court commuted the sentences, many a times 'rarest of rare' was misinterpreted or ignored. This also allowed other judges to pay lip service to *Bachan Singh* while continuing to award death sentences. We tried to ascertain the various factors that affect the courts' considerations while granting sentences; some benches have categorised them as 'mitigating factors', while others have called them aggravating.

The addition or subtraction of various elements to the rarest of rare formulation ended up tempering with the very intent of *Bachan Singh*. The fact that in very few cases the original intent was preserved goes to show that the subjective interpretations of various judges go a long way in deciding the outcome of capital cases. At times the court added the triple test, society's call for justice, public opinion or collective conscience to the mix; at other times it gave one priority over the other. There is no way of knowing which way the judicial coin will land. Heads one could live and tails one could die. The court believed that the rarest of rare guidelines would provide the necessary guidance for the exercise of judicial discretion in crimes of murder, thereby installing a guarantee against the death penalty from being arbitrary. However, the phenomenon of judicial discretion led to several innovations of their own, failing to keep arbitrariness at bay. Not only did the courts not follow the guideline of analysing the aggravating and mitigating factors to the letter, they kept introducing their own elements into what were or were not aggravating or mitigating circumstances. Undoubtedly, the courts engaged in cherry picking of facts apropos of crime and criminal. They outlined certain guiding principles on the basis of which they decided the fate of certain cases. In the process, did they identify certain penological goals? What were these penological goals and did the Court succeed in actualising them? This is what the next chapter deals with.

Chapter 3

'States of Exception'

Introduction

> *After many lengthy and detailed deliberations, it is the view of the Law Commission that the administration of death penalty even within the restrictive environment of 'rarest of rare' doctrine is constitutionally unsustainable... Continued administration of death penalty asks very difficult constitutional questions... these questions relate to the miscarriage of justice, errors, as well as the plight of the poor and disenfranchised in the criminal justice system.*
>
> —Saikumar Rajgopal, "Negotiating Constitutionalism and Democracy: The 262nd Report of the Law Commission of India on Death Penalty," *Socio-Legal Review* 12, no. 1, 81–107

The Law Commission of India (henceforth, LCI) in its 262nd Report, noting that it does not serve the penological goal of deterrence any more than life imprisonment, recommended the 'swift' abolition of death penalty.[1] However, it did not extend it to terror-related cases. The recommendation by the nine-member panel was, however, not unanimous, with one full-time member and two government representatives dissenting and supporting retention of capital punishment.[2] In its last report,

[1] Justice A. P. Shah, Former Chief Justice of the Delhi High Court presented Report No. 262: as quoted in, Suhrith Parthasarathy, "Law Commission Report on 'Death Penalty': A Chance to Overcome Incoherence in Indian Jurisprudence?," *Economic and Political Weekly* 49, no. 29 (2014).

[2] One of three full-time members Justice Usha Mehra and both the ex-officio members, Law secretary P K Malhotra and Legislative Secretary Sanjay Singh, gave their dissenting

the 20th Law Commission had said that there is a need to debate as to how to bring about the abolition of the punishment of death penalty in all its aspects soon.

In this chapter, I will use the Law Commission's 2015 report as a microcosm of this debate. Almost all standard arguments against death penalty were accepted as valid by the LCI, and yet, the Report ultimately ends up justifying the death sentence in cases of terrorism. In this chapter, I argue that creating such a 'state of exception' has become a definitive marker of our times. How does the LCI 'justify' the exception of terrorism, while simultaneously agreeing with all the grounds for abolition of the penalty; grounds that remain largely universal in scope? Could it be explained through John Austin's argument that the need for a strong state is linked closely to the need for a strong punishment like the death penalty.[3] From this we can talk about the need for due process and emergency provisions in the constitution. Does the inevitability of a strong state, may be defined with reference to political prisoners, people serving sentences under terrorism (actual or assumed) extra-judicial encounters or cases of mob lynching?

Furthermore, can the creation of this 'state of exception' be attributed to, as articulated by Carl Schmitt and later Giorgio Agamben, to point towards the Sovereign's discretion in transcending the discourses of rule oof law under the pretext of public good.[4] In the Introduction to this thesis, we looked at Peter Linebaugh's *The London Hanged*,[5] wherein he talked about the practice of public executions for very minor crimes. I argue that in modern times, the idea of the spectacle has undergone a transformation, which relates deeply to the changing nature of the state. How can we understand this shift? We no longer need people to have committed proven crimes, we no longer need to hang people in a public space making the idea of death penalty redundant- we now have moved on to something more intense that can spread its tentacles to the most

notes.

[3]John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (Cambridge University Press, 1995).

[4]This understanding is taken from George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt Between 1921 and 1936* (Greenwood Press, 1989), and; Samuel Weber, "Taking Exception to Decision: Walter Benjamin and Carl Schmitt," *Diacritics* 22, nos. 3/4 (1992): 5–18

[5]Linebaugh, *The London Hanged*.

unthinkable of spaces; the mere assumption of a crime against the 'spirit' of a nation (through any activity) is enough for implementing public/mob justice. Without losing the original point, we wish to reiterate that in both these variations of spectacle, the powerful arm of the state gets to decide the punishment and the punished.

In this chapter, we begin with discussing the Law Commission of India's reasons for abolishing death penalty. Then we explore their reasons for excluding 'terrorism' from this abolition. And in the later part, we investigate how the states of exception are brought in and whether terrorism is a good instance of the same.

3.1 Arguments by the Law Commission of India for abolishing the Death Penalty

The Law Commission of India forwards an entire set of reasons in support of abolishing the death penalty. In this section we look at these moral-philosophical reasons (right to life, liberty, dignity, universal in scope), judicial lapses (inconsistency in precedents, judge-centric, arbitrariness), irrevocable nature of the punishment (probability of error in judgment is high); instrumental reasons (that death sentence does not deter crime and vengeance is of little value); political reasons (misuse of clemency powers); and ideological concerns (systemic biases based on caste, religion, class, gender etc.). Towards the end, the LCI places a 'but', by constructing an exception in cases of terrorism. In the next section, we will explore what are the LCI's reasons for recommending this exception.

In terms of support for abolition, it recognises that all human beings have an inalienable right to life and liberty and reiterates the core principles of human dignity and respect as universal. It is important to note that this is a universal claim theoretically applicable to all humans (typical of the human rights discourse; and yet, the LCI excludes terrorists from this universal claim). Moreover, the LCI acknowledges that the death penalty fails to reach the goal of deterrence. Moreover, it rejects the retributive claim, arguing that the notion of 'an eye for an eye' does not sit well with the logic of the constitutionally mediated criminal justice system, and so 'capital punishment fails to achieve any constitutionally valid penolog-

ical goals'.[6] Further, the LCI acknowledges that police investigation is often poor, victims are not well-represented by lawyers, and the criminal justice system is ailing with problems such as undue delay. And so, the probability of error in a judgment is rather high. Given the irrevocable nature of the death sentence, such punishments would be unfair.

Although Bachhan Singh laid down the 'rarest of rare as a 'demanding and compelling' standard, the evolution of this guideline has been uneven. In the 1996 Supreme Court decision in *Ravji v. State of Rajasthan*, this 'rarest of rare' standard was completely ignored, departing from any notion of stare decisis, condemning two accused to death. Following Ravji, thirteen persons were given the capital punishment ignoring the standards set by *Bachhan Singh*. In *Bariyar*, the Court held that 'there is no uniformity of precedents, to say the least. In most cases, the death penalty has been affirmed or refused to be affirmed by us, without laying down any legal principle'.[7] That the application of Bachhan Singh has been inconsistent, arbitrary, judge-centric rather than principled, has been repeatedly iterated in several Supreme Court judgments. Next, the execution of clemency powers by State and Union governments has been insensitive and appalling, procedurally inefficient as well as delayed, while also being highly politicised by ruling governments, so much so that it seems to lack proper application of mind. 'Furthermore, racial, cultural, and class-based biases are deeply entrenched in our criminal justice system, given that the overwhelming majority of the convicts are from backward castes, Dalits and minorities; almost all of them are poor, from the poorer States, and at some point in the investigation, they were tortured into confessions.'[8]

Another philosophical goal of punishment that is often turned towards by the courts is that if Deterrence. The LCI engages in a detailed discussion of the same gearing towards the conclusion that deterrence as a penological goal no longer gets served via the punishment of the death penalty. Let us look at this debate briefly.

[6]For details on the same, refer to, Sanskar Vanshaj, "Capital Punishment in India: Constitutional Validity of Capital Punishment," *Jus Corpus Law Journal*, 1 2021, 299–305.

[7]Ibid.

[8]Kunal Ambasta, "An Unclear Empiricism: A Review of the Death Penalty India Report," *Socio-Legal Rev.* 13, no. 2 (2017): 130–138.

3.2 The Debate on Deterrence

In the context of Indian judiciary, the penological goal of deterrence emerged in close contact with the principle of social necessity as well as public opinion. In committing certain violent acts, some offenders harm not just the particular victim but adversely affect the social fabric. In this violation of the larger public interest, they go against the societal interest. Social necessity thus demands that the person is removed from amongst them and prevented from committing the offence twice. This makes it necessary for some offenders to be given the death penalty. It is not clear how life imprisonment does not deter them as much as death sentence. Because in either case they are removed from society.

Deterrence refers to using the threat or fear of punishment to dissuade individuals from committing a crime. The assumption behind this theory is that everyone is a rational individual and will commit any crime only after calculating that the gains derived from the criminal act will be far greater than the pain they might suffer from its consequences.[9] It is presumed that if the punishment is made as extreme as death itself, the logic of deterrence will be strengthened. Death penalty is often used as a way of deterring offenders from re-offending. This is the most common defence of deterrence that is provided. If someone knew fully well that they would be losing their life in the event of them committing a crime, their instinct towards self-preservation would help overcome their impulse to commit it, in the first place. In this context, Sir James Fitzjames Stephen wrote that:

> Some men, probably, abstain from murder because they fear that if they committed murder they would be hanged. Hundreds of thousands abstain from it because they regard it with horror. One great reason why they regard it with horror is that murderers are hanged.[10]

The observations made by the 35th report of the Law Commission are relevant at this stage. This report claimed that the death penalty had a considerable deterrent value. It gave the following reasons to support its claim[11]:

[9] Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 2010).

[10] Ernest van der Haag, "The Purpose of Punishment," chap. 2 in *The Death Penalty: A Debate*, by Ernest van der Haag and John P. Conrad (Springer Science, 1983), 53–62.

[11] Law Commission of India, *35th Report: Report on Capital Punishment* (New Delhi:

1. Every human being fears death.[12]
2. Death penalty and life imprisonment differ from each other not just in terms of degree but also quality.
3. It is doubtful that other methods of punishment are as equipped as the death penalty.
4. Experts consulted by the commission opined that 'the deterrent object of capital punishment is achieved in a fair measure in India.'[13]
5. A 'considerable body of opinion' categorises the death penalty as a deterrent punishment.
6. It is not clear what the statistics of other countries point towards. Neither does it prove the deterrent value of capital punishment nor does it conclusively disprove it.[14]

Deterrence has been used by the court as a penological justification, in a number of cases. In the *Bachan Singh* judgement, the court listed the cases of *Shiv Mohan Singh v. State*; *Jagmohan v. State*; *Charles Sobhraj v. Superintendent, Central Jail, Tihar, New Delhi*; *Ediga Annamma v. State of Andhra Pradesh*; *Paras Ram v. State of Punjab* as instances where it had resorted to the deterrent aspect of the death penalty.[15] In Bachan Singh itself, the Court gave the logic of deterrence. The Court had also observed that in many countries of the world, 'a large segment of the population, including notable penologists, judges, jurists, legislators, and other enlightened people'believed that death sentences were more effective than life imprisonment when it came to deterrence.[16] In *Jagmohan* the court had argued that *there should be an equal focus on deterrence and reformation.*

Law Commission of India, 1967), para 370. http://lawcommissionofindia.nic.in/187th%20report.pdf.

[12]Hood and Hoyle argue that although it is possible that some people refrained from committing murder because of fear of execution, this is an insufficient basis to conclude that existence of the death penalty deters people from committing murders. See, Carolyn Hoyle, Roger Hood, and Jeff Fagan, "Deterrence and Public Opinion," chap. 2 in *Moving away from the Death Penalty: Arguments, Trends and Perspectives*, ed. Ivan Šimonović (New York: United Nations, 2014), 68–83.

[13]Law Commission of India, *35th Report: Report on Capital Punishment*, para 370.

[14]Ibid.

[15]*Bachan Singh v. State of Punjab*; *Shiv Mohan Singh v. State*; *Charles Sobhraj v. Superintendent, Central Jail, Tihar, New Delh* (1978); *Ediga Anamma v. State of Andhra Pradesh*; *Paras Ram v. State of Punjab* (1981).

[16]*Bachan Singh v. State of Punjab*, 2 SCC 684.

In Jashuba Bharatsinh Gohil v. State of Gujarat, the court observed that 'protection of society and deterring the criminal is the avowed object of law.'[17]

In *Mahesh v. State of Madhya Pradesh*, the court imposed the death penalty arguing that, '[the common man] understands and appreciates the language of deterrence more than the reformative jargon.'[18] In this judgment, Justices Khalid and Oza confirmed the death sentences of two accused who had committed five murders over a caste related dispute. Not many facts are presented in this judgement and it does not even give a detailed account of the convict's roles. Despite Bachan Singh's proposition, no mitigating circumstances were discussed in this case. Instead the focus was laid on the 'the evils of untouchability.' In this case, the High Court had stated 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.[19]

Later the Supreme Court observed,

> 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.[20]

While the Court recognised the need for adopting a reformative approach in general, in this case it suggested that it had no other alternative. It so appeared that while the Court relied on different goals in theories and practice. It is as though the Court itself was fighting a regular war

[17] *Jashuba Bharatsinh Gohil v. State of Gujarat* (1994). See also, *Paniben v. State of Gujarat* (1992), 2 SCC 474, 483, *B. Kumar v. Inspector of Police* (2015), 2 SCC 346, 354, *Gyasuddin Khan v. State of Bihar* (2003), 12 SCC 516, 525, *Paras Ram v. State of Punjab*, 2 SCC 508, 508.

[18] *Mahesh s/o Ram Narain & ors. v. State of Madhya Pradesh*, 3 SCC 80, 82. See also, *Sevaka Perumal v. State of Tamil Nadu* (1991), 3 SCC 471, 480, *Ankush Maruti Shinde v. State of Maharashtra* (2009), 6 SCC 667, *Mohan Anna Chavan v. State of Maharashtra* (2008), 7 SCC 561, 574

[19] *Bachan Singh v. State of Punjab*, 2 SCC 684, 713.

[20] Ibid.

between which theory to choose. Sometimes some principle matched with 'public opinion' and at other times something else did.

In *Jumman Khan v. State of U.P.*, the social necessity-based logic of deterrence came to the fore.[21] An accused was tried for murdering and killing a six year old. Justices Pandian and Reddy upheld the death penalty, calling the crime as 'most gruesome and beastly.' In *Kamta Tiwari v. State of Madhya Pradesh*, Justices Mukherjee and Kurudkar confirmed the death sentence of an accused for kidnapping, raping and murdering a young girl.[22] Once again the Court said that social abhorrence of the crime needed the goal of deterrence to be fulfilled.

The logic of deterrence flowing from social necessity involves two assumptions- first if the death sentence is not given, the offender will shock the moral fibre of society again. Second is the assumption of how the society reacts to certain crimes. This further involves the assumption of an outrage in cases of disjunct between societal expectations and judicial award of punishment in a given crime. Globally the rationale of deterrence is being questioned. Over two thirds of the countries of the world have discontinued the judicial award of death penalty. In *The State v. Makwanyane and Machunu*, the South African Constitutional Court ruled that:

> It was accepted by the Attorney General that [deterrence] is a much disputed issue in the literature on the death sentence. He contended that it is common sense that the most feared penalty will provide the greatest deterrent, but accepted that there is no proof that the death sentence is in fact a greater deterrent than life imprisonment for a long period... A punishment as extreme and as irrevocable as death cannot be predicated upon speculation as to what the deterrent effect might be.[23]

In India, in cases like *Sushil Murmu*,[24] the court rejected deterrence as the primary motivator behind the death penalty. In yet another variation, in the case of *Ravindra Trimbak Chouthmal v. State of Maharashtra* the court doubted the efficiency of deterrence itself.[25] In the *Bachan Singh* judgement, Justice Bhagwati's dissenting opinion debated the deterrent aspect of the death penalty. About deterrence, Justice Bhagwati argued

[21] *Jumman Khan v. State of U.P.*, AIR 1991 SC 345.
[22] *Kamta Tiwari v. State of M. P.*, AIR 1996 SC 2800.
[23] *The State v. T. Makwanyane and M. Machunu* (1995).
[24] *Sushil Murmu v. State of Jharkhand*.
[25] *Ravindra Trimbak Chouthmal v. State of Maharashtra*.

that crime rates are conditioned by factors other than the invoking of the death penalty. This is true for both abolitionist and retentionist nations. In *Bachan Singh*, the court observed that:

> We may add that whether or not death penalty in actual practice acts as a deterrent, cannot be statistically proved, either way, because statistics as to how many potential murderers were deterred from committing murders, but for the existence of capital punishment for murder, are difficult, if not altogether impossible, to collect. Such statistics of deterred potential murderers are difficult to unravel as they remain hidden in the innermost recesses of their mind.

The debate on the efficiency of deterrence first emerged in Issac Ehrlich's study that was published in 1975. In his work, he claimed to have discovered a 'unique deterrent effect' of executions on murders.[26] He suggested that every time someone was executed, it saved nearly 'eight innocent lives.'[27] The Indian Supreme Court cited Ehrlich's work in Bachan Singh extensively.[28] Some Scholars have identified two major problems with these assumptions- (a) Knowledge fallacies and (b) Rationality fallacies[29]

Knowledge fallacies refer to the belief that offenders are unaware of the punishment that can ensue from them committing a crime. Therefore, they are not deterred by fear of a strict penalty. Deterrence presumes that every one fully knows the legal punishment one will be subjected to in case of them committing a crime. However, there is considerable evidence that suggests the unawareness of the public generally and the offenders particularly about the penalties they might face. In this context, King has written: 'About-to-be lawbreakers don't look up penalties in the law books; they plan, if at all on how to avoid being caught.'[30]

Rationality fallacies refer to the assumption that prospective offenders are rational decision makers. Although it must be noted that a huge number of crimes are committed under depression, paranoia, or a desire to

[26]Ehrlich, "Deterrence: Evidence and Inference."

[27]Ibid.

[28]*Bachan Singh v. State of Punjab*.

[29]Paul H. Robinson and John M. Darley, "Does Criminal Law Deter? A Behavioural Science Investigation," *Oxford Journal of Legal Studies* 24, no. 2 (2004): 173–205.

[30]David A. Anderson, "The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging," *American Law and Economics Review* 4, no. 2 (2002): 295–313, https://doi.org/10.1093/aler/4.2.295.

vent one's rage or anger.[31] If any of these factors are at play, the potential criminal will not think about the possible penalties but rather work to address his then state of mind.[32] What we have here is a considerable move away from the uncritical acceptance of deterrence as the most fulfilling goal of death penalty. While the Indian courts have utilised the logic of deterrence in some considerable cases, the LCI recognises that it may no longer be an effective penological goal vis-à-vis the irreversible punishment of death penalty.

3.3 The Case of Terrorism

The LCI, therefore, agrees with the moral-philosophical reasons (right to life, liberty, dignity, universal in scope), judicial lapses (inconsistency in precedents, judge-centric, arbitrariness), irrevocable nature of the punishment (probability of error in judgment is high); instrumental reasons (that death sentence does not deter crime & vengeance is of little value); political reasons (misuse of clemency powers); and ideological concerns (systemic biases based on caste, religion, class, gender etc.). Still, in the very end, it places a *but*, by constructing an exception in cases of terrorism. Let us briefly explore what are the LCI's reasons for recommending this exception.

The Report, in effect, replaces *rarest of rare* with *terrorism* as the exception. Therefore, in creating an exception, the LCI has to argue why terrorism does not fall in any of the above-mentioned reasons for abolition. For instance, they must argue why so-called terrorists do not fall under universal rights such as life, liberty, and dignity (they must explain why terrorists are not deserving of basic human dignity or can enjoy the natural rights accrued to them by virtue of having born as human beings)[33] or why ideological biases (for instance, invoking religious or identity politics in case of terrorism), will not interfere with the judicial system, or why deterrence would work for terrorists (contrary to all evidence) and so on. But surprisingly, the LCI does not give a single such

[31] Robinson and Darley, "Does Criminal Law Deter? A Behavioural Science Investigation."

[32] Ibid.

[33] Martha C. Nussbaum, "Capabilities and Human Rights," *Fordham Law Review* 66 (2 1997): 273–300.

reason.

Chapter 4 (C), part (iii) of the LCI report deals with terrorism. The section begins by stating the lack of evident connection between terrorism and death penalty. It considers various arguments, such as (a) that death penalty is unlikely to deter terrorists who may often be in suicide missions anyway; (b) that death penalty is too adversarial and may in fact increase terror attacks, (c) they even quote Jeremy Bentham to suggest that executing terrorists, anti-nationals and rebels only makes martyrs out of them, inspiring them to rebel further, rather than to deter them. After exploring these possibilities, the report abruptly ends this section without countering any of these arguments. So, the only justification that the LCI offers to exclude terrorism is as follows:

> Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism-related offences will affect national security. There is a sharp division among law-makers due to this concern. Given these concerns raised by the law makers, the Commission does not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.[34]

3.3.1 Shift in Arguments

It so appears then that the justification for excluding 'terrorism' is that the 'law-makers' intend so. Here, I want to stress on a perplexing shift in the nature of the argument. Abolition of death penalty was grounded in a *constitutionalism argument* (fundamental rights, rule of law).[35] But in creating an exception, they suddenly take a *representative governance* argument, that citizens vote for their representatives, and it is ultimately they who have to decide. There have also been judgements where the Court has clearly stated that if the legislature, by virtue of being people's representative, decides to keep certain laws, the Court cannot do much in that regard. This sudden leap in registers, from a language of constitutional rights, to a language of majoritarian democracy, from an argument of constitutionalism to an argument of representative governance, is what

[34]Rajgopal, "Negotiating Constitutionalism and Democracy: The 262nd Report of the Law Commission of India on Death Penalty."

[35]Maurice John Crawley Vile, *Constitutionalism and the Separation of Powers* (Clarendon Press, 1967).

is perplexing. That constitutionalism is often in conflict with representative governance is well known. In a representative government, ideally, the laws reflect the unrestricted will of the citizens, regardless of how it represents the ethos of the shared political life. Constitutionalism, on the other hand, sets limits on the people's will, on their determination of the laws of the state. For instance, Rule of Law requires that the representative government not violate human rights of people. So, representative governance is contradictory to constitutionalism, or as Habermas calls it, 'a paradoxical union of contradictory principles'.[36] As shown in Part 1 of this chapter, the LCI's reasons for abolition of death penalty have predominantly been on grounds of constitutionalism and rule of law, that is, legal claims but in creating an exception for terrorism, they conveniently shift gears to an argument of representative governance, a political claim. This is not to say that a constitutionalism argument is better than a political one, or vice versa, but the shift is arbitrary and on convenience.

An important question faced by this Commission was whether the death penalty should be retained in the context of terrorism-related crimes, even if it is abolished for all other offences. One of the major reasons for this proposition is that the death penalty acts as an important tool for maintaining the security of citizens and the integrity of the nation, by deterring similar future crimes. Since terrorist crimes are very different from ordinary crimes in terms of the motives applicable, deterrence assumptions need a re-look to ascertain whether it is desirous to perhaps retain the death penalty for terrorism related crimes.

A view is taken by many that the death penalty is unlikely to deter terrorists, since many are on suicide missions (they are prepared to give up their life for their 'cause'),[37] there are other reasons why the death penalty in fact might increase terrorist attacks. The death penalty is often solicited by terrorists, since upon execution, their political aims immediately stand vindicated by the theatrics associated with an execution.[38] They not only get public attention, but often even gain the support of organisations and nations which oppose the death penalty. The Indonesian Bali Bomber's

[36]"Deliberative Democracy or Agonistic Pluralism? The Relevance of the Habermas-Mouffe Debate for Third World Politics," *Alternatives* 27, no. 4 (2002): 459–487.

[37]Thomas M. McDonnell, "The Death Penalty–An Obstacle to the "War on Terrorism"?," *Vanderbilt Journal of Transnational Law* 37 (2004).

[38]Ibid.

reaction to news of his conviction and execution was beaming and with a 'thumbs-up' as if he had just won an award.[39] Jessica Stern, a pre-eminent expert on the issue of terrorism opines,

> One can argue about the effectiveness of the death penalty generally. But when it comes to terrorism, national security concerns should be paramount. The execution of terrorists, especially minor operatives, has effects that go beyond retribution or justice. The executions play right into the hands of our adversaries. We turn criminals into martyrs, invite retaliatory strikes and enhance the public relations and fund-raising strategies of our enemies.[40]

Similarly, while commenting on the specific case of the Boston marathon Bomber, Dzhokhar Tsarnaev, Alan Dershowitz writes:

> Seeking the death penalty against Tsarnaev, and imposing it if he were to be convicted, would turn him into a martyr. His face would appear on recruiting posters for suicide bombers. The countdown toward his execution might well incite other acts of terrorism. Those seeking paradise through martyrdom would see him as a role model...[41]

Relatedly, it is useful also to refer to Jeremy Bentham, the pioneer of the deterrence theory. In the context of 'rebels' or in cases of 'rebellion' (which can be roughly equated to anti-nationals or terrorists), Bentham said that executing them would not deter other potential rebels, but in fact make the executed person a martyr, whose death would inspire, and not deter potential followers.[42] It so appears then there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism related offences will affect national security.

3.3.2 Bringing in the State of Exception

The majoritarian argument against the abolition of death penalty is the strongest, stating that it is the law-makers (and majority of the citizens)

[39] Oksidelfa Yanto, "Death Penalty Execution and the Right to Life in Perspective of Human Rights, 1945 Constitution of the Republic of Indonesia, and Indonesian Law," *Yustisia Jurnal Hukum* 5, no. 3 (2016): 643–662.

[40] Jessica Stern, *Terror in the Name of God: Why Religious Militants Kill* (Harper Collins, 2003).

[41] Alan Dershowitz, "Tortured Reasoning," chap. 14 in *Torture: A Collection*, ed. Sanford Levinson (Oxford University Press, 2004), 257–80.

[42] Herbert Lionel Adolphus Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford University Press, 1982).

who want to retain it. As Malhotra (from the LCI team) states, 'The Parliament which reflects the will of the people passed law with death penalty for certain offences against women as late as in 2013.'[43] The Hijacking Bill that proposes death penalty also reflects the will of the people. With a paternalistic subtext, he laments that the will of the Parliament shows that looking into the prevalent situation in the country, the Indian society has not matured for total abolition of death penalty', and that the time has not come yet for a total and wholesale abolition.

No doubt that the majoritarian argument is the most difficult one to counter precisely because of the paradox built internally in a 'constitutional democracy.'[44] That arguments of constitutional morality do conflict with 'will of the people', and resolving it may be not be the easiest. How can the State first iterate a right to life, and without any logical inconsistency, legislate the taking away of this life? The philosopher Jacques Derrida points out a contradiction in modern law in Biblical terms. He asks,

> So, how can God tell Moses [in the Ten Commandments]…thou shalt not kill and, in the next moment, in an immediately consecutive and apparently inconsistent fashion, 'you will deliver up to death whoever does not obey these commandments?'[45]

Derrida is intrigued by how God can decree a law that is itself a 'flagrant offence'[46] of the Ten Commandments. How can the State first iterate a right to life and, without any logical inconsistency, legislate the taking away of this life? This inconsistency holds valid even for nations that are so-called 'abolitionists' of death penalty, for they may uphold the right to life by abolishing death penalty but the very next moment snatch it away in the guise of a war on terrorism. I shall conclude with two broad set of remarks.

First, the manoeuvre, from a constitutionalism argument to a majoritarian argument (from legal to the political) in order to exclude terrorism is typical of what philosopher Georgio Agamben called the *State of Ex-*

[43]Law Commission of India, *Report No. 262: The Death Penalty*.

[44]Jürgen Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?," *Political Theory* 29, no. 6 (2001): 766–781.

[45]Jacques Derrida, *The Death Penalty*, ed. Geoffrey Bennington, Marc Crépon, and Thomas Dutoit, trans. Peggy Kamuf, vol. 1 (The University of Chicago Press, 2014).

[46]Ibid.

ception.[47] Here I am saying that the state of exception operates at the intersection of law and politics, wherein politics makes its entry via the suspension of the rule of law. The extra-juridical is both inside and outside the law. In the modern state, especially evident after 9/11, the exception has become the rule; a modus operandi that has become so common that the entire separation of law and politics is collapsing. For Agamben, the state routinely suspends the 'rule of law' in order to preserve the 'rule of law', and the sovereign is the one 'who decides on the state of exception'. Just as Guantanamo Bay is an exception in American law, or terrorists are an exception to the Rule of Law, or Jews were an exception to Nazi law, in the same vein, terrorism is the exception to LCI's law. It is this 'state of exception' that defines and explains, even rationalises and justifies, the State's transgressions and injustices.

Moreover, the dominant arguments against death penalty are abstracted in a legal, philosophical and empirical language. Yet, the reason death penalty persists, as evident from the three detractors of the LCI Report, is not based on this language of abstract reason. Their support for death penalty is driven by passion, a discourse of fear, insecurity, blame, vengeance, xenophobic exclusionism, identity politics and so on. These two discourses are operating in parallel worlds. As evident from the LCI's own argumentative strategy of conveniently shifting from constitutionalism to representative democracy, and excluding terrorism on political grounds, the emotive and political cannot be abstracted, the anti-death penalty movement has to respond at this register of the 'political' as well.

While the 2015 report is significant, its treatment of terrorism is problematic on three counts. First, citing issues of 'national security' and 'a sharp division among law-makers', the Commission recommends that the death penalty be retained for terror related offences. On the one hand, the Commission itself states that 'public opinion' is not a pre-condition to determine the question of abolition. However, it then goes on to rely on 'public opinion' for carving out the terrorism exception. Further, it actually acknowledges that creating this exception can be counterproductive, since it 'would not deter other potential rebels, but in fact make

[47] Agamben, *State of Exception*; and, Stephen Humphreys, "Legalizing Lawlessness: On Giorgio Agamben's *State of Exception*," *European Journal of International Law*, 2006, 677–687.

the executed person a martyr, whose death would inspire, and not deter potential followers.'[48] In spite of this, the death penalty has been regarded as permissible in cases of terrorism.

As observed by Anup Surendranath, the recommendation seems to be based on a deference often paid to the legislature in matters relating to 'national security'.[49] If the constitutional safeguards of non-arbitrariness are being violated in the imposition of the death penalty, can 'national security' be used to justify it in terror cases? The Supreme Court in *Shatrughan Chauhan* has explicitly rejected a similar distinction between ordinary offences and terrorism while discussing the factors based on which the death penalty can be commuted to life imprisonment. In fact, as Kunal Ambasta explains, the case for abolition is stronger in terrorism related cases since they are often subject to extraordinary procedures for investigation and prosecution (such as, a reversal of the burden of proof).[50]

The overt and covert usage of emotive reasons then becomes a tactic employed by the state to limit public discussions on death penalty. It is as though a consistent narrative of villainy is constantly being created. It is a cinch to vilify a bunch of people the state chooses. It is much tougher and largely unsuitable to the State's political motives if they engage in organising a discussion on the broader, tougher question of what in our society produces this kind of violence. So we will simply be told that yes here you have a bunch of people who engaged in sexual violence, they are evil and we must get rid of them but the organisation of a public discussion on the 'why' of such violence, remains conspicuous by its absence. In a related vein, society is brought face to face with another 'othering' discourse.[51] In the post 9/11 global context of war on terror, the world we live in is traversed by fear of terrorism: both actual and

[48] A. Prasad, Jyotsna Yagnik, and Binod C. Agarwal, "Should India Retain Death Penalty?," *Liberal Studies* 1 (1 2016): 5–26; and, Abhishek Priyadarshi and Isha Tiwari, "Rethinking of the Need of Capital Punishment in India," *Supremo Amicus* 16 (2020).

[49] Anup Surendranath and Surabhi Kanga, "We villainise rapists to exonerate ourselves: Anup Surendranath on the futility of the death penalty," 2020, https : / / caravanmagazine . in / law / death - penalty - execution - delhi - gang - rape - anup - surendranath.

[50] Ambasta, "An Unclear Empiricism: A Review of the Death Penalty India Report."

[51] Fred Dervin, "Cultural Identity, Representation and Othering," chap. 11 in *he Routledge Handbook of Language and Intercultural Communication*, ed. Jane Jackson (Routledge, 2012), 181–194.

assumed. In such situations, once again public discussion is very didactic and deductive: those with ability to channelise, influence, organise or control public opinion often present the larger public with the image of a dangerous other. The argument is that here is this community with a *propensity* to being anti-state and thereby anti-national and it is best that we, at the helm of the state, must deal with them in any of the ways we consider suitable. This serves the additional purpose of exoneration, amongst others—the state (usually majoritarian) is able to exonerate itself—saying I am not like that and hence I must be deciding the fate of everyone who is such. Surendranath argues,

> When we are villainising one person, we are seeking to exonerate ourselves. We say, we are not like that but we are exactly like that. We participate in, contribute to and routinely condone the spectrum of sexual violence. The distinct othering helps the state. Giving death penalty is easier than organising a discussion on it...imagine if there was death penalty for corruption.[52]

Moving ahead, the LCI report falls just short of recognising that the death penalty violates the right to life and dignity, and amounts to a cruel, inhuman and degrading punishment, as has been done in other jurisdictions (including the UN, and South Africa). Instead, the recommendations are solely based on the lack of a valid penological rationale for, and arbitrariness in, the imposition of the death penalty. Finally, the Commission makes no recommendation to safeguard the rights of persons who may be subjected to capital punishment in the time that it takes for Parliament to act on this report. A moratorium (or similar protections) would have provided much needed protection since the legislative debate around the issue is likely to be protracted. The lacunae in the death penalty report that we have seen is not just a result of oversight by the commission. It is attributable to something much bigger. Its reasons are rooted in the very logic of the modern state. State's power over violence, preserved with the help of two arguments:

1. creating states of Exception.

2. shifting from constitutionalism to representative governance arguments.

[52]Surendranath and Kanga, "We villainise rapists to exonerate ourselves: Anup Surendranath on the futility of the death penalty."

3.4 Giorgio Agamben and the 'State of Exception'

The concept of the state of exception has a long history, since discussion upon it can be traced back to the French Revolution.[53] It defines a special condition in which the juridical order is actually suspended due to an emergency or a serious crisis threatening the state. In such a situation, the sovereign, i.e. the executive power, prevails over the others and the basic laws and norms can be violated by the state while facing the crisis. The idea that the exception is the fundament of law has not been originally formulated by Agamben, but had been developed by Carl Schmitt and Walter Benjamin (2004) in the initial part of the twentieth century.[54] Benjamin only tangentially reflected on the issue of exception in his analysis of the existence of a pure form of violence, which he calls 'divine violence, outside the law'.[55] He claimed precisely that the exception is excluded from the juridical order by the sovereign.

Schmitt conceptualized sovereign power as possessing the authority to suspend the legal system and declare a state of exception if the country faced an existential threat to its integrity.[56] As Vaughan-Williams frames it, 'For Schmitt, the essence of sovereignty is understood to be a monopoly on the ability to decide on the exception', thus rephrasing and correcting the Weberian theorization of sovereignty as the monopoly on the use of violence.[57] As a matter of fact, grounding the state of exception both within and beyond the law was Schmitt's most significant intuition. He argued that the decision on exception is above the normative framework in that it consists in the temporary suspension of the legal constraints on sovereignty, but that at the same time the exception is what defines the condition of possibility for the law to exist. The legal order, in fact, is

[53] Agamben, *State of Exception*.

[54] Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty*, trans. G. Schwab (1922; University of Chicago Press, 2005); Walter Benjamin, "Critique of Violence," in *Walter Benjamin: Selected Writings, Volume One, 1913-1926*, ed. Marcus Bullock and Michael Jennings (Belknap Press, 2004).

[55] David Pan, "Against Biopolitics: Walter Benjamin, Carl Schmitt, and Giorgio Agamben on Political Sovereignty and Symbolic Order," *The German Quarterly* 82, no. 1, 42–62.

[56] Weber, "Taking Exception to Decision: Walter Benjamin and Carl Schmitt."

[57] Angharad Closs Stephens and Nick Vaughan-Williams, *Terrorism and the Politics of Response* (Routledge, 2009).

negatively characterized by its opposite, that is a state of exception which highlights what is comprised within the law, and thus what the realm of such a law is, by creating a situation in which the normative order does not apply. In Jef Huysmans' words, 'the norm does not define the exception but the exception defines the norm'.[58]

Agamben starts his inquiry from this theoretical perspective aiming at the formulation of a general theory of the state of exception, which, he claims, has become 'the dominant paradigm of government in contemporary politics'.[59] He reads the emergence of exception in a Foucauldian sense, since he focuses his analysis on the 'biopolitical significance' of exceptionalism as a widespread political device. For Agamben, such suspension of the law is pivotal in that it directly affects people's lives, not as subjects of politics or citizens, but as human beings as such. The key of Agamben's thought, around which the theory of the state of exception revolves, is the indistinction, in the realm of politics, between the external and the internal, between the private life—which he calls *zoe*—and the public sphere, the one characterizing life as *bios*.[60]

This Aristotelian distinction does not hold anymore for Agamben, since the sovereign power needs to blur the lines in order to legitimize its ever-growing control over the lives of its citizens. The indistinct form of human being that is created in this process is called *homo sacer*.[61] This figure has been reduced to what he defines as 'bare life', meaning that the sovereign has complete authority over homo sacer, not only as a citizen of a state, but even to the point of acting upon his/her own natural life, depriving this individual of the right to live. The locus where people are stripped to a 'bare life' is defined by Agamben as the camp, with a clear reference to concentration camps in Nazi Germany, where Jews were denied not only political rights, but also the condition of human beings itself.[62]

As Vaughan-Williams has correctly stressed, the meaning of the con-

[58]Jef Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (Routledge, 2006).

[59]Giorgio Agamben, "Biopolitics and the Rights of Man," in *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (California: Stanford University Press, 1998), 126–135.

[60]Ibid.

[61]Agamben, *Homo Sacer*.

[62]Agamben, "Biopolitics and the Rights of Man."

cept of bare life does not lie in the reduction of political to natural life, of *bios* to *zoe*, but in the *indistinction* between the two of them: 'bare life is a form of life that is amenable to the sway of the sovereign power because it is banned from the realm of law and politics [...] whenever and wherever the law is suspended'.[63] As he elsewhere stated, the principal difference between Foucault and Agamben lies in this indistinctiveness that characterizes contemporary politics: while for the first biopolitics consisted in the inclusion of natural life in the sovereign's control, the latter claims that politics is inherently biopolitical.[64]

For Agamben, *zoe* can never be totally separated from *bios*, since exclusion in a sense reinforces the relationship with the other object that is included. In a similar way, the state of exception is coterminous with the law, since it defines the borders of the normative order. According to Agamben, 'the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other'.[65] The significance of this 'zone of indifference' for contemporary international politics has, however, been largely neglected, mainly due to the conceptual difficulty of renouncing to a clear inside/outside dichotomy in favour of a theory of indistinction.

For this reason, Agamben has argued for the need to develop what he describes as a 'logic of the field', where stark lines of differentiation cannot be drawn.[66] Central to this is the concept of the ban, which is a political device that simultaneously exclude an individual from a community while defining the very exclusion through a continued relation with it: not being part of a society defines the banned element precisely in terms of that society from which he is outlawed. The ban is conceptually connected to the state of exception not only because they both produce the exclusion of an object from a realm through the continuous reference to that context. At a more profound level, they both perform the function

[63]Nick Vaughan-Williams, "Borderwork beyond Inside/Outside? Frontex, the Citizen–Detective and the War on Terror," *Space and Polity* 12, no. 1 (2008): 63–79.

[64]Ibid.

[65]Giorgio Agamben, "Bodies Without Words: Against the Biopolitical Tatoo," *German Law Journal* 5, no. 2 (2019): 167–169.

[66]Ulrich Raulff, "An Interview with Giorgio Agamben," *German Law Journal* 5, no. 5 (2004): 609–614.

of constituting a social group by exploiting the fear of the diverse, of the inhuman, *the-different-from-us*.

According to scholars who have focused on theory of identity and securitization, such as David Campbell, identity is shaped by difference, i.e. a certain 'we' requires a different 'them', in order to create their identity as peculiar and distinct from others. As Campbell states, '[t]he passage from difference to identity as marked by the rite of citizenship is concerned with the elimination of that which is alien, foreign, and perceived as a threat to a secure state'.[67] Such an elimination and distinction is exactly what the state of exception is about, since it legitimises itself in reference with an external threat which has to be dealt with through exceptional measures, and at the same time it strengthens national identity by depicting the enemy as inhuman, and thus unworthy of being treated as other than 'bare life'. As it has been noticed by Aradau and Van Munster, 'exceptionalism does not just play upon public panics, but also institutionalizes fear of the enemy as the constitutive principle for society'.[68] Accordingly, the use of exceptional measures is effective both in creating a sense of danger around which to unite the nation whilst reinforcing the particular self, and in delegitimizing and dehumanizing the other by reducing the alien to 'bare life'. That is precisely what happened in the detention camp at Guantanamo Bay, or at the Abu Ghraib prison in Iraq, where prisoners were denied both the rights to be put on trial according to American law, and the status of prisoners of war as stated by the Geneva Convention.[69] Interestingly, this is also what happens in cases of extra-judicial encounters or mob lynchings in India.

Michel Foucault famously argued that the essential characteristic of sovereignty was its 'power to exercise the right to decide life and death.'[70] In its earlier, premodern form, the state exercised that power in 'the

[67]David Campbell, *Writing Security: United States Foreign Policy and the Politics of Identity* (University of Minnesota Press, 1992).

[68]Claudia Aradau and Rens van Munster, "Governing Terrorism through Risk: Taking precautions (un)knowing the future," *European Journal of International Relations* 13, no. 1 (2007): 89–115; and, Claudia Aradau and Rens van Munster, "The Time/Space of Preparedness: Anticipating the "Next Terrorist Attack"," *Space and Culture* 15 (2 2012): 98–109

[69]Mika. Ojakangas, "Impossible Dialogue on Bio-power: Agamben and Foucault," *Foucault Studies*, no. 2 (2015): 5–28.

[70]Michel Foucault, "Right of Death and Power over Life," in *The Foucault Reader*, ed. Paul Rabinow (Pantheon, 1984), 258–272.

right to *take* life or *let* live', that is, in its power to kill its subjects (for transgressing its laws) or allow them to live. Natural death retained its own power over life that the state could emulate but not attack at its roots. The advent of techno-scientific modernity, however, gave the state the opportunity for the first time to contest natural mortality by prolonging and improving the lives of its citizens beyond simply threatening them. Accordingly, in this new bio-political state, sovereign power took on new functions that were not simply negative and prohibitory (transgress the law and you will die) but were affirmatively directed at promoting and enhancing life itself.

In Foucault's formula, the modern state now concerned itself with the welfare and productivity of its population by exercising its 'power to *foster* life or *disallow* it to the point of death'[71] through its regulatory interventions into the social fields of medicine, education, public hygiene, food production, and so on. By the same token, however, these interventions meant that state law necessarily subordinated its authority, at least to some extent, to the technical expertise of the various sciences and disciplines that it sought to employ in its new role of 'fostering life.' Hence we see the emergence of the techno- bureaucratic state, staffed and largely run by experts rather than political leaders in the traditional sense of the term (the state form that Foucault called 'governmentality').[72]

As Foucault also noted, this mutation in the form of the state's…exercise of the right to decide life and death' necessarily resulted in a change in the political meaning of capital punishment as well. How could power exercise its highest prerogatives by putting people to death, when its main role was to ensure, sustain, and multiply life, to put this life in order? The answer was that capital punishment could no longer be justified by 'the enormity of the crime' but only by the 'monstrosity of the criminal, his incorrigibility, and the safeguard of society.'[73] The answer is that one had the right to kill those who represented a kind of biological danger to others: a shift in understanding of state killing from the punishment of evil to just another biopolitical regulation intended to

[71]Chloe Taylor, *The Routledge Guidebook to Foucault's History of Sexuality* (Routledge, 2016).

[72]Graham Burchell, Colin Gordon, and Peter Miller, eds., *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, 1991).

[73]Ibid.

foster the health of the body politic.

3.5 The Modern *State* of Exception

The state of exception therefore is commonly employed as a device of government both in the Western and non-Western countries, particularly in the United States and in Europe, and in postcolonial regions, like India and Pakistan, that alternatively become the battlefield of the so-called 'War on Terror'.[74] It focuses on how both the US-led drone strikes and the Pakistani central government have delegitimized citizens of that area, who live in a permanent condition of second-class citizenship, where the constitution does not apply. Through mob lynchings, extra judicial killings, riot states, India too seems to have achieved a similar state of exceptionalism. It may be argued then the punishment of death penalty, when being protected via the language of majoritarianism, actually refers to a tool of exception, preserved by the modern states to protect their coercive apparatus. In Douglas Hay's work[75] as mentioned in the Introduction, the fear of the strong arm derived very strongly from the arbitrariness that was deliberately introduced by the judges to keep people constantly in fear of the erratic authority. In a similar vein, the seemingly random selection of the 'other' or the 'non-proven criminal' is meant to fulfil the exact same goal: have a permanent fear of the strength of the Leviathan: the modern Sovereign that may deploy any tactic to ensure compliance and allegiance.

The state of exception has been a persistent feature of European states at least since World War I. Agamben traces its origin back to the French Revolution, when revolutionaries introduced the possibility of suspending the constitution in face of a great danger. It is interesting to note that, although the suspension of the legal order had been declared in many states during the two World Wars, France's constitution explicitly regu-

[74]For example, the state of exception in France will highlight the first outcome of exceptionalism, i.e. the strengthening of the sovereign power against the legal democratic order and its effectiveness in creating a sense of danger. The exception as the condition of the FATA region of Pakistan, instead, shows the more international effects of exceptionalism.

[75]Gerda Ray, "Douglas Hay and Peter Linebaugh and John G. Rule and E.P. Thompson and Cal Winslow," *Crime and Social Justice*, no. 6 (1976): 86–93, accessed November 9, 2022.

lates till today the declaration of a state of emergency, while most Western constitutions (the German, the Italian, the British and the American ones) do not mention such a suspension. For this reason, Agamben indicates that 'the declaration of the state of exception [in France] has gradually been replaced by an unprecedented generalization of the paradigm of security as the normal technique of government'.[76] While he is referring here to the declaration of emergency due to the Algerian War, his analysis acquired new relevance in the aftermath of the terrorist attacks that hit Paris in November 2015. Immediately following the strikes, President François Hollande invoked the state of emergency according to Article 16 of the French constitution, which was first declared for three months, was subsequently extended for other three, and finally expired on May 26, 2016 (France24 2016). This prolonged exceptionalism has sparked several protests in the country and motivated the United Nations to warn France that it is imposing 'excessive and disproportionate restrictions on human rights'[77].

Bringing the state of emergency into force in the country, in fact, gives full powers to the President of the Republic, enhances the authority of the police forces, prohibits mass gatherings and demonstrations and, most crucially, allows that suspects be arrested and detained without any formal charge, similarly to the condition of the prisoners in Guantanamo. The arrest without a clear accusation is manifestly contrary to the principle of habeas corpus, and thus the theme of natural and political life, of the indistinction between *bios* and *zoe* reappears. In such a situation, there is no difference between citizens and immigrants, a fact which is stressed by the debate currently being held in the French National Assembly over depriving people convicted for terrorism of their French citizenship, an action that would literally reduce such individuals to a condition of 'bare life'.

Taking a cue from the French example, it seems that in India too, the constant play on emotive factors of securing the state from the lurking

[76]Ojakangas, "Impossible Dialogue on Bio-power: Agamben and Foucault."

[77]L. Dearden, "Paris attacks: France's state of emergency is imposing 'excessive' restrictions on human rights, UN says," 2016, accessed January 1, 2019, http://www.independent.co.uk/news/world/europe/paris-%20attacks-%20frances-state-%20of-emergency-%20is-imposing-excessive-restrictions-%20on-human-%20rights-un-%20says-a6822286.html.

enemy (internal and external), contributing to the *atmanirbharta* (self-reliance) of a land under attack by more internal enemies than external has brought about a transformation of India into a 'security state', one which bases its legitimacy upon the propagation of fear, not upon its elimination.[78] The state of emergency produces then both 'a new form of social relation, namely one of generalized, limitless control' and the depoliticization of citizens, who are not seen as active participants in the democratic process, but as a group who needs to be protected by the state.[79] This process is strikingly similar to the theories of Schmitt and Nazi jurists, who operated the elimination of the society from the sphere of politics, conceiving the people not 'as a multi-faceted and autonomous political dynamic' but rather as 'a political entity [existing] only by being called into existence by the ruler'.[80] Such a process is reinforced by the use of a narrative depicting India as 'at war' with terrorists. The rhetoric of constantly being at war performs the function of increasing support for the government, through the so called 'rally-around-the-flag effect', and serves the purpose of unifying the society against a common enemy. Thus, it sharpens the 'us versus them' perception: '[f]ear integrates political communities according to friend/enemy lines and creates homogenous identities that need to be defended'.[81] This trend is significant in that it highlights the continuities that still persist between democratic and authoritarian states, and the danger of a suspension of the legal order could further weaken the already stretched Indian democracy. As discussed above, the whimsical classification of the exceptional citizen/entity seeps into identification of the exceptional in cases of terrorism; the unruly citizen then is seen as engaging in unruly activities that hamper the progress of the security state.

The rise of *exceptionalist* policies is also helpful in explaining practices of dehumanization of the other that are currently being employed in postcolonial countries, both by the West and by local governments. It has

[78]Girogio Agamben, "From the State of Control to a Praxis of Destituent Power," chap. 1 in *Resisting Biopolitics: Philosophical, Political, and Performative Strategies*, ed. S. E. Wilmer and Audronė Žukauskaitė (Routledge, 2016), 21–29.

[79]Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge University Press).

[80]Jef Huysmans, "The Jargon of Exception—On Schmitt, Agamben and the Absence of Political Society," *International Political Sociology* 2 (2 2008): 165–183.

[81]Davide Giordanengo, "The State of Exception," *E-International Relations*.

to be stressed that the state of exception is not limited to the domestic sphere, but also bears an international significance. The realm of the international has, in fact, always been described in terms of war and exceptional conditions that distinguish it from domestic politics.[82]

As Walker affirms, the international has been represented in terms of international law and the idea of modernity, which is derived from the Enlightenment, and the norms for participating in the inter-state relations are defined according to such rationality. In such a context, 'exceptions may be enacted as a claim about inhumanity', that is, all individuals not belonging or conforming to such a paradigm are considered as not being human beings, but rather as pre-human or inhuman persons, to which the legal juridical order that sustains the international, i.e. the regime of human rights, does not apply.[83] Such 'wasted lives', as Bauman has labelled them, are then excluded by the community of humans and treated as human waste, disposable lives that are superfluous, not necessary to the current order but at the same time part of it: they are 'the waste of order-building combined into the main preoccupation and meta-function of the state, as well as providing the foundation for its claim to authority'.[84] This explains the general ease with which perpetrators of lynching and extra judicial killings are able to perform in contemporary India.

The claim to exceptional policies is a biopolitical practice that has been constantly used by the sovereign to exert domination over the bodies of its subjects, particularly through the lens of race, which has been employed as a means for depriving individuals of their humanity (Foucault 2004). Interestingly, a similar account of the colonial and postcolonial domination is the one proposed by Mbembe, in his analysis of what he defines as 'the right to dispose' that the colonial master enjoyed on the colonized other, seen not as a human, but as an animal.[85] The state of exception is thus used to reinstate a hierarchy of worth, which assesses that some bodies are disposable and reducible to 'bare life', whilst others are worthy of full rights.[86]

[82]Giordanengo, "The State of Exception."

[83]William Walker, "Nuclear Enlightenment and Counter-Enlightenment," *International Affairs* 83, no. 3 (2007): 431–453.

[84]Zygmunt Bauman, *Wasted Lives: Modernity and Its Outcasts* (John Wiley / Sons, 2003).

[85]Achille Mbembe, *On the Postcolony* (University of California Press, 2001), 25.

[86]Vivienne Jabri, "War and the Contingency of Citizenship," in *States of War since 9/11:*

This section has tried to demonstrate the relevance of the concept of the state of exception in explaining how death penalty receives justifications from a language of majoritarianism and representative democracy in the contemporary political discourse in India. It can both account for the growing securitization which Western states are enduring as a response to the so-called global 'War on Terror' and for the blurring of lines between inside/outside, legality and illegality, which is the typical feature of our times. A common trend appears to be forming, one which relies on the legal indistinction between private and public life, and which encompasses both Western states and postcolonial populations.

In conclusion, there are two possible ways of looking at the persistence of death penalty in democracies, particularly India:

1. that the LCI report is yet another instance of how the modern state creates 'states of exception' to rationalise and justify its transgressions of the 'rule of law', and that creating states of exception is inherent to 'sovereignty', this is Agamben's argument in State of Exception; and,

2. it is not due to lack of 'reasons' (moral and legal) that death penalty persists, but the 'will of the people' (political) holding on to this form of punishment. And the 'will of the people' is engulfed in a discourse of 'fear', 'insecurity', believing in the myth of 'deterrent effects of death penalty', the fear of terrorism, minorities, outsiders, xenophobia etc. Our problem, therefore, is not one of 'reasons' (legal, empirical, moral), rather, it is at the realm of the 'political' (fear, insecurity, passion, nationalism), and 'reasons' cannot be abstracted from the political and emotive contexts.

3.6 The Language of Constitutionalism

We have seen that the continuation of death penalty is attributed to the languages of exception/exceptionalism and constitutionalism respectively. Till now we have been trying to understand the first reason. Let us try to analyse the constitutionalism argument now. The 262nd Law Commission

Terrorism, Sovereignty and the War on Terror, ed. Alex Houen (Routledge, 2014), 239–257.

of India report on death penalty has recommended the abolition of death penalty for all offences except those related to terrorism. Three members of the commission dissent from this majority view, taking a retentionist stand. The argument this essay makes is not whether terrorism ought to be the exception, but that within the commission's framework of the argument for abolition, 'terrorism' appears as an arbitrary exception. The report carves this exception by the sleight of a hand, in shifting the register of its argument. That is, from making 'Constitutionalism Arguments' for abolition to suddenly slipping into a 'Democracy Argument' for the exception. It comfortably slips through the cracks of what Habermas calls the 'paradoxical union of contradictory principles,' namely, constitutionalism and democracy. In closely reading the report, this section explores two crucial strands of the arguments that the abolitionists and the retentionists deploy: (a) the implications of indeterminacy in judicial decision-making on death penalty cases; and (b) a legislative supremacy argument which suggests that it is ultimately the legislature representing the 'will of the people' that has to decide on the issue of abolition. Finally, in aiding the commission's argument for abolition, I read the landmark *Santosh Kumar Bariyar v. State of Maharashtra*, via Jacques Derrdia's Force of Law, to unearth the indeterminacies in legal decision-making that strengthen the justifications for abolition of the capital punishment.[87]

As is being discussed, the 262nd report of the Law Commission of India has recommended the abolition of death penalty for all offences except those related to terrorism. Dubbed 'historic,' 'seminal,' 'decisive,' and in a more hyperbolic vein a 'paradigm shift,' the report has been widely acknowledged as a progressive move in Indian death penalty jurisprudence. But by recommending changes in the language of exception, what is the progress that it has made? The report replaces the 'rarest of rare' standard as the exception to death penalty abolition with 'terrorism' cases. The term 'replace' however may be an uneasy fit in describing what the report does because of a curious conflation at play: 'rarest of rare' is a standard of judicial scrutiny, while 'terrorism' is a category of criminal offence. The effect, regardless of this conflation is that those accused of crimes of terrorism become what Chantal Mouffe calls the new

[87]Rajgopal, "Negotiating Constitutionalism and Democracy: The 262nd Report of the Law Commission of India on Death Penalty."

'constitutive outside' of the death penalty discourse in India,

> There will always be a constitutive outside, as exterior to the community that is the very condition of its existence. It is crucial to recognize that, since to construct a 'we' it is necessary to distinguish it from a 'them,' and since all forms of consensus are based on acts of exclusion, the condition of possibility of the political community is at the same time the condition of impossibility of its full realisation.[88]

We shall now engage with the analytics of how this exception is carved out within the juridical discourse. Let us look at the commission's report with attention towards law's operation in its own suspension, and its creation of liminal spaces where its own derogations exist.

The Law commission concurs with several of the standard abolitionist arguments that are based on universalist claims (such as right to life, dignity, and human rights that all possess, regardless of race, gender, sexuality, etc.), and yet, ensures an exit route so to speak. How has this been reasoned out? I suggest that the report does this by shifting the register of its argument, i.e., from making 'Constitutionalism Arguments' for abolition to suddenly making a 'Democracy Argument' for the exception.

Constitutionalism is used as an umbrella term covering a 'family resemblance' between overlapping concepts such as constitutional morality, rule of law, primacy of fundamental rights, and so on, that together articulate limits and constraints upon the scope and powers of electorally formed democratic institutions. Democracy is used as an umbrella term covering these family resemblances between overlapping concepts such as representative governance, majoritarian electoral systems, Demos, populism, deliberative democracy, parliamentary sovereignty, etc., as forms of political institutions that derive legitimacy from the will of people. The inherently difficult relation between constitutionalism and democracy is further complicated in India where judicial review grants supremacy to unelected judges as the final arbiters of the Constitution. Given this conflicting relation, my argument is that the commission can carve out its exception by comfortably slipping through the cracks of this relation; a relation that Jurgen Habermas characterises as 'a paradoxical union of contradictory principles.'[89]

[88]Chantal Mouffe, "Citizenship and Political Identity," *October*, 1992, 28–32.

[89]Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?"

Constitutional morality is precisely about protecting what will otherwise be excluded by popular morality and the 'constitutive outsides' of democratic politics. Yet, the irony is in this flip wherein the commission leaves out these 'constituent outsides' to democratic whims and protects the rest by asserting constitutional limits on legislative powers. It is in this newly emerging language of death penalty discourse that I proceed to contextualise the Law Commission report. 'The march of our jurisprudence....shows the direction in which we have to head.'[90]

As discussed in Chapter Two, the Commission articulates death penalty jurisprudence in India as a progressive march towards absolute abolition: the law until 1955 was to give special reasons for imposing life imprisonment instead of the prescribed death sentence; an amendment in 1973 to Section 354(3) of the Code of Criminal Procedure, 1973 mandated 'special reasons' to be given when death sentence is imposed; 36 subsequently in 1980 the Supreme Court in Bachhan Singh upheld the constitutionality of the punishment but restricting it to the 'rarest of rare' cases.[91] The commission projects its recommendations as the next step towards abolition. However, the evolution of precedents since Bachhan Singh begs the question of whether the death penalty jurisprudence in India has been a forward march or otherwise. The three-judge bench in Machhi Singh began the misreading of the 'rarest of rare' exception by trying to concretely define something that was not intended to be an 'absolute rule for invariable application' or a 'ready [reckoner]'.[92]

First, the commission suggests that 'the passage of thirty five years since' Bachan Singh, along with 'considerably altered global and constitutional landscape in that time' necessitates a re-evaluation of Bachan Singh itself. It reiterates a thick conception of rule of law, substantive due process and reaffirms Maneka Gandhi's reading of Article 21, that life and personal liberty can be deprived only 'according to procedure established by law,' where the procedure, through a harmonious construction of

[90]Abhishek Priyadarshi and Isha Tiwari, "Rethinking of the Need of Capital Punishment in India," *Supremo Amicus* 16 (2021).

[91]Surya Deva, "Death Penalty in the 'Rarest of Rare' Cases: A Critique of Judicial Choice-making," chap. 13 in *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion*, ed. Roger Hood and Surya Deva (Oxford: Oxford University Press, 2013), 238–286.

[92]Rachi Singh, "Analysis of Bachan Singh and Machhi Singh and its Implication," *International Journal of Research and Analytical Reviews* 5, no. 4 (2018): 135–143.

Articles 14, 19 and 21 has been interpreted as a substantive due-process clause.[93] This introduces a stricter test on grounds of cruelty, reasonableness, dignity, and proportionality in the sentencing process especially because these are cases concerning infringement of fundamental rights. Although the commission doesn't extend this rationale to its end, one can assume that the specific argument for abolition being made here is premised on the moral belief in the sanctity of human life. Respecting for the sanctity of life, a principle that the commission unearths as existing in the Constitution, becomes a ground for its abolitionist argument.

As is evident, the first argument is a universalist, human rights-like argument (based on the presumption of an inviolable sanctity of human life). The second is a functionalist argument (that the punishment does not serve the purpose/objective was intended for); while the third, fifth and sixth indicate problems of institutional prejudices. The fourth indicates the problem of indeterminateness in legal decision-making. The commission seems to argue that because these reasons ultimately jeopardise due process and render the application of rule of law on shaky ground, capital punishment deserves to be abolished. Both due process and rule of law are crucial devices that, enabled by the Constitution, set limits on the scope and powers of the democratic institutions. For this reason, I have titled the commission's arguments for abolition, Constitutionalism Arguments. I use 'constitutionalism' as an umbrella term covering a family of overlapping concepts such as constitutional morality, rule of law, primacy of fundamental rights, etc., that together articulate limits and constraints upon the scope and powers of electorally formed democratic institutions.

3.7 Retentionist Arguments by Dissenting Members of the Commission

Three members of the commission, namely, Justice (Retd.) Usha Mehra, and ex-officio members Dr. Sanjay Singh and Mr. P.K. Malhotra, rejected the recommendations of the commission in its entirety. The Appendix

[93] Srinibas Nayak and Sibasis Pattnaik, "Capital Punishment in India: An Analysis," *PalArch's Journal of Archaeology of Egypt / Egyptology* 17, no. 6, 5059–5065.

to the Report, comprising about twenty pages, consists of their counter. It is curious how the recommendations of this reasonably well-drafted report were rejected in such haste. Their broad set of arguments can be summarised as follows:

First, Human Fallibility Argument: As Justice Usha Mehra states in all platitudes, 'to err is human. Almighty alone is the dispenser of absolute justice. Judges of the highest court do their best, subject of course to the limitation of human fallibility.' As per this line of argument, indeterminacy and error in judgment is inherent and all too human, and so this is not reason enough to abolish death penalty. Since errors in judgment are unavoidable, these 'accidental' deaths are inevitable by-products of a system. Second, Order and Security: P. K. Malhotra is of the opinion that 'in spite of economic development, improvement in the education levels, there is increase in the crime rates and overall cultural deterioration.' In a more serious tone, Mr. Malhotra suggests that abolition of the death penalty may eventually lead to a time 'when the law will cease to exist.'

He alludes, without evidence, to the growing threat of terrorism, increased cases of kidnapping and abduction for ransom and organised crime as there as on for retaining the punishment. He has to presume the effectiveness of deterrence to make such an argument but does not explicitly comment on it. Third, Due Process of Law Argument: The three members agree that there is an unbridled, arbitrary and judge-centric application of death penalty in several cases. But they assert their faith in the due process of law, rule of law, procedural safeguards and institutional checks and balances to remedy this arbitrariness. As per this line of reasoning, the problem with death penalty in India is the poor application of law: the problem is not essential, it is incidental. That is, the legal framework in essence can handle death sentence cases in a principled manner and so, as this argument goes, we just must start doing it right.

Fourth, Deterrence Argument: With no reference to any evidence, the members consider the deterrent value as self-evident. For instance, Singh claims: 'The capital punishment acts as a deterrent. If death sentence is abolished, the fear that comes in the way of people committing heinous crimes will be removed, which would result in more brutal crimes. Who-

ever committing a pre-meditated heinous crime...should not be allowed to go with life imprisonment...as they do not deserve for the same.'[94] Fifth, Legislative Supremacy Argument: As per this view, it is the will of the majority, expressed through the law-makers, which justifies retention of the sentence. As Malhotra states 'The Parliament which reflects the will of the people passed law with death penalty for certain offences against women as late as in 2013.'[95] With a paternalistic subtext, Mr. Malhotra laments 'that the will of the Parliament shows that looking into the prevalent situation in the country, the Indian society has not matured for total abolition of death penalty' and that the 'time is not ripe' yet.

It can be inferred then that the second and fourth argument are functionalist justifications presuming that capital punishment leads to deterrence in crime. Since neither the abolitionists nor the retentionists in the report adduce any substantive India-centric evidence to support their respective claims, it is hard to wrestle with whether deterrence works or not (although global evidence clearly shows that it does not).

The first and third argument refer to indeterminacy in legal decision-making. As evident from the abolitionist argument as well, two kinds of indeterminacies emerge:

1. inherent indeterminacy, and;

2. resolvable indeterminacy.

The Human Fallibility Argument of the retentionist is of the former kind of indeterminacy, one which is inherent and inevitable in the judicial process. They suggest that if all forms of legal decision-making are indeterminate and uncertain, then this is not reason enough to abolish the penalty for it would lead to the absurd proposition that all legally imposed punishments, including fines and imprisonment, are unjustified. Resolvable indeterminacy is the kind which can be corrected, such as remedying Ravji's misreading of Bachan Singh, or ensuring better police investigation, correcting institutional biases, etc. Since we can potentially correct these factors, the retentionists argue that this too is not a sufficient justification for abolition.

[94] Law Commission of India, *Report No. 262: The Death Penalty*.
[95] Ibid.

The final strand of argument by the dissenters (fifth argument) suggests that abolition of death penalty is not a constitutional/judicial matter but a legislative one. Abolition must ultimately be a legislative decision representing democratic sentiments. As is obvious by now, the abolitionist and retentionist debate in the commission's report hinges on these three inter-related themes: constitutionalism, legislative supremacy and indeterminacy in judicial decision-making.

In effect, the commission's justification for excluding terrorism is that the 'law-makers' intend so. As described in Part I, the report proposes the abolition of death penalty on what has been described as the Constitutionalism Argument. They are the sort of arguments that are meant to place limits on the scope of legislative powers. Yet the commission allows for a derogation from these limits. And it justifies this by grounding it in representative governance ('Democracy Argument'): that people vote for their representatives, and these representatives do not intend such an abolition. This leap in register, from a language of constitutionalism, to a language of democracy is highly confusing. The question then is: how do exceptions arise from the conflict between these two different but equally legitimate rationales?

In this context however, the Law Commission becomes a body that allows itself to swerve between these two incommensurable choices in a manner that is arbitrary, and ultimately political. The report instrumentalizes the 'paradoxical unity of contradictory principles,' to the end that it is predisposed towards. That constitutionalism is often in conflict with democracy is well known. In classical political theory, a representative government ideally reflects the 'unrestricted' will of the citizens regardless of how it represents the ethos of the shared political life. Constitutionalism, on the other hand, sets limits on people's will and their determination of the laws of the state. As Leslie Green starkly puts it 'Democracy is rule by the people. Constitutionalism is [rule] under a constitution. There is no guarantee that what the people will want is what their constitution will permit.'[96]

In modern polities the relation between constitutionalism and democracy is hyphenated rather than paradoxical. The former becomes the precondition for the latter to arise, and in the process reinforce each other.

[96]Leslie Green, *The Authority of the State* (Clarendon, 1988).

But in making the Constitution the precondition for democratic politics, the judiciary consisting of unelected judges as the final arbiter of the Constitution (through powers such as of Judicial Review) takes up an institutional supremacy over and above democratic institutions. So, although they are theoretically meant to reinforce each other, in practice the relationship remains one of struggle between two competing institutions over the final say on the Constitution. In the Indian context, Pratap Bhanu Mehta frames the conflict between parliamentary sovereignty and constitutionalism as a competitive struggle for supremacy between the judiciary and the legislature. The Supreme Court's striking down of the of the National Judicial Appointments Commission (99th Constitutional Amendment) on grounds of it being violative of judicial independence, while the Union Government in turn accusing the Court of becoming the 'tyranny of the unelected,' is recent instance of this conflict.[97]

The entire report is an embodiment of this conflict between the two contradictory principles. Add to this the fact that the report, which is meant to give recommendations to the legislative wing of governance, has been referred to not by the legislature but the Court itself. It is in embodying this conflict that it walks a slippery slope mediating the constitutional and the democratic, the political and the judicial. The argument is that it is the possibility of this slippage that ultimately allows for such exceptionalism. *Shatrughan Chauhan v. Union of India* is significant in the context of terrorism laws for holding *Devender Pal Singh Bhullar v. State of Delhi* per incuriam and upholding *Triveniben v. State of Gujarat* as valid law. In effect, the Supreme Court states that unexplained delay as grounds for commutation of death sentence into life imprisonment is applicable to all cases including those falling under terrorism laws. Distinguishing terrorism cases from other criminal offences, in the context of mercy petitions, was held to be unconstitutional. Although this judgment is not directly applicable to death sentencing itself, it does reopen the question of whether a blanket distinction between terrorism offences and other offences is valid.[98]

[97]Kartikeya Tanna, "Tyranny of the unelected: It is time judges recognised the limits of their powers," April 20, 2021, accessed April 20, 2021, https://www.firstpost.com/blogs/blog-india/tyranny-of-the-unelected-why-judges-must-be-conscious-of-limits-of-their-powers-9546531.html.

[98]The report has to be read in the context of the Indian Supreme Court's history

The indeterminacy in legal decision-making arises from a peculiar negotiation between two conflicting demands made upon the judge. In the context of death penalty, *Santosh Kumar Bariyar* articulates, perhaps not consciously or voluntarily, this conflicting demand that I suggest is the cause for indeterminacy in judgments. *Bariyar* is being considered a landmark judgment for providing a much-needed corrective reading of *Bachan Singh*. But in doing so, the judges themselves get trapped in a conflict that shows how indeterminacies can never be eliminated from the 'rarest of rare' test. I wish to draw attention to the following two conflicting arguments articulated in Bariyar:

1. 'there is no uniformity of precedents, to say the least. In most cases, the death penalty has been affirmed or refused to be affirmed by us, without laying down any legal principle.' And 'principled sentencing' has degenerated into 'judge-centric sentencing'.

2. *Bariyar* is crucial for reiterating the centrality of 'Individualized Sentencing' while deciding cases.

'...[A] standardisation of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single-offence category ceases to be judicial. It tends to sacrifice justice at the altar of blind uniformity.'[99]

Here the Court laments the lack of principled, calculable, predictable uniformity in decision-making, and stresses on the need for individualising every case and to avoid mechanising or standardising the sentencing process. The demand is simultaneously for generality, uniformity, and sameness as well as uniqueness and difference. The disjunct between (a) and (b) is what gives rise to indeterminacy. Derrida suggests that it is these two opposing impulses: equal treatment and singular respect that open an irresolvable aporia that plagues judicial decision-making.

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of negotiating with executive discretion in terrorism laws. See, Ujjwal Kumar Singh, *The State, Democracy and Anti-Terror Laws in India* (Sage, 2007); and, Shylashri Shankar, "Judicial Restraint in an Era of Terrorism: Prevention of Terrorism Cases and Minorities in India," *Socio-Legal Review* 11 (1 2022).

[99]Diganta Biswas, "Approaches of the Supreme Court to Award Death Sentence During Post Independence Period: A Critical Study," 2017, accessed November 11, 2021, https://ssrn.com/abstract=2892910.

The Bench in *Bariyar* is no formalist, they insist that 'there is a real danger of such mechanical standardisation degenerating into a bed of procrustean cruelty,' thus noting that one cannot 'sacrifice justice at the altar of blind uniformity.'[100] In effect, the judges insist that justice mandates a balance between the two demands. Indian death penalty jurisprudence is arguably at its best in Bariyar precisely for reflecting on this conflict that plagues legal decision- making. The aspiration on one hand is toward legality, stability, calculability, predictability, prescriptive regularity, while at the same time is the desire for a unique and singular response that justice demands of judges. 'The necessary passage of time between the enunciation of a norm and its application, and the necessary uniqueness of the present judgment by comparison to its prior instances, inevitably opens up a space for decision.'[101]

This echoes the conflict discussed in the previous section between constitutionalism and democracy as well. For instance, as Leslie Green says: 'Democracy requires an agile responsibility to the will of the people; constitutionalism requires a government under a slow-moving system of fundamental law. They make an uneasy pair... The 'agile responsibility is to respond to the individual-singular fact situations of the people (demos), while the 'slow-moving system of fundamental law' (nomos) embodies the spirit of the Constitution as envisaged by the drafters.'[102] The Basic Structure Doctrine is one such negotiation between (a) the scope of legislative agility to meet the singular demands of populist realities and (b) holding on to the basic features of the Indian constitution as envisaged by the framers of the constitution. The former demands adapting to change while the latter demands stability and endurance. Decision-making is a pull towards consistent application of a rule on the singular demand of the fact-situation before the judge. This gap throws up the aporiatic indeterminacies inherent to judicial decision-making. *Bariyar* most clearly articulates this indeterminacy although misleading believes it can overcome it.

In sum, the philosopher Jacques Derrida points out the contradiction in modern law in Biblical terms. He asks: 'So, how can God tell Moses [in

[100] Biswas, "Approaches of the Supreme Court to Award Death Sentence During Post Independence Period: A Critical Study."

[101] *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*.

[102] Green, *The Authority of the State*.

the Ten Commandments]...thou shalt not kill and, in the next moment, in an immediately consecutive and apparently inconsistent fashion, 'you will deliver up to death whoever does not obey these commandments?' Derrida is intrigued by how God can decree a penal code that itself looks like a 'flagrant offence' against the ethic of the Ten Commandments. How can the State first iterate a right to life and, without any logical inconsistency, legislate the taking away of this life?[103]

In this chapter, I have argued that even though the commission provides Constitutionalism Arguments for abolition based on universalizable guarantees, it is able to derogate from its own act of universalisation. How do they justify this selective derogation? I suggested that they do this by exploiting the paradox between constitutionalism and democracy. It is because constitutionalism conflicts with democracy that arbitrary exception such as that of terrorism, is possible in juridical discourse.

While this thesis is not primarily concerned with providing a defence/ rejection of the death penalty, the discussions above do contain a crucial insight that needs to be pursued by those looking at abolition in India. The abolitionists expound abstract principles of justice based on a conception of humanity's intrinsic value and moral worthiness. The retentionists, as evident in the report, talk a language of passion, fear, insecurity, and exclusionism. Here, the difference is also one of style and rhetoric. The significant point is that in doing so, the retentionist dissent speaks to the demos and engages in agonistic politics, while the former speaks a detached language of constitutional morality devoid of politics.

This gap in the dialogue between abolitionists and retentionists, between nomos and the demos, is what has to be overcome by death penalty activism in India. The abstract principles of justice that the abolitionists talk of has to embrace sociality and take roots in culture. As Martha Nussbaum suggests in *Political Emotions*, 'the human mind is quirky and particularistic, more easily able to conceive a strong attachment if these high principles are connected to a particular set of perceptions, memories and symbols that have deep roots in the personality and in people's sense of their own history.'[104] By appeal to emotions, using symbols, poetry, narratives, films, literature and music, the abstract principles of justice

[103]Derrida, *The Death Penalty*.
[104]Martha C. Nussbaum, *Political Emotions* (Harvard University Press, 2013).

get embedded in the ethos of the community. It is only by speaking to the demos that the gap between constitutionalism and democratic sentiments can be potentially bridged.

Chapter 4

The Political Discourse and the Death Penalty

Introduction

In the previous chapter we saw how the argument for retaining the death penalty has moved on from the legal to the political and how the justifications provided are grounded in beyond the juridical. This chapter is concerned about the political discourse on death penalty and its various aspects. It explores the relationship between the increasing politicisation of death penalty (through judicial or extra-judicial means) especially since the turn of the century. The question arises whether with the strengthening of the Hindu right in the times of neoliberalism, death penalty has been seen not just as a necessary evil but a necessary good to security issues in the popular perception. Further, whether the slogan for death penalty in serious cases helps the political groups in organizing themselves or seek larger support in any way. It then links up with the media discourse on the issues of 'terrorism', 'women's security' etc. Finally, the chapter looks at the discourse of the left on these issues.

In the opening two decades of the 21st century, death penalty in India has become not only a judicial topic but also a political topic. More often than not, it is the right which drives the discourse concerning death penalty, though not in any critical but adulatory manner. The right's advocacy, indeed celebration, of death penalty seems to fit well with the larger culture of normalizing violence and coercion in the late neoliberal

times. In this chapter we discuss this hermeneutics of death penalty in the Indian political discourse. In the Introduction, we had highlighted that while the left opposes death penalty almost as a matter of principle, the right advocates the usage of death penalty as a 'solution' to what it perceives as problems (outrageous crimes, especially rapes, etc.) and terrorism. Ultimately, the arguments advocated become self-serving and cyclical, almost in a conflation of the repressive and the ideological state apparatuses, as it were. It is no surprise, therefore, that one of the most cited concerns in the predominant political discourse are that of national security and public morality (read, gender violence)—eerily similar to the juridical discourse of 'nation's conscience'. Cases, for example, can include famous ones like the hanging of Afzal Guru and the rape of Nirbhaya. In both these cases, the criminal was presented as the ultimate violator of the 'nation's conscience' and hence 'deserving' to be put to death sooner than later. The ones who advocated re-examination of the verdict—either of the very trial and verdict or, as in the latter case, that of death penalty—were to be vilified in the media as simply enemies of the nation. We will discuss these processes in more detail in the next section.

There is a plethora of theoretical approaches to help us understand these ideological discourses. In the era of neoliberalism and Hindutva, it is imperative to unravel how political authority takes into account its own failure in advance and uses it as a self-replicating excuse. Generally, the repressive status apparatus seems to have had occupied a stronger presence in a context in which contradictions of development have been exacerbated to the extreme. In the Introduction, we noted the usage of death penalty in disciplining the British working class towards respecting private property through the works of social historians. In neoliberal times, the massive inequalities of wealth and income generated as a consequence of abandoning the *dirigiste* system have produced similar (but not same) patterns which have resulted into complex re-arrangements of the public and the private, the regional and the national or transnational, of gender, caste and labour, in other words, set in motion what Gilles Deleuze called as 'deterritorialization'.[1] This is evident from a

[1]Gilles Deleuze and Felix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (University of Minnesota Press, 1983). For literature on neoliberalism and India, see K. R. Shyam Sundar, ed., *Perspectives on Neoliberalism, Labour and Globalization in India: Essays In Honour of Lalit K. Deshpande* (Palgrave Macmillan, 2019); Clarinda Still, *Dalits in Ne-*

pattern of cases involving rape-and-murder, terrorism, and extra-judicial killings (popularly referred to as 'encounter killings'), wherein the locus of judgements seem to be runing parallel to the political locii.

Within the liberal framework, one of the first to articulate a 'legal positivist' theory of jurisprudence was the British judge John Austin (1790-1859). Austin preferred the term 'general' or 'universal' jurisprudence for his ideas. His concern was not laws in their particularistic aspects but their general nature: law as such.[2] General jurisprudence is concerned about 'law as it necessarily *is*, rather than with law as it ought to be; with law as it must be, *be it good or bad*, rather than with law as it must be, *if it be good*'.[3] The more important aspect of Austin's theory is how law relates to sovereignty. Distinguishing between positive law and moral law, Austin defines sovereign as the one who is not in the habit of obedience to anyone else. All independent societies have a sovereign. Laws enshrined by the sovereign are true laws, while laws enshrined by those who are not sovereign are moral laws.[4] This implies that most laws are not moral, and law-making institutions do nothing to guarantee that law should me made moral. 'The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals.'[5] Austin's example is that of United States: neither the federal nor the state governments are sovereign, but it is the electorate as a whole which is sovereign.[6]

Problem with Austin's theory, as John Dewey noted, is that it fails to define the source of sovereignty. Dewey cited the example of Austin's own England, where it was near impossible to pinpoint the sovereign as per Austin's theory, with neither the British crown nor the Parliament being able to qualify as the sovereign. While pointing out this error, Dewey notes that Austin's theory is still superior to Rousseau's General

oliberal India: Mobility or Marginalisation? (Routledge, 2015); Jayati Ghosh and C. P. Chandrasekhar, *The Market that Failed: Neoliberal Economic Reforms in India* (Leftword Books, 2002); and, Tamsin Bradley, *Women and Violence in India: Gender, Oppression and the Politics of Neoliberalism* (I. B. Tauris, 2017).

[2]Austin, *The Province of Jurisprudence*.

[3]John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, ed. Robert Campbell (John Murray, 1885), Emphasis original.

[4]John Dewey, "Austin's Theory of Sovereignty," *Political Science Quarterly* 9, no. 1 (1894): 31–52.

[5]Austin, *Lectures on Jurisprudence*, 158.

[6]Dewey, "Austin's Theory of Sovereignty," 39.

Will because it lays emphasis upon identifying a determinate source of authority. However, it can be argued that, in our context, that it is precisely this monopoly of violence which the state had a theoretical right to which is being broken up by the rightwing by distributing it vertically as well as horizontally. The mechanisms to ensure this are multiple: it can be achieved by the use of extra-judicial killings (encounters via police), by the use of illegal militias, by the exacerbation of caste and gender-based inequalities, etc. One important addition to this is also by widening the scope of repressive laws or by a stricter adherence to the logic of death penalty through the capture of the state institutions. Hence, the monopoly of power of the sovereign state is broken up while at the same time the state becomes even more repressive.

According to Hegel, awarding death penalty to a convict is an act of full subjectivisation, in the sense that the criminal is held fully responsible for his or her deeds. At the heart of Hegel's theory is a desire for deepest reform of the criminal, which he asserts can only be realised via punishment. It is only by means of punishment that the criminal is forced to recognise the law which s/he rejected in the act of crime. Deterrence is therefore not a valid operation because the criminal is merely frightened out of repeating the crime. So, is the case with vindictive punishment, because that too denies the agency of the criminal. Hegel's argument rests on the idea that it is for the criminal's own sake that he or she must be punished. Otherwise, the criminal is simply treated as a prisoner of his or her own circumstances, or as a biopolitical victim. As Hegel writes: '[I]n punishment the offender is honoured as a rational being, since punishment is looked on as a right.'[7] As we will see later, this seemingly paradoxical mechanism of law and punishment is what is at the core of Indian political debates around death penalty.

In his *Discipline and Punish*, Michel Foucault notes the evolution of death penalty in Europe. In the early nineteenth century, the French notion of death penalty functioned in so far as the criminal was hidden away from the public gaze, in contrast to the Revolutionary era usage of guillotine: 'the more monstrous a criminal was, the more he must

[7]G. W. F. Hegel, *The Philosophy of Right and The Philosophy of Law*, trans. J. Loewenberg and S. W. Dyde (e-artnow, 2019).

be deprived of light: he must not see, or be seen.'[8] Foucault calls this as 'the age of sobriety in punishment', whose focus in punishment was not to torture the body or make a spectacle of it, but to strike the soul.[9] However, Foucault says that in England the same principle was not adopted because of the social changes in during 1780-1820. In *Introduction*, we have seen how Foucault's theory of death penalty is challenged by the British Marxist historians in insightful ways. In our context, the use of death penalty and other forms of state violence is less about deterring criminals or to discipline them towards respecting private property or as an inherent mechanism of what Foucault called as *dispositif*. It appears more inclined to ensure the more or less permanent mobilization of a large section of society against imaginary enemies. That is, the role of the mass movement led by the rightwing appears to be overlooked through Foucault's conceptuology, notwithstanding his many insights about the historical period that he is concerned with.

In his book *State of Exception*, Agamben argues that the Third Reich was not completely different from the Weimar Republic, but it was founded within the space provided by the latter's emergency laws. Ultimately, 'from a juridical standpoint, the entire Third Reich can be considered a state of exception that lasted twelve years'.[10] This can be helpful in understanding India's own evolution from a dirigiste economy to a neoliberal one, and one under which the repressive laws receive due sanction from the pre-existing constitutional framework. Secondly, Agamben's concept of Homo sacer, derived from Ancient Rome, implies that while the Jews or any other 'enemy' figures conjured up by the Nazis could be killed with impunity, they could not be sacrificed because they were not eligible as a sacrificial offer.[11] In the present Indian context, it can help understand not only the judicial killings but also the various extra-judicial killings, like in the various police 'encounters'. This becomes especially relevant under a rightwing dispensation whose very founding principle is the Carl Schmittian distinction between friend and foe.[12] Indeed, as Aijaz

[8]Foucault, *Discipline and Punish*, 13–14.

[9]Ibid., 16.

[10]Agamben, *State of Exception*, 2.

[11]Agamben, *Homo Sacer*.

[12]Anustup Basu, *Hindutva as a Political Monotheism* (Duke University Press, 2020), ch. 2.

Ahmad has attempted in his essay in the contemporary Indian context, the right's ascendancy to power is in no 'irreconcilable contradiction' with liberal democracy, rather, it sits comfortably close with the practices of past governments and state institutions.[13] The 'extreme right' has cut the Gordian knot of liberal democracy—how to organize a revolution within the liberal democratic setup—not theoretically but practically, something that the left has failed to do. The chief mechanism of doing so has been through the capture of state institutions.

However, capturing the state institutions would have been easier in a context of widespread structural violence. This can be understood within the rubric of what Aijaz Ahmad has called, almost in moralistic (Marxist-humanist) vein and drawing from Gramsci, as the two poles of 'cultures of civility' (represented by the left) and 'cultures of cruelty'[14] (represented by the right). Through a discussion largely concerned about the right, Ahmad wants to highlight the role violence plays in pre-empting both the tolerant pluralism of the centre, which is increasingly under threat, and the secularism of the left, which is not yet actualized. In his understanding, punctual and variegated use of violence is basically a strategy practised by the right so as to make itself more appealing to larger and larger number of people beyond the dedicated cadres. Ahmad charges that the Indian right draws its power from the 'cultures of cruelty' inherent in the traditional society, but when this society is caught in a capitalist modernization of an incomplete and inconclusive nature, then this culture of cruelty gets further exacerbated. Sporadic and illegal use of violence, like mob lynchings or pogroms, then becomes more and more inseparable from a growing usage of legal violence by the state controlled by the right. It is not difficult to extend this line of argumentation with regard to death penalty, especially when it is heavily politicized. Although it is the task of the judiciary to pass verdicts and award (or not award) death penalty, the political implications of famous cases do impact the verdict and its carrying out, as happened in the case of Afzal Guru. Furthermore, the celebration of death penalty and vilification of entire groups (Kashmiris, JNU students, etc.) appear simply as one of the same self-serving and self-

[13] Aijaz Ahmad, *India: Liberal Democracy and Extreme Right* (Navatelangana Publishing House, 2020).

[14] Aijaz Ahmad, "Right-Wing Politics, and the Cultures of Cruelty," *Social Scientist* 26, nos. 9/10 (1998): 3–25.

reproducing mechanisms of the ideology steeped deep into 'cultures of cruelty'—traditions whose force is now being extended onto the modern political processes.

4.1 Post-Independence Political Discourse on Death Penalty in India

As we have noted in the Introduction before, one of the most important factors to have driven the entire juridical-political debate on death penalty was the rejection of the post-Independence Indian state to comply by its own promise of abolishing the death penalty, as articulated in the Karachi Resolution (1931). The cause célèbre that provided this excuse was no other than the one of M. K. Gandhi's assassination at the hands of Nathuram Godse. It was in this context that the Jawaharlal Nehru-led government simply kept aside the issue of abolishing the death penalty and therefore kept it alive. No arguments whatsoever were provided in defence of this choice, and we can guess that it was the 'context' that was invoked to silence the critics of this choice, some of whom were close to Gandhi. We can surmise, therefore, that the death penalty was persisted with for the same reasons as some of the other controversial aspects like preventive detention.[15]

Appeals made to spare Nathuram Godse's life were made with reference to Gandhi's own thinking and his aim of addressing the moral dimension of the adversary. So influential was this idea in the aftermath of Independence that it even inspired a Hindi film on this subject: V. Shantaram's *Do Aankhein Barah Haath* (1957). On the surface, the film comes out as an argument for the reform of even the most dangerous criminals. However, the only way the Gandhian-paternal figure, the jail warden Adinath, could succeed at 'reforming' the six brutal murderers condemned to rigorous imprisonment was through an extreme infantilization of subjects, unable to think of the larger picture by themselves, even when they resort to a defensive battle nearing the end of being transformed into good characters. No wonder then that the two eyes of the warden ('Do Aankhein' of the title) appear almost magically in the

[15] Austin, *The Indian Constitution: Cornerstone of a Nation*.

sky, as if watching their acts like in Bentham's panopticon, or as what Slavoj Žižek calls as 'the big Other', the socio-symbolic authority which provides the background of one's acts.[16] The film, therefore, provides not only an articulate cinematic version of Gandhi's philosophy of reforming, it also points out important shortcomings in this idea (without realizing it though). As Hegel would say, the aim of reform is not complete until the criminal is fully re-subjectivised by means of punishment. Though not as such a political discourse, the film also acted like a mirror to the throwing away of the Gandhian position in the aftermath of the Independence.

One of the biggest problems with locating rightwing's position on death penalty, as with many others, is the lack of a principled articulation. Hence, one must derive it indirectly. It seems ironical for multiple reasons that the first person to be hanged in independent India was no other than Nathuram Godse, someone who is often looked upon as an icon by the Hindu right and subjected to death penalty by some of the closest disciples of Gandhi: it is clear that the death penalty was not simply a judicial decision as Nehru and Patel tried extraordinary methods to suppress alternative possibilities. In contrast, the Karachi Resolution's promise to abolish the death penalty came in the wake of the death penalty awarded to Bhagat Singh and his friends. Godse's hanging does not seem to have produced any similar condemnation of death penalty by the right. It would be futile to imagine any kind of opposition to death penalty from the Hindu right in this period, thanks largely to its own delegitimization and banishment from the public sphere thanks to the bans imposed upon it in the aftermath of Gandhi's assassination. The only principled opposition to death penalty (including arguing for clemency for Nathuram Godse and associates) was to be articulated by Gandhi's followers and finally by his own family, because of their belief in Gandhian non-violence and appeals to the moral nature of the oppressor or the criminal.[17] The argument raised by Brajeshwar Prasad was that the Gandhian legacy could be further strengthened and done justice to if the convicted assassins were to be pardoned:

[16]Slavoj Žižek, "The Big Other Does Not Exist," *European Journal of Psychoanalysis*, no. 5 (1997).

[17]Prateek Jain, *Hang Till Death: India's Most Notorious Cases of Capital Punishment* (Bloomsbury, 2019).

> It will be befitting Gandhiji's memory to pardon this scoundrel along with others who have been sentenced. They should forcibly made to settle down in the Andamans as free man...[18]

To this suggestion, the reply by Home Minister Vallabhbhai Patel was rather terse:

> I am sure you will appreciate that nobody knows better than myself what Gandhiji would expect me to do in the matter. You can, therefore, leave the matter at that.[19]

In fact, Sardar Patel's Correspondence is a veritable archive of all those who were opposed to death penalty and how Patel and others dealt with their concern. Apart from Brajeshwar Prasad, Gandhi's sons Manilal and Ramdas too requested the government to reconsider the death penalty. Ramdas even suggested to C. Rajgopalachari to put Nathuram in a penitentiary rather than condemn him to death penalty in order to think for himself whether his methods were any good for Hindus. This suggestion too was shot down, as was Ramdas' attempt to meet Nathuram in prison. Both Prime Minister Nehru and Home Minister Patel stalled these efforts. Patel even forestalled the publication of an argument for Nathuram's clemency in Harijan, a journal founded by Gandhi. Patel's argument was as follows:

> ...[N]o sensible man would think of abolishing the death penalty in India in the conditions which prevail today...If the death penalty is not to be abolished, then I could not think of a stronger case for the infliction of the death penalty than that of Godse. He has committed the worst crime imaginable...he stabbed the heart of India.[20]

Among those who opposed the death penalty for Godse were included G. V. Mavalankar (India's first Lok Sabha Speaker), Mahadev Desai (Gandhi's associate and editor) and Assam Congress leader Debeswar Sarma and even some foreign journalists. The Government of India's official response to this particular demand was expressed by C. Rajgopalachari and Vallabhbhai Patel:

> It is suggested in some quarters that as Gandhiji favoured the abolition of capital punishment, we ought to extend clemency to those who murdered

[18] Vallabhbhai Patel and Shankar Prasada, *Sardar Patel's Correspondence, 1945-50*, ed. Durga Das (Navjian Publishing House, 1971), 259.
[19] Ibid.
[20] Ibid., 279.

> him. We have not abolished the death penalty and those on whom the responsibility of government is placed cannot make a distinction and treat more favourably those who have chosen to kill the best among us while ordering the execution of the death penalty in so many other cases.[21]

Clearly, the nascent Indian state was in no mood to abolish death penalty, and thus fulfil one of the key promises made in the Nehru Report (1928) and the Karachi Resolution (1931). The only argument advanced was that of the 'immediate context' in which it was not feasible to abolish death penalty. However, there was no corresponding principled articulation against death penalty by the rightwing. In fact, with Nathuram Godse we find that though he projected himself as a Hindu icon who performed the courageous act of assassinating a mass leader apparently bent to destroy Hindu society, he also secretly harboured hopes that his life could be saved thanks to the principles of ahimsa that his victim practiced.[22] Jha mentions the letter that Gandhi's son Ramdas wrote to Godse in prison. Although Ramdas' letter was concerned more about maintaining the Gandhian ideals by seeking clemency for Godse's life and the latter's repentance, Godse would have none of the latter. Jha mentions the subtext of his reply, which consisted of a tactful invitation to a personal meeting in jail the purpose of which was an eventual clemency. Unfortunately, for Godse, that was not to be.[23]

The politics of Gandhi's assassination has been commented upon by many. Ashish Nandy locates Gandhi's assassination as a play of repressed masculinity. Briefly the argument is as follows: Godse's act was an act of recovery of the (mis-)perceived loss (which, incidentally is Nandy's other title) of masculinity at the hands of, first, the Muslims and the British, and then by Gandhi. This redoubled loss was further accentuated by Godse's own 'distorted' sexuality which he attempted to set right by projecting himself as a virile, masculine superhero who avenged the injustice done to Hindu community. However, cracks in the mirror of this Hindutva masculinity were too large to be concealed in this manner. Hence, we find that Nathuram Godse died a painful death whilst hoping that he could be saved by his own detractors. As Nandy writes:

[21]Patel and Prasada, *Sardar Patel's Correspondence, 1945-50*, 242.

[22]G. D. Khosla, *The Murder of the Mahatma And Other Cases from a Judge's Notebook, cited in* Dhirendra K. Jha, *Gandhi's Assassin, The Making of Nathuram Godse and His Idea of India* (Penguin, 2019).

[23]Ibid.

> So Gandhi died, according to his own scenario, at the hands of one who was apparently a zealot, a religious fanatic, a typical assassin with a typical assassin's background: educated and intelligent, but an under-achiever; relatively young; coming from the middle class and yet from a group which was a displaced elite; and a long list of failures. Here was a man fighting a diffused sense of self-definition with the help of a false sense of mission and trying to give through political assassination some meaning to his life. One might even note, for psychologists, that there was also in Godse the authoritarian man's fear of sexuality, status-seeking, idealization of parents, ideological rigidity, construction of emotions, and even some amount of what Eric Fromm would diagnose as love of death.[24]

Nandy also flatly contradicts Nehru's assertion that Godse did not know what he did. Nandy cites K. P. Karunakaran to remark cheekily that the only two men who ever understood Gandhi were Godse (his assassin) and G. D. Birla (who funded Gandhi). Thus, Godse was no demented killer, but someone fully aware of the larger tragedy to his world (the caste privileges, etc.) that was unfolding at the hands of Gandhi. This much, Nandy says, was visible to both Gandhi and Godse, who blamed the same person for partition (Gandhi). Hence, through his assassination Gandhi received what he wanted: to pay for what he perceived as the sins of Partition by being killed at the hands of a Hindu fanatic.

The rightwing ideology with regard to death penalty is, therefore, a denial of the theory of the circumstances leading the criminal to act as s/he did. The left discourse, officially articulated very recently with the CPI(M) becoming the first political party to ask for the abolition of death penalty, is precisely the opposite. It is intererwsting, though, that it is exactly this idea that Prabhat Patnaik identified as underlining the rejection of the death penalty by the CPI(M), a recognition of biopolitics:

> . . . [T]he basic Left position, which is also widely accepted in progressive liberal circles (and was reflected in the Karachi resolution). . . [is]. . . that infirmities on the part of an individual, including 'deviant behaviour', are, at least in part, socially caused. The individual alone cannot be held responsible for his or her actions, whence it follows that instead of doing away with the individual as the means of removing the threat that he or she poses to society, we should rather change society in a manner that such individuals are not produced.[25]

Patnaik employs the same phrase as Aijaz Ahmad, 'cultures of cruelty' as exacerbated by the rightwing, contrasted with left's 'culture of

[24] Ashis Nandy, "Final Encounter: The Politics of Gandhi's Assassination," in *Debating Gandhi: A Reader*, ed. A. Raghuramraju (Oxford University Press, 2006), 65–66.

[25] Patnaik, "On the Question of Capital Punishment."

compassion':

> Such a perception, associated generally with the Left and working class formations, produces a 'culture of compassion'. The change in the correlation of class forces which comes about with the hegemony of finance capital and a weakening of the Left and working class formations, also entails generally, at the level of ideology, a substitution of a 'culture of cruelty' for a 'culture of compassion'. This is what has happened in the Indian case too (which is not to suggest that anyone in India who subscribes to a neo-liberal outlook is ipso facto in favour of the death penalty).[26]

Patnaik here holds not only the larger historical 'cultures of cruelty' but also the recent addition of neoliberalism to the list, by which he means the 'hegemony of finance'. It is in this context that we can remember Peter Linebaugh and other British Marxist historians' contribution that capital punishment was discretely used to discipline the people in respecting private property in the aftermath of the Industrial Revolution. Today, under late capitalism, the developmental contradictions inflected by neoliberalism have unleashed a new dynamic of their own: that of exacerbation of old violence with the addition of new forms of violence. Judicial or extra-judicial killings are, therefore, part of the same systemic logic which is based upon ever growing inequalities and uneven development.

If *Do Aankhein Barah Haath* represented the post-Independence Gandhian framework, then *Ab Tak Chhappan* (2004, director Shimit Amin) represents the neoliberal India. Literally translating 'Fifty Six So Far', the film focuses on the story of a Mumbai cop who has 'encountered' fifty six criminals so far, while constantly looking to 'score' more. 'Encounter' is an Indian context specific euphemism for extra-judicial killings by the police. One of his colleagues, Imtiyaz Siddiqui, resents him because of this high score. Back home Sadhu is a dedicated family man. The story begins in medias res, when the cop Sadhu Agashe (played by Nana Patekar) accompanies a young recruit Jatin to one such mission of an encounter killing. At the end of the mission, he asks Jatin why does he feel compelled to use the gun. Jatin responds that it is because of the love for country. At this answer, Sadhu Agashe bursts out with cynical laughter, and corrects his novice junior that it is not the love for country which drives him in shooting the criminals but his own safety. Later in the film, Sadhu and Imtiyaz become pawns in a gangster warfare, and

[26]Patnaik, "On the Question of Capital Punishment."

Sadhu's wife is killed. Sadhu is forced to join a Dubai based gangster, Zameer, but kills him when a meeting is arranged, revealing that it was Zameer all along who was responsible for his wife's death. Now a fugitive, he re-establishes link with his former police boss, and vows to keep eliminating the criminals in the same old fashion despite not being a cop anymore.

The ideological underpinnings of the film are not hard to see. It is an India recently thrust into what Prabhat Patnaik calls a hegemony of finance': it is not only financially connected to the outer world but also acts as global supplier of labour. Most of the encounter killings in the film take place within impoverished, ghettoised neighbourhoods of Mumbai where 'precariats' (the new rootless proletariat) are located. This underbelly of the city is causally linked with the flow of finance and criminal activities from the outside world. In this universe, legal system is itself one of the players in the market, just like the various gangster groups which are on war footing with each other. It is not established to eliminate crime, but to preserve the system by means of routine purges and forging ever new alliances. Out there in the field, therefore, saving one's own life is the key motif which can ensure survival. One's criminality is not something that is to be established by legal examination, but by (manufactured) popular perception. Thus, a cop who routinely engages in extra-judicial killings is not a criminal, even when he is officially out of the police force, while there are 'insiders' who act like criminals even if they act in a perfectly legal way. The boundaries between the legal and extra-legal are therefore fluid, and it is only through a hermeneutics from the position of power that one decides who is going to live and who is going to be executed. In other words, *Ab Tak Chappan* captures what Žižek calls as the ever widening 'parallax gap between between the public Law and its superego obscene supplement'.[27] This gap is exemplarily played out in the politics of 'encounter' cases, now openly admitted not only by police officials but also chief ministers like Yogi Adityanath. This is discussed in the next section.

[27] Žižek, *The Parallax View*, 306–308.

4.2 The Contemporary Rightwing Discourse on Death Penalty

4.2.1 Rape and Murder Cases

In December 2012, the infamous Delhi gangrape and murder took place. A young physiotherapy student, Jyoti Singh, was brutally assaulted (along with her friend) and raped inside a moving bus which she boarded while travelling late at night in the city of Delhi by five men and a minor. While the victim battled for her life in hospital, a great outrage was sparked. Students from the Jawaharlal Nehru University, which was not far from the site of the crime, took out a march to the bus stop from where the victim boarded the fateful bus.[28] The matter received national and international attention amidst the outrage, with newspapers like The Guardian, New York Times, etc, all widely reporting on the issue. The case brought to centrestage the disturbingly large numbers of rapes in India. The Congress government at the Centre and in New Delhi faced massive protests, with women's groups, civil society organizations, students, political parties and influential figures all criticizing the government. When the victim died two weeks after the incident, the protests swelled and were staged across all major cities. In a bid to not reveal her identity, media addressed her by the pseudonym, among others, 'Nirbhaya', meaning fearless.

What is interesting is that despite the protests, few had little idea how to curb gender violence. The protests culminated in the constitution of the Justice Verma Committee which consisted of students and academics, apart from the former Chief Justice himself, former Solicitor General and a judge. It submitted its report in 29 days and most of these recommendations were quickly accepted by the Indian Parliament.[29] However, some suggestions of the Committee like trial of army officers in areas where AFSPA (Armed Forces Special Powers Act, which gives extraordinary insulation to the army and paramilitary forces where it is implemented, such as in Jammu and Kashmir and the north-east states) was imple-

[28]Manash Pratim Gohain, "Nirbhaya case: At JNU, the cause has grown wider," https://timesofindia.indiatimes.com/city/delhi/nirbhaya-case-at-jnu-the-cause-has-grown-wider/articleshow/27492929.cms.

[29]Justice J. S. Verma, Justice Leila Seth, and Gopal Subramaniam, *Report of the Committee on Amendments to Criminal Law* (Government of India, 2013).

mented, or the criminalisation of marital rape and the ban on politicians accused of sexual violence against standing in elections was not accepted. The Committee had already rejected the demand for lowering the juvenile age from 18 to 16 (as one of the offenders in the Jyoti Singh case was below 18 at the time of crime).

Tasmin Bradley has quantitatively analysed the reporting of rape in the print media, especially the newspaper *The Hindu*. She claims that even prior to the Delhi gang-rape (Nirbhaya incident), activism around the issue of rape had led to a massive increase in the reporting of rape incidents.[30] The newspaper brought attention to the fact that a murderer was more likely to be convicted than a rapist, something that the feminists had been underlining for long. While acknowledging this growing awareness surround rape within media, Bradley brought another problematic facet of the same: of not recognising different social categories while reporting, for example, rape of low-caste women. Though the Nirbhaya rape case resulted in a conviction (that resulted into the death sentence of the convicts), it was the only one of 706 rape cases registered in 2012 in New Delhi. According to Bradley, while the left-feminist activists linked the mass prevalence of violence against women to India's economic trajectory—contrasting the success story with the growth of violence against women—the Hindu right joined the protests against the Nirbhaya rape because the victim was perceived as an *ideal victim*: someone who had not violated patriarchal norms, who did not wear "Western" clothes, someone who was venturing out with her legitimate partner, etc.[31] This was the basis of the "apparent unity" of the coming together of left-liberal-feminists and rightwing conservatives.

This fact that a juvenile was involved along with other men led some rightwing sections to demand that he too be given the maximum punishment and not let off on a mere technicality. Although the Verma Committee did not accept the demand, the NDA government that succeeded the UPA government brought out the Juvenile Justice Bill, 2015, which allows anyone from 16-18 to be treated as an adult if involved in serious crimes. The basic motive was to give maximum punishment (death penalty) in cases like rape and murder where the culprits were juvenile.

[30]Bradley, *Women and Violence in India*, 86.
[31]Ibid., 102.

When the bill was presented in the Parliament, except the Left parties most MPs supported it, including the main opposition party, Congress. Parties which had little representation in the Parliament, like the Aam Aadmi Party, also welcomed it. Apparently, the bill was a demand which was actively supported by the family of Jyoti Singh.

The BJP-led rightwing seems to have seen an opportunity to further discredit the Congress-led UPA government following the Nirbhaya case. The massive outrage against the government came on the back of several big-ticket corruption charges against the UPA government, like 2G spectrum, Commonwealth Games (2010) and Coal scam (known as coal-gate). The rape-and-murder incident added fuel to the fire, with emotional outburst filled by rage against the brutality of the incident (the media publicised the case in gory detail, how the victim suffered because of a rusted iron rod being inserted inside her body during the act which led to her death). The last-minute decision by the Manmohan Singh led Cabinet to transport the victim to Singapore for better treatment also added to the perception of mishandling the case. BJP leader Sushma Swaraj, while meeting Nirbhaya's parents, called for the harshest punishment for the juvenile offender.[32] She demanded death penalty for everyone included.[33] Venkiah Naidu suggested that the culprits should be chemically castrated.[34] Rashtriya Swayamasevak Sangh Sarsanghchalak (head of the organization RSS) Mohan Bhagwat made the distinction between India and Bharat and said that the latter did not have rapes, implying that modernity was to blame for these crimes.[35] Akhil Bhartiya Vidyarthi Parishad (ABVP), the RSS related student organization, provoked violence in some of the agitations.[36] Exactly a year after the Nirbhaya

[32]"Delhi gangrape victim's mother announces trust for rape survivors," 2013, https://www.indiatvnews.com/crime/news/delhi-gangrape-victim-mother-announces-trust-for-rape-survivor-4759.html.

[33]"Delhi gangrape: How defence and prosecution argued in the court," https://www.news18.com/news/india/sentencing-live-638006.html.

[34]"Delhi gang-rape case: BJP suggests chemical castration, death penalty for rapists," https://economictimes.indiatimes.com/news/politics-and-nation/delhi-gang-rape-case-bjp-suggests-chemical-castration-death-penalty-for-rapists/articleshow/17830236.cms?from=mdr.

[35]"Rapes happen in India, not Bharat: RSS chief Mohan Bhagwat blames western culture for gangrapes," https://www.indiatoday.in/india/story/rapes-happen-in-india-not-bharat-rss-chief-mohan-bhagwat-blames-western-culture-for-gangrapes-150752-2013-01-03.

[36]"ABVP violence mars protest at Jantar Mantar," https://www.thehindu.com/

incident, Narendra Modi, then BJP's Prime Ministerial candidate, asked voters to remember Nirbhaya while they went to vote for state elections in the 'rape capital' that was Delhi.[37] He also criticised the government for using repressive measures against the protestors in this case. Several BJP leaders demanded that death penalty should become the norm in dealing with rape related cases. Baba Ramdev, known for manifest sympathies with the rightwing, too joined in the protests. Asaram held that the victim was herself to blame for her rape, as she did not refer to the culprits as her brothers during the incident.[38] He was found guilty in a rape case in 2018.

It was not as if these attitudes were confined to the BJP or RSS. In 2019, a veterinary doctor was raped and murdered in Hyderabad by four suspects. Following the outrage at their mishandling of the incident, the family of the victim had accused of delay in police action, the police arrested four suspects, obtained their 'confession' and 'encountered' them in a staged event, as per the findings of a Supreme Court appointed commission in 2022. However, the Chief Minister of Telangana took pride in the 'swift action' by the police, and asked people to cheer for the police.[39] Social media praised Telangana police generally, while Swami Ramdev commented that court proceedings should take place only in those cases where there was any doubt.[40] Eventually, even the father of the victim thanked the police and state government for ensuring swift justice and peace upon his daughter.[41] The action by Telangana police soon

news/national/abvp-violence-mars-protest-at-jantar-mantar/article4256009.ece.

[37]"Narendra Modi in Delhi: Remember Nirbhaya when you go to vote," https://www.indiatoday.in/elections/story/delhi-polls-modi-attacks-congress-on-graft-security-of-women-219290-2013-11-30.

[38]"Girl should have called rapists as 'brothers': Asaram Bapu," https://economictimes.indiatimes.com/news/politics-and-nation/girl-should-have-called-rapists-as-brothers-asaram-bapu/articleshow/17932691.cms.

[39]"Hyderabad vet rape and murder: People shout slogans in support of police, CM at encounter site," https://www.thehindu.com/news/national/telangana/hyderabad-vet-rape-and-murder-people-shout-slogans-in-support-of-police-cm-at-encounter-site/article30203940.ece.

[40]"Celebrations abound over the killing of Hyderabad rape accused. Are you surprised?," https://www.newslaundry.com/2019/12/06/hyderabad-police-gangrape-accused-killed.

[41]"'My daughter's soul at peace', says Telangana doctor's father; girl students applaud police move," https://www.timesnownews.com/mirror-now/in-focus/article/telangana-encounter-disha-rape-case-victim-father-express-gratitude-hyderabad-police-on-the-news-girls-also-applaud-the-decision/523725.

became a model. Former chief minister of neighbouring Karnataka, H. D. Kumaraswami also called upon Karnataka police to take a clue and act in a gangrape and murder case in Mysuru. In 2008, a similar encounter took place in Warangal where the same police officer was posted. He is seen as an 'encounter specialist'. Here again, minors accused of pouring acid over a woman were stage 'encountered'. Similarly, politician and former chief minister of Uttar Pradesh, Mayawati criticized the situation in her state and asked the government to take inspiration from Hyderabad case in doing swift justice. Mayawati was criticizing a chief minister who openly prides himself for promoting encounters. Yogi Adityanath routinely prides himself for presiding over police which has 'encountered' an unprecedented number of criminals (151).[42] Unofficial sources rate the numbers even higher, as high as 3, 300.[43]

However, these cases are not the only ones to have received political outrage, and ones in which Hindutva took the position of strictest punishment, i.e. death penalty via judicial means or encoutner killings as in Telangana and elsewhere. In Uttar Pradesh's Hathras district, a young Dalit woman was gang-raped in September 2020 by four men belonging to the Thakur caste, the same as that of then and current Chief Minister Yogi Adityanath. She died two weeks later in hospital due to severe injuries. It was clear that the victim may not have died had the gang-rape not been as brutal as it was, with the victim reportedly undergoing a spinal cord injury and biting out her own tongue while resisting strangulation. The state police only registered a complaint a week later.[44] With the death of the victim, the political opposition and media began to criticise the state administration, comparing the rape-and-murder incident as similar to that of Nirbhaya's. Defying lockdown due to Covid-22 pandemic, opposition leaders started visiting the village

[42] "151 'criminals' shot dead in encounters since 2017, says Yogi Adityanath," https://www.thehindu.com/news/national/other-states/many-criminals-shot-dead-in-encounters-in-last-five-years-says-yogi-adityanath/article37108956.ece.

[43] "Under Adityanath, UP Police Has Injured Over 3,300 in 'Encounters', Finds Report," https://thewire.in/government/under-adityanath-up-police-has-injured-over-3300-in-encounters-finds-report.

[44] "UP Woman, Gang-Raped And Tortured 2 Weeks Ago, Dies In Delhi Hospital," September 29, 2020, accessed December 12, 2021, https://www.ndtv.com/india-news/woman-gang-raped-and-assaulted-in-ups-hathras-two-weeks-ago-dies-in-delhi-hospital-2302445.

where the incident took place and to express solidarity with the family of the victim, but they were forcibly prevented from entering the village by the police citing pandemic restrictions, and resorted to unprecedented violence on opposition leaders like Rahul Gandhi.[45] The body of the victim was not even handed over to the family for her last rites, but they were forced to cremate her before sunrise.[46] Meanwhile, rightwing outlets ran a counter-narrative saying that the victim had not died of rape but due to 'family feud', and that the victim's body was cremated by the father and not under police pressure.[47] The implication was that the case was being undue prominence by opposition because it lacked a genuine agenda and, furthermore, caste hierarchies were not related to gender violence.

Similarly, an eight year old girl, named Asifa, belonging to the Bakkarwal tribe was raped and murdered by a priest along with his son, his juvenile nephew, his friend and three policemen (who joined in as they went to the village to locate the girl) at Kathua in Jammu district in January, 2018. Though the police complaint about the missing girl belonging to the nomadic community (Muslim) had been registered earlier on, the state police probed the case for rape-and-murder and accused the people involved, including a constable only after the Bakkarwal and Gujjar community came out in large numbers to protest against police's inaction.[48] It was found that the rape-and-murder was pre-planned by the priest to drive out the nomadic community from the village. However, what was interesting that before the case became widely known outside Jammu and became a national issue, the local Bhartiya Janata Party MLAs took out a rally to protest against the arrest of the accused, citing that they were being harassed because they were Hindus under a state administration

[45] "Rahul Gandhi pushed to ground in scuffle with cops trying to prevent him from reaching Hathras," October 1, 2020, https://www.indiatoday.in/india/story/rahul-gandhi-pushed-to-ground-on-way-to-hathras-1727345-2020-10-01.

[46] "In videos: How the Dalit woman raped in Hathras was cremated without letting her family say goodbye," https://scroll.in/article/974529/in-videos-how-the-dalit-woman-raped-in-hathras-was-cremated-without-letting-her-family-say-goodbye.

[47] "Chronology of Hathras case from 14th September to 5th October: A tale of contradictions and the truth getting lost in the cacophony," 2020, https://www.opindia.com/2020/10/hathras-case-timeline-of-events/.

[48] "Kathua rape-murder case: Tests confirm victim held in prayer hall, was sedated," April 17, 2018, accessed April 17, 2018, https://indianexpress.com/article/india/kathua-rape-murder-case-tests-confirm-victim-held-in-prayer-hall-was-sedated-5123806/.

that was chosen by a largely Muslim electorate.[49] At that time, the BJP was in alliance with the Mehbooba Mufti-led People's Democratic Party. Soon, the alliance between the two parties broke apart, said to be as a result of the BJP MLAs' act of supporting the rape accused.[50] Two months later, the Union Government announced that it was going to do away with Article 370, which gave Jammu and Kashmir a special status, only a year after the Supreme Court had said that Article 370 had become a permanent feature of India's Constitution.[51]

It was clear that the framework in which the right-wing understood and sought to address the rape issue was what Aijaz Ahmad called as 'cultures of cruelty'. For the right-wing, the dreadful incident was not an opportunity to analyse why the rapes were happening, but how they could be channelled selectively and politically by supporting strong retributive measures, which included not only death penalty but also chemical castration. The basic viewpoint was to address the symptoms and not the disease, to use a medical metaphor. The distinction between 'Bharat' and 'India' implied that where rapes were not reported it was not an issue for outrage. The idyllic image of 'rural' India (free of modernity) as a rape free region surrounded by island of urbanity where rapes occurred frequently was in tune with the vision that Indian society by itself is problem-free: it is 'outsiders' or 'foreign influence' which brought problems like rape. The same ideology led the rightwing to consistently oppose recognition of marital rape. It also brought into existence the Juvenile Justice Act of 2015, which implied that juveniles below 18 could also be prosecuted as adults if they were implicated in 'serious' crimes.

The Hindu right's shrill rhetoric against rape and its advocacy of death penalty or other such punishments like castration is does not extend to each and every case. Expectedly, where the culprits are of Muslim identity, the noise emanating from rightwing sections is loudest. For

[49] "Kathua rape case: 2 BJP ministers attend rally in support of accused," https://www.indiatoday.in/india/story/kathua-rape-case-2-bjp-ministers-attend-rally-in-support-of-accused-1181788-2018-03-04.

[50] "Kashmir: Mehbooba Mufti resigns after BJP withdraws support," June 19, 2019, https://www.aljazeera.com/news/2018/6/19/kashmir-mehbooba-mufti-resigns-after-bjp-withdraws-support.

[51] "Article 370 has acquired permanent status: Supreme Court," April 4, 2018, https://timesofindia.indiatimes.com/india/article-370-has-acquired-permanent-status-supreme-court/articleshow/63603527.cms.

example, in September 2022, the rape and murder of two young sisters belonging to Dalit families by Muslim men became a rally point across Hindu right organisations and internet groups. When the international media reported this as yet another instance of violence against vulnerable identities due to the persistence of the caste system, rightwing web portal *OpIndia* denounced it as 'anti-Hindu propaganda' by bringing forward the Muslim identities of the perpetrators.[52] However, in the (in)famous case Hathras, the portal denied the fact of the rape of the victim, or of any brutal treatment at the hands of the upper caste men, thus implying that this was not the norm within the caste framework.[53]

Historically, the image of the rape of innocent Hindu women at the hands of Muslims or any other 'intimate' enemy is a theme that provides one of the key building blocks of the entire Hindutva ideology. According to this ideology, the Hindus have been oppressed for centuries by the Muslim conquests and rule. The Muslims succeeded because the Hindus were, one, too much virtuous and, two, internally divided into castes. the caste system was not reprehensible because of its intrisic characteristics, rather it was deplorable simply because it rendered Hindu men incapable of defending their women. In some of the famous passages in his *Six Glorious Epochs of Indian History* (hereafter, *Six Epochs*), V. D. Savarkar propounded the idea that because Hindu men never retaliated back in the same fashion as their Muslim counterparts, when it came to the matter of disrobing women of their honour:

> The Muslim women never feared retribution or punishment at the hands of any Hindu for their heinous crime. They had a perverted idea of woman chivalry. If in a battle the Muslims won, they were rewarded for such crafty and deceitful conversions of Hindu women; lull even if the Hindus carried the field and a Hindu power was established in that particular place (and such incidents in those times were not very rare) the Muslim men alone, if at all, suffered the consequential indignities but the Muslim women—never! Only Muslim men, and not women, were taken prisoners. Muslim women were sure that even in the thick of battles, and in the confusion wrought just after then, neither the victor Hindu chiefs, nor any of their common soldiers, nor even any civilian would ever touch their hair.

[52] "BBC blames 'Hindu hierarchy' for rape and murder of Dalit sisters, forgets to mention that the arrested accused were Arif, Sohail, and Junaid among others," 2022, https://www.opindia.com/2022/09/bbc-blames-hindu-hierarchy-for-rape-and-murder-of-dalit-sisters-committed-by-junaid-sohail-arif/.

[53] "Chronology of Hathras case from 14th September to 5th October: A tale of contradictions and the truth getting lost in the cacophony."

> For, albeit enemies and atrocious, they were women! Hence, even when they were taken prisoner in battles, the Muslim women—royal ladies as also the commonest slaves—were invariably sent back safe and sound to their respective families! Such incidents were common enough in those times. And this act was glorified by the Hindus as their chivalry towards the enemy women and the generosity of their religion![54]

Apart from the culture of banishing rape victims from their castes, the caste system also robbed from the Hindus their potential to use their numerical superiority—what Purushottam Agarwal calls as the 'potency of the numbers'—against 'invaders' like Muslims and Christians. In trying to establish how the Hindus have led to their own downfall because of their virtuous nature, Savarkar chastised the Maratha king Shivaji (anachronistically seen as a 'Hindutva icon') and military leader Chivaji Appa, for being decent and chivalrous by not choosing to rape Muslim women when he could.[55] In his essay on Savarkar and the issue of rape in *Women and Right-wing Movements*, Purushottam Agarwal discusses Savarkar's discourse on rape and women *in extenso*. He writes that because Savarkar's book *Six Glorious Epochs* cannot be considered a work of history but a work of moral philosophy, it would be misleading to suggest that Savarkar's book is not prescriptive; that is, Savarkar is actually hinting to use rape as a political weapon (against Muslims).[56] According to Agarwal, Savarkar's entire moral philosophy is based on the idea of women as a medium for the reproduction of the community; hence their linkage to 'honour'. Through works like *Six Epochs*, Savarkar creates a false version of 'history' which receives its strength because it gets embedded into local oral traditions. Raping women of the other community, then, simply becomes an act of historical justice. However, this may proves difficult for most people to carry out because of their moral inhibitions. Savarkar aims to provide an ideological framework in which these inhibitions can be overcome:

> Savarkar breaks down this resistance with one decisive stroke by removing the conflict between virtue and perversion. He does it boldly and unhesitatingly by systematically turning virtue itself into perversion, and

[54]Vinayak Damodar Savarkar, *Six Glorious Epochs of Indian History*, ed. and trans. S. T. Godbole (Bal Savarkar, 1971), para 449, 164.

[55]Ibid., para 450-451A, 179.

[56]Purushottam Agarwal, "Savarkar, Surat and Draupadi: Legitimizing Rape as a Political Weapon," in *Women and RIght-wing Movements: Indian Experiences*, ed. Urvashi Butalia and Tanika Sarkar (Kali for Women, 1995), 53.

> that too, as the natural moral of a grand story—by lambasting none other than Shivaji himself. The perspective is structured as a tale of heroic deeds and horrible defeats. So, even the conduct of a hero like Shivaji is to be condemned if it upholds a moral barrier for the construction of baser instincts as the valid political mode. The sexuality of women is nothing but an arena, a medium, a symbol; just as you die for holding the honour of your national flag and consider it your national duty to save the flag from the enemy, so also your attitude towards women should be the same, that is, uphold the dignity of yours and violently defile the others as retribution or pre-emption.[57]

Thus, when leading figures of the Hindutva movement, like Sadhvi Ritambhra address Hindu males to leave behind their effeminate corruption (by shedding their life as virtual *hijras*—a pejorative slang for transwomen), they are only carrying forward the terms of the same discourse as set by Savarkar.[58] In other words, more than a a work of history, *Six Epochs* can be identified as Hindutva's own genealogy of morals. It is by reading Savarkar that we can begin to understand why the Hindutva worldview is for strictest punishment in some rape cases while in others it remains silent or even attempts to suppress the judicial outcome.[59]

Indeed, it is precisely this charge—that Savarkar recommended political usage of rape—that was repeated by Ajaz Ashraf, a columnist with *Scroll.in*.[60] Ashraf focused on the usage of a Sanskrit quotation by Savarkar, which carried the meaning that 'to carry away the women of others and to ravish them is itself the supreme religious duty of the Rakshasas'.[61] Ashraf quotes Savarkar as saying that the Muslims continued this aspect of the Rakshasas so as to conquer India demographically, because controlling females allowed more progenies. This interpretation

[57] Agarwal, "Savarkar, Surat and Draupadi: Legitimizing Rape as a Political Weapon," 52.

[58] Agarwal's example, though it can today include contemporaries like Yati Narsimhananda or even a suave sounding Jaggi Vasudev aka Sadhguru. For a full length discussion of Sadhvi Ritambhara see Tanika Sarkar's analysis of a prominent Ram Temple activist Ritambhara, Tanika Sarkar, "Aspects of Contemporary Hindutva Theology: The Voice of Sadhvi Ritambhara," in *Hindu Wife, Hindu Nation: Community, Region and Cultural Nationalism* (Permanent Black, 2001), 268–290.

[59] As this thesis is being composed, the convicts in Bilkis Bano case have been released before completing their stipulated prison time at the directions of the Union Government. See, "Bilkis Bano: India PM Modi's government okayed rapists' release," accessed October 21, 2022, https://www.bbc.com/news/world-asia-india-62574247.

[60] Ajaz Ashraf, "Reading Savarkar: How a Hindutva icon justified the idea of rape as a political tool," *Scroll.in*, https://scroll.in/article/808788/reading-savarkar-how-a-hindutva-icon-justified-the-idea-of-rape-as-a-political-tool.

[61] Savarkar, *Six Glorious Epochs of Indian History*, 176.

of Savarkar's sought to be countered by *OpIndia*, which focused on the term Rakshasa. Accordingly, since the Rakshashas are seen as negatively in Hindu mythology, this cannot be the basis of any policy by the Hindus and hence cannot also be the recommendation of Savarkar.[62] The article then cuts off abruptly without focusing on other parts of Ashraf's article and Savarkar's recommendations.[63] Similarly, Aravindan Neelakandan's article in *Swarajya*, founded by BJP MP Swapan Dasgupta, defends Savarkar by arguing that Savarkar's work was essentially a work of history, and that Savarkar's lament that Muslims were not paid back in the same coin by the Hindus was therefore simply a historical lament, and this aspect of the book prevented it from being a tool of prescription, not relevant for the political present.[64] As we have seen, it is precisely this interpretation that Purushottam Agarwal had rejected by calling *Six Epochs* as a work of moral philosophy. The ideological hold is so strong in these rightwing responses such that it cannot even question the 'facts' that underpin Savarkar's account, i.e. that Muslims and Hindu chieftains formed separate and mutually hostile groups in historical times. It is through this bypassing of academic history, which it regard with contempt, that the rightwing sustains its ideological monolith.[65] Neelakandan even describes Gandhi to be on the same side as Savarkar with regard to the rape of Hindu women at the hands of Muslim men:

> . . . [W]hen Savarkar was writing those lines, even as he was not prescribing the same horrendous treatment in the contemporary conditions, the abduction of Hindu and Sikh women during the riots would have definitely agonized him.
>
> . . . Savarkar was not alone in that agony. The stories of systematic abduction and conversion of Hindu women had reached Mahatma Gandhi as well. In his speech made to Indian Muslims in New Delhi on 18 September 1947, he told them that Sardar Patel had informed him that he had reasons

[62] Romila Thapar, "History as Way of Remembering the Past: Early India," in *A Companion to Global Historical Thought*, ed. Prasenjit Duara, Viren Murthy, and Andrew Sartori (Wiley Blackwell, 2014), 27.

[63] "Ajaz Ashraf, of The Scroll, with his WRONG interpretation about a freedom fighter, says Savarkar justified the idea of rape as a political tool," May 31, 2020, accessed November 11, 2011, https://myvoice.opindia.com/author/anandv/.

[64] Aravindan Neelakandan, "Did Savarkar Justify Rape As A Political Weapon?," *Swarajya*, May 28, 2019, https://swarajyamag.com/ideas/did-savarkar-justify-rape-as-a-political-weapon.

[65] For example, Arvind Neelakandan is associated with Rajiv Malhotra, with whom he has written books criticising academic historians for 'colonial' and 'anti-Hindu' biases.

> to suspect that a vast majority of the Muslims in India were not loyal to India. For Gandhi himself, the Muslims who wished to be citizens of the Indian Union, their loyalty to the Union must come before everything else. Muslims in Delhi had assured through their written declaration that they were loyal to the Indian Union.[66]

Ironically, this very same charge—of disallowing the Hindus to avenge the rapes of their women—was what had apparently led Godse, a associate of Savarkar's, to assassinate Gandhi. As for his justification of Gandhi's assassination, Nathuram Godse detailed events of rape of Hindu women at the hands of Muslims, for which he held Gandhi squarely responsible.[67] Thus, even Gandhi's murder was ostensibly done to save the honour of Hindu women. Godse does not spare Gandhi (in so far as Gandhi can be said to be a 'Hindu' figure) with the same sympathetic critique as Savarkar did to Shivaji for being too chivalrous in not avenging rape with rape. Ashraf notes in parentheses that this ideology is Nietzschean because Hindus are said to have suffered precisely because of their virtuous nature.[68] It is on this basis that we can begin to understand why the Hindutva movement mobilized against the rape of Nirbhaya but did not do the same in other cases where, in fact, it tried to suppress accountability and judicial process.

While this may explain why the Hindu right not-so-secretly condones violence against women (or children, as in Asifa's case) if the victims are especially Muslims, it does not adequately explain why Hindu right goes in denial mode when it comes to violence against Dalits or lower caste women, as in the Hathras or Unnao cases. This can be understood by looking at Hindu right chiefly as an upper caste discourse, something that has been observed by many.[69] Although they do not say it explicitly, even symbolically making Ambedkar an icon of their political discourse, but they continue to reject arguments for equality in terms of belief as well as caste and gender. As Aijaz Ahmad has argued, the Hindu right has been one of the very few political forces anywhere and across political spectrum which has managed to solve the problem of bypassing liberal democracy

[66]Neelakandan, "Did Savarkar Justify Rape As A Political Weapon?"

[67]Nathuram Godse, *Why I Killed Gandhi*, ed. Gopal Das Godse (Surya Prakashan, 1989).

[68]Ashraf, "Reading Savarkar."

[69]Kancha Ilaiah, *Why I am not a Hindu: A Sudra Critique of Hindutva Philosophy, Culture and Political Economy* (Samya, 1996); Anand Teltumbde, ed., *Hindutva and Dalits: Perspectives for Understanding Communal Praxis* (Sage, 2020).

from within: "Their documents are at best turgid and unreadable for the stupidity of their content. Their organisational practices, by contrast, have often been frighteningly brilliant."[70]

Arundhati Roy pointed out another reason why the Hindu right also mobilized protests against the Nirbhaya incident. The death penalty in cases like Nirbhaya point to a big flaw in not only the judicial system but also in the larger society, which has sharp inequalities of class too. Without contesting the facts of the case, her argument is that the Nirbhaya rape culprits were presented in extraordinary bad light in the media and condemned to death penalty because of their poor class background.[71] This is why culprits from privileged backgrounds are not treated so severely as the others, as happened in the Jessica Lal case. The same logic also explains the extraordinary apathy shown by the Uttar Pradesh government in the Hathras rape and murder case, in which the victim was a young Dalit woman and the culprits belonged the same Thakur caste as that of the Chief Minister.

4.2.2 Terrorism Related Cases

The Afzal Guru case is one of the most (in)famous, and one which reaped the rightwing a huge political dividend in form of electoral victories and opinion building. The case began in the aftermath of 13th December 2001, when the Indian Parliament was raid-attacked by five terrorists armed with assault rifles and automatic weapons. It was later reported that the terrorists belonged to the Pakistan bases Lashker-e-Taiba and Jaish-e-Muhammad groups. Nine people including security forces and police were killed, while the attackers were shot dead inside the Parliament premises. The attack led to huge political tensions between India and Pakistan, with the NDA government claiming that it has clinching evidence of this act being Pakistan's handiwork and deploying armed forces near the Pakistan border taking a clue from the then ongoing War on Terror by USA led NATO after the September 11 Twin Tower attacks. Global intervention helped de-escalate the war-like situation, but Pak-

[70] Ahmad, *India: Liberal Democracy and Extreme Right*, 25.

[71] "Writer Arundhati Roy on impunity for rape in India & how violence is used as a tool of the State," 2018, https://www.pressenza.com/2018/05/writer-arundhati-roy-impunity-rape-india-violence-used-tool-state/.

istan Government was pressurized to ban certain terrorist organizations like Jaish-e-Muhammad. During the investigations, an Indian Kashmiri named Afzal Guru was arrested by the Indian investigation agencies, along with his cousin Shaukat Hussain Guru and a University of Delhi professor named S. A. R. Geelani. Shaukat Hussain was later released prior to the completion of his sentence and Geelani, whom the agencies had dubbed as the mastermind of the conspiracy, was acquitted by the court, but Afzal Guru was sentenced to death. This was in part due to Afzal Guru's own confession in 1993 that he had been a militant, and his subsequent collusion with Indian security agencies, especially his interaction with Deputy Superintendent of Police, Davinder Singh. Afzal Guru alleged that he was drafted into the Parliament attack by Davinder Singh without being told what was being conspired, and that he was coerced into parting with his money and freedom to do the job. Davinder Singh meanwhile openly accepted some of these allegations, including that of brutal torture, but he was not charged with anything nor ever brought under trial. Davinder Singh was convicted in 2021 in a decade old graft case, while media reported him getting caught red-handed while escorting Hizbul Mujahideen members.[72] Meanwhile, in 2004, the NDA government was ousted by the Manmohan Singh led UPA government. However, investigative agencies continued the case. Several commentators pointed out several holes in the story narrated by security agencies. Arundhati Roy compiled a number of them, including her own piece on the subject, and brought it out in the form of a book.[73] The larger agreement among scholars, journalists and one former finance minister of West Bengal, Ashok Mitra whose articles were collected in the book was that Afzal Guru had been denied the basic protection laid out in the procedures of the law, and that his trial should be at least re-conducted even if he was not to be released. Under no circumstances his death sentence should have been carried out before the whole conspiracy was fully exposed. However, the Congress Party led UPA government decided to go ahead with the hanging of Afzal Guru in 2013, just prior to

[72] "Took Rs 12 lakh to move Hizbul terrorists but DSP Davinder Singh's luck finally ran out before retirement," https://www.indiatoday.in/india/story/dsp-davinder-singh-took-rs-12-lakh-to-move-hizbul-terrorists-1636611-2020-01-14.

[73] Arundhati Roy, ed., *The Hanging of Afzal Guru and the Strange Case of the Attack on the Indian Parliament* (New Delhi: Penguin, 2016).

the General Elections. Only a few months back, Ajmal Kasab's death sentence too had been carried out, who was the only Pakistani terrorist captured alive during the 2008 Mumbai attacks, although no one had argued for Kasab's release. The general sense in political circles was that these hangings were hurriedly carried out by the UPA government in order to pre-empt the criticism by BJP for being 'soft on terror'. Initially, starting the trial itself proved difficult because no lawyer would stand up to take his case. The Bar Council of Maharashtra passed a resolution barring all the lawyers from representing Kasab. If someone agreed, Shiv Sena, a hardcore rightwing party, threatened to use violent means and indeed used them against a few lawyers who took up the case simply for technical reasons. Afzal Guru's Kahsmiri identity and his tormented life meant that with his controversial hanging – his family was not telephoned before the hanging but a letter was sent due to reach only after the sentence was carried out – made him a martyr amongst Kashmiris. A number of protests took place despite the heavy security that followed the hanging. His hanging became a symbol of India's mishandling of an ordinary Kashmiri. In another incident from Hyderabad University (January, 2016), Rohith Vemula, a Dalit student protesting for many weeks against the denial of his scholarship and suspension from studies following confrontation with ABVP (RSS student wing), died by suicide. Soon the left and dalit activists starting referring to it as 'institutional murder'.[74] This led to a furore against the Central Government led by the BJP, because not only the government was seen as having instructed the central university to not give Vemula and his friends any scope of re-joining, but also pressured the administration to go soft on ABVP cadres. The issue of Rohith Vemula's death became a political problem, with debate taking place in Parliament. Student Unions along with the Jawaharlal Nehru University Student Union publicised the case, and organized several agitations pertaining to it.[75] On February 9, 2016, leftwing students

[74]"'This is not a suicide but murder': protests in India over lower-caste scholar's death," https://www.theguardian.com/world/2016/jan/19/this-is-not-a-suicide-but-protests-in-india-over-lower-caste-scholars-death.

[75]"Hyderabad University suicide: Rohith Vemula hangs himself in campus, student unions protest," https://www.firstpost.com/india/dalit-phd-student-rohith-vemula-commits-suicide-hyderabad-central-university-students-cry-foul-2588166.html; "Rohith Vemula's death anniversary: Over 20 JNU students detained for staging Insaaf March," https://www.indiatoday.in/india/story/rohith-vemula-death-anniversary-

organized a memorial protest meeting against Afzal Guru's hanging. . Soon, ABVP got involved and tried to stop the programme. Several Kashmiri students raised anti-India slogans at the event in confrontational sloganeering. Now BJP MPs came into the picture and filed cases of sedition against several JNU students, including Student Union President Kanhaiya Kumar, Umar Khalid and several other students. Sections of the media sympathetic to the rightwing vilified the students as traitors liable for sedition. Within few days, Kanhaiya Kumar was arrested and the police secured the campus. Through television news channels and internet, the BJP tried to present JNU as a den of anti-national activities out there to shield terrorists like Afzal Guru. At the same time, protests against Kanhaiya's arrests by JNU students led the Delhi High Court to eventually grant him bail, although with several pop-nationalist recommendations (like listening to 'patriotic' Bollywood songs, etc.). He was also beaten up inside the court premises by lawyers sympathetic to the Hindutva worldview, if not members of the key political organizations. The narrative that BJP successfully built up was as follows: (a) Pakistan in collusion with Indian Muslims, especially Kashmiris is conspiring to break India apart; (b) liberal and left sections like university spaces promote the questioning of what is calls as 'nationalism'. Hence it branded the protesting students and their leaders as 'anti-national', a charge which the media amplified; (c) the open support of 'terrorists' like Afzal Guru by JNU students was a strong evidence of the collusion between anti-national citizens with the enemies of the country; and, (d) anyone who dares question the government or criticise its policies can be termed as 'anti-national', because 'objectively speaking', he or she is merely playing as the pawn of the enemies of the country. So successful this narrative became that it can be argued that the BJP benefitted from the hanging of Afzal Guru by the Congress-led UPA government that it might not have imagined at that moment. Later on, with anti-Muslim pogrom happening in Eastern Delhi in the wake of protests against the Citizenship Amendment Act (2019), the Central Government managed to arrest or re-arrest several other students from JNU, like Umar Khalid, Natasha Narwal and Sharjeel Imam, for instigating violence from the side of the Muslims. What is even more apparent is the underlying premises

jnu-students-protest-insaaf-march-20-detained-delhi-955586-2017-01-17.

that violence against country's perceived enemies was justifiable. In the course of events, JNU was imagined as the hub of all sort of immoral activities, like free sex, alcohol consumption and a promoter of 'anti-Hindu' interpretation of Indian history. Historians, especially, working at the university were referred to as 'distorians'. In the wake of the controversy created by the government and the rightwing, several people associated with the RSS viewpoint were appointed within the University, like Rajiv Malhotra, whose academic credentials were questioned by historians in his home country, USA. A statue of Swami Vivekananda was installed and inaugurated by Prime Minister Narendra Modi, but not before left activists were accused of trying to vandalise the statue. Around the same time, a change in government in Tripura led to vandalization of statutes of Lenin installed by the previous Left Front government by anonymous supporters of the new dispensation. In retaliation, several statues of Shyama Prasad Mukherjee, an early Hindutva exponent and member of Nehru government's cabinet, were targeted in West Bengal. In counter-retaliation, Hindutva supporters vandalized statues of anti-caste movement leaders like Ambedkar and Periyar in Tamil Nadu and several other regions. The whole country seemed to have been polarized like never before. The cycle of violence and counter-violence became self-serving.

4.3 Conclusion

Looking at the Indian context, it is difficult to say that the judicial process is insulated from political interventions. Although the Indian Constitution was framed with the stated vision of an independent judiciary, at least the record on death penalty shows a different picture. This is especially true in the neoliberal phase with the rise of Hindutva, where reasoning for death penalty inside the court is not much different from the discourse out in the open. One of the first evidences of this mutual reinforcement of the judiciary and the executive was in the Kehar Singh case, in which Kehar Singh was sentenced to death. That judgement had been severely criticized by the International Commission of Jurists for the use of circumstantial evidence alone. Similarly, in the Afzal Guru case, political discourse on the ground heavily affected the outcome of the case.

Even if it is assumed that Afzal Guru was fairly indicted, the manner in which he was executed by the outgoing UPA-2 government implied that the decision was taken with the view of pre-empting criticism from the BJP. In other words, the ever-growing acceptance of Hindutva forced even its opponents to adopt a similar strategy, thereby making the whole polity drift rightward. In Agamben's terms, victims of death penalty appear as not only victims of biopolitics but also as Homo sacers who can be executed without impunity. The state transforms into state of exception, with repressive like UAPA becoming ever more useful. In the rape-and-murder cases, the Hindutva-led state inspires the adoption of harsher laws and stricter punishment, but the rhetoric remains at a superficial level. First, existing laws themselves can be applied more efficiently if prevention of rapes is a priority, and reforming police is a first requirement. Instead the police is lauded for engaging in extra-judicial killings (euphemistically referred to as 'encounters') and thereby ensuring swift justice, implying saving the pain of proper trial or due process. Furthermore, where the culprit is from the privileged sections of the society or where the victim is from the oppressed sections then the particular rape case does not outrage as much. The demand for harsher punishment is not made in these circumstances. Thus, the state and popular perception applies different standards for similar cases.

Conclusion

As I write the conclusion, television channels in India are replete with debates on the death penalty once again. On 14 November, 2022, the Supreme Court had set free Nalini Sriharan and five other remaining convicts, who were serving life term for about three decades in the former Prime Minister's Rajiv Gandhi assassination case, highlighting that its earlier order releasing another convict A. G. Perarivalan was equally applicable to them. Following through its order in May (2022), directing the release of life convict A. G. Perarivalan in the Rajiv Gandhi assassination case by invoking its powers under Article 142 of the Constitution, the Supreme Court used this extraordinary jurisdiction to extend the same to the six convicted for assassinating the former Prime Minister and ordered that they be also set free forthwith.

The former Prime Minister was assassinated by a woman suicide bomber named Dhanu at a poll rally in Sriperumbudur in Tamil Nadu on the night of May 21, 1991. The blast killed at least 13 other people and over 40 were left injured. In 1999, the Supreme Court had confirmed the award of death sentence to Nalini, her husband Sriharan and two others. Nalini's death sentence was commuted to life term in 2000 by the Tamil Nadu government. Nalini and Sriharan were among the six convicts freed on November 12 following an order of the apex court.

Interestingly enough, following this, *Swami Shradhanand*, whose death sentence for murdering his wife for her wealth was altered to entire life in prison, on Wednesday pleaded with the Supreme Court for his release, seeking parity with the convicts in the Rajiv Gandhi assassination case. Over different periods, the debate on the death penalty has ranged from whether it should be retained in the legal statutes at all, the kind of crimes it should be allowed for , whether it is constitutionally valid, the validity of the 'rarest of rare' test, the presence (or otherwise) for a uniform basis

for it, do all cases of death penalty follow the same penological or even the larger philosophical goal(s) of punishment, is there any possibility of deterrence with the death penalty, is this irreversible punishment reliant on the subjective predilections of individual judges, factors influencing mercy petitions, debate over legislative amendments regarding clemency, so on and so forth.

It may not be possible to settle these debates in a manner that convinces everyone equally. It may be further difficult to fix any of these answers for posterity. What is clear then is that the practice of death penalty as a form of state punishment in India, presents a puzzle. This puzzle constitutes three important strands. First has to do with the continuation of a system of reprimand that is based on a life-life trade-off in a liberal democratic system. Second deals with how India has actually retained and expanded the use of death penalty under various pretexts, despite being a signatory to the International covenant of Human Rights (1966). The third part of this puzzle has to do with the Constituent Assembly Debates. Despite an obvious tilt towards the abolition of this pre-colonial method of punishment, it was finally retained in the statutes.

It is against this background that the introductory chapter dealt with the history of death penalty in India, beginning with death penalty in colonial India and the debates over corporal punishment in the Constituent Assembly sessions. Chapter two traced the evolution of death penalty in the judicial discourses, viz., how it changed from a state of rule to a state of exception. It looked at the different judicial phases and sought to delineate the different principles that the judiciary came up with during different phases under the rubric of death penalty.

At the outset, capital punishment cannot but appear out of sync with the principles of liberal-democratic governance and its judicial system, which is based upon the idea of liberty of all people, constraining them only in so far as they do not impinge upon others' freedoms. However, the continuance of its practice at the hands of the state, suggests that it can be seen either as an exception grounded within the same principles or as the state's neglect/violation of those principles. Narratives by the state imply that capital punishment is awarded only in two categories of offences, namely treason and murder. However, the judges, in the offences punishable with sentence of death and alternatively with life im-

prisonment, have to crucially choose between the two permissible penal alternatives (viz. death sentence and imprisonment for life). The constitutional validity of death penalty was considered by a Constitutional Bench of the Supreme Court in *Bachan Singh v. State of Punjab*. The reference to the Constitutional Bench came about, as the Bench hearing the case noticed that there was a conflict between two rulings of the Supreme Court on the issue of the validity and scope of the provision that imposed death penalty. The two cases were the rulings in *Jagmohan v. State of Uttar Pradesh*, which declared death penalty to be constitutionally valid and the ruling of another three-member bench in *Rajendra Prasad vs. State of Uttar Pradesh*, in which a majority of two judges, ruled that when the trial court comes to a conclusion that the accused is guilty of murder, then the state through the prosecutor should be called upon by the court to state whether the extreme penalty is called for; and if the answer is in the positive, the court shall call upon the prosecutor to establish, if necessary by leading evidence, facts for seeking the extreme penalty of law.

Any theory of state punishment in a liberal democracy must grapple with the problem of political legitimacy. If that system of punishment takes away the right to life itself, the need for a justification becomes all the more pressing. Nothing stops liberal democracies from having a mode of punishment; nothing explains however why that method of punishment has to be a life-life trade-off? The primary justification provided here is that if I take away someone else's right to life and liberty, then I forego the right to my own life and liberty. But if this is the basic argument that sustains a liberal democracy, then how is it that all murderers are not awarded the Death Penalty? Who decides what lives are worthy of state protection and which ones are not? The definition of what is morally impermissible changes with every judge and bench. Similarly, the court's arguments have moved from 'public outcry for justice', need for 'deterrence', protecting the 'social fibre' to the more famous 'rarest of rare' tests. Moreover, given that India is a signatory to the International covenant on civil and political rights (1966), and therefore, is committed to phase out the application of death penalty, it is puzzling how India has actually continued to use Death Penalty under various pretexts. It is pertinent to note, way back in 1997, India abstained when the commission on human rights of United Nations passed a resolution calling for an

end to judicial executions in the world. However, India swiftly moved towards re-rewarding of death penalty in extreme cases. A look at the constituent assembly debates reveals that the majority of the leaders were highly uncomfortable with the idea of retaining the death penalty. Despite such apparent discomfort however, it was given a prominent position in the law books. This anomaly has been explained trough the state's usage of 'Exception' as explained in chapter three.

In the third chapter, I used the Law Commission's 2015 report as a microcosm of the larger debate on the death penalty. Almost all standard arguments against death penalty were accepted as valid by the Law Commission of India, and yet, the Report ultimately ends up justifying the death sentence in cases of terrorism. In this chapter, I argued that creating such a 'state of exception' has become a definitive marker of our times. How does the LCI justify the exception of terrorism, while simultaneously agreeing with all the grounds for abolition of the penalty; grounds that remain largely universal in scope? I explained it through John Austin's argument that the need for a strong state is linked closely to the need for a strong punishment like the death penalty. From this we can talk about the need for due process and emergency provisions in the constitution. It so emerges then that the inevitability of a strong state, may be defined with reference to political prisoners, people serving sentences under terrorism (actual or assumed) extra-judicial encounters or cases of mob lynching.

Furthermore, the creation of this 'state of exception' may be attributed to, as articulated by Carl Schmitt and later Giorgio Agamben, to the Sovereign's discretion in transcending the discourses of rule of law under the pretext of public good. In the Introduction to this thesis, we looked at Peter Linebaugh's *The London Hanged*, wherein he talked about the practice of public executions for very minor crimes. Towards the end of this thesis, I concluded that in modern times, the idea of the *spectacle* has undergone a transformation, which relates deeply to the changing nature of the state. How can we understand this shift? We no longer need people to have committed proven crimes, we no longer need to hang people in a public space making the idea of death penalty redundant—we now have moved on to something more intense that can spread its tentacles to the most unthinkable of spaces; the mere assumption of a crime against

the 'spirit' of a nation (through any activity) is enough for implementing public/mob justice. Without losing the original point, I wish to reiterate that in both these variations of spectacle, the powerful arm of the state, overtly or covertly, tacitly or otherwise, gets to decide the punishment and the punished.

The Law Commission of India in its 262nd Report, noting that it does not serve the penological goal of deterrence any more than life imprisonment, recommended the 'swift' abolition of death penalty. However, it did not extend it to terror-related cases. The recommendation by the nine-member panel was, however, not unanimous, with one full-time member and two government representatives dissenting and supporting retention of capital punishment. In its last report, the 20th Law Commission had said that there is a need to debate as to how to bring about *the abolition of the punishment of death penalty in all its aspects* soon.

It may be concluded then that the argument for retaining the death penalty has moved on from the legal to the political and the justifications provided are grounded in beyond the juridical. The fourth chapter dealt with the political discourse on death penalty and its various aspects. It explores the relationship between the increasing politicisation of death penalty (through judicial or extra-judicial means) especially since the turn of the century. It seems that the strengthening of the Hindu right in the times of neoliberalism, death penalty has been seen not just as a necessary evil but a necessary good to security issues in the popular perception. Further, whether the slogan for death penalty in serious cases helps the political groups in organizing themselves or seek larger support in any way. It then links up with the media discourse on the issues of 'terrorism', 'women's security' etc.

In the opening two decades of the 21st century, death penalty in India has become not only a judicial topic but also a political topic. More often than not, it is the right which drives the discourse concerning death penalty, though not in any critical but adulatory manner. The right's advocacy, indeed celebration, of death penalty seems to fit well with the larger culture of normalizing violence and coercion in the late neoliberal times. In this chapter I discussed this hermeneutics of death penalty in the Indian political discourse. In the Introduction, we had highlighted that while the left opposes death penalty almost as a matter of principle,

the right advocates the usage of death penalty as a 'solution' to what it perceives as problems (outrageous crimes, especially rapes, etc.) and terrorism. Ultimately, the arguments advocated become self-serving and cyclical, almost in a conflation of the repressive and the ideological state apparatuses, as it were. It is no surprise, therefore, that one of the most cited concerns in the predominant political discourse are that of national security and public morality (read, gender violence)—eerily like the juridical discourse of 'nation's conscience'. Cases, for example, can include famous ones like the hanging of Afzal Guru and the rape of Nirbhaya. In both these cases, the criminal was presented as the ultimate violator of the 'nation's conscience' and hence 'deserving' to be put to death sooner than later. The ones who advocated re-examination of the verdict, either of the very trial and verdict or, as in the latter case, that of death penalty, were to be vilified in the media as simply enemies of the nation. Since the authority to punish the deviant members of society lies with state officials, it is only reasonable to envisage the possibility of factual, legal as well as ethical error. A look at Supreme Court judgments and the different stances adopted by the respective judges and benches, reveals that taking of life remains a rather subjective matter. While political parties like the BJP call(ed) for immediate execution of terrorists like Afzal Guru, groups like Peoples union for civil liberties, Asian Centre for Human Rights, have sought relentlessly to abolish the death penalty. This section seeks to look at the groups fighting for and against the death penalty and the arguments advanced by both.

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