CHAPTER - VI

CAPITAL PUNISHMENT & HUMAN RIGHTS PERSPECTIVE : JURISPRUDENCE OF THE SUPREME COURT OF INDIA

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6.1 INTRODUCTION:

Human Rights is a dynamic and live concept; it has to be treated with sensitivity and its meaning has to be interpreted and understood with the changes brought in by the developments in social, economic, cultural, civil and political spheres. These developments also give rise to further aspirations of the people to be able to exercise their right of equality and justice in its finer aspects. Evolution of Human rights after all depends on evolution of mankind.¹

To understand and answer any query relating to the jurisprudence of the Indian courts from Human Rights Perspective was an uphill task for the researcher. The quest to reach at a just conclusion led the researcher to have a cumbersome task of examining all available decisions relating to death penalty delivered by the Apex Court from 1950 till date, which figure went on to 578 cases. In this chapter, the researcher would focus on the updates from the judicial trends relating to human rights and the need to review the interrelationship of capital punishment and human rights *vis-à-vis* the contemporary transnational developments. This chapter will work like a slideshow of human rights jurisprudence of the Indian Judicial System.

It is stated that life, liberty and dignity of person are at the core of human rights without which a human life will be more miserable than animals.² The democracy can only be meaningful and effective if government and civil society go hand in hand to give the

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² HUMAN RIGHTS BEST PRACTICES RELATING TO CRIMINAL JUSTICE IN A NUTSHELL, (V) (1st ed., NATIONAL HUMAN RIGHTS COMMISSION 2007).
citizens a dignified life.\textsuperscript{3} The concept of human rights is truly a vast one and embraces many diverse fields of human endeavour.\textsuperscript{4}

Indian democratic system is one of the finest systems of the world. The Constitution of India is woven with golden threads. It takes care of human rights of an individual. Procedural Laws provide an opportunity to every accused to prove his innocence. The procedural safeguards provided to an accused in criminal trials provide a picture of one country’s criminal justice system. It also gives an impression of working of the judiciary and the law makers.

The Code of Criminal Procedure, 1973 provides for practice and procedure for trial of Criminal Cases leading towards infliction of punishment on offenders under the substantive criminal laws including the Indian Penal Code, 1860. Indian courts have a long experience in exercising wide discretion to select penalty under Section 302. A fair capital sentencing system, which aims towards achieving a consistent and principled approach and delineating articulate sentencing pegs has long been the concern of this Court. Any capital sentencing system, by virtue of the nature of penalty it deals with, inheres a hierarchical review mechanism. A tiered court system is at the heart of achieving a substantial standard of review which essentially kicks in as soon as death punishment is awarded. The review courts are supposed to assess the findings emerging from the pre-sentencing hearing at the trial stage as also other available material and then arrive at a conclusion of its own on the propriety of sentence. The Apex Court as the final reviewing authority has “a far more serious and intensive duty to discharge. The Court not only has to ensure that award of death penalty does not become a perfunctory exercise of discretion under Section 302 after an ostensible consideration of rarest of rare doctrine, but also that the decision-making process survives the special rigours of procedural justice applicable in this regard.”\textsuperscript{5} Further, the Supreme Court has always held that death sentence would be subject to any order passed in exercise of the clemency powers of the President of India or the Governor of the State, as the case may be.

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\textsuperscript{3} National Human Rights Commission, Human Rights Manual For District Magistrate, 5 (1\textsuperscript{st} ed., National Human Rights Commission 2007)
\textsuperscript{4} Murthy, YSR, Human Rights Handbook, VII (1\textsuperscript{st} ed., LexisNexis Butterworth 2001)
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6.2 HUMAN RIGHTS JURISPRUDENCE – INTERNATIONAL COVENANTS AND THE CONSTITUTION OF INDIA

Value of “Human Rights” has been described by Justice V. Krishna Iyer in the following matchless words:\(^6\):

“Human rights are writ on a large canvas, as large as the sky. The law-makers, lawyers and particularly, the judges, must make the printed text vibrant with human values, not be scared of consequences on the status quo order. The militant challenges of today need a mobilisation of revolutionary consciousness sans which civilised systems cease to exist. Remember, we are all active navigators, not idle passengers, on spaceship earth as it ascends to celestial levels of the glorious human future.”

Human rights are the basic, inherent, immutable and inalienable rights to which a person is entitled simply by virtue of his being born a human. They are such rights which are to be made available as a matter of right. The Constitution and legislations of a civilised country recognise them since they are so quintessentially part of every human being. That is why every democratic country committed to the rule of law put into force mechanisms for their enforcement and protection\(^7\).

Freedom cannot last long unless it is coupled with order, freedom can never exist without order, freedom and order may coexist. Man being a rational individual has to live in harmony with equal rights of others and more differently for the attainment of antithetic desires. This intertwined network is difficult to delineate within defined spheres of conduct within which freedom of action may be confined. Therefore, liberty would not always be an absolute licence but must arm itself within the confines of law. Thus the essence of civil liberty is to keep alive the freedom of the individual subject to the limitation of social control which could be adjusted according to the needs of the dynamic social evolution\(^8\).

No civilised society would countenance that a citizen has a fundamental right to trade or business in activities which are criminal in propensity, immoral, obnoxious and injurious to health, safety and welfare of the general public\(^9\). Justice is supreme and justice ought to be beneficial for the society so that the society is placed in a better-off situation. Law courts exist for the society and ought to rise up to the occasion to do the needful in the matter, and

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\(^6\) In his Tagore Law Lecture, The Dialectics and Dynamics of Human Rights in India [referred to in Ram Deo Chauhan v. Bani Kant Das, (2010) 14 SCC 209]

\(^7\) Suthendraraja v. State, (1999) 9 SCC 323 para 47

\(^8\) Kartar Singh & Others v. State of Punjab, (1994) 3 SCC 569

\(^9\) PN Krishna Lal v. Govt. of Kerala, 1995 Supp. (2) SCC 187
as such ought to act in a manner so as to subserve the basic requirement of the society. It is a
requirement of the society and the law must respond to its need. … In the present-day society,
crime is now considered a social problem and by reason therefore a tremendous change even
conceptually is being seen in the legal horizon so far as the punishment is concerned.  

The principles of rule of law and due process are closely linked with human rights
protection. Such rights can be protected effectively when a citizen has recourse to the courts
of law.  

The mood and temper of the public with regard to the treatment of crime and criminals is one of the unfailing tests of the civilisation of any country. A calm, dispassionate,
recognition of the rights of the accused and even of the convicted … mark and measure the
stored-up strength of a nation, and are sign and proof of the living virtue in it.  

The Constitution of India is highly valued for its articulation. One such astute drafting is Article
21 of the Constitution which postulates that every human being has an inherent right to life
and mandates that no person shall be deprived of his life or personal liberty except according
to the procedure established by law. Over the span of years, the Supreme Court has expanded
the horizon of “right to life” guaranteed under the Constitution to balance with the progress
of human life. 

Human rights are uniformly recognized throughout the universe. The Universal
Declaration of Human Rights, the International Covenant on Civil and Political Rights, 1966
and other international covenants recognize the observance of certain universal rights,
articulated therein, to be human rights, and these are acknowledged and accepted as equal and
inalienable and necessary for the inherent dignity and development of an individual.

Article 10 of the Universal Declaration of Human Rights, 1948 states that “everyone
is entitled in full equality to a fair and public hearing by an independent and impartial
tribunal, in the determination of his rights and obligations and of any criminal charge against
him.” Article 11(1) provides that “everyone charged with penal offences has a right to be
presumed innocent until proved guilty according to law in a public trial at which he has had
all the guarantees necessary for his defence.”

11 Mohd. Hussain v. State (Govt. of NCT of Delhi), (2012) 2 SCC 584
12 Sir Winston Churchill as quoted by C.H. ROLPH in COMMONSENSE ABOUT CRIME AND PUNISHMENT, p. 175
13 Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1
Article 6(1) of the International Covenant on Civil and Political Rights, 1966 states that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” Article 6(4) states that “anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.” Article 14 guarantees to the citizens of nations signatory to that covenant various rights in the determination of any criminal charge and confers on them the minimum guarantees. Article 14(2) states that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. Article 14(3)(d) entitles the person facing the criminal charge either to defend himself in person or through the assistance of a counsel of his choice and if he does not have legal assistance, to be informed of his right and provide him the legal assistance without payment in case he does not have sufficient means to pay for it. United Nations’ Economic and Social Council vide Resolution 1984/50 dated 25th May 1984 adopted certain safeguards (referred to supra) covering the basic guarantees to be respected in criminal justice proceedings to ensure the rights of the offenders charged with a capital offence. 14

The salutary features mentioned above which came to be introduced in international covenants from time to time already formed part of the Constitution of India and other legislations. Article 20 of the Constitution of India provides that “no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.” Article 21 commands in emphatic terms that “no person shall be deprived of his life or personal liberty except according to the procedure established by law.” Article 22(1) states that “no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.” Article 39-A casts a duty on the State to ensure that justice is not denied by reason of economic or other disabilities in the legal system and to provide free legal aid to every citizen with economic or other disabilities. Articles 72 and 161 provides for grant of pardon.

If a person has been guaranteed certain rights either under the Constitution or under an International Covenant or under a law, and he is denied access to such a right, then it amounts to a clear violation of his human rights. However, India’s commitment does not go beyond what is prohibited in the Constitution and the Indian Penal Code and the Criminal Procedure Code. The spirit of the international convention has to be kept in view in considering the validity of the impugned provisions and their applications.  

In Alok Nath Dutta v. State of W.B., the Supreme Court noted that “there has been a growing demand in the international fora that death penalty should be abolished. Pursuant to or in furtherance of the pressure exorted by various international NGOs, several countries have abolished death penalty. The superior courts of several countries have been considering the said demand keeping in view the international covenants, conventions and protocol.”

In Swamy Shraddananda v. State of Karnataka, the Supreme Court discussed and referred to several cases and observed that “reference to the decision of other jurisdictions and/or the recent trend in the international fora has not been referred to by way of precedents or even a persuasive value but the court in this age cannot afford to put down blinkers on its window to the outside world.”

In Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, the Supreme Court further noted that “we are also aware that on 18-12-2007, the United Nations General Assembly adopted Resolution 62/149 calling upon countries that retain the death penalty to establish a worldwide moratorium on executions with a view to abolishing the death penalty. India is, however, one of the 59 nations that retain the death penalty. Credible research, perhaps by the Law Commission of India or the National Human Rights Commission may allow for an up-to-date and informed discussion and debate on the subject.”

It is worthwhile to refer to the decision of the Supreme Court in Ram Deo Chauhan v. Bank Kanta Das, wherein the Court discussed the issue of human rights and the role of the National Human Rights Commission in the following words:

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15 P.N. Krishna Lal v. Govt. of Kerala, 1995 Supp. (2) SCC 187
“47. Human rights are the basic, inherent, immutable and inalienable rights to which a person is entitled simply by virtue of his being born a human. They are such rights which are to be made available as a matter of right. The Constitution and legislations of a civilised country recognise them since they are so quintessentially part of every human being. That is why every democratic country committed to the rule of law put into force mechanisms for their enforcement and protection.

49. Possibly considering the wide sweep of such basic rights, the definition of “human rights” in the 1993 Act has been designedly kept very broad to encompass within it all the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India. Thus, if a person has been guaranteed certain rights either under the Constitution or under an International Covenant or under a law, and he is denied access to such a right, then it amounts to a clear violation of his human rights and NHRC has the jurisdiction to intervene for protecting it.”

The abovementioned cases indicate welcoming discussion on human rights jurisprudence at transnational level and its impact in Indian judicial system. The decision in Ram Deo Chauhan has infused a new life into human rights jurisprudence thereby enlarging the ambit and scope of human rights jurisprudence by recognizing that if a person has been guaranteed certain rights either under the Constitution or under an International Covenant or under a law, and he is denied access to such a right, then it amounts to a clear violation of his human rights and NHRC has the jurisdiction to intervene for protecting it.

In Shankar Kisanrao Khade, the Supreme Court observed that “while the standard applied by the judiciary is that of the rarest of rare principle (however subjective or Judge-centric it may be in its application), the standard applied by the executive in granting commutation is not known. This may also need to be considered by the Law Commission of India.”

In the above background of the decisions, the Law Commission of India once again considered the issue in question in its 262nd report.

### 6.3 WIDENING SCOPE OF ARTICLE 21 OF THE CONSTITUTION OF INDIA

Life is said to be the most sublime creation of God. It is this belief and conception which lies at the root of the arguments, and forceful at that, by many religious denominations that human beings cannot take away life, as they cannot give life. Article 21 of the

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21 Jacob George (Dr.) v. State of Kerala, (1994) 3 SCC 430
Constitution of India mandates that no person shall be deprived of his life or personal liberty except according to the procedure established by law. The citizen’s right to life and personal liberty are guaranteed by Article 21 irrespective of his political beliefs, class, creed or religion. The Constitution has by Article 21 itself forged certain procedural safeguards for protection to the citizen of his life and personal liberty. The idealistic considerations as to the inherent worth and dignity of man is a fundamental and pervasive theme of the Constitution. Article 21 is said to be the heart of our Constitution. Forty-fourth Amendment Act of 1978 of the Constitution provided that Article 21 cannot be suspended even during the proclamation of emergency under Article 359.

Article 21 has been brought before the Supreme Court for its interpretation on various occasions. Initial restrictive interpretation of Article 21 came to be widened by the Supreme Court in later years.

*A.K. Gopalan v. State of Madras* was the first case in which the Supreme Court was called upon to determine how far the Constitution has secured personal liberty to the citizens of this country. The Court gave very restrictive interpretation to the words “life”, “personal liberty” and “procedure established by law”. *A.K. Gopalan* became a leading case concerning Article 21 of the Constitution. However, the restrictive interpretation given in the said case has not been followed in subsequent decisions. After *A.K. Gopalan*, the point in issue was whether the reasonableness of a law can be examined with reference to Article 19 which fell for consideration before the Supreme Court in *Rustom Cavasjee Cooper (Banks Nationalisation) v. Union of India*. The Supreme Court held thus:

“51. Limitations prescribed for ensuring due exercise of the authority of the State to deprive a person of his property and of the power to compulsorily acquire his property are, therefore, specific classes of limitations on the right to property falling within Article 19(1)(f). Property may be compulsorily acquired only for a public purpose. Where the law provides for compulsory acquisition of property for a public purpose it may be presumed that the acquisition or the law relating thereto imposes a reasonable restriction in the interest of the general public. If there is no public purpose to sustain compulsory acquisition, the law violates Article 31(2). If the acquisition is for a public purpose, substantive reasonableness of the restriction which includes deprivation may, unless otherwise established, be presumed, but enquiry into reasonableness of

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24 *Rustom Cavasjee Cooper (Banks Nationalisation) v. Union of India*, (1970) 1 SCC 248
the procedural provisions will not be excluded. For instance if a tribunal is authorised by the Act to determine compensation for property compulsorily acquired, without hearing the owner of the property, the Act would be liable to be struck down under Article 19(1)(f).

52. ... The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights.

53. ... the expression “law” means a law which is within the competence of the Legislature, and does not impair the guarantee of the rights in Part III. We are unable, therefore, to agree that Articles 19(1)(1) and 31(2) are mutually exclusive.”

The ratio of the above judgment that Articles 19(1)(f) and 31(2) are not mutually exclusive was made applicable to Articles 19 and 21 of the Constitution. To the extent of this inter-relationship, R.C. Cooper overruled A.K. Gopalan.

It is needless to mention here that ambit and scope of Article 21 was widened by the Supreme Court in its landmark decision in Maneka Gandhi v. Union of India25, which transformed the judicial view of its interpretation implying many more fundamental rights from Article 21. The facts of the said case read as under:

“The petitioner who was the holder of the passport under the Passports Act, 1967 received a letter from the Regional Passport Officer, Delhi intimating to her that it has been decided by the Government of India to impound her passport under Section 10(3)(c) of the Act in public interest and requiring her to surrender the passport within seven days from the date of receipt of the letter. The action of the Government was impugned.”

The Court held thus:

“The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be “right and just and fair” and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

25 Maneka Gandhi v. Union of India, (1978) 1 SCC 248
It is hoped that such cases will not recur under a Government constitutionally committed to uphold freedom and liberty but it is well to remember, at all times, that eternal vigilance is the price of liberty, for history shows that it is always subtle and insidious encroachments made ostensibly for a good cause that imperceptibly but surely corrode the foundations of liberty.

In a democratic society governed by the rule of law, it is expected of the Government that it should act not only constitutionally and legally but also fairly and justly towards the citizen.”

The ruling in *Maneka Gandhi* has been followed consistently in subsequent cases.

The Supreme Court in another decision in *Francis Coralie Mullan v. Administrator, Union Territory of Delhi* held that “the right to life protected under Article 21 is not confined merely to the right to physical existence, but it also includes within its broad matrix the right to the use of every faculty or limb through which life is enjoyed as also the right to live with basic human dignity. The State cannot therefore by law or otherwise deprive any person of the right to live with basic human dignity and hence torture or cruel, inhuman or degrading treatment or punishment, which trenches upon human dignity, would be impermissible under the Constitution.” The Supreme Court thus elevated immunity against torture or cruel, inhuman or degrading treatment or punishment to the status of a fundamental right under Article 21, though it is not specifically enumerated as a fundamental right in the Constitution and incorporated Article 7 of the International covenant on Civil and Political Rights into the constitutional jurisprudence of the country.

In a recent landmark judgment of the nine-Judge Constitution Bench in *Justice K.S. Puttaswamy (Retd.) v. Union of India*, it is authoritatively held that “right to life enshrined in Article 21 includes right to privacy. One of the facets of this right acknowledged is an individual’s decision to refuse life prolonging medical treatment or terminate his life.”

In recent past, in *Rishi Malhotra v. Union of India*, a submission has been before the Supreme Court of India that when a man is hanged, his dignity is destroyed. A man must have dignity even in his death and when dignity at the time of death is lost, living the life with dignity is dainted. A convict whose life has to end because of the conviction and the

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26 *Francis Coralie Mullan v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608
28 *Justice KS Puttaswamy (Retd.) v Union of India*, (2017) 10 SCC 1
29 *Rishi Malhotra v. Union of India*, Writ Petition (Criminal) No.145 of 2017
sentence he should not be compelled to suffer the pain of hanging. The Supreme Court while issuing notice on the petition observed that “though we do not intend to advert to the same at present, yet it may be observed, prima facie, that legislature can think of some other mode by which a convict who, in law, has to face the death sentence should die without pain. It has been said for centuries that nothing can be equated with painless death.” This petition is now pending consideration before the Supreme Court.

In another recent decision in \textit{Common Cause v. Union of India & Another},\textsuperscript{30} the Supreme Court dealt with a petition seeking declaration that “right to die with dignity” is a fundamental right within the fold of “right to live with dignity” guaranteed under Article 21 of the Constitution; and to issue directions to to ensure that persons of deteriorated health or terminally ill patients should be able to execute a document titled “My Living Will and Attorney Authorisation” which can be presented to the hospital for appropriate action in the event of the executant being admitted to the hospital with serious illness which may threaten termination of the life of the executant. The Supreme Court laid down certain guidelines and upheld the right of a dying man to die with dignity when life is ebbing out. The directive and guidelines shall remain in force till the Parliament brings a legislation in the field.

The abovementioned decisions are glaring examples of widening scope of Article 21 of the Constitution of India.

\subsection*{6.4 CONSTITUTIONAL VALIDITY OF DEATH SENTENCE}

The constitutional validity of death sentence has been challenged several times. In \textit{Jagmohan Singh v. State of U.P.},\textsuperscript{31} the Supreme Court upheld the constitutional validity of death sentence by observing thus:

“Capital punishment cannot be described as unusual because that kind of punishment has been with us from ancient times right up to the present day though the number of offences for which it can be imposed has continuously dwindled. The framers of our Constitution were well aware of the existence of capital punishment as a permissible punishment under the law. The Constitution-makers had recognised the death sentence as a permissible punishment and had made constitutional provisions for appeal, reprieve and the like. Article 21 provides that no person shall be deprived of his life except according to procedure established by law. \textbf{The implication is very clear. Deprivation of life is constitutionally permissible if that is done}

\textsuperscript{30} \textit{Common Cause v. Union of India & Another}, Writ Petition (Civil) No.215 of 2005, Date of Decision: 09.03.2018

\textsuperscript{31} \textit{Jagmohan Singh v. State of U.P.}, (1973) 1 SCC 20
according to procedure established by law. In the face of these indications of constitutional postulates it will be very difficult to hold that capital sentence was regarded per se unreasonable or not in the public interest.

In dealing with the question of reasonableness, we cannot ignore the procedural safeguards provided by the statute. It will be thus seen that there are inbuilt procedural safeguards against any hasty decision. If the Legislature decides to retain capital punishment for murder, it will be difficult for this Court in the absence of objective evidence regarding its unreasonableness to question the wisdom and propriety of the Legislature in retaining it. The representatives of the people do not welcome the prospect of abolishing capital punishment. In this state of affairs, we are not prepared to conclude that capital punishment, as such, is either unreasonable or not in the public interest.

The death sentence imposed after trial in accordance with the procedure established by law is not unconstitutional under Article 21.”

The decision in Jagmohan Singh was upheld in Bachan Singh.

The constitutional validity of death sentence once again came to be challenged in Shashi Nayar v. Union of India\(^{32}\). The Court held that no material has been placed to show that the view taken in Bachan Singh requires reconsideration. Further, a judicial notice can be taken of the fact that the law and order situation in the country has not only not improved since 1967 but has deteriorated over the years and is fast worsening today. The present is, therefore, the most inopportune time to reconsider the law on the subject. The writ petition was thus rejected.

In view of the foregoing, sentence of death stands constitutionally valid.

6.5 PUBLIC HANGING OF DEATH ROW CONVICTS

Issue relating to mode of execution of death sentence also came to be challenged before the Supreme Court in Deena & Others v. Union of India & Others.\(^{33}\) The Court held that “the system of hanging which is now in vogue consists of a mechanism which is easy to assemble. The preliminaries to the act of hanging are quick and simple and they are free from anything that would unnecessarily sharpen the poignancy of the prisoner's apprehension. The chances of an accident during the course of hanging can safely be excluded. The method is a quick and certain means of executing the extreme penalty of law. It eliminates the possibility of a lingering death. Unconsciousness supervenes almost instantaneously after the process is

\(^{32}\) Shashi Nayar v. Union of India, (1992) 1 SCC 96

\(^{33}\) Deena & Others v. Union of India & Others, (1983) 4 SCC 645
set in motion and the death of the prisoner follows as a result of the dislocation of the cervical vertebrae. The system of hanging, as now used, avoids to the full extent the chances of strangulation which results on account of too short a drop or of decapitation which results on account of too long a drop. The system is consistent with the obligation of the State to ensure that the process of execution is conducted with decency and decorum without involving degradation or brutality of any kind.” The Court further held that “on the question of pain involved in a punishment, the concern of law has to be to ensure that the various steps which are attendant upon or incidental to the execution of any sentence, more so the death sentence, do not constitute punishments by themselves. If a prisoner is sentenced to death, it is lawful to execute that punishment and that only. He cannot be subjected to humiliation, torture or degradation before the execution of that sentence, not even as necessary steps in the execution of that sentence. That would amount to inflicting a punishment on the prisoner which does not have the authority of law. Humaneness is the hallmark of civilised laws. Therefore, torture, brutality, barbarity, humiliation and degradation of any kind is impermissible in the execution of any sentence. The process of hanging does not involve any of these, directly, indirectly or incidentally.”

In *Attorney General of India v. Lachma Devi & Others*34, the Supreme Court dealt with an interesting case where the High Court of Rajasthan had directed execution of death sentence by public hanging at the Stadium Ground or Ramlila Ground of Jaipur after giving widespread publicity - through the media - of the date, time and place of such execution. The Supreme Court held that the execution of death sentence by public hanging would be a barbaric practice clearly violative of Article 21 of the Constitution. Public hanging is a revolting spectacle harking back to earlier centuries. The direction for execution of the death sentence by public hanging is, to our mind, unconstitutional and we may make it clear that if any Jail Manual were to provide public hanging, we would declare it to be violative of Article 21 of the Constitution. It is undoubtedly true that the crime of which the accused have been found to be guilty is barbaric and a disgrace and shame on any civilised society which no society should tolerate; but a barbaric crime does not have to be visited with a barbaric penalty such as public hanging.

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34 *Attorney General of India v. Lachma Devi & Others*, 1989 Supp. (1) SCC 264
It is not only the victims of crime that require soothing balm, but also the incidental victims like the family, the co-sufferers and to a relatively large extent the society too. The judiciary has a paramount duty to safeguard the rights of the victims as diligently as those of the perpetrators. Judges while imposing sentence, should never be swayed away by any kind of individual philosophy and predilections. It should never have the flavour of Judge-centric attitude or perception. It has to satisfy the test laid down in various precedents.

Before discussing the aspect relating to evolution of Rarest of Rare formula by the judiciary, it is worthy to mention here that our Parliamentarians are very much conscious about the rights of the people including the accused and the victims. The Parliamentarians were the first to suggest evolving of Rarest of Rare formula in capital punishment cases.

On 23rd March 1956, Shri M.L. Agarwal, Member of Parliament, sought leave to introduce a Bill further to amend the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1898 to provide for abolition of capital punishment. The motion was adopted. The bill was introduced. On 24th August 1956, Shri Mukund Lal Agarwal sought consideration of the bill for abolition of capital punishment. After detailed discussion, on 23rd November 1956, the bill was negatived. It is interesting to note that the principle of rarest of rare expounded by the Supreme Court of India in 1980 in *Bachan Singh* was propounded by our Parliamentarians in the said debate of 1956. Pandit Thakur Dass Bhargav observed as follows:

> मैं श्री मुकुन्द लाल अगरवाल को मुबारकबाद देता हूँ कि उन्होंने एक ऐसे मजबुत को इस बिल के अन्दर लाकर हाउस के सामने रखकर अभी नहीं रखी था और जो दृष्टिबद्ध (वादविवाद के योग्य) भी है।
> मैं इस विचार का मानता हूँ कि रःकेज (किंचित मामलों) में फांसी की सजा चाहिए क्योंकि इसके जज ने हमेशा ही सर्टन्टी (निरिच्छितता) नहीं हो सकती। इसलिए इस सजा को उन केसेज के लिये ही होना चाहिए जिसे सर्टन्टी हो।

37 Lok Sabha Debates, Criminal Law Amendment Bill (Reg.: Abolition of Capital Punishment), 23rd November 1956 Volume 9 p. 915
In the same Parliamentary Debate, Shri Raghubir Sahai observed that “if any punishment in India has got a deterrent effect, it is the capital punishment. We find that the High Courts and the Supreme Court are very very cautious and they are very reluctant to maintain the capital punishment. Only in extreme cases, they would award that punishment. The present state of society does not permit us to say that the abolition of the capital punishment will be to the good of the country and to the society in which we live. To say that capital punishment should be abolished, I think, will be something very indiscreet.”

It is needless to mention here that in pre-1955 position\(^{38}\), the normal rule was to sentence to death a person convicted for murder and to impose the lesser sentence for reasons to be recorded in writing. The extreme penalty was to be inflicted unless special reasons could be found to justify the lesser sentence. The 1955 amendment\(^ {39}\) in the Code of Criminal Procedure left the Courts “free to award either sentence”. With the enactment of

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\(^{38}\) Section 367 (5) Cr.P.C. “if the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall, in its judgment state the reasons why sentence of death was not passed”.

\(^{39}\) By the Amendment Act 26 of 1955 a new sub-section, sub-section (5), was substituted for the former sub-section (5) which does not contain the provision making it incumbent for a judge to record his reasons for imposing a lesser penalty. The discretion of the court in deciding whether to impose the sentence of death or of imprisonment for life became wider.
1973 Code\textsuperscript{40}, a significant change came into practice. The life imprisonment for murder became a rule and capital punishment an exception to be resorted to for reasons to be stated. Further, there was a development at international level. The International Covenant on Civil and Political Rights, 1966 came into force in 1976 and India being signatory to this covenant committed itself to the progressive abolition of death penalty. Therefore, a need had arisen for consideration of the constitutional validity of the death penalty.

The challenge to the constitutional validity of death sentence in \textit{Jagmohan Singh} belongs to pre-1973 era. After this decision, winds of compassion for criminals started blowing and affecting law and logic, the Judge and the Legislators alike. The scale of justice also started tilting more towards humanistic approach. Humane considerations of administering justice tempered with mercy started impelling the courts to recognise it as an ameliorating circumstance.

Subsequent to the decision in \textit{Jagmohan Singh}, certain developments took place. The 1973 Cr.P.C. Amendment came into existence; in \textit{Maneka Gandhi} the Supreme Court held that every law of punitive detention both in its procedural and substantive aspects must pass the test of reasonableness on a collective reading of articles 14, 19 and 21 of the Constitution of India. In \textit{Rajendra Prasad v. State of U.P.}\textsuperscript{41}, the Court (per Krishna Iyer, J.) held that “special reasons necessary for imposing the death penalty must relate not to the crime as such but to the criminal.” It was further held that “death sentence can be awarded only in certain restricted categories.” In the same judgment, Hon’ble Sen, J. in his dissenting opinion observed that “failure to impose a death sentence in such grave cases where it is a crime against the society - particularly in cases of murders committed with extreme brutality - will bring to naught the sentence of death provided by Section 302 of the Indian Penal Code, 1860. To allow the appellants to escape with the lesser punishment after they had committed such intentional, cold-blooded, deliberate and brutal murders will deprive the law of its effectiveness and result in travesty of justice.”

\textsuperscript{40} By the Code of Criminal Procedure, 1973 (Act 2 of 1974), sub-section (3) to Section 354 came to be introduced: “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.

\textsuperscript{41} \textit{Rajendra Prasad v. State of U.P.}, (1979) 3 SCC 646
In a subsequent decision *Bachan Singh v. State of Punjab*\(^{42}\), the Supreme Court had an occasion to consider the ratio of the decision in *Rajendra Singh* and *Jagmohan Singh*. Disagreeing with the majority opinion in *Rajendra Prasad*, mainly on the ground that it is not in conformity with the decision of the Constitutional Bench of this Court in *Jagmohan case*, the matter was referred to a larger Bench. Apart from the said reference, several persons convicted of murders and sentenced to death also filed writ petitions under Article 32 of the Constitution. All the matters were heard together by a larger Bench in *Bachan Singh v. State of Punjab*.\(^{43}\)

The decision of the larger Bench in *Bachan Singh* became a celebrated decision in the field of capital sentencing. In the said decision, the majority opinion affirmed the decision in *Jagmohan Singh* and overruled *Rajendra Prasad* insofar as it sought to restrict the imposition of death penalty only in cases where the security of the state and society, public order and the interests of the general public were threatened. The Court held that “the provision of death penalty as an alternative punishment for murder is not unreasonable and is in public interest. The impugned provision in section 302 IPC violates neither the letter nor ethos of Articles 19 or 21 of the Constitution. The normal sentence for murder is life imprisonment and the sentence of death can be passed only in gravest cases of extreme culpability.” The Court while dealing with “special reasons” held that “for making the choice of punishment or for ascertaining the existence or absence of special reasons in that context, the court must pay due regard both to the crime and the criminal. 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.”

It is also important to note that in the said decision, there was also a dissenting opinion\(^{44}\) of Hon’ble Bhagwati, J. His Lordship held that “death penalty has no rational nexus with any legitimate penological goal or any rational penological purpose and it is arbitrary and irrational and hence violative of Articles 14 and 21 of the Constitution. There can be no doubt that 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.

\(^{42}\) *Bachan Singh v. State of Punjab*, (1979) 3 SCC 727


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.” His Lordship favoured death sentence in exceptional cases as follows:

“303. Before I part with this topic I may point out that only way in which the, vice of arbitrariness in the imposition of death penalty can be removed is by the law providing that in every case where the death sentence is confirmed by the High Court there shall be an automatic review of the death sentence by the Supreme Court sitting as a whole and the death sentence shall not be affirmed or imposed by the Supreme Court unless it is approved unanimously by the entire court sitting en banc and the only exceptional cases in which death sentence may be affirmed or imposed should be legislatively limited to those where the offender is found to be so depraved that it is not possible to reform him by any curative or rehabilitative therapy and even after his release he would be a serious menace to the society and therefore in the interest of the society he is required to be eliminated. Of course, for reasons I have already discussed such exceptional cases would be practically nil because it is almost impossible to predicate of any person that he is beyond reformation or redemption and therefore, from a practical point of view death penalty would be almost non-existent. But theoretically it may be possible to say that if the State is in a position to establish positively that the offender is such a social monster that even after suffering life imprisonment and undergoing reformatory and rehabilitative therapy, he can never be reclaimed for the society, then he may be awarded death penalty. If this test is legislatively adopted and applied by following the procedure mentioned above, the imposition of death penalty may be rescued from the vice of arbitrariness and caprice. But that is not so under the law as it stands today.”

In another celebrated decision in Machhi Singh v. State of Punjab\(^45\), the “rarest of rare cases” formula emerged in Bachan Singh once again engaged attention of the Court as the identification of the guidelines spelled out in that case in order to determine whether or not death sentence should be imposed was creating problem and required to be addressed. The Court noted the reasons why the community as a whole does not endorse the humanistic approach reflected in ‘death sentence in no case’ doctrine and finally held that if upon taking an overall global view of all the circumstances and taking into account the answers to the questions posed by way of the test for the rarest or rare case, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

\(^{45}\) Machhi Singh v. State of Punjab, (1983) 3 SCC 470
The Rarest of Rare Cases formula came to be evolved in the abovementioned two decisions which have finally proved to be the terra firma in the field of death sentence cases. These cases laid down the safeguards for the accused in cases of death penalty, which have been adhered to in series of subsequent cases strengthening the humanistic approach in such matters.

The decision in *Bachan Singh* came to be reasserted in *Swamy Shraddananda (2) v. State of Karnataka* as follows:

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

Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in *Bachan Singh* besides being in accord with the modern trends in penology.”

*Swamy Shraddananda (2)* thus reasserted the decision of *Bachan Singh* to the extent that where a sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate, the Courts will prefer imposing sentence somewhere between 14 years imprisonment and death.

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46 *Swamy Shraddananda (2) v. State of Karnataka*, (2008) 13 SCC 767
It is worthwhile to refer to the decisions of the Supreme Court in *Ediga Anamma* v. *State of A.P.*\(^{47}\) and *Dalbir Singh* v. *State of Punjab*\(^{48}\). In *Ediga Anamma*, the Supreme Court held that in contemporary India, the *via media* of legal deprivation of life being the exception and long deprivation of liberty the rule fits the social mood and realities and the direction of the penal and processual laws. While deterrence through threat of death may still be a promising strategy in some frightful areas of murderous crime, to espouse a monolithic theory of its deterrent efficacy is unscientific and so we think it right to shift the emphasis, to accept composite factors of penal strategy and not to put all the punitive eggs in the “hanging” basket but hopefully to try the humane mix. The Court also held that where the murderer is too young or too old the clemency of penal justice helps him. Where the offender suffers from socio-economic, psychic or penal compulsions insufficient 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.

In *Dalbir Singh*, the Supreme Court devised the *via media* approach to adequately punish an accused for a period over and above 14 years imprisonment. The Court held as follows:

“… we may suggest that life imprisonment which strictly means imprisonment for the whole of the man’s life, but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder.”

In many cases\(^{49}\) whenever death sentence has been commuted to life imprisonment, where the offence alleged was serious in nature, while awarding life imprisonment, the Supreme Court has imposed imprisonment of 20 years or 25 years or 30 years or 35 years mentioning that if

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\(^{48}\) *Dalbir Singh* v. *State of Punjab*, (1979) 3 SCC 745  
the appropriate Government wants to give remission, the same has to be considered only after the expiry of the said period. This kind of fixed term of non-remittable term of incarceration upon commutation of death sentence is an alternative devised by the Supreme Court as a via media to impose proportional punishment between “life imprisonment”, which usually passes off after completion of 14 years of imprisonment by grant of remissions by the Executive, and “death sentence”. The Supreme Court laid down such a pathway as it found in several cases that death penalty falls little short and the life imprisonment with remission seems inadequate sentence.

In *Union of India v. V. Sriharan*[^50], the via media approach evolved in *Swamy Shraddananda (2)* carving out a special category of punishment came up for consideration[^51] and the Court held that “a special category of sentence instead of death can be substituted by the punishment of imprisonment for life or for a term exceeding 14 years.”

It is worthy to mention here that in *Sangeet v. State of Haryana*[^52], the Supreme Court considered the power of remission vested in the appropriate Government under Section 432 CrPC as follows:

> “55. A reading of some recent decisions delivered by this Court seems to suggest that the remission power of the appropriate Government has effectively been nullified by awarding sentences of 20 years, 25 years and in some cases without any remission. Is this permissible? Can this Court (or any court for that matter) restrain the appropriate Government from granting remission of a sentence to a convict? What this Court has done in *Swamy Shraddananda* and several other cases, by giving a sentence in a capital offence of 20 years’ or 30 years’ imprisonment without remission, is to effectively injunct the appropriate Government from exercising its power of remission for the specified period. In our opinion, this issue needs further and greater discussion, but as at present advised, we are of the opinion that this is not permissible. The appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence, whatever be the reason.”

[^50]: *Union of India v. V. Sriharan*, (2014) 11 SCC 1
[^51]: Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of *Swamy Shraddananda (supra)*, a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?
In *V. Sriharan*, the Constitution Bench overruled the decision of this Court in *Sangeet* to the extent that the Court cannot prohibit the State from granting remission.

In *Sunil Damodar Gaikwad v. State of Maharashtra*[^53], the Court once again reasserted the ratio laid down in *Bachan Singh* and *Machhi Singh* by observing thus:

“When there are binding decisions, judicial comity expects and requires the same to be followed. Judicial comity is an integral part of judicial discipline and judicial discipline the cornerstone of judicial integrity. No doubt, in case there are newer dimensions not in conflict with the ratio of the larger Bench decisions or where there is anything to be added to and explained, it is always permissible to introduce the same. **Poverty, socio-economic, psychic compulsions, undeserved adversities in life are thus some of the mitigating factors to be considered, in addition to those indicated in Bachan Singh and Machhi Singh cases.** Thus, we are bound to analyse the facts in the light of the aggravating and mitigating factors indicated in the binding decisions which have influenced the commission of the crime, the criminal, and his circumstances, while considering the sentence.”

Poverty, socio-economic, psychic compulsions and undeserved adversities in life are some additions to the mitigating factors. Such grounds have also been considered in certain other cases while commuting death sentence to life imprisonment.

In 2010, the Supreme Court dealt with another case[^54] wherein abduction and murders took place for ransom. While commuting death sentence to life imprisonment, the Supreme Court observed that “another factor which unfortunately has been left out in much judicial decision-making in sentencing is the socio-economic factors leading to crime. We at no stage suggest that economic depravity justify moral depravity, but we certainly recognise that in the real world, such factors may lead a person to crime. The 48th Report of the Law Commission also reflected this concern. Therefore, we believe, socio-economic factors might not dilute guilt, but they may amount to mitigating circumstances. Socio-economic factors lead us to another related mitigating factor i.e. the ability of the guilty to reform. It may not be misplaced to note that a criminal who commits crimes due to his economic backwardness is most likely to reform. This Court on many previous occasions has held that this ability to reform amounts to a mitigating factor in cases of death penalty.”

For the sake of humanistic approach, the Supreme Court in some decisions has critically examined the scheme of Rarest of Rare and suggested to revisit the decisions in *Bachan Singh* and *Machhi Singh*.

In *Aloke Nath Dutta v. State of W.B.*\(^{55}\), the Supreme Court after examining various judgments over the past two decades in which the issues of *rarest of rare* fell for consideration, admitted the failure on the part of this Court to evolve a uniform sentencing policy in capital punishment cases and conclude as to what amounted to *rarest of rare*. Disparity in sentencing has also been noted in *Swamy Shraddananda (1) v. State of Karnataka*\(^{56}\). In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*\(^{57}\), the Supreme Court observed 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. It is now clear that even 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. It can be safely said that the *Bachan Singh* threshold of the *rarest of rare* cases has been most variedly and inconsistently applied by the various High Courts as also this Court.” The Court held that “the nature, motive, and impact of crime, culpability, quality of evidence, socio-economic circumstances, impossibility of rehabilitation are some of the factors the Court may take into consideration while dealing with such cases.”

In *Swamy Shraddananda (2)*, the Supreme Court held that “the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the Judges constituting the Bench. The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system. Thus the overall

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\(^{56}\) *Swamy Shraddananda (1) v. State of Karnataka*, (2007) 12 SCC 288

\(^{57}\) *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498
larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied.”

In Sangeet, the Court noted that “in view of the inherent multitude of possibilities, the aggravating and mitigating circumstances approach has not been effectively implemented. Therefore, not only does the aggravating and mitigating circumstances approach need a fresh look but the necessity of adopting this approach also needs a fresh look in light of the conclusions in Bachan Singh. It appears to us that even though Bachan Singh intended “principled sentencing”, sentencing has now really become Judge-centric as highlighted in Swamy Shraddananda and Bariyar. This aspect of the sentencing policy in Phase-II as introduced by the Constitution Bench in Bachan Singh seems to have been lost in transition.”

To put at rest the contrary views relating to sentencing policy in death penalty cases, the Supreme Court in Oma v. State of Tamil Nadu58 held that “we have referred to the aforesaid decisions to highlight that this Court, on a number of occasions, has dealt with under what circumstances death penalty could be imposed and what are the mitigating factors not to impose such punishment. Illustrative guidelines have been provided, and, needless to say, it would depend upon the facts of each case. No straitjacket scale can be provided as has been said in a number of pronouncements.”

Despite there being abovementioned critical examination of the principle of Rarest of Rare in few cases, one aspect is very much clear that the principle of Rarest of Rare still works as a lighthouse for death penalty cases, though it needs reassertion in the wake of present day challenges.

6.7 JUDICIAL TRENDS

The question regarding appropriateness of capital sentence for murder has raised serious controversy in our country for many decades, sometimes with emotional overtones. It is very much essential to approach this important constitutional question with objectivity and proper measure of self-restraint. In quest of a just conclusion, the researcher went on to

58 Oma v. State of Tamil Nadu, (2013) 3 SCC 440 at page 454
travel on a less travelled road to get an opportunity to peep into 578 decisions of the Supreme Court of India.

6.7.1 STATISTICS AT A GLANCE OF TRENDS (1950-2015) RELATING TO DEATH SENTENCE

Before commenting further, it would be worthy to mention the statistics of trends relating to death sentences awarded by the trial Courts and confirmed by the Supreme Court:

<table>
<thead>
<tr>
<th>Duration</th>
<th>No. of Cases</th>
<th>Death Sentence by Trial Court</th>
<th>Death Sentence by Supreme Court</th>
<th>Percentage of Confirmation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950-1955</td>
<td>26</td>
<td>38</td>
<td>19</td>
<td>50.00</td>
</tr>
<tr>
<td>1956-1960</td>
<td>22</td>
<td>39</td>
<td>31</td>
<td>79.48</td>
</tr>
<tr>
<td>1961-1965</td>
<td>16</td>
<td>36</td>
<td>23</td>
<td>63.88</td>
</tr>
<tr>
<td>1966-1970</td>
<td>32</td>
<td>40</td>
<td>29</td>
<td>72.50</td>
</tr>
<tr>
<td>1971-1975</td>
<td>104</td>
<td>153</td>
<td>51</td>
<td>33.33</td>
</tr>
<tr>
<td>1976-1980</td>
<td>49</td>
<td>71</td>
<td>18</td>
<td>25.35</td>
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<td>1981-1985</td>
<td>33</td>
<td>58</td>
<td>12</td>
<td>20.68</td>
</tr>
<tr>
<td>1986-1990</td>
<td>20</td>
<td>39</td>
<td>10</td>
<td>25.64</td>
</tr>
<tr>
<td>1996-2000</td>
<td>58</td>
<td>132</td>
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<td>2006-2010</td>
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<td>34.52</td>
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<tr>
<td>2011-2015</td>
<td>80</td>
<td>153</td>
<td>22</td>
<td>14.47</td>
</tr>
</tbody>
</table>

A survey of the decisions for the period 1950-1970 makes it clear that the Courts were strictly adhering to the legislation of the Parliament. The humanistic approach towards the accused has been ingrained in our Constitutional provisions and the Judges have been very well aware of these provisions which may be noticed in some of the initial cases. The humanistic approach of the Courts came to be widened by the passage of time. The changes in law in the years 1955 and 1973 are clearly reflected in the above statistics. A sea-change came into sentencing regime after the evolution of Rarest-of-Rare Formula in the year 1980. From 1950 to 1970, 96 cases were decided and in these cases, the trial Court awarded 153 (15.19%) death sentences out of total 1007 death sentences. For the years 1971 to 1980, the trial Court decided 153 cases and awarded 225 (22.34%) death sentences. In comparison to death sentences awarded by the trial Courts, for the years 1950 to 1970, the Supreme Court confirmed 101 death sentences (66.01%) and for the years 1971 to 1980, 71 death sentences were confirmed (31.55%). The above chart clearly shows that in subsequent years the rate of confirmation of death sentences by the Supreme Court has been on the lower level. The guidelines laid down in *Bachan Singh* and *Machhi Singh* were the main reasons for the low rate of confirmation of death sentences.
In a series of decisions, the Supreme Court has also recognized the right of the undertrial prisoners by stressing the need for providing free legal aid\(^{59}\) and speedy & fair trial\(^{60}\), so as to achieve constitutional goal of providing access to justice to every segment of the society.

### 6.7.2 WITHERING AWAY MANDATORY DEATH SENTENCE

The legislature cannot make relevant considerations irrelevant or deprive the Courts of their power of judicial review. Withering away the power of judicial review renders the substantive right of appeal illusory and ineffective.

In **Mithu v. State of Punjab**\(^{61}\), the Supreme Court dealt with the challenge to Section 303 IPC providing for mandatory death sentence. The sum and substance of the argument was that the provision contained in Section 303 is wholly unreasonable and arbitrary and thereby, it violates Article 21 of the Constitution which affords the guarantee that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. Since the procedure by which Section 303 authorises the deprivation of life is unfair and unjust, the Section is unconstitutional. The Court examined the argument and struck down the provision. The Court held that “a savage sentence is anathema to the civilized jurisprudence of Article 21. Section 303 of the Penal Code violates the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law. The section was originally conceived to discourage assaults by life convicts on the prison staff, but the legislature chose language which far exceeded its intention. The Section also assumes that life convicts are a dangerous breed of humanity as a class. There shall be no mandatory sentence of death for the offence of murder.”


In *State of Punjab v. Dalbir Singh*\(^62\), section 27(3) of the Arms Act, 1959 having been enacted in clear contravention of Part III rights has been declared repugnant to Articles 14 and 21 and *ultra-vires* the Constitution. By providing imposition of mandatory death penalty, section 27(3) ran contrary to those statutory safeguards which give judiciary the discretion in the matter of imposing death penalty. While declaring this provision void, the Supreme Court also observed that it also deprives the judiciary from discharging its constitutional duties of judicial review whereby it has the power of using discretion in the sentencing procedure.

On the same theory, there has been a challenge\(^63\), in the High Court of Bombay, to Section 31A of the Narcotic Drugs and Psychotropic Substances Act, 1985 which provided for mandatory death penalty. The High Court held section 31A as violative of Article 21 of the Constitution. The Union Government argued before the High Court to construe the provision as directory by reading down the expression “shall be punishable with death” as “may be punishable with death” in relation to the offences covered under Section 31A of the NDPS Act. This argument was accepted by the High Court and didn’t declare the provision as unconstitutional.

In *Vikram Singh alias Vicky & Another v. Union of India & Others*\(^64\), the convict, who has been convicted under Sections 302 and 364-A IPC and whose sentence was upheld by the Supreme Court challenged constitutional validity of Section 364-A IPC being violative of Articles 14 and 21 of the Constitution. The case of the convict was that the provisions of Section 364-A are *ultra vires* because a simple kidnapping for ransom in which the victim is released without any harm to him/her with or without payment of the ransom demanded for his/her release, is also on a plain reading of Section 364-A, punishable with death without there being any guidelines in Section 364-A for the courts to follow while determining the quantum of punishment to be awarded in a given case. The Supreme Court examined the matter and held thus:

"... Given the background in which the law was enacted and the concern shown by the Parliament for the safety and security of the citizens and the unity, sovereignty and integrity of the country, the punishment prescribed for those committing any act contrary to Section 364A cannot be dubbed as so outrageously disproportionate to the nature of the offence as to call for the same being declared unconstitutional. Judicial discretion available to the Courts to choose one


\(^63\) CRLWP No.1784/2010 and CRLWP No.1790/2010 of the High Court of Bombay

\(^64\) *Vikram Singh alias Vicky & Another v. Union of India & Others*, (2015) 9 SCC 502
of the two sentences prescribed for those falling foul of Section 364A will doubtless be exercised by the Courts along judicially recognized lines and death sentences awarded only in the rarest of rare cases. But just because the sentence of death is a possible punishment that may be awarded in appropriate cases cannot make it per se inhuman or barbaric. In the ordinary course and in cases which qualify to be called rarest of the rare, death may be awarded only where kidnapping or abduction has resulted in the death either of the victim or anyone else in the course of the commission of the offence. Fact situations where the act which the accused is charged with is proved to be an act of terrorism threatening the very essence of our federal, secular and democratic structure may possibly be the only other situations where Courts may consider awarding the extreme penalty. But, short of death in such extreme and rarest of rare cases, imprisonment for life for a proved case of kidnapping or abduction will not qualify for being described as barbaric or inhuman so as to infringe the right to life guaranteed under Article 21 of the Constitution."

The Supreme Court has clearly laid down the law that in no case there will be a mandatory death sentence but just because the sentence of death is a possible punishment that may be awarded in appropriate cases cannot make it per se inhuman or barbaric.

The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. 65

6.8 IMPACT OF DELAY IN DISPOSAL OF APPEALS/MERCY PETITIONS AND/OR EXECUTION OF DEATH SENTENCE

There can be no attributes more important than the life and liberty of a citizen in a civilized society. Article 21 of the Constitution of India provides that no person shall be deprived of his life and liberty except in accordance with the procedure established by law. The imposition of death penalty on a convict is the procedure established by law which is subject to appeal and review. After exhausting all legal remedies, a convict has an option to

seek remedy under constitutional scheme of “Pardon” by moving a petition of mercy before the President of India or the Governor of a State, as the case may be.

The philosophy underlying the policy of pardon, in a democratic system, provides a fillip to the constitutional scheme of exercising an act of humanity leading towards achieving perfection over imperfect judicial decisions based on the strict criminal laws thereby achieving the vision of the fathers of the constitution by granting mercy, scrutinizing the validity of the threatened denial of life and personal liberty and correcting possible judicial error, on undeserving people adopting Gandhian philosophy with hope that good will finally prevail and rule over devils and evils. The rationale behind granting of pardons by the executives exercising the sovereign power mentioned above has been tested on the anvil of truth time and again and the Courts have hammered it being absolute and unfettered power, but of course on different theories and reasoning in tune with the maturing and developing society keeping in view the arena of international level.

The principle of checks and balances in a democratic society like ours has great significance as it not only controls the chariot but also the myriad kinds of theories sprouting in the mind of the charioteer thereby cautioning him to only follow the assigned path and finally setting the alleyway in an orderly fashion, failure of which may invest the charioteer to run amok.

In certain cases, the Supreme Court has refused to intervene in the constitutional power relating to grant of pardon by holding that all power, however majestic the dignitary wielding it shall be exercised in good faith, with intelligent and informed care and honestly for the public weal. Absolute, arbitrary, law-unto-oneself mala fide execution of public power, if gruesomely established, the Supreme Court may not be silent or impotent.

In *G. Krishta Goud v. State of U.P.*

66, the Supreme Court held that “as judges, we cannot rewrite the law whatever our views of urgent reforms, as citizens, may be. And the sentence of death having been awarded by the court, the judicial frontiers have been crossed and, however regrettable and irrevocable, taking of human life by the State’s coercive apparatus, may be, our sympathies have no jural relevance. So the new and expanding trend towards abolition of capital penalty, while true, cannot halt the hangman’s rope in this case. A constitutional order built on the founding faith of the rule of law may posit wide powers in

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high functionaries and validly exclude judge-power from eating these forbidden fruits.” The Court further held thus:

“All power, however majestic the dignitary wielding it shall be exercised in good faith, with intelligent and informed care and honestly for the public weal. … Absolute, arbitrary, law-unto-oneself mala fide execution of public power, if gruesomely established, the Supreme Court may not be silent or impotent.”

Mercy, like divinity, is amenable to unending exercise but in this mundane matter it is for the Head of State to act and not for the Apex Court. Possibly, Presidential power is wider but judicial power is embanked. The fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinize the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State. The fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinize the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State.

In Sher Singh v. State of Punjab, the Supreme Court observed that “we must take this opportunity to impress upon the Government of India and the State Governments that petitions filed under Articles 72 and 161 of the Constitution or under Sections 432 and 433 of the Criminal Procedure Code must be disposed of expeditiously”. The Court further observed that “A self-imposed rule should be followed by the executive authorities rigorously, that every such petition shall be disposed of within a period of three months from the date on which it is received. Long and interminable delays in the disposal of these petitions are a serious hurdle in the dispensation of justice and indeed, such delays tend to shake the confidence of the people in the very system of justice.”

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67 Shiv Mohan Singh v. State (Delhi Admn.), (1977) 2 SCC 238
68 Joseph Peter v. State of Goa, Daman and Diu, (1977) 3 SCC 280
69 Kehar Singh v. Union of India, (1989) 1 SCC 204
70 Sher Singh v. State of Punjab, (1983) 2 SCC 344
In view of the foregoing, it is clear that initially the Supreme Court was strict in entertaining the petitions after dismissal of the regular appeals on merit. The Supreme Court was not inclined to interfere within the domain of the pardoning power unless established exercise of absolute arbitrary execution of public power.

Of late, delay in disposal of appeals or in execution of death sentences has been viewed seriously by the Supreme Court. By passage of time, a sea-change came to be seen in the decisions of the Supreme Court of India. On numerous occasions, the executive power of pardon has been subjected to judicial review.

In *Maru Ram v. Union of India*\(^71\), the Supreme Court observed that “wide as the power of pardon, commutation and release (Articles 72 and 161) is, it cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. .. It is that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power.”

In *Swaran Singh v. State of U.P.*\(^72\), the Supreme Court rejected the contention that “this Court has no power to touch the order passed by the Governor under Article 161 of the Constitution and held that if such power was exercised arbitrarily, mala fide or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it.”

In *Satpal v. State of Haryana*\(^73\), the Supreme Court observed that “there cannot be any dispute with the proposition of law that the power of granting pardon under Article 161 is very wide and does not contain any limitation as to the time on which and the occasion on which and the circumstances in which the said powers could be exercised. But the said power being a constitutional power conferred upon the Governor by the Constitution is amenable to judicial review on certain limited grounds.”

\(^71\) *Maru Ram v. Union of India*, (1981) 1 SCC 107
In *Bikas Chatterjee v. Union of India*\(^\text{74}\), the Supreme Court reiterated the settled legal position that although the decision of the President of India on a petition under Article 72 of the Constitution is open to judicial review but the grounds therefore are very very limited.

In *Epuru Sudhakar & Another v. Govt. of A.P. & Others*\(^\text{75}\), the Supreme Court examined the pardoning power under Articles 72 and 161 of the Constitution of India in *ex tenso*. The Court observed thus:

“It is fairly well settled that the exercise or non-exercise of pardon power by the President or Governor, as the case may be, is not immune from judicial review. Limited judicial review is available in certain cases.”

In *Narayan Dutt v. State of Punjab*\(^\text{76}\), the Supreme Court examined the question - whether the power under Article 161 of the Constitution of India is subject to judicial review and if yes, to what extent? The Court held that “considerations for exercise of power under Articles 72/161 may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases will the court examine the exercise. It is clear that there is limited scope of judicial review on the exercise of power by the Governor under Article 161 of the Constitution of India.”

In *Devender Pal Singh v. State (NCT of Delhi)*\(^\text{77}\), the Supreme Court once again examined the pardoning power under Articles 72 and 161 of the Constitution of India in *ex tenso* but refused to entertain the petition.

In *Triveniben v. State of Gujarat*\(^\text{78}\), the Court held that “as between funeral fire and mental worry, it is the latter which is more devastating, for, funeral fire burns only the dead body while the mental worry burns the living one. This mental torment may become acute when the judicial verdict is finally set against the accused. Earlier to it, there is every reason for him to hope for acquittal. That hope is extinguished after the final verdict. If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether it is just and fair to allow the sentence of death to be executed.”

\(^{74}\) Bikas Chatterjee v. Union of India, (2004) 7 SCC 634, at 637
\(^{75}\) Epuru Sudhakar & Another v. Govt. of A.P. & Others, (2006) 8 SCC 161
\(^{76}\) Narayan Dutt v. State of Punjab, (2011) 4 SCC 353
\(^{77}\) Devender Pal Singh v. State (NCT of Delhi), (2013) 6 SCC 195
\(^{78}\) Triveniben v. State of Gujarat, (1989) 1 SCC 678, para 73
In *T.V. Vatheeswaran v. State of T.N.*\(^{79}\) where the prisoner condemned to death over eight years ago claimed that it is not lawful to hang him now, the Supreme Court held “that delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death. Death sentence was substituted with the sentence of imprisonment for life.”

In *Mahendra Nath Das v. Union of India*\(^{80}\), the Supreme Court considered the question whether improper and long unexplained delay in disposal of mercy/clemency petition was sufficient for commutation of the sentence of death into life imprisonment. The Court held that “12 years’ delay in the disposal of the appellant’s mercy petition was sufficient for commutation of the sentence of death and the Division Bench of the High Court committed serious error by dismissing the writ petition solely on the ground that he was found guilty of committing heinous crime. The rejection of the appellant’s mercy petition was declared illegal and the sentence of death was commuted into life imprisonment.”

In a subsequent decision in *Shatrughan Chauhan v. Union of India*\(^{81}\), the Supreme Court considered the ratio laid down in *Devender Pal Singh Bhullar*\(^{82}\) which reads as follows:

“We are also of the view that … long delay may be one of the grounds for commutation of the sentence of death into life imprisonment cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes. ...”

and held that “there is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence. Each case requires consideration on its own facts.” The ratio laid down in *Devender Pal Singh Bhullar* was declared *per incuriam*.

There are numerous decisions where the hangman’s noose has been taken off the accused’s neck by the Supreme Court by altering death sentence to life imprisonment on the ground of delay in disposal of appeals.\(^{83}\)

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\(^{80}\) *Mahendra Nath Das v. Union of India*, (2013) 6 SCC 253

\(^{81}\) *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1


In *Shatrughan Chauhan (supra)*, the Supreme Court dealt with number of cases seeking commutation of death sentence to imprisonment for life on the ground of delay in disposal of mercy petitions. The Court observed that “a series of the Constitution Benches of this Court have upheld the constitutional validity of the death sentence in India over the span of decades but these judgments in no way take away the duty to follow the due procedure established by law in the execution of sentence. Like the death sentence is passed lawfully, the execution of the sentence must also be in consonance with the constitutional mandate and not in violation of the constitutional principles.” The Court further held that “the procedure prescribed by law, which deprives a person of his life and liberty must be just, fair and reasonable and such procedure mandates humane conditions of detention preventive or punitive. Delay caused by circumstances beyond the prisoners’ control mandates commutation of death sentence. The mercy petitions under Articles 72/161 can be disposed of at a much faster pace than what is adopted now, if the due procedure prescribed by law is followed in verbatim. Although, no time frame can be set for the President for disposal of the mercy petition but we can certainly request the Ministry concerned to follow its own rules rigorously which can reduce, to a large extent, the delay caused. India has been a signatory to the Universal Declaration of Human Rights, 1948 as well as to the United Nations Covenant on Civil and Political Rights, 1966. Both these conventions contain provisions outlawing cruel and degrading treatment and/or punishment.”

### 6.9 SOLITARY CONFINEMENT VIS-À-VIS DELAY IN DISPOSAL OF APPEALS/MERCY PETITIONS

The Law Commission of India in its 42nd Report took the view that solitary confinement was “out of tune with modern thinking and should not find a place in the Penal Code as a punishment to be ordered by any criminal court”.

In *Sunil Batra v. Delhi Admn.* the Supreme Court dealt with the issue of solitary confinement and held that “solitary or single cell confinement prior to rejection of the mercy...
petition by the President is unconstitutional. Almost all the Prison Manuals of the States provide necessary Rules governing the confinement of death convicts. The Rules should not be interpreted to run counter to the above ruling and violate Article 21 of the Constitution.”

In *Shatrughan Chauhan*, there was also an occasion for the Supreme Court to deal with a supervening circumstance of solitary confinement. The Court came to the conclusion that keeping a prisoner in solitary confinement would amount to inflicting “additional and separate” punishment not authorised by law.

In *Ajay Kumar Pal v. Union of India*, the Supreme Court dealt with a case of an inordinate delay of 3 years and 10 months in disposal of his mercy petition and solitary confinement. The Court held that “though no time-limit can be fixed within which the mercy petition ought to be disposed of, in our considered view the period of 3 years and 10 months to deal with such mercy petition in the present case comes within the expression ‘inordinate delay’.” Further, dealing with the submission of solitary confinement, the Court held that “in the light of the enunciation of law by this Court, the petitioner could never have been segregated till his mercy petition was disposed of. It is only after such disposal that he could be said to be under a finally executable death sentence. The law laid down by this Court was not adhered to at all while confining the petitioner in solitary confinement right since the order of death sentence by the first court. In our view, this is complete transgression of the right under Article 21 of the Constitution causing incalculable harm to the petitioner. The combined effect of the inordinate delay in disposal of mercy petition and the solitary confinement for such a long period, in our considered view has caused deprivation of the most cherished right. A case is definitely made out under Article 32 of the Constitution of India and this Court deems it proper to reach out and grant solace to the petitioner for the ends of justice. Death sentence was finally substituted with the sentence of life imprisonment.”

The above decisions have redefined the law relating to solitary confinement of the accused.

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86 *Sunil Batra v. Delhi Admn.*, (1978) 4 SCC 494
6.10 MENTAL ILLNESS VIS-À-VIS DELAY IN DISPOSAL OF APPEALS OR MERCY PETITIONS

In the wake of rising humanistic approach, the Supreme Court has now started treating the ground of mental illness as a supervening circumstance to commute death sentence to life imprisonment.

In Amrit Bhushan Gupta v. Union of India\textsuperscript{88}, the Supreme Court while rejecting the plea of commutation of death to life sentence on the ground of mental illness held that “the question whether, on the facts and circumstances of a particular case, a convict, alleged to have become insane, appears to be so dangerous that he must not be let loose upon society, lest he commits similar crimes against other innocent persons when released, or, because of his antecedents and character, or, for some other reason, he deserves a different treatment, are matters for other authorities to consider after a court has duly passed its sentence.”

In Jagdish v. State of Madhya Pradesh\textsuperscript{89}, the Supreme Court dealt with a submission that sentence of death imposed on the convict may be altered to imprisonment for life on the ground of insanity. The Court refused to treat that ground as a supervening circumstance and upheld death sentence by holding that the benefit of Section 84 IPC is available to a person who at the time when the act was done was incapable of knowing the nature of his act or that what he was doing was wrong or contrary to law. The implication of this provision is that the offender must be of this mental condition at the time when the act was committed and the fact that he was of unsound mind earlier or later are relevant only to the extent that they, along with other evidence, may be circumstances in determining the mental condition of an accused on the day of incident. The statements in the status report and the affidavit do not advance the appellant’s case whatsoever.

The ink of the above decision was yet to dry that the Supreme Court started giving a new approach in cases of mental illness or insanity\textsuperscript{90}. In cases where the Supreme Court found that the execution of death sentence has been delayed on various counts and the convict has suffered a great deal of mental agony of living under the shadow of death for long

\textsuperscript{88} Amrit Bhushan Gupta v. Union of India, (1977) 1 SCC 180
\textsuperscript{89} Jagdish v. State of Madhya Pradesh, (2009) 9 SCC 495
\textsuperscript{90} Magan Lal v. State of Madhya Pradesh, (2014) 3 SCC 1
time, to ensure that the convict should not suffer that agony any longer, death sentence has been altered to imprisonment for life.\textsuperscript{91}

In \textit{Shatrughan Chauhan}, the Supreme Court noted that India is a member of the United Nations and has ratified the ICCPR. A large number of the United Nations international documents prohibit the execution of death sentence on an insane person. Clause 3\textit{(e)} of the Resolution 2000/65 dated 27-4-2000 of the U.N. Commission on Human Rights titled “The Question of Death Penalty” urges “all States that still maintain the death penalty ... not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person”. Similarly, Clause 89 of the Report of the Special Rapporteur on Extra-judicial Summary or Arbitrary Executions published on 24-12-1996 by the UN Commission on Human Rights” under the caption “Restrictions on the use of death penalty” states that “the imposition of capital punishment on mentally retarded or insane persons, pregnant women and recent mothers is prohibited”. Further, Clause 116 thereof under the caption “Capital punishment” urges that “Governments that enforce such legislation with respect to minors and the mentally ill are particularly called upon to bring their domestic criminal laws into conformity with international legal standards”.

The Supreme Court further observed that “the above materials, particularly, the directions of the United Nations international conventions, of which India is a party, clearly show that insanity/mental illness/schizophrenia is a crucial supervening circumstance, which should be considered by this Court in deciding whether in the facts and circumstances of the case death sentence could be commuted to life imprisonment.”

In \textit{Shatrughan Chauhan}, the Court heard and decided a batch of matters that included \textit{Magan Lal}\textsuperscript{92}, a writ petition filed by People’s Union for Democratic Rights (PUDR) seeking commutation of death sentence on the ground that the accused has been suffering from mental illness and that he has been confined in single cell for the last three years and also on the ground of 1½ years delay in deciding mercy petition. The Court called for the record dealing with mercy petition from the Ministry of Home and held that “insofar as the delay is concerned, it cannot be claimed that the same is excessive though there is a delay of one year in disposal of mercy petition by the President. However, during the period of trial before the Sessions Court and even after conviction, the petitioner was suffering from

\textsuperscript{91} Madhu Mehta v. Union of India, (1989) 4 SCC 62
\textsuperscript{92} Magan Lal v. State of Madhya Pradesh, (2014) 3 SCC 1
mental illness. This is clear from the note made by the Prison Superintendent who opined for alteration of petitioner’s sentence from death to life. This important aspect was not noted by the Home Ministry. For all the reasons, more particularly, with regard to his mental illness, the Court commuted the sentence of death into life imprisonment.

It is pertinent to mention here that in *Shatrughan Chauhan*, the ratio laid down in *Devender Pal Singh Bhullar* has been declared *per incuriam* by observing that “there is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence. Each case requires consideration on its own facts.” On the basis of the said decision, in *Navneet Kaur v. State of NCT of Delhi*93, the Court deemed it fit to commute death sentence imposed on Devender Pal Singh Bhullar into life imprisonment both on the ground of unexplained/inordinate delay of 8 years in disposal of mercy petition and on the ground of insanity.

### 6.11 GUIDELINES FOR SAFEGUARDING THE INTEREST OF DEATH ROW CONVICTS

In *Shatrughan Chauhan*, the Supreme Court observed that “mercy jurisprudence is a part of evolving standard of decency, which is the hallmark of the society.” The Court went on to frame certain guidelines for safeguarding the interest of the death row convicts. The said guidelines relate to the Legal Aid, Solitary Confinement, Procedure in placing the mercy petition before the President, Communication of rejection of mercy petition by the President and the Governor, Minimum 14 days’ notice for execution of death sentence, Supply of copy of rejection mercy petition, Communication to family members, Mental health evaluation, Physical and mental health reports, Furnishing documents to the convict, Final meeting between prisoner and his family etc. These guidelines will be very valuable for protection of the rights of death-row convicts.

### 6.12 HEARING OF DEATH SENTENCE CASES BY THREE-JUDGE BENCH AND OPEN COURT HEARING OF REVIEW PETITIONS IN DEATH SENTENCE CASES

There has been a demand from various corners at the Supreme Court of India for hearing of death sentence cases at least by a bench of Three Judges and that the review petitions in cases of death sentence may be heard in the open Court instead of hearing in Chambers. A

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five-Judge Constitution Bench of the Supreme Court in *Mohd. Arif @ Ashfaq v. The Registrar, Supreme Court of India & Others* has accepted both the pleas. The newly enacted the Supreme Court Rules, 2013 also provided for hearing of death sentence cases by a three-Judge Bench, therefore, the Court directed that “Henceforth, in all cases in which death sentence has been awarded by the High Court in appeals pending before the Supreme Court, only a bench of three Hon’ble Judges will hear the same”. The Court also accepted the plea for hearing of review petitions in cases of death sentence in open Court by providing an outer limit of 30 minutes hearing.

### 6.13 CONCLUSION

From the above discussion, it transpires that initially the Court was unwilling to intervene as an omniscient, omnipotent or omnipresent being, in the decision of the President or a Governor of the State presuming it a *bona fide* exercise by the custodian of the power. The Court interfered only in gruesomely established cases of absolute, arbitrary, law-unto-oneself *mala fide* execution of the power. Thereafter came a phase of judicial review of the said power within the strict limitations or in other words with limited judicial review. Even though it has been a consistent stand of the Supreme Court that the exercise of power under Articles 72/161 of the Constitution would be tested on the anvil of truth within the strict limitations yet in the recent phase it transpires that the Court in order to examine that the *public power*, including constitutional power, is not exercised arbitrarily or *mala fide* went on to check whole procedure of moving a mercy petition, its processing, notes prepared by the Ministry of Home, the papers placed before the President of India and final noting thereon. All this exercise was carried on after the Court noticed that the order passed by the President is an outcome of “non-application of mind” and the rejection of mercy petition is arbitrary and suffers from the vice of inequality and unfairness. The Court found it justified after examining all the material on record. The decisions were found to have been based on non-application of mind and arbitrariness suffering from the vice of inequality and unfairness, particularly on the unexplained reasons including the suppression of facts on the part of the aid and advice machinery of the Government on whose advice the President or Governor of a State has to base its opinion. The Court which was in the past reluctant to interfere in the process of pardoning power not only interfered but also laid down certain guidelines for

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*Mohd. Arif @ Ashfaq v. The Registrar, Supreme Court of India & Others*, (2014) 9 SCC 737
smooth functioning of the constitutional scheme to uphold the *de facto* protection provided by the Constitution to every accused including death row convicts.

In view of the foregoing survey of the jurisprudence of the Indian Courts, it becomes crystal clear that in the changing scenario, the Supreme Court of India has strengthened the humanistic approach and the sentencing structure reflects the evolving standards of decency that mark the progress of a maturing democracy. It is, however, need of the hour that all the guidelines laid down by the Supreme Court of India in the abovementioned cases as well as the relevant provisions of the Constitution of India and other Legislations which are in conformity with the Safeguards provided for death-row convicts by various Resolutions of the United Nations General Assembly and ratified by Government of India must form part of the Human Rights Act, 1993 so as to provide information to the world about human rights jurisprudence of India.

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