THE MEANDERING COURSE OF DEATH PENALTY SENTENCING IN INDIA: A CRITICAL ANALYSIS

Abhishek K. Singh*

Abstract:

The Constitutional bench of the Supreme Court of India in Bachan Singh v. State of Punjab has laid down elaborate criteria that needs to be applied to decide whether an accused deserves death penalty or not. Analyzing the decision of the Supreme Court from 1973- 2013, the author argues that subsequent Courts have not only failed to apply the criteria laid down but have also grossly misunderstood the decision of the Constitutional bench, thereby sending several accused to the gallows for whom the appropriate punishment may have been imprisonment for life. This paper traces the path the meandering course of death penalty sentencing in India has taken and suggests corrective course.

Keywords: *Death Penalty, Rarest of Rare, Criminology, Deterrence, Retributive.*

**B.A.LLB.,(Hons.), NALSAR University of Law, Hyderabad.* *The author is indebted to Prof. D. Balakrishna, Professor of Law, NALSAR University of Law, Hyderabad for his continued guidance and critical inputs into the paper.*

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INTRODUCTION

'*Guilt once established, the punitive dilemma begins*'

-Late Justice V. Krishna Iyer[1]

The issue of awarding death penalty for certain crimes has always been a contentious one, not just in India but around the world. The world in this regard has been divided into two factions, the abolitionists, who argue for the removal of death penalty and the retentionists, who argue for its retention in the Statute book.[2]

The argument favoring death penalty is often founded on the deterrent theory of punishment.[3] This theory assumes that the motive behind awarding punishment is to deter other members of the community from committing the same crime.[4] The result is the establishment of a stable social order in the society. Since people fear death the most, death penalty serves as the most effective deterrence among people. This argument was given further credence by the research of a criminologist named Issac Ehrlich, who established that for every death penalty seven lives are saved because of the deterrence created in the society.[5] However employment of Deterrence theory as a tool for justifying continuance of death penalty has been severely criticized by several criminologists.[6] They argue that there is lack of any

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[1] Late Justice V. Krishna Iyer in, Ediga Anamma v. State of Andhra Pradesh, A.I.R. 1974 S.C. 799.

[2] According to the information available on the website of Amnesty International as of 2012, 140 countries have abolished death penalty while only 58 countries have still retained it. For more *See*, http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries, (last updated Dec. 20, 2014).

[3] Janet Chan and Deborah Oxley, *The deterrent effect of capital punishment: A review of the research evidence*, 84 CRIME. & JUST. BULL. (October 2004), http://info.lawaccess.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB84.pdf/$file/CJB84.pdf.

[4] *Id.*

[5] Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397-417.

[6] In 2009 research conducted by two criminologists to gage the opinion of other criminologists on the issues of abolition of death sentence, around 67% of the criminologists believed that death sentence does not create any deterrence in the society. Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views Of Leading Criminologists*, 99(2) J. CRIM. L. & CRIMINOLOGY 489- 508.

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credible data in support of this claim. In fact in 1989, a resolution was adopted by the American Society of Criminology which had demanded the abolition of death penalty on the grounds that there does not exist any evidence which could give credence to the fact that death penalty causes deterrence among other members of the community and prevent them from committing any sort of crime.[7]

Another justification for the continuance of death penalty is the retribution theory of punishment. This theory is founded on the principle of *lex talionis*[8] and argues that a just punishment is one which inflicts the same amount of pain to the offender as he caused to the victim.[9] The retentionists argue that since death penalty is prescribed in those cases where the accused has caused the death of another person it is very much reasonable and justified that law takes the life of the offender to give retribution to the family of the deceased.[10] However, the abolitionists expose the absurdity in this hypothesis by arguing that modern punishment is not founded on the principle of retribution because if this was the case then no punishment can be given to rapists, thieves and whole lot of other criminals.[11] Instead they argue that reformation and rehabilitation is the primary purpose of punishment, which is defeated if death penalty is awarded to an offender.[12]

The Supreme Court of India in a series of decisions has consistently upheld the continuance of death penalty in Statute book. According to the available data, the Supreme Court has awarded 1,455 death penalty from 2001 – 2011 but during the same period it has commuted 4,321 death penalty awarded by

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[7] The Resolution is Available on http://www.asc41.com/policies/policyPositions.html, (last updated Dec. 20, 2014).

[8] The Black's Law Dictionary defines *lex talionis* as, "the law of retaliation, under which punishment should be in kind- an eye for an eye, a tooth for a tooth and so on," BRYAN A. GARNER (ed.), BLACK'S LAW DICTIONARY 924 (7th ed. 1999).

[9] Hugo Adam Bedau, *Retribution and the Theory of Punishment*, 75 (2) J. PHIL. 601-620.

[10] Clarie Finkelstien, *Death and Retribution*, CRIM. JUST. ETHICS. 12-21, https://www.law.upenn.edu/cf/faculty/cfinkels/workingpapers/death%20and%20retribution.pdf (last updated Dec. 20, 2014).

[11] *Id.*

[12] *Supra* note 10.

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the lower Courts.[13] This clearly indicates a much cautioned approach taken by the Supreme Court in awarding death penalty. The factors that a Court needs to consider while awarding death penalty was laid down by a Constitutional bench of the Supreme Court in *Bachan Singh v. State of Punjab*.[14] However, the researcher shall demonstrate through-out this paper as to how the continuous decisions of the supreme court have not followed this decision in letter and spirit thereby committing grave miscarriage of justice.

The main objective of this paper is to study and elicit the sentencing jurisprudence in India relating to death penalty. It is critical to highlight that the paper does not express any opinion on whether we should continue with death penalty or not? It rather concerns with the line of reasoning that a Court should give while sentencing a person to death. However, to completely ignore this debate would be absolutely foolhardy hence various arguments in favour and against death penalty have been considered from the perspective of criminology.

The decision of the Supreme Court from 1973- 2013 was studied. However, these decisions were filtered on the basis that only those cases which have either added/clarified the law relating to death penalty were studied in detail.

For the sake of convenience and brevity this paper has been divided into six sections. The first section introduces the paper while the second section discusses those judgments which have been delivered prior to the *Bachan Singh* case. The third section elaborates upon the Rarest of the Rare doctrine while the next two sections demonstrates the manner in which the Rarest of

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[13] ASIAN CENTRE FOR HUMAN RIGHTS, *The State of Death Penalty in India: Discriminatory treatment amongst the death row convicts*, Feb. 14, 2013, http://www.achrweb.org/reports/india/IndiaDeathPenaltyReport2013.pdf. The data was released by NATIONAL CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS.

[14] A.I.R.1980 S.C. 898. (India). (*Bachan Singh case)*.

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the Rare case doctrine has not been followed by the Supreme Court in its subsequent decisions. The last section is the conclusion which summarizes the various issues raised in the paper and also suggests the most appropriate sentencing guidelines the Courts should follow while awarding death penalty.

THE PRE- BACHAN SINGH ERA

Prior to the *Bachan Singh* case the Supreme Court had delivered a series of judgment which had set the backdrop and the tone in which the Constitutional Bench had rendered its historic decision. This section intends to survey and map those leading cases and tries to highlight the legal principles emerging from them.

In these lines of cases, *Jagmohan Singh v. State of Uttar Pradesh*[15] is one of the foremost cases because the Court for the first time authoritatively dealt with the dilemma in awarding deaths sentence in preference over life imprisonment. In the instant case the appellant was convicted and awarded death sentence, by the Trial Court and subsequently confirmed by the High Court, for the murder of one Chhotey Singh. On appeal the constitutional validity of death sentence was challenged on several grounds. *Inter alia*, it was argued on behalf of the appellant that in the absence of any guidelines for imposing death penalty there is a wide discretion in the hands of the judge. As a result, there may arise a situation where on similar facts two different judges' award death sentence to one accused and life imprisonment to another. It was argued that this unguided and unfettered discretion in the hands of the judges violates equality clause enshrined in Article 14 of the Constitution[16] as two similarly placed individuals may be treated differently.

The Constitutional bench of the Supreme Court while negating this argument

[15] A.I.R. 1973 S.C. 947.
[16] Article 14 of the Constitution of India reads, 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'

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observed that there is an absence of absolute discretion in the hands of the judges while awarding death sentence. In its considered view, the principle that guides the sentencing Court while awarding death sentence is that it must, *'[balance] all the aggravating and mitigating circumstances of the crime….*'[17] Since the Court has to give due consideration to facts and circumstances, which in each case shall differ it refused to hold that there is violation of Article 14 while awarding death sentence. This is perhaps the first case where the court laid down the guiding principle for award of death penalty- i.e. to balance the aggravating and mitigating circumstances.

Another equally important case is that of *Ediga Anamma v. State of Andhra Pradesh*[18] In this case the accused, Anamma- a married lady who had a child of around 10 years at the time of commission of crime, killed another married lady and her 2 year old child because she suspected that the deceased was having an extra marital affair with another widower for whom she had deep seated affection and also an extra marital affair. The Trial Court and the High Court had both awarded death sentence to the accused. While deciding the appeal of the accused, the Supreme Court had observed that while deciding the sentence of an accused the focus should not only be on the crime committed but also on the criminal. It was reasoned by the Court that this balancing act would ensure that the pronounced sentence does justice to both the theories of punishment- reformation of the accused and deterrence towards the act committed. In the Courts words, '*Modern penology regards crime and criminal as equally material when the right sentence has to be picked out* .[19]

Hence, after duly considering not just the severity of the crime committed but also the overall social and other circumstances of the criminal, the Court gave due regard to the fact that the accused was a female,was of a young age,

[17] *Supra* note 15, at ¶ 28.
[18] A.I.R. 1974 S.C. 799.
[19] *Supra* note 18, at ¶12.

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and was also expelled from the matrimonial home and had a young child to look after to, and hence commuted the death sentence to life imprisonment.

It is submitted that this case is the first in line which considered not just the crime committed but also the mitigating circumstances of the criminal while sentencing the accused. Post this judgment, in a series of cases, namely *Balwant Singh v. State of Punjab*[20], *Ambaram v. The State of Madhya Pradesh*[21], *Sarveshwar Prasad Sharma v. State of Madhya Pradesh*[22], the Supreme Court has held that there cannot be any straight jacket formulae definition of 'special reasons'. Hence, the decision of whether to award death sentence or life imprisonment was left entirely to the discretion of the judge.

In *Rajendra Prasad v. State of Uttar Pradesh*[23], the accused and one Ram Bharosey were involved in a long standing family feud. The accused in heat of passion murdered one of the family members of Ram Bharosey for which he was sentenced to life imprisonment. However, after being released from the jail on the occasion of Gandhi Jayanti he gruesomely murdered Ram Bharosey and his friend Mansukh. The Trial Court awarded death sentence which was duly confirmed by the High Court. The Supreme Court, while, reversing the sentence was of the opinion that death sentence is justified in only those cases where public interest, social defence and public order warrants. Exemplifying on its position further, the Court laid down several tests to decide whether to impose death sentence or life imprisonment.

Firstly, death sentence is warranted when due to the crime committed by the accused, the normal life in the community is paralyzed and there is absolute destruction of the social order.

[20] A.I.R. 1976 S.C. 230.
[21] A.I.R. 1976 S.C. 2196.
[22] A.I.R. 1977 S.C. 2424.
[23] A.I.R. 1979 S.C. 916.

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Secondly, if the accused shows no remorse to the committed crime and is beyond repair within the confines of the prison then death may be awarded. The Court in this case interestingly observed that while sentencing the Court should not give any weightage to the brutality of the crime committed but should consider the brutality for the evidence as to whether the accused can be reformed or not.

Thirdly, the motivation of the accused for committing the crime must also be given due weight age and if the accused committed a cold blood murder with planning then such facts must be considered against him. In the opinion of the Court, the motivation of the accused was not the sole criterion but a relevant one in determining death penalty.

Fourthly, the Court quoted with approval several of its previous decisions like *Srirangan v. State of Tamil Nadu,*[24] *Nanu Ram v. State of Assam*[25] and *State of Uttar Pradesh v. Lalla Singh & Others*.[26] to hold that death sentence may not be preferred if the accused is too young or is suffering from any kind of economic hardship or mental imbalance and even if there has been sufficient time gap between the date of the commission of the crime and disposal of appeal by the Supreme Court.

RAREST OF THE RARE DOCTRINE

The previous section illustrates that in the absence of any legislative guideline on sentencing, the decision of awarding death penalty had become a function of judicial discretion. Sporadic judgments did try to curtail this discretion by enlisting specific instances in which death penalty may be avoided; still an authoritative pronouncement by the Supreme Court was lacking. This lacuna was soon realized and filled by a constitutional bench of the Supreme Court in *Bachan Singh* case[27], which formulated the *rarest of*

[24] A.I.R.1978 S.C. 274.
[25] A.I.R. 1975 S.C. 762.
[26] A.I.R. 1978 S.C. 368.
[27] A.I.R.1980 S.C. 898.

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the rare doctrine. The doctrine was further explained in another landmark case of *Machhi Singh v. State of Punjab*[28]. The two cases serve an important pointer in guiding judicial discretion while sentencing an accused for death sentence or otherwise and hold water till today.

In *Bachan Singh* case, the petitioner Bachan Singh was sentenced to death, by the Trial Court and confirmed by the High Court, for the murder of three individuals under Section 302[29] of the Indian Penal Code, 1860. According to Section 354(3) of the Criminal Procedure Code, 1973 when death sentence is awarded to an accused in preference to life imprisonment then the Court must provide 'special reasons' for awarding death penalty.[30] Among other defenses on appeal to the Supreme Court, the petitioner contended that no special reasons existed for which death sentence should be granted to him. To drive home this point the petitioner relied on the host of judicial decisions which have been discussed in great detail in the preceding section.

The Court observed that death penalty must be awarded only in the *rarest of the rare case*. It is critical to highlight that the Constitutional Court in the *Bachan Singh* case substantially agreed with most of the findings of the Court in *Jagmohan Singh* case. However, it differed only on two accounts. *Firstly*, in the *Jagmohan Singh* case the Court held that death sentence may be awarded if the aggravating and mitigating circumstances of the case are duly considered. However, the Court in the *Bachan Singh* case was of the opinion that this is not needed in light of the new Criminal Procedure Code and introduction of Section 354(3) wherein death penalty may be given by detailing 'special reasons'. The Court took the liberty to define 'special reasons' as 'exceptional reasons'.

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[28] A.I.R. 1983 S.C. 957 (*Machhi Singh case*).

[29] § 302 of the Indian Penal Code, 1860 reads, 'Whosoever commits murder shall be punished with death, or imprisonment for life and shall also be liable to fine.'

[30] § 354(3) of the Code of Criminal Procedure, 1973 reads, 'When the conviction is for an offence punishable with dealt 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.'

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Secondly, while in the *Jagmohan Singh* case the Court had held that only circumstances in relation to the crime must be considered, the *Bachan Singh* case partially modified this by holding that Court must not only, '*confine its consideration principally or merely to the circumstances connected with particular crime, but also give due consideration to the circumstances of the criminal*.'[31] Hence, while until *Bachan Singh* case the focus was only on the crime post this decision the focus shifted to both the crime as well as the circumstances of the criminal. This marks a critical shift in the Judicial attitude.

In *Machhi Singh* case the facts which gave rise to the dispute was that one Machhi Singh along with his eleven other companions had murdered seventeen persons belonging to the family of one Amar Singh. There was long standing animosity and feud between the two families and Macchi Singh sought to revenge this by killing family members of Amar Singh. As a result of being awarded death sentence by the Lower Courts, the accused preferred an appeal to the Supreme Court.

The Supreme Court while holding that *Bachan Singh* case was the law on the subject listed the following guidelines emerging from that case[32]:

Firstly, death penalty should be granted only in rarest of the rare case.

Secondly, while sentencing the accused the circumstances of the crime and that of the accused both are relevant and neither of them could be left out from consideration.

Thirdly, the fundamental guiding principle is that death sentence is exception to the general principle of awarding life imprisonment and hence it should be used only in sporadic cases where the facts and circumstances warrants nothing but the death of the accused and any other punishment would be wholly inadequate.

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[31] *Supra* note 27, at ¶164.
[32] *Supra* note 28, at ¶37.

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Fourthly, before awarding death sentence the sentencing Court must draw a '*balance sheet of all the aggravating and mitigating circumstances*.'[33] After giving weightage to the mitigating circumstances and if the balance is still tilted in favor of the aggravating circumstances only then death penalty should be awarded.

While *Machhi Singh* case is considered to extrapolate the decision of the Supreme Court in *Bachan Singh*, it is submitted that the former case did not read the later decision correctly. While culling out the proposition laid down by the Supreme Court in the *Bachhan Singh* case, as detailed earlier, it required the sentencing Court to adopt *the balance sheet approach*. This is contrary to the express words of the Court in the *Bachan Singh* case and is in fact one of the two points where the Court disagreed with the *Jagmohan Singh* case. Moreover, the *balance sheet approach* is itself faulty because it tries to compare two dissimilar and different things- i.e. the crime with the criminal. It is indeed sad that until today this *balance sheet approach* though contrary to the Constitutional bench decision of the Supreme Court is being blindly carried forward by different Courts in the Country.

Moreover, besides enumerating the guidelines that needs to be followed in the case of awarding death sentence, the Court in *Macchi Singh* case listed two questions which must always be answered while deciding on the sentence.[34] *Firstly,* is the offence committed so exceptional that there is no scope for awarding any other sentence? *Secondly*, even when weightage is accorded to the mitigating circumstances does the circumstances still warrants death penalty?

It is critical to highlight that the Supreme Court in *Macchi Singh* case did attempt to define rarest of the rare by holding that they are those cases which

[33] *Id.* (Balance Sheet Approach).
[34] *Supra* note 28, at ¶38.
[35] *Id.* ¶32.

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shocks the '*collective conscience of the community*.'[35] The Court did list five pointers which may be considered by the Court:

Firstly, the manner in which the crime was committed. Those cases where the murder committed by the accused was '*brutal, grotesque, diabolical, revolting, or dastardly manner*'[36] would fall under this category. *Secondly*, the motive behind the criminal act may be looked at. Killing people for money or cold blood murder would usually fall under this category. *Thirdly*, the nature of the crime which has been committed may be a relevant consideration. Killing of members of the Schedule Caste and Schedule Tribe Community with the intention to terrorize other members of the same community or death in pursuance of dowry would fall under this category. *Fourthly*, the degree of crime must be considered. Illustration could be those cases where members of the same family are killed. *Finally*, the status of the victim is also relevant and should be duly considered. Hence this category would comprise those cases where the victim is a child or a famous political leader who has been killed for nefarious political reasons.

These pointers even though may be of extreme help to the sentencing Court it is submitted, is against the spirit of the Court's decision in *Bachan Singh* case. In that case the Court[37] was of the firm opinion that it would not be possible to lay down with precision all the mitigation and aggravating circumstances. It had opined that any attempt by it to lay down circumstances would run the risk of frustrating the very purpose for which discretion was granted.[38] The rationale behind grant of discretion was that since facts and circumstances of each case are different, the sentencing judge

[36] *Id.* ¶ 33.
[37] Arnold v. Georgia, (1976) 224 SE 2d 386; Dennis v. United States, Trop v. Dulles, (1958) 356 US 86. (The Supreme Court besides discussing Commentaries and Law Reports of various jurisdiction, discussed in great detail in these judgments of the Unites States Supreme Court).
[38] To arrive at this conclusion the Court quoted with approval the decision of the Supreme Court in Gurbaksh Singh Sibbia v. State of Punjab, 1980 S.C.R. (3) 383.

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can duly consider each of the circumstances independently without having to worry whether the circumstances would fit within the straight jacket formulae. This discretion by application of judicial mind would not only ensure that most suited punishment is awarded but also that ends of justice are always met.[39]

DEVIATING FROM BACHAN SINGH- A MISGUIDED APPROACH

This section shall demonstrate with the help of decided cases of the Supreme Court how the *Bachan Singh* approach of considering circumstances relevant to the crime and criminal was systematically given away by the Court. In deciding these cases, the Court not only gave no credence to the judicial authority in hand but also devised their own set of guiding factors while sentencing the accused. Even though these decisions suffer from the vice of *per incuriam*[40] and hence are bad in law they have sent several men and women to the gallows even when the alternate punishment of life imprisonment may have been available to them.

Shifting the Focus to Crime Only

As discussed earlier one of the contributions of the *Bachan Singh case* was that it shifted the focus from crime to crime and criminal both. However, this approach though pronounced by a Constitutional bench of the Supreme Court was short lived and a two judge bench of the Supreme Court in *Ravji alais Ram Chandra v. State of Rajasthan*,[41] brought the focus back to the *crime only* while completely neglecting the circumstances of the criminal.

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[39] 31(I & III) LAW COMMISSION OF INDIA, '*Capital Punishment*", 190 http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf, (last updated Dec. 20, 2014).

[40] JUSTICE G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION (2012). (In law of precedents when a bench does not follow the ratio laid down by a larger bench of the same or higher court then the decision of such Court is rendered *per incuriam* and other Courts are not bound to follow it).

[41] A.I.R. 1996 S.C. 787.

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In *Ravji* case, the accused murdered his wife and three minor children and attempted to murder his mother and neighbors' wife. He was convicted and sentenced to death by the two Lower Courts. While considering the case of the accused, the Court erroneously believed that in a criminal trial while sentencing, '*It is the nature and gravity of the crime and not the criminal*.' [42] which must be considered. Hence, without even justifying that the case falls within rarest of the rare category the Supreme Court confirmed the death sentence. The decision exhibits complete absence of any discussion on the mitigating circumstances relevant to the accused and briefly inquires only into the severity and brutality of the crime committed by the accused.

Even though the *Ravji* decision was *per incuriam* in a shocking state of affairs the Supreme Court brazenly applied it and quoted with approval in as many as six other cases. These six cases are *Shivaji v. State of Maharashtra*[43], *Mohan Anna Chavan v. State of Maharashtra*[44], *Bantu v. State of U.P*[45]*., Surja Ram v. State of Rajasthan*[46], *Dayanidhi Bisoi v. State of Orissa*[47]and *State of U.P. v. Satta*[48]. It is submitted that it is not the contention of the researcher that these individuals do not deserve death sentence- perhaps they did. However, without any discussion on mitigating circumstances, there does exists a possibility that perhaps life imprisonment would have been the more suited punishment.

The Ravji decision was delivered by the Supreme Court in 1996 and was detected 13 years later in 2009 by another bench of same Court in *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*,[49] the bench besides lamenting over the fact that a *per incuriam* judgment was being incorrectly

[42] *Id.* 25.
[43] AIR 2009 SC 56.
[44] (2008) 11 S.C.C. 113.
[45] J.T. 2008 (8) S.C. 136.
[46] 1997 Crim.L.J. 51.
[47] 2003 Crim.L.J. 3697.
[48] (2009) 4 S.C.C. 736.
[49] 2009 (2) A.L.T. (Cri) 386.

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followed with authority by other Courts did not attempt to undo the wrong committed and perhaps save those individuals who due to reliance on an incorrect precedent were sentenced to be hanged by neck till death.

Shifting the Focus to Criminals Only

In *B.A. Umesh v. Registrar General, High Court of Karnataka*,[50] the accused committed the gruesome murder of a woman and thereafter looted her home while in *Sushil Murmu v. State of Jharkhand*,[51] the accused had sacrificed a two year old boy in order to please Goddess Kali. In both the two decisions the Supreme Court was hearing an appeal against the judgment of the Higher Court which had confirmed the death penalty of the lower Court.

The absence of discussion on mitigation circumstances relevant to the criminal coupled with the fact that the Court does not give any '*special reasons*' for awarding death penalty renders these two judgments bad in law. The brief facts of the case in both the two cases demonstrate that the crime was extremely heinous, committed with a lackadaisical motive and for petty gains and the circumstances may even warrant death penalty. However while discharging it duty as the sentencing Court, the Supreme Court ought to have given a thought to the circumstances relevant to criminal. It is submitted that a mere survey of cases relating to death penalty and vaguely mentioning that the case indeed falls under the rarest of the rare category would not meets the ends of justice.

MANDATORY DEATH PENALTY

A latest disquieting trend in the Supreme Court is of classifying certain offences as those that fall within rarest of the rare category and thus deserving nothing short of death penalty. It is submitted that this discomforting trend by the Supreme Court not only run foul to the judgment of the Constitutional Bench in *Bachan Singh case* but also of another

[50] (2011) 3 S.C.C. 85.

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Constitutional Bench decision of the Supreme Court in *Mithu v. State of Punjab*.[52]

In *Mithu case*, Section 303 of the Indian Penal Code, 1860, which prescribes mandatory death sentence for those accused who have been previously convicted of murder and awarded life imprisonment was challenged under Article 14 and 21 of the Constitution.[53] The Union Government while defending the impugned section before the Court, among other defence availed by it, had argued that from a criminologist perspective the rationale for punishment was to reform the accused. However, a life convict who has already committed a heinous crime for which he is being punished for life when goes ahead and commits murder then it shows that there are no chances of him being reformed and that he poses a threat to the society. Hence, in such cases death is the only remedy available to the society.

The Court while striking down Section 303 of the IPC as unconstitutional observed that, '*A standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case.*'[54] The Court not only favored but also dwelt upon the necessity of having discretion in the hands of the sentencing judge. The rationale stems from the fact that there may be cases and events in which the circumstances warrant taking a lenient view in favor of the accused and awarding life imprisonment. However, taking away judicial discretion would result in the judge being relegated to the position of fence sitter post the determination of the guilt of the accused and allow travesty of justice to take place before his own eyes.

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[51] (2004) 2 S.C.C. 338.

[52] A.I.R.1983 S.C. 473 (*Mithu case*).

[53] § 303 of the Indian Penal Code, 1860 reads, 'Punishment for murder by life convict- Whoever, being under sentence of imprisonment for life commits murder, shall be punished with death.' For the text of Article 14 see *supra* note 16. Article 21 of the Constitution of India reads, 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'

[54] *Supra* note 51, at ¶22.

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Despite this settled position of law of not prescribing mandatory death sentence, several recent judgments of the Supreme Court in the most brazen disrespect to the judicial precedents in hand have mandated compulsory death penalty in certain class of cases. In *Bhagwan Dass v. State (NCT) of Delhi*,[55] the married daughter of the accused-appellant had left her matrimonial home and was living with her uncle in an incestuous relationship. This act had angered the father so much that he killed her daughter in the name of protecting the honour of his family. The Supreme Court, while dismissing the appeal of the accused against death sentence awarded by the Lower Court, observed that all cases of honour killings fall within the rarest of the rare category and in such cases only death sentence should be awarded and other reasons and considerations should be completely overlooked.[56] What is even more bizarre is the fact that the Court did not attempt to define what honour killing would mean and left it to the colloquial understanding of the word.

In *Prakash Kadam & Othrs. v. Ramprasad Vishwanath Gupta & Anr.*[57], a two judges bench of the Supreme Court while hearing bail petition failed by the some police officers who have been accused of fake encounter, the Court while dismissing their bail application observed that all fake encounter cases fall within the rarest of the rare category. Hence once it is established that the accused are guilty they should be mandatorily sentenced to death.[58]

In *Satya Narayan Tiwari @ jolly & Anr. v. State of U.P.*[59], the accused and his mother was charged under Section 304B[60] and 498A[61] of the Indian Penal

[55] (2011) 6 S.C.C. 396.
[56] *Id.* ¶8.
[57] A.I.R. 2011 S.C. 1945.
[58] *Id.* ¶25.
[59] (2010) 13 S.C.C. 689.
[60] § 304 B of the Indian Penal Code, 1860, prescribes seven year to life imprisonment for the offence of dowry death.
[61] § 4898A of the Indian Penal Code, 1860, prescribes imprisonment upto seven years for the offence of cruelty by husband or his relatives towards his wife.

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Code, 1860, for the killing his wife, as her family members were unable to satiate the dowry demands of her in-laws. While confirming the death penalty the Court observed that cases relating to dowry death fall under the rarest of rare category and hence death penalty should be compulsorily be awarded.[62]

While the observation of the Court in *Prakass Kadam*[63] and *Satya Narayan Tiwari*[64] case would have qualified as *obiter dicta* because while in the first case, the Court was dealing with a bail application and in the second case with Section 304B and 498A in which death penalty is not prescribed, the Supreme Court in *Ajitsingh Harnamsingh Gujral v. State of Maharashtra*[65] has expressly endorsed and confirmed these view and hence even these obiter have now become binding law. Moreover, this case further added that hired or contractual killing should also deserve nothing short of death penalty.

The instance of the division bench judgment of the Supreme Court on the fact that in certain categories carved out by them, the rarest of the rare category test is automatically satisfied and further inquiry into the facts and circumstances of the crime and criminal would be a futile exercise goes and that in such cases only death sentence is the *just* punishment is not only against the letter but also the spirit of the judicial pronouncements in *Bachan Singh case* and *Mithu case*. It is needed that the decisions which have been mentioned in this section of the paper should be urgently revisited by a larger bench of the Supreme Court before they are followed by any other lower Court as binding precedent.

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[62] *Supra* note 59, at ¶7.
[63] *Supra* note 57.
[64] *Supra* note 59.
[65] 2011 (10) SCALE 394.

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CONCLUSION AND SUGGESTIONS

The present discussion reveals that death sentencing in India has largely become a judge centric exercise,[66] where the Courts are not shying from digressing from established legal precedent. It is submitted that the need of the hour is to come up with uniform sentencing guidelines which could be followed by the Courts while sentencing the accused. In fact the *Malimath Committee on Reforms of Criminal Justice System* had recommended way back in 2003, the need for sentencing guidelines so as to ensure that discretion in the hands of the judges remain thoroughly guided.[67]

A welcome step in framing of sentencing guidelines has been the decision of the Supreme Court in *Ramnaresh v. State of Chhattisgarh*,[68] where the Court after surveying various judicial decisions on death penalty[69] has framed principles which a Court of law must follow while awarding death sentence and if sentencing guideline relating to death sentence is ever rolled out. The principles are:[70]

Firstly, the application of rarest of the rare case doctrine is sine quo non for awarding death penalty.

Secondly, factors like the manner in which the crime was committed and the motive behind the commission of crime must also be considered.

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[66] Sangeet & Anr. v. State of Haryana, Criminal Appeal No. 490-491 of 2011, Supreme Court of India.

[67] 1 REPORT OF THE MALIMATH COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM, Part IV, §14.4, 170, http://mha.nic.in/pdfs/criminal_justice_system.pdf. (last updated Dec. 20, 2014).

[68] 2012 CRIM. L. J. 1898.

[69] Maharashtra v. Goraksha Ambaji Adsul, (2011) 7 S.C.C. 437; Dhananjoy Chatterjee @ Dhana v. State of West Bengal, (1994) 2 S.C.C. 220; Surja Ram v. State of Rajasthan, (1996) 6 S.C.C. 271; Prajeet Kumar Singh v. State of Bihar, (2008) 4 SCC 434; State of Rajasthan v. Kashi Ram, (2006) 12 SCC 254; Atbir v. Government of NCT of Delhi, (2010) 9 S.C.C. 1; Ronny @ Ronald James Alwaris Etc. v. State of Maharashtra, (1998) 3 S.C.C. 625; Allauddin Mian and Ors. v. State of Bihar, (1989) 3 S.C.C. 5; Bantu @ Naresh Giri v. State of M.P., (2001) 9 S.C.C. 615.

[70] *Supra* note at 68, ¶ 41-44.

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Thirdly, the golden rule that death sentence is exception and to be used sparingly when the circumstances do not warrant giving life imprisonment to the accused must always be followed.

Fourthly, due consideration must be given to the circumstances of the crime and that of the criminal.

Fifthly, judicial discretion to the Court in matter of death penalty must always be given.

While no sentencing guidelines have been issued till date,[71] recently the Supreme Court in *Soman v. State of Kerala*[72] has listed out certain parameters which a Court must always keep in mind while sentencing the accused. Even though the facts of the case did not warrant death penalty the parameters issued by the Court can be said to be a starting point and are of equal importance for our present discussion. The parameters listed by the Court for consideration are:

1. The Court must always ensure that the punishment handed to an accused is in *proportion* to the crime committed by him.

2. The net effect of the punishment should be that it creates effective deterrence among others. A punishment which fails to create deterrence is no punishment at all.

3. It is relevant to find out whether under ordinary circumstances the accused was aware of the consequences of his act?

4. Severe punishment should be handed out when the accused was in possession of the knowledge of his intended consequences and it did occur.

[71] As on Dec. 25, 2014.
[72] 2013 (3) R.C.R. (Criminal) 503.

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5. Even if the accused did not intend those consequences which did occur, if the consequences can be reasonable foreseen then he must be punished according to the severity of the occurred consequences and not those which he intended. Example, if a person is making spurious liquor; drinking which several people died then even he the maker did not intend those death he should be punished because they are reasonable foreseeable.

In light of this brief sentencing guideline issued by the Supreme Court and juxtaposing these with the judicial precedents on the issue of awarding death penalty, in the opinion of the researcher the correct law and sentencing guideline relating to death penalty as it stands today is:

1. Death penalty should be awarded only in rarest of the rare case.

2. It would not be possible to give a straight jacket formulae definition of rarest of rare and it would depend upon the discretion of the judge.

3. A sentencing judge while deliberating on the question of whether to award death penalty or not should consider not only the circumstances with reference to the crime but also to the criminal.

4. However, it is not only unnecessary but also incorrect for the Court to adopt the *balance sheet approach*. To do so would be comparing two unequal and different things, which is wholly unwarranted and uncalled for.

5. Instead of drawing *balance sheet* the judges should give *special reasons* in accordance with Section 354(3) of the Code of Criminal Procedure, 1973 for preferring death penalty over life imprisonment.

6. Death should be the last preferred option and to be used sparingly in only those cases where the accused cannot be transformed.

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7. The Supreme Court should refrain itself from creating categories of crime in which death should compulsorily be awarded, to do so would not only take discretion from the hands of the judges but also against the letter and spirit of the judgment of the Court in *Bachan Singh* and *Mithu* case.

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