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HANG THEM NOW, HANG THEM NOT :
**INDIA'S TRAVAILS WITH
THE DEATH PENALTY**

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Dr S. Muralidhar

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I. Introduction

The debate over the death penalty has in the recent past acquired renewed vigour. The government of the day has been insisting on the increased use of death penalty for crimes other than murder, particularly rape. Certain women's groups have welcomed this. The judiciary too has been awarding the death penalty for violent crimes with increased regularity. When the designated court that tried the Rajiv Gandhi assassination case recommended death penalty to all the 26 accused arraigned before it, it was time for the abolitionists to once again hold a banner of protest. Despite being party to the International Covenant on Civil and Political Rights (ICCPR) that requires a progression towards abolition of death penalty, India appears to be heading the other way.

After tracing the judicial decisions which upheld the constitutionality of the death penalty, and the evolution of the 'rarest of rare' test in the landmark Bachan Singh case, I propose to examine how that test has been applied by the court in subsequent cases. The non-adherence to the mandatory procedural requirement of a pre-sentencing hearing, the real possibility of the wrong person being convicted, the uncertainty of executive clemency, the domination of the debate by retentionists since Bachan Singh are some of the contexts in which it is proposed to examine the justification for retention of death penalty as a form of punishment.

The need to revisit the contention that death penalty is a cruel punishment is inspired by two recent developments in the international sphere. The first is the judgment in 1995 of the South African Constitutional Court, declaring death penalty to be a cruel and inhuman punishment and therefore unconstitutional. This despite strong public opinion to the contrary. The second is the signing by 120 countries of the statute creating the International Criminal Court, which was rejected the death penalty as a punishment for genocide, crimes against humanity and war crimes.

Finally, it is perhaps apposite to recapture the spirit of non-violence that fosters reconciliation while not compromising on truth. There is also a need to recognise the limitations of a judicial system that may be concerned only with what Albie Sachs calls the "microscopic truth". It is never too late to realise the importance that a reformative theory of punishment has for lasting peace.

a. Constitutional Validity of Death Penalty

S.367 (5) of the Criminal Procedure Code, 1898, prior to its amendment in 1955, required a court sentencing a person convicted of an offence punishable with death to a punishment other than death to state the reasons why it was not awarding death sentence. The amendment deleted this provision but there was no indication in either the Cr.PC or the Indian Penal Code, 1860 (IPC) as to which cases called for life imprisonment and which the alternative – death penalty. The Law Commission of India in 1967 undertook a study of death penalty and submitted its 35th Report to the government. It justified its conclusion for retention of death penalty thus:¹

Having regard... to the conditions in India, to the variety of social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment.

Jagmohan

If the extinguishments of life through a judicial sentence could be brought about by the combination of a substantive and a procedural penal law, the first attack of the abolitionist had to be upon the validity of such a law. A Constitution Bench of the Supreme Court repelled the initial challenge to the constitutionality of death penalty as a form of punishment in *Jagmohan Singh v. State of U.P.*². On behalf those facing the death penalty it was contended that death sentence extinguishes all the freedoms guaranteed under article 19 (1) (a) to (g) and was accordingly unreasonable and not in public interest. Secondly, the discretion vested in judges to award either

of the two punishments was not based on any legislative policy or standard or constituted an abdication by the legislature of its essential function attracting the vice of excessive delegation. Thirdly, the unguided sentencing discretion in judges rendered it violative of article 14 since two persons found guilty of murder could be treated differently – one sentenced to life the other to death. Fourthly, there was no procedure provided in the Cr.PC for determining which of the two punishments were to be awarded. The absence of a procedure established by law under which life could be extinguished resulted in a violation of article 21.

The five judges refused to be persuaded by the decision of the U.S. Supreme Court in *Furman v. Georgia*³ declaring death penalty to be in violation of the Eighth Amendment, which forbade cruel and unusual punishments. Expressing doubts about transplanting western experience the court felt that “social conditions are different and so also the general intellectual level.”⁴ In coming to the conclusion that capital punishment was neither unreasonable nor opposed to public interest, the court drew support from the 35th Report of the Law Commission and the fact that on four occasions between 1956 and 1962 bills or resolutions tabled in Parliament for abolition of death penalty had been rejected. Negating the argument of excessive delegation the court opined:⁵ “The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the judges with a very wide discretion in the matter of fixing the degree of punishment. The discretion... is liable to be corrected by superior courts.” As regards the procedure, the accused could always ask to lead additional evidence and counsel could address the court on the question of sentence. It was held that deprivation of life was constitutionally permissible as it was imposed after a trial in accordance with procedure established by law.

Bachan Singh

Three developments subsequent to the judgment in *Jagmohan* prompted a renewed challenge in *Bachan Singh v. State of Punjab*⁶ to the constitutional validity of the death penalty. The Cr.PC was reenacted in 1973 and section 354 (3) required that the judgment recording conviction for an offence punishable with death shall state special reasons for such sentence.⁷ Thus death sentence became the exception and not the rule as far as punishment for murder was concerned.

Secondly, the decision in *Maneka Gandhi v. Union of India*⁸, required that every law of punitive detention both in its procedural and substantial aspects must pass test of reasonableness on a collective reading of articles 21, 19 and 14. Based on this interpretation, the Supreme Court had in *Rajendra Prasad v. State of U.P.*⁹ held that the special reasons necessary for imposing the death penalty must relate not to the crime but the criminal. It could be awarded only if the security of the state and society, public order and the interests of the general public compelled that course. When *Bachan Singh*'s appeal came up for hearing in the Supreme Court before a bench of Sarkaria and Kailasam, JJ., the latter observed that the judgment of the majority in *Rajendra Prasad* ran counter to the judgment in *Jagmohan* and hence required reconsideration.

The third development was that India had acceded to the ICCPR that came into force on December 16, 1976.¹⁰ By ratifying the treaty, India had committed itself to the progressive abolition of death penalty.

In support of the first limb of the challenge, to the validity of s.302 IPC, it was argued for the abolitionists in *Bachan Singh* that:

- (a) death penalty was irreversible and could be, given the fallibility of the processes of law, inflicted upon innocent persons;
- (b) there was no convincing evidence that the death penalty served any penological purpose - its deterrence remained unproved, retribution was no longer an acceptable end of punishment and reformation of the criminal and his rehabilitation was the primary purpose of punishment;
- (c) execution by whatever means for whatever the offence was a cruel, inhuman and degrading punishment.

The majority of four judges in *Bachan Singh* negated the challenge to the constitutionality of death penalty, affirmed the decision in *Jagmohan* and overruled *Rajendra Prasad* in so far as it sought to restrict the imposition of death penalty only to cases where the security of the state and society, public order and the interests of the general public were threatened.¹¹

The Court continued to draw support from the Law Commission's 35th Report. The fact that there was, among rational persons, a deep division of opinion on this issue, was itself, according to the court, a ground for rejecting the argument that retention of the penalty was totally devoid of reason and purpose. The perceived majoritarian view supporting retention meant that death penalty as an alternative punishment was neither unreasonable nor lacking in public interest.

The court rejected the second limb of the challenge to the validity of section 354 (3) of Cr.PC on the ground that it permitted imposition of death penalty in an arbitrary and whimsical manner. It explained that the requirement under section 235 (2) for a pre-sentence hearing of the accused coupled with the requirement that the sentence of death had to be confirmed by the High Court under section 366 (2) of the Cr.PC, meant that errors in the exercise of the judicial discretion could be corrected by the superior courts.

Although the court was not inclined to lay down standards or norms for guiding the exercise of judicial discretion, it accepted the suggestions of the *amicus curiae*¹² as to what could generally constitute aggravating and mitigating circumstances. The court recorded the following possible aggravating circumstances suggested by the *amicus curiae*:

- (a) murder committed after previous planning and involves extreme brutality; or
- (b) murder involving exceptional depravity; or
- (c) murder of a member of any of the armed forces or of any police force or of any public servant and committed:
 - i) while such member of public servant was on duty; or
 - ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty

Among the mitigating factors suggested by the *amicus curiae* were:

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

The court termed these euphemistically as ‘indicators’ and ‘relevant circumstances’ attitude required to be accepted. It, however, indicated that these were not exhaustive and that the court did not want to be seen as fettering judicial discretion in the matter of sentencing.

The concluding remarks in the majority opinion marked the real shift in the judicial attitude towards sentencing. It also reflected the changing perceptions of the judiciary influenced as it was by major strides in human rights jurisprudence. The majority said:¹³ “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.”

In *Machhi Singh v. State of Punjab*¹⁴ the court summarised the propositions emanating from *Bachan Singh* and spelt out the task for the sentencing judge. It said:¹⁵

A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

The court then explained how it envisaged the guidelines would apply. The questions that the sentencing court had to ask were:¹⁶

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

Thus both in *Jagmohan* and *Bachan Singh*, the court bowed to legislative wisdom and shrank away from striking down the death penalty. But the similarity in the two decisions ended there. The change brought about by *Bachan Singh*, as explained by *Machhi Singh*, was significant. There was an affirmation that death penalty was the exception and not the rule. There was an affirmation that death penalty was the exception and not the rule. The formulation of the rarest of rare test, credited craftily by the court, still shy of being accused of legislating, to the amicus curiae who assisted it, acknowledgment of reformation and rehabilitation of the delinquent as one goal of punishment. It cannot be gainsaid that the rate of imposition of death penalty would definitely have been higher but for *Bachan Singh*. In retrospect, *Bachan Singh* was neither a small nor insignificant achievement for the abolitionists.

Bachan Singh also showed abolitionists that the challenge to the constitutionality of the death penalty was not a one-time exercise and had to be revived at regular intervals. Perhaps taking a cue, the challenge was renewed, albeit unsuccessfully, in *Shashi Nayar v. Union of India*.¹⁷ The petitioner requested reconsideration of *Jagmohan* and *Bachan Singh* on the ground that both those decisions were based on the 1967 report of the Law Commission which did not reflect current reality. However, the court was unmoved. It took “judicial notice... 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”.¹⁸ It was firm that “the present is, therefore, the most inopportune time to reconsider the law on the subject”.¹⁹ It perhaps this continuing perception of a real link between rising crime rate the severity of the punishment, the former justifying the latter, that is the real stumbling block in the re-examination of the necessity for retention.

b. Applying the Test of 'Rarest of Rare'

Machhi Singh requires the trying court to draw up a balance sheet of the aggravating and mitigating circumstances and opt for the maximum penalty only if even after giving the maximum weightage the mitigating circumstances, there is no alternative but to impose death sentence. However on an analysis of the decisions handed down by the Supreme Court since Bachan Singh, it appears that the exercise of balancing the aggravating and mitigating circumstances is rarely performed.²⁰ The reasons afforded by the court for either confirming death sentence or commuting it appear to invariably turn on the nature of the crime or on the role of the offender in the crime. The background of the offender and the possibility of his reformation or rehabilitation is seldom accounted for.²¹

Dispensability as a Special Reason

Kuljeet Singh v. Union of India²² was a decision rendered in a writ petition by the accused Ranga and Billa after their special leave petitions were dismissed by the Supreme Court. They were sentenced to death for killing a teenaged girl and her younger brother after giving them a lift in their stolen car while moving in the roads of Delhi. The court found that the death of the children was as a result of "savage planning" which bore a professional stamp. It said: "The survival of an orderly society demands the extinction of the life of persons like Ranga and Billa who are a menace to social order and security".²³

In another instance, the Supreme Court was dismayed that the sentencing court had adopted a not too serious approach in deciding whether the accused deserved to die. The Sessions Judge had observed in his order that "the accused has committed a terrific double murder and so no sympathy can be shown to him".²⁴ The Supreme Court disapproved of this and said:²⁵

The reasons given by the learned Sessions Judge for imposing the death sentence are not special reasons within the meaning of s. 354(3)... and we are not sure whether, if he was cognisant of his high responsibility under that provision, he would have necessarily imposed the death sentence.

Shankarlal Gyarsilal Dixit, a married man, had been convicted and sentenced to death for raping and murdering a girl of five years. The Supreme Court found the vital link in the chain of circumstances missing and acquitted him. The poignancy of the situation was captured pithily by the court when it said:²⁶

Unfaithful husbands, unchaste wives and unruly children are not for that reason to be sentenced to death if they commit murders unconnected with the state of their equation with their family and friends. The passing of the sentence of death must elicit the greatest concern and solicitude of the judge because, that is one sentence which cannot be recalled.

Similar Crime, Different Punishment

While certain kinds of crime have invariably been looked upon with severity and have unfailingly invited the maximum sentence - these include rape and murder of minor girls²⁷; the kidnapping and murder of a male child²⁸ or the merciless killing of a sister-in-law and her children²⁹ - there are several instances where a similar crime need not invite the same punishment. The case that demonstrates this best is Harbans Singh v. State of U.P.³⁰ Harbans and three others, Mohinder Singh, Kashmira Singh and Jeeta Singh were involved in the murder of four persons. With Mohinder dying in a police encounter, the remaining three stood trial and were convicted and sentenced to death by a sessions court. This was confirmed by the High Court.

What followed in the Supreme Court demonstrated how unpredictable the fate of an accused, no different from another, could be. Jeeta Singh's SLP was dismissed on April 15, 1976. He was executed on October 6, 1981.

Kashmira's SLP sent from the jail was entertained and on April 10, 1977 a different bench of Bhagwati and Fazal Ali, JJ., commuted his sentence to life imprisonment.

Harbans's SLP also sent from the jail, was dismissed by Sarkaria and Shinghal, JJ., on October 16, 1978. Despite the registry of the court pointing out that Kashmira's sentence had been commuted, a bench of Sarkaria and A.P.Sen, JJ., dismissed on May 9, 1980 the review petition filed by Harbans. The President rejected his mercy petition on October 6, 1981. He then filed a writ petition under article 32 before the Supreme Court.

Faced with the obvious miscarriage of justice, an anguished court opined that Kashmira's death sentence having been commuted by it, it would be unjust to confirm the death sentence imposed on Harbans. In a concurring judgment, A.N.Sen, J., exclaimed: "It will be a sheer travesty of justice and the course of justice will be perverted, if for the very same offence, the petitioner has to.... pay the extreme penalty of death whereas the death sentence imposed on his co-accused for the very same offence is commuted..."³¹ However, since the President had rejected the mercy petition, the court felt "in the interest of comity between the powers of this Court and the powers of the President of India, it will be more in the fitness of things if we were to recommend that the President may be so good as to exercise his power under Article 72... to commute the death sentence imposed upon the petitioner into imprisonment for life."³²

In *Om Prakash v. State of Haryana*³³ seven persons were murdered by a person working in the Border Security Force. All the seven victims including men, women and children were sleeping at the time of the offence and firing was resorted to without any provocation to wreak vengeance over a dispute over a plot of land. The court accepted the argument that the accused was compelled to resort to the crime because the authorities had paid no heed to the complaints made by him against the deceased in regard to encroachment on the property. The court took into consideration the fact that the appellant was working as a disciplined member of the armed forces having no criminal antecedents, was 23 years at the time of commission of the offence and that "there is no reason to believe that he cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society".³⁴

In *Shiv Ram v. State of U.P.*³⁵ death sentence was awarded for the murder of five persons, including a 10-year old boy, in a terribly deprived and brutal manner by dismembering the heads, carrying them in a procession and roasting the bodies in fire. In *State of U.P. v. Bhoora*,³⁶ which involved the murder of four persons, death sentence was commuted to life imprisonment. In *Nirmal Singh v. State of Haryana*³⁷ the murder by the appellant, who was on parole, of five persons of the family of the rape victim whose evidence at the trial had resulted in his conviction, invited the maximum punishment. Going by the individual role of the accused, the appellant's brother was given the benefit of a commuted sentence.

Pardon Them, Not Hang Them

The decisions where death sentences have been commuted do not appear to be based on any set pattern of sentencing. This deprives the decisions of real precedential value and necessitates formulating arguments for mitigation of sentence not on the basis of past practice but restricted to the facts of a case.

In *Panchhi v. State of U.P.*,³⁸ four members of the family of the accused became killers of four members of another family consequent upon a long history of quarrels. The accused made 27 attacks with axes and daranti on the deceased. The three surviving accused included a septuagenarian, a youth in his prime age and a mother who had given birth to a child even while undergoing the sentence. The death sentence awarded by the trial court was confirmed by the High Court. The Supreme Court commuted the sentence for all the three stating: "No doubt brutality looms large in the murders in this case particularly of the old and also the tender age child. It may be that the manner in which the killings were perpetrated may not by itself show any lighter side but that is not very peculiar or very special in these killings. Brutality of the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the 'rarest of rare cases'."³⁹ Apart from mentioning that a thirst for retaliation was a possible motive for the crime, the Court was totally silent on what mitigating factors had weighed with it.⁴⁰

In *Raja Ram Yadav v. State of Bihar*⁴¹ where six murders had been committed in a cold diabolical manner, the court commuted the sentence on the accused to life imprisonment on account of the special fact that the sole eye witness to the crime was a child aged 9 years. This was an instance where the court did not travel outside the record to seek factors that would weigh with it for a decision on the appropriate sentence. An internal

‘weakness’ in the evidence has sufficient for mitigation of sentence, although not for the purposes of returning a finding of innocence.

In *Major R.S. Budhwar v. Union of India*⁴² the carrying out of two murders by subordinate army personnel under orders of the superior officers was seen as not falling under the ‘rarest of rare’ category. The court pointed out that the accused had acted under dictation, surrendered within two days of the commission of the offence and had spoken the truth in the form of confessions that helped bring the superiors to book. However in *Shankar v. State of Tamil Nadu*⁴³ the confessions by the accused which led to the solving of the crime, did not help mitigate the death sentence awarded to them.

In *Kishori v. State of Delhi*,⁴⁴ the appellant was the member of a riotous mob that went on a rampage in Delhi following the assassination of prime minister Indira Gandhi on October 31, 1984. Thousands of Sikhs were done to death. The appellant was charged with having committed the murder three named and several other unnamed Sikhs. The Supreme Court commuted the death sentence. The factors that weighed with the court were that the appellant had been initially convicted in seven cases but on appeal had been acquitted in four of them. Therefore it could not be said that he was a hard-boiled criminal. None of the witnesses had stated that the appellant was a leader of the mob or that he exhorted its members to do any particular act. It further elaborated that “the acts of the mob of which the appellant was a member cannot be stated to be the result of any organisation or any group indulging in violent activities formed with any purpose or scheme so as to call an organised activity. In that sense, we may say that the acts of the mob of which the appellant was a member was only the result of a temporary frenzy”.⁴⁵

In *Ronny v. State of Maharashtra*⁴⁶ the three appellants were sentenced to death for the rape and murder of married woman of 45 years who was a mother of two children as well as that of her husband and son aged 17 years. In commuting the death sentences awarded to them the court took into account that one of the perpetrators crime, which also involved robbery, was a qualified civil engineer, married, having a son aged 4 years and parents living at the Spiritual Life Centre, Narsapur for three decades. He was also the nephew of the woman who was raped and murdered. Another had been awarded titles, “Thaneshri” and “Vasaishri”, for bodybuilding. His was a love marriage against the wishes of both their parents and there was nobody to look after their two daughters and two sons. The third accused had a sick father and no adverse antecedents. The court held that offences could not be said to have been committed under the influence of extreme mental or emotional disturbance. The possibility of reform and rehabilitation could not be ruled out. From the facts and circumstances it was not possible to predict as to which among the three played which part. It was not possible to say whose case fell within the rarest of rare cases.

The designated court that tried the Rajiv Gandhi assassination case, found all the twenty-six arraigned before it to be guilty of, inter alia, committing terrorist acts as defined by Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA).⁴⁷ The court then recommended that each of the twenty-six persons be sentenced to death. A perusal of the judgment reveals that the judge did not give individual reasons for each of the accused but gave seven ‘special reasons’ for all of them. There was absolutely no mention of any balancing of aggravating and mitigating circumstances for each of the accused.⁴⁸ Some of those special reasons were:⁴⁹

1. Rajiv Gandhi, the former Prime Minister of India was brutally assassinated in pursuance of diabolical plot carefully conceived and executed by a highly organised foreign terrorist organisation, the LTTE, operating from a closed preserve cut off from the rest of the world.
2. Sixteen innocent lives were lost and many sustained grievous/simple injuries in the gruesome, inhuman, uncivilized and merciless bomb blast by an LTTE woman human bomb which was successfully executed with the active help, assistance and participation of accused who are LTTE militants or its staunch supporters.
3. Nine police officers involving a Superintendent of Police, who were public servants and were on security duty at Sriperumbudur lost their lives while on duty, in this most heinous and gruesome crime perpetrated as a result of a pre-planned and premeditated conspiracy.

4. The brutal killings of Rajiv Gandhi brought the Indian democratic process to a grinding halt in as much as the general election to the Lok Sabha and assemblies in some States had to be postponed. Such was the impact and after effect of the killing of Rajiv Gandhi.
5. The victims were not in a position to protect themselves from the human bomb as the terrorists intelligently and ingeniously used Dhanu as a human bomb.
6. For killing Rajiv Gandhi and others, some of the accused infiltrated into India, clandestinely and with the full support and participation of other accused who are local Tamils, this heinous crime was committed by the LTTE militants.
7. Giving deterrent punishment alone can deter other potential offenders and in future dissuade our people from associating with any terrorist organisation to do such diabolical and heinous crimes.

In the Supreme Court, nineteen of the twenty-six were found to be innocent of the offence of murder and all of them of any TADA offence. Of the seven that were found guilty of the murder charge, four including a woman Nalini, were sentenced to death. Of the three judges, who wrote separate opinions, Thomas, J., felt that Nalini did not deserve the maximum penalty. The reasons that weighed with him were that she was an elderly and educated woman; she was led into the conspiracy by playing on her feminine sentiments; she played no dominating role; she was persistently brainwashed by A-3 (Murugan) who became her husband and then the father of her child; she was made to believe in the virtue of offering her help to the task undertaken by the conspirators. Another consideration was that she was the mother of a little female child who had to be saved from orphanhood.⁵⁰

However, the other two judges, Wadhwa, J. and Quadri, J. were of the view that Nalini did not deserve any leniency and the final order was that she too be sentenced to death.⁵¹ While Thomas J. dwelt on the mitigating circumstances for Nalini neither he nor the other judges considered those that would be relevant for the other accused being awarded the death sentence. Adopting the pattern followed by the trial court, they only recounted the aggravating circumstances emanating from the crime itself.

The upshot of the discussion on the application of the rarest of rare test is that there is no consistent or reliable pattern under which judges will exercise their discretion. The gnawing uneasiness that the same case if heard by a different set of judges may have resulted in a different punishment will always rankle in the minds of those successful death row convicts facing the noose. One sure safeguard is the strict adherence to the pre-sentence hearing requirement. An examination of the track record of the judiciary in this area is not very encouraging.

II. Non-adherence to the Pre-sentencing Hearing Requirements

a. The Law

A less noticed area of the death penalty discourse has been the unwitting failure of the courts in general, and the trial courts in particular, to ensure compliance with the mandatory procedural requirement of a pre-sentence hearing as spelt out under s.235(2) read with s.354 (3) Cr.PC. The object of the provision was obviously to enable the court to have information relevant to arriving at a decision on the choice of the appropriate sentence. In its 48th report the Law Commission acknowledged that one deficiency in the system was that there was a lack of comprehensive information as to characteristics and background of the offender. This obscured even more than before the aims of sentencing. Thus it became imperative that “the taking of evidence as to the circumstances relevant to sentencing should be encouraged and both the prosecution and the accused should be allowed to cooperate in the process”.⁵²

The rationale of s.235 (2), as explained by the Supreme Court in *Santa Singh v. State of Punjab*,⁵³ was to provide a separate stage when the court could hear the accused in regard to the extenuating or aggravating factors and then pass a proper sentence.

The nature of the hearing envisaged was explained in *Muniappan v. State of Tamil Nadu*⁵⁴ where the Sessions Judge did not make any serious effort to elicit from the accused what he wanted to say on the question of sentence. The judge merely recorded “When the accused was asked on the question of sentence, he did not say anything”. The Supreme Court deplored this approach and explained:⁵⁵

The obligation to hear the accused on the question of sentence which is imposed by s.235 (2) of the Cr.PC is not discharged by putting a formal question to the accused as to what he has to say on the question of sentence. The judge must make a genuine effort to elicit from the accused all information, which will eventually bear on the question of sentence... questions which the judge can put to the accused under s.235(2) and the answers which the accused makes to those questions are beyond the narrow constraints of the Evidence Act. The court, while on the question of sentence is in an altogether different domain in which facts and factors which operate are of an entirely different order than those which come to play on the question of conviction.

The inviolability and non-dispensability of the hearing at the pre-sentencing stage was firmly reiterated in *Allaudin Mian v. State of Bihar*⁵⁶. The court pointed out that this requirement was intended to satisfy the rule of natural justice. The court emphasised that this was mandatory and should not be treated as a mere formality. It added:⁵⁷ “We think as a general rule the trial court should, after recording the conviction, adjourn the matter to a future date and call upon the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender...”

This position was reaffirmed in *Malkiat Singh v. State of Punjab*.⁵⁸ In that case when the accused were questioned under s. 235(2) Cr. PC. “they declined to lead evidence.”⁵⁹ However, that did not disentitle them to an opportunity to adduce evidence to show mitigating circumstances.

b. The Practice

Despite the above decisions, in *Jai Kumar v. State of M.P.*⁶⁰ the trial court did not adjourn the case for hearing the accused on the question of sentence and pronounced the sentence on the same day. Further, the trial court recorded that “Learned counsel of both the parties were heard on the question of sentence. Both the parties do not want to give any documentary oral verbal evidence with regard to the above.” The Supreme Court held that where a judge invites the lawyers to address it on the question of sentence and lawyers do not seek an adjournment, the question of a further adjournment would not arise. The court felt that in the facts of the case where the accused had killed a pregnant woman as well as her minor daughter in a brutal manner by chopping of their heads, they could be no mitigating circumstances in order to strike a balance with the aggravating circumstances.

The approach of the trial judge in the Rajiv Gandhi assassination case was no different. The judge recorded the proceedings thus:⁶¹

After finding the accused guilty, with the consent of the advocates for the accused and A3 Sriharan for hearing the accused on question of sentence under section 235(2) of Code of Criminal Procedure the case is passed over from 11.30 a.m. to 1.30 p.m. The case taken up by 1.30 p.m. Accused were questioned under section 235(2) of Cr.PC on the question of sentence.

The judgment of the trial court does indicate that this entire exercise of hearing twenty-six persons on the question of sentence was completed in less than two hours’ time. It is not possible to imagine that there was enough time given to any of them to reflect on what they wanted to say. The Allaudin Mian requirement of a mandatory adjournment of the hearing by at least a day seems not to have been insisted upon. The judgment of the Supreme Court in the case also does not advert to this aspect.

The position that emerges on the question of pre-sentence hearing is that despite the court in Bachan Singh accepting the proposition that the State must be required to show through evidence that the accused cannot be reformed or rehabilitated, there is seldom any attempt made in the trial court to have a full-fledged hearing on this aspect. There is no instance of the State having been asked to produce such material either. Lawyers in the criminal system must seriously address this issue and ensure that the mandatory requirement of the Cr.PC is not a dead letter.

It does appear that the rigidity that ought to be attached to the procedure under which the death sentence is awarded is being followed more in the breach. The apprehension of the abolitionists in Jagmohan that the absence of a procedure established by law under which life could be extinguished through judicial orders deserves serious renewed attention.

III. The Arbitrariness of Laws and Procedures

a. Hanging an Innocent Person

The danger of an innocent person being hanged has never merely been a theoretical possibility. In the United States, a report issued in 1993 by the subcommittee on Civil and Constitutional Rights, Committee on the Judiciary of the US Congress, entitled 'Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions', noted that at least 48 people have been released from prison after serving time on death row since 1973 with significant evidence of their innocence. In 43 of these cases, the defendant was subsequently acquitted, pardoned or charges were dropped. Some of these men were convicted on the basis of perjured testimony or because the prosecutor improperly withheld exculpatory evidence.⁶²

The Rajiv Gandhi assassination case serves as a warning to the dangers of sending an innocent person to the gallows. The three judges of the Supreme Court who heard the case, in their separate judgments, concurred in holding that none of the 26 accused could be held guilty of any of the offences they were charged with under TADA and acquitted all of them of those offences. Only seven of the accused were found guilty of an offence under s. 302 read with 120-B IPC and of these seven, four were sentenced to death. In other words, barring a conviction for some minor offences under the IPC, the Foreigners Act and the Passports Act, nineteen of the accused who had been sentenced to death by the trial court after having been found guilty of offences under TADA as well for murder under s. 302 IPC, were acquitted. They were directed to be set at liberty since they had served more than 8 years in jail when in fact the maximum punishment for those minor offences was just two years. The arbitrariness of the whole exercise serves a grim reminder of the dangers that the criminal justice system is fraught with. What is disturbing is that each of these innocent persons has had to spend over eight years in jail without any justification or reparation for loss of reputation, for the acute mental agony and complete loss of liberty. The silence of the Supreme Court on this crucial aspect is too deafening to be ignored.

Another disturbing feature is that the entire trial in the Rajiv Gandhi assassination case was conducted under the special procedure prescribed under the TADA which allows confessions made to a police officer to be admissible in evidence. Moreover, TADA does not provide a tier of appeal to the High Court. The provisions of bail are also very strict and in this case, none of the accused was released on bail even for a day. The Supreme Court, however, did not find the use of such confessions by the accused to the police officers as evidence to be illegal or impermissible.⁶³

In the Indira Gandhi assassination case⁶⁴, one of the accused, Balbir Singh, was totally acquitted by the Supreme Court despite being found guilty and sentenced to death by the trial court as well as the High Court.

b. No Right of Appeal

In the above context the denial of an automatic right of appeal to the Supreme Court in a case of confirmation of death sentence by the High Court requires to be examined.

There is no automatic right of appeal in the Supreme Court where death sentences awarded by a trial court gets confirmed by the High Court.⁶⁵ It is only where there is a reversal acquittal by the trial court and awarding of life sentence or death sentence or a sentence of ten years or more by the High Court that the Cr.PC.⁶⁶ and the constitution⁶⁷ provide for a automatic right of appeal. While it has been a practice that the Supreme Court will not summarily reject a special Leave Petition where it involves death sentence, a recent instance makes real such a possibility. In that event there would not be really a right of appeal on the question of sentence, which gets confirmed for the first time in the High Court.⁶⁸ This may be inconsistent with the ICCPR treaty requirement to which India is a state party.⁶⁹

The recent case of Sheik Meeran, Selvam and Radhakrishnan were sentenced to death is an eye opener in this regard. The three were sentenced to death by the Sessions Court at Tirunelveli, Tamil Nadu on October 5, 1998 after being found guilty of the murder of an under trial in the court hall of the Judicial Magistrate, Nagercoil even while the court was holding its proceedings. Together with four others the three accused inflicted as many as 12 serious cut wounds on the face head and body of the accused. They then dragged the body to the court compound threatening the onlookers. They also threw a country bomb on the side of the sessions court while departing from the scene of the offence. The High Court had no difficulty in holding this to be the rarest of rare case. Although it did not consider the mitigating circumstances, it held that there were none and confirmed the death sentence on April 30, 1999. The Special Leave Petition filed by the three accused was listed on an urgent basis during the summer recess of the Supreme Court since the date of execution had been fixed on July 15, 1999. On June 21, 1999 at the first hearing of the special leave petition, the vacation bench of the Supreme Court dismissed the Special Petition in limine by an order of three sentences which read:⁷⁰

“In view of the consistent evidence of PWs 1, 2, 6 and 12 it has been believed by the learned Sessions Judge and also accepted by the High Court in appeal, there is no justification for entertaining these applications. The brutal murder (was) inside the court premises and therefore the award of the penalty is only death sentence. The SLPs are dismissed.”

The Review Petitions against this unusually cryptic order were heard on July 15, 1999 and dismissed. Normally, after leave to appeal is granted by the Supreme Court, and it usually is in a death sentence case, the case is heard as a regular appeal and the records are examined at length. With the special leave petition of the three accused being dismissed at a preliminary hearing of a few minutes, they were effectively denied the right of an appeal involving a full-fledged hearing on the question of conviction and sentence. Article 136 being a discretionary jurisdiction the possibilities that a bench of the Supreme Court might in fact throw out, at the admission stage itself, a special leave petition challenging a death sentence awarded by the High Court has thus become a reality.

c. Uncertainty of the Mercy Jurisdiction

The power of the executive to grant clemency is vested in both the President⁷¹ and the Governor⁷² under our Constitution.

In *Maru Ram v. Union of India*,⁷³ a Constitution Bench of the court held that the power under article 72 is to be exercised on the advice of the central government and not by President on his own, and that the advice of the government binds the head of the state. This was reiterated in *Kehar Singh v. Union of India*⁷⁴ in which the challenge was to the order of the President declining clemency to one of the accused in the Indira Gandhi assassination case on the ground that he could not “go into the merits of the case finally decided by the highest court of the land”⁷⁵. The court here explained that “the question as to the area of the President’s power under article 72 falls squarely within the judicial domain and can be examined by the court the way of judicial review.”⁷⁶ The court clarified that the order of the President cannot be subjected to judicial review on its merits except

within the strict limitation defined in *Maru Ram*.⁷⁷ The court held that the power of the President was not in any manner circumscribed by the decision of the court on merits of the case and that the President was required to take a decision independent of the judgment of the court.⁷⁸ However, the court declined the request of counsel for the petitioner that in order to prevent an arbitrary exercise of power under article 72, the court should draw up a set of guidelines for regulating the exercise. The court said: “it seems to us that there is sufficient indication in the terms of article 72 and the history of the power enshrined in that provision as well existing case law, and specific guidelines need not be spelt out.”⁷⁹

In *Swaran Singh v. State of U.P.*⁸⁰ where the Governor of U.P. had granted remission of the life sentence awarded to the Member of State Legislature of Assembly upon being convicted for the offence of murder, the Supreme Court interdicted the order of the Governor. While the court acknowledged that it had no power to touch the order passed by the Governor under article 161, if such power was exercised arbitrarily, malafide or in absolute disregard of the finer canons of constitutionalism, the by product order cannot get the approval of law and in such cases the judicial hand must be stretched to it. It found that the order of the Governor in the case “fringes on arbitrariness”.

In *Gentela Vijayvardhanrao v. State of A.P.*⁸¹ the two appellants were dalit boys who set afire a bus for the purpose of robbery. This resulted in the death of 23 passengers and serious burns to a number of other passengers. The court considered the barbarity of the crime, depravity in the manner of the execution, the number of victims and greed as the aggravating factors and confirmed the death sentence awarded to both of them. Even while the mercy petitions were pending, human rights groups took a campaigning against the death sentence awarded to the two boys. Attempts were made to bring back the issue to the Supreme Court by way of writ petitions. These did not succeed. The President of India, however, deemed it fit to grant pardon to the two and commuted their sentence to one of life imprisonment. In the absence of the requirement to give any reasons for such decision and further since the order of the President is neither published nor made available, it is impossible to know what weighed with the President in commuting the sentence. If such decisions were made public, as they ought to be, it would help know the factors in favour of not awarding death sentence and would provide guidance for the future. Otherwise the exercise of the clemency power on an extremely selective basis may give rise to the reasonable apprehension that it is capable of being arbitrarily used. With the President in this jurisdiction acting on the advice of the cabinet, the possibility of political considerations weighing with the decision to exercise clemency cannot be ruled out. The mercy jurisdiction then does not really offer a reliable answer to the charge that the arbitrary application of the rarest of rare test by the judiciary does not really have a corrective mechanism.

d. The Retentionist Mode

That the retentionists continue to dominate public opinion and therefore, legislative wisdom is an unmistakable fact in the post *Bachan Singh* phase. A series of legislative measures have either introduced or continued with the death penalty for various offences.⁸² There has been an increasing demand from the government and certain women’s groups for extending death penalty for the offence of rape. Deterrence continues to be viewed as the desired objective of punishment in academic and judicial circle as much as it is mistakenly believed that incarceration is a softer option. Overcoming some of these rigid positions has proved to be the biggest hurdle yet for the abolitionists.

e. Death Penalty Statutes

The Terrorist and Disruptive Activities (Prevention) Act (TADA) which was first enacted in 1985 and reenacted in 1987 provides for death penalty as an alternative punishment for the commission of a terrorist act.⁸³ Despite the non-renewal by the Parliament of TADA after 1995 resulting in its lapse,⁸⁴ a large number of trials under TADA still await completion. A death sentence recommended in the first instance by the designated court trying the case under TADA becomes final when confirmed at the next level by the Supreme Court, there being no appeal against such confirmation of sentence⁸⁵.

The IPC prescribes death penalty as an alternative punishment to life imprisonment for eleven kinds of offences, the recent one being introduced by an amendment in 1993.⁸⁶ By an amendment in 1988, section 31 A of the Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act) was introduced. This provision prescribes a mandatory death sentence for certain offences committed by a previous offender under that Act. A similar provision, section 303 IPC, which prescribed mandatory death sentence for the commission of murder by a life convict was held to be unconstitutional by the Supreme Court on the ground that “so final, so irrevocable and so irresuscitable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable”.⁸⁷ Based on Mithu, a writ petition challenging section 31 A NDPS Act was filed in the Goa bench of the Bombay High Court. It was rejected as premature since there was no known instance yet of a court having awarded the death penalty under this provision.⁸⁸

Section 3 (2) (i) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is another provision, which prescribes a mandatory death sentence. It states: “If an innocent member of a scheduled caste or scheduled tribe be convicted and executed in consequence of such false or fabricated evidence, the person who gives or fabricates such false evidence shall be punished with death.”⁸⁹

The Commission of Sati (Prevention) Act, 1987 provides for the death penalty among the punishments that may be imposed on any person who abets, directly or indirectly, the commission of sati. The National Security Guards Act, 1986 and the Indo-Tibetan Border Police Act, 1992 both prescribe the death sentence as an alternative punishment for defined offences committed by members of the two armed forces.

The abortive attempts by Tamil Nadu and Andhra Pradesh to enact special laws to deal with terrorism, both providing for death penalty, are pointers to the popular belief that retribution and deterrence are desired goals of punishment. This also explains the demand by the Home Minister, in which he is stated to have the support of many state governments, that death penalty be prescribed as a punishment for rape.⁹⁰

The baying for blood as a shrill cry of retribution is not a new phenomenon. It was not too far in the past that the Rajasthan High Court ordered the public hanging of a mother-in-law whom it found guilty of causing a dowry death.⁹¹ Two passages from earlier decisions of the Supreme Court, often quoted by later benches, also reflect this trend of popular thinking. In *Dhananjay Chatterjee v. State of West Bengal* the court said:⁹²

In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment”.

Earlier in *Mahesh v. Madhya Pradesh*, which was a case of multiple murders committed in a brutal manner, the court said:⁹³

It will be a mockery of justice to permit these appellants to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the appellants would be to render the justicing system of this country suspect. The common man will lose faith in courts. In such cases he understands and appreciates the language of deterrence more than the reformatory jargon.

Academics are not lacking in expressing similar sentiments. In a hard-hitting article,⁹⁴ Professor Pande has demanded that the court should be imbued with social sentiment and treat the rarest of rare as a social category. Criticizing the Supreme Court's judgment in *Ravindra Trimbak Chouthmal v. State of Maharashtra*⁹⁵ where the court commuted the death sentence awarded to the husband and father-in-law for killing a young eight month pregnant wife on the ground that dowry deaths have ceased to be of the rarest of rare types and that there were doubts about the deterrent effect of the death penalty, Pande argues that this was ignoring the strong and growing opinion that dowry death and violence were the worst form of reprehensible behaviour and that the court's opinion reflects “a clear preference for a classical utilitarian position that justifies punishment solely on the basis of its benefits to the society”.⁹⁶

The failure on the part of law academics⁹⁷ and even lawyers⁹⁸ to see death penalty as a human rights issue has further harmed the cause of the abolitionists. However, they should be able to point out that the general decline in law and order, to which state-engineered lawlessness has contributed in no small measure, only demonstrates that the retention of death penalty has had no visible deterrent effect whatsoever.⁹⁹ They may also want to refer to the research findings the United Nations, which after a survey, concluded that:¹⁰⁰

This research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment - such proof is unlikely to be following. The evidence as a whole still gives no possible support to the deterrent hypothesis.

IV. Death Penalty as a Cruel Punishment

a. Indian Position

The Bachan Singh court negated the contention that death by hanging constituted an unreasonable, cruel or unusual punishment. The Court noted that despite the U.S. Supreme Court in *Furman v. Georgia*¹⁰¹ holding the penalty to be a cruel and unusual punishment in violation of the 8th and 14th Amendments, the legislatures of no less than 32 states, posthaste revised their penal laws and reinstated death penalty for murder and certain other crimes. In the subsequent decision in *Gregg v. Georgia*,¹⁰² it read down the concerns expressed in *Furman* and held “as a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and providing with standards to guide its use of the information.”¹⁰³

The cruel nature of death sentence by hanging, prescribed by s.354 (5) Cr.PC, was again examined by the Supreme Court in *Deena v. Union of India*.¹⁰⁴ Justifying it, the court said: “The system of hanging is as painless as is possible in the circumstances, it causes no greater pain than any other known method of executing the death sentence and it involves no barbarity, torture or degradation. This conclusion is based on reason, supported by expert evidence and the findings of modern medicine.”¹⁰⁵ Later in *Pt. Parmanand Katara v. Union of India*¹⁰⁶ the court was only prepared to hold that allowing the body to remain on the noose beyond the point of death violated the dignity of the human body and was unconstitutional. Nevertheless, the question of cruelty attaching to the act of hanging itself has not been seriously addressed as was done by the South African Constitutional Court.¹⁰⁷

In *Smt. Triveniben v. State of Gujarat*¹⁰⁸ a Constitution Bench examined the contention of death row convicts that their sentences should be commuted on ground of prolonged delay in the execution of death sentence. It was pointed out that the condemned prisoner undergoes inhuman suffering and mental torture in the long wait to execution. The court held that judicial delay in disposal of the appeal finally would not render the award of death sentence unconstitutional. The court also declined to fix any time limit for disposal even of mercy petitions. It however permitted a condemned prisoner to come to the court requesting it to examine the fairness of the death sentence if there was inordinate delay in its execution.

In *Madhu Mehta v. Union of India*¹⁰⁹ a public interest litigation succeeded in persuading the court to commute death sentence awarded to one Gyasi Ram to life imprisonment. It held the delay of eight years in disposing of his mercy petition had caused him to suffer the “mental agony of living under the shadow of death for long, far too long.”¹¹⁰

b. South African Position

Section 12 (1) (e) of the Constitution of the Republic of South Africa, 1996¹¹¹ guarantees that everyone has the right to the freedom and security of the person which includes the right not to be punished in a cruel, inhuman or degrading way. The question whether section 277(1) (a) of the South African Criminal Procedure Act, 1977 which prescribed death sentence as a competent sentence for murder came to be considered by the Constitutional Court in *The State v. T. Makwanyane*.¹¹² The court was unanimous in declaring death penalty to be a cruel and inhuman form of punishment and therefore unconstitutional. Given the importance of the issue, each of the eleven judges constituting the court gave separate concurring opinions, bringing to the fore the divergent perspectives. The arguments of the abolitionists and retentionists heard elsewhere were addressed here as well. Only this time, the court was unanimous in upholding the view of the abolitionists.

The court first considered whether the retention of death penalty satisfied the criterion under section 36 (1)¹¹³ that any limitation on the right under s. 12 (1) must be both reasonable and necessary and must not negate the essential content of the right. Reference was made to the judgment of the Canadian Supreme Court in *R v. Oakes*¹¹⁴ where the need for proportionality between the limitation and the objective of the right was emphasised thus:

There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question.¹¹⁵ Third, there must be a proportionality between the effect of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

In his judgment Chaskalson, J., pointed out that the as far as the second component was concerned, the fact that a severe punishment in the form of life imprisonment is available as an alternative punishment would be relevant to the question whether the death sentence impairs the right as little as possible. He drew starkly the picture of a condemned prisoner in the following words:¹¹⁶

A prisoner is not stripped naked, bound, gagged and chained to his or her cell. The right of association with other prisoners, the right to exercise, to write and receive letters and the rights of personality... are of vital importance to prisoners and highly valued by them precisely because they are confined, have only limited contact with the outside world, and are subject to prison discipline. Imprisonment is a severe punishment; but prisoners retain all the rights to which every person is entitled under Chapter Three subject only to limitations imposed by the prison regime that are justifiable under section 33. Of these, none are more important than the section 11(2) right not to be subjected to "torture of any kind.... nor to cruel, inhuman or degrading treatment or punishment". There is a difference between encroaching upon rights for the purpose of punishment and destroying them altogether. It is that difference with which we are concerned in the present case.

The contrast with the approach in *Bachan Singh*, where our court looked to the abolitionists to provide all the facts and figures, is telling in the following passage of the judgment of Chaskalson, J. where he repelled the contention that death penalty had a deterrent value:

We would be deluding ourselves if we were to believe that the execution of the few persons sentenced to death during this period, and of the comparatively few other people from now onwards will provide the solution to the unacceptably high rate of crime. There will always be unstable, desperate, and pathological people for whom the risk of arrest and imprisonment provides no deterrent, but there is nothing to show that a decision to carry out the death sentence would have any impact on the behaviour of such people, or that there will be no more of them if imprisonment is the only sanction. No information was placed before us by the Attorney General in regard to the rising crime rate other than bare statistics, and they alone prove nothing, other than that we are living in a violent society in which most crime goes unpunished - something that we all

know.¹¹⁷

In the best answer yet given by a judiciary to its critics for not heeding public opinion, Chaskalson.J, explains:¹¹⁸

Public Opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.

The judgment of the Constitutional Court helps also understand the agony faced by a condemned prisoner while awaiting the final moment. Didcott J., in his opinion¹¹⁹ refers to the opinion of Liacos J in *District Attorney for the Suffolk District v. Watson* thus:¹²⁰

The ordeals of the condemned are inherent and inevitable in any system that informs the condemned person of his sentence and provides for a gap between sentence and execution. Whatever one believes about the cruelty of the death penalty itself, this violence done to the prisoners mind must afflict the conscience of enlightened government and give the civilized heart no rest.... The condemned must confront this primal terror directly, and in the most demeaning circumstances. A condemned man knows, subject to the possibility of successful appeal or commutation, the time and manner of his death. His thoughts about death must necessarily be focussed more precisely than other people's. he must wait for specific death, not merely expect death in the abstract. Apart from cases of suicide or terminal illness, this certainty is unique to those who are sentenced to death. The state puts the question of death to the condemned person, and he must grapple with it without the consolation that he will be naturally or with his humanity intact. A condemned person experience on extreme form of debasement. The death sentence itself is a declaration that society deems the prisoner a nullity, less than human and unworthy to live. But that negotiation of his personality carries through the entire period between sentence and execution.

The futility of the death penalty was pithily stated by Sachs.J, in his judgment:¹²¹

Executing a trussed human being long after the violence has ended, totally lacks proportionality in relation to the use of force, and does not fall within the principles of self-defence. From one point of view capital punishment, unless cruelly performed, is a contradiction in terms. The 'capital' part ends rather than expresses the 'punishment', in the sense that the condemned person is eliminated, not punished. A living being held for years in prison is punished; a corpse cannot be punished, only mutilated. Thus, execution ceases to be a punishment of a human being in terms of this Constitution, and becomes instead the obliteration of a sub-human from the purview of the Constitution.

The judgment of the South African Constitutional Court is the strongest answer to the retentionists. Given the turmoil of a painful transition from the apartheid years and the inherent problems in a culturally diverse society that South Africa is home to, the judgment deserves close scrutiny and admiration for the courage and innovation that the highest court of that country has shown.

c. International Practice

India being a state party to the ICCPR is required to periodically submit a country report about the measures it has taken to give effect to the rights recognised therein. The emphasis on progressive abolition is contained in article 6 (6) which states: "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant." In 1989 the UN General Assembly adopted the Second Optional Protocol to the ICCPR which aims at abolition of death penalty. Article 1 requires that no one within the jurisdiction of a State Party to the Second Optional Protocol shall be executed. India is not a signatory to the Second Optional Protocol.

At the meeting of the Human Rights Committee, set up by the ICCPR to examine complaints against state parties, held on July 24 and 25, 1997, the Attorney General for India was questioned in particular about India's track record on the death penalty. The Attorney General informed the Committee that in India even when sentences are imposed in the rarest of rare cases, they are normally not carried out. He also furnished statistics gathered from various states: In 1991, there were 24 sentences imposed out of which about only 4 were carried out. The President intervened in about 75% of cases. In 1992, 6 sentences were carried, in 1994, 1 and in 1995, 2 and the percentage of sentence carried out was getting less and less as compared to what was imposed.¹²² The explanation offered by him for India not signing the Second Optional Protocol was that "the legislative wisdom today is that the actual sentencing is rare. The actual execution is even rarer because the President intervenes in about 75% cases and reduces the sentence to life imprisonment and therefore today the legislative perception is that capital punishment should not be abolished, particularly because it is rarely exercised, but some sort of a concept of retribution still remains in the mind of the legislature."¹²³

In its report, which it required should receive maximum publicity, the Committee expressed concern at the lack of compliance of the Penal Code with article 6 paragraphs 2 and 5 of the Covenant. It therefore recommended that India abolish by law the imposition of the death penalty on minors and reduce the number of offences carrying the death penalty to the most serious crimes, with a view to its ultimate abolition.¹²⁴

A document produced by Amnesty International in May, 1999 shows that at the end of 1998, 68 countries in the world have totally abolished death penalty for all crimes. As many as 91 countries including India and the United States have retained death penalty as a form of punishment. United Kingdom and Canada became abolitionist for all crimes during 1998.

While there is a strong move towards abolition, there have been moves the other way too. Ethiopia, St. Kitts and Sri Lanka have, after a long gap, reintroduced death penalty as an offence and this purportedly has popular support in those countries. In Thailand too death sentences have resumed after a number of years and executions are being carried out by shooting by the machine gun. A court in Vietnam recently sentenced a Thai businessman to death for having cheated two state owned corporations in export deals.¹²⁵

d. ICC

On July 17, 1998, after three years of discussions, governments assembled for the conclusion of the diplomatic conference in Rome to establish a permanent International Criminal Court (ICC). 120 countries voted in favour of the statute creating the ICC, 21 including India abstained and only 7, including the U.S.A. and China voted against it. When the statute receives the 60 ratifications it will enter into force and have jurisdiction to try individuals for crimes against humanity, war crimes, genocide and aggression. In the deliberations that preceded the signing of the treaty, there were divergent views on whether the death penalty should be explicitly included as a penalty, with Trinidad and Tobago, the Arab states, Nigeria, and Rwanda in favour of its inclusion. The U.S.A., supported by Japan, made an intervention that the principle of complementarity would permit countries to still use capital punishment to punish the core crimes. The end result is that the death penalty cannot be awarded by the ICC as a punishment for any of the offences it tries.¹²⁶ This is not an insignificant development since such a large body of countries has overwhelmingly rejected death penalty as a form of punishment. For those concerned with popular opinions and majoritarian views, the ICC statute cannot possibly be ignored.

IV. Non-violence and Peace

Kent E. Gipson, an attorney representing death row inmates in their post-conviction appeals in Missouri, U.S.A. points out that: “The death penalty in America is a ‘cruel lottery’, because at each stage of the process from the prosecution’s decision to seek the death penalty to the carrying out of the sentence, a defendant’s chance of being given the death penalty depend to an astonishing degree on arbitrary and capricious circumstances rather than on the defendant’s criminal and moral responsibility. This system, permeated with unfairness from beginning to end, is so flawed as to be unjustifiable.”¹²⁷

These observations might as well apply to our country beset as it is with its endemic problems of an overburdened judicial system, an inadequate network of legal aid and assistance and poor prison conditions. Early on the Supreme Court had, in a series of far-reaching orders in public interest litigation cases, highlighted the harshness of both the criminal justice and penitentiary systems.¹²⁸ Prisoners in our jails die a thousand deaths before they reach the gallows. There is a general misconception that incarceration for long terms is a less severe form of punishment when compared to the death penalty.¹²⁹

The system of legal aid developed thus far has not held out much promise for the poor, who constitute the largest percentage of the litigants within the criminal justice system. The Legal Services Authorities Act, 1987 does entitle a person in custody to avail of legal aid. However, this legislation was enforced by the government only in November, 1995 and its effectiveness remains to be seen.¹³⁰ The Cr.PC¹³¹ provides that a sessions judge may request a lawyer to act for an unrepresented accused. The working of this system has been unsatisfactory since the litigant does not have the choice of a lawyer.¹³²

Even while we need to grapple with some of these systemic deficiencies, on a different plane, rather than confine the debate over the death penalty to the acknowledged domains of the abolitionists and retentionists, it might be necessary to introspect and resurrect the values of non-violence and respect for human dignity that forms the core of our constitutional values. We may usefully learn from the search for indigenous values that has deeply influenced the approach of the South African Constitutional Court to the question of retaining death penalty. Drawing on the concept of ‘ubuntu’ Madala .J, points out:¹³³

“The Constitution in its post-amble declares: ‘..... there is a need for understanding but not vengeance, and for reparation but not for retaliation, a need for unbuntu but not victimisation’. The concept ‘unbuntu’ appears for the first time in the post-amble, but it is a concept that permeates the Constitution generally and more particularly Chapter Three, which embodies the entrenched fundamental human rights. The concept carries in it the ideas of humaneness, social justice and fairness.”

He then queries:¹³⁴

As observed before, the death penalty rejects the possibility of rehabilitation of the convicted persons, condemning them as “no good”, once and for all, and drafting them to the death row and the gallows. One must then ask whether such rejection of rehabilitation as a possibility accords with the concept of ubuntu.

He then concluded that “the death penalty does not belong to the society envisaged in the constitution, is clearly in conflict with the constitution generally and runs counter to the concept of ‘ubuntu’”.¹³⁵

Yet another judge, Kentridge, J., quoted Churchill’s address to the House of Commons in 1910, to drive home the point:

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm dispassionate recognition of the rights of the accused, and even of the convicted criminal, against the State - a constant heart-searching by all charged with the duty of punishment - a desire and eagerness to rehabilitate in the world of coinage of punishment: tireless efforts towards discovery of curative and regenerative processes: unflinching faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols, which, in the treatment of crime and criminal, mark and measure the

*stored-up strength of a nation, and are sign and proof of the living virtue in it.*¹³⁶

Albie Sachs, a judge of the South African Constitutional Court as well as a member of its Truth and Reconciliation Commission (TRC), spoke in India in December, 1998 about the philosophy of the TRC. Emphasising the need to move from the microscopic truths that courts and the law determine to a dialogic truth, he said:

*Court records... are notoriously arid as sources of information. Outside the microscopic events under enquiry, you learn little. The social processes and cultural and institutional systems responsible for the violations remain uninvestigated. The answer to this puzzle must lie in the differing objectives of the respective enquiries. Courts are concerned with accountability in a narrow individualised sense. Due process of law relates not so much to truth, as to proof. Before you send someone to jail there has to be proof of the responsibility in the microscopic sense. When the penalties and consequences are grave and personalised you need this constrained mode of proceeding. The nation wishing to understand and deal with its past, however, is asking much larger questions: how could it happen, what was it like for all concerned, how can you spot the signs and how can it be prevented from occurring again? If you are dealing with large episodes, the main concern is not punishment or due compensation after due process of law, but to have an understanding and acknowledgment by society of what happened so that the healing process can really start. Dialogue is the foundation of repair. The dignity that goes with dialogue is the basis for achieving common citizenship. It is the equality of voice that marks a decisive start, the beginnings of a sense of shared morality and responsibility.*¹³⁷

Can we measure up to the challenge posed? Are we prepared to ask the right questions and seek the kind of information we need? Surprisingly the general consensus on the reasons for the spiralling crime rate has not prompted a debate over its real causes. Law persons must show the lead in reviving the platform for an informed debate on the retention of death penalty. Given the fact that there is very little information made available on how many people are being sentenced to death at any given point in time, how many await decisions on their mercy petitions, how many wait the hangman's noose to be tightened around their necks and where, there is much that needs to be done to facilitate research and analysis. Prison doors need to be knocked at and prisoners engaged in a dialogue. This task needs to be undertaken on a priority basis before mounting the next challenge to the constitutionality and justification for retaining the death penalty.

Endnotes

¹ 35th Report of the Law Commission of India, p.354.

² (1973) 1 SCC 20.

³ 33 L Ed 2d 346

⁴ *Supra* note 2 at 28.

⁵ *Id.* at 35.

⁶ 1980 (2) SCC 684.

⁷ The Joint Committee of Parliament in its Report stated the object and reason of making the change, as follows: A sentence of death is the extreme penalty of law and it is but fair that when a court awards that sentence in a case where the alternative sentence of life imprisonment is also available, it should give special reasons in support of the sentence.

⁸ 1978 (2) SCR 621.

⁹ (1979) 3 SCC 646.

¹⁰ Article 6 (2) ICCPR: In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

The main objective of the provision was spelt out in the Resolution 32/61 of December 8, 1977 of the General Assembly of the United Nations which said: "The main objective to be pursued in the field of capital punishment is of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment."

¹¹ The dissenting opinion of Bhagwati. J, (as he then was) is reported in *Bachan Singh v. State of Punjab* (1982) 3 SCC 24.

¹² Dr. Y.S. Chitale, Senior Advocate

¹³ *Id.* at 751.

¹⁴ (1983) 3 SCC 470.

¹⁵ *Id.* at 749

¹⁶ *Ibid.*

¹⁷ (1992) 1 SCC 96. The petitioner's husband was convicted for the murder of his father and stepbrother. The petition was filed after his mercy petitions had been rejected first by the President of India and then by the Governor of Jammu and Kashmir.

¹⁸ *Id.* at 99.

¹⁹ *Ibid.*

²⁰ A notable exception is the decision in *Anshad v. State of Karnataka* (1994) 4 SCC 381 where the Supreme Court commuted the death sentence awarded to three persons by the High Court on a reversal of acquittal. The Supreme Court held that the reasons given by the High Court without balancing the aggravating and mitigating circumstances were not 'special reasons' contemplated by law.

²¹ The cases that follow are only illustrative.

²² (1981) 3 SCC 324.

²³ *Id.* at 325. A subsequent petition questioning the rejection of their mercy petition by the President was also dismissed: *Kuljit Singh v. Lt. Governor of Delhi* (1982) 1 SCC 417.

- ²⁴ *Muniappan v. State of Tamil Nadu* (1981) 3 SCC 11 at 15.
- ²⁵ *Id.* at 15.
- ²⁶ *Shankarlal Gyarsilal Dixit v. State of Maharashtra* (1981) 2 SCC 35 at 45. This was in response to the High Court's comment that "such a person could neither be an asset to his wife and children nor entitled to live in society"
- ²⁷ *Dhananjoy Chatterjee v. State of West Bengal* (1994) 2 SCC 220; *Laxman Naik v. State of Orissa* (1994) 3 SCC 381; *Kamta Tiwari v. State of M.P.* (1996) 6 SCC 250. But see *Kumudi Lal v. State of U.P.* (1999) 4 SCC 108 where the appellant convicted for raping and murdering a fourteen year old girl who had gone to the fields to ease herself was given the benefit of commutation of sentence on the ground that since "the circumstances indicated that she willingly allowed the appellant to have some liberty with her", this was not the rarest of rare cases.
- ²⁸ *Henry Westmuller Roberts v. State of Assam* (1985) 3 SCC 291; *Mohan v. State of Tamil Nadu* (1998) 5 SCC 336 where the death sentences awarded to the principal accused and his younger brother were confirmed while those awarded to the two accomplices were commuted.
- ²⁹ *Javed Ahmed Pawala v. State of Maharashtra* (1983) 3 SCC 39; *Jai Kumar v. State of M.P.* (1999) 5 SCC 1. But see *State of Tamil Nadu v. Suresh* (1998) 2 SCC 372 where the passage of time helped to commute the sentence.
- ³⁰ (1982) 2 SCC 101
- ³¹ *Id.* at 107
- ³² *Id.* at 104
- ³³ (1999) 4 SCC 19.
- ³⁴ *Id.* at 29.
- ³⁵ (1998) 1 SCC 149
- ³⁶ (1998) 1 SCC 128
- ³⁷ (1999) 3 SCC 670
- ³⁸ (1998) 7 SCC 177
- ³⁹ *Id.* at 183.
- ⁴⁰ The case attracted wide attention since one of those on death row was a woman with a suckling child. Significantly, the Supreme Court rejected the plea of the National Commission for Women for intervening in the case "for the obvious reason that under the Code of Criminal Procedure, the National Commission for Women or any other organisation cannot have locus standi in this murder case". *Supra* note 38 at 180.
- ⁴¹ (1996) 9 SCC 287
- ⁴² (1996) 9 SCC 502
- ⁴³ (1994) 4 SCC 478. Despite the principal accused giving copious details of the police officers who aided him in his business of illicit liquor and prostitution, the court was not inclined to direct the government to take action against the named officers even while it relied on that very confession to find him and his brother guilty and sentence them to death. *Id.* at 519-20.
- ⁴⁴ (1999) 1 SCC 148
- ⁴⁵ *Id.* at 157
- ⁴⁶ (1998) 3 SCC 625
- ⁴⁷ S.3 (1) TADA defines a terrorist act as an act done with an intent to (i) overawe the government or (ii) to strike terror in people or (iii) to alienate any section of the people or (iv) to adversely affect the harmony amongst different sections of the people.

⁴⁸ Among the accused were five women. Four belonged to one family and there were three couples. One other accused was a seventy-six year old man whose granddaughter was also an accused in the same case.

⁴⁹ Unreported judgment dated January 28, 1998 of Judge Navaneetham, at 1625-26.

⁵⁰ *State v. Nalini* 1999 (3) SCALE 241 at 307.

⁵¹ *Id.* at 500. In *V.K.Saxena v. State of U.P.* (1983) 4 SCC 645 it was held that when one out of two judges of the High Court in appeal differ on the point of guilt, the death sentence cannot be restored. While it will be interesting to see if this helps Nalini in her review petition now pending consideration before the Supreme Court, this is perhaps the first known instance of a death sentence on a woman being confirmed and there being a dissenting opinion over it. The earlier instances of *Lichhama Devi* (*infra* n.93) and *Ram Shri* (*supra* n.39) resulted in commuted sentences.

⁵² 48th Report of the Law Commission, 16 (1970)

⁵³ (1976) 4 SCC 190 at 195

⁵⁴ (1981) 3 SCC 11

⁵⁵ *Id.* at 13

⁵⁶ (1989) 3 SCC 5.

⁵⁷ *Id.* at 21.

⁵⁸ (1991) 4 SCC 341

⁵⁹ *Id.* at 347

⁶⁰ *Supra* note 29

⁶¹ *Supra* note 49 at 1621

⁶² Roger Hood, *The Death Penalty: A Worldwide Perspective* 104 (1996)

⁶³ The court relied on s.12 TADA which permits a confession made to a police officer to be admissible in the trial of such a person for an offence under TADA together with any other offence. In an earlier similar instance death sentence was awarded to both Sukha and Jinda for committing the murder of General Vaidya. They were found innocent of any TADA offence but the entire trial court took place under the TADA procedure: See *State of Maharashtra v. Sukvinder Singh* 1992 (3) SCC 700. The attempt to question this arbitrary procedure through a PIL failed on the ground of lack of standing: See *Simranjit Singh Mann v. Union of India* 1992 (4) SCC 653. See also the attempt of the National Commission for Women in the Ram Shree case which also failed *Panchhi Vs. State of U.P. supra* n. 39.

⁶⁴ *Kehar Singh v. State, Delhi Administration* (1988) 3 SCC 609. See also *Arjun Marik v. State of Bihar* 1994 Supp 2 SCC 372. There are many other similar instances.

⁶⁵ The only remedy is to file a Special Leave Petition within sixty days of the receipt of the certified copy of the order.

⁶⁶ S.379

⁶⁷ Art.134

⁶⁸ For an award of death sentence under the TADA, the Supreme Court is the first court that confirms the sentence and there is no appeal against it.

⁶⁹ Art. 14 (5) ICCPR which provides that everyone convicted of a crime shall have the right to have his conviction and sentence being reviewed by a higher tribunal according to law.

⁷⁰ Unreported Order dated June 21, 1999 in S.L.P. (Crl) No.1990-91/99 – *Sheik Meeran & 2 Ors. v. State of Tamil Nadu*. A mercy petition has been sent to the President of India who has ordered

the stay of the executions.

⁷¹ Article 72: *Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.*-(1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence-

(a)....

(b)....

(c) In all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the governor of a State under any law for the time being in force.

⁷² Article 161: *Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.*- The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

⁷³ (1981) 1 SCC 107

⁷⁴ (1989) 1 SCC 204

⁷⁵ *Id.* at 209

⁷⁶ *Id.* at 217

⁷⁷ *Id.* at 214

⁷⁸ “The President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given it by this court”. *Supra* note 74 at 214

⁷⁹ *Id.* at 217

⁸⁰ (1998) 4 SCC 75. See also *Harbans Singh v. State of U.P.* *supra* note 30

⁸¹ (1996) 6 SCC 241

⁸² See Usha Ramanathan, “The Death Penalty and Some Issues” *Frontline* 123 (June 4, 1999)

⁸³ For definition of a terrorist act see *supra* note 47

⁸⁴ The challenge to the constitutional validity of TADA failed in the Supreme Court: *Kartar Singh v. Union of India* (1994) 3 SCC 569

⁸⁵ See S.20 (6) TADA

⁸⁶ S.364 A (kidnapping for ransom) was introduced with effect from May 22, 1993 by the Criminal Law (Amendment) Act, 1993. The other eight offences are waging war against the government of India (s.121), abetting mutiny actually committed (s.132), giving or fabricating false evidence upon which an innocent person suffers death (s.194), murder (s.302), murder by life convict (s.303 – though struck down by the Supreme Court in *Mithu* (1983) 2 SCC 277, it still remains in the statute book), abetment of suicide of a minor or insane, or intoxicated person (s.305), attempt to murder by a person under a sentence of imprisonment for life if hurt is caused (s.307), dacoity accompanied with murder (s.396) and criminal conspiracy to commit any of the above offences (s.120-B).

⁸⁷ *Mithu v. State of Punjab* *supra* note 86 at 298.

⁸⁸ Unreported judgment dated March 9, 1998 of the High Court of Bombay at Goa in W.P.No.80/98 – *Jos. Peter D’Souza v. Union of India*

⁸⁹ It appears that the challenge to the constitutional validity of this provision failed: See AIR 1994

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- ⁹⁰ For a criticism of this move see Usha Ramanathan, “Only a Safety Valve” *The Hindu* New Delhi 25 (November 22, 1998)
- ⁹¹ Fortunately in *Attorney General of India v. Lichhama Devi*, AIR 1986 SC 467, the Supreme Court cried halt stating “a barbaric crime does not have to be visited with a barbaric penalty such as public hanging”. When her appeal was finally taken up, the death sentence was commuted by the Supreme Court which found that” the decision to award death sentence is more out of anger than on reasons. The judicial discretion should not be allowed to be swayed by emotions and indignation.”: *Lichhamadevi v. State of Rajasthan* (1988) 4 SCC 456 at 462.
- ⁹² (1994) 2 SCC 220 at 239. The case involved the rape and murder of a teenage girl in Calcutta. This passage was cited in the confirming judgment in *Jai Kumar v. State of M.P.* (supra n. 30)
- ⁹³ (1987) 3 SCC 80 at 82. Followed in *Sri Mahendra Nath Das v. State of Assam* 1999 (3) SCALE 700.
- ⁹⁴ B.B. Pande, “Murder Most Foul, Though Not Rarest of Rare” (1996) 5 SCC (Journal) 1
- ⁹⁵ (1996) 4 SCC 148
- ⁹⁶ *Supra* note 94 at 5
- ⁹⁷ An extreme example in the recent past is the reported statement of the Dean of the Law Faculty , Delhi University who when asked why his department was not teaching a human rights course was reported to have said “I don’t think human rights have much to do with law. It is more of a philosophical subject which deals with human values and responses, right and wrong”: See Gautam Roy, ‘Rights Course Stuck in Quagmire’, *The Hindustan Times*, New Delhi July 15, 1999, p.1.
- ⁹⁸ The bar awaits the likes of the lamented R.K.Garg, who valiantly led the abolitionist onslaught through *Jagmohan*, *Bachan Singh* and *Deena* and kept the fight going in various other cases, many of which are listed in this piece.
- ⁹⁹ For the orders made by the Supreme Court in connection with the mass cremation of thousands of persons by the Punjab Police after labelling them as unidentified, see *Paramjit Kaur v. State of Punjab* (1996) 7 SCC 20; 1996 (6) SCALE SP-21; 1996(8) SCALE SP-6. The Report of the NHRC for the period Between April 1, 1994 and March 31, 1995 records that among the cases admitted for disposal by it were 111 of deaths in police custody, 51 in judicial custody, 9 other custodial deaths, 55 cases of disappearances, 114 cases of illegal detention, 497 other “police excesses”.
- ¹⁰⁰ United Nations: *The Question of the Death Penalty and the New Contributions of Criminal Science to the Matter* at 110 (1988)
- ¹⁰¹ *Supra* note 1
- ¹⁰² 49 L Ed 859
- ¹⁰³ The U.S. is one of the countries which continues to retain death penalty. 24 States in the U.S. permit children below 18 to be sentenced to death. Between 1985 and 1998 11 persons who were 17 at the time of the commission of the crime were executed and one of them was 38 years of age at the stage of execution. Currently nearly hundred persons who were children at the commission of the offence are on death row.
- ¹⁰⁴ (1983) 4 SCC 645
- ¹⁰⁵ *Id.* at 688. The question was raised again in *Shashi Nayar v. Union of India* *supra* note 17 but to no avail
- ¹⁰⁶ (1995) 3 SCC 248
- ¹⁰⁷ In *The State v. T.Makwanyane*,(infra n.114) that court referred to description of the execution of

the death penalty by Professor Chris Barnard as follows:

The man's spinal cord will rupture at the point where it enters the skull, electrochemical discharges will send his limbs flailing in a grotesque dance, eyes and tongue will start from the facial apertures under the assault of the rope and his bowels and bladder may simultaneously void themselves to soil the legs and drip on the floor..." (*Rand Daily Mail* (June 12, 1978).

¹⁰⁸ (1989) 1 SCC 678. The earlier decisions in *T.V.Vatheeswaran v. State of Tamil Nadu* (1983) 2 SCC 68 and *Javed Ahmed Pawala v. State of Maharashtra* (1985) 1 SCC 275 which had declared that a delay of over two years in carrying out the execution would result in automatic commutation, were overruled.

¹⁰⁹ (1989) 4 SCC 62

¹¹⁰ *Id.* at 70

¹¹¹ In the Interim Constitution of 1993, this was S.11 (2)

¹¹² The references hereafter are to the printed copy of the judgment dated June 6, 1995.

¹¹³ S.33 (1) of the Interim Constitution.

¹¹⁴ (1986) 19 CRR 308

¹¹⁵ *R v. Big M Drug Mart Ltd.* at p. 352

¹¹⁶ *Supra* note 112 at 84

¹¹⁷ *Id.* at 72 (para 121). In *Shashi Nayar v. Union of India* in 1991 after taking judicial notice of the rising crime rate, and casting the onus on the petitioners to produce materials to take a view contrary to *Bachan Singh*, our Supreme Court simply declared "The death penalty has a deterrent effect and it does serve a social purpose" (*supra* n.19 at 99)

¹¹⁸ *Supra* note 112 at 51-52

¹¹⁹ *Id.* at 125 para 178

¹²⁰ (1980) 381 Mass 648 at 678-9, 681 and 683. A similar account was furnished by Gubbay CJ in *Catholic Commission for Justice and Peace, Zimbabwe v. Attorney General* 1993 (4) SA 239 at 268:

"From the moment, he enters the condemned cell, the prisoner is enmeshed in a dehumanising environment of near hopelessness. He is in a place where the sole object is to preserve his life so that he may be executed. The condemned prisoner is 'the living dead'.... He is kept only with other death sentence prisoners - with those whose appeals have been dismissed and who await death or reprieve; or those whose appeals are still to be heard or are pending judgment. While the right to an appeal may raise the prospect of being allowed to live, the intensity of the trauma is much increased by knowledge of its dismissal. The hope of a reprieve is all that is left. Throughout all this time the condemned prisoner constantly broods over his fate. The horrifying spectacle of being hanged by the neck and the apprehension of being made to suffer a painful..... death is never far from mind".

¹²¹ *Supra* note 12 at 210

¹²² This is an extract from the transcript of the Attorney General's address to the Human Rights Committee. This is perhaps the first time that any statistics concerning the use of death penalty in India has been shared with anyone. That such information is not readily available to anyone within the country explains the difficulty in making any meaningful analysis of how often death sentence is used and in what instances. When *Kehar Singh v. Union of India* (*supra* n.76) was being argued, the Attorney General of the day informed the Supreme Court that "a mere 29 persons were hanged when 85,000 murders were committed during the period 1974 to 1978" (*supra* n.76 at 218).

¹²³ *Ibid.* This sort of a claim made before an international body must require the abolitionists in the

country to sit up and take notice. It must spur a movement to demand that full information on actual award and execution of death sentences be made available.

- ¹²⁴ Concluding Observations of the Human Rights Committee (Re: India), Sixtieth Session, Geneva, July 14 - August 1, 1997, p.6, para 20. This document is again not freely available. Under s.22 (1) of the Juvenile Justice Act 1986 no delinquent juvenile shall be sentenced to death. S.2 (h) of the Act defines a juvenile as a boy below 16 and a girl below 18 years. A boy aged 17, for instance would be a minor but would not attract the prohibition. This perhaps explains the comment on minors.
- ¹²⁵ “Marisa Chimprabha, Thai Businessman Fails in Appeal against VN Death Sentence’, *The Nation*, Bangkok 3, (July 6, 1999)
- ¹²⁶ An article entitled “Non-prejudice to national application of penalties and national law,” (Article 80), was offered as a compromise to those states who were pushing for the inclusion of the death penalty; it reads that “nothing in this part of the statute affects the application by States of penalties prescribed by their national law.”
- ¹²⁷ Kent E.Gipson, ‘America’s Death penalty: A Crime Against Humanity and Reason’ in *A Human Rights Message, Regeringskansliet*, Ministry of Foreign Affairs of Sweden, 1998, p.63 at 66.
- ¹²⁸ *Sunil Batra v. Delhi Admn* (1978) 4 SCC 494
- ¹²⁹ In *Ranjit Singh v. Union Territory of Chandigarh* (1991) 4 SCC 304, the Supreme Court reiterated relying on its earlier decision in *Gopal Vinayak Godse v. State of Maharashtra* (1961) 3 SCR 440, that “unless the said sentence is commuted... a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison”. Recently, the *State of Gujarat v. Hon’ble High Court of Gujarat* (1998) 7 SCC 392, the Supreme Court held that denial of minimum wages for prison labour was not violative of their fundamental right against exploitation. Wadhwa, J., in a concurring judgment, said: “To me it appears, there will be no violation of article 23 if prisoners doing hard labour when sentenced to rigorous imprisonment are not paid wages”; *Id.* at 430. For the position that life imprisonment is also one form of an ultimate penalty, see generally, Leon Shaskolsky Sheleff, ‘*Ultimate Penalties: Capital Punishment, Life Imprisonment, Physical Torture*’ (1987)
- ¹³⁰ For a critique of this Act see S.Muralidhar, “Legal Aid and Social Justice,” *Supreme Court Bar Association Journal*, Vol. 1, May, 1998, pp. 74-81.
- ¹³¹ S. 304.
- ¹³² This was acknowledged by the Supreme Court in *Kishore Chand v. State of Himachal Pradesh* (1991) 1 SCC 286 at 297, where it suggested that senior counsel practicing in the Supreme Court must come forward to defend indigent accused as part of their professional duty. In the Supreme Court, jail petitions from condemned prisoners are routinely entertained and assigned to a counsel at State’s expense. A panel of such amicus curiae is prepared every year. The Supreme Court Legal Services Committee also provides free legal aid to many death row convicts. However, the geographical distance from the jail makes it impossible for the Supreme Court lawyer to interact and obtain instructions from a convict in a jail anywhere in the country.
- ¹³³ *Supra* note 112 at 159
- ¹³⁴ *Id.* at 160-61
- ¹³⁵ *Id.* at 165
- ¹³⁶ Quoted by Kentridge J., in *State v. Makwanyane*, *supra* note 112 at 145.
- ¹³⁷ Albie Sachs, The Fourth D.T.Lakdawala Memorial Lecture, “Post-Apartheid Africa: Truth, Reconciliation and Justice”, Institute of Social Sciences (mimeo) 37-38.

