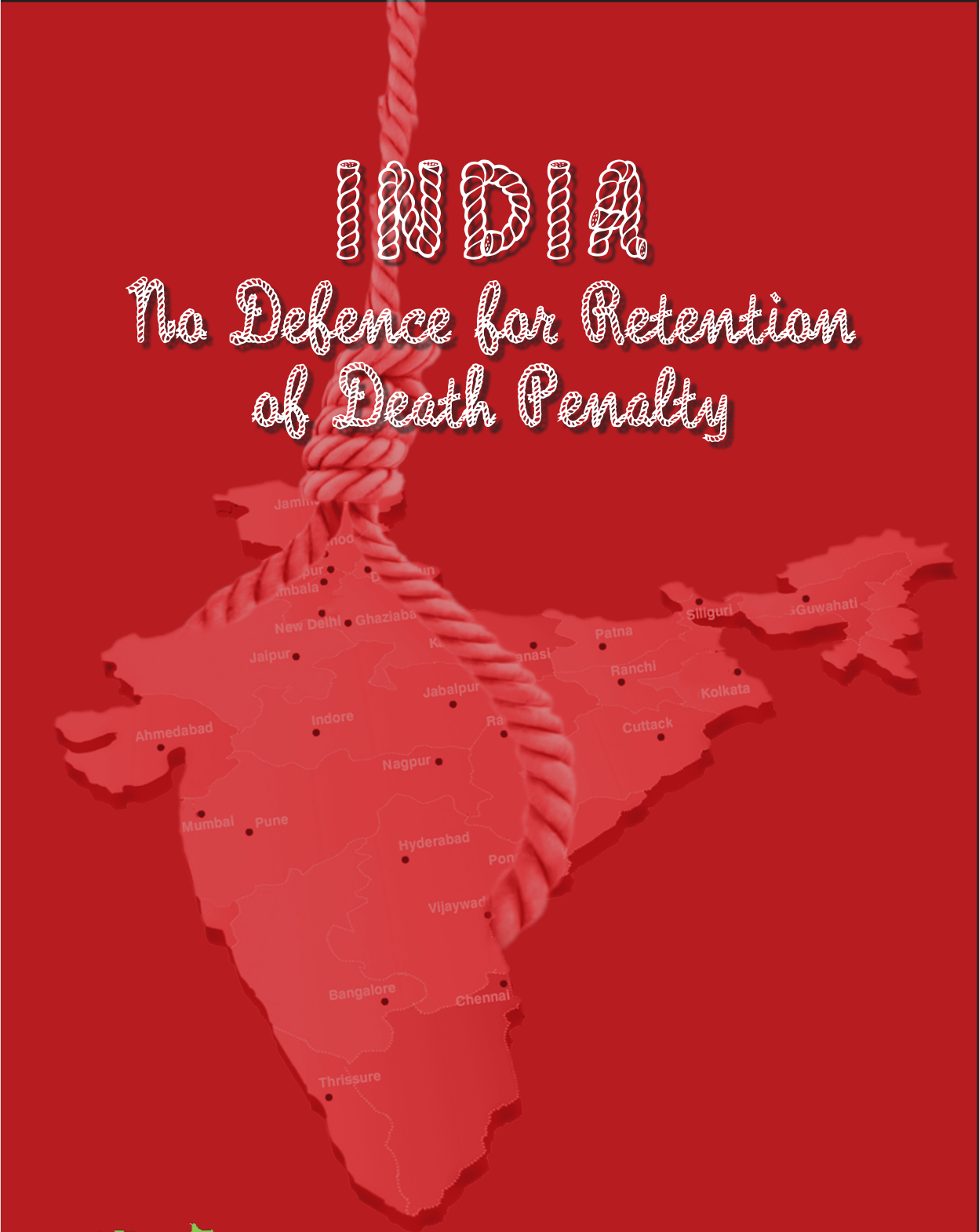
INDIA

No Defence for Retention of Death Penalty



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Asian Centre For Human Rights

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I. INTRODUCTION

India has been valiantly trying to defend its record on the issue of death penalty before the international community. In its National Report submitted in the Second Cycle of the Universal Periodic Review of the United Nations Human Rights Council in March 2012, India stated "*28. In India, the death penalty is awarded in the 'rarest of rare' cases. The Supreme Court has restricted the use of death penalty only where the crime committed is so heinous as to 'shock the conscience of society'. Indian law provides for all requisite procedural safeguards. Juvenile offenders cannot be sentenced to death under any circumstances and there are specific provisions for pregnant women. Death sentences in India must also be confirmed by a superior court. The President of India in all cases, and the Governors of States under their respective jurisdictions, 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. For instance, 13 mercy petitions were decided between 1.11.2009 and 23.11.2012 of which 10 were commuted to life imprisonment and 3 rejected. The last death sentence in India was carried out in 2004* **(emphasis ours)**."[1] India sought to defend its virtual moratorium but with the execution of Ajmal Kasab[2], Afzal Guru[3] and Yakub Abdul Razak Memon[4] since November 2012 India can no longer flaunt its virtual moratorium.

This report shows India's defence has no merit.

The statement that *"in India death penalty is awarded in the 'rarest of rare'*

1. A/HRC/WG.6/13/IND/1, 8 March 2012
2. Ajmal Kasab was executed in Pune, Maharashtra on 21 November 2012. Some of the major charges in which Ajmal Kasab was found guilty were: conspiracy to wage war against the Government of India; collecting arms with the intention of waging war against the Government of India; waging and abetting the waging of war against the Government of India; commission of terrorist acts; criminal conspiracy to commit murder; criminal conspiracy, common intention and abetment to commit murder; committing murder of a number of persons; attempt to murder with common intention; criminal conspiracy and abetment; abduction for murder; robbery/ dacoity with an attempt to cause death or grievous hurt; and causing explosions punishable under the Explosive Substance Act, 1908.
3. Afzal Guru was executed in Tihar Jail, Delhi on 9 February 2013. The charges against which he was convicted by the designated POTA Court were Sections 121, 121A, 122, Section 120B read with Sections 302 & 307 read with Section 120B of the IPC, sub-Sections (2), (3) & (5) of Section 3 and Section 4(b) of the POTA and Sections 3 & 4 of the Explosive Substances Act, and Section 3(4) of the POTA. See State v Mohd. Afzal And Ors [2003 (3) JCC 1669]
4. Yakub Abdul Razak Memon was executed in Nagpur, Maharashtra on 30 July 2015. The charges in which he was convicted included Section 3(3) of TADA; Section 120-B of IPC; Section 3(3) of TADA; Section 5 of TADA; Section 6 of TADA; and Sections 3 and 4 read with Section 6 of the Explosive Substances Act, 1908. See Yakub Abdul Razak Memon vs State Of Maharashtra

cases" is indefensible in the light of the imposition of death sentence on 6,174 convicts by the Sessions Courts during 2001 to 2013 i.e. 475 convicts were sentenced to death every year. Out of these, death sentence on 1,677 convicts was confirmed by the higher courts while death sentence on 4,497 convicts were commuted to life imprisonment.[5]

That *"the Supreme Court has restricted the use of death penalty only where the crime committed is so heinous as to 'shock the conscience of society'* has become an alibi for manufacturing conscience to justify death. Whether an accused shall live or die has become essentially a matter of luck "*by the subjective philosophy of the judge called upon to pass the sentence and on his value system and social philosophy which is often termed as judicial conscience which varies from judge to judge depending upon his attitudes and approaches, his predilections and prejudices, his habits of mind and thought and in short all that goes with the expression social philosophy. ……..There is nothing like complete objectivity in the decision making process and especially so, when this process involves making of decision in the exercise of judicial discretion.*"[6]

That *"Indian law provides for all requisite procedural safeguards"* appears euphemistic. India imposes death penalty without legal sanction i.e. without ensuring guarantees for fair trial standards. The Supreme Court in appellate jurisdiction enhances life imprisonment to death penalty thereby leaving no right to appeal – a blatant violation of the United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty. It is so much so that in terror cases self-incrimination has been used to award death sentence. The conscious of the society has been allowed to condemn Surinder Koli, an accused of rape and murder, based on self-incrimination. Death sentence continue to be imposed despite dissenting judgments.

Similarly, "death sentences in India must also be confirmed by a superior court" ought to be considered from admission of errors by the Supreme Court itself in awarding death sentence in a number of cases including *Santosh Kumar Satish Bhusan Bariyar Vs. State of Maharashtra*[7]*, Ravji v. State of Rajasthan, Shivaji @ Dadya Shankar Alhat v. State of Maharashtra*[8], *Mohan Anna Chavan*

5. Please refer to the Annual Reports 2001 to 2013 of the National Crimes Record Bureau, Ministry of Home Affairs, Government of India
6. Bachan Singh vs State Of Punjab [AIR 1980 SC 898], [1980 CriLJ 636]
7. Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra (2009) 6 SCC 498
8. Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra, [AIR2009SC56]

v. State of Maharashtra[9], *Bantu v. The State of U.P.*[10], *Surja Ram v. State of Rajasthan*[11], *Dayanidhi Bisoi v. State of Orissa*[12], and *State of U.P. v. Sattan @ Satyendra and Ors*[13], *Saibanna vs. State of Karnataka*[14], *Ankush Maruti Shinde and Ors. vs. State of Maharashtra* etc while the rejection of the writ petition of Devender Pal Singh Bhullar against rejection of his mercy plea by the President by one of the benches of the Supreme Court on the ground that terror convicts cannot seek mercy too has been declared as *per incuriam.*[15]

There has been blatant failure of the President of India and the Governors of States to ensure respect for the instructions for dealing with mercy petitions and the guidelines for granting mercy issued by the Government of India warranting judicial interventions. It has brought so much disrepute that the President has lost the moral authority and his decisions on mercy petitions no longer evoke the necessary confidence that the decisions taken by the President meet the tests of due care and diligence for compliance with the instructions for dealing with mercy petitions, the guidelines for granting mercy, judgments of the Supreme Court and respect for stare decisis.

The net result of retention of death penalty has been reduced to execution of the poor without adequate legal defence.

The Law Commission of India in its 262nd Report of August 2015 recommended "that the death penalty be abolished for all crimes other than terrorism related offences and waging war". [16] While commenting on the report of the Law Commission of India, the officials of the Ministry of Home Affairs of the Government of India stated that "time has not come yet to do away with capital punishment as threat of terrorism to India continues". However, the Law Commission of India had actually recommended retention of death penalty for "terrorism related offences and waging war".[17]

9. Mohan Anna Chavan v. State of Maharashtra [(2008)11SCC113]
10. Bantu v. The State of U.P., [(2008)11SCC113]
11. Surja Ram v. State of Rajasthan, [(1996)6SCC271]
12. Dayanidhi Bisoi v. State of Orissa, [(2003)9SCC310]
13. State of U.P. v. Sattan @ Satyendra and Ors [2009(3)SCALE394]
14. Mithu vs State of Punjab Etc. 1983 AIR 473, 1983 SCR (2) 690
15. Shatrughan Chauhan vs Union of India [(2014)35SCC1]
16. LAW COMMISSION OF INDIA Report No.262. The Death Penalty, August 2015 available at http://lawcommissionofindia.nic.in/reports/Report262.pdf
17. Time not ripe yet to abolish death penalty, says Home Ministry, Indian Express, 4 October 2015 available at:http://indianexpress.com/article/india/india-news-india/home-ministry-against-abolition-of-death-

India has no defence for retention of death penalty for offences "other than terrorism related offences and waging war". In India, death penalty is mainly imposed for murder but murder rate per 100,000 population had been falling to its lowest level in India since the 1960s. The murder rate started increasing from the mid-1960s when execution was the norm to reach its peak in 1992 when the combined rate of murder and culpable homicide not amounting to murder was 5.15 per 100,000 population, roughly double the level in 1957. Since 1992, it has been falling steadily. In 2014, the country witnessed 33,981 murders and 3,332 incidents of culpable homicide not amounting to murder and the combined rate of the two crimes per 100,000 population was 3.0 in 2014 and 2.98 in 2013 respectively.[18]

The time has come for the Government of India to implement the recommendations of the Law Commission of India made in its 262nd Report of August 2015 that "the death penalty be abolished for all crimes other than terrorism related offences and waging war."

penalty/#sthash.KXSaSfxy.dpuf

18. Murder count in India falls to its lowest level since 1960s, The Times of India, 23 August 2015, http://timesofindia.indiatimes.com/india/Murder-count-in-India-falls-to-its-lowest-level-since-1960s/articleshow/48635001.cms

1. Laws providing death penalty

India retained the death penalty as one of the punishments in the Indian Penal Code, 1860 (IPC) after independence. Death penalty is also prescribed in special or local laws for various offences. Presently, death penalty is provided under the IPC for various offences such as Section 121,[19] Section 132,[20] Section 194,[21] Section 195A,[22] Section 302,[23] Section 305,[24] Section 307(2),[25] Section 364A,[26] Section 396,[27] Section 376E,[28] and Section 376A.[29]

The special or local laws which provide for death penalty are the Army Act, 1950;[30] the Air Force Act, 1950;[31] the Navy Act, 1950;[32] the Indo Tibetan Border Police Act, 1992;[33] the Assam Rifles Act, 2006;[34] the Border Security Force Act, 1968;[35] the Sashastra Seema Bal Act, 2007;[36] the Defence and Internal Security Act, 1971;[37] the Narcotic Drugs and Psychotropic Substances (Prevention) Act, 1985 as amended in 1988;[38] the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989;[39] the Explosive Substances Act, 1908 as amended in 2001;[40] the Unlawful Activities Prevention

19. Treason, for waging war against the Government of India
20. Abetment of mutiny actually committed
21. Perjury resulting in the conviction and death of an innocent person
22. Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person
23. Murder
24. Abetment of suicide by a minor, insane person or intoxicated person
25. Attempted murder by a serving life-convict
26. Kidnapping for ransom
27. Dacoity with murder
28. Repeat offenders of rape
29. Person committing an offence of sexual assault and inflicting injury which causes death or causes the person to be in a persistent vegetative state
30. Section 34, Section 37, Section 38, Section 69
31. Section 34, Section 35, Section 38, Section 71
32. Section 34, Section 35, Section 36, Section 37, Section 38, Section 39, Section 43, Section 44, Section 49, Section 56, Section 59, Section 77
33. Section 16, Section 19, Section 20, Section 49
34. Section 21, Section 24, Section 55
35. Section 14, Section 15, Section 17, Section 18, Section 46
36. Section 16, Section 19, Section 20, Section 49
37. Section 5
38. Section 31A
39. Section 3(2)(i)
40. Section 3(b)

Act, 1967, as amended in 2004;[41] the Maharashtra Control of Organised Crime Act, 1999;[42] the Karnataka Control of Organised Crime Act, 2000;[43] the Andhra Pradesh Control of Organised Crime Act, 2001;[44] and the Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002.[45] A number of local laws such as the Arunachal Pradesh Control of Organised Crime Act, 2002 providing death penalty have been repealed.[46]

Although various laws provides for the death penalty for homicide and non-homicide offences, it is mainly given under Section 302 IPC.

1.1 Comparative chart of homicide and non-homicide offences attracting death penalty

Homicide offences	**Non-homicide offences**
	Section 121 IPC: Waging, or attempting to wage war, or abetting waging of war, against the Government of India
	Section 132 IPC: Abetment of mutiny, if mutiny is committed in consequence thereof
Section 194 IPC: Giving or fabricating false evidence with intent to procure conviction of capital offence	
Section 195A IPC: Threatening or inducing any person to give false evidence	
Section 302 IPC: Punishment for murder	

41. Section 16(1)
42. Section 3(1)(i)
43. Section 3(1)(i)
44. Section 3(1)(i)
45. Section 3(1)(G)(i)
46. Section 3(1)(i)

Section 305 IPC: Abetment of suicide of child or insane person	
Section 307 IPC: Murder attempt by a life convict	
Section 364A IPC: Kidnapping for ransom, etc	
Section 376A IPC: Punishment for causing death or resulting in persistent vegetative state of victim	
Section 376E IPC: Punishment for repeat offender	
Section 396 IPC: Dacoity with murder	
	Section 34(a) to (l) Army Act, 1950: Offences in relation to the enemy and punishable with death
	Section 3 Explosives Substances Act, 1908: 3. Punishment for causing explosion likely to endanger life or property
	Section 37 Army Act, 1950: Punishment for mutiny
	Section 38 Army Act, 1950: Desertion and aiding desertion
	Section 34 Air Force Act, 1950: Offences in relation to the enemy and punishable with death
	Section 37 Air Force Act, 1950: Punishment for mutiny
	Section 38 Army Act, 1950: Desertion and aiding desertion
Section 27 (3) Arms Act, 1950: Punishment for using arms, etc.	

	Section 34 Navy Act, 1957: Misconduct by officers or persons in command
	Section 35 Navy Act, 1957: Misconduct by persons other than those in command
	Section 36 Navy Act, 1957: Delaying or discouraging action or service commanded
	Section 37 Navy Act, 1957: Penalty for disobedience in action
	Section 38 Navy Act, 1957: Penalty for spying
	Section 39 Navy Act, 1957: Punishment for having correspondence, etc., with the enemy
	Section 43 Navy Act, 1957: Punishment for mutiny
	Section 44 Navy Act, 1957: Persons on board ships or aircraft seducing naval personnel from allegiance
	Section 49 Navy Act, 1957: Punishment for desertions
	Section 56 Navy Act, 1957: Punishment for offences by officers in charge of convoy to defend ships and goods
	Section 59 Navy Act, 1957: Punishment for committing arson
Section 3(1)(a) Geneva Convention Act, 1960: Punishment for willful killing of a person protected by any of the Conventions	

Section 15 (4) The Petroleum and Minerals Pipelines (Acquisition of rights of user in land) Act, 1962: Penalty for causing damage or destruction to pipeline with the knowledge that such act is so imminently dangerous that it will in all probability cause death of any person or bodily injury	
Section 10 (b)(i) Unlawful Activities (Prevention) Act, 1967: Penalty for being member of an unlawful association, etc	
Section 15 (b) Unlawful Activities (Prevention) Act, 1967: Punishment for terrorist acts	
	Section 14 Border Security Force Act, 1968: Offences in relation to the enemy and punishable with death
	Section 17 Border Security Force Act, 1968: Punishment for mutiny
	Section 18 B Border Security Force Act, 1968: Punishment for desertion and aiding desertion
	Section 5 The Defence of India Act, 1971: Enhanced penalties
	Section 6 (4) The Defence of India Act, 1971: Punishment for an offence committed with intent to assist any country committing external aggression against India or to wage war against India
	Section 17 Coast Guard Act, 1978: Punishment for mutiny
Section 4(i) The Commission of Sati (Prevention) Act, 1987: Punishment for abetment of Sati	

	Section 31A The Narcotic Drugs and Psychotropic Substances Act, 1985: Death penalty for certain offences after previous conviction
	Section 3(2)(i) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989: Punishment for offences of atrocities
	Section 16 ITBPF Act, 1992: Offences in relation to the enemy or terrorist and punishable with death
	Section 19 ITBPF Act, 1992: Punishment for mutiny
	Section 20 ITBPF Act, 1992: Punishment for desertion and aiding desertion
Section 3 Maharashtra Control of Organised Crimes Act, 1999: Punishment for organised crime resulting in death of persons	
Section 3 Karnataka Control of Organised Crime Act, 2000: 3. Punishment for organized crime	
Section 3 Andhra Pradesh Control of Organised Crime Act, 2001: Punishment for organised crime	
Section 3 (g) (i) Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002: Punishment for causing death of any person in the course of commission of or in attempt to commit, any offences in connection with a fixed platform or in connection with a ship	

	Section 21 (k) Assam Rifle Act, 2006: Offences in relation to the enemy and punishable with death
	Section 24 (e) Assam Rifle Act, 2006: Punishment for mutiny
	Section 25 Assam Rifle Act, 2006: Punishment for desertion and aiding desertion
	Section 16 Sashastra Seema Bal Act 2007: Offences in relation to enemy and punishable with death
	Section 17 Sashastra Seema Bal Act, 2007: Offences in relation to the enemy and not punishable with death
	Section 19 Sashastra Seema Bal Act, 2007: Punishment for Mutiny
	Section 20 Sashastra Seema Bal Act, 2007: Desertion and aiding desertion

In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.[47] Obviously, a number of offences in India for which death sentence is provided for cannot be termed as serious crimes.

47. Safeguards guaranteeing protection of the rights of those facing the death penalty; available at: http://www.unrol.org/files/SAFEGU~1.PDF

2. The scale of death penalty in India

2.1 Death penalty during pre-Bachan Singh judgment

Under Section 367(5) of Code of Criminal Procedure, 1898 (old code) the normal sentence for an offence of murder was death and the lesser sentence was the exception. The courts had to give reasons in case of not awarding death penalty to murder convicts. In 1955, this position was changed following the amendment of Section 367(5) of the Code of Criminal Procedure by the Criminal Procedure Code (Amendment) Act, 1955 (Act 26 of 1955). After the introduction of the amendment it was not obligatory for the court to state the reasons for not awarding death sentence in cases of murder and the discretion of the courts in deciding whether to impose a sentence of death or imprisonment for life became wider. The amendment came into force from 1 January 1956. Yet, an average of 128 persons were executed from 1956 to 1963, indicating that the lesser sentence was still the 'exception'.[48]

In an article written for a law journal, Justice K T Thomas, former judge of the Supreme Court stated that when he started his legal practice in 1960 *"…many sessions judges were lavishly awarding death penalty on persons convicted for murder during those times. That situation continued upto 1965."*[49] There are no accurate statistics on execution after 1965. But it can be stated with certitude that the death sentence was still awarded routinely at least till 1980, when the Supreme Court propounded the 'rarest of rare' doctrine in the *Bachan Singh* case.

2.2 Death penalty during post-Bachan Singh judgment

There is no doubt that following amendments of the Code of Criminal Procedure (CrPC) in 1973 and the *Bachan Singh* judgment the number of death penalties has reduced. The CrPC of 1973 introduced Section 354(3) requiring the judge to give "special reasons" for imposing a death sentence. However, this has had little impact on the sentencing practices of the judges across the spectrum. It

48. As per the 35th Report (1967) of the Law Commission of India, 1131 persons were executed from 1956 to 1963 i.e. 151 in 1956; 153 in 1957; 144 in 1958; 181 in 1959; 174 in 1960; 150 in 1961; 107 in 1962; and 71 in 1963. The 35th Report of the Law Commission of India, Ministry of Law, Government of India is available at: http://lawcommissionofindia.nic.in/1-50/Report35Vol2.pdf

49. See 'Time to revisit Bachan Singh', by K T Thomas, Livelaw.in, 25 June 2013, available at: http://www.livelaw.in/constitutionality-of-death-penalty/

was the *Bachan Singh* case in 1980 which held that life sentence was the norm and the death penalty is an exception that could be awarded only in the *"rarest of rare"* cases.[50]

As Justice K T Thomas stated, "However, this drastic curtailment of power to impose capital punishment remained only in paper. The Supreme Court itself began to dilute the rigors of the condition imposed in *Bachan Singh* case. Many judges employ semantics whenever and wherever they want to impose death penalty. All that the judges are required to do was to use some superlative degree words such as "brutal, atrocious, etc." and then say that "I / we hold that this is one of the rarest of rare cases". It became a matter of luck for an accused, depending vastly on the mind set or philosophy entertained by the individual judges. Soon after the majority judgment in *Bachan Singh* case was published, a smaller bench of two judges in *Machhi Singh Vs. State of Punjab* watered down the rigor of the rule of *"rarest of rare"* cases by enumerating some illustrative cases in which capital punishment would be justified. That bench identified illustrative cases that would fall within the ambit of the *"rarest of rare"* cases".[51]

i. Nation-wide intensity of death penalty

According to the National Crimes Records Bureau, Ministry of Home Affairs, Government of India death sentence was imposed on 6,174 convicts by the Sessions Courts during 2001 to 2013 i.e. 475 convicts were sentenced to death every year.

Out of these, death sentence on 1,677 convicts was confirmed by the higher courts. These include 106 persons in 2001; 126 persons in 2002, 142 persons in 2003, 125 persons in 2004, 164 persons in 2005, 129 persons in 2006, 186 persons in 2007, 126 persons in 2008, 137 persons in 2009, 97 persons in 2010, 117 persons in 2011, 97 persons in 2012 and 125 persons in 2013. This implies that on average on every third day, one convict is awarded death penalty in India. During this period, the highest number of death penalty has been imposed in Uttar Pradesh (406) followed by Bihar (163), Maharashtra (142), Madhya Pradesh (116), Karnataka (107), Tamil Nadu (100), Jharkhand

50. *See* 'Hanging on theories', Frontline, Volume 29 - Issue 17 :: Aug. 25-Sep. 07, 2012, available at: http://www.frontline.in/static/html/fl2917/stories/20120907291702900.htm
51. See 'Time to revisit Bachan Singh', by K T Thomas, Livelaw.in, 25 June 2013, available at: http://www.livelaw.in/constitutionality-of-death-penalty/

and Delhi (91 each), West Bengal (84), Gujarat (62), Rajasthan (43), Haryana (41), Kerala (38), Odisha (33), among others.[52]

During the same period i.e. 2001 to 2013, sentences for 4,497 persons were commuted from death penalty to life imprisonment. This clearly indicates that thousands of convicts remain on death row. The highest number of capital punishment commuted to life imprisonment was in Delhi (2470), Uttar Pradesh (486), Bihar (369), Jharkhand (304), Maharashtra (191), Assam (102), West Bengal (106), Odisha (70), Madhya Pradesh (68), Uttaranchal (46), Rajasthan (39), Punjab (36), Haryana (32), Chhattisgarh (31), Tamil Nadu (30), Kerala (23), and Jammu and Kashmir (22), among others.[53]

Table 1: Year-wise statistics of death penalty given and death penalty commuted during 2001-2013 as per the NCRB

Year	No. of Death Penalty	No. commuted to life imprisonment	No of Executed
2001	106	303	0
2002	126	301	0
2003	142	142	0
2004	125	179	1
2005	164	1,241	0
2006	129	1,020	0
2007	186	881	0
2008	126	46	0
2009	137	104	0
2010	97	62	0
2011	117	42	0
2012	97	61	1
2013	125	115	1
Total	**1,677**	**4,497**	**3**

52. Please refer to the Annual Reports 2001 to 2013 of the National Crimes Record Bureau, Ministry of Home Affairs, Government of India
53. Please refer to the Annual Reports 2001 to 2013 of the National Crimes Record Bureau, Ministry of Home Affairs, Government of India

ii. State-wise intensity of death penalty

During 2001 to 2013, the highest number of death penalty were imposed in Uttar Pradesh (406) followed by Bihar (163), Maharashtra (142), Madhya Pradesh (116), Karnataka (107), Tamil Nadu (100), Jharkhand and Delhi (91 each), West Bengal (84), Gujarat (62), Rajasthan (43), Haryana (41), Kerala (38), Odisha (33), Chhattisgarh (29), Assam (29), Jammu and Kashmir and Punjab (22 each), Uttaranchal (18), Andhra Pradesh (10), Meghalaya and Chandigarh (6 each), Daman & Diu, Himachal Pradesh and Tripura (4 each), Manipur (3), Pondichery (2), and Goa and Andaman & Nicobar Islands (1 each). The rest States (Arunachal Pradesh, Mizoram, Nagaland, Sikkim) and UTs (Dadra & Nagar Haveli and Lakswadweep) registered no death penalty during the period.[54]

Table 2: State wise statistics of death penalty awarded during 2001-2013 as per the NCRB

Name of states	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Total
Andhra Pradesh	1	3	1	0	0	0	0	0	0	0	3	2	0	10
Arunachal Pradesh	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Assam	3	1	1	2	8	1	2	2	1	0	0	6	2	29
Bihar	13	20	25	16	2	6	14	25	5	4	2	12	19	163
Chhattisgarh	1	5	2	0	0	0	7	2	1	0	0	0	11	29
Goa	0	0	0	0	0	0	1	0	0	0	0	0	0	1
Gujarat	3	0	5	19	8	0	0	0	8	0	14	3	2	62
Haryana	8	2	3	3	0	0	3	3	5	0	4	3	7	41
Himachal Pradesh	0	0	0	1	1	0	1	0	0	0	0	0	1	4
Jammu & Kashmir	4	0	0	0	0	0	3	0	3	1	9	0	2	22
Jharkhand	0	4	0	15	21	8	2	6	11	8	6	1	9	91
Karnataka	0	0	0	7	14	13	14	22	5	19	1	8	4	107
Kerala	2	0	11	1	4	3	5	3	5	0	0	3	1	38
Madhya Pradesh	4	4	4	6	11	9	22	17	2	4	4	7	22	116
Maharashtra	7	13	14	4	4	20	29	12	15	4	3	4	13	142
Manipur	0	1	1	0	0	0	0	1	0	0	0	0	0	3
Meghalaya	0	0	0	0	0	0	3	3	0	0	0	0	0	6
Mizoram	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Nagaland	0	0	0	0	0	0	0	0	0	0	0	0	0	0

54. Please refer to the Annual Reports 2001 to 2013 of the National Crimes Record Bureau, Ministry of Home Affairs, Government of India

Odisha	5	0	0	5	0	7	14	0	0	2	0	0	0	33
Punjab	11	0	0	0	0	0	0	0	0	0	8	3	0	22
Rajasthan	1	0	11	2	6	6	3	3	0	4	2	2	3	41
Sikkim	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Tamil Nadu	16	24	22	1	N/A	10	14	0	4	4	0	3	1	99
Tripura	0	0	0	0	0	0	2	0	0	0	0	1	1	4
Uttar Pradesh	19	34	35	33	51	24	30	15	57	25	47	25	1	396
Uttarakhand	0	0	2	0	1	11	0	0	2	0	0	1	1	18
West Bengal	6	3	0	3	24	1	6	8	10	12	6	2	3	84
A&N Islands	0	0	0	0	0	0	0	0	0	0	0	0	1	1
Chandigarh	0	0	0	0	0	0	2	1	1	0	0	2	0	6
D&N Haveli	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Daman & Diu	0	4	0	0	0	0	0	0	0	0	0	0	0	4
Delhi	2	8	5	7	9	10	9	3	0	10	8	9	11	91
Lakswadweep	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pondichery	0	0	0	0	0	0	0	0	2	0	0	0	0	2
Total	106	126	142	125	164	129	186	126	137	97	117	97	115	1,667

During 2001 to 2013, death sentence on 4,497 convicts were commuted to life imprisonment with the highest number of commutation being in Delhi (2462) followed by Uttar Pradesh (458), Bihar (343), Jharkhand (300), Maharashtra (175), West Bengal (98), Assam (97), Odisha (68), Madhya Pradesh (62), Uttaranchal (46), Rajasthan (33), Tamil Nadu, Punjab and Chhattisgarh (24 each), Haryana and Kerala (23 each), Jammu and Kashmir (18), Nagaland (15), Tripura (9), Andhra Pradesh, Gujarat and Chandigarh (3 each), Lakswadweep, Meghalaya, Himachal Pradesh and Karnataka (2 each) and Pondichery and Manipur (1 each). The rest States (Mizoram, Arunachal Pradesh, Goa and Sikkim) and UTs (Andaman & Nicobar Islands, Dadra & Nagar Haveli and Daman & Diu) registered nil.

Table 3: State wise statistics of death penalty commuted during 2001-2013 as per the NCRB

Name of states	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Total
Andhra Pradesh	1	1	1	0	0	0	0	0	0	0	0	0	0	3
Arunachal Pradesh	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Assam	2	1	3	8	0	63	17	0	0	2	1	0	5	102
Bihar	50	89	73	6	33	27	8	21	20	12	4	4	22	369
Chhattisgarh	21	0	2	0	0	0	1	0	0	0	0	4	3	31
Goa	0	0	0	0	0	0	0	0	0	0	0	1	0	1
Gujarat	1	0	0	0	0	0	0	0	1	0	1	2	1	6
Haryana	2	8	0	3	0	3	2	2	2	1	0	7	2	32
Himachal Pradesh	0	0	0	0	0	0	1	1	0	0	0	0	0	2
Jammu & Kashmir	1	0	5	5	0	3	0	0	0	3	1	0	4	22
Jharkhand	0	1	0	44	132	8	92	1	10	8	4	3	1	304
Karnataka	0	0	0	0	0	0	0	2	0	0	0	1	21	24
Kerala	0	0	1	9	9	1	0	0	0	0	3	0	0	23
Madhya Pradesh	3	17	1	3	11	0	0	10	15	2	0	5	1	68
Maharashtra	1	126	12	16	2	0	0	1	4	11	2	0	16	191
Manipur	0	0	0	0	0	0	0	0	0	0	1	0	0	1
Meghalaya	1	0	0	0	0	1	0	0	0	0	0	0	0	2
Mizoram	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Nagaland	6	4	5	0	0	0	0	0	0	0	0	0	0	15
Orissa	53	0	0	0	0	1	14	0	0	0	0	2	0	70
Punjab	24	0	0	0	0	0	0	0	0	0	0	1	11	36
Rajasthan	13	0	3	2	1	4	3	2	1	0	4	4	2	39
Sikkim	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Tamil Nadu	1	6	6	0	NA	0	0	0	8	1	2	4	2	30
Tripura	0	0	0	0	0	0	8	0	1	0	0	0	1	10
Uttar Pradesh	120	45	18	82	117	26	8	5	21	12	4	14	14	486
Uttarakhand	0	0	9	0	15	22	0	0	0	0	0	0	0	46
West Bengal	2	0	0	1	2	55	0	1	17	7	13	6	2	106
A&N Islands	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Chandigarh	0	0	0	0	0	0	0	0	0	2	1	0	2	5
D&N Haveli	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Daman & Diu	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Delhi	0	2	3	0	919	806	726	0	4	1	1	3	5	2470
Lakswadweep	0	1	0	0	0	0	1	0	0	0	0	0	0	2
Pondichery	1	0	0	0	0	0	0	0	0	0	0	0	0	1
Total	303	301	142	179	1241	1020	881	46	104	62	42	61	115	4,497

3. The stand of the key State organs and political parties

3.1 The executive

There is no doubt that successive governments of India sought to retain death penalty. In fact, even after the Supreme Court declared mandatory death sentence unconstitutional in the case of *Mithu vs State Of Punjab* in 1983,[55] the government of India continues to enact laws providing for mandatory death sentence in defiance and contempt of the Supreme Court judgment. The laws enacted to provide mandatory death sentences include the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act of 1989, the Narcotics and Psychotropic Substances Act 1985 by amendment in 1989 and the Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002. At the same time, the Government of India failed to amend the Arms Act of 1959 which provides for mandatory death sentence under Section 27(3).

3.2 Law Commission of India

The Law Commission of India conducted three studies on the issue of death penalty. The LCI in its 35th Report on "Capital Punishment" of December 1967 in its report recommended retention of death penalty. The Commission of India in its 187th Report[56] on the Mode of Execution (2003) only examined the limited question on the mode of execution and did not engage with the substantial question of the constitutionality and desirability of death penalty as a punishment. The 252nd report recommended abolition of death penalty except in terror cases and waging war.[57]

55. Mithu, Etc., Etc vs State Of Punjab Etc. 1983 AIR 473, 1983 SCR (2) 690
56. The 187th Report of the Law Commission of India is available at http://lawcommissionofindia.nic.in/reports/187th%20report.pdf
57. LAW COMMISSION OF INDIA Report No.262. The Death Penalty, August 2015 available at http://lawcommissionofindia.nic.in/reports/Report262.pdf

3.3 National Human Rights Commission

The National Human Rights Commission of India played no role for abolition of death penalty. It even refused to entertain petitions pertaining to death row convict's access to clemency justice. On 17 August 2015, Chairman of the National Human Rights Commission stated "India hadn't yet reached the stage where capital punishment can be done away with."[58]

3.4 Parliament and the State legislatures

The Parliament of India has seldom debated death penalty. However a number of private members Bill had been tabled for abolition of death penalty. As the Law Commission of India reported,

> "Before independence, Shri Gaya Prasad Singh attempted to introduce a Bill abolishing the death penalty for IPC offences in 1931, which was defeated. Since independence, M.A. Cazmi's Bill to amend Section 302 IPC in 1952 and 1954, Mukund Lal Agrawal's Bill in 1956, Prithviraj Kapoor's resolution in the Rajya Sabha in 1958 and Savitri Devi Nigam's 1961 resolution had all sought to abolish the death penalty. In 1962, Shri Raghunath Singh's resolution for abolition of the death penalty was discussed in the Lok Sabha, and following this the matter was referred to the Law Commission, resulting in the 35th Commission Report. At present, two bills moved by Rajya Sabha Members of Parliament are relevant to the issue. Kanimozhi has moved a Private Member's Bill demanding the abolition of the death penalty and D. Raja moved a Private Member's Bill asking the Government to declare a moratorium on death sentences pending the abolition of the death penalty". [59]

The State Assemblies seldom debated death penalty. On 7 August 2015, the Tripura Legislative Assembly passed a resolution to request the Government of

58. We still need to continue with death penalty, says former CJI KG Balakrishnan, The Economic Times, August 17, 2015 available at http://articles.economictimes.indiatimes.com/2015-08-17/news/65525754_1_death-penalty-state-human-rights-commission-capital-punishment
59. LAW COMMISSION OF INDIA Report No.262. The Death Penalty, August 2015 available at http://lawcommissionofindia.nic.in/reports/Report262.pdf

India to amend Section 302 of the Indian Penal Code, 1860 to abolish death penalty and to replace capital punishment with life sentence unto death.[60]

Previously on 30th August 2011, the Tamil Nadu Legislative Assembly adopted a resolution asking the President to reconsider mercy petitions of three death row convicts in the Rajiv Gandhi assassination case, Murugan, Santhan and Perarivalan.[61]

3.5 Political parties

Position of Congress

In March 1931, when the British government executed Bhagat Singh, Sukhdev and Rajguru, the Indian National Congress moved a resolution in its Karachi session, which included a demand for the abolition of the death penalty. Clause XIII of the resolution on Fundamental Rights and Duties declared: "There shall be no capital punishment." The Karachi resolution was drafted by Jawaharlal Nehru and revised by Mahatma Gandhi. The All India Congress Committee in its meeting in August 1931 declared that "any Constitution which may be agreed to on its behalf should provide for" the Karachi Resolution, which included abolition of the death penalty. Indeed, the Constituent Assembly, which deliberated between 9 December 1946 and 26 November 1949, incorporated most of aspects of the Karachi Resolution in the Indian Constitution.[62]

However, by the time the Constituent Assembly took up the issue of capital punishment, the killing of Mahatma Gandhi on 30 January 1948 the stand for abolition of death penalty in 1931 got sabotaged.[63] On 30 November 1948, two members of the Constituent Assembly, both from the Indian National Congress, opposed the amendment seeking abolition of death penalty.[64]

60. Tripura assembly passes resolution against death penalty, The Hindu, 7 August 2015; Available at: http://www.thehindu.com/news/national/tripura-assembly-passes-resolution-against-death-penalty/article7512195.ece
61. Rajiv case: Abolish death penalty for killers, says DMK MP, September 7, 2011; Available at: http://www.oneindia.com/2011/09/07/abolish-death-penalty-dmk-mp.html
62. See 'Bhagat Singh and Godse: How India's stand on death penalty changed between two killings' by Dhirendra K. Jha, Scroll.in, 6 August 2015, http://scroll.in/article/746552/bhagat-singh-and-godse-how-indias-stand-on-death-penalty-changed-between-two-killings
63. Ibid
64. Ibid

Since then, the stand of the Indian National Congress has been in support of the death penalty.

Position of BJP

The Bhartiya Janata Party (BJP) supports the death penalty.

Position of CPI

On 31 July 2015, D. Raja of the Communist Party of India (CPI) introduced a Private Member's Bill in the Rajya Sabha asking the Government to declare a moratorium on death sentences pending the abolition of the death penalty.[65]

Position of CPI-M

The Communist Party of India-Marxist (CPI-M) in Manifesto for the 16th Lok Sabha Elections had announced to "amend the Indian Penal Code and other statutes to remove the death penalty from the statutes".[66]

Position of CPI-ML

The Communist Party of India - Marxist-Leninist (CPI-ML) in its Manifesto for the 16th Lok Sabha Elections had stated that "*Provision for death penalty shall be removed from the statute book*".[67]

Position of DMK

In August 2015, Dravida Munnetra Kazhagam (DMK) Member of Parliament Kanimozhi introduced a private member's bill in the Rajya Sabha seeking abolition of capital punishment.[68] The Dravida Munnetra Kazhagam (DMK) in it Election Manifesto for the 16th Lok Sabha Elections had proposed abolition of death penalty.[69]

65. LAW COMMISSION OF INDIA Report No.262. The Death Penalty, August 2015 available at http://lawcommissionofindia.nic.in/reports/Report262.pdf
66. See 'CPI(M) Manifesto Highlights' available at: http://cpim.org/content/cpim-manifesto-highlights
67. See 'Election Manifesto of CPI (ML) Red Star for 16th Lok Sabha' available at: http://www.cpiml.in/home/index.php?view=article&id=1167:election-manifesto-of-cpi-ml-red-star-for-16th-lok-sabha&Itemid=107&option=com_content
68. LAW COMMISSION OF INDIA Report No.262. The Death Penalty, August 2015 available at http://lawcommissionofindia.nic.in/reports/Report262.pdf
69. See 'In manifesto, DMK proposes abolition of death penalty' India Today, 11 March 2014, http://indiatoday.intoday.in/story/dmk-manifesto-m-karunanidhi-j-jayalalithaa/1/347800.html

Position of other parties

Some other political parties who are in favour of abolition of the death penalty includes the Viduthalai Chiruthaigal Katchi (VCK), the Manithaneya Makkal Katchi (MMK), the Gandhiya Makkal Iyakkam (GMI), and the Marumalarchi Dravida Munnetra Kazhagam (MDMK).[70]

3.6 Judiciary

The judiciary's role has evolved certainly towards reduction if not abolition of death penalty. As per Section 367(5) of the Code of Criminal Procedure (CrPC) of 1898 (old code) usual sentence for an offence punishable with death was death penalty and lesser sentence was an exception. The courts had to give reasons for not awarding death penalty especially to murder convicts.[71] Judiciary therefore had no option but to award death penalty. After the amendment of Section 367(5) of the CrPC in 1955, the courts were no longer required to state the reasons for not awarding death sentence and were given the discretion in deciding whether to impose a sentence of death or imprisonment for life.[72] However, further amendment of the CrPC in 1973 required the Courts to state the reason for imposing death penalty under Section 354(3).[73] The Supreme Court in the *Bachan Singh*[74] case in 1980 in which the doctrine of the "rarest of rare" principle to award death sentence after weighing both the aggravating and mitigating circumstances of a particular case is judgment for reduction of death penalty. The declaration of mandatory death sentencing unconstitutional in the case of *Mithu v. State of Punjab was another instance of the Supreme Court's willingness to reduce death penalty.*

It is another matter that the "rarest of rare" doctrine has become a misnomer as the sessions judges, the first court empowered to impose death penalty[75],

70. LAW COMMISSION OF INDIA Report No.262. The Death Penalty, August 2015 available at http://lawcommissionofindia.nic.in/reports/Report262.pdf
71. "(5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed."
72. After the amendment of Section 367(5) of old Code by Act XXVI of 1955, it is not correct to hold that the normal penalty of imprisonment for life cannot be awarded in the absence of extenuating circumstances which reduce the gravity of the offence. The matter is left, after the amendment, to the discretion of the Court.
73. "(3) When the conviction is for an offence punishable with death or, in the alternative, with imrisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded and, in the case of sentence of death, the special reasons for such sentence."
74. Bachan Singh vs State Of Punjab [AIR 1980 SC 898], [1980 CriLJ 636]
75. In India, the death penalty is first imposed by the Sessions Courts and mandatorily be confirmed by the High Courts.

sentenced 5,054 convicts to death during 2004 to 2013 out of which death sentence on 1,303 convicts were confirmed and death sentence on 3,751 convicts were commuted to life imprisonment by the higher courts.[76] There had been serious error of judgments and whether an accused shall live or die has become essentially a matter of luck "*by the subjective philosophy of the judge called upon to pass the sentence and on his value system and social philosophy which is often termed as judicial conscience which varies from judge to judge depending upon his attitudes and approaches, his predilections and prejudices, his habits of mind and thought and in short all that goes with the expression social philosophy. ……..There is nothing like complete objectivity in the decision making process and especially so, when this process involves making of decision in the exercise of judicial discretion.*"[77]

These mistakes have been repeated. The Supreme Court vide judgment dated 13 May 2009 in *Santosh Kumar Satish Bhusan Bariyar Vs. State of* Maharashtra held the decision in *Ravji @ Ravi Chandra v. State of Rajasthan* as *per incuriam* because it only considered the aggravating circumstances of the crime without conforming with the *Bachan Singh* judgment which directed to impose death penalty after considering both aggravating and mitigating circumstances of the particular case. In the same case, the Supreme Court also declared six other judgements as *per-incuriam* as reasoning propounded in *Ravji v. State of Rajasthan* was followed in awarding death penalty. These six judgments are *Shivaji @ Dadya Shankar Alhat v. State of Maharashtra*[78], *Mohan Anna Chavan v. State of Maharashtra*[79], *Bantu v. The State of U.P.*[80], *Surja Ram v. State of Rajasthan*[81], *Dayanidhi Bisoi v. State of Orissa*[82], and *State of U.P. v. Sattan @ Satyendra and Ors.*[83] In 2009, the Supreme Court also declared *Saibanna vs. State of Karnataka per incuriam* on the ground that it upheld mandatory death sentence under Section 303 of the IPC, which was struck down by the Supreme Court in the case of *Mithu vs State Of Punjab* in 1983.[84] In February 2014, the Supreme Court declared *Ankush Maruti Shinde and Ors. vs. State of Maharashtra*

76. NCRB, "Prison Statistics India" report series from 2004 to 2013 available at: http://ncrb.gov.in/
77. Bachan Singh vs State Of Punjab [AIR 1980 SC 898], [1980 CriLJ 636]
78. Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra, [AIR2009SC56]
79. Mohan Anna Chavan v. State of Maharashtra [(2008)11SCC113]
80. Bantu v. The State of U.P., [(2008)11SCC113]
81. Surja Ram v. State of Rajasthan, [(1996)6SCC271]
82. Dayanidhi Bisoi v. State of Orissa, [(2003)9SCC310]
83. State of U.P. v. Sattan @ Satyendra and Ors [2009(3)SCALE394]
84. Mithu, Etc., Etc vs State Of Punjab Etc. 1983 AIR 473, 1983 SCR (2) 690

as *per incuriam for imposing the death* sentenced based on *Ravji alias Ram Chandra vs. State of Rajasthan.*[85] Earlier in January 2014, the Supreme Court declared the rejection of the petition of Devender Pal Singh Bhullar by one if benches on the ground that terror convicts cannot seek mercy as *per incuriam.* [86] The Supreme Court in the case of *Sangeet & Anr Vs State of Harayana* [87]on 20 November 2012 admitted "*even though Bachan Singh intended a "principled sentencing", sentencing has now really become judge centric."*

The Supreme Court intervened in a number of cases to commute death sentence on the grounds of delay in a number of judgments including *Triveniben v. State of Gujarat*[88] to *Shatrughan Chauhan v Union of India.*[89]

85. Times of India, "SC revisiting death penalties, stays three more" 6 February 2014, http://timesofindia.indiatimes.com/india/SC-revisiting-death-penalties-stays-three-more/articleshow/29920086.cms
86. Shatrughan Chauhan vs Union of India [(2014)35SCC1]
87. (2013) 2 SCC 452
88. (1989) 1 SCC 678
89. Shatrughan Chauhan v. UOI, (2014) 3 SCC 1

4. The key contentions on death penalty

4.1 No deterrent effects of death penalty

There has been no scientific or empirical basis to suggest that death penalty acts as a deterrent against any crime. There is also no evidence to suggest that the death penalty has brought down the crime rate in any country where the death penalty is retained.

i. Murder case increased despite more executions in India during 1953 to 1963

According to the 35th Report (1967) of the Law Commission of India, an average of 128 persons per year was executed during 1953 to 1963. But, the executions had almost no deterrent effect as murder rate consistently increased as can be seen from the table below.

Table 1: Statistics of increase of murder cases despite large executions during 1953 to 1963

Year	Murder cases*	Executions	Increase/decrease per year
1953	9802	21	
1954	9765	108	-0.38%
1955	9700	150	-0.67%
1956	10025	151	3.35%
1957	10419	153	3.93%
1958	10661	144	2.32%
1959	10712	181	0.48%
1960	10910	174	1.85%
1961	11188	150	2.55%
1962	11586	107	3.56%
1963	10754	71	-7.18%
Average	**10502**	**128**	**17% (decadal increase)**

*Note: Murder cases as reported by the NCRB

An analysis of the above data shows that during this period despite large number of executions, murder cases reported an increase. For example, in 1955, 150 persons were executed but murder cases increased by 3.35% in 1956. Similarly,

151 persons were executed in 1956 but murder cases increased by 3.93% in 1957; 153 persons were hanged in 1957 but murder cases increased by 2.32% in 1958; 181 persons were hanged in 1959 but murder cases increased by 1.85% in 1960; 174 persons were hanged in 1960 but murder cases increased by 2.55% in 1961; 150 persons were hanged in 1961 but murder cases increased by 3.56% in 1962.

The above statistics establish that executions do not act as a deterrent.

ii. Murder cases decreased with virtual moratorium on death penalty in India during 1992-2012

While an average of 128 persons per year were executed during 1953 to 1963, it is generally acknowledged that the award of death sentence declined significantly post-*Bachan Singh* case.

According to National Crime Records Bureau (NCRB), a total of 1,552 persons or an average of 129 persons per year were awarded capital punishment in India from 2001 to 2012.[90] There was virtual moratorium on death penalty following the execution of Dhananjoy Chatterjee in West Bengal in August 2004[91] which was resumed with execution of Mohammed Ajmal Amir Kasab in 2012[92] and Afzal Guru in 2013.[93]

Yet, the decline in execution or death sentencing has not caused an increase in murder rates. According to the NCRB, murder cases have been declining for the last 20 years since 1992 as shown in the table below:

90. These include 106 persons sentenced to death in 2001; 126 persons in 2002, 142 persons in 2003, 125 persons in 2004, 164 persons in 2005, 129 persons in 2006, 186 persons in 2007, 126 persons in 2008, 137 persons in 2009, 97 persons in 2010, 117 persons in 2011 and 97 persons in 2012. Please see Prison Statistics Report from 2001 to 2012 of the National Crime Records Bureau available at http://ncrb.nic.in/

91. *See* 'The last hanging took 14 years after rape and murder', 26 December 2012', at: http://archive.indianexpress.com/news/the-last-hanging-took-14-years-after-rape-and-murder/1050101/0

92. *See* 'Ajmal Kasab hanged and buried in Pune's Yerwada Jail, The Times of India, 21 November 2012 at:http://timesofindia.indiatimes.com/india/Ajmal-Kasab-hanged-and-buried-in-Punes-Yerwada-Jail/articleshow/17303820.cms

93. *See* 'Afzal Guru hanged in secrecy, buried in Tihar Jail', The Hindu, 9 February 2013 at: http://www.thehindu.com/news/national/afzal-guru-hanged-in-secrecy-buried-in-tihar-jail/article4396289.ece

Table 2: Statistics of decrease of murder cases despite reduction of execution from 1992 to 2012

Year	Murder cases	Increase/decrease per year
1992	40105	
1993	38240	-4.65%
1994	38577	0.88%
1995	37464	-2.89%
1996	37671	0.55%
1997	37543	-0.34%
1998	38653	2.96%
1999	37170	-3.84%
2000	37399	0.62%
2001	36202	-3.20%
2002	35290	-2.52%
Decadal increase or decrease		-12.43%
Year	**Murder cases**	**Increase/decrease per year**
2003	32716	-7.29%
2004	33608	2.73%
2005	32719	-2.65%
2006	32481	-0.73%
2007	32318	-0.50%
2008	32766	1.39%
2009	32369	-1.21%
2010	33335	2.98%
2011	34305	2.91%
2012	34434	0.38%
Decadal increase or decrease		-1.99%

The above statistics of the NCRB show that despite increase in population which is one of the yardsticks for determining crime rate, murder cases significantly decreased in the last two decades. The population of India increased from 846.3 million in 1991 to 1.028 billion in 2001 (decadal growth rate of 21.34%), but the murder cases reduced from 39,174 cases in 1991 to 36,202 cases in 2001.[94] Similarly, the population increased to 1.21 billion in 2011 over 1.028 billion in

94. *See* 'Crime in India' reports 1991 and 2001 available at: http://ncrb.nic.in/, and Census data of 1991 & 2001 available at: http://censusindia.gov.in/

2001 (decadal growth rate of 17.64%)[95], but the murder cases again indicated a decline - 34,305 cases in 2011 compared to 36,202 cases in 2001.[96]

v. Death penalty does not act as deterrent to non-homicide offences including rape

That death penalty does not act as a deterrent is clear from increase of rape incidents in West Bengal following the execution of rape and murder convict Dhananjoy Chatterjee in August 2004. The execution has not reduced incidence of rape in West Bengal. As per NCRB data, 1,475 rape cases were reported in West Bengal in 2004, 1,686 cases in 2005, 1,731 cases in 2006, 2,106 cases in 2007, 2,263 cases in 2008, 2,336 cases in 2009, 2,311 cases in 2010, 2,363 cases in 2011 and 2,046 cases in 2012. Clearly, West Bengal has been witnessing an increasing trend since 2004. There was no deterrent effect at national level either. In 2004, 18,233 rape cases were reported across India, which increased to 24,923 cases in 2012.[97]

Following the Nirbhaya gang rape case in Delhi on 16 December 2012, the Government of India expanded the scope of the death penalty to include certain crimes of rape following the enactment of the Criminal Law (Amendment) Act, 2013. The Criminal Law (Amendment) Act, 2013, which came into force from 3 February 2013, introduced death penalty for repeat offenders of rape under Section 376E of the IPC.[98]

On 4 April 2014, a Sessions Court in Mumbai, Maharashtra became the first in the country to impose death penalty to three repeat offenders of rape under the new Section 376E of the IPC. After the court ruling, Maharashtra Home Minister R. R. Patil said *"No one will dare commit such a crime after this verdict. The death penalty is necessary to deter such criminal acts."*[99] However, the statistics provided by Mumbai Police shows that 273 rape cases were reported in Mumbai from January – 15 June 2014[100] including 138 cases registered during January

95. Census data of 2001 & 2011 available at: http://censusindia.gov.in/
96. *See* 'Crime in India' reports 2001 & 2011 available at: http://ncrb.nic.in/, and Census data of 2001 & 2011 available at: http://censusindia.gov.in/
97. *See* Crime in India Report series, 2004 to 2012, National Crime Records Bureau at: http://ncrb.nic.in/
98. Criminal Law (Amendment) Act, 2013 is available at: http://indiacode.nic.in/acts-in-pdf/132013.pdf
99. *See* 'Three repeat offenders get death penalty in Shakti Mills rape case', The Hindu, 4 April 2014, at: http://www.thehindu.com/news/national/three-repeat-offenders-get-death-penalty-in-shakti-mills-rape-case/article5871677.ece
100. *See* '43% rise in rape cases in Mumbai but the police claims more than 90% ''consensual', Daily News and

to March 2014.[101] This means 135 rape cases were reported from April to 15 June 2014. This clearly suggests that the award of death penalty to those three convicts by the Sessions Court in the Mumbai's Shakti Mill gang rape case on 4 April 2014 had no deterrent impact on sexual predators.

Similarly, the award of death penalty to four adult accused found guilty by a first track court in September 2013 in connection with the Delhi gang-rape case of December 2012 failed to act as a deterrent. According to data released by the Delhi Police, 616 rape cases were registered in Delhi from 1 January 2014 to 30 April 2014 i.e. six cases were reported every day. This is an increase of 36% compared to around 450 cases registered in the same period in 2013.[102]

vi. Death penalty has not reduced fragging/fratricidal killings in the security forces

Capital punishment is provided in various legislations relating to the establishment of the security forces such as the Army Act of 1950, the Air Force Act of 1950, the Navy Act of 1957, the Border Security Force Act of 1968, Assam Rifles Act of 2006, the *Sashastra Seema Bal* Act of 2007, and Indo-Tibetan Border Police Act of 1992 for a number of military offences such as in relation to the enemy or terrorist, mutiny, desertion and aiding desertion and other offences such as murder including fratricide.[103] However, award of death sentence under the military offences is rare except under the provision of civil offences i.e. fragging/fratricidal killings etc. The first death sentence awarded ever by an Army Court post-Independence was in September 1990 against jawan Devendra Nath Rai of the Armoured Regiment, in connection with a fratricidal killing.[104]

Analysis, 24 June 2014, at: http://www.dnaindia.com/mumbai/report-43-rise-in-rape-cases-in-mumbai-but-the-police-claims-more-than-90-consensual-1997422

101. *See* 'In 2014, Mumbai has become more unsafe for women than last year, says statistics'. Daily News and Analysis, 29 April 2014, at: http://www.dnaindia.com/mumbai/report-in-2014-mumbai-has-become-more-unsafe-for-women-than-last-year-says-statistics-1983111

102. *See* 'Six rapes daily in Delhi, says police data', Hindustan Times, 26 May 2014 at: http://www.hindustantimes.com/india-news/newdelhi/six-rapes-daily-in-capital-city-says-police-data/article1-1222882.aspx

103. The sentence of death can be awarded under Section 69(a) of Army Act, Section 71(a) of Air Force Act, Section 77(1) of Navy Act, 1957, Section 49(a) of ITPB Act, Section 46(a) of BSF Act, Section 49(a) of SSB Act and Section 55(a) of the Assam Rifles Act

104. *See* 'Death penalty for Army jawan', Outlook, 2 March 2007, at: http://www.outlookindia.com/news/article/Death-penalty-for-Army-jawan-/455049

The capital punishment in various legislations relating to the establishment of the security forces does not act as deterrent as incidents of fragging/fratricidal killings are reported at regular intervals. The Ministry of Defence stated that 83 cases of fratricide were reported from the armed forces from 2000 to 2012 (till April). Majority of the cases are reported in the Army.[105]

The central paramilitary forces reported 44 incidents of fratricide from 2008 to 2011. Out of these 44 incidents, the Central Reserve Police Force (CRPF) reported highest number of 18 such incidents.[106]

However, the Central Reserve Police Force[107] Act of 1949 does not have the provision of death penalty for any offence. If fragging/fratricidal incidents and other offences by the CRPF personnel who have the highest number of fratricidal killings can be dealt with without death penalty, surely the provision of death penalty can be removed by other security forces.

vii. Even execution in public fails to reduce crimes

It is not only in matters of national security but on homicide offences too, India fails to learn from the experiences of other countries from Asia, Africa and Latin America.

In comparison to the Philippines, South Africa, Colombia and Honduras, India has the lowest homicide rate despite India not executing any convict for homicide offences since execution of Dhananjoy Chatterjee on 14 August 2004 while India executed Ajmal Kasab, a terror convict in 2013.

Murder rate per 100,000 population had been falling to its lowest level in India since the 1960s. The murder rate started increasing from the mid-60s when execution was the norm to reach its peak in 1992 when the combined rate of murder and culpable homicide not amounting to murder was 5.15 per 100,000 population, roughly double the level in 1957. Since 1992, it has been falling steadily. In 2014, the country witnessed 33,981 murders and 3,332

105. Information given by Minister of Defence Shri AK Antony in a written reply to Dr. Gyan Prakash Pilania in the Rajya Sabha on 2 May 2012, available at: http://pib.nic.in/newsite/erelease.aspx?relid=82918
106. *See* 'Fratricide incident kills 3 CRPF jawans in J&K', India Today, 26 December 2011, at: http://indiatoday.intoday.in/story/crpf-jawans-killed-in-fratricide-incident-srinagar/1/165800.html
107. *See State Of Punjab vs Dalbir Singh*, Supreme Court of India, 1 February, 2012 at: http://indiankanoon.org/doc/166513655/

incidents of culpable homicide not amounting to murder and the combined rate of the two crimes per 100,000 population was 3.0 in 2014 and 2.98 in 2013 respectively.[108]

According to the United Nations Office on Drugs and Crimes (UNDOC), number of homicides and rate per 100,000 population during 12 years between 1998 and 2009 in the Philippines was 7.2 persons.[109]

In comparison, South Africa which abolished death penalty in 1996 has far higher homicide rates than India. In 2012, South Africa recorded 25,470 cases of intentional homicides accounting for 60.4 homicide rate per 100,000 population.[110] Homicide rate in South Africa decreased steadily between 1995 and 2011 by more than 50 per cent (from 64.9 to 30.0 per 100,000 population) following abolition of death penalty, though it experienced a slight increase back to 31 per 100,000 population in 2012.[111]

Honduras with no armed conflict has been caught in a vortex of crime, drug trafficking, gang wars, political upheaval and fierce land disputes. With a population of eight million Honduras has the world's highest murder rate. As per the UNDOC, the homicide rate per 100,000 people in Honduras from 2002 to 2012 was 62.5 persons and has been consistently rising since 2000 (rate 50.9) to 2012 (rate 90.4). The murder rate was 173 per 100,000 population in San Pedro Sula, the highest in the world outside a war zone.[112] Yet, death penalty had been abolished in Honduras in 1957.[113]

Colombia is among the top countries with highest homicide rates in the world. As per the UNDOC, the homicide rate per 100,000 people in Colombia from 2002 to 2012 was 44.39 persons with murder rate falling consistently below 40 persons since 2005. Colombia has not reintroduced the death

108. Murder count in India falls to its lowest level since 1960s, The Times of India, 23 August 2015, http://timesofindia.indiatimes.com/india/Murder-count-in-India-falls-to-its-lowest-level-since-1960s/articleshow/48635001.cms
109. United Nations Statistics on Intentional homicide, number and rate per 100,000 population; available at: http://data.un.org/Data.aspx?d=UNODC&f=tableCode%3a1
110. Intentional homicide, number and rate per 100,000 population, UNODC Homicide Statistics 2012; available at: http://data.un.org/Data.aspx?d=UNODC&f=tableCode%3a1#UNODC
111. Global Study on Homicide 2013 (Trends, Context, Data) by United Nations Office on Drugs and Crime, Vienna; Available: https://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf
112. Inside San Pedro Sula – the most violent city in the world, The Guardian, 15 May 2013, http://www.theguardian.com/world/2013/may/15/san-pedro-sula-honduras-most-violent
113. A/HRC/WG.6/22/HND/1, 23 August 2010

penalty on the ground that the maximum sentence of 60 years is a sufficient punishment.[114]

Indian courts regularly award death penalty in rape followed by murder cases. On 3 December 2013, a fast-track court sentenced all the four men namely Vinay Sharma, Akshay Thakur, Pawan Gupta and Mukesh Singh to death for gang-rape of "Nirbhaya", a young medical student on a moving bus in capital Delhi that provoked national outrage and led to massive protests across India in December 2012. Judge Yogesh Khanna stated that the student was "tortured till the very end" and that the case fell into the "rarest of rare category", which justified capital punishment.[115]

South Africa is considered as the "rape capital" of the world. In 1999, South African Police recorded a rape every 26 seconds.[116] In 2013 the Reuters stated that brutal sexual attack such as on Nirbhaya in Delhi barely made a stir in South Africa. It described South Africa as a country long known as the "rape capital of the world"[117]. In 1995, one Moses Sithole was arrested and charged with 38 murders and 40 rapes between 1994 to1995. During the arrest Sithole attacked an undercover police officer with an axe and was shot three times. Sithole was sentenced to 2410 years in prison. His sentence is made up of 12 years for each of the 40 rapes he committed, 50 years for each of the 38 murders and another 5 years for each of his six robberies.[118]

If Nepal, Sri Lanka, Colombia and the Philippines with fewer resources than India can deal with deadly insurgencies without death penalty, does India require the same? If rape and homicide can be dealt without death penalty in South Africa and Honduras, does India needs death penalty.

It is clear that retention of death penalty has no justification in India.

114. Colombia rules out death penalty for child molesters, International Business Times, 17 February 2015, http://www.ibtimes.co.uk/colombia-rules-out-death-penalty-child-molesters-1488298
115. Delhi gang-rape: all four convicts sentenced to death, NDTV, 3 December 2013, http://www.ndtv.com/india-news/delhi-gang-rape-all-four-convicts-sentenced-to-death-534502
116. Every 26 Seconds: In 1999, 52,000 Rapes In South Africa, 1 February 2000; Available: http://www.cbsnews.com/news/every-26-seconds/
117. Outcry over India gang rape shames some in South Africa, Reuters.com, 6 February 2013; available: http://www.reuters.com/article/2013/02/06/us-safrica-rape-idUSBRE9150RB20130206
118. South Africa's 11 deadliest serial killers murdered 205 people, 29 May 2014; Available: http://www.timeslive.co.za/local/2014/05/29/south-africas-11-deadliest-serial-killers-murdered-205-people

viii. Death is not a deterrent to counter terror

The Law Commission of India in its "Report No.262: The Death Penalty" of August 2015 recommended that "*the death penalty be abolished for all crimes other than terrorism related offences and waging war. Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism related offences and waging war, will affect national security. However, given the concerns raised by the law makers, the commission does not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.*"[119]

Threat to national security has been used to justify retention of death penalty in many countries of the world.

There are countries with fewer resources than India which faced far more protracted and deadly insurgencies and acts of terrorism but did not feel the necessity to use death penalty to ensure national security. These countries are mainly in Asia including Philippines, Nepal and Sri Lanka.

The Philippines abolished death penalty in 2006 in the midst of insurgencies and widespread acts of terrorism from the Moro National Liberation Front (MNLF), the Moro Islamic Liberation Front (MILF), the Abu Sayyaf Group (ASG) and the Communist Party of Philippines (CPP) with the death toll of 120,000 in the conflict with the Moro insurgents[120] and 40,000 with the CPP between 1969 and 2014.[121] Prior to the abolition of death penalty, the Abu Sayyaf group claimed responsibility for a series of bomb attacks over the years, including an attack on a passenger ferry in Manila Bay in February 2004 that killed 100 people.[122] In February 2005, the guerrillas killed 13 Marines in an ambush in Patikul, Sulu.[123] In the face of these acts of terrorism and without

119. Law Commission of India, Report No.262 The Death Penalty August 2015 available at http://lawcommissionofindia.nic.in/reports/Report262.pdf
120. Philippines arrests Muslim rebel over killing of U.S. troops, Reuters, 2 June 2014; available at: http://in.reuters.com/article/2014/06/02/us-philippines-militants-idINKBN0ED0K220140602
121. Guide to the Philippines conflict, BBC, 8 October 2012; available at: http://www.bbc.com/news/world-asia-17038024
122. Bomb caused Philippine ferry fire, BBC News, 11 October 2004, http://news.bbc.co.uk/2/hi/asia-pacific/3732356.stm
123. 14 Marines killed; 10 were beheaded, Inquirer.net, July 12, 2007; available at: http://www.inquirer.net/specialreports/thesoutherncampaign/view.php?db=1&article=20070712-76172

any political solution, on 6 June 2006 the Philippines Congress passed bills abolishing the death penalty and President Gloria Macapagal-Arroyo signed the Republic Act No. 9346, '*An Act prohibiting the imposition of the death penalty in the Philippines*'.[124] Following the abolition of death penalty, the Philippines continued to face deadly acts of terrorism. In April 2007, the Abu Sayyaf cadres abducted and beheaded six construction workers and a factory worker in Jolo, Southern Philippines.[125] In August 2007, the MNLF and the Abu Sayyaf groups claimed responsibility for an ambush on troops in Jolo, which led to death of 60 soldiers.[126] From 2008 to 2011, the Abu Sayyaf group conducted a series of kidnappings for ransom. Kidnap victims included a group of Filipino journalists in 2008; foreign members of the International Committee of the Red Cross in 2009; and two Filipino-Americans in 2011.[127] Philippines has been able to find a political solution with the Moro Islamic Liberation Front (MILF) in May 2015[128] while it still confronts the CPP whose sole aim has been to overthrow the Philippine government using guerrilla-style warfare.[129]

No other country in the world has witnessed the assassination of its national political leaders as Sri Lanka. The Liberation Tigers of Tamil Eelam (LTTE) had perfected the use of suicide bombers, invented the suicide belt and pioneered the use of women in suicide attacks. The LTTE assassinated former Prime Minister of India, Rajiv Gandhi on 21 May 1991,[130] President of Sri Lanka Ranasinghe Premadasa on 1 May 1993,[131] Member of Parliament Dr Neelan Tiruchelvam of the Tamil United Liberation Front (TULF) on 29 July 1999,[132] and Lakshman Kadirgamar, Sri Lanka's Foreign Minister on 12 August

124. Available at: http://www.icomdp.org/cms/wp-content/uploads/2013/04/Report-How-States-abolition-the-death-penalty.pdf
125. Philippine group beheads hostages, BBC, 20 April 2007; available at: http://news.bbc.co.uk/2/hi/asia-pacific/6574773.stm
126. Guide to the Philippines conflict, BBC, 8 October 2012, available at: http://www.bbc.com/news/world-asia-17038024
127. Ibid
128. In 2012, the Philippines Government and the MILF had agreed to a framework for a peace deal after 17 years of negotiations and both parties signed the Comprehensive Agreement in 2014. See BBC News, "MILF rebels hand over arms in the Philippines", 16 June 2015, http://www.bbc.com/news/world-asia-33144749
129. Philippines-CPP/NPA (1969 – first combat deaths): August 2014; available at: http://ploughshares.ca/pl_armedconflict/philippines-cppnpa-1969-first-combat-deaths/
130. 5 things to know about the Rajiv Gandhi assassination case, Business Standard, 19 February 2014, http://www.business-standard.com/article/politics/5-things-to-know-about-the-rajiv-gandhi-assassination-case-114021900625_1.html
131. Suicide Bomber Kills President of Sri Lanka, New York Times, 2 May 1993 http://www.nytimes.com/1993/05/02/world/suicide-bomber-kills-president-of-sri-lanka.html
132. A Leading Sri Lankan Moderate Is Killed, The New York Times, 30 July 1999, http://www.nytimes.com/1999/07/30/world/a-leading-sri-lankan-moderate-is-killed.html

2005[133] while it made attempts to assassinate then sitting President Chandrika Bandaranaike Kumaratunga in a suicide attack on 18 December 1999[134] and then Minister and current President of Sri Lanka, Maithripala Sirisena on 9 October 2008.[135] Though death penalty remains in the statute book, Sri Lanka did not carry out an execution since 1976 to deal with the dreaded LTTE.

In fact, the Communist Party of Nepal-Maoist (CPN-M) is the only leftist insurgent organisation in the 21st century which caused overthrow of the monarchy in Nepal. In the armed struggle that claimed over 13,000 lives from 1996 to 2006, the People's Liberation Army (PLA), the military wing of the CPN (Maoist) spread to 73 out of 75 districts of Nepal except two districts of Manang and Mustang.[136] According to some estimates, the Maoists established control over approximately 40 per cent of Nepal's countryside, thereby assuming the functions of governance in the areas under their control.[137] Yet Nepal did not recall the death penalty to deal with the Maoists.

Colombia faced far more serious and protracted armed conflict than India, Philippines, Nepal and Sri Lanka. Colombia has been in armed conflict with the *Fuerzas Armadas Revolucionarias de Colombia* (FARC or the Revolutionary Armed Forces of Colombia) since 1964. Between 1980s and 2000s, the FARC succeeded in gaining control of over one-third of Colombia's national territory, having fighters on the entry and exit routes of all major cities.[138] Yet, Colombia did not feel the need to invoke death penalty abolished in 1910 under the Legislative Act No. 3 to combat the FARC.[139]

133. Assassination and after, The Frontline, Volume 22 - Issue 18, Aug 27 - Sep 09, 2005, http://www.frontline.in/static/html/fl2218/stories/20050909006100400.htm
134. President survives assassination bid, The Sunday Times, 19 December 1999, http://www.sundaytimes.lk/991219/frontm.html
135. Minister Maithripala Sirisena escapes suicide bomb attack, deputy minister injured, The Sunday Times, 9 October 2008, http://www.sundaytimes.lk/081005/latestnews/42.html
136. Nepal Conflict Report 2012 http://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf
137. http://www.hrw.org/reports/2005/nepal0205/2.htm
138. Fact sheets - FARC areas of influence, Colombia Reports, 21 April 2014, http://colombiareports.com/farc-areas-of-influence/
139. The Legislative Act No. 3 provided that *"in no event may legislators impose the death penalty"*. For details, refer to Observations to the Draft Additional Protocol to the American Convention on Human Rights to abolish the death penalty, Colombia, 5 February 1990, https://www.oas.org/en/iachr/mandate/Basics/observations-death-penalty-Colombia.pdf

European countries too faced isolated but deadly terror attacks such as the 2005 London Bombings killing 52 people and injuring more than 770,[140] the 2004 Madrid bombings killing 191 people and wounding nearly 2,000[141] and the 2011 Breivik killings in which Anders Behring Breivik, a far-right extremist detonated a bomb next to government offices in Oslo, Norway killing eight people and injuring at least 209 persons[142] while he further opened fire killing 69 youths who were holidaying at a summer camp on the Utoeya island.[143]

There is no doubt that these isolated but deadly terror attacks in Europe would have fallen into the "rarest of rare" category but non-execution of those convicted or the prohibition on the use of death penalty did not make the continent more vulnerable to terror attacks.

The Government of India enacted a number of anti-terror legislations such as Terrorist and Disruptive Activities (Prevention) Act of 1985 (TADA), Prevention of Terrorism Act, 2002 (POTA) and Unlawful Activities Prevention Act to provide death penalty.

However, experience has shown that the death penalty has not yielded the desired results. The execution of Kehar Singh and Satwant Singh in the assassination of former Prime Minister Smt. Indira Gandhi[144] did not deter two Khalistani extremists namely Sukhdev Singh and Nirmal Singh from killing General A S Vaidya in retaliation against the Operation Blue Star,[145] or targeting innocent persons such as June 1991 attack on a passenger train by Khalistani extremists in Punjab, which killed at least 55 persons[146], or September 1993 bombing in New Delhi targeting Indian Youth Congress President M S Bitta that killed nine persons.[147] Similarly, award of capital punishment to convicts of 1993

140. BBC, http://news.bbc.co.uk/2/shared/spl/hi/uk/05/london_blasts/what_happened/html/
141. Madrid bombing suspects charged, BBC, 11 April 2006, http://news.bbc.co.uk/2/hi/europe/4899042.stm
142. Anders Breivik pleads not guilty at Norway murder trial, BBC, 16 April 2012, http://www.bbc.com/news/world-europe-17724535
143. Timeline: How Norway's terror attacks unfolded, BBC, 17 April 2012, http://www.bbc.com/news/world-europe-14260297
144. *See* 'End of the road' India Today, 31 January 1989 at: http://indiatoday.intoday.in/story/indira-gandhi-assassination-trial-satwant-singh-and-kehar-singh-hanged/1/323031.html
145. *See* State of Maharashtra Vs. Sukhdeo Singh & Anr, 15 July 1992
146. *See* 'DEAD SILENCE: The Legacy of Human Rights Abuses in Punjab', Human Rights Watch, May 1994 at: http://www.hrw.org/sites/default/files/reports/India0594.pdf
147. *See Devender Pal Singh Vs State NCT of Delhi and Anr*, 22 March 2002

In an interview with *The Economic Times* on 11 February 2013 Justice V R Krishna Iyer, former Supreme Court judge stated, *"Even for terrorists, death penalty is not the answer. It does not deter terrorists from executing future terror strikes. It is foolish to think that death penalty to a terrorist would deter future terror attacks. People do these crimes driven by emotion or propaganda. So, death penalty can never be a deterrent to stop terror……."*[148]

Prevention is one of the key elements to counter terror attacks. It is also known to the Government of India that terror activities in India have reduced because of the peace-processes initiated, changes in geo-politics and cooperation of the neighbouring countries and international community, and not necessarily because of imposition of death penalty. According to the Ministry of Home Affairs, Government of India, terrorist activities in Jammu and Kashmir showed a significant decline with incidents of terrorist violence declining from 499 in 2009, 488 in 2010 and 340 in 2011 to 192 in 2012. The number of persons killed also declined from 389 in 2009 to 102 in 2012.[149] Similarly, the security situation including reduction of terror attacks in the North East India has been also improving for the last one and half decades. According to the Ministry of Home Affairs, 1561 incidents of violence were reported in 2008 which reduced to 1025 incidents in 2012.[150] This reduction is a direct consequence of the peace talks initiated by the Ministry of Home Affairs with a number of insurgent groups, and not because of the imposition of death penalty.[151]

4.2 Death without legal sanction

i. International law on fair trial standards

There is universal consensus that imposition of death penalty, which may be imposed only in the most serious crimes, must meet the highest standards of

148. The interview is available at: http://articles.economictimes.indiatimes.com/2013-02-11/news/37039183_1_death-penalty-padma-vibhushan-ajmal-kasab
149. Annual Report 2012-13, Page 5, Ministry of Home Affairs, available at: http://www.mha.nic.in/sites/upload_files/mha/files/AR(E)1213.pdf
150. Annual Report 2012-13, Page 11, Ministry of Home Affairs, available at: http://www.mha.nic.in/sites/upload_files/mha/files/AR(E)1213.pdf
151. *See* Status of Peace Process, Ministry of Home Affairs at: http://www.mha.nic.in/sites/upload_files/mha/files/Peaceprocess-300813.pdf

fair trial. Article 6.2 of the International Covenant on Civil and Political Rights (ICCPR) provides that "*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*".

ICCPR ratified by India sets forth international standards on fair trial.[152] The international fair trial standards include equality before law, the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, to be presumed innocent until proven guilty, the right to have adequate time and facilities for the preparation of defence, the right to communicate with counsel of the defendant's choosing, the right to free legal assistance for poor defendants, the right to cross-examination, the right to free assistance of an interpreter if the defendant cannot understand or speak the language used in court, the right against self-incrimination, the right to have the sentence reviewed by a higher tribunal and making all judgements rendered in a criminal case public.

The ICCPR is further complemented by the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, the UN Basic Principles on the Independence of the Judiciary, the UN Basic Principles on the Role of Lawyers, the UN Guidelines on the Role of Prosecutors, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the UN Standard Minimum Rules for the Treatment of Prisoners.

With respect to foreign nationals, Article 36 of the Vienna Convention on Consular Relations[153] ensures the consular access.

152. THE RIGHT TO A FAIR TRIAL: PART II – FROM TRIAL TO FINAL JUDGEMENT, OHCHR, available at http://www.ohchr.org/Documents/Publications/training9chapter7en.pdf

153. Article 36 Communication and contact with nationals of the sending State

1.With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

Article 14 of the ICCPR provides the following guarantees for fair trial:

"Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

   (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

   (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

   (c) To be tried without undue delay;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2.The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

The United Nations safeguards guaranteeing protection of the rights of those facing the death penalty as adopted by the United Nations Economic and Social

Council resolution 1984/50 of 25 May 1984 as given as under:

"1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.

2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.

4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

5. Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.

9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering."

The UN Human Rights Committee in its General Comment No. 6 has stated that "*the imposition of the death penalty upon the conclusion of a trial in which the due process and fair trial guarantees in article 14 of the Covenant have not been respected, constitutes a violation of article 6 of the Covenant on the right to life*." [154] Therefore, imposition of death penalty without ensuring respect for the fair trial standards provided under the ICCPR amounts to violation of the Article 6.1 of the ICCPR which unequivocally states that "*No one shall be arbitrarily deprived of his life*". Arbitrary deprivation of the right to life need not be perpetrated only by the law enforcement personnel alone but by the judiciary too if the standards of fair trial are not ensured or complied with during trial for imposition of death penalty.

ii. Imposition of death sentence without legal sanction in India

In India, there are cases of imposition of death sentence without legal sanction, arbitrary rejection of mercy pleas by the President without respect for *stare decisis* and arbitrary execution of death row convicts in violation of Article 21 of the Constitution of India[155]. While the violations of international fair trial standards i.e. denial of legal assistance of the defendant's own choosing at every stage of the proceedings and trial without delay are plenty, this report highlights six critical instances of imposition of death penalty without legal sanction.

First, judicial discretion is one of the cardinal principles of independence of judiciary which stands violated in case of mandatory death penalty as it prevents any possibility of taking into account the defendant's personal circumstances,

154. Moving Away from the Death Penalty: Lessons in South-East Asia, Office of the High Commissioner for Human Rights Regional Office for South-East Asia, October 2013, available at http://bangkok.ohchr.org/files/Moving%20away%20from%20the%20Death%20Penalty-English%20for%20Website.pdf

155. Article 21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

the circumstances of the particular offence and any related mitigating factors by the judiciary. The UN Human Rights Committee has stated that "*the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of Article 6, paragraph 1 of the ICCPR*", and is fundamentally incompatible with the right to fair trial and due process guarantees under Article 14 of the ICCPR.[156] India's Supreme Court had declared mandatory death penalty under Section 303 of the Indian Penal Code (IPC) as unconstitutional in *Mithu vs State Of Punjab* in 1983 stating, inter alia, that

> *"… Thus, there is no justification for prescribing a mandatory sentence of death for the offence of murder committed inside or outside the prison by a person who is under the sentence of life imprisonment. A standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case. "The infinite variety of cases and facets to each would make general standards either meaningless 'boiler plate' or a statement of the obvious.....*
>
> *It is because the death sentence has been made mandatory by section 303 in regard to a particular class of persons that, as a necessary consequence, they are deprived of the opportunity under section 235(2) of the Criminal Procedure Code to show cause why they should not be sentenced to death and the Court is relieved from its obligation under section 354(3) of that Code to state the special reasons for imposing the sentence of death. The deprivation of these rights and safeguards which is bound to result in injustice is harsh, arbitrary and unjust…..*
>
> *Judged in the light shed by Maneka Gandhi and Bachan Singh, it is impossible to uphold Sec. 303 as valid. Sec. 303 excludes judicial discretion. The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable 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*

156. Moving Away from the Death Penalty: Lessons in South-East Asia, Office of the High Commissioner for Human Rights Regional Office for South-East Asia, October 2013, available at http://bangkok.ohchr.org/files/Moving%20away%20from%20the%20Death%20Penalty-English%20for%20Website.pdf

reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Sec. 303 is such a law and it must go the way of all bad laws".[157]

Though the Supreme Court declared mandatory death sentence as unconstitutional in 1983, the Government of India continued to enact laws providing for mandatory death sentences. The laws enacted since 1983 providing mandatory death sentence include the Narcotic Drugs and Psychotropic Substances Act of 1985 (NDPS),[158] the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act of 1989[159], and **the** Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act of 2002.[160]

This lack of respect for the Court judgment led to numerous litigations challenging constitutional validity of the mandatory death sentencing. The Supreme Court in *State of Punjab vs Dalbir Singh* struck down Section 27(3) of the Arms Act, 1959 which provided for mandatory death sentence as unconstitutional on 1 February 2012.[161] In June 2011, the Bombay High Court in an order read down Section 31A[162] of the NDPS Act which prescribed

157. Mithu vs State Of Punjab Etc. 1983 AIR 473, 1983 SCR (2) 690

158. Under Section 31A of the NDPS Act

159. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 provides mandatory death sentence under Section 3(2)(i) of the Act which provides:

"3.(2). Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,-

(i) gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any member of a Scheduled Caste or a Scheduled Tribe to be convicted of an offence which is capital by the law for the time being in force shall be punished with imprisonment for life and with fine; and if an innocent member of a Scheduled Caste or a 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."

160. Section 3(1)(g)(i) of the SUA Act read as under:"3 Offences against ship, fixed platform, cargo of a ship, maritime navigational facilities, etc.- (1) Whoever unlawfully and intentionally-.....(g) in the course of commission of or in attempt to commit, any of the offences specified in clauses (a) to (d) in connection with a fixed platform or clauses (a) to (f) in connection with a ship-

(i) causes death to any person shall be punished with death." **The** SUA Act, 2002 can be accessed at: http://www.nia.gov.in/acts/The_Suppression_of_Unlawful_Acts_Against_Safety_of_Maritime_Navigation_Act_2002.pdf

161. State of Punjab vs Dalbir Singh (2012) 3 SCC 346

162. Section 31A of NDPS provides "Death penalty for certain offences after previous conviction.- (l) Notwithstanding anything contained in section 31, if any person who has been convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, any of the offences punishable under 3 [section 19, section 24, section 27 A and for offences involving commercial quantity of any narcotic

drug or psychotropic substance] is subsequently convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence relating to-

(a) engaging in the production, manufacture, possession, transportation, import into India, export from India or transshipment, of the narcotic drugs or psychotropic substances specified under column (1) of the Table below and involving the quantity which is equal to or more than the quantity indicated against each such drug or substance, as specified in column (2) of the said Table:..... (b) financing, directly or indirectly, any of the activities specified in clause (a), shall be punishable with death." Note the Table not produced here but it

mandatory death sentence and the Supreme Court is currently considering the constitutionality of Section 31A of NDPS Act.[163]

However, the courts in India continue to impose mandatory death penalty under Section 31A of the NDPS Act, Section 27(3) of the Arms Act[164] and Section 303 of the IPC.

In January 2012, the Court of Additional District and Sessions Judge, Chandigarh awarded death sentence to Paramjit Singh of Punjab under Section 20(C) read with Section 31A of the NDPS Act.[165] In March 2012, the District Court Chandigarh again awarded death sentence to Balwinder Singh of Punjab under Section 21(c) read with Section 31A of the NDPS Act.[166]

On 25 April 2005, a trial court in West Bengal imposed death penalty under various provisions including under Section 27(3) under the Arms Act to seven persons including Jamiludin Nasir and Aftab Ahmed Ansari. On 5 February 2010, the High Court of Calcutta confirmed the conviction and death sentence of two out of the seven persons, Jamiludin Nasir and Aftab Ahmed Ansari passed by the trial court on all counts. On appeal, the Supreme Court on 10 October 2014 set aside their conviction under Section 27(3) of Arms Act and altered the death sentence imposed on other provisions despite but confirmed the conviction under other provisions.[167]

Similarly, Saibanna Nigappa Natikar of Karnataka was given death sentence under Section 303 of the IPC by a trial court in 2003. The High Court of Karnataka despite acknowledging that the imposing of death sentence under

says Opium, Morphine, Heroin, Codeine, Thebaine, Cocaine, Hashish, LSD, LSD-25(+)-N, N Diethyllysergamide (d-lysergic acid diethylamide), THC (Tetrahydrocannabinols, the following Isomers: 6a (10a), 6a (7) 7, 8, 9, 10, 9 (11) and their stereochemical variants), Methamphetamine (+)-2-Methylamine-1- Phenylpropane, Metha qualone (2- Meth y 1-3-0-tol y 1-4-(3h)-quinazolinone), Amphetamine (+)-2-amino-1-phenylporpane, Salts and preparations of the psychotropic substances mentioned in (ix) to (xii) etc, of quantity ranging between 500 grams to 20 Kgs

163. Writ Petition (Civil) No. 1784 and 1790 of 2010

164. Section 27(3) of the Arms Act, "Whoever uses any prohibited arms or prohibited ammunition or does any act in contravention of section 7 and such use or act results in the death of any other person, shall be punishable with death".

165. See 'Drug peddler gets capital punishment', Times of India, 29 January 2012, http://timesofindia.indiatimes.com/city/chandigarh/Drug-peddler-gets-capital-punishment/articleshow/11670031.cms

166. Drug peddler gets death sentence, Hindustan Times, 26 March 2012, available at: http://www.hindustantimes.com/punjab/chandigarh/drug-peddler-gets-death-sentence/article1-831175.aspx

167. Md. Jamiluddin Nasir vs State of West Bengal (2014) 42 SCD 19

303 of the IPC was wrong confirmed the death sentence on Saibanna[168] and the Supreme Court also upheld the death sentence in 2005.[169] Finally, the Supreme Court by judgment dated 13 September 2009 in *Santosh Kumar Satishbhusan Bariyar vs. State of Maharashtra* held the decision in *Saibanna vs State of Karnataka* as *per incurium* on the ground that it upheld mandatory death sentence under section 303 of the IPC.[170]

Second, India imposes death penalty in clear violation of the fair trial standards provided under the ICCPR. Article 6.2 of the ICCPR provides that death penalty "*can only be carried out pursuant to a final judgment rendered by a competent court*". In this regard, the features of the "competent court" ought to be considered as the establishment of a court by law by itself cannot be considered as 'competent' unless the trial complies with the fair trial standards and the court itself meets the UN Basic Principles on the Independence of the Judiciary. A competent court must conduct the trial through the common laws of the country such as Code of Criminal Procedure (CrPC) and Evidence Act. However, when the common laws of conducting trial are circumscribed and made subservient to special laws while trying the cases relating to national security, counter terrorism or anti-drug measures, the special courts or designated courts are effectively reduced to military tribunal/ summary trial. The Government of India under the Terrorist and Disruptive Activities (Prevention) Act (TADA) and the Prevention of Terrorism Act (POTA) made self-incrimination prohibited under ICCPR admissible for the purposes of imposing death penalty and further allowed in camera trial including the National Investigation Agency Act[171]. Though the courts under the TADA and the POTA were established by law, because of the violations of the principles of fair trial, the courts cannot be considered as "competent court"; and therefore imposition of death sentences by these courts are illegal

168. Criminal Ref. Case No. 2/2003 and Criminal Appeal No. 497 of 2003, High Court of Karnataka, Judgment available at: http://judgmenthck.kar.nic.in/judgments/bitstream/123456789/367873/1/CRLRC2-03-10-10-2003.pdf

169. Saibanna vs. State of Karnataka [2005(2)ACR1836(SC)]

170. Santosh Kumar Satishbhusan Bariyar vs. State of Maharashtra: (2009)6SCC498

171. Section 13 of the TADA, 1985 refers to protection of the identity and address of the witness and in camera proceedings. Section 16 of TADA, 1987 followed the TADA, 1985 as it provided camera trial for the protection of identity of witnesses. It was mandatory to hold proceedings in camera under Section 13 of TADA, 1985 whereas the proceedings could be held in camera under Section 16 of TADA, 1987 only where the Designated Court so desired.

Section 30 of POTA 2002 also provided camera proceedings on the same lines as Section 16 of TADA, 1987.

Section 17 of National Investigative Agency Act, 2008 also provides for camera proceedings for the protection of identity of witnesses if the Special Court so desires.

irrespective of the review by the Supreme Court.

Devender Pal Singh Bhullar was arrested under the TADA and the Indian Penal Code and he was sentenced to death solely based on his confessional statements recorded by Deputy Commissioner of Police B.S. Bhola under Section 15[172] of the TADA. While two judges of the Supreme Court confirmed the conviction and death sentence on Bhullar on 22 March 2002, Justice M. B. Shah delivered a dissenting judgment, and pronounced Bhullar as "innocent". Justice Shah held that there was nothing on record to corroborate the confessional statement of Bhullar and police did not verify the confessional statement including the hospital record to find out whether D. S. Lahoria, one of the main accused went to the hospital and registered himself under the name of V. K. Sood on the date of incident and left the hospital after getting first aid. None of the main accused, i.e. Harnek or Lahoria was convicted[173] but Bhullar, the alleged conspirator, was sentenced to death. In April 2013, Anoop G Chaudhari, the Special Public Prosecutor who had appeared against Bhullar in the Supreme Court in 2002 stated that though two of the three judges on the Supreme Court bench upheld his arguments, he found himself agreeing with the dissenting verdict delivered by the presiding judge, M B Shah, who had acquitted Bhullar. Chaudhari had stated "*Surprising as it may sound, I believe that Shah was right in not accepting my submissions in support of the trial court's decision to convict Bhullar in a terror case, entirely on the basis of his confessional statement to the police*".[174]

Similarly for assassination of Rajiv Gandhi, former Prime Minister of India, one of the accused Perarivlan @ Arivu was sentenced to death. The Central Bureau of Investigation (CBI) charge-sheeted 26 accused for various offences

172. "15. Certain confessions made to police officers to be taken into consideration. - (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872, but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder:

    Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

    (2) The police officer shall, before recording any confession under subsection (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily."

173. ACHR "Death Penalty Through Self Incrimination in India", October 2014, http://www.achrweb.org/reports/india/Incrimination.pdf

174. Public prosecutor turns surprise ally for Bhullar, The Times of India, 18 April 2013, http://timesofindia.indiatimes.com/india/Public-prosecutor-turns-surprise-ally-for-Bhullar/articleshow/19606737.cms

under the TADA and the IPC[175] and the Special Judge of the TADA Court sentenced all 26 main accused to death.[176] On 11 May 1999, the Supreme Court set aside convictions under the TADA but confirmed the death sentence passed by the TADA Court on Nalini, Santhan, Murugan and Arivu under the Indian Penal Code.[177] Arivu was sentenced to death based on his confessional statement. Interestingly, in a documentary released in November 2013 on Arivu, the former Superintendent of Police of the CBI Mr P V Thiagarajan admitted that he had manipulated Arivu's confessional statement in order to join the missing links in the narrative of the conspiracy in order to secure convictions. Thiagarajan stated, "*But [Perarivalan] said he did not know the battery he bought would be used to make the bomb. As an investigator, it put me in a dilemma. It wouldn't have qualified as a confession statement without his admission of being part of the conspiracy. There I omitted a part of his statement and added my interpretation. I regret it*."[178]

In the cases of both Arivu and Bhullar, the confessions made to the police officers are in violation of the Indian Evidence Act,[179] which does not allow confessions made to police officers as admissible evidence, and Article 14(3)(g) of the ICCPR which prohibits self-incrimination.[180] Had they been tried under the IPC based on the evidence taken under the India Evidence Act, both would have certainly been acquitted. Had they been tried only under the TADA, they would not have been sentenced to death as the maximum punishment for abetment under the TADA is five years imprisonment.[181] Since Arivu was discharged under the TADA, the evidence (confession made to police officer) extracted under the TADA should not have been used as evidence to prosecute him under the IPC offences. In such a case Arivu would have been released as

175. They were charged under Section 302 read with Section 120-B of the Indian Penal Code and Section 3 & 4 of the TADA.
176. They were sentenced under Section 302 read with Section 120-B IPC. One of accused was also sentenced to death under Section 3(1)(ii) of the TADA.
177. The death sentence was under Section-120B read with Section 302 IPC. State through Superintendent of Police, CBI/SIT vs. Nalini and Ors.[AIR1999SC2640]
178. Ex-CBI man altered Rajiv death accused's statement, The Times of India, 24 November 2013, available at:http://timesofindia.indiatimes.com/india/Ex-CBI-man-altered-Rajiv-death-accuseds-statement/articleshow/26283700.cms
179. Section 25. Confession to police officer not to be proved - No confession made to police officer shall be proved as against a person accused of any offence.
180. Article 14 (3). In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (g) Not to be compelled to testify against himself or to confess guilt."
181. Under Section 3(3) of the TADA the punishment for abetting terrorism is "imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine".

confession made to a police officer is not admissible under the Indian Evidence Act. Devender Pal Singh Bhullar too, if tried under the IPC without relying on the evidence obtained under the TADA (confession made to a police officer) would have certainly been acquitted.

It is clear that death sentences are imposed in terror cases in clear violations of the ICCPR and therefore, without proper legal sanction as provided under international human rights law.

Third, imposition of death penalty in clear violation of *stare decisis* is imposition of death penalty without legal sanction. The *Bachan Singh* judgment held that death penalty can be imposed only in the "rarest of rare" cases after considering aggravating circumstances relating to the crime and mitigating circumstances relating to the criminal. A balance sheet of these elements should be spelt out in the judgment.

In the same judgment i.e. *Santosh Kumar Satish Bhusan Bariyar vs. State of Maharashtra,* the Supreme Court further declared *Saibanna vs. State of Karnataka*[182] as *per incuriam* for being "inconsistent with Mithu (supra) and Bachan Singh (supra)".

In February 2014, the Supreme Court stayed execution of three death row convicts sentenced in *Ankush Maruti Shinde and Ors. vs. State of Maharashtra* following the logic laid down in *Ravji vs. State of Rajasthan* which had been declared as *per incuriam.*[183]

Fourth, the President of India does not consider and/or rejects mercy pleas of the death row convicts in violation of Article 21 of the constitution of India. The Supreme Court has held that "*It is well established that exercising of power under Article 72/161 by the President or the Governor is a constitutional obligation and not a mere prerogative. Considering the high status of office, the Constitutional framers did not stipulate any outer time limit for disposing the mercy petitions under the said Articles, which means it should be decided within reasonable time. However, when the delay caused in disposing the mercy petitions is seen to be unreasonable, unexplained*

182. Santosh Kumar Satish Bhusan Bariyar Vs. State of Maharashtra [(2009) 6 SCC 498]
183. Times of India, "SC revisiting death penalties, stays three more" 6 February 2014, http://timesofindia.indiatimes.com/india/SC-revisiting-death-penalties-stays-three-more/articleshow/29920086.cms

and exorbitant, it is the duty of this Court to step in and consider this aspect. Right to seek for mercy under Article 72/161 of the Constitution is a constitutional right and not at the discretion or whims of the executive. Every Constitutional duty must be fulfilled with due care and diligence; otherwise judicial interference is the command of the Constitution for upholding its values." The Court further held that "*Therefore, inasmuch as Article 21 is available to all the persons including convicts and continues till last breath if they establish and prove the supervening circumstances, viz., undue delay in disposal of mercy petitions, undoubtedly, this Court, by virtue of power under Article 32, can commute the death sentence into imprisonment for life. As a matter of fact, it is the stand of the petitioners that in a petition filed under Article 32, even without a presidential order, if there is unexplained, long and inordinate delay in execution of death sentence, the grievance of the convict can be considered by this Court.*"

The Supreme Court had commuted the death sentence of a number of death row convicts for violation of Article 21 of the Constitution of India by the President of India. These included commutation of death sentences of Mahendra Nath Das on 1 May 2013[184]; 14 death row convicts consisting of Suresh, Ramji, Gurmeet Singh, Praveen Kumar, Sonia, Sanjeev Kumar, Sundar Singh, Jafar Ali, Shivu, Jadeswamy, Bilavendran, Simon, Gnanprakasam and Madiah on 21 January 2014[185]; Devinder Pal Singh Bhullar on 31 March 2014[186]; and Ajay Kumar Pal in 12 December 2014[187]. On 28 January 2015, the Allahabad High Court commuted the death sentence of death row convict, Surendra Koli[188] on the same ground.

Indeed, there is legal bar to consider mercy pleas. Section 32A of the NDPS Act deprives an accused/convict from exercising his right to be granted remission/ commutation, etc. The provision states *"32A. No suspension, remission or commutation in any sentence awarded under this Act.-Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law for the time being in force but subject to the provisions of Section 33, no sentence awarded under this Act (other than Section 27) shall be suspended or remitted or commuted."* On

184. Mahindra Nath Das vs Union Of India (2013) 6 SCC 253
185. Shatrughan Chauhan vs Union of India (2014) 3 SCC 1
186. Navneet Kaur vs State of NCT of Delhi (2014) 7 SCC 264
187. Ajay Kumar Pal vs Union Of India & Anr, Writ Petition (Criminal) No.128 of 2014
188. Public Interest Litigation (PIL) No 57810 of 2014

7 May 2013, a Division Bench of the Supreme Court while hearing an appeal filed by one Krishnan and others, convicted under NDPS Act, challenging the Punjab and Haryana High Court's order which held that he was not entitled to any remission in view of the provisions of Section 32A of the NDPS Act referred the matter to the larger bench of the Supreme Court for examining the validity of Section 32A of the NDPS Act.[189] This provision effectively deprives a convict sentenced to death under Section 31A of the NDPS Act from filing mercy petition to the Governors and the President of India for commutation of the death sentence.

Fifth, India carries out execution of death row convicts in clear violation of Article 21 of the Constitution of India and international human rights law relating to equality and non-discrimination. The Supreme Court of India in the landmark *Shatrughan Chauhan vs Union of India* delivered on 21 January 2014 held: "*It is well settled law that executive action and the legal procedure adopted to deprive a person of his life or liberty must be fair, just and reasonable and the protection of Article 21 of the Constitution of India inheres in every person, even death row prisoners, till the very last breath of their lives. We have already seen the provisions of various State Prison Manuals and the actual procedure to be followed in dealing with mercy petitions and execution of convicts.*"

As the rights under Article 21 of the Constitution of India extend to till the last breadth, it implies that all death row convicts are equal before law even after rejection of their mercy pleas and the laws of India do not differentiate between those convicted under anti-terror laws and other criminal offences. The right to equality and non-discrimination among the death row convicts does not get extinguished by rejection of mercy pleas.

However, there are at least two recent cases where President of India jumped queue ahead of others to reject the mercy petitions and executed them too.

On 28 October 2012, the President's Secretariat had displayed all the mercy petitions pending before President Pranab Mukherjee on its webpage. As per that list, there were altogether 12 pending mercy pleas which were listed in sequential order as per the date of recommendation received by the President

189. Krishnan & Ors vs State of Haryana & Ors, Criminal Appeal No. 973 of 2008

Secretariat from the Ministry of Home Affairs (MHA), with the oldest listed first. In that list, the mercy plea of Ajmal Kasab, sentenced to death for 26/11 Mumbai terror attack, was put at the last being number 12 based on the receipt of the recommendations of the MHA dated 16.10.2012 to reject the mercy plea.[190] However, President Pranab Mukherjee jumped the queue of 11 other convicts whose cases appeared first in sequential order and rejected the mercy plea of Kasab on 05.11.2012.[191] Soon after rejection of his mercy plea Kasab was executed on 21.11.2012 and buried at Pune's Yerwada Central Prison.[192]

Similarly, the mercy plea of Mohammad Afzal Guru, convicted for the attack on Parliament in 2001, had been listed at number 6 based on the receipt of the recommendation of the MHA dated 04.08.2011.[193] The President rejected his mercy plea ahead of the other pending cases[194] on 03.02.2013[195] and he was hanged on 09.02.2013[196] without his family being informed about the hanging as required under the Jail Manual.

Sixth, the courts in India continue to impose death sentence on juveniles though the same have been corrected, at times with great difficulty, when the issue of juvenility was brought to the notice of the courts. With respect to Ramdeo Chauhan, a juvenile sentenced to death, the Supreme Court corrected itself after mistakenly ruling that Chauhan was not a child or near or about the age of being a child within the meaning of the Juvenile Justice Act.[197] Similarly, Ankush Maruti Shinde was sentenced to death by the Supreme Court[198] and he further filed a mercy petition with the President of India. However, the mercy petition became redundant after it was confirmed by the Additional

190. Ajmal Kasab's mercy petition last among 12 pending petitions in President Pranab Mukherjee's office, The Times of India, 30 October 2012; link http://articles.economictimes.indiatimes.com/2012-10-30/news/34817055_1_mercy-petitions-mercy-plea-afzal-guru
191. President Secretariat: Statement of Mercy Petition cases – Rejected as on 01.08.2014; available at: http://rashtrapatisachivalaya.gov.in/pdfs/mercy.pdf
192. Ajmal Kasab hanged, buried at Pune's Yerwada Jail, Indiatoday.com, 21 November 2012; available at: http://indiatoday.intoday.in/story/ajmal-kasab-hanged-after-president-rejected-his-mercy-plea/1/230103.html
193. Ajmal Kasab's mercy petition last among 12 pending petitions in President Pranab Mukherjee's office, The Times of India, 30 October 2012; link http://articles.economictimes.indiatimes.com/2012-10-30/news/34817055_1_mercy-petitions-mercy-plea-afzal-guru
194. Afzal Guru hanged in secrecy, buried in Tihar Jail, The Hindu, 10 February 2013
195. President Secretariat: Statement of Mercy Petition cases – Rejected as on 01.08.2014; available at: http://rashtrapatisachivalaya.gov.in/pdfs/mercy.pdf
196. Afzal Guru hanged in secrecy, buried in Tihar Jail, The Hindu, 10 February 2013
197. Ramdeo Chauhan @ Rajnath Chauhan vs Bani Kant Das & Ors.: SCR [2010] 15 (ADDL.) S.C.R.
198. RTI reply No.RB-2013/Admin/RTI/23805 dated 15 June 2013 received from PIO & Under Secretary to Governor (Admin), Raj Bhavan, Mumbai by ACHR

Sessions Court in Nashik on 7 July 2012 that he was a juvenile at the time of the commission of offence following an inquiry into his age.[199] Even though the judgements awarding death sentence were corrected by the Courts, the facts remains juveniles continue to be sentenced to death because of the failure of the system. While the maximum sentence under the Juvenile Justice Act for any crime is three years, Shinde had served six years jail including in solitary confinement.[200]

4.3 Death penalty without the right to appeal

The United Nations safeguards guaranteeing protection of the rights of those facing the death penalty specifically provide that "*6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory*."[201]

In a number of cases, the Supreme Court of India set aside acquittal by the High Courts and awarded death penalty such as Kheraj Ram of Rajasthan[202] and Satish of Uttar Pradesh who were acquitted by respectively the Rajasthan High Court and the Allahabad High Court.[203]

In a number of other cases, the Supreme Court enhanced lesser sentences of life imprisonment into death penalty. These include convictions under anti-terror laws like the Terrorist and Disruptive Activities Prevention Act (TADA)[204] and the Indian Penal Code (IPC). With respect to anti-terror cases which were directly considered by the Supreme Court following adjudication by the designated courts, Simon Anthoniyappa, Gnanaprakasham, Meesekar Madaiah and Bilavendran were sentenced to life imprisonment in September 2001 by a Special Court set up under the Terrorist and Disruptive Activities Prevention Act (TADA) for their involvement in a land mine blast in 1993. However, the

199. *See* 'After six years on death row, spared for being a juvenile', The Times of India, 21 August 2012 at: http://timesofindia.indiatimes.com/india/After-six-years-on-death-row-spared-for-being-a-juvenile/articleshow/15577973.cms
200. Ibid
201. Safeguards guaranteeing protection of the rights of those facing the death penalty, approved by Economic and Social Council resolution 1984/50 of 25 May 1984 and available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/DeathPenalty.aspx
202. *State of Rajasthan Vs. Kheraj Ram* (Criminal Appeal No. 830 of 1996 decided on 22.08.2003)
203. *State of U.P. vs. Satish* [Criminal Appeal Nos. 256-257 of 2005 (Arising out of S.L.P. (Crl.) Nos. 1666-1667 of 2004 decided on 08.02.2005]
204. Under the TADA, the Supreme Court was the first and only appellate court.

Supreme Court in January 2004 on an appeal filed by the State of Karnataka enhanced their punishment from life imprisonment to death.[205] In the IPC offences, the death sentence imposed on Dharmendra Singh and Narendra of Uttar Pradesh was commuted to life imprisonment by the Allahabad High Court on 19 August 1997[206] but the Supreme Court restored the death sentence.[207] Similarly, death sentence imposed on Sonia Choudhary and Sanjeev Choudhary by the Sessions Court on 27 May 2004 was reduced to life imprisonment by the Punjab & Haryana High Court on 12 April 2005 but the Supreme Court enhanced to death penalty on 15 February 2007.[208] On 22 March 2007, the Bombay High Court commuted the death sentence of the convict Ambadas Laxman Shinde, Bapu Appa Shinde and Surya alias Suresh to life imprisonment[209] but on 30 April 2009, the Supreme Court set aside the order of the Bombay High Court and reinstated the death sentence.[210] In the case of Sattan @ Satyendra and Upendra @ Guddu, the death sentence imposed by the trial Court was commuted to life imprisonment by the Allahabad High Court on 18 October 2000[211] but on 27 February 2009, the Supreme Court restored the death sentence upon Sattan and Upendra[212]

In fact, the Supreme Court directed for fresh consideration by the High Courts in some cases where death penalty was not imposed, in a way implying that death penalty should have been imposed. In the case of commutation of death penalty of Kunal Majumdar into life imprisonment by the High Court of Rajasthan on 11 July 2007[213], the Supreme Court in an order dated 12 September 2012 set aside the High Court order and remitted the matter back to the High Court for fresh order on the sentence.[214] By the judgment dated 13 February 2013, the Division Bench of the High Court of Rajasthan at Jodhpur reconfirmed the life sentence on the convict, Kunal Majumdar.[215]

205. (2004)2SCC694
206. State of U.P. Vs. Dharmendra Singh & Anr, Supreme Court of India, 21 September 1999
207. Ibid
208. *Sonia and Sanjeev vs. Union of India*, 2007(2)ACR1708(SC), AIR2007SC1218
209. State Of Maharashtra vs Ankush Maruti Shinde And Ors, Bombay High Court, 22 March 2007
210. Ankush Maruti Shinde and Ors. Vs. State of Maharashtra, Supreme Court of India, 30 April 2009
211. Sattan Alias Satyendra And Ors.... vs State Of U.P. on 18 October, 2000, Allahabad High Court, available at: http://indiankanoon.org/doc/1286351/
212. State of U.P. Vs. Sattan @ Satyendra and Ors, Supreme Court of India, 27 February 2009
213. Kunal Majumdar Vs. State of Rajasthan, Supreme Court of India, 12 September 2012
214. Ibid
215. State of Rajasthan vs Kunal Majumdar, Rajasthan High Court, 13 February 2013, available at: http://courtnic.nic.in/jodh/judfile.asp?ID=CRLA&nID=243&yID=2007&doj=2%2F13%2F2013

However, convict Devendra Nath Rai has not been as lucky as Mr Kunal Majumdar. Rai, an Army Jawan, was accused of murder of his colleagues on 15 October 1991 and was sentenced to death by the Court Martial. The Allahabad High Court converted the death sentence to life imprisonment holding that the case did not fall in the category of "rarest of the rare" category. However, the Supreme Court on 10 January 2006 directed the Allahabad High Court to reconsider its judgment on the quantum of sentence while noting that the High Court without considering that the balance sheet of aggravating and mitigating circumstances abruptly concluded the case as not being covered by rarest of rare category.[216] Following re-trial, Rai has been reportedly given death sentence by the Allahabad High Court in 2013.[217] This has created a bizarre situation in which the Allahabad High Court gave two separate rulings on the same facts and circumstances of the case. Rai has decided to challenge the order of the High Court and the trial has been going on for over 23 years!

While enhanced punishment of death by the Supreme Court is constitutional in India, whether it meets the requirement that "*anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory*" is questionable.

The Review Petition which can be filed against the orders of the Supreme Court as per Article 137 of the Constitution of India[218] and rules made under Article 145 of the Constitution of Indi[219]a cannot be considered as an appeal

216. Union of India (UOI) and Ors. Vs. Devendra Nath Rai (Civil Appeal No. 206 of 2003), Supreme Court of India, Decided on 10.1.2006

217. http://www.outlookindia.com/article/The-Noose-Has-Loose-Ends/233274
When fate hangs uncertain: Capital punishment in UP raises questions, http://www.samachar.com/when-fate-hangs-uncertain-capital-punishment-in-up-raises-questions-odueMdbbaeg.html

218. Article 137. Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

219. Article 145 (Rules of Court, etc.)
Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including
rules as to the persons practising before the Court;
rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered;
rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III; (cc) rules as to the proceedings in the Court under article 139A;
rules as to the entertainment of appeals under sub-clause (c) of clause (1) of article 134;
rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court or such review are to be entered;

"*to a court of higher jurisdiction*" as provided in the *United Nations safeguards guaranteeing protection of the rights of those facing the death penalty*. Under the Supreme Court Rules of 1966[220] a review a petition is to be filed within thirty days from the date of judgment or order and as far as practicable, it is to be circulated without oral arguments, to the *same Bench of Judges* which delivered the judgment or order sought to be reviewed. As the same Bench of Judges considers the review petition, it cannot be considered as an appeal "*to a court of higher jurisdiction*". As the review is filed before the same Bench of Judges, a different order is least likely.

Even a curative petition filed before the Supreme Court as per the judgment in the case of *Rupa Ashok Hurrah vs. Ashok Hurrah* 2002 (4) SCC 388 after dismissal of a review petition to cure gross miscarriage of justice cannot be considered as an appeal to a court of higher jurisdiction as provided under the *United Nations safeguards guaranteeing protection of the rights of those facing the death penalty*. The curative petition is restrictive and the Supreme Court held that "… *curative petitions ought to be treated as a rarity rather than regular and the appreciation of the Court shall have to be upon proper circumspection having regard to the three basic features of our justice delivery system to wit, the order being in contravention of the doctrine of natural justice or without jurisdiction or in the*

rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein;

rules as to the granting of bail;

rules as to stay of proceedings;

rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexations or brought for the purpose of delay;

rules as to the procedure for inquiries referred to in clause (1) of article 317.

Subject to the provisions of clause (3), rules made under this article may fix the minimum number of Judges who are to sit for any purpose, and may provide for the powers of single Judges and Division Courts.

The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under article 143 shall be five: Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than article 132 consists of less than five Judges and in the course of the hearing of the appeal of the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion.

No judgment shall be delivered by the Supreme Court save in open Court, and no report shall be made under article 143 save in accordance with an opinion also delivered in open Court.

No judgment and so such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion.

220. Supreme Court of India, Manual of Judicial Procedure (Judicial Side) available at http://www.sci.nic.in/CGP/manual_judicial_side.pdf

event of there is even a likelihood of public confidence being shaken by reason of the association or closeness of a judge with the subject matter in dispute." As per the rules of the Supreme Court, a curative petition can be filed only if a Senior Advocate certifies that it meets the requirements of the case. Further, such petition is to be first circulated, in chambers before a Bench comprising of three senior most Judges and such serving Judges who were members of the Bench which passed the judgment/order.[221]

Among the cases cited above, the President of India had commuted death sentences of Kheraj Ram and Satish into life imprisonment in 2006 and 2012 respectively.[222] There is no doubt that the condemned prisoners had to go through another procedure to file the mercy pleas following enhancement of sentence by the Supreme Court.

4.4 Death penalty through self-incrimination

Death penalty or capital punishment is the harshest form of punishment. It extinguishes life and provides no scope for correction in case of mistake. Therefore, the standard of proof must be of the highest standards.

i. Legal guarantees against self-incrimination

One of the cardinal principles of criminal jurisprudence universally accepted is that no person be compelled to testify against himself or to confess guilt. This is guaranteed under Article 20(3) of the Constitution of India and further codified both under Section 25 of the Indian Evidence Act and various Sections of the Code of Criminal Procedure Act, 1973. India had no difficulty to except this obligation while ratifying the International Covenant on Civil and Political Rights in 1979 which prohibits self-incrimination.

Article 20(3) of the Constitution provides that "*No person accused of any offence shall be compelled to be a witness against himself*". This provision embodies the principle of protection against compulsion of self-incrimination which is one of

221. Supreme Court of India, Manual of Judicial Procedure (Judicial Side) available at http://www.sci.nic.in/CGP/manual_judicial_side.pdf
222. *See* 'Kalam OKs mercy plea of Jaipur Death Row convict', The Indian Express, 19 October 2006, at: http://archive.indianexpress.com/news/kalam-oks-mercy-plea-of-jaipur-death-row-convict/15009/; and 'Angel of mercy' Pratibha Patil commutes 30 death row sentences, India Today, 4 June 2012, at:http://indiatoday.intoday.in/story/pratibha-patil-commutes-30-death-row-sentences/1/198933.html

the fundamental canons of the administration of criminal justice. The Supreme Court in a number of decisions explained the intendment of Article 20(3).[223]

This guarantee has further been codified under the Indian Evidence Act, 1872.

Under section 25 of the Evidence Act[224] of 1872 there is a clear embargo in making use of the statement of an accused given to a police officer. This section provides that no confession made to a police officer shall be proved as against a person accused of any offence. Section 26[225] also provides that no confession made by any person whilst he is in custody of a police officer shall be proved as against such person unless such confession is made in the immediate presence of a Magistrate. The only exception is provided under section 27[226] which serves as a proviso to Section 26. Section 27 provides that only so much of information whether amounts to confession or not, as relates distinctly to the fact thereby discovered, in consequence of that information received from a person accused of any offence while in custody of the police can be proved as against the accused.

The Code of Criminal Procedure under which trials are conducted also bars the use of self-confession. Section 161[227] of the Code of Criminal Procedure Act,

223. M.P. Sharma v. Satish Chandra, District Magistrate, Delhi and Others:1954 AIR 300: 1954SCR; Raja Narayanlal Bansilal v. Maneck Phiroz Mistry: (1961) 1 SCR 417: AIR 1961 SC 29; and Nandini Satpathy v. P.L. Dani: (1962) 3 SCR 10: AIR 1961 SC 180: (1978) 2 SCC 424: 1978 SCC (Cri) 236

224. Section 25 of Indian Evidence Act. Confession to police officer not to be proved - No confession made to police officer shall be proved as against a person accused of any offence.

225. Section 26 of Indian Evidence Act. Confession by accused while in custody of police not to be proved against him - No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate[1], shall be proved as against such person

226. Section 27 of Indian Evidence Act. How much of information received from accused may be proved- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

227. 161 of CrPc. Examination of witnesses by police.

(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case Put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

"Provided further that the statement of a woman against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer."

1973 empowers a police officer making an investigation to examine orally any person supposed to be acquainted with the facts and circumstances of the case and to reduce into writing any statement made to him in the course of such examination while section 162 states that no statement recorded by a police officer, if reduced into writing, be signed by the person making it and that the statement shall not be used for any purpose save as provided in the Code and the provisions of the Evidence Act. The ban imposed by Section 162[228] applies to all the statements whether confessional or otherwise, made to a police officer by any person whether accused of any offence or not during the course of the investigation under Chapter XII of the Code.

Section 164 of the Code of Criminal Procedure provides for recording of confessions and statements by Magistrates by complying with the legal formalities and observing the statutory conditions also provides that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.[229]

228. 162 of CrPc. Statements to police not to be signed: Use of statements in evidence.
(1) No statement made by any person to a police officer in the course of' an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it, nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:
Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of' his statement, if duly proved, may be used by the accused, and with the permission of' the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872) and when any part of' such statement is so used, any part thereof' may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.
(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act.
Explanation: An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.

229. Section 164 of CrPC. Recording of confessions and statements.
(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:
Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.
(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.
(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in police custody.
(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a

Not surprisingly, India had no reservation to ratify the International Covenant on Civil and Political Rights which under Article 14(3)(g) provides that "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (g) Not to be compelled to testify against himself or to confess guilt."

In Indian context, the prohibition on the use of confessional statement as evidence against oneself must be seen in the context of use of torture as the key instruments for administration of justice and counter-terrorism measures. From 2001 to 2010, the National Human Rights Commission (NHRC) recorded 14,231 i.e. 4.33 persons died in police and judicial custody in India. This includes 1,504 deaths in police custody and 12,727 deaths in judicial custody from 2001-2002 to 2009-2010. These deaths reflect only a fraction of the problem with torture and custodial deaths in India. Not all the cases of deaths in police and prison custody are reported to the NHRC. The NHRC does not have jurisdiction over the armed forces under Section 19 of the Human Rights Protection Act. Further, the NHRC does not record statistics of torture not resulting into death. The Asian Centre for Human Rights (ACHR) has consistently underlined that about 99.99% of deaths in police custody can be ascribed to torture and occur within 48 hours of the victims being taken into custody.[230]

ii. Legalisation of self-incrimination in India

In clear violation of the clear constitutional and statutory embargo against self-incrimination, the Government of India introduced the Terrorist and Disruptive Activities (Prevention) Act, 1985 and incorporating a non-obstante clause under section 15 of the TADA to exclude the application of the relevant provisions of the Code of Criminal Procedure Act, 1973 and the Indian

memorandum at the foot of such record to the following effect-

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B. Magistrate".

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

230. TORTURE IN INDIA 2011, Asian Centre for Human Rights, 21 November 2011

Evidence Act, 1872 to make confessional statement made by an accused before a police officer not below the rank of Superintendent of Police admissible in the trial of such person or co-accused, abettor or conspirator, for an offence under the TADA or rules made thereunder. Section 15 of the TADA provided,

> *"15. Certain confessions made to police officers to be taken into consideration.- (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872, but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person [or co-accused, abettor or conspirator] for an offence under this Act or rules made thereunder:*
>
> *[Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused].*
>
> *(2) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily*."[231]

The TADA was grossly abused and mis-used. Out of 76,000 arrests under the TADA, the conviction rate was just 0.41 per cent[232] and a large majority of the convictions were based on confession made under Section 15 of the Act.

The TADA was allowed to lapse in 1995[233] only to be replaced by the Prevention of Terrorism Ordinance (POTO), 2001 which was subsequently replaced by the Prevention of Terrorism Act, 2002. However, Section 32 of the POTA preserved the same provision contained in Section 15 of the TADA as given below:

231. See section 15 of the TADA, 1987 as amended by Act 43 of 1993
232. SC notice to Centre on pleas questioning POTA, The Hindu, 27 August 2002 available at http://www.thehindu.com/thehindu/2002/08/27/stories/2002082702481300.htm
233. A terror of a Bill: Frontline Magazine, Volume 17 - Issue 16, August 5 - 18, 2000; available on: http://www.frontline.in/static/html/fl1716/17160240.htm

"32 of POTA. Certain confessions made to police officers to be taken into consideration.-

1. Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical or electronic device like cassettes, tapes or sound tracks from out of which sound or images can be reproduced, s all be admissible in the trial of such person for an offence under this Act or the rules made thereunder.

2. A police officer shall, before recording any confession made by a person under sub-section (1), explain to such person in writing that he is not bound to make a confession and that if he does so, it may be used against him: Provided that where such person prefers to remain silent, the police officer shall not compel or induce him to make any confession.

3. The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes it.

4. The person from whom a confession has been recorded under sub-section (1), shall be produced before the Court of a Chief Metropolitan Magistrate or the Court of a Chief Judicial Magistrate along with the original statement of confession, written or r corded on mechanical or electronic device within forty-eight hours.

5. The Chief Metropolitan Magistrate or the Chief Judicial Magistrate, shall, record the statement, if any, made by the person so produced and get his signature or thumb impression and if there is any complaint of torture, such person shall be directed o be produced for medical examination before a Medical Officer not lower in rank than an Assistant Civil Surgeon and thereafter, he shall be sent to judicial custody."

In 2004, the Government of India repealed the POTA, 2002 through an ordinance[234] and effected amendments to the Unlawful Activities (Prevention)

234. http://lawmin.nic.in/legislative/THE%20%20POTA%20Ordinance%20(latest).htm

Act, 1967 (UAPA) to deal with terrorist offences.[235] A number of provisions of the repealed POTA were incorporated in the UAPA but the Government deleted Section 32 of the POTA.

iii. Imposition of death penalty through self-incrimination

India's failure to comply with the cardinal principle of criminal jurisprudence against self incrimination had chilling effect as torture has been an integral part of investigation and criminal justice system and it is often used to extract confessions.

In an interview with the *Times of India* on 21st November 2013 former CBI Superintendent of Police Mr P V Thiagarajan admitted that he had manipulated the confessional statements of A.G. Perarivalan @ Arivu, one of the accused in the Rajiv Gandhi assassination case to join the missing links in respect of charge of bomb making in order to secure convictions. He reportedly regretted having done that. In the interview Thiagarajan said that Perarivalan, in his confession before him, admitted that he purchased the battery. In the words of Thiagarajan who stated, "*But he said he did not know the battery he bought would be used to make the bomb. As an investigator, it put me in a dilemma. It wouldn't have qualified as a confession statement without his admission of being part of the conspiracy. There I omitted a part of his statement and added my interpretation. I regret it*."[236] Perarivalan is one of the three accused whose death sentence was confirmed by the Supreme Court in State through *Superintendent of Police, CBI/ SIT vs. Nalini and Ors*.[237]

Hundreds of accused have been charged and convicted solely based on self-incriminatory confessional statements recorded under section 15 of the TADA and section 32 of POTA. In a number of cases as discussed in this paper, the Supreme Court had confirmed death penalty on accused who had been convicted solely based on their confessional statements under the TADA and the POTA. Many of the cases under the TADA and the POTA are still being adjudicated given the judicial delay in India.

235. http://mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/UAPA-1967.pdf
236. Ex-CBI man altered Rajiv death accused's statement, The Times of India, 24 November 2013, available at:http://timesofindia.indiatimes.com/india/Ex-CBI-man-altered-Rajiv-death-accuseds-statement/articleshow/26283700.cms
237. State through Superintendent of Police, CBI/SIT vs. Nalini and Ors.[AIR1999SC2640]

However, the damage done to administration of justice cannot be rectified by the police officer confessing their illegal acts.

The issue of self-incrimination in non-terror cases also came to the fore following the rejection of mercy plea of death row convict Surinder Koli.[238] Koli had effectively been convicted based on his confession made before the police and confirmed in his statement before the Magistrate under Section 164 of the Criminal Procedure Code (CrPC). However, Koli in his letter to the Supreme Court had alleged that he was subjected to torture in police custody for extracting the confession; and the Magistrate had failed to notice the telltale signs of torture such as missing fingernails and toenails of himself.[239]

4.5 Death in the name of conscience

As per Section 367(5) of the Code of Criminal Procedure (CrPC) of 1898 (old code) usual sentence for an offence punishable with death was death penalty and lesser sentence was an exception. The courts had to give reasons for not awarding death penalty for an offence punishable with death.[240] After the amendment of Section 367(5) of the CrPC in 1955, the courts were no longer required to state the reasons for not awarding death sentence and were given the discretion in deciding whether to impose a sentence of death or imprisonment for life.[241] Further amendment of the CrPC in 1973 required the Courts to state the reason for imposing death penalty under Section 354(3).[242] The Supreme Court in the *Bachan Singh*[243] case in 1980 further held that death penalty is an exception to be awarded only in the "rarest of

238. Surinder Koli has been held guilty in one of the 16 cases of rape and murder of young women and girls in Nithari village in Uttar Pradesh. The girls and children were killed over a period of time and skeletal remains of a number of missing children were discovered from a drain near the house of Maninder Singh Pandher at D-5, Sector 31, Noida where Koli was employed as a domestic servant. Koli and Pandher are co-accused in 11 cases which are yet to be concluded. As Koli faces the gallows, Pandher had walked free from Dasna jail, Uttar Pradesh on 27 September 2014 after being granted bail by the Allahabad High Court on 24 September 2014.

239. Hanging Koli May Bury The Truth Of Nithari Killings, Ushinor Majumdar, Tehelka, 30 August 2014 available at http://www.tehelka.com/nithari-killing-hanging-surinder-kohli-will-bury-the-truth/

240. "(5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed."

241. After the amendment of Section 367(5) of old Code by Act XXVI of 1955, it is not correct to hold that the normal penalty of imprisonment for life cannot be awarded in the absence of extenuating circumstances which reduce the gravity of the offence. The matter is left, after the amendment, to the discretion of the Court.

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

243. Bachan Singh vs State Of Punjab [AIR 1980 SC 898], [1980 CriLJ 636]

rare" cases after weighing both the aggravating and mitigating circumstances of a particular case.

The "rarest of rare" doctrine has become a misnomer as the sessions judges, the first court empowered to impose death penalty[244], sentenced 5,054 convicts to death during 2004 to 2013 out of which death sentence on 1,303 convicts were confirmed and death sentence on 3,751 convicts were commuted to life imprisonment by the higher courts.[245] Whether an accused shall live or die has become essentially a matter of luck "*by the subjective philosophy of the judge called upon to pass the sentence and on his value system and social philosophy which is often termed as judicial conscience which varies from judge to judge depending upon his attitudes and approaches, his predilections and prejudices, his habits of mind and thought and in short all that goes with the expression social philosophy. ……..There is nothing like complete objectivity in the decision making process and especially so, when this process involves making of decision in the exercise of judicial discretion*."[246]

No other case exposes the arbitrariness in the imposition of death penalty than judgment in *Harbans Singh v. Union of India.*[247] In this particular case, the petitioner Harbans Singh and three other persons, Mohinder Singh, Kashmira Singh and Jeeta Singh had identical role in the murder of Jindi Singh, Surjeet Singh, Bira Singh and Gurmeet Singh. One of them, Mohinder Singh, died in an "encounter" with the police. Harbans Singh, Kashmira Singh and Jeeta Singh were tried and sentenced to death vide order dated 1st May 1975 by the Additional Sessions Judge, Pilibhit, Uttar Pradesh. On 20th October 1975, the High Court of Allahabad confirmed their conviction and the death sentence. Thereafter, each of them preferred separate Special Leave Petitions (SLP) before the Supreme Court. Each SLP was heard by a separate bench and each bench pronounced separate judgment despite the same facts and circumstances and identical role of each convict. Jeeta Singh's SLP was dismissed on 15 April 1976 and he was executed on 6th October 1981. Kashmira Singh's SLP was allowed and his death sentence was commuted into life imprisonment by an order dated 10th April 1977. Harbans Singh's SLP and Review Petition (No.

244. In India, the death penalty is first imposed by the Sessions Courts and thereafter mandatorily must be considered by the High Courts.
245. NCRB, "Prison Statistics India" report series from 2004 to 2013 available at: http://ncrb.gov.in/
246. Bachan Singh vs State Of Punjab [AIR 1980 SC 898], [1980 CriLJ 636]
247. *AIR 1982 SC 849*

140/79) were dismissed on 9th May 1980. He also filed a mercy petition but the President of India refused him clemency. Harbans Singh then moved a Writ Petition before the Supreme Court bringing into light the arbitrariness of the Supreme Court itself. By judgment dated 12th February 1982, the Supreme Court recommended to the President to commute the petitioner's sentence into life imprisonment. In the said judgment, Chief Justice Y. V. Chandrachud, while lamenting the execution of Jeeta Singh stated: "*The fate of Jeeta Singh has a posthumous moral to tell. He cannot profit by the direction which we propose to give because he is now beyond the process of human tribunals*."

Yet, these mistakes continue to be repeated. The Supreme Court vide judgment dated 13 May 2009 in *Santosh Kumar Satish Bhusan Bariyar Vs. State of Maharashtra*[248] held the decision in *Ravji v. State of Rajasthan* as *per incuriam* because it only considered the aggravating circumstances of the crime without conforming to the *Bachan Singh* judgment which directed to impose death penalty after considering both aggravating and mitigating circumstances of the particular case. In the same case, the Supreme Court also declared six other judgements as *per-incuriam* as reasoning propounded in *Ravji v. State of Rajasthan* was followed in awarding death penalty. These six judgments are *Shivaji @ Dadya Shankar Alhat v. State of Maharashtra*[249], *Mohan Anna Chavan v. State of Maharashtra*[250], *Bantu v. The State of U.P.*[251], *Surja Ram v. State of Rajasthan*[252], *Dayanidhi Bisoi v. State of Orissa*[253], and *State of U.P. v. Sattan @ Satyendra and Ors.*[254] Apart from these six judgements, the Supreme Court also declared the judgment in *Saibanna vs. State of Karnataka* as *per incuriam* for being *"inconsistent with Mithu (supra) and Bachan Singh (supra)"*.[255] In February 2014, the Supreme Court stayed execution of three death row convicts sentenced in *Ankush Maruti Shinde and Ors. vs. State of Maharashtra* following the logic laid down in *Ravji vs. State of Rajasthan* which had been declared as per incuriam.[256] Earlier in January 2014, the Supreme Court declared the

248. Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra (2009) 6 SCC 498
249. Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra, [AIR2009SC56]
250. Mohan Anna Chavan v. State of Maharashtra [(2008)11SCC113]
251. Bantu v. The State of U.P., [(2008)11SCC113]
252. Surja Ram v. State of Rajasthan, [(1996)6SCC271]
253. Dayanidhi Bisoi v. State of Orissa, [(2003)9SCC310]
254. State of U.P. v. Sattan @ Satyendra and Ors [2009(3)SCALE394]
255. Mithu vs State of Punjab Etc. 1983 AIR 473, 1983 SCR (2) 690
256. Times of India, "SC revisiting death penalties, stays three more" 6 February 2014, http://timesofindia.indiatimes.com/india/SC-revisiting-death-penalties-stays-three-more/articleshow/29920086.cms

rejection of the petition of Devender Pal Singh Bhullar by one of the benches of the Supreme Court on the ground that terror convicts cannot seek mercy as *per incuriam.* [257]

The mistakes are repeated as imposition of death penalty by definition is judge centric. The Supreme Court in *Sangeet & Anr Vs State of Haryana* on 20 November 2012 admitted "*even though Bachan Singh intended a "principled sentencing", sentencing has now really become judge centric."*

In as much as there are retentionists and abolitionists of death penalty, the conscience of individual judges shall matter so long death penalty is provided under the statutes. In order to illustrate how conscience of individual judges play out the collective conscience, Asian Centre for Human Rights (ACHR) examined the judgements on death penalty adjudicated by two distinguished former judges of the Supreme Court viz. Justice M B Shah and Justice Arijit Pasayat, who are currently serving as Chairperson and Vice-Chairperson of the Special Investigation Team on Black Money[258] appointed by the Supreme Court of India. ACHR found that at least 49 death penalty cases were adjudicated by them.

Out of the 34 death penalty cases adjudicated, Justice A Pasayat (i) confirmed death sentence in 16 cases including 5 cases where lesser sentences were enhanced to death sentence and two cases where acquittal by the High Courts were enhanced to death sentence, (ii) upheld acquittal in 8 cases, (iii) commuted death sentence in 7 cases and (iv) remitted 3 cases back to the High Courts to decide on quantum of sentence. It is pertinent to mention that out of the 16 cases in which death penalty was confirmed by Justice Pasayat, 5 cases have since been declared as *per incuriam* by the Supreme Court.

On the other hand, in 15 cases of death penalty adjudicated by Justice M B Shah, Justice Shah did not confirm death penalty on any case, commuted death sentence in 12 cases, did not enhanced life imprisonment into death penalty, did not alter acquittal by the High Courts into death penalty, did not remit back any case to the High Court on the quantum of sentence, did not deliver a single judgment which was declared as *per incuriam*, delivered dissenting

257. Shatrughan Chauhan vs Union of India [(2014)35SCC1]
258. Writ Petition (Civil) No. 176 of 2009 pending before the Supreme Court of India

judgment against death penalty in 2 cases and upheld acquittal by the High Courts in 3 cases.

Out of these 49 cases, three cases i.e., *Devender Pal Singh Vs. State of National Capital Territory of Delhi and Anr*, *Krishna Mochi and Ors. Vs. State of Bihar etc*, and *Lehna Vs. State of Haryana,* the Supreme Court benches comprised Justice A Pasayat and Justice M B Shah along with Justice B N Agrawal. In *Devender Pal Singh* and *Krishna Mochi & Anr*, the majority view comprising Justice Pasayat and Justice Agrawal confirmed death sentence on all the accused. Justice Shah, on the other hand, acquitted Bhulllar and altered the death sentence on Krishna Mochi, Nanhe Lal Mochi and Bir Kuer Paswan to life imprisonment and further acquitted Dharmendra Singh. However, there was no disagreement or dissent between Justice Shah and Justice Pasayat in commutation of death sentence in *Lehna Vs. State of Haryana*.

Though consideration of the aggravating circumstances relating to the crime and mitigating circumstances relating to the criminal as enunciated by *Bachan Singh* judgment cannot be deduced to a zero sum game, the inconsistency in consideration of these circumstances by the judiciary is all pervasive. It is troubling as it makes the life and death of a person dependent on sophisticated judicial lottery. These inconsistencies stand exposed on perusal and analysis of various judgements of the Supreme Court.

First, convict's young age was given importance for commutation of death penalty in *Amit vs. State of Maharashtra*[259]*; Surendrapal Shivbalakpal Vs. State of Gujarat*[260]*; Rameshbhai Chandubhai Rathod vs. State of Gujarat*[261] and *Amit vs. State of Uttar Pradesh*[262]. However, convict's young age was not considered as mitigating factor in *Dhananjoy Chatterjee vs. State of West Bengal*[263]*; Jai Kumar vs. State of M.P.*[264] and in *Shivu and Anr. Vs. Registrar, High Court of Karnataka and Anr.*[265]

259. Amit @ Ammu vs. State of Maharashtra., [2003 Supp(2) SCR 285]
260. Surendrapal Shivbalakpal Vs. State of Gujarat., 2004 Supp(4) SCR 464
261. Rameshbhai Chandubhai Rathod vs. State of Gujarat., CRIMINAL APPEAL NO. 575 OF 2007
262. Amit Vs. State of Uttar Pradesh., (2012) 4 SCC 107; (2012) 39 SCD 98
263. Dhananjoy Chatterjee vs. State of West Bengal., (1994) 2 SCC 220
264. Jai Kumar vs. State of M.P., AIR1999SC1860
265. Shivu and Anr. Vs. Registrar, High Court of Karnataka and Anr., 2007CriLJ1806

Second, the benefit of possible reformation or rehabilitation as a ground for commutation of death penalty was considered in *Raju v. State of Haryana*[266], *Bantu @ Naresh Giri vs. State of Madhya Pradesh*[267], *Surendra Pal Shivbalakpal vs. State Gujarat*[268], *Amit v. State of Uttar Pradesh*[269] and *Rajesh Kumar Vs. State through Govt. of NCT of Delhi*[270]. However the benefit of the same was not provided in *B.A. Umesh v. Registrar General, High Court of Karnataka*[271] *and Mohd. Mannan Alias Abdul Mannan v. State of Bihar.*[272]

Third, acquittal or life sentence awarded by the High Courts was considered good enough by the Supreme Court to commute death sentences in *State of Tamil Nadu v. Suresh*[273] and *State of Maharashtra v. Suresh*.[274] However, the same was considered not good enough reason by the Supreme Court to commute the death sentence in *State of U.P. vs. Satish*[275] and *B.A. Umesh v. Registrar General, High Court of Karnataka*[276].

Fourth, circumstantial evidence was held not to be a mitigating factor in *Jumman Khan vs. State of Uttar Pradesh*[277], *KamtaTewari Vs State of M.P.*[278], *Molai and Another vs. State of M.P.*[279] *and Shivaji @ Dadya Shankar Alhat vs. State of Maharashtra*[280] but it was so held in *Bishnu Prasad Sinha vs. State of Assam*[281].

Arbitrariness has been one of the grounds for declaring many laws as unconstitutional. The Constitutional Court of South Africa declared death penalty provided under Section 277 of the Criminal Procedure Act of South Africa as unconstitutional, among others, on the ground of arbitrariness.

266. (MANU/SC/0324/2001., (2001) 9 SCC 50)
267. Bantu @ Naresh Giri vs. State of Madhya Pradesh., AIR 2002 SC 70
268. Surendra Pal Shivbalakpal vs. State Gujarat., [2004 Supp(4) SCR 464]
269. Amit Vs. State of Uttar Pradesh., (2012) 4 SCC 107; (2012) 39 SCD 98
270. Rajesh Kumar Vs. State through Govt. of NCT of Delhi[(2011)13SCC706]
271. B.A. Umesh v. Registrar General, High Court of Karnataka., (2011) 3 SCC 85
272. Mohd. Mannan Alias Abdul Mannan v. State of Bihar., (2011) 5 SCC 317
273. State of Tamil Nadu v. Suresh., (1998) 2 SCC 372
274. State of Maharashtra v. Suresh., [(2000) 1 SCC 471
275. State of U.P. v. Satish., (2005) 3 SCC 114
276. B.A. Umesh v. Registrar General, High Court of Karnataka., MANU/SC/0082/2011 : (2011) 3 SCC 85
277. Jumman Khan v. State of Uttar Pradesh., [(1991) 1 SCC 752]
278. Kamta Tiwari v. State of M.P., [(1996) 6 SCC 250]
279. Molai and another v. State of M.P., [(1999) 9 SCC 581]
280. Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra., [(2008) 15 SCC 269]
281. Bishnu Prasad Sinha v. State of Assam., (2007) 11 SCC 467

President of the Constitutional Court stated that "*arbitrariness inherent in the application of section 277 in practice. Of the thousands of persons put on trial for murder, only a very small percentage are sentenced to death by a trial court, and of those, a large number escape the ultimate penalty on appeal. At every stage of the process there is an element of chance. The outcome may be dependent upon factors such as the way the case is investigated by the police, the way the case is presented by the prosecutor, how effectively the accused is defended, the personality and particular attitude to capital punishment of the trial judge and, if the matter goes on appeal, the particular judges who are selected to hear the case. Race and poverty are also alleged to be factors*." President of the Constitutional Court further stated "*Most accused facing a possible death sentence are unable to afford legal assistance, and are defended under the pro deo system. The defending counsel is more often than not young and inexperienced, frequently of a different race to his or her client, and if this is the case, usually has to consult through an interpreter. Pro deo counsel are paid only a nominal fee for the defence, and generally lack the financial resources and the infrastructural support to undertake the necessary investigations and research, to employ expert witnesses to give advice, including advice on matters relevant to sentence, to assemble witnesses, to bargain with the prosecution, and generally to conduct an effective defence. Accused persons who have the money to do so, are able to retain experienced attorneys and counsel, who are paid to undertake the necessary investigations and research, and as a result they are less likely to be sentenced to death than persons similarly placed who are unable to pay for such services*."

The situation described above by the South African Constitutional Court is not dissimilar to India – the mirror reflection is possibly worse in India. If death penalty can be declared unconstitutional on the ground of arbitrariness in South Africa, there is no reason why it should be constitutional in India.

i. Manufacturing conscience to justify death

The Government of India and the retentionists of death penalty in India often rely on the *Bachan Singh* judgment that laid down "the rarest of rare" doctrine to justify continuation of death penalty in India. Yet, more than the *Bachan Singh* judgment delivered by five member constitutional bench which directed to consider aggravating and mitigating circumstances relating to the crime and the criminal of a particular case to impose death penalty, it

is the judgment of the three-judge Bench of the Supreme Court in *Machhi Singh v. State of Punjab*[282] which prevails for imposition of death sentence in the country. *The Machhi Singh* case illustrated the circumstances of the "*rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty*".[283]

In the post *Bachan Singh* period, there has not been a single case of death penalty which has not been justified in the name of the "collective conscience" of the society. The notion of "collective conscience" is deeply flawed and is often manufactured through scapegoating of the dispensable i.e. the poor and socially disadvantaged who are unable to defend themselves in all stages, most notably at the stage of the trial under intense local social pressure, hostile environment and/or those accused of terrorism charges. Some crimes are so gruesome and become politically significant that it almost becomes indispensable for the State to find the guilty, even if it means tweaking justice, to assuage public anger, which is equally directed against the failure of the State and the system as much against the crimes and the criminals.

282. 1983(3) SCC 470

283. The circumstances illustrated by *Machhi Singh case for imposition of death penalty are:*

"I. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance, when the house of the victim is set aflame with the end in view to roast him alive in the house when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death; and when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. When the murder is committed for a motive which evinces total depravity and meanness. For instance when a hired assassin commits murder for the sake of money or reward or a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or a murder is committed in the course for betrayal of the motherland.

III. When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances, etc., which arouse social wrath. For instance when such a crime is committed in order to terrorise such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance. In cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another man on account of infatuation.

IV. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. When the victim is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-avis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons."

In terror cases, manufacturing of the "collective conscience" is most evident. Judges "*take upon themselves the responsibility of becoming oracles or spokesmen of public opinion*"[284].

There is no doubt that the attack on the Indian parliament on 13 December 2001 was atrocious but it also reflected failure of the intelligence agencies of the country to prevent the attacks. While sentencing Afzal Guru[285] to death for the parliament attack, the judges declared that *"the collective conscience of the society will only be satisfied if capital punishment is awarded to the offender"*.

For convicting Devender Pal Singh Bhullar[286], accused of conspiracy for triggering a bomb blast in New Delhi in September 1993 killing nine persons and injuring 25 others, the Supreme Court stated in 2002, "*When the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty*." The Supreme Court while dismissing the petition filed by Bhullar seeking commutation of the death sentence to life imprisonment on the ground of the delay in considering his mercy plea by the President of India further held on 12 April 2013 that "*long delay may be one of the grounds for commutation of the sentence of death into life imprisonment cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes…. as it is paradoxical that the people who do not show any mercy or compassion for others plead for mercy and project delay in disposal of the petition filed under Article 72 or 161 of the Constitution as a ground for commutation of the sentence of death*".[287] Fortunately, the Supreme Court in *Shatrughan Chauhan vs Union of India*[288] declared the *Devinder Singh Bhullar* judgment of 12 April 2013 as *per incuriam* as there is no provision in law which states that terror convicts cannot be given mercy as per law! This exposes judge centric character in awarding death sentence in the name of collective conscience.

284. Bachan Singh vs State Of Punjab [AIR 1980 SC 898]
285. (2005)11 SCC 600
286. (2002)5 SCC 234
287. Devender Pal Singh Bhullar & Anr vs State Of Nct Of Delhi on 12 April, 2013 WRIT PETITION (CRIMINAL) D.NO. 16039 OF 2011
288. (2014) 3 SCC 1

The fact remains that Bhullar was arrested under the Terrorist and Disruptive Activities (Prevention) Act (TADA) and the Indian Penal Code (IPC) and was sentenced to death solely based on his confessional statement recorded by Deputy Commissioner of Police B.S. Bhola under Section 15 of the TADA. While two judges of the Supreme Court confirmed the conviction and death sentence on Bhullar on 22 March 2002, Justice M. B. Shah, Presiding Judge, delivered a dissenting judgment, and pronounced Bhullar as "innocent". Justice Shah held that there was nothing on record to corroborate the confessional statement of Bhullar and police did not verify the confessional statement including the hospital record to find out whether D. S. Lahoria, one of the main accused went to the hospital and registered himself under the name of V. K. Sood on the date of incident and left the hospital after getting first aid. Neither of the main accused i.e. Harnek or Lahoria was convicted[289] but Bhullar, the alleged conspirator, was sentenced to death. In April 2013, Anoop G Chaudhari, the Special Public Prosecutor who had appeared against Devinder Pal Singh Bhullar in the Supreme Court in 2002 stated that though two of the three judges on the Supreme Court bench upheld his arguments, he found himself agreeing with the dissenting verdict delivered by the presiding judge, M B Shah, who had acquitted Bhullar. Chaudhari had stated "*Surprising as it may sound, I believe that Shah was right in not accepting my submissions in support of the trial court's decision to convict Bhullar in a terror case, entirely on the basis of his confessional statement to the police*".[290]

Similarly in the case of the assassination of Rajiv Gandhi, former Prime Minister of India, the Central Bureau of Investigation (CBI) charge-sheeted 26 accused for various offences under the TADA and the IPC.[291] The Special Judge of the TADA Court sentenced all 26 main accused to death.[292] On 11 May 1999, the Supreme Court set aside convictions under the TADA but confirmed the death sentence passed by the TADA Court on Nalini, Santhan, Murugan and Arivu.[293] Arivu was sentenced to death based on his confessional statement.

289. ACHR "Death Penalty Through Self Incrimination in India", October 2014, http://www.achrweb.org/reports/india/Incrimination.pdf
290. Public prosecutor turns surprise ally for Bhullar, The Times of India, 18 April 2013, http://timesofindia.indiatimes.com/india/Public-prosecutor-turns-surprise-ally-for-Bhullar/articleshow/19606737.cms
291. They were charged under Section 302 read with Section 120-B of the Indian Penal Code and Section 3 & 4 of the TADA.
292. They were sentenced under Section 302 read with Section 120-B IPC. One of accused was also sentenced to death under Section 3(1)(ii) of the TADA.
293. The death sentence was under Section-120B read with Section 302 IPC. State through Superintendent of Police, CBI/SIT vs. Nalini and Ors.[AIR1999SC2640]

Interestingly, in a documentary released in November 2013 on Arivu, the former Superintendent of Police of the CBI Mr P V Thiagarajan admitted that he had manipulated Arivu's confessional statement in order to join the missing links in the narrative of the conspiracy in order to secure convictions. Thiagarajan stated, "*But [Perarivalan] said he did not know the battery he bought would be used to make the bomb. As an investigator, it put me in a dilemma. It wouldn't have qualified as a confession statement without his admission of being part of the conspiracy. There I omitted a part of his statement and added my interpretation. I regret it*."[294]

Indeed, in order to satisfy the socalled "collective conscience" of the nation, the application of the laws had been tweaked consistently. In the cases of both Arivu and Bhullar, the confessions made to the police officers are in violation of the Indian Evidence Act,[295] which does not allow confessions made to police officers as admissible evidence, and the International Covenant on Civil and Political Rights which prohibits self-incrimination.[296] Had they been tried under the IPC based on the evidence taken under the Indian Evidence Act, both would have certainly been acquitted. Had they been tried only under the TADA, they would not have been sentenced to death as the maximum punishment for abetment under the TADA is five years imprisonment.[297] Since Arivu was discharged under the TADA, the evidence (confession made to police officer) extracted under the TADA should not have been used as evidence to prosecute him under the IPC offences and in that case Arivu should have been released as confession made to a police officer is not admissible under the Indian Evidence Act and therefore he could not have been sentenced under the IPC. Similarly, Devender Pal Singh Bhullar, if tried under the IPC without relying on the evidence obtained under the TADA (confession made to a police officer), once again would have certainly been acquitted.

In the trial and conviction of terror-related offences in India, justice system has

294. Ex-CBI man altered Rajiv death accused's statement, The Times of India, 24 November 2013, available at:http://timesofindia.indiatimes.com/india/Ex-CBI-man-altered-Rajiv-death-accuseds-statement/articleshow/26283700.cms

295. Section 25. Confession to police officer not to be proved - No confession made to police officer shall be proved as against a person accused of any offence.

296. Article 14 (3). In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (g) Not to be compelled to testify against himself or to confess guilt."

297. Under Section 3(3) of the TADA the punishment for abetting terrorism is "imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine".

developed a clear precedent whereby the investigating agencies and prosecutors present evidence gathered under special laws like TADA in trials conducted under the IPC to extract maximum punishment and the Courts embolden by "collective conscience" have accepted the same without any qualm. This is nothing but abuse of the law driven by the desire for retribution in order to satisfy the socalled "collective conscience" rather than meeting the basic requirements of justice.

In a few cases though, the Supreme Court acknowledged manufacturing of conscience. While acquitting the accused sentenced to death by the Prevention of Terrorist Act designated court and the Gujarat High Court for the terror attacks on the Swaminarayan Akshardham temple at Gandhinagar, Gujarat on 24.09.2002, the Supreme Court of India in its judgment on 16.05.2014 stated, "*136. Before parting with the judgment, we intend to express our anguish about the incompetence with which the investigating agencies conducted the investigation of the case of such a grievous nature, involving the integrity and security of the Nation. Instead of booking the real culprits responsible for taking so many precious lives, the police caught innocent people and got imposed the grievous charges against them which resulted in their conviction and subsequent sentencing*."[298]

It is not only in terror cases that "collective conscience" is manufactured. Crimes against children and women evoke public outrage, and it becomes a necessity to find the culprit by any means.

The case of Surendra Koli, sentenced to death for the Nithari murders, appears to fall in this category. Koli was accused of rape and murder of several children who went missing between 2005 and 2006 from Nithari Village in Gautam Budh Nagar district, Uttar Pradesh. Investigations into these serial murders began in December 2006 by the Uttar Pradesh Police when the skeletal remains of a number of missing children were discovered from a drain near Maninder Singh Pandher's house at Noida where Koli worked as a domestic servant. At least 19 young women and girls were stated to have been raped and killed.[299] There was immense public outrage and the State obviously had to find the culprit/s.

298. Adambhai Sulemanbhai Ajmeri & Ors. Vs. State of Gujarat (Criminal Appeal Nos. 2295-2296 of 2010 with Criminal Appeal No. 45 of 2011)

299. Surendra Koli Vs State of U.P. Ors, http://judis.nic.in/supremecourt/imgst.aspx?filename=37556

On 13 February 2009, a special trial court in Ghaziabad awarded death sentence to Surendra Koli and Maninder Singh Pandher for the rape and murder of 14-year-old girl Rimpa Halder.[300] On appeal, the Allahabad High Court upheld the death sentence of Surendra Koli but acquitted Pandher.[301] The Allahabad High Court confirmed the death sentence on the ground that "*Surendra Koli is a menace to the society… and the crime committed by him "is so gruesome, diabolical and revolting which shocks the collective conscience of the community*".[302] The Supreme Court too confirmed the death penalty on Surendra Koli noting that the *"case clearly falls within the category of rarest of rare case and no mercy can be shown to the appellant Surendra Koli."*[303]

It is pertinent to mention that Koli was pronounced a menace to the society only in Rimpa Haldar rape and murder case as the remaining cases (CBI had filed chargesheets in 16 out of the 19 cases of abduction, rape and murder against Koli) were pending adjudication at the time of the judgment on Rimpa Haldar murder case.[304] It is clear that the Courts were already inferring to all other pending cases which were yet to be decided. Whether Surinder Koli would have been given the death sentence if the victim was only Rimpa Haldar is a matter of conjecture. But, somebody had to be found guilty for the murder of so many children even if it means ignoring critical evidence relating to the case.

The critical evidence were the findings of the Committee of the Ministry of Women and Child Development (MWCD) constituted "*to investigate into allegations of large-scale sexual abuse, rape and murder*" in Nithari which had identified 17 victims from the skulls and bones found in the ditches near Pandher's house. As per the report of the MWCD, the doctor, Vinod Kumar who supervised the postmortems of the children "*indicated that it was intriguing to observe that the middle part of all bodies (torsos) was missing…Such missing torsos give rise to a suspicion that wrongful use of bodies for organ sale, etc could be possible. ..The surgical precision with which the bodies were cut also pointed to this fact. .. body*

300. *See* 'Justice still far away in 18 Nithari cases', Rediff.com, 28 December 2009, at: http://news.rediff.com/report/2009/dec/28/noida-justice-still-far-away-for-18-nithari-cases.htm
301. Surendra Koli Vs State of U.P. Ors, http://judis.nic.in/supremecourt/imgst.aspx?filename=37556
302. Criminal (Capital) Appeal No. 1475 of 2009 available at: Law Resource India https://indialawyers.wordpress.com/nithari-high-court-judgement-acquits-pandher/
303. Surendra Koli Vs State of U.P. Ors, http://judis.nic.in/supremecourt/imgst.aspx?filename=37556
304. *See* 'Nithari killings: Koli guilty of seven-year-old's murder', NDTV, 4 May 2010, at: http://www.ndtv.com/article/india/nithari-killings-koli-guilty-of-seven-year-old-s-murder-23049

organs of small children were also in demand as these were required for transplant for babies/ children. A body generally takes more than 3 months to start decomposing and the entire process continues for nearly 3 years. Since many of the reported cases related to children having been killed less than a year back, it is a matter for investigation as to why only bare bones were discovered. …The theory of cannibalism … could be a ruse to divert attention from the missing parts of the bodies".[305]

The MWCD recommended the CBI to look into all angles including organ trade, sexual exploitation and other forms of crimes against women and children and the organ transplant records of all hospitals in Noida over the last few years to study the pattern and trend of these operations and tracing the donors and recipients.[306]

These aspects were never investigated by the CBI for reasons best known to it. This is despite the fact that the prosecution witness (PW), Ramesh Prasad Sharma who deposed before the trial court at Ghaziabad, as recorded in the Allahabad High Court's order, stated that his employer namely Dr Naveen Chaudhary was arrested in 1997 in some kidney scam matter. Dr Naveen Chaudhary was the next door neighbor of Pandher and lived in the neighboring bungalow that overlooked the same ditch where the bodies were found. Ramesh Prasad Sharma was the cook of Dr Naveen Chaudhary.[307]

The only clinching evidence against Koli was his confession to the magistrate under Section 164 of the CrPC where he repeated what he had told the police in custody. Koli allegedly informed his lawyers that he was tortured before his confession and had been threatened with more if he did not repeat it before the magistrate. In his letter to the Supreme Court, Koli mentioned that the magistrate failed to notice the telltale signs of torture on him. His fingernails and toenails were allegedly missing due to torture. Koli's confessional statement was made before a magistrate in Delhi and not in Ghaziabad. Koli alleged that it was done so that the investigators could have a magistrate of their choice. The police on that other hand claimed that the statement was recorded before

305. Report of the Committee Investigating into allegations of large scale sexual abuse, rape and murder of children in Nithari village of NOIDA (UP), Ministry of Women and Child Development Government of India Shastri Bhawan, New Delhi available at http://wcd.nic.in/nitharireport.pdf

306. Ibid

307. Why We Should Not Hang Surinder Koli, Yahoo News, 27 October 2014, https://in.news.yahoo.com/why-we-should-not-hang-surinder-koli-071255867.html

a magistrate in Delhi given an attack on Koli by the lawyers when he was brought to a Ghaziabad court. However, the police had taken him to the same court in Ghaziabad twice after the said attack before recording the statement in Delhi. It was also alleged that the statement was taken down in English, a language Koli does not understand. Further, the stenographer who jotted the statement of Koli was not examined in court. Koli was allegedly not medically examined before or after the confessional statement.[308]

The massive public outrage is as much against the diabolical nature of the crimes and criminals as against the failure of the system of the State to prevent the crimes.

In the Nithari case, police failed to prevent the crimes and threatened to take action against the parents of the poor families for not taking care of their own children when they went to lodge the complaints about their missing children. This discouraged the families from approaching the police. This had been duly noted by the Committee of the MWCD which stated, "*A number of them complained that when their children were originally found to be missing, the police would not heed their complaints nor even register them*".[309] Yet, in order to satisfy public anger against the failure of the system to prevent the crime, somebody had to be found guilty in the name of "collective conscience".

The infamous Nirbhaya gang-rape and murder in Delhi on 16 December 2012 was not an exception either. "Hair raising" and brutal as the crime was,[310] the unprecedented public protest in Delhi for days that drew international attention was as much to express outrage against the brutal crime as it was against the failure of the State to prevent the crime. It is pertinent to mention that prior to gang-rape of Nirbhaya on 16 December 2012 inside the bus, one Ramadhar Singh had boarded the same bus and was beaten, robbed and dumped by the same convicts a few hours before the gang-rape. Ramadhar Singh approached a Delhi police patrolling team to lodge a complaint but the police patrolling team directed him to go to the Vasant Vihar police station as the crime spot "was

308. See 'Hanging Koli May Bury The Truth Of Nithari Killings', Tehelka, 30 August 2014, Issue 35 Volume 11, at: http://www.tehelka.com/nithari-killing-hanging-surinder-kohli-will-bury-the-truth/

309. Report of the Committee Investigating into allegations of large scale sexual abuse, rape and murder of children in Nithari village of NOIDA (UP), Ministry of Women and Child Development Government of India Shastri Bhawan, New Delhi available at http://wcd.nic.in/nitharireport.pdf

310. State of NCT Delhi vs Ram Singh [Death Sentence Reference No.6/2013, CRL. APP. NOS.1398/2013, 1399/2013 and 1414/2013]

not under their purview". Few minutes later, Nirbhaya boarded the same bus along with her male friend wherein she was gang-raped and brutalised leading to her death subsequently by the same convicts who had beaten, robbed and dumped Ramadhar Singh.[311] Had the Delhi Police patrolling team intervened in the complaint of Ramadhar Singh and alerted other police patrolling teams in the area to intercept the bus and arrest the accused, Nirbhaya gang rape incident might not have taken place at all. Justice Verma Committee set up after the 16th December Nirbhaya gang rape observed *"Practically every serious breach of the rule of law can be traced to the failure of performance by the persons responsible for its implementation. The undisputed facts in public knowledge relating to the Delhi gang rape of December 16, 2012 unmistakably disclose the failure of many public functionaries responsible for traffic regulation, maintenance of law and order and, more importantly, their low and skewed priority of dealing with complaints of sexual assault."* The Justice Verma Committee recommended that the non-registration of First Information Reports (FIRs) be made a punitive offence and no death penalty should be imposed.[312] However, in order to hide its systemic failure, the State went on to include provisions for death penalty under 376A[313] and 376E[314] of the IPC introduced under the Criminal Law Amendment Act 2013.

The reliance on collective conscience to impose death penalty is fraught with malafides at every stage. As former member of the National Human Rights Commission (NHRC), Mr Satyabrata Pal asked, "*What is the community whose conscience the judge must tap into and channel into a pronouncement of death? For a sessions judge, it will presumably be that of the local community. If that judgment is overturned on appeal, it can either mean that the [Sessions] judge had misread that conscience, or that the High Court felt that the conscience of the larger community of the State did not want blood. If the Supreme Court reinstated the death sentence,*

311. Times of India, "Delhi gang rape: Three cops suspended for duty failure", 23.12.2012, http://timesofindia.indiatimes.com/city/delhi/Delhi-gang-rape-Three-cops-suspended-for-duty-failure/articleshow/17724910.cms
312. Justice Verma Committee Report on Amendments to Criminal Law, http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf
313. Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of Section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall be not less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death
314. Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death

this would presumably mean that the national conscience was at one with the local, but that of the State concerned was out of step with both. Which is the segment of the community to whose conscience judges must defer? Logically, it should be the one most affected, which would imply that no sentence of death from a sessions court should be overturned. How does a judge in the State or Central capital determine that the local community had not been galvanised into bloodlust?"[315]

ii. Per incuriam cases: Admitted judicial errors in death sentencing

Whether an accused shall live or die has become essentially a matter of luck depending on which judge/bench his/her case is listed before. This has been lucidly established in *Harbans Singh v. Union of India.*[316]

As per the *Bachan Singh* judgment, death penalty can only be imposed in the "rarest of rare" cases after considering aggravating circumstances relating to the crime and mitigating circumstances relating to the criminal. A balance sheet of these elements should be spelt out in the judgment.

The Supreme Court vide judgment dated 13 May 2009 in *Santosh Kumar Satish Bhusan Bariyar Vs. State of Maharashtra* held the decision in *Ravji v. State of Rajasthan* as *per incuriam* because it only considered the aggravating circumstances of the crime without conforming to the *Bachan Singh* judgment. In the same case, the Supreme Court also declared six other judgements as *per-incuriam* as reasoning propounded in *Ravji v. State of Rajasthan* was followed in awarding death penalty. These six judgments are *Shivaji @ Dadya Shankar Alhat v. State of Maharashtra*[317], *Mohan Anna Chavan v. State of Maharashtra*[318], *Bantu v. The State of U.P.*[319], *Surja Ram v. State of Rajasthan*[320], *Dayanidhi Bisoi v. State of Orissa*[321], and *State of U.P. v. Sattan @ Satyendra and Ors.*[322]

A cursory scrutiny of these judgements show that in all these judgements declared as per incuriam, the Supreme Court had also actually confirmed the death sentences in the name of conscience.

315. Why capital punishment must go, Satyabrata Pal, The Hindu, 3 October 2013 available at http://www.thehindu.com/opinion/lead/why-capital-punishment-must-go/article5193670.ece
316. *AIR 1982 SC 849*
317. Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra, [AIR2009SC56]
318. Mohan Anna Chavan v. State of Maharashtra [(2008)11SCC113]
319. Bantu v. The State of U.P., [(2008)11SCC113]
320. Surja Ram v. State of Rajasthan, [(1996)6SCC271]
321. Dayanidhi Bisoi v. State of Orissa, [(2003)9SCC310]
322. State of U.P. v. Sattan @ Satyendra and Ors [2009(3)SCALE394]

In *Shivaji @ Dadya Shankar Alhat v. the State of Maharashtra*, the Supreme Court while relying on the *Jashubha Bharatsinh Gohil v. State of Gujarat* (1994 (4) SCC 353), inter alia, stated that "*It is expected that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Even though the principles were indicated in the background of death sentence and life sentence, the logic applies to all cases where appropriate sentence is the issue*". The Court further went to state that "*Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system*." The Supreme Court further relying on the *Dhananjoy Chatterjee v. State of* W.B. (1994 (2) SCC and *Ravji v. State of Rajasthan* (1996 (2) SCC 175) held that "*The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal*".

It is pertinent to mention that misappropriation of public money referred by the Supreme Court in the *Shivaji @ Dadya Shankar Alhat v. the State of Maharashtra* is not punishable with death.

In *Mohan Anna Chavan v. State of Maharashtra,* the Supreme Court once again held the same ground as that of *Shivaji @ Dadya Shankar Alhat v. the State of Maharashtra*. Though *Mohan Anna Chavan* case related to rape and murder of a child, the Supreme Court further relied upon the judgment in *Devender Pal Singh Bhullar v. the State of NCT of Delhi* [2002 (5)SCC 234] which was a terror case under the TADA and wherein sentencing had been pronounced

solely based on confessional statement of the accused. There are no similarities of the facts and circumstances between the *Devender Pal Singh Bhullar* and *Mohan Anna Chavan* cases.

In *Bantu v. the State of U.P.,* the Supreme Court once again held the same ground as that of *Shivaji @ Dadya Shankar Alhat v. the State of Maharashtra*. Once again though *Bantu v. the State of U.P.* case too related to rape and murder of a child but the Supreme Court further relied upon the judgment in *Devender Pal Singh v. the State of NCT of Delhi* [2002 (5)SCC 234].

In *Surja Ram v. State of Rajasthan,* the Supreme Court apart from relying on *Jasnupna Bharat Singh and others vs. State of Gujarat* (1994(4) SCC 353) and *Ravji @ Ram Chandra vs. State of Rajasthan* (JT 1995 (B) SC 520) and further held that "….*Such murders and attempt to commit murders in a cool and calculate manner without provocation cannot but shock the conscience of the society which must abhor such heinous crime committed on helpless innocent persons. Punishment must also respond to the society's cry for justice against the criminal.*"

In *State of U.P. v. Sattan @ Satyendra and Ors*, the Supreme Court in addition to *Jashubha Bharatsinh Gohil v. State of Gujarat* (1994 (4) SCC 353), *Dhananjoy Chatterjee v. State of W.B.* (1994 (2) SCC 220) and *Ravji v. State of Rajasthan*, (1996 (2) SCC 175) further relied upon the judgment in *Devender Pal Singh v. State of NCT of Delhi* [2002 (5) SCC 234] to assert that "*the principle culled out is that when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, the same can be awarded*". In conclusion the Supreme Court also held that "*29. Murder of six members of a family including helpless women and children having been committed in a brutal, diabolic and bristly manner and the crime being one which is enormous in proportion which shocks the conscious of law, the death sentence as awarded in respect of accused Sattan and Guddu was the appropriate sentence and the High Court ought not to have altered it.*"

In the case of *Saibanna Nigappa Natikar Vs State of Karnataka*, the Supreme Court in 2005 while sentencing Saibanna to death relied upon *Machhi Singh v. State of Punjab* to hold that "*it was only in rarest of rare cases, when the collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards*

desirability or otherwise of retaining death penalty." However, in *Santosh Kumar Satish Bhusan Bariyar Vs. State of Maharashtra* [(2009) 6 SCC 498], the Supreme Court also declared *Saibanna vs. State of Karnataka* as per incuriam for being "*inconsistent with Mithu (supra) and Bachan Singh (supra)*" judgements. Saibanna Nigappa Natikar was initially convicted for life for murder of his first wife in 1992. While on parole in September 1994, Saibanna killed his second wife and his minor daughter and attempted to commit suicide. On conviction, the trial court awarded death sentence to Saibanna on 4 January 2003. A two bench judges of the Karnataka High Court which heard Saibanna's appeal against the death sentence gave a split verdict. His appeal was then referred to a third judge, who confirmed his death sentence. However, Saibanna was sentenced to death under Section 303 of the IPC which was already held as unconstitutional in *Mithu* case.

It is pertinent to mention that two of the two condemned prisoners namely Ravji @ Ram Chander and Surja Ram who were sentenced to death based judgements held incuriam by the Supreme Court had been executed on 4 May 1996 and 7 April 1997.[323] The fact that Saibanna was sentenced to death based on a judgment already declared per incuriam by the Supreme Court itself was brought to the attention of the President by 14 former judges of the Supreme Court and High Courts on 1 June 2012. Yet on 4 January 2013, President Pranab Mukherjee rejected Saibanna's mercy petition on the advice of the Ministry of Home Affairs (MHA).[324] He filed a writ petition seeking judicial review of rejection of his mercy petition in the High Court of Karnataka which stayed Saibanna's execution[325] and the Court is yet to deliver its final verdict.

iii. Judge centric death sentences

The Supreme Court in *Sangeet & Anr Vs State of Harayana* on 20 November 2012 stated "*It appears that even though Bachan Singh intended a "principled sentencing", sentencing has now really become judge-centric as highlighted in Swamy Shraddananda and Bariyar. This aspect of the sentencing policy in Phase II*

323. The Hindu, "Take these men off death row" 6.7.2012, http://www.thehindu.com/opinion/lead/take-these-men-off-death-row/article3606856.ece
324. President Secretariat: Statement of Mercy Petition cases – Rejected as on 01.08.2014; available at: http://rashtrapatisachivalaya.gov.in/pdfs/mercy.pdf
325. Karnataka HC extends stay on murder convict Saibanna's execution till April 6, Times of India, 5 March 2013; available at: http://timesofindia.indiatimes.com/india/Karnataka-HC-extends-stay-on-murder-convict-Saibannas-execution-till-April-6/articleshow/18810209.cms

as introduced by the Constitution Bench in Bachan Singh seems to have been lost in transition."

A. Comparison between Justice Arijit Pasayat and Justice M B Shah

In as much as there are retentionists and abolitionists of death penalty, the perception of individual judges shall matter so long death penalty is provided under the statutes. ACHR studied 49 cases relating to death penalty adjudicated by two former judges of the Supreme Court viz. Justice M B Shah and Justice Arijit Pasayat, who are serving in the Special Investigation Team on Black Money reflect how "conscience" of individual judge matter.

Out of the 34 death penalty cases adjudicated, Justice A Pasayat (i) confirmed death sentence in 16 cases[326] including 5 cases[327] in which lesser sentences were enhanced to death sentence and two cases[328] in which acquittal by the High Courts were enhanced to death sentence, (ii) upheld acquittal in 8 cases[329], (iii) commuted death sentence in 7 cases[330] and (iv) remitted 3 cases[331] back to the High Courts to decide on quantum of sentence. It is pertinent to mention that out of the 16 cases in which death penalty was confirmed by Justice Pasayat, 5 cases[332] have since been declared as *per incuriam* by the Supreme Court.

326. Ankush Maruti Shinde and Ors. Vs. State of Maharashtra (AIR2009SC2609); Bantu Vs. The State of U.P. [(2008)11SCC113]; Devender Pal Singh Vs. State of National Capital Territory of Delhi and Anr. (AIR2002SC1661); Krishna Mochi and Ors. Vs. State of Bihar etc. (Criminal Appeal No. 761 of 2001); Mohan Anna Chavan Vs. State of Maharashtra [2008(2) ALT (Cri) 329]; Rameshbhai Chandubhai Rathod Vs. State of Gujarat [2009(3)ALT(Cri)1]; SachcheyLalTiwari Vs. State of Uttar Pradesh (AIR2004SC5039); Shivaji @ Dadya Shankar Alhat Vs. The State of Maharashtra (AIR2009SC56); Shivu and Anr. Vs. R.G. High Court of Karnataka and Anr. (2007CriLJ1806); State of Rajasthan Vs. Kheraj Ram (AIR2004SC3432); State of U.P. Vs. Sattan @ Satyendra and Ors. [2009(1)ALD(Cri)602]; State of U.P. Vs. Satish (AIR2005SC1000); Sushil Murmu Vs. State of Jharkhand (AIR2004SC394); Bablu @ Mubarik Hussain Vs. State Of Rajasthan [Appeal (crl.) 1302 of 2006]; Bani Kanta Das & Anr vs State of Assam & Ors (Writ Petition (C) No. 457 of 2005); and M.A. Antony @ Antappan Vs. State of Kerala (AIR2009SC2549)

327. Ankush Maruti Shinde and Ors. Vs. State of Maharashtra (AIR2009SC2609); SachcheyLalTiwari Vs. State of Uttar Pradesh (AIR2004SC5039; State of Rajasthan Vs. Kheraj Ram (AIR2004SC3432); State of U.P. Vs. Sattan @ Satyendra and Ors. [2009(1) ALD (Cri) 602]; and State of U.P. Vs. Satish (AIR2005SC1000)

328. State of Rajasthan Vs. Kheraj Ram (AIR2004SC3432) and State of U.P. Vs. Satish (AIR2005SC1000)

329. State of Rajasthan Vs.Raja Ram (AIR2003SC3601); State of Haryana Vs. Jagbir Singh and Anr. (AIR2003SC4377); State of Rajasthan Vs. Khuma [2004(3) ACR 2698(SC)]; State of Madhya Pradesh Vs. Chamru @ Bhagwandas etc. etc. (AIR2007SC2400); State of U.P. Vs. Ram Balak and Anr. ((2008)15SCC551); State of Maharashtra Vs. Mangilal [(2009)15SCC418]; State of Punjab Vs. Respondent: Kulwant Singh @ Kanta (AIR2008SC3279); and State of U.P. Vs. Respondent: Raja @ Jalil (2008CriLJ4693)

330. Lehna Vs. Respondent: State of Haryana (2002(1) SCALE273); Nazir Khan and Ors. Vs. State of Delhi (AIR2003SC4427); Gopal vs State Of Maharashtra (Appeal (crl.) 1428 of 2007); Anil Sharma & Ors vs State of Jharkhand (Appeal (crl) 622-624 of 2003); Prem Sagar Vs. Dharambir and Ors. (AIR2004SC21); Aqeel Ahmad Vs. State of U.P. (AIR2009SC1271); and Liyakat Vs. State of Uttaranchal (2008CriLJ1931)

331. Union of India (UOI) and Ors. Vs. Devendra Nath Rai (2006CriLJ967); State of U.P. Vs. Govind Das @ Gudda and Anr. (2007CriLJ4289); and Gobind Singh Vs. Krishna Singh and Ors. [2009(1)PLJR200]

332. Ankush Maruti Shinde and Ors. Vs. State of Maharashtra (AIR2009SC2609); Bantu Vs. The State of U.P. [(2008)11SCC113]; Mohan Anna Chavan Vs. State of Maharashtra [2008(2)ALT(Cri)329]; Shivaji @ Dadya Shankar

On the other hand, Justice M B Shah did not confirm death penalty in any of 15 cases of death penalty adjudicated by him. He rather commuted sentence in 12 cases,[333] did not enhance life imprisonment into death penalty in any case, did not alter acquittal by the High Courts into death penalty in any case, did not remit back any case to the High Courts on the quantum of sentence and did not deliver a single judgment which was declared as *per incuriam*. He acquitted convicts in 3 cases[334] out of which 2 cases[335] were dissenting judgment against imposition of death penalty.

Out of these 49 cases, three cases i.e., *Devender Pal Singh Vs. State of National Capital Territory of Delhi and Anr.*[336], *Krishna Mochi and Ors. Vs. State of Bihar etc*.[337], and *Lehna Vs. State of Haryana,* the Supreme Court benches comprised Justice A Pasayat and Justice M B Shah along with Justice B N Agrawal. In *Devender Pal Singh* and *Krishna Mochi& Anr*, the majority view comprising Justice Pasayat and Justice Agrawal confirmed death sentence on all the accused. Justice Shah, on the other hand, acquitted Bhulllar and altered the death sentence on Krishna Mochi, Nanhe Lal Mochi and Bir Kuer Paswan to life imprisonment and further acquitted Dharmendra Singh. However, there was no disagreement or dissent between Justice Shah and Justice Pasayat in commutation of death sentence of the convict in *Lehna Vs. State of Haryana*.

B. Judicial lottery

Asian Centre for Human Rights studied a number of judgements of the Supreme Court of India which establish that judgements awarding the death sentence are judge-centric. An analysis of the cases where the death penalty

Alhat Vs. The State of Maharashtra (AIR2009SC56); and State of U.P. Vs. Sattan @ Satyendra and Ors. [2009(1) ALD(Cri)602]

333. Ashok Kumar Pandey vs. State Of Delhi (Appeal (crl.) 874 of 2001); Bantu @ NareshGiri vs. State of M.P. (AIR2002SC70); Farooq @ Karatta Farooq and Ors. Vs. State of Kerala (AIR2002SC1826); Jayawant Dattatray Suryarao vs. State Of Maharashtra (AIR 2002 SC 143); Lehna Vs.State of Haryana [(2002)3SCC76]; Nirmal Singh & Anr. Vs. State of Haryana (AIR1999SC1221); Om Prakash Vs.State of Haryana [1999(1)ALD(Cri)576]; Prakash Dhawal Khairnar (Patil) Vs. State of Maharashtra (AIR2002SC340); Raju vs. State of Haryana [2001(1)ALD(Cri)854]; Ram Anup Singh and Ors. Vs. State of Bihar (2002CriLJ3927); Shri Bhagwan vs. State of Rajasthan; and Surendra Singh Rautela @ Surendra Singh Bengali Vs. State of Bihar (Now State of Jharkhand)[2002(1)ALD(Cri)270]
334. Devender Pal Singh Vs. State of National Capital Territory of Delhi and Anr. (AIR2002SC1661); Krishna Mochi and Ors. Vs. State of Bihar etc. (Criminal Appeal No. 761 of 2001) and K.V. Chacko @ Kunju vs State Of Kerala on 7 December, 2000 (Appeal (crl.) 5-76 2000)
335. Devender Pal Singh Vs. State of National Capital Territory of Delhi and Anr. (AIR2002SC1661) and Krishna Mochi and Ors. Vs. State of Bihar etc. (Criminal Appeal No. 761 of 2001)
336. AIR 2002 SC1661
337. AIR 2002 SC1661

was "commuted" and cases where the death penalty was "confirmed" suggests that the reasons/factors taken into accounts for commuting the death sentence were based on predilection of individual judges and can be easily described as judicial lottery.

First, convict's young age that was given importance for commutation of death penalty in *Amit vs. State of Maharashtra*[338]*; Surendrapal Shivbalakpal Vs. State of Gujarat*[339]*; Rameshbhai Chandubhai Rathod vs. State of Gujarat*[340] and *Amit vs. State of Uttar Pradesh*[341]. However, convict's young age was not considered as mitigating factor in *Dhananjoy Chatterjee vs. State of West Bengal*[342]*; Jai Kumar vs. State of M.P.*[343] and *Shivu and Anr. Vs. Registrar, High Court of Karnataka and Anr.*[344]

Second, the benefit of possibility of reformation or rehabilitation as a ground for commutation of death penalty was considered in *Raju v. State of Haryana*[345]*, Bantu @ Naresh Giri vs. State of Madhya Pradesh*[346]*, Surendra Pal Shivbalakpal vs. State Gujarat*[347]*, Amit v. State of Uttar Pradesh*[348] and *Rajesh Kumar Vs. State through Govt. of NCT of Delhi*[349]. However the same benefit was not provided in *B.A. Umesh v. Registrar General, High Court of Karnataka*[350] and *Mohd. Mannan Alias Abdul Mannan v. State of Bihar.*[351]

Third, acquittal or life sentence awarded by the High Court was considered good enough by the Supreme Court to commute death sentences in the case of *State of Tamil Nadu v. Suresh*[352] and *State of Maharashtra v. Suresh*.[353] However, the same was considered not good enough reason by the Supreme Court to

338. Amit @ Ammu vs. State of Maharashtra., [2003 Supp(2) SCR 285]
339. Surendrapal Shivbalakpal Vs. State of Gujarat., 2004 Supp(4) SCR 464
340. Rameshbhai Chandubhai Rathod vs. State of Gujarat., CRIMINAL APPEAL NO. 575 OF 2007
341. Amit Vs. State of Uttar Pradesh., (2012) 4 SCC 107; (2012) 39 SCD 98
342. Dhananjoy Chatterjee vs. State of West Bengal., (1994) 2 SCC 220
343. Jai Kumar vs. State of M.P., AIR1999SC1860
344. Shivu and Anr. Vs. Registrar, High Court of Karnataka and Anr., 2007CriLJ1806
345. (MANU/SC/0324/2001., (2001) 9 SCC 50)
346. Bantu @ Naresh Giri vs. State of Madhya Pradesh., AIR 2002 SC 70
347. Surendra Pal Shivbalakpal vs. State Gujarat., [2004 Supp(4) SCR 464]
348. Amit Vs. State of Uttar Pradesh., (2012) 4 SCC 107; (2012) 39 SCD 98
349. Rajesh Kumar Vs. State through Govt. of NCT of Delhi[(2011)13SCC706]
350. B.A. Umesh v. Registrar General, High Court of Karnataka., MANU/SC/0082/2011 : (2011) 3 SCC 85
351. Mohd. Mannan Alias Abdul Mannan v. State of Bihar., (2011) 5 SCC 317
352. State of Tamil Nadu v. Suresh., (1998) 2 SCC 372
353. State of Maharashtra v. Suresh., [(2000) 1 SCC 471

commute the death sentence in *State of U.P. vs. Satish*[354] and *B.A. Umesh v. Registrar General, High Court of Karnataka*[355].

Fourth, circumstantial evidence was held not to be a mitigating factor in *Jumman Khan vs. State of Uttar Pradesh*[356], *KamtaTewari Vs State of M.P.*[357], *Molai and Another vs. State of M.P.*[358] and *Shivaji @ Dadya Shankar Alhat vs. State of Maharashtra*[359] but it was so held in *Bishnu Prasad Sinha vs. State of Assam*[360].

4.6 Death despite dissent

Justice P N Bhagwati in his minority judgment in the *Bachan Singh*[361] case held that the "*only way in which the vice of arbitrariness in the imposition of death penalty can be removed is by the law providing that in every case where the death sentence is confirmed by the High Court there shall be an automatic review of the death sentence by the Supreme Court sitting as a whole and the death sentence shall not be affirmed or imposed by the Supreme Court unless it is approved unanimously by the entire court sitting enbanc and the only exceptional cases in which death sentence may be affirmed or imposed should be legislatively limited to those where the offender is found to be so depraved that it is not possible to reform him by any curative or rehabilitative therapy and even after his release he would be a serious menace to the society and therefore in the interest of the society he is required to be eliminated".*

The vice of arbitrariness on imposing death penalty has come to haunt Indian justice system. The Supreme Court in *Sangeet & Anr Vs State of Haryana*[362] of 20 November 2012 admitted "*judge centric*" character in death sentencing, a euphemistic term to describe the vice of the arbitrariness.

The lack of unanimity in death sentencing is a serious issue of concern. The ratio of difference of opinion whether somebody should die or live in most cases is 2:1. The differences of opinion are not usual one of whether to impose death penalty or life imprisonment, but ranges between acquittal and death

354. State of U.P. v. Satish., (2005) 3 SCC 114
355. B.A. Umesh v. Registrar General, High Court of Karnataka., MANU/SC/0082/2011 : (2011) 3 SCC 85
356. Jumman Khan v. State of Uttar Pradesh., [(1991) 1 SCC 752]
357. Kamta Tiwari v. State of M.P., [(1996) 6 SCC 250]
358. Molai and another v. State of M.P., [(1999) 9 SCC 581]
359. Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra., [(2008) 15 SCC 269]
360. Bishnu Prasad Sinha v. State of Assam., (2007) 11 SCC 467
361. 1982 AIR 1325
362. (2013) 2 SCC 452

sentence. In exceptional cases, there are differences on the issue of determining juvenility while for terror capital crimes, death sentencing is the rule.

The experiences of the United States on the need for unanimity of judges for death sentencing are instructive. In 2002, the United States Supreme Court in Timothy Ring (*Ring v. Arizona*) ruled Arizona's death penalty statute as unconstitutional because it allowed "*a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty*."[363] A study in the US in 2005 had shown that if there is no unanimity for imposition of death penalty, in 20 states of the United States, courts must impose a lesser penalty when the jury cannot agree on whether to impose the death penalty, in four states the jury can continue to deliberate on penalties other than the death penalty before the court imposes a sentence, in one State the judge has the option of imposing a sentence of life imprisonment without parole or impaneling a new jury, and in two states, statutes authorise the court to impanel a new jury if the first jury cannot reach a verdict.[364]

The "differences of opinion at the level of High Court" is recognised as a ground for commutation of death sentences under the broad guidelines on consideration of mercy pleas adopted by the Ministry of Home Affairs, Government of India.[365] However, the Ministry of Home Affairs regularly flouts its own guidelines while advising the President of India.

Considering the miscarriage of justice and admitted judge-centric character of death sentencing, the time has come for India to make imposition of death penalty solely based on unanimous decisions of a constitutional bench of the Supreme Court. The President of India too ought to automatically grant mercy if there are differences of opinion at any stage of the proceedings, and not necessarily at the stage of the High Court. The differences of opinion at the stage of the Supreme Court ought to be given more importance.

363. RING v. ARIZONA CERTIORARI TO THE SUPREME COURT OF ARIZONA available at https://www.law.cornell.edu/supct/html/01-488.ZS.html

364. Juries in death penalty sentencing hearings by Christopher Reinhart, Senior Attorney, 10 February 2005 available at http://www.cga.ct.gov/2005/rpt/2005-R-0153.htm

365. The broad guidelines for consideration of mercy pleas available at http://mha1.nic.in/par2013/par2013-pdfs/ls-110214/3107.pdf refer to "differences of opinion at the level of High Court" as a ground for commutation of death sentence into life imprisonment.

i. Death despite dissenting judgments

> "*312. Before I part with this topic I may point out that only way in which the vice of arbitrariness in the imposition of death penalty can be removed is by the law providing that in every case where the death sentence is confirmed by the High Court there shall be an automatic review of the death sentence by the Supreme Court sitting as a whole and the death sentence shall not be affirmed or imposed by the Supreme Court unless it is approved unanimously by the entire court sitting enbanc and the only exceptional cases in which death sentence may be affirmed or imposed should be legislatively limited to those where the offender is found to be so depraved that it is not possible to reform him by any curative or rehabilitative therapy and even after his release he would be a serious menace to the society and therefore in the interest of the society he is required to be eliminated. Of course, for reasons I have already discussed such exceptional cases would be practically nil because it is almost impossible to predicate of any person that he is beyond reformation or redemption and therefore, from a practical point of view death penalty would be almost non-existent. But theoretically it may be possible to say that if the State is in a position to establish positively that the offender is such a social monster that even after suffering life imprisonment and undergoing reformative and rehabilitative therapy, he can never be reclaimed for the society, then he may be awarded death penalty. If this test is legislatively adopted and applied by following the procedure mentioned above, the imposition of death penalty may be rescued from the vice of arbitrariness and caprice. But that is not so under the law as it stands today.*" Justice P N Bhagwati in his dissenting judgment in *Bachan Singh vs State of Punjab* (1982 AIR 1325) on 16 August 1982 declaring the death penalty provided under Section 302 of the Indian Penal Code read with Section 354 Sub-section (3) of the Code of Criminal Procedure, 1973 as unconstitutional and void as being violative of Articles 14 and 21.

In India, it is only when two judge bench of the High Courts or the Supreme Court differ on the issue of imposing death penalty that the case is referred to a third judge at the High Court level and three bench judges at the Supreme Court. Therefore, the ratio of difference of opinion is often as narrow as 2:1. This makes decisions on imposing death penalty extremely vulnerable to arbitrariness, irrationality and unfairness.

The minority view in the judgements is seldom referred as *stare decisis*. Otherwise, the judgment of Justice Bhagwati in the *Bachan Singh* would have significantly addressed what the Supreme Court in *Sangeet & Anr Vs State of Haryana*[366] of 20 November 2012 termed as "*judge centric",* an euphemistic term to describe the vices of the arbitrariness for death sentencing.

There is no doubt that the unanimity has become almost indispensable considering the unreliability, unpredictability, and arbitrariness of the judges while imposing death penalty. Though the broad guidelines of the Government of India for consideration of mercy petitions, among others, accepts "differences of opinion at the level of High Court" as a ground for commutation,[367] the need for unanimity of the judges for imposing death penalty has not been adequately deliberated upon by the Indian judiciary and the government. There is need to address this issue considering the differences of opinion ranging from acquittal to death sentence.

ii. Differences of opinion: acquittal vs death sentence

There is no doubt that if the difference of opinion is a serious as acquittal vs death sentence, death penalty ought not to be imposed as *ratio decidendi*. However, in such cases, the Supreme Court awarded both death sentence and life imprisonment. It is clear that the Supreme Court has not yet considered differences of opinion among judges of a bench as a ground for not imposing death sentences.

In the case of *Gurmeet Singh* of Uttar Pradesh, out of the two judges of the High Court one was for upholding the Sessions Court's conviction including the death sentence, the other judge was for acquittal of the accused.[368] The matter was referred to a third judge who upheld conviction and death sentence.[369] The Supreme Court also upheld the conviction and death sentence considering the case as 'rarest of the rare'. On 1 March 2013, President Pranab Mukherjee rejected the mercy petition of Gurmeet Singh and failed to comply with the guidelines of the Government of India to grant mercy in case of "*difference of opinion in a Bench of two Judges necessitating reference to the third Judge of the High*

366. (2013) 2 SCC 452
367. The broad guidelines for consideration of mercy pleas are available at http://mha1.nic.in/par2013/par2013-pdfs/ls-110214/3107.pdf
368. Gurmeet Singh vs. State of Uttar Pradesh: AIR2005SC3611
369. See Shatrughan Chauhan & Vs. Union of India, (2014) 3 SCC 1

Court"[370]. Thereafter, the Supreme Court in *Shatrughan Chauhan Vs. Union of India*[371] commuted the death sentence of Gurmeet Singh into life imprisonment due to delay in disposal of his mercy petition by the President of India.

However, in the case of *Lalit Kumar Yadav* of Uttar Pradesh, the division bench of the Allahabad High Court differed on the quantum of the sentence. One of the judges affirmed the order of conviction and sentence recorded by the trial Court while the other judge reversed the whole judgment and the order of the trial Court and acquitted him. The case was referred to a third judge who upheld the judgment rendered by the trial Court confirming the death penalty.[372] On 25 April 2014, the Supreme Court affirmed the conviction of the appellant but commuted the death sentence to life imprisonment.[373]

iii. Differences of opinion: death penalty vs life imprisonment

The usual divergence or differing views relate to quantum of sentence i.e. whether to impose death penalty or life imprisonment. In some cases when the matter was referred to larger bench, death sentence was confirmed while in some other cases, life imprisonment was imposed.

In the case of *Saibanna Nigappal Natikar* of Karnataka,[374] on 10 June 2003, a Division Bench of the High Court of Karnataka differed on the quantum of sentence with one judge imposing life imprisonment and the other imposing death sentence under Section 302 of the Indian Penal Code (IPC). Both however held that framing of charge for the offence under Section 303 of the IPC by the trial Court was incorrect in the light of the *Mithu vs State of Punjab*.[375] The matter was referred to a third Judge of the High Court who confirmed the death penalty on Saibanna.[376] Regrettably, the Supreme Court failed to note the unanimous verdict of two High Court judges that framing of charge under Section 303 was wrong and the Supreme Court went on to

370. http://mha1.nic.in/par2013/par2013-pdfs/ls-110214/3107.pdf
371. (2014) 3 SCC 1
372. Lalit Kumar Yadav @ Kuri vs State Of U.P, 2014 AIR SCW 2655
373. Ibid
374. Criminal Ref. Case No. 2/2003 and Criminal Appeal No. 497 of 2003, High Court of Karnataka, Judgment available at: http://judgmenthck.kar.nic.in/judgments/bitstream/123456789/367873/1/CRLRC2-03-10-10-2003.pdf
375. Criminal Ref. Case No. 2/2003 and Criminal Appeal No. 497 of 2003, High Court of Karnataka, Judgment available at: http://judgmenthck.kar.nic.in/judgments/bitstream/123456789/367873/1/CRLRC2-03-10-10-2003.pdf
376. Criminal Ref. Case No. 2/2003 and Criminal Appeal No. 497 of 2003, High Court of Karnataka, Judgment available at: http://judgmenthck.kar.nic.in/judgments/bitstream/123456789/367873/1/CRLRC2-03-10-10-2003.pdf

uphold the death sentence on Saibanna in 2005.[377] It was only on13 September 2009 in *Santosh Kumar Satishbhusan Bariyar vs. State of Maharashtra*[378] that another bench of the Supreme Court declared that death sentence imposed on Saibanna under section 303 of the IPC is "*inconsistent with Mithu (supra) and Bachan Singh (supra)*."[379] The President of India while rejecting the mercy plea of Saibanna on 4 January 2013 further failed to consider guidelines of the Government of India to grant mercy in case of "*difference of opinion in a Bench of two Judges necessitating reference to the third Judge of the High Court*"[380] and the fact that Supreme Court itself had declared the death sentence on Saibanna as *per incuriam*.[381] The Karnataka High Court stayed the execution of Saibanna[382] and is yet to deliver the final judgment.

Two judges of the High Court of Karnataka confirmed the conviction of *B A Umesh* but differed whether to impose death sentence or life imprisonment. The case was referred to the third judge who concurred with imposition of death sentence.[383] The Supreme Court too upheld his death penalty on 2 January 2011.[384] On 12 May 2013, President Pranab Mukherjee rejected the mercy petition of B A Umesh[385] in violation of the Government of India's guidelines to grant mercy in case of "*difference of opinion in a Bench of two Judges necessitating reference to the third Judge of the High Court*"[386] The review petition filed by B A Umesh before the Supreme Court is pending for hearing in open court.[387]

However, in some cases when the matter was referred to larger bench, life imprisonment was imposed. In the case of *Swami Shraddananda @ Murali Manohar Mishra*, the death sentence was confirmed by the High Court of Karnataka on 19 September 2005. A two judge Bench of the apex court

377. Saibanna vs. State of Karnataka [2005(2)ACR1836(SC)]
378. Santosh Kumar Satishbhusan Bariyar vs. State of Maharashtra: (2009)6SCC498
379. Ibid
380. http://mha1.nic.in/par2013/par2013-pdfs/ls-110214/3107.pdf
381. Karnataka HC extends stay on murder convict Saibanna's execution till April 6, Times of India, 5 March 2013; available at: http://timesofindia.indiatimes.com/india/Karnataka-HC-extends-stay-on-murder-convict-Saibannas-execution-till-April-6/articleshow/18810209.cms
382. Saibanna's execution stayed by a week Saibanna's execution stayed by a week, Deccan Herald, 23 January 2013 available at http://www.deccanherald.com/content/307123/saibannas-execution-stayed-week.html
383. B.A. Umesh v. Registrar General, High Court of Karnataka., MANU/SC/0082/2011 : (2011) 3 SCC 85
384. Ibid
385. See 'Statement of Mercy Petition-Rejected' at: http://rashtrapatisachivalaya.gov.in/pdfs/mercy.pdf
386. http://mha1.nic.in/par2013/par2013-pdfs/ls-110214/3107.pdf
387. B.A.UMESH Vs Registrar, Supreme Court of India, Writ Petition (Criminal) No.52 of 2011

differed on the quantum of the sentence – whether to impose death sentence or life imprisonment.[388] In view of the split verdict, the case was referred to larger bench of three judges. On 22 July 2008, the three-judge bench commuted appellant's death sentence into life imprisonment till rest of his life.[389]

In the case of *Rameshbhai Chandubhai Rathod*, the High Court of Gujarat confirmed the conviction and death penalty[390] but the Supreme Court differed on the sentence to be awarded. While Justice Arijit Pasayat upheld the death penalty, Justice Ashok Kumar Ganguly commuted the death penalty into life imprisonment after observing uncertainty with the nature of the circumstantial evidence, mitigating circumstances in particular young age of the appellant and possibility of his reformation, inadequate opportunity to the accused to plead on the question of sentence, etc.[391] The case was referred to a three judge bench which on 24 January 2011 commuted the death sentence of the appellant to imprisonment for life extending to the full life subject to any remission or commutation by the government *"taking into account all the aggravating and mitigating circumstances".*[392]

iv. Normal capital crimes vs terror capital crimes

Though there is no legal basis to differentiate normal capital crimes and terror capital crimes, the Courts in India often differentiate between terror offences and other offences with the courts invariably awarding death sentence for the terror offences.

Devender Pal Singh Bhullar[393], Perarivlan @ Arivu[394] and Afzal Guru[395], all accused of terrorism were sentenced to death based on confessional statement and circumstantial evidence. They were not given any benefit of doubt as they were accused of terror offences. However, in the case of *Bishnu Prasad Sinha and Anr Vs. State of Assam* held that **"***There are authorities for the proposition that*

388. Swamy Sharaddananda vs. State of Karnataka:AIR2007SC2531
389. Ibid
390. Rameshbhai Chandubhai Rathod vs. State of Gujarat, (2009) 5 SCC 740
391. Ibid
392. Ibid
393. Devender Pal Singh Bhullar Vs. State (NCT of Delhi), (2002) 5 SCC 234
394. State (N.C.T of Delhi) Vs. Najvot Sandhu @ Afsan Guru And Shaukat Hussain Guru Vs. State (N.C.T. of Delhi) : AIR2005SC3820
395. State through Superintendent of Police, CBI/SIT vs. Nalini and Ors.[AIR1999SC2640]

if the evidence is proved by circumstantial evidence, ordinarily, death penalty would not be awarded".

v. The issue of determining juvenility

Even on the question of considering juvenility of death row convicts which requires stricter scrutiny as international human rights law prohibits execution of juveniles[396], the Supreme Court had faltered. In the case of Ram Deo Chauhan @ Rajnath Chauhan of Assam, the Gauhati High Court vide judgment dated 1 February 1999 confirmed the conviction and sentence of death on the appellant.[397] On 31 July 2000, two judges Bench of the Supreme Court upheld the death sentence.[398] Ram Deo Chauhan filed a review petition contending that he was a juvenile at the time of commission of the offence. On 10 May 2001, a larger Bench held that Chauhan was not a child or near or about the age of being a child within the meaning of the Juvenile Justice Act.[399] On 8 May 2009, the Supreme Court indeed set aside the Governor's order of commutation of death sentence on Ramdeo Chauhan to life imprisonment, among others, on the recommendation of the National Human Rights Commission (NHRC) on the grounds of juvenility. The Supreme Court in fact stated that the NHRC had no jurisdiction to make such recommendation and held "*the NHRC proceedings were not in line with the procedure prescribed under the Act. That being so, the recommendations, if any, by the NHRC are non est*".[400] However, *o*n 19 November 2010, two judge Bench of the apex court comprising Justice Aftab Alam and Justice Ashok Kumar Ganguly quashed the Supreme Court order dated 8 May 2009 and restored the decision of the Governor commuting appellant's death sentence. The Court observed that both the findings of its previous bench on the commutation by the Governor and NHRC's jurisdiction were *"vitiated by errors apparent on the face of the record"*. The Court held the NHRC had not "committed any illegality" in making a recommendation to the Governor and that the "NHRC acted within its jurisdiction".[401]

396. Article 6(5) of the International Covenant on Civil and Political Rights provides that "5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."
397. Ramdeo Chauhan @ Rajnath Chauhan vs Bani Kant Das & Ors.: SCR [2010] 15 (ADDL.) S.C.R.
398. Ibid
399. Ibid
400. Bani Kanta Das vs State Of Assam, Writ Petition (Civil) No. 457 of 2005
401. Ramdeo Chauhan @ Rajnath Chauhan vs Bani Kant Das & Ors, Review Petition (C) No.1378 of 2009

4.7 Death reserved for the poor

The execution of death row convict Surinder Koli stayed by the Allahabad High Court expires on 25 November 2014. A Public Interest Litigation challenging his execution, *inter alia*, on the grounds of delay was heard on 31 October 2014. On 28 October 2014, a Supreme Court bench of Chief Justice H L Dattu, Justice Anil R. Dave and Justice S A Bobde, in the first open court hearing of the review petition of death sentence cases, rejected the review petition of Koli. Earlier, the Supreme Court had also rejected Koli's plea seeking the recall of its order upholding his death sentence in one of the 16 cases of rape and murder of young women and girls in Nithari village in Uttar Pradesh.[402] The girls and children were killed over a period of time and skeletal remains of a number of missing children were discovered from a drain near the house of Maninder Singh Pandher at D-5, Sector 31, Noida where Koli was employed as a domestic servant.

The case of Koli who is an co-accused with Pandher is unique: this is the first case where one of the co-accused (Koli) has been sentenced to death and exhausted all the procedures in one case while the trial in 11 cases where both are co-accused are yet to be concluded. Further, Koli is the only witness in all the cases against the co-accused i.e. Pandher, whose trials are yet to be completed.[403]

As Koli faces the gallows, Pandher had walked free from Dasna jail, Uttar Pradesh on 27 September 2014 after being granted bail by the Allahabad High Court on 24 September 2014.[404]

There is no legal bar to execute Koli at this stage. However, can the Indian justice system, which had already ignored non compliance with the Indian Evidence Act by convicting Koli based on his confessional statement to the police allegedly taken under torture, overlook the consequences of executing Koli before the conclusion of the trial in 11 other similar cases in which he is co-accused and the only witness against other co-accused i.e. Pandher? If Koli

402. See 'Nithari case: Surinder Koli's execution stayed till Nov 25 by Allahabad HC', India Today, 31 October 2014, at: http://indiatoday.intoday.in/story/nithari-case-surinder-koli-execution-allahabad-high-court/1/398538.html
403. See 'Hanging Koli May Bury The Truth Of Nithari Killings', Tehelka, 2014-08-30 , Issue 35 Volume 11, at: http://www.tehelka.com/nithari-killing-hanging-surinder-kohli-will-bury-the-truth/
404. See 'Nithari killings: Co-accused Moninder Singh Pandher released from jail, CNN IBN, 27 September 2014, at: http://ibnlive.in.com/news/nithari-killings-coaccused-moninder-singh-pandher-released-from-jail/502364-3-242.html

is executed, there is no doubt that the families of the victims of 11 pending cases in which Koli is an accused shall be denied justice which means nothing less than final conclusion of the trial. Further, if Koli is executed, co-accused Pandher is likely to get inadvertent favour. As Koli remains in jail, he does not pose any threat to society whatsoever.

The pertinent question is what warrants his execution before the conclusion of the trials of all the pending cases?

Article 39A of the Constitution[405] provides fundamental right to equal justice and free legal aid. This right to defence is an inbuilt right to life and liberty envisaged under Article 21 of the Constitution[406]. However, the right to equal justice both in substance and procedure remains highly flawed in India, and it depends almost on a person's socio-economic status.

Criminals coming from poor economic and social strata are simply unable to cope with "*the inherent imperfections of the system in terms of delays, mounting cost of litigation in High Courts and apex court, legal aid and access to courts and inarticulate information on socio-economic and criminological context of crimes…. In such a context, …... it is invariably the marginalized and destitute who suffer the extreme penalty ultimately*"[407] as noted by the Supreme Court.

On the other hand, the rich and well-connected criminals can sabotage the probe,[408] intimidate, influence, and induce witnesses, suppress evidence with money and muscle power,[409] and abuse all the procedural rights.

In the case of Ram Deo Prasad who was sentenced to death, the Supreme Court noted that the appellant (Ram Deo Prasad) *"did not have sufficient resources to*

405. Article 39A says 'The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities', available at: http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%202Pg.Rom8Fsss(7).pdf
406. Article 21 says 'No person shall be deprived of his life or personal liberty except according to procedure established by law, available at: http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%202Pg.Rom8Fsss(6).pdf
407. Mohd. Farooq Abdul Gafur and Anr. v. State of Maharashtra [2009] INSC 1403
408. Santosh Kumar Singh Vs State through CBI, http://judis.nic.in/supremecourt/imgst.aspx?filename=36948
409. *See* 'Sting heat on Munshi', The Telegraph, 28 September 2006, at: http://www.telegraphindia.com/1060928/asp/nation/story_6803488.asp

engage a lawyer of his own choice and get himself defended up to his satisfaction"[410] while in other cases, the apex Court observed that the defence counsel appointed by the Court *"did not appear at the commencement of the trial nor at the time of recording of the evidence of the prosecution witnesses"* and in many cases defending the accused is *"rather proforma than being active"*.[411] Lawyers appointed by the Courts to defend those facing death sentence have no experience of conducting a single murder trial and in some cases, the apex Court concluded that "*accused have not been provided with effective and meaningful legal assistance"*.[412] In some cases, critical aspects such as *"the mental condition"* of the death row convicts[413] or juvenility were not brought before the Court by the lawyers.

In the case of Ram Deo Chauhan of Assam, who was represented by *amicus curiae* in the Supreme Court,[414] while considering the Review Petition, the Supreme Court observed that the Court upheld the death sentence on 31.7.2000 as the Supreme Court *"did not advert to the question of age of the petitioner as it was possibly not argued."*[415] Similarly, in the case of Ankush Maruti Shinde of Maharashtra whose death sentence was upheld by the Supreme Court on 30 April 2009,[416] the issue of juvenility was not raised despite existence of unimpeachable documentary proof of him being a juvenile[417] and it was only in July 2012, the Additional Sessions Court in Nashik ruled that Ankush Maruti Shinde was a juvenile at the time of the commission of offence.[418]

Obviously, these are instances of gross miscarriage of justice by the Indian justice system because of the failure of the defence counsels. Ravji alias Ram Chandra defended by an *amicus curiae* was sentenced to death by the Supreme

410. Ram Deo Prasad vs State Of Bihar (Criminal Appeal No. 1354 of 2012 decided on 11 April 2013)
411. Mohd Hussain @ Julfikar Ali vs The State (Govt. Of NCT) Delhi (Criminal Appeal No. 1091 of 2006 decided on 11 January 2012)
412. *See* 'Lawyers providing free legal aid should be experienced', The Times of India, 12 October 2009 at: http://timesofindia.indiatimes.com/city/mumbai/Lawyers-providing-free-legal-aid-should-be-experienced/articleshow/5113526.cms
413. Durga Domar Vs State of Madhya Pradesh, (2002)10SCC193
414. Ram Deo Chauhan @ Raj Nath Chauhan Vs. State of Assam: AIR2000SC2679
415. Judgement dated 19 November 2010 of the Supreme Court in Review Petition (C) No.1378 OF 2009 in Writ Petition (C) No.457 OF 2005Remdeo Chauhan @ Rajnath Chauhan Vs. Bani Kant Das & Others
416. Ankush Maruti Shinde and Ors. Vs. State of Maharashtra [Criminal Appeal Nos. 1008-09 of 2007 and Criminal Appeal Nos. 881-882 of 2009 (Arising out of SLP (Crl.) Nos. 8457-58 of 2008 decided on 30.04.2009]
417. See 'Relief for a juvenile', Frontline, Volume 29 - Issue 17 :: Aug. 25-Sep. 07, 2012, at: http://www.frontline.in/static/html/fl2917/stories/20120907291701100.htm
418. *See* 'After six years on death row, spared for being a juvenile', The Times of India, 21 August 2012 at: http://timesofindia.indiatimes.com/india/After-six-years-on-death-row-spared-for-being-a-juvenile/articleshow/15577973.cms

Court on 5 December 1995.[419] But, in 2009, the Supreme Court held the decision confirming the death sentence on Ravji as *per incuriam* but by then he was already executed in 1996.[420]

In August 1990, the Supreme Court in the case of *Kishore Chand vs State of Himachal Pradesh* observed that *"Though Art. 39A of the Constitution provides fundamental rights to equal justice and free legal aid and though the State provides amicus curiae to defend the indigent accused, he would be meted out with unequal defence if, as is common knowledge the youngster from the Bar who has either a little experience or no experience is assigned to defend him. It is high time that senior counsel practicing in the court concerned, volunteer to defend such indigent accused as a part of their professional duty."*[421]

A division bench of the Bombay High Court consisting of Justice Naresh Patil and Shrihari Davare had in October 2009 ordered that senior advocates who have sufficient experience on the legal issues raised in a specific case should be appointed on behalf of the legal aid panel.[422] On 21 January 2014, the Supreme Court in the *Shatrughan Chouhan* case[423] reaffirmed that access to legal aid should not just be provided at the trial stage but at all stages even after rejection of the mercy petition by the President.

However, implementation of these directions remains wanting.

Surendra Koli and Maninder Singh Pandher: The emblematic case of death sentence on the poor and the rich in India

Between 2005 and 2006, several children had gone missing from Nithari village in Gautam Budh Nagar district, Uttar Pradesh. Several of such children were alleged to have been killed by Surendra Koli, servant of businessman Maninder Singh Pandher at his residence at D-5, Sector 31, Noida.[424]

419. Ravji @ Ram Chandra vs State Of Rajasthan [1996 SCC (2) 175]
420. See 'Take these men off death row', The Hindu, 6 July 2012 at: http://www.thehindu.com/opinion/lead/take-these-men-off-death-row/article3606856.ece
421. Kishore Chand vs State Of Himachal Pradesh [1990 AIR 2140]
422. *See* 'Lawyers providing free legal aid should be experienced', The Times of India, 12 October 2009 at: http://timesofindia.indiatimes.com/city/mumbai/Lawyers-providing-free-legal-aid-should-be-experienced/articleshow/5113526.cms
423. (2014)35SCC1
424. Surendra Koli Vs State of U.P. Ors, http://judis.nic.in/supremecourt/imgst.aspx?filename=37556

Investigations into the serial murders began in December 2006 by the Uttar Pradesh Police when the skeletal remains of a number of missing children were discovered from a drain near Pandher's house. At least 19 girls and women were stated to have been raped and killed. The case was transferred to the Central Bureau of Investigation (CBI) in January 2007.[425] The CBI filed chargesheets in 16 out of the 19 cases of abduction, rape and murder. Surendra Koli was charged with rape, abduction and murder in all the cases,[426] while Pandher was exonerated by the CBI for lack of evidence. Later, he was summoned as a co-accused in eight cases when the victims' families approached the court.[427]

Death sentence on Koli as Pandher granted bail:

On 13 February 2009, a special trial court in Ghaziabad awarded death sentence to Surendra Koli and Maninder Singh Pandher after convicting them for the rape and murder of 14-year-old girl Rimpa Halder.[428] On appeal, the Allahabad High Court upheld the death sentence of Koli but the death sentence of Pandher was set aside and he was acquitted.[429] The High Court found no evidence on record against Pandher.[430] On 15 February 2011, the Supreme Court confirmed the death penalty on Surendra Koli holding that *"this case clearly falls within the category of rarest of rare case and no mercy can be shown to the appellant Surendra Koli."*[431]

On 20 July 2014, the mercy petition of Koli was rejected by the President of India.[432] On 24 July 2014, the Supreme Court had rejected Koli's review petition against confirmation of his death penalty. On 2 September 2014, a Constitution bench of the Supreme Court ruled that the review petitions of convicts facing death sentence warranted an open court hearing since the issue

425. *See* 'Justice still far away in 18 Nithari cases', Rediff.com, 28 December 2009, at: http://news.rediff.com/report/2009/dec/28/noida-justice-still-far-away-for-18-nithari-cases.htm
426. *See* 'Nithari killings: Koli guilty of seven-year-old's murder', NDTV, 4 May 2010, at: http://www.ndtv.com/article/india/nithari-killings-koli-guilty-of-seven-year-old-s-murder-23049
427. *See* 'Nithari case: Pandher may walk out of Dasna jail next week', Hindustan Times, 14 August 2014, at: http://www.hindustantimes.com/india-news/nithari-case-pandher-may-walk-out-of-dasna-jail-next-week/article1-1250964.aspx
428. *See* 'Justice still far away in 18 Nithari cases', Rediff.com, 28 December 2009, at: http://news.rediff.com/report/2009/dec/28/noida-justice-still-far-away-for-18-nithari-cases.htm
429. Surendra Koli Vs State of U.P. Ors, http://judis.nic.in/supremecourt/imgst.aspx?filename=37556
430. Criminal (Capital) Appeal No. 1475 OF 2009, http://indialawyers.wordpress.com/nithari-high-court-judgement-acquits-pandher/
431. Surendra Koli Vs State of U.P. Ors, http://judis.nic.in/supremecourt/imgst.aspx?filename=37556
432. *See* 'Statement of Mercy Petition Cases - Rejected', available at: http://rashtrapatisachivalaya.gov.in/pdfs/mercy.pdf

pertained to the right to life.[433] On 3 September 2014, the Ghaziabad sessions court issued a death warrant against Surendra Koli in connection with Rimpa Halder murder case. Surendra Koli was to be hanged at Chaudhary Charan Singh district jail, Meerut on 8 September 2014.[434] Koli's execution was stayed by the Supreme Court in the intervening night of 7 and 8 September 2014.[435] On 12 September 2014, the Supreme Court further stayed the execution of Koli till 29 October 2014 while posting the review petition for hearing on 28 October 2014.[436] The Supreme Court rejected the review petition of Koli on 28 October 2014 noting *"we are fully satisfied that this court has not committed any error that may persuade us to review the order"* upholding his death sentence.[437] On 31 October 2014, the Allahabad High Court stayed the hanging of Koli till 25 November 2014 while hearing a Public Interest Litigation.[438]

Prior to the confirmation of the death penalty by the Supreme Court in Rimpa Haldar murder case, the Special CBI Court awarded death sentence to Surendra Koli in three other cases. These included rape and murder of Arti (7) on 12 May 2010,[439] rape and murder of Rachna Lal (9) on 28 September 2010,[440] and murder of Dipali Sarkar (12) on 22 December 2010.[441] On 24 December 2012, Surendra Koli was found guilty of rape and murder of Chhoti Kavita (5) and given a fifth death sentence.[442]

433. *See* 'Nithari case: SC stays Surinder Koli's execution till Oct. 29', Business Standard, 12 September 2014, at: http://www.business-standard.com/article/printer-friendly-version?article_id=114091200279_1
434. See 'SC stays execution of Nithari killer Surinder Koli', The Times of India, 8 September 2014, at: http://timesofindia.indiatimes.com/India/SC-stays-execution-of-Nithari-killer-Surinder-Koli/articleshow/41998225.cms
435. See 'SC stays execution of Nithari killer Surinder Koli', The Times of India, 8 September 2014, at: http://timesofindia.indiatimes.com/India/SC-stays-execution-of-Nithari-killer-Surinder-Koli/articleshow/41998225.cms
436. *See* 'Nithari killer's execution stayed till Oct. 29', The Hindu, 12 September 2014, at: http://www.thehindu.com/news/national/supreme-court-hears-nithari-killings-convict-kolis-plea/article6403787.ece?ref=relatedNews
437. *See* 'Supreme Court rejects Nithari convict Surinder Koli's review plea', The Hindu, 28 October 2014, at: http://www.thehindu.com/news/national/supreme-court-rejects-nithari-murder-case-convict-surinder-kolis-review-plea/article6541300.ece
438. See 'Nithari case: Surinder Koli's execution stayed till Nov 25 by Allahabad HC', India Today, 31 October 2014, at: http://indiatoday.intoday.in/story/nithari-case-surinder-koli-execution-allahabad-high-court/1/398538.html
439. *See* 'Another death sentence for Koli', The Hindu, 13 May 2010 at: http://www.thehindu.com/todays-paper/another-death-sentence-for-koli/article766406.ece
440. *See* 'Rachna Rape-Murder: Surinder Koli Sentenced to Death', Outlook, 28 September 2010, at: http://www.outlookindia.com/news/article/Rachna-RapeMurder-Surinder-Koli-Sentenced-to-Death/695085
441. *See* 'Nithari: Koli handed death in fourth case', The Indian Express, 23 December 2010, at: http://indianexpress.com/article/cities/delhi/nithari-koli-handed-death-in-fourth-case/
442. *See* 'Nithari killer Koli gets death sentence in fifth case', The Hindu, 25 December 2012, at: http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/nithari-killer-koli-gets-death-sentence-in-fifth-case/article4236882.ece

The remaining 11 cases are pending further legal proceedings against Koli and Pandher remains co-accused in eight.[443] On 27 September 2014, Maninder Singh Pandher was released from Dasna jail after he was granted bail by the Allahabad High Court on 24 September 2014.[444] Currently, a petition challenging the acquittal of Maninder Singh Pandher by the High Court in the murder of Rimpa Haldar is pending before the Supreme Court.[445]

Legal representation: the wide divide between the rich and poor:

Surendra Koli could not hire lawyers of his own choice in all the decided cases where he was found guilty and awarded death penalty. The court provided him *amicus curiae*/lawyers on legal aid panel to defend him. On 31 March 2011, Surendra Koli moved an application before the court seeking a new defence lawyer as he alleged that the lawyer provided to him by the government was not competent enough which resulted in him being awarded the death sentence. On 5 April 2011, the CBI Court allowed his petition and appointed a new defence lawyer.[446] On the other hand, Maninder Singh Pandher being an well to do person was able to hire very capable lawyers to defend himself.

As on date, Surendra Koli has been sentenced to death in five cases out of which the Supreme Court confirmed the death sentence in one case. However, the only clinching evidence against him till date is his confession to the magistrate under Section 164 of the Criminal Procedure Code, where he repeated what he had told the police in custody. Surendra Koli allegedly informed his lawyers that he was tortured before his confession and had been threatened with more if he did not repeat it before the magistrate. In his letter to the apex court, Surendra Koli mentioned that the magistrate failed to notice the telltale signs of torture. His fingernails and toenails were allegedly missing due to torture. Surendra Koli's confessional statement was made before a magistrate in Delhi and not in Ghaziabad. However, Surendra Koli alleged that it was done so that

443. *See* '7 years on, 11 cases still pending in Nithari killings', Hindustan Times, 30 December 2013 at: http://www.hindustantimes.com/india-news/newdelhi/7-years-on-11-cases-still-pending-in-nithari-killings/article1-1167597.aspx

444. See 'Nithari killings: Co-accused Moninder Singh Pandher released from jail, CNN IBN, 27 September 2014, at: http://ibnlive.in.com/news/nithari-killings-coaccused-moninder-singh-pandher-released-from-jail/502364-3-242.html

445. *See* 'SC Notice on Petition Challenging Pandher's Acquittal', Outlook, 10 January 2010 at: http://www.outlookindia.com/news/article/SC-Notice-on-Petition-Challenging-Pandhers-Acquittal/673078

446. *See* 'Nithari killings: Court allows Koli's plea for new lawyer', Sify News, 5 April 2011 at: http://www.sify.com/news/nithari-killings-court-allows-koli-s-plea-for-new-lawyer-news-national-lefrumgedbgsi.html

the investigators could have a magistrate of their choice. The police claimed that the reason was an attack by lawyers when he was brought to a Ghaziabad court. However, the police had taken him to the same court in Ghaziabad twice after the said attack. It was also alleged that the statement was taken down in English, a language Surendra Koli does not understand. Further, the stenographer was not examined in court. Surendra Koli was not allegedly medically examined before or after the confessional statement.[447]

447. See 'Hanging Koli May Bury The Truth Of Nithari Killings', Tehelka, 2014-08-30 , Issue 35 Volume 11, at: http://www.tehelka.com/nithari-killing-hanging-surinder-kohli-will-bury-the-truth/

5. The status of the mercy pleas

The functions of the President of India are ceremonial. The President's critical role usually comes to play in the case of a hung parliament, dismissal of a State government and/or with respect to signing of certain controversial bills. In the last two decades the President's role on all these issues has seldom been questioned. It can therefore be safely stated that the President's most controversial decisions have been with respect to the mercy petitions of the death row convicts filed under Article 72 of the Constitution of India.

That the President of India and for that matter the government of India do not have the records of the mercy petitions considered by the President since independence is nothing short of scandalous. In 2013, the Government of India informed the Supreme Court that over 300 mercy petitions were filed before the President of India by convicts on death row between 1950 and 2009.[448] The Government of India did not realize that it had earlier informed the Rajya Sabha, upper house of Indian Parliament, on 29 November 2006 that 1,261 mercy petitions were disposed off by the President of India between 1965 and 2006 alone![449] Other studies indicated that about 3,796 mercy petitions were filed with the President of India between 1947 and 1964. Information collated by Asian Centre for Human Rights (ACHR) shows that since India's independence, a total of 5,106 mercy petitions were filed by death row convicts from 1947 to 2015 (as on 5th August). Of these, 3,534 mercy petitions or 69% were rejected while death sentences in 1,572 mercy petitions or 31% were commuted to life imprisonment.

The Supreme Court of India in a number of judgments including in the *Shatrughan Chauhan v. Union of India*[450] held that "*exercising of power under Articles 72/161 by the President or the Governor is a constitutional obligation and not a mere prerogative. … Right to seek for mercy under Articles 72/161 of the*

448. The statistics was submitted by the Additional Solicitor General of India in Devender Pal Singh Bhullar v. State of N.C.T. of Delhi decided on 12.04.2013, http://judis.nic.in/supremecourt/imgst.aspx?filename=40266

449. See Annexure A in reply to Rajya Sabha unstarred question No. 815 of S.S. Ahluwalia answered by S. Regupath, Minister of State in the Ministry of Home Affairs on 29.11.2006 at: http://164.100.47.5/qsearch/QResult.aspx (Accessed 14.05.2015)

450. Shatrughan Chauhan v. Union of India (2014) 3 SCC 1

Constitution is a constitutional right and not at the discretion or whims of the executive. Every constitutional duty must be fulfilled with due care and diligence".

The Government of India has issued instructions for dealing with mercy petitions and adopted broad guidelines for granting mercy. The Supreme Court in a number of judgments had shown that the decisions of the President of India on the mercy petitions do not meet the test of due care and diligence with respect to compliance with the instructions for dealing with mercy petitions and guidelines for granting mercy.

5.1 Violations of the instructions for dealing with mercy petitions

The instructions for dealing with mercy petitions are routinely violated. Rule I provides for "*submission of a mercy petition for mercy within seven days after and exclusive of the day on which the Superintendent of Jail informs him of the dismissal by the Supreme Court of his appeal*". Considering that majority of the death row convicts are poor and illiterate and held in solitary confinement, most death row convicts are unlikely to be able to collate all the necessary documents before filing mercy petitions. There is no provision for providing legal aid to death row convicts to prepare the mercy petitions. Consequently, mercy petitions filed fail to reflect the grounds which ought to be considered for granting clemency and the condemned prisoners depend on the predilections of injudicious officials of the Ministry of Home Affairs (MHA). One week time to file mercy petition is inherently against the death row convicts and in favour of dismissal of mercy petitions as no meaningful mercy petition can be filed in one week's time.

Rule V of the instructions states that "*in all cases in which a petition for mercy from a convict under sentence of death is to be forwarded to the concerned authorities, as expeditiously as possible, along with the records of the case and his or its observations in respect of any of the grounds urged in the petition*". However, mercy petition are often forwarded without all the records, in piece meal manner. In fact, mercy petitions of *Suresh and Ramji*,[451] and *Praveen Kumar*[452] were rejected without considering the trial court judgments which are the basic documents to assess their petitions. There have been cases of suppression of facts from the President by the MHA. The note dated 30 September 2005 prepared by then

451. Ibid
452. Ibid

President A.P.J Abdul Kalam in which he recommended to commute the death sentence of *Mahendra Nath Das* to life imprisonment was not provided to his successor, President Mrs. Pratibha Singh Patil who actually went to reject the mercy petition of Mahendra Nath Das.[453] The opinion of the prison authorities that death row convicts *Manganlal Barela* and *Sundar Singh* were mentally unfit was not shared with the President of India while advising rejection of their mercy petitions.[454]

Rule VI of the instructions mandates that "*upon receipt of the orders of the President, all orders will be communicated by telegraph and the receipt thereof shall be acknowledged by telegraph. In the case of other States and Union Territories, if the petition is rejected, the orders will be communicated by express letter and receipt thereof shall be acknowledged by express letter. Orders commuting the death sentence will be communicated by express letters, in the case of Delhi and by telegraph in all other cases and receipt thereof shall be acknowledged by express letter or telegraph, as the case may be*". This rule is routinely violated and the condemned prisoners are not provided any information about the rejection of their mercy petitions. In the case *Suresh and Ramji*, on 29.07.2004, the Governor rejected the mercy petitions but they were never informed about the same until the final adjudication of the rejection of their mercy petitions by the Supreme Court of India. In case of *Praveen Kumar*, on 26.03.2013, the President rejected the mercy petition but he had not received any communication till the judgment of the Supreme Court on 21 January 2014. In case of *Gurmeet Singh*, on 05.04.2013, he heard the news reports that his mercy petition was rejected by the President of India but till the judgment of the Supreme Court on 21 January 2014 he had not received any official written communication about the rejection of his mercy petition.[455]

Further, when the condemned prisoners are informed about the rejection of their mercy petitions, there is considerable delay. In the case of *Jafar Ali* on 22.06.2013, the prison authorities were informed vide letter dated 18.06.2013 that the President rejected the petitioner's mercy petition but it was only on 08.07.2013 that he was informed of the rejection. In case of *Maganlal Barela*, on 16.07.2013, the President rejected the petitioner's mercy petition but he

453. Mahindra Nath Das v. Union of India (2013) 6 SCC 253
454. Shatrughan Chauhan v. Union of India (2014) 3 SCC 1
455. Ibid

was orally informed on 27.07.2013 and was neither furnished with any official written communication regarding the rejection of his mercy petition by the President of India nor was the petitioner informed that his mercy petition had been rejected by the Governor. With respect to *Shivu*, on 27.07.2013 the President rejected the petitioners' mercy petitions but he was informed only on 13.08.2013. In case of *Simon, Gnana Prakash, Madhiah and Bilavendra*, the President rejected the mercy petitions on 08.02.2013 and although they were informed orally and signatures were obtained, the prison authorities refused to hand over the copy of the rejection letter to them or to their advocate.[456]

The failure to notify the rejection of mercy petitions on time or notify at all, has direct implications on execution. As per the Prison Manuals which vary from State to State, execution can be scheduled from one day to 14 days of informing the prisoner of rejection of mercy petition. This has been blatantly violated in the case of Afzal Guru who was denied the opportunity to challenge the rejection of his mercy petition by the President before the Supreme Court and was executed on 09.02.2013.[457] The family members of Guru were not informed about the rejection of the mercy petition and about his scheduled execution. The official communication dated 6 February 2013 informing the scheduled execution of Guru was received by his family members two days after his execution at Tihar Jail, Delhi.[458]

5.2. Violations of the guidelines for granting mercy

The MHA has framed broad guidelines[459] for consideration of mercy petitions. These guidelines are violated at will.

The MHA in complete disregard for the guideline *(i) relating to personality of the accused* recommended rejection of mercy petitions of *Sundar Singh* and *Manganlal Barela* who were declared as mentally unfit by doctors. [460]

456. Ibid
457. Afzal Guru hanged in secrecy, buried in Tihar Jail, The Hindu, 10 February 2013
458. See '2 days after hanging, Afzal Guru's wife receives letter from Delhi' Rediffnews, 11 February 2013, http://www.rediff.com/news/report/letter-from-delhi-delivered-to-afzal-guru-s-wife-today/20130211.htm
459. GUIDELINES REGARDING CLEMENCY TO DEATH ROW CONVICTS available at http://mha1.nic.in/par2013/par2014-pdfs/rs-120214/2280.pdf
460. Shatrughan Chauhan v. Union of India (2014) 3 SCC 1

With respect to guideline *(ii) relating to "cases in which the appellate Court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction*", Devender Pal Singh Bhullar was sentenced to death by majority of 2:1 by the Supreme Court, the first appellate court under the Terrorist and Disruptive Activities (Prevention) Act, (TADA).[461] The presiding judge of the Supreme Court, Justice M B Shah in a dissenting judgment set aside conviction of Bhullar as the reliability of evidence was questionable and ordered his release.[462] Yet, the MHA recommended rejection of his mercy petition and the President was too compliant.

With respect to Guideline *(iii) relating cases where it is alleged that fresh evidence is obtainable mainly with a view to seeing whether fresh enquiry is justified*, Surinder Koli, accused of rape and murder of several children who went missing between 2005 and 2006 from Nithari Village in Gautam Budh Nagar district, Uttar Pradesh,[463] alleged that he was tortured before his confession by police and was threatened with more if he did not repeat it before the magistrate. In his letter to the Supreme Court, Koli mentioned that the magistrate failed to notice the telltale signs of torture on him. His fingernails and toenails were allegedly missing due to torture. Koli's confessional statement was made before a magistrate in Delhi and not in Ghaziabad, Uttar Pradesh. Koli alleged that it was done so that the investigators could have a magistrate of their choice. The police on the other hand claimed that the statement was recorded before a magistrate in Delhi given an attack on Koli by the lawyers when he was brought to a Ghaziabad court. However, the police had taken him to the same court in Ghaziabad twice after the said attack before recording the statement in Delhi. It was also alleged that the statement was taken down in English, a language Koli does not understand. Further, the stenographer who noted down the statement of Koli was not examined in court. Koli was allegedly not medically examined before or after the confessional statement.[464] While the Supreme Court could not have acted as a trial court to consider the fresh allegations made by Koli before it, the President of India while considering his mercy petition ought to have ensured the respect for guideline "*relating to cases*

461. Devender Pal Singh Bhullar v. State (NCT of Delhi) (2002) 5 SCC 234
462. Dissenting judgment of Justice M B Shah in Devender Pal Singh v. State (NCT of Delhi) is available at: http://judis.nic.in/supremecourt/imgst.aspx?filename=18351
463. Surendra Koli v. State of U.P. Ors available at http://judis.nic.in/supremecourt/imgst.aspx?filename=37556
464. See 'Hanging Koli May Bury The Truth Of Nithari Killings', Tehelka, 30 August 2014, Issue 35 Volume 11, at: http://www.tehelka.com/nithari-killing-hanging-surinder-kohli-will-bury-the-truth/

where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified".

With respect to guideline "*(iv) where the High Court has reversed on appeal an acquittal by a Session Judge or has on appeal enhanced the sentence*", the MHA recommended rejection of mercy petition of death convicts in cases where the appellate courts had enhanced the life sentence to extreme penalty of death. *Simon, Gnana Prakash, Madhiah and Bilavendra* were sentenced to life imprisonment by the designated TADA Court but the Supreme Court *suo motu* enhanced their sentence to death penalty.[465] The President rejected their mercy petitions on 8 February 2013.[466] Under the TADA, the Supreme Court is the first and the only appellate court while for the offences under the Indian Penal Code, the High Court is the first appellate court.[467] Similarly, *Sonia Choudhary and Sanjeev Choudhary*[468] were convicted in May 2004 of the murder of eight relatives in August 2001 and sentenced to death. On appeal, the Punjab and Haryana High Court commuted their sentences to life imprisonment in April 2005 but the Supreme Court enhanced the life sentence into death penalty in February 2007. Their mercy petitions were rejected by the President.

With respect to guideline (v) "*any difference of opinion in the Bench of High Court Judges necessitating reference to a larger Bench*", there are a number of cases such as *Gurmeet Singh*[469], *Saibanna Nigappal Natikar*[470] and *B A Umesh*[471] in which difference of opinion in the Bench of High Court Judges necessitated reference to a larger Bench. The President of India once again had been too compliant to reject their mercy petitions.

465. Simon And Ors v. State Of Karnataka, Supreme Court of India, 16 October, 2003, http://judis.nic.in/supremecourt/imgst.aspx?filename=21075

466. See Shatrughan Chauhan v. Union of India (2014) 3 SCC 1

467. See TADA at http://www.satp.org/satporgtp/countries/india/document/actandordinances/Tada.htm#19.
"19. Appeal- (1) Nothwithstanding anything contained in the Code, an appeal shall lie as a matter of right from any judgment, sentence or order, not being an interlocutory order, of a Designated Court to the Supreme Court both on facts and on law.
(2) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Designated Court.
(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment; sentence or order appealed from:
Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days.

468. Sonia and Sanjeev v. Union of India, 2007(2)ACR1708(SC), AIR2007SC1218

469. Gurmeet Singh v. State of Uttar Pradesh in Criminal Appeal No. 1371 of 2004, Supreme Court of India, 28.9.2005

470. Criminal Ref. Case No. 2/2003 and Criminal Appeal No. 497 of 2003, High Court of Karnataka, Judgment available at: http://judgmenthck.kar.nic.in/judgments/bitstream/123456789/367873/1/CRLRC2-03-10-10-2003.pdf

471. B.A. Umesh v. Registrar General, High Court of Karnataka., MANU/SC/0082/2011 : (2011) 3 SCC 85

In fact, the government of India has developed its unwritten guideline to reject all mercy petitions of those convicted of terror offences.

Equally disturbing is the blatant violations of the orders of the Supreme Court of India. The President of India should ideally be the first person to ensure respect for the judgments and the rule of *stare decisis* i.e. law established by previous decisions of the superior courts. However, there has been blatant failure to comply with prohibition of solitary confinement, failure to grant mercy in the cases already declared *per incuriam* by the Supreme Court despite the same being brought to the notice, consider delay as a ground for granting mercy after the *Shatrughan Chauhan*[472] judgment as reflected by *Holiram Bordoloi* case[473], and consult with the Presiding Judge of the Supreme Court as per Section 432(2) of the Criminal Procedure Code before imposition of death penalty.

While the political decision to reject mercy petitions of terror convicts is omnipresent, in order to examine arbitrariness and non-application of mind, ACHR examined 41 cases of mercy petitions considered by the President of India which are broadly categorised under six categories i.e. (1) cases of murder of spouse and children, (2) cases of murder by servants for gains; (3) cases of murder due to enmity, (4) cases of murder by relatives, (5) cases of rape and murder of minor girls, and (6) cases of kidnapping followed by murder for gains. In all these cases, President gave contradictory opinion with respect to the cases with similar facts and circumstances. That President Kalam recommended commutation of death penalty of Mahendra Nath Das while his successor President Patil was made to recommend rejection of the mercy petition of the same Mahendra Nath Das shows the grave arbitrariness in granting mercy.

The failure to ensure due care and diligence had resulted in wrongful executions including of Ravji Rao and Surja Ram[474] while Afzal Guru was denied the right to challenge the rejection of his mercy petition by the President unlike others convicted of the same terror offences.

472. (2014) 3 SCC 1
473. Holiram Bordoloi v. State of Assam [AIR2005SC2059]
474. Law Commission of India Report No. 262 "The Death Penalty" August 2015

The failure to ensure respect for the instructions for dealing with mercy petitions and the guidelines for granting mercy are caused either by incompetence leading to non application of mind by the officials of the MHA or belief of the officials of the MHA in death penalty as the panacea for all crimes, which seriously hamper independent and impartial consideration of the mercy petitions. This has brought so much disrepute that the President of India appears to have lost the moral authority and the decision of the President on mercy petitions no longer evokes the necessary confidence that it meets the tests of due care and diligence for compliance with instructions for dealing with mercy petitions and the guidelines for granting mercy, judgments of the Supreme Court and respect for *stare decisis*.

ACHR is of the considered opinion that had the instructions for dealing with mercy petitions and the guidelines for granting mercy were implemented in letter and spirit, a number of death row convicts would have been given mercy despite the instructions being inherently against the death row convicts.

6. Death penalty: India's self goal on extradition

On 5 October 2015, Germany had refused to sign the Mutual Legal Assistance Treaty (MLAT) with India citing its provision for death penalty in Indian law. The MLAT is an agreement between two or more countries for the purpose of gathering and exchanging information in an effort to enforce public laws or criminal laws. Since 2007, India and Germany has been negotiating to sign the MLAT in criminal matters but has not been able to reach a conclusion due to Germany's strong reservation to the provision of death penalty in Indian law.[475]

The execution of three terror convicts i.e. Ajmal Kasab[476], Afzal Guru[477] and Yakub Abdul Razak Memon[478] in the last three years is likely to seriously impact India's request for extradition from a number of countries which have abolished death penalty. The European Union had been reeling under intense pressure not to deport any suspect facing penalty since imposition of death penalty on Devender Pal Singh Bhullar following deportation from Germany[479]. The EU is unlikely to extradite any terror convict without guarantees that death sentences shall not be imposed. Following the death sentence on Bhullar, the

475. See 'Death Penalty Becomes Stumbling Block for India-Germany Mutual Legal Assistance Treaty', NDTV, 6 October 2015, http://www.ndtv.com/india-news/death-penalty-becomes-stumbling-block-for-india-germany-mutual-legal-assistance-treaty-1227819

476. Ajmal Kasab was executed in Pune, Maharashtra on 21 November 2012. Some of the major charges in which Ajmal Kasab was found guilty were: conspiracy to wage war against the Government of India; collecting arms with the intention of waging war against the Government of India; waging and abetting the waging of war against the Government of India; commission of terrorist acts; criminal conspiracy to commit murder; criminal conspiracy, common intention and abetment to commit murder; committing murder of a number of persons; attempt to murder with common intention; criminal conspiracy and abetment; abduction for murder; robbery/ dacoity with an attempt to cause death or grievous hurt; and causing explosions punishable under the Explosive Substance Act, 1908.

477. Afzal Guru was executed in Tihar Jail, Delhi on 9 February 2013. The charges against which he was convicted by the designated POTA Court were Sections 121, 121A, 122, Section 120B read with Sections 302 & 307 read with Section 120B of the IPC, sub-Sections (2), (3) & (5) of Section 3 and Section 4(b) of the POTA and Sections 3 & 4 of the Explosive Substances Act, and Section 3(4) of the POTA. See State v Mohd. Afzal And Ors [2003 (3) JCC 1669]

478. Yakub Abdul Razak Memon was executed in Nagpur, Maharashtra on 30 July 2015. The charges in which he was convicted included Section 3(3) of TADA; Section 120-B of IPC; Section 3(3) of TADA; Section 5 of TADA; Section 6 of TADA; and Sections 3 and 4 read with Section 6 of the Explosive Substances Act, 1908. See Yakub Abdul Razak Memon vs State Of Maharashtra

479. Devinder Pal Singh Bhullar was extradited from Germany in 1995. Germany had made strong representation for clemency for Bhullar by pointing out that "Germany has already abolished death penalty and in terms of Section 34C of the Extradition Act, 1962, death penalty cannot be imposed if the laws of the State which surrenders or returns the accused do not provide for imposition of death penalty for such crime." See Devender Pal Singh Bhullar v. State of N.C.T. of Delhi delivered by the Supreme Court on 12 April 2013

jurisprudence against deportation without guarantees for non-imposition of death sentences have further been established across Europe and India had to give similar assurance to Portugal with respect to Abu Salem.[480]

As of July 2015, the Central Bureau of Investigation (CBI) has issued about 650 red corner notices either to face prosecution or to serve a penal sentence. Of these, 192 wanted persons have been charged under laws that provides for death penalty as punishment such as under the Arms Act of 1959[481], Indian Penal Code of 1860[482], the Maharashtra Control of Organized Crimes Act of 1999[483], the Narcotic Drugs and Psychotropic Substances Act of 1985[484], the Unlawful Activities Prevention Act, 1967 (UAPA)[485], and the Terrorist and Disruptive Activities (Prevention) Act of 1987[486] and the Prevention of Terrorism Act of 2002.[487] Out of 192 wanted persons, 124 are wanted for committing terrorist offences. [488]

A total of 140 countries have abolished death penalty including 98 countries which abolished death penalty for all crimes while seven countries have abolished capital punishment for ordinary crimes and 35 countries are abolitionist in practice.[489] Further, a total of 158 countries have ratified the UN Convention Against Torture which prohibits extradition against torture. Regional human rights instruments such as the European Convention on Human Rights[490]

480. In 2006, the charges framed by the Designated TADA Court, Mumbai against Abu Salem included criminal conspiracy punishable under Section 3(3) of the TADA Act and Section 120 B of the IPC read with Sections 3(2)(i), (ii), 3(3), 3(4), 5 and 6 of the TADA Act read with Sections 302, 307, 326, 324, 427, 435, 436, 201 and 212 of the IPC and offences under Sections 3 and 7 read with Sections 25 (1A), (1B), (a) of the Arms Act, 1959, Sections 9-B(1), (a), (b), (c) of the Explosives Act, 1884, Sections 3, 4(a), (b), 5 and 6 of the Explosive Substances Act, 1908 and Section 4 of the Prevention of Damage to Public Property Act, 1984. Abu Salem was extradited from Portugal after India assured Portugal that "Abu Salem would not be visited by death penalty or imprisonment for a term beyond 25 years" and "not be prosecuted for offences other than those for which his extradition has been sought", among others. See Abu Salem Abdul Qayoom Ansari v. State Of Maharashtra delivered by Supreme Court on 10 September, 2010
481. Under Section 27(3) of Arms Act, 1959, which was strike down by the Supreme Court in 2012 in State of Punjab v. Dalbir Singh
482. Presently, death penalty is provided under the IPC for various offences such as Section 121, Section 132, Section 194, Section 195A, Section 302, Section 305, Section 307(2), Section 364A, Section 396, Section 376E, and Section 376A.
483. Section 3(1)(i)
484. Section 31A
485. Section 16(1)
486. Section 3(2)(1)
487. Section 3(2)(a)
488. http://www.cbi.nic.in/rnotice/notices.php
489. Available at: http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries
490. Article 3 of ECHR states "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

bar European Union countries from extraditing prisoners if they face capital punishment. The national courts across the world have already established the jurisprudence against extradition of suspects facing death penalty.

The European Court on Human Rights in *Soering v. United Kingdom* (1989) held that the United Kingdom's extradition of a German national to face capital murder charges in Virginia would violate its obligations under Article 3 of the European Convention on Human Rights, which prohibits cruel, inhuman, or degrading treatment or punishment. The Court's decision was based on its review of death row conditions and the anticipated time that Soering would have to spend on death row if sentenced to death which amounts to torture. In compliance with the Soering decision, the U.K. sought and received assurances from the United States that the state of Virginia would not impose a death sentence. Thereafter, Soering was extradited, convicted, and sentenced to life.[491]

In *Judge v. Canada*, Communication No. 829/1998 (U.N. Doc. CCPR/C/78/D/829/1998 (2003), the United Nations Human Rights Committee found that Canada had violated article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) by deporting Roger Judge to the United States to face a death sentence in 1998. Roger Judge had been sentenced to death in Pennsylvania, but escaped from prison and fled to Canada. While there, he was convicted of two robberies and sentenced to ten years. In 1998, Canada deported him to the United States to serve his death sentence. The Committee concluded that an abolitionist country violates the right to life protected by Article 6 of the ICCPR when it deports a detainee to the United States without seeking assurances that the death penalty will not be carried out.[492]

The Supreme Court of Canada likewise held that extraditions of suspects to face the death penalty are constitutionally prohibited. In *Burns and Rafay,*[493] both the accused were 18 years old at the time when they allegedly murdered Rafay's parents and sister in the state of Washington and then fled to Canada. Washington charged them with first-degree murder, a capital crime.[494]

491. http://www.deathpenaltyworldwide.org/extradition.cfm
492. http://www.deathpenaltyworldwide.org/extradition.cfm
493. Minister of Justice v. Burns and Rafay, 2001 SCC 7 (S.C. Canada, 22 March 2001).
494. http://www.deathpenaltyworldwide.org/extradition.cfm

National courts in Switzerland, which is not a member of European Union, likewise made it mandatory to acquire assurances that the nation requesting extradition would not impose the death penalty. The Italian Constitutional Court has gone one step further, refusing to extradite suspects even in the face of assurances. In the case of Pietro Venezia, the Italian Constitutional Court held that under no circumstances would Italy extradite an individual to a country where the death penalty existed, despite the United States' assurances of not imposing death penalty.[495]

Under a 1978 treaty with the United States, Mexico, which has no death penalty, cannot extradite anyone facing possible execution. To get a fugitive extradited, U.S. prosecutors must give guarantees that he/she would not be executed.[496]

South African law prohibits the extradition of persons to countries that impose the death penalty. On 27 July 2012, the Constitutional Court of South Africa refused to extradite two Botswana nationals, Emmanuel Tsebe and Jerry Phale, on the ground that the South African Government cannot surrender a person to a country where he or she faces the death penalty without first seeking an assurance that the death penalty would not be imposed.[497] Further on 23 September 2014, the High Court in Pretoria, South Africa, ruled that the extradition to Botswana of Edwin Samotse, a man sought on murder charges in that country was a violation of the South African Constitution and illegal.[498]

For extradition, the Philippines also seeks assurance that the death penalty will not be carried out. Article X of the Extradition Treaty Between the Republic of the Philippines and the Republic of Indonesia states, "If the crime for which extradition is requested is punishable by death under the law of the requesting Party; and if in respect of such crime the death penalty is not provided for by the law of the requested party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death penalty will not be carried out."[499]

495. Venezia v. Ministero di Grazia & Giustizia, Corte coste, 27 June 1996, 79 Rivista di Diritto Internazionale 815 (1996) please see http://www.deathpenaltyworldwide.org/extradition.cfm
496. U.S. fugitives in Mexico spared death penalty, NBCNews.com, 17 January 2008, http://www.nbcnews.com/id/22717899/ns/us_news-crime_and_courts/t/us-fugitives-mexico-spared-death-penalty/#.Vc2Rbvmqqko
497. http://hrlc.org.au/minister-of-home-affairs-and-others-v-tsebe-and-others-2012-zacc-16-27-july-2012/
498. http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404133_text
499. http://www.chanrobles.com/rpindonesiaextraditiontreaty.htm#.Vc2WX_mqqko

It is a known fact that India has not been able to procure extradition of Kim Davy, main accused in Purulia arms drop case, as India is not a ratifying party to the United Nations Convention Against Torture. A petition was filed in the Kolkata High Court. The Danish government had decided on 9 April 2010 to extradite Kim Davy to India[500] but the Danish High Court ruled against extradition of Kim Davy on the grounds that he could face mistreatment in Indian prisons.[501] The Danish authorities decided not to appeal the high court judgment in the Supreme Court.[502] In September 2011, the Kolkata High Court issued notices to the Ministry of Home Affairs and the CBI seeking details about the actions taken by the Government of India to ensure Kim Davy's extradition as a Public Interest Litigation held that if the U.N. Convention against Torture had been ratified by the Government of India, it might have been possible to ensure the extradition of Kim Davy. [503] The petition appears to have been lost in the Indian judicial system.

Extradition remains one of the key contentions with the United Kingdom and Denmark.[504]

On 2 May 2012, a British Court ordered the extradition of Mohammed Hanif Umerji Patel @ Tiger Hanif, an alleged associate of the underworld don Dawood Ibrahim, who has been wanted in India for his role in two terror attacks in Surat city of Gujarat in January and April 1993. In February 2010, the British authorities arrested him at Bolton, a town in north-west England, acting on an Interpol warrant.[505] Hanif could not be extradited to India as he claimed there was "a real risk of torture" if he is extradited.[506] In May 2015, Minister of State for Home Haribhai Parathibhai Chaudhary stated that India

500. Danish court decision on Kim Davy can encourage terrorists: India, The Times of India, 8 July 2011, http://timesofindia.indiatimes.com/india/Danish-court-decision-on-Kim-Davy-can-encourage-terrorists-India/articleshow/9151887.cms?referral=PM
501. Bhaskar Balakrishnan, "Let's mend fences with Denmark", The BusinessLine, 17 June 2013, http://www.thehindubusinessline.com/opinion/columns/bhaskar-balakrishnan/lets-mend-fences-with-denmark/article4823648.ece
502. Danish court decision on Kim Davy can encourage terrorists: India, The Times of India, 8 July 2011, http://timesofindia.indiatimes.com/india/Danish-court-decision-on-Kim-Davy-can-encourage-terrorists-India/articleshow/9151887.cms?referral=PM
503. Kim Davy extradition: time sought to file affidavits, The Hindu, 15 September 2011, http://www.thehindu.com/news/national/kim-davy-extradition-time-sought-to-file-affidavits/article2453673.ece
504. http://www.cbi.nic.in/rnotice/notices.php
505. U.K. court orders extradition of 'Tiger' Hanif to India, The Hindu, 4 May 2012, available at: http://www.thehindu.com/news/international/uk-court-orders-extradition-of-tiger-hanif-to-india/article3380893.ece
506. Available:http://www.dnaindia.com/india/report-tiger-hanif-makes-another-bid-to-avoid-extradition-to-india-1930122

has made request to the British authorities for expediting Hanif's extradition.[507]

There is no machismo in providing death sentence to counter terror as often portrayed by the Government whether it is UPA or the NDA. It is the fear of the law, not necessarily death penalty, that can act as deterrent. That Abu Salem is still being tried for the same offences while Yakub Abdul Razak Memon has been hanged explains India's adhoc approach to counter terrorism. Abu Salem Abdul Qayoom Ansari has been accused as an active member of criminal conspiracy in the serial Bombay Bomb Blast cases of 12 March 1993. He has been accused of actively participated in transporting and distribution of smuggled sophisticated arms and ammunitions which, were smuggled into the country in the beginning of 1993.[508]

India ought to abolish death penalty for its fight against terrorism.

507. Available at: http://www.madhyamam.com/en/node/33607#sthash.nL7HLObY.dpuf
508. Available at: http://cbi.nic.in/pressreleases/pr_2011-09-27-2.php

ANNEXURE I: DEATH PENALTY STATISTICS OF THE NCRB DURING 2001-2013

TABLE – 7.3

DETAILS OF DEATH SENTENCE AT THE END OF 2001

SL. NO.	STATE/UT	NUMBER OF PRISONERS		
		SENTENCED TO DEATH DURING THE YEAR	WHOSE SENTENCE COMMUTTED TO LIFE IMPRISONMENT	EXECUTED DURING THE YEAR
(1)	(2)	(3)	(4)	(5)
1	ANDHRA PRADESH	1	1	0
2	ARUNACHAL PRADESH	-	-	-
3	ASSAM	3	2	0
4	BIHAR	13	50	0
5	CHHATTISGARH	1	21	0
6	GOA	0	0	0
7	GUJARAT	3	1	0
8	HARYANA	8	2	0
9	HIMACHAL PRADESH	0	0	0
10	JAMMU & KASHMIR	4	1	0
11	JHARKHAND	0	0	0
12	KARNATAKA	0	0	0
13	KERALA	2	0	0
14	MADHYA PRADESH	4	3	0
15	MAHARASHTRA	7	1	0
16	MANIPUR	0	0	0
17	MEGHALAYA	0	1	0
18	MIZORAM	0	0	0
19	NAGALAND	0	6	0
20	ORISSA	5	53	0
21	PUNJAB	11	24	0
22	RAJASTHAN	1	13	0
23	SIKKIM	0	0	0
24	TAMILNADU	16	1	0
25	TRIPURA	0	0	0
26	UTTAR PRADESH	19	120	0
27	UTTARANCHAL	0	0	0
28	WEST BENGAL	6	2	0
	TOTAL(STATES)	**104**	**302**	**0**
29	A & N ISLANDS	0	0	0
30	CHANDIGARH	0	0	0
31	D & N HAVELI	0	0	0
32	DAMAN & DIU	0	0	0
33	DELHI	2	0	0
34	LAKSHADWEEP	0	0	0
35	PONDICHERRY	0	1	0
	TOTAL(UTs)	**2**	**1**	**0**
	TOTAL (ALL-INDIA)	**106**	**303**	**0**

TABLE – 7.3

DETAILS OF DEATH SENTENCE DURING 2002

SL. NO.	STATE/UT	NUMBER OF PRISONERS		
		SENTENCED TO DEATH DURING THE YEAR	WHOSE SENTENCE COMMUTTED TO LIFE IMPRISONMENT	EXECUTED DURING THE YEAR
(1)	(2)	(3)	(4)	(5)
1	ANDHRA PRADESH	3	1	0
2	ARUNACHAL PRADESH	-	-	-
3	ASSAM	1	1	0
4	BIHAR	20	89	0
5	CHHATTISGARH	5	0	0
6	GOA	0	0	0
7	GUJARAT	0	0	0
8	HARYANA	2	8	0
9	HIMACHAL PRADESH	0	0	0
10	JAMMU & KASHMIR	0	0	0
11	JHARKHAND	4	1	0
12	KARNATAKA	0	0	0
13	KERALA	0	0	0
14	MADHYA PRADESH	4	17	0
15	MAHARASHTRA	13	126	0
16	MANIPUR	1	0	0
17	MEGHALAYA	0	0	0
18	MIZORAM	0	0	0
19	NAGALAND	0	4	0
20	ORISSA	0	0	0
21	PUNJAB	0	0	0
22	RAJASTHAN	0	0	0
23	SIKKIM	0	0	0
24	TAMILNADU	24	6	0
25	TRIPURA	0	0	0
26	UTTAR PRADESH	34	45	0
27	UTTARANCHAL	0	0	0
28	WEST BENGAL	3	0	0
	TOTAL(STATES)	**114**	**298**	**0**
29	A & N ISLANDS	0	0	0
30	CHANDIGARH	0	0	0
31	D & N HAVELI	0	0	0
32	DAMAN & DIU	4	0	0
33	DELHI	8	2	0
34	LAKSHADWEEP	0	1	0
35	PONDICHERRY	0	0	0
	TOTAL(UTs)	**12**	**3**	**0**
	TOTAL (ALL-INDIA)	**126**	**301**	**0**

TABLE – 7.3

DETAILS OF DEATH SENTENCE DURING 2003

SL. NO.	STATE/UT	NUMBER OF PRISONERS		
		SENTENCED TO DEATH DURING THE YEAR	WHOSE SENTENCE COMMUTTED TO LIFE IMPRISONMENT	EXECUTED DURING THE YEAR
(1)	(2)	(3)	(4)	(5)
1	ANDHRA PRADESH	1	1	0
2	ARUNACHAL PRADESH	-	-	-
3	ASSAM	1	3	0
4	BIHAR	25	73	0
5	CHHATTISGARH	2	2	0
6	GOA	0	0	0
7	GUJARAT	5	0	0
8	HARYANA	3	0	0
9	HIMACHAL PRADESH	0	0	0
10	JAMMU & KASHMIR	0	5	0
11	JHARKHAND	0	0	0
12	KARNATAKA	0	0	0
13	KERALA	11	1	0
14	MADHYA PRADESH	4	1	0
15	MAHARASHTRA	14	12	0
16	MANIPUR	1	0	0
17	MEGHALAYA	0	0	0
18	MIZORAM	0	0	0
19	NAGALAND	0	5	0
20	ORISSA	0	0	0
21	PUNJAB	0	0	0
22	RAJASTHAN	11	3	0
23	SIKKIM	0	0	0
24	TAMILNADU	22	6	0
25	TRIPURA	0	0	0
26	UTTAR PRADESH	35	18	0
27	UTTARANCHAL	2	9	0
28	WEST BENGAL	0	0	0
	TOTAL(STATES)	**137**	**139**	**0**
29	A & N ISLANDS	0	0	0
30	CHANDIGARH	0	0	0
31	D & N HAVELI	0	0	0
32	DAMAN & DIU	0	0	0
33	DELHI	5	3	0
34	LAKSHADWEEP	0	0	0
35	PONDICHERRY	0	0	0
	TOTAL(UTs)	**5**	**3**	**0**
	TOTAL (ALL-INDIA)	**142**	**142**	**0**

TABLE – 7.3

DETAILS OF DEATH SENTENCE DURING 2004

SL. NO.	STATE/UT	NUMBER OF PRISONERS		
		SENTENCED TO DEATH DURING THE YEAR	WHOSE SENTENCE COMMUTTED TO LIFE IMPRISONMENT	EXECUTED DURING THE YEAR
(1)	(2)	(3)	(4)	(5)
1	ANDHRA PRADESH	0	0	0
2	ARUNACHAL PRADESH	-	-	-
3	ASSAM	2	8	0
4	BIHAR	16	6	0
5	CHHATTISGARH	0	0	0
6	GOA	0	0	0
7	GUJARAT	19	0	0
8	HARYANA	3	3	0
9	HIMACHAL PRADESH	1	0	0
10	JAMMU & KASHMIR	0	5	0
11	JHARKHAND	15	44	0
12	KARNATAKA	7	0	0
13	KERALA	1	9	0
14	MADHYA PRADESH	6	3	0
15	MAHARASHTRA	4	16	0
16	MANIPUR	0	0	0
17	MEGHALAYA	0	0	0
18	MIZORAM	0	0	0
19	NAGALAND	0	0	0
20	ORISSA	5	0	0
21	PUNJAB	0	0	0
22	RAJASTHAN	2	2	0
23	SIKKIM	0	0	0
24	TAMILNADU	1	0	0
25	TRIPURA	0	0	0
26	UTTAR PRADESH	33	82	0
27	UTTARANCHAL	0	0	0
28	WEST BENGAL	3	1	1
	TOTAL(STATES)	**118**	**179**	**1**
29	A & N ISLANDS	0	0	0
30	CHANDIGARH	0	0	0
31	D & N HAVELI	0	0	0
32	DAMAN & DIU	0	0	0
33	DELHI	7	0	0
34	LAKSHADWEEP	0	0	0
35	PONDICHERRY	0	0	0
	TOTAL(UTs)	**7**	**0**	**0**
	TOTAL (ALL-INDIA)	**125**	**179**	**1**

TABLE – 7.3

DETAILS OF DEATH SENTENCE DURING 2005

SL. NO.	STATE/UT	NUMBER OF PRISONERS		
		NO. OF CAPITAL PUNISHMENT DURING THE YEAR	WHOSE SENTENCE COMMUTTED TO LIFE IMPRISONMENT	EXECUTED DURING THE YEAR
(1)	(2)	(3)	(4)	(5)
1	ANDHRA PRADESH	0	0	0
2	ARUNACHAL PRADESH	-	-	-
3	ASSAM	8	0	0
4	BIHAR	2	33	0
5	CHHATTISGARH	0	0	0
6	GOA	0	0	0
7	GUJARAT	8	0	0
8	HARYANA	0	0	0
9	HIMACHAL PRADESH	1	0	0
10	JAMMU & KASHMIR	0	0	0
11	JHARKHAND	21	132	0
12	KARNATAKA	14	0	0
13	KERALA	4	9	0
14	MADHYA PRADESH	11	11	0
15	MAHARASHTRA	4	2	0
16	MANIPUR	0	0	0
17	MEGHALAYA	0	0	0
18	MIZORAM	0	0	0
19	NAGALAND	0	0	0
20	ORISSA	0	0	0
21	PUNJAB	0	0	0
22	RAJASTHAN	6	1	0
23	SIKKIM	0	0	0
24	TAMILNADU	NA	NA	NA
25	TRIPURA	0	0	0
26	UTTAR PRADESH	51	117	0
27	UTTARANCHAL	1	15	0
28	WEST BENGAL	24	2	0
	TOTAL(STATES)	**155**	**322**	**0**
29	A & N ISLANDS	0	0	0
30	CHANDIGARH	0	0	0
31	D & N HAVELI	0	0	0
32	DAMAN & DIU	0	0	0
33	DELHI	9	919	0
34	LAKSHADWEEP	0	0	0
35	PONDICHERRY	0	0	0
	TOTAL(UTs)	**9**	**919**	**0**
	TOTAL (ALL-INDIA)	**164**	**1241**	**0**

TABLE – 7.3

DETAILS OF DEATH SENTENCE DURING 2006

SL. NO.	STATE/UT	NUMBER OF PRISONERS		
		NO. OF CAPITAL PUNISHMENT DURING THE YEAR	WHOSE SENTENCE COMMUTTED TO LIFE IMPRISONMENT	EXECUTED DURING THE YEAR
(1)	(2)	(3)	(4)	(5)
1	ANDHRA PRADESH	0	0	0
2	ARUNACHAL PRADESH*	-	-	-
3	ASSAM	1	63	0
4	BIHAR	6	27	0
5	CHHATTISGARH	0	0	0
6	GOA	0	0	0
7	GUJARAT	0	0	0
8	HARYANA	0	3	0
9	HIMACHAL PRADESH	0	0	0
10	JAMMU & KASHMIR	0	3	0
11	JHARKHAND	8	8	0
12	KARNATAKA	13	0	0
13	KERALA	3	1	0
14	MADHYA PRADESH	9	0	0
15	MAHARASHTRA	20	0	0
16	MANIPUR	0	0	0
17	MEGHALAYA	0	1	0
18	MIZORAM	0	0	0
19	NAGALAND	0	0	0
20	ORISSA	7	1	0
21	PUNJAB	0	0	0
22	RAJASTHAN	6	4	0
23	SIKKIM	0	0	0
24	TAMILNADU	10	0	0
25	TRIPURA	0	0	0
26	UTTAR PRADESH	24	26	0
27	UTTARANCHAL	11	22	0
28	WEST BENGAL	1	55	0
	TOTAL(STATES)	**119**	**214**	**0**
29	A & N ISLANDS	0	0	0
30	CHANDIGARH	0	0	0
31	D & N HAVELI	0	0	0
32	DAMAN & DIU	0	0	0
33	DELHI	10	806	0
34	LAKSHADWEEP	0	0	0
35	PONDICHERRY	0	0	0
	TOTAL(UTs)	**10**	**806**	**0**
	TOTAL (ALL-INDIA)	**129**	**1020**	**0**

TABLE – 7.3

DETAILS OF DEATH SENTENCE DURING 2007

SL. NO.	STATE/UT	NUMBER OF PRISONERS		
		NO. OF CAPITAL PUNISHMENT DURING THE YEAR	WHOSE SENTENCE COMMUTTED TO LIFE IMPRISONMENT	EXECUTED DURING THE YEAR
(1)	(2)	(3)	(4)	(5)
1	ANDHRA PRADESH	0	0	0
2	ARUNACHAL PRADESH*	-	-	-
3	ASSAM	2	17	0
4	BIHAR	14	8	0
5	CHHATTISGARH	7	1	0
6	GOA	1	0	0
7	GUJARAT	0	0	0
8	HARYANA	3	2	0
9	HIMACHAL PRADESH	1	1	0
10	JAMMU & KASHMIR	3	0	0
11	JHARKHAND	2	92	0
12	KARNATAKA	14	0	0
13	KERALA	5	0	0
14	MADHYA PRADESH	22	0	0
15	MAHARASHTRA	29	0	0
16	MANIPUR	0	0	0
17	MEGHALAYA	3	0	0
18	MIZORAM	0	0	0
19	NAGALAND	0	0	0
20	ORISSA	14	14	0
21	PUNJAB	0	0	0
22	RAJASTHAN	3	3	0
23	SIKKIM	0	0	0
24	TAMIL NADU	14	0	0
25	TRIPURA	2	8	0
26	UTTAR PRADESH	30	8	0
27	UTTARAKHAND	0	0	0
28	WEST BENGAL	6	0	0
	TOTAL (STATES)	**175**	**154**	**0**
29	A & N ISLANDS	0	0	0
30	CHANDIGARH	2	0	0
31	D & N HAVELI	0	0	0
32	DAMAN & DIU	0	0	0
33	DELHI	9	726	0
34	LAKSHADWEEP	0	1	0
35	PUDUCHERRY	0	0	0
	TOTAL (UTs)	**11**	**727**	**0**
	TOTAL (ALL-INDIA)	**186**	**881**	**0**

* Jails do not exist

TABLE – 7.3

DETAILS OF DEATH SENTENCE DURING 2008

SL. NO.	STATE/UT	NUMBER OF PRISONERS		
		NO. OF CAPITAL PUNISHMENT DURING THE YEAR	WHOSE SENTENCE COMMUTTED TO LIFE IMPRISONMENT	EXECUTED DURING THE YEAR
(1)	(2)	(3)	(4)	(5)
1	ANDHRA PRADESH	0	0	0
2	ARUNACHAL PRADESH*	-	-	-
3	ASSAM	2	0	0
4	BIHAR	25	21	0
5	CHHATTISGARH	2	0	0
6	GOA	0	0	0
7	GUJARAT	0	0	0
8	HARYANA	3	2	0
9	HIMACHAL PRADESH	0	1	0
10	JAMMU & KASHMIR	0	0	0
11	JHARKHAND	6	1	0
12	KARNATAKA	22	2	0
13	KERALA	3	0	0
14	MADHYA PRADESH	17	10	0
15	MAHARASHTRA	12	1	0
16	MANIPUR	1	0	0
17	MEGHALAYA	3	0	0
18	MIZORAM	0	0	0
19	NAGALAND	0	0	0
20	ORISSA	0	0	0
21	PUNJAB	0	0	0
22	RAJASTHAN	3	2	0
23	SIKKIM	0	0	0
24	TAMIL NADU	0	0	0
25	TRIPURA	0	0	0
26	UTTAR PRADESH	15	5	0
27	UTTARAKHAND	0	0	0
28	WEST BENGAL	8	1	0
	TOTAL (STATES)	**122**	**46**	**0**
29	A & N ISLANDS	0	0	0
30	CHANDIGARH	1	0	0
31	D & N HAVELI	0	0	0
32	DAMAN & DIU	0	0	0
33	DELHI	3	0	0
34	LAKSHADWEEP	0	0	0
35	PUDUCHERRY	0	0	0
	TOTAL (UTs)	**4**	**0**	**0**
	TOTAL (ALL-INDIA)	**126**	**46**	**0**

* Jails do not exist

TABLE – 7.3

DETAILS OF DEATH SENTENCE DURING 2009

SL. NO.	STATE/UT	NUMBER OF PRISONERS		
		NO. OF CAPITAL PUNISHMENT DURING THE YEAR	WHOSE SENTENCE COMMUTTED TO LIFE IMPRISONMENT	EXECUTED DURING THE YEAR
(1)	(2)	(3)	(4)	(5)
1	ANDHRA PRADESH	0	0	0
2	ARUNACHAL PRADESH	0	0	0
3	ASSAM	1	0	0
4	BIHAR	5	20	0
5	CHHATTISGARH	1	0	0
6	GOA	0	0	0
7	GUJARAT	8	1	0
8	HARYANA	5	2	0
9	HIMACHAL PRADESH	0	0	0
10	JAMMU & KASHMIR	3	0	0
11	JHARKHAND	11	10	0
12	KARNATAKA	5	0	0
13	KERALA	5	0	0
14	MADHYA PRADESH	2	15	0
15	MAHARASHTRA	15	4	0
16	MANIPUR	0	0	0
17	MEGHALAYA	0	0	0
18	MIZORAM	0	0	0
19	NAGALAND	0	0	0
20	ORISSA	0	0	0
21	PUNJAB	0	0	0
22	RAJASTHAN	0	1	0
23	SIKKIM	0	0	0
24	TAMIL NADU	4	8	0
25	TRIPURA	0	1	0
26	UTTAR PRADESH	57	21	0
27	UTTARAKHAND	2	0	0
28	WEST BENGAL	10	17	0
	TOTAL (STATES)	**134**	**100**	**0**
29	A & N ISLANDS	0	0	0
30	CHANDIGARH	1	0	0
31	D & N HAVELI	0	0	0
32	DAMAN & DIU	0	0	0
33	DELHI	0	4	0
34	LAKSHADWEEP	0	0	0
35	PUDUCHERRY	2	0	0
	TOTAL (UTs)	**3**	**4**	**0**
	TOTAL (ALL-INDIA)	**137**	**104**	**0**

TABLE – 7.3

DETAILS OF DEATH SENTENCE DURING 2010

SL. NO.	STATE/UT	NUMBER OF PRISONERS		
		NO. OF CAPITAL PUNISHMENT DURING THE YEAR	WHOSE SENTENCE COMMUTTED TO LIFE IMPRISONMENT	EXECUTED DURING THE YEAR
(1)	(2)	(3)	(4)	(5)
1	ANDHRA PRADESH	0	0	0
2	ARUNACHAL PRADESH	0	0	0
3	ASSAM	0	2	0
4	BIHAR	4	12	0
5	CHHATTISGARH	0	0	0
6	GOA	0	0	0
7	GUJARAT	0	0	0
8	HARYANA	0	1	0
9	HIMACHAL PRADESH	0	0	0
10	JAMMU & KASHMIR	1	3	0
11	JHARKHAND	8	8	0
12	KARNATAKA	19	0	0
13	KERALA	0	0	0
14	MADHYA PRADESH	4	2	0
15	MAHARASHTRA	4	11	0
16	MANIPUR	0	0	0
17	MEGHALAYA	0	0	0
18	MIZORAM	0	0	0
19	NAGALAND	0	0	0
20	ODISHA	2	0	0
21	PUNJAB	0	0	0
22	RAJASTHAN	4	0	0
23	SIKKIM	0	0	0
24	TAMIL NADU	4	1	0
25	TRIPURA	0	0	0
26	UTTAR PRADESH	25	12	0
27	UTTARAKHAND	0	0	0
28	WEST BENGAL	12	7	0
	TOTAL (STATES)	**87**	**59**	**0**
29	A & N ISLANDS	0	0	0
30	CHANDIGARH	0	2	0
31	D & N HAVELI	0	0	0
32	DAMAN & DIU	0	0	0
33	DELHI	10	1	0
34	LAKSHADWEEP	0	0	0
35	PUDUCHERRY	0	0	0
	TOTAL (UTs)	**10**	**3**	**0**
	TOTAL (ALL-INDIA)	**97**	**62**	**0**

TABLE – 7.3

DETAILS OF DEATH SENTENCE DURING 2011

SL. NO.	STATE/UT	NUMBER OF PRISONERS		
		NO. OF CAPITAL PUNISHMENT DURING THE YEAR	WHOSE SENTENCE COMMUTTED TO LIFE IMPRISONMENT	EXECUTED DURING THE YEAR
(1)	(2)	(3)	(4)	(5)
1	ANDHRA PRADESH	3	0	0
2	ARUNACHAL PRADESH	0	0	0
3	ASSAM	0	1	0
4	BIHAR	2	4	0
5	CHHATTISGARH	0	0	0
6	GOA	0	0	0
7	GUJARAT	14	1	0
8	HARYANA	4	0	0
9	HIMACHAL PRADESH	0	0	0
10	JAMMU & KASHMIR	9	1	0
11	JHARKHAND	6	4	0
12	KARNATAKA	1	0	0
13	KERALA	0	3	0
14	MADHYA PRADESH	4	0	0
15	MAHARASHTRA	3	2	0
16	MANIPUR	0	1	0
17	MEGHALAYA	0	0	0
18	MIZORAM	0	0	0
19	NAGALAND	0	0	0
20	ODISHA	0	0	0
21	PUNJAB	8	0	0
22	RAJASTHAN	2	4	0
23	SIKKIM	0	0	0
24	TAMIL NADU	0	2	0
25	TRIPURA	0	0	0
26	UTTAR PRADESH	47	4	0
27	UTTARAKHAND	0	0	0
28	WEST BENGAL	6	13	0
	TOTAL (STATES)	**109**	**40**	**0**
29	A & N ISLANDS	0	0	0
30	CHANDIGARH	0	1	0
31	D & N HAVELI	0	0	0
32	DAMAN & DIU	0	0	0
33	DELHI	8	1	0
34	LAKSHADWEEP	0	0	0
35	PUDUCHERRY	0	0	0
	TOTAL (UTs)	**8**	**2**	**0**
	TOTAL (ALL-INDIA)	**117**	**42**	**0**

Table – 7.3

Details of Death Sentence during 2012

Sl. No.	State/UT	Number of prisoners awarded Capital Punishment during the year	Number of prisoners whose sentence Commuted to Life Imprisonment during the year	Number of prisoners Executed during the year
(1)	(2)	(3)	(4)	(5)
1	ANDHRA PRADESH	2	0	0
2	ARUNACHAL PRADESH	0	0	0
3	ASSAM	6	0	0
4	BIHAR	12	4	0
5	CHHATTISGARH	0	4	0
6	GOA	0	1	0
7	GUJARAT	3	2	0
8	HARYANA	3	7	0
9	HIMACHAL PRADESH	0	0	0
10	JAMMU & KASHMIR	0	0	0
11	JHARKHAND	1	3	0
12	KARNATAKA	8	1	0
13	KERALA	3	0	0
14	MADHYA PRADESH	7	5	0
15	MAHARASHTRA	4	0	1
16	MANIPUR	0	0	0
17	MEGHALAYA	0	0	0
18	MIZORAM	0	0	0
19	NAGALAND	0	0	0
20	ODISHA	0	2	0
21	PUNJAB	3	1	0
22	RAJASTHAN	2	4	0
23	SIKKIM	0	0	0
24	TAMIL NADU	3	4	0
25	TRIPURA	1	0	0
26	UTTAR PRADESH	25	14	0
27	UTTARAKHAND	1	0	0
28	WEST BENGAL	2	6	0
	TOTAL (STATES)	**86**	**58**	**1**
29	A & N ISLANDS	0	0	0
30	CHANDIGARH	2	0	0
31	D & N HAVELI	0	0	0
32	DAMAN & DIU	0	0	0
33	DELHI	9	3	0
34	LAKSHADWEEP	0	0	0
35	PUDUCHERRY	0	0	0
	TOTAL (UTs)	**11**	**3**	**0**
	TOTAL (ALL-INDIA)	**97**	**61**	**1**

Table – 7.3

Details of Death Sentence during 2013

Sl. No.	State/UT	Number of prisoners awarded Capital Punishment during the year	Number of prisoners whose sentence Commuted to Life Imprisonment during the year	Number of prisoners Executed during the year
(1)	(2)	(3)	(4)	(5)
1	ANDHRA PRADESH	0	0	0
2	ARUNACHAL PRADESH	0	0	0
3	ASSAM	2	5	0
4	BIHAR	19	22	0
5	CHHATTISGARH	11	3	0
6	GOA	0	0	0
7	GUJARAT	2	1	0
8	HARYANA	7	2	0
9	HIMACHAL PRADESH	1	0	0
10	JAMMU & KASHMIR	2	4	0
11	JHARKHAND	9	1	0
12	KARNATAKA	4	21	0
13	KERALA	1	0	0
14	MADHYA PRADESH	22	1	0
15	MAHARASHTRA	13	16	0
16	MANIPUR	0	0	0
17	MEGHALAYA	0	0	0
18	MIZORAM	0	0	0
19	NAGALAND	0	0	0
20	ODISHA	0	0	0
21	PUNJAB	0	11	0
22	RAJASTHAN	3	2	0
23	SIKKIM	0	0	0
24	TAMIL NADU	1	2	0
25	TRIPURA	1	1	0
26	UTTAR PRADESH	11	14	0
27	UTTARAKHAND	1	0	0
28	WEST BENGAL	3	2	0
	TOTAL (STATES)	**113**	**108**	**0**
29	A & N ISLANDS	1	0	0
30	CHANDIGARH	0	2	0
31	D & N HAVELI	0	0	0
32	DAMAN & DIU	0	0	0
33	DELHI	11	5	1
34	LAKSHADWEEP	0	0	0
35	PUDUCHERRY	0	0	0
	TOTAL (UTs)	**12**	**7**	**1**
	TOTAL (ALL-INDIA)	**125**	**115**	**1**

The National Campaign for Abolition of Death Penalty in India - a programme of the Asian Centre for Human Rights (ACHR) supported by the European Commission under the European Instrument for Democracy and Human Rights (EIDHR) - conducts research, analysis and advocacy on issues relating to death penalty with the aim for its eventual abolition. The National Campaign for Abolition of Death Penalty in India has published the following reports relating to the issue of death penalty in India:

- India: No defence for retention of death penalty, November 2015
- Right to life: Death Penalty and the UN Human Rights Committee, October 2015
- The Status of Mercy Petitions in India, October 2015
- Our Standards and Their Standards: India Vs Abolitionist Countries, September 2015
- India: Not safe for extradition of those facing death sentences?, August 2015
- The State of the Right to Life in India, August 2015
- India: Death Without Legal Sanction, June 2015
- India: Death despite dissenting judgments, June 2015
- India: Death in the name of conscience, May 2015
- Arbitrary on all Counts: Consideration of mercy pleas by President of India, December 2014
- Death Reserved for the Poor, November 2014
- Death penalty through self incrimination in India, October 2014
- India: Death Without the Right to Appeal, September 2014
- Award of enhanced punishment of death by the Supreme Court, September 2014
- India: Death Penalty Has No Deterrence, August 2014
- India: Death Penalty Statistics, June 2014
- The Case for Abolition of Death Penalty in India - ACHR's submission to the Law Commission of India on Capital Punishment, May 2014
- Mercy on Trial in India, October 2013
- The State of Death Penalty in India 2013, February 2013

All the reports are available at http://www.achrweb.org/death_penalty.html

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