Committee for Public Policy and Governance

School of Law, Christ University

In Response To The Consultation Paper On Capital Punishment, 2014

Recommendations to the Law Commission of India

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INTRODUCTION

We the committee on Public Policy and Governance, School of Law Christ University Bangalore have the privilege of submitting our recommendations to the Law commission in response to the consultation paper regarding capital punishment issued by the Law commission in the month of May 2014. The committee on Public Policy and Governance is among the few student managed and faculty assisted committees, conducting extensive research on contemporary policy issues and providing a platform for the youth to improve the state of governance in the country. We have previously submitted recommendations to the Parliamentary Standing Committee on the Judicial Appointment Commission, Bill 2012 and Biotechnology Regulatory Authority of India Bill, 2013. We through this recommendation wish to put forth our suggestions on improving the existing framework of capital punishment.

The recommendations are in conformity with the issues raised in the consultation paper. They have been broadly divided into four segments each addressing an area of capital punishment.

1. **Guidelines on Mercy petitions in reference to recent judicial pronouncements**: The mercy petitions are today subject of political decisions and have been used by the executive and legislature as a medium to influence vote banks. This has resulted in delaying the decision on the status of such petitions and hence has forced the judiciary to intervene and remit convictions amounting to death penalty to life imprisonment. The committee through these recommendations have suggested guidelines such as extension of right to information to secretarial decisions, bar on decisions on mercy petitions prior to the elections. These may be adopted by the executive in making such decisions transparent and be subjected to public scrutiny. We have also suggested means of making such decisions apolitical. The recent judicial decisions have also criticised the delay in deciding such petitions and have recommended feasible methods to overcome this roadblock in the framework of capital punishment

2. **Judge centric and rarest of rare are critical factors affecting capital punishment**: It is our opinion that the framework for invoking the death penalty by way of judicial decisions as laid down in the Bachan Singh case

Provides fn efficient guide in the interpretation on capital punishment crimes. The guideline being the rarest of the rare, if interpreted verbatim, leaves limited scope for arbitrary interpretations as prevailing social circumstances serve as a tool for determining whether the mitigating factors do necessarily deserve the death penalty. However, the problem arises when judges themselves are influenced by strong public opinion in making their decisions thus deeming them Judge Centric. The committee would like the recommend statutory enforcement of certain suggestions which we feel are imperative in administering capital sentencing.

3. **Extending death penalty to offence under section 376 of the Criminal Law Amendment Act:** The committee through the recommendations have made a socio-legal analysis of the deterrence death penalty would act to prevent the occurrence of rape. The analyses have taken into considerations foreign precedents, amnesty reports and opinions of jurists to arrive at suggestions which may be adopted by the commission and further by the government. The Verma Committee report which first suggested the following alteration to the law have taken the views of public and civil society in this regard. However the committee is of the view that extension of death penalty under 376E does not necessary deter the cause it is meant to serve.

4. **Alternate methods for modes of execution**: The issue of modes of execution has been subject much public debate nationally and internationally, with the United Nations issuing suggestions for the reformation of the same. The committee has considered medical reports and opinions and foreign judicial pronouncements to arrive at a reasoned conclusion on an appropriate method which may be adopted for execution . Through these references the committee recommends lethal injection to be most dignified and humane mode of execution over hanging.

We hope the recommendations are of assistance to the law commission and we would glad if our suggestions make an impact on improving the framework of capital punishment in India.

Thank you.

Bangalore:
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Committee on Public Policy and Governance
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1. GUIDELINES FOR MERCY PETITIONS

1.1 ANALYSIS

The death penalty issue is dealt at two levels- the Judiciary and the Executive. A delay has been observed in making a final decision in several cases. The law today is such that for computing the time period of delay, a distinction has been made between the time taken in carrying out judicial and non-judicial proceedings, thereby, considering the latter as laid down in Triveniben v. State of Gujarat[1]. In case, the delay in non-judicial proceedings is seen to be arbitrary, inordinate, unexplained, it shall be inexcusable and would result in the commutation of death sentence into life imprisonment. The recent judgements given by the court such as Shatrugan Chauhan and Murugun case shows that this approach has been adopted.

Justice Holmes in W.I Buddle v. Vuco Perovich[2] and United States v. Benx[3] distinguished judicial power from executive power in the context of sentences and it was observed that shortening sentences by an act of clemency while exercising executive power may result in avoiding enforcement of the judgement as such but may not alter the judgement.The problem with such an approach though justified on grounds of humanity is that ineptitude and mercy plea decision delays are setting convicts free. The need of the hour is to regulate how the mercy petitions can be disposed expeditiously.

1.2 PROBLEMS WITH EXECUTIVE DESICIONS

Following past judgments, the SC once again in the landmark case of Shatrugan Chauhan refrained from specifying a specific or fixed time frame for consideration of mercy petitions by the President or Governors and left it open for Courts when approached by death row prisoners on ground of supervening events like inordinate, unexplained delay in considering mercy petitions to examine the factual situation before deciding on whether to consider commutation to life sentence.

Though the court gave a guideline fixing a time limit for the authorities to forward the necessary materials such as police records, judgment of the trial court, the High Court and the Supreme Court and all other connected documents to the Ministry of Home Affairs, no time

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[1] *Triveniben* vs. *State of Gujarat* (1988) 4 SCC 574

[2] 71 L ED 1161

[3] 75 Law Ed 364

limit has been fixed for the Ministry and the President itself to decide on the matter. The court held that even after sending the plea for mercy, if there is no response from the office of the President, it is the responsibility of the Ministry of Home Affairs to send periodical reminders and to provide required materials for early decision.

However, again such a procedure would not ensure speedy disposal. Thus, we recommend that a time limit should be fixed for the Ministry as well as the Home Ministry once they receive the information.

Earlier in the case of Sher Singh[4], it was held that a "*self-imposed rule should be followed by the executive authorities rigorously, that every such petition shall be disposed of within a period of three months from the date on which it is received*." After such a period, the convict under death sentence could file a case for commutation. With the passage of time, in reality it is seen that the Executive has taken more time to deliberate and decide. We think a time period of two years seems reasonable.

1.3 CURBING INEFFICIENCY IN MERCY PLEAS

We would like to recommend that the time limit to be fixed should not be one wherein once the period exhausts, it directly gets commuted to life imprisonment as seen in *T.V. Vatheeswaran* vs. *State of Tamil Nadu*[5]. We instead recommend that once the time period gets exhausted, the Executive should be answerable to a judiciary panel in order to create a system of checks. This also ensures that the future cases of those given the death penalty are disposed expeditiously and a situation for the courts to intervene and commute the sentence to life imprisonment doesn't arise. This procedure ensures that the Executive has the last word.

Also, after the lapse of the fixed period of two years, the Executive is merely answerable in terms of the progress of the case and need not necessarily make a definite decision. The idea is to do away with petitions being kept in the drawers of either the Ministry of Home Affairs or the President.

The Shatrugan Chauhan case clearly says that the mercy jurisdiction is not an act of grace or favour but a constitutional duty and responsibility to be discharged scrupulously in accordance with constitutional values. For the performance of such a duty, it is imperative that some guidelines are made.

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[4] *Sher Singh and Ors.* vs. *State of Punjab* (1983) 2 SCC 344

[5] (1983) 2 SCC 68

The supremacy of the executive in regard to mercy petitions must be accepted; however in the recent past there have been numerous instances of conflict between the judiciary and the executive which has portrayed a reasonably erroneous image of India's stand on Death penalty and mercy petitions. The Shanmugam and the Murugan cases showcase the delay in disposing a mercy petitions as a violation of fundamental rights. This judgement although criticized has caused a strong dent in the executive's primacy over mercy petitions. At this point it is apt to ask ourselves if the Executive must declare guidelines on the way it handles mercy petitions and if the immunity granted to the executive through the SR Bommai Case be subject to public scrutiny and hence lower the politicisation of such petitions.

The committee has compared law of pardons of various jurisdictions with that of India, to only reach a consensus on how democratic our process is. However the delays in disposing such petitions do not show the democratization in its true light. Thus committee proposes the following recommendations to strengthen the democratic values and make executive decisions more transparent:

1.3.1 RIGHT TO INFORMATION MUST BE EXTENDED TO EXECUTIVE DECISIONS PERTAINING TO MERCY PETITIONS:

In Maru Ram v. Union of India[6] Justice Krishn Aiyer speaking for the constitution bench held although the power under article 72 and 161 of the constitution of India are very wide it cannot "run riot" and no legal power can run unruly and it must kept sensibly to a steady course all public power including constitutional power shall never be exercised arbitrarily or mala fide and ordinarily, guidelines for fair and equal executions are guarantors of the valid play of Power. The petitions once received by the Home ministry are often under the considerations of the secretary to the Ministry of Home Affairs who advices the merits of the petition to the Minister. The ministry on advice of the secretary places the petition before the cabinet and in a closed room discussion arrives at a decision on the petition. The proposal of extending Right to information is only on the advice the secretary tenders to the minister and not of the rationale behind the cabinet decision. The committee does acknowledge the oath of secrecy of the ministers and hence would advice the Law commission only to consider the extension of RTI to the boundary of secretarial

[6] 1990 AIR 1336

decisions. This would make the decisions transparent and allow the judiciary to understand the executive's perception on its decisions and would also be an attempt to resolve the constant conflict between the two organs

1.3.2 NO DECISIONS ON MERCY PETITIONS THREE MONTHS PRIOR TO LEGISLATIVE ELECTIONS:

The very finality of the death penalty would seem to necessitate the possibility of mercy. Mercy, which encompasses the discretion of decision-makers at every stage of the death penalty process, has been eroded by politics and an increasingly bureaucratized capital punishment system. Mercy's demise can be seen particularly in the actions of governors and president, who have been discouraged from exercising merciful discretion due to erroneous advice tendered by council of ministers. Political considerations have figured prominently in the unwillingness of many governors to be merciful. The popularity of the death penalty suggests to these officials that the safest course of action is to avoid the exercise of their clemency powers.27 Prisoners scheduled to be executed shortly before election day are particularly vulnerable to denials of clemency

1.4 CONCLUSION

There is a requirement to fix the time period to be taken by the executive to dispose the mercy petitions of the accused. There are plethora of cases still pending before the President and it is seldom seen that the petitions are decided based on social and economic bias and pressure put by internal and external parties and organizations.The success of the mercy petitions of condemned prisoners is dependenton the information given to the President and whether validity of rejection can be established by the Government in the courts to explain the concealment of any mitigating factor. Thus, delay maybe caused by the executive due to political powerplay and it is imperative that the law ensures that condemned prisonders under death sentence don't suffer and such a circumstance be taken intoconsideration before a final verdict is passed.

2. RAREST OF RARE DOCTRINE AND JUDGE CENTRIC DESICIONS

2.1 ANALYSIS

When discussing any topic concerning capital punishment, it is important firstly to remind ourselves of the all important principle which decided the constitutionality of the death penalty, laid down in the case of Bachan Singh v. State of Punjab. Justice Bhagwati explicitly states that a man's life can only be taken in the '*rarest of rare'* cases, where any other alternative remedy is unquestionably foreclosed. It also highlighted the "balance sheet of aggravating and mitigating circumstances" that would qualify in determining as to whether the case would fall under the rarest of the rarest category.

The broad spectrum of what actually constitutes the 'rarest of rare' was charted in the case of *Machhi Singh & Ors. V. State of Punjab*[7] which provided for five categories of murder.

In recent times, after the decree passed in the Maachi Singh case, the judiciary has witnessed approximately two hundred and thirty six cases[8] where courts at all levels have awarded the death penalty for crimes that could have been satisfied with life imprisonment and rehabilitation instead of a punishment as harsh as the death penalty. This has been a fault of the judiciary in cases subsequent to ignore the principle laid down in the Bachan Singh case and instead follow the judicial guidelines of the Maachi Singh case widened the mitigating factors under which the death penalty may be awarded.

Maachi Singh vs Union of India which was decided in 1983 and laid down five principles prescribed to work as guidelines which enhanced the capability of judges in employing the death penalty[9]. These guidelines were initially conceptualized to restrict the use of capital sentencing but instead interpreted freely by judges in cases where the facts although gruesome in nature did not necessarily invoke the death penalty as they were not as laid down in Bachan Singh,the rarest of the rare.

2.2 PROBLEMS WITH INTERPRETATION

There have been discrepancies in using this 'rarest of rare' doctrine which is deemed to be 'judge centric' most times. For example, in the case of *Dhananjoy Chatterjee v. State of*

7 Machhi Singh & Ors. V. State of Punjab, (1983)3SCC470

8 http://www.amnesty.org/en/death-penalty/numbers

9 1983 AIR 957, 1983 SCR (3) 413

Bengal[10], the Supreme Court awarded death penalty to a security guard who raped and killed a teenage girl. But however, in the case of *State of Punjab v. Harchet Singh*[11], which was decided in the same year, death was not awarded because the crime was committed out of lust and not enmity. In *Swamy Shraddananda (2)*[12] *v. State of Karnataka*, the Court observed that there is a want for uniformity in the sentencing process to avoid marked imbalances in the results.[13]

We do believe that capital sentencing does carry the risk of being judge centric but it's interpretation must not be blinded by the veils of ignorance. In *Ramnaresh & Ors v. State of Chhattisgarh*[14] case, it was held that "it is imperative for the court to examine each case on its own facts, in light if its enunciated principles".

As in any case not restricting ourselves to cases of capital punishment, the judges of the judiciary have been appointed and authorized, by the executive of the state, solely for their expertise in deciding cases rationally and after careful scrutiny of its proceedings.[15], it is in the end, the discretion of the judge using his rationality and sense of logic reviewing the facts to decide whether an accused individual is guilty or not. ***The introduction of any other system for instance a council to decided whether a judgment upholds the spirit of the law would be extremely time consuming and uneconomical.***

In cases of death penalty, to compensate for any possible error, the Criminal Code of Procedure under chapter 29 provides for an efficient redressal system where the accused

10 Dhananjoy Chatterjee v. State of Bengal,

11 State of Punjab v. Harchet Singh (1994)3 Cr.L.J (SC)1529

12 (2008) 13 SCC 767

13 Para *52*. The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system. Thus the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied."

Swamy Shraddananda (2) v. State of Karnataka, Criminal Appeal No.454 OF 2006, http://indiankanoon.org/doc/989335/

14 Ramnaresh & Ors v. State of Chhattisgarh, AIR 2012 SC 1357.

15 Article 124 of Indian Constitution

may appeal the verdict of the court challenging its jurisdiction in capital sentencing.[16]

These appeals are provided from the sentencing given at the lowest level of a tribunal to the highest level of the Supreme court to allow minimal arbitrariness in judicial decisions.

2.3 ALTERNATIVE FRAMEWORK FOR CAPITAL SENTENCING

In order to address the discrepancies and the ambiguity involved in the concept of 'rarest of rare' and to bring forth a standardized form of sentencing, a few recommendations are advocated and the same are listed underneath:

2.3.1 ESTIMATION OF AGGRAVATING AND MITIGATING FACTORS

To ameliorate the problem of discretional hearing, the death penalty statutes can articulate the computation of "aggravating factors" and the "mitigating factors" with respect to a particular case at hand in order to distribute the death penalty in a non-random fashion. The principles were propounded in *Ramnaresh & Ors. V. State of Chhatisgarh*[17]. Aggravating factors are those issues that work against the accused and increase or exemplify the crime committed. For example a murder committed during the course of rape; repeated offences of rape etc. can be viewed as aggravating factors. In order to balance this branch, the judges must also look into the much needed mitigating factors of the accused involved in the crime. Mitigating factors can also be related to the persona of the victim. Presenting of mitigating evidence is essential to ensure that a sentence is "a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion."[18] This determination of aggravating and mitigating factors must be made in a rational manner where less of subjective but more of reasoned deductions are arrived at. In a case where there exist only aggravating factors and no mitigating factors, the court can reason out the application of death penalty provided all other alternative remedies are unquestionably foreclosed. But however, it is to be recommended here that even in the presence of a single mitigating factor pertaining to the accused, the case has to be re-tried at the very trial court level and fresh amassing of evidence and deductions have to be arrived at.

2.3.2. PRE-SENTENCE HEARING

16 Chapter 29 of Crpc. Sections 372-394

17 Ramnaresh & Ors v. State of Chhattisgarh, AIR 2012 SC 1357.

18 The Rhetoric of Difference and the Legitimacy of Capital Punishment, Harvard Law Review, Vol.114, No.5 (March 2001), pp 1599- 1622

the effect of passage of time on the accused since the sentence was first passed by the trial court and the actual carrying out of the sentence is marred with constant litigation and appeals that often prolong the process (at the same time ensuring that the court's decision to give death penalty to the accused is foolproof). It is important to adopt any safeguards that prove vehemently that the accused is beyond reform and regulation. A pre-sentence hearing can be adopted even at the appellate stage, where it is specifically proved that the appellate is beyond reform.[19] Such a pre-sentence hearing right before the actual administration of sentence but much after the initial judicial pronouncement of the sentence by the trial court ensures and accommodates for any change in circumstances in the meantime. any positive aberrations or reflections that occur in the accused person's life that was probably not present before can be addressed to and considered as a fresh new mitigating factor in a pre-sentence hearing and can be dealt with then. The procedure of pre-sentence hearing must be enabled to alter, deduct, amend or abolish the sentence of capital punishment that was rendered on the accused. Thus, such a creation of an elaborate, exhaustive and effective body of criminal procedural law specific to death penalty creates a network of checks and balances that makes the execution of an innocent person almost impossible.

2.3.3. CONSTITUTIONAL BENCHES TO PRESIDE OVER CAPITAL PUNISHMENT CASES

Crimes which have the possibility of capital punishment must only be presided over by a minimum bench of five judges who must act like a jury and discuss whether the nature of the crime deserves capital sentencing while relying on the rarest of the rare principle. Order 35 Rule 1(1) requires every petition under Article 32 of the Constitution to be heard by a Division Court of not less than five Judges and if such petition does not raise any substantial question of law as to the interpretation of the Constitution, it may be heard and decided by a Division Court of less than five Judges.[20]

Involving a constitutional bench to decide such matters would be beneficial as-

i. The overall image of the court as a guardian institution is fostered by its panel structure. The court is widely perceived as a group of periodically revolving and mostly

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[20] Competence of Two-Judge Benches of The Supreme Court to Refer Cases to Larger Benches, By Dr. R. Prakash & dagger (2004) 6 SCC (Jour) 75, http://www.supremecourtcases.com/index2.php?option=com_content&itemid=1&do_pdf=1&id=499.

apolitical judicial experts that provide a backstop for governance failures committed by the other branches of government.

ii. Important questions of law are to be decided in the presence of more judges in order to increase legitimacy and standing of the judgement. Having the Supreme Court, as the apex court, sit en banc (have one bench only) will ensure that determinations are final and authoritative. This reduces scope for appeal to higher benches in the same court, thereby reducing the multiplicity of proceedings too.

iii. The court's controlled pluralism can be seen as a tool, employed consciously or not, to keep the law and the court open to different social forces with divergent views.[21] If the case is able to stand the test of these divergent views and yet yield a decision conferring death penalty to the accused then it proves that all/most members of the bench are convinced beyond reasonable doubt about the accused's culpability. This also reduces the scope for personal views of a single or two judges to decide the question of life and death of a man.

2.3.4. STANDARD OF PROOF

The committee recommends that the standard of proof for all sentences regarding capital punishment is that ***ALL members of the Constitutional bench must be convinced beyond reasonable doubt that the accused deserves the punishment. A single dissent will result in the sentence being reduced to life imprisonment. This would reduce the scope for a faulty conviction and also increase the standards in determining the highest punishment of our land.*** Although it is already a principle of custom not to award the death penalty if one of the judges on the bench does not agree with the sentence of capital punishment[22], courts in the past have ignored this principle per incuriam. For instance in the case of Krishna Mochi vs Union of India where two judges of the High Court did not agree with sentencing the accused to death, the sentence was still upheld.[23]

2.3.5. CONDUCTING DETAILED RESEARCH ON TRENDS OF ADMINISTERING DEATH PENALTY

Justice Bhagwati in his dissenting opinion in Bacchan Singh held that "death sentence has certain class complexion or class bias in as much as it is largely the poor and downtrodden who become victims of this extreme penalty. We would hardly find a rich or

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21 The Indian Supreme Court and its benches**,** Nick Robinson, http://india-seminar.com/2013/642/642_nick_robinson.htm.

22 1996 AIR 787, 1996 SCC (2) 175

23 *AIR* 2003 SC 809

affluent person going to the gallows". The question asked of the Home Ministry in 2005 by President Kalam – why all those on death row were the poorest of the poor, remains well known but officially unacknowledged.[24] [25] The absence of detailed studies that track discrimination within the criminal justice system more generally and the implementation of the death penalty more specifically, calls for a detailed analysis on trends on administering death penalty to take place.

It is apparent that the death penalty, as it is used now, is discriminatory. It strikes mostly against the disadvantaged sections of society, showing its arbitrary and capricious nature - thus rendering it unconstitutional.[26] It is almost impossible to analyse the impact of the application of the death penalty on members of particular religious or caste groups through a study of the judgments as ***the judicial practice in India avoids references to caste, community, religion and other socio-economic factors relevant to the victim or the accused, unless seen to be of direct relevance to the adjudication of the case.***

Hence, we strongly recommend that the Law Commission of India undertake this empirical research and ascertain as to whether capital sentences have an undertone of geographical, racial or caste-based or gender discrimination. The discoveries of this empirical study can then be used to place more safeguards to protect those groups from discriminatory sentences.

2.3.6. MANDATORY DEATH SENTENCING HAS TO BE REMOVED COMPLETELY

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[27], paragraph 1, of the International Covenant On Civil and Political Rights, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence."

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24 Why only poor on death row?' The Times of India, 18th October 2005.

25 Why only poor on death row?' The Times of India, 18th October 2005.

26 Death Penalty in India: "One hardly finds a rich or affluent person going to the gallows", http://www.amnesty.org/en/news/death-penalty-india-one-hardly-finds-rich-or-affluent-person-going- gallows- 2013-04-17, 17 April 2013

27 Article 6. 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. http://www.refworld.org/pdfid/3ae6b3aa0.pdf.

Mandatory death sentences are currently prescribed in India in three 'special' laws: the Arms

Act 1959; The Narcotic Drugs and Psychotropic Substances Act 1985; and The Scheduled Castes And Scheduled Tribes (Prevention Of Atrocities) Act 1989. Previously, mandatory death sentences were also prescribed in Section 303 of the Indian Penal Code, which was later declared unconstitutional.[28]

We make a two fold recommendation:

a. Provide for alternative punishment for the mandatory death penalty provisions prescribed in the above mentioned acts.

b. Delete Section 303 of the IPC in order to ensure there is no scope of error. An Indian Penal Code Amendment Bill was drafted to this effect in 1972 which would have deleted this provision, but it was never passed.

In 2005 a trial judge in *Saibanna V. State Of Karnataka* ((2005) 4 SCC 165) convicted a person under section 303 before the defence and the court realized during sentencing that the provision had been declared unconstitutional more than two decades earlier. Deleting this provision will ensure that there is no scope for error in future.

2.4 CONCLUSION

Statutory implementation for guidelines on the rarest of the rare principle and the unanimity of opinion of judges for cases of such nature would enhance the administration of capital sentencing making it less arbitrary and more efficient as it would not only be the discretion of one judge as to what he considers rare but the rationality of all in deciding the punishment. Biases, partiality and the influences of a trial by the media would be removed by making statutory legislation and adopting this system of awarding the death penalty. Rarity is a concept which cannot be quantified which is why the opinions of each judge would differ in considering what is rare and what is common.

3 EXTENSION OF DEATH PENALTY FOR OFFENCES UNDER SEC.376E OF CRIMINAL LAW AMENDMENT ACT:

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[28] 1983 AIR 473, 1983 SCR (2) 690

3.1) UNDERSTANDING THE GRAVITY OF OFFENCES UNDER SEC.376E

The Amendment increased sentences for the rapists, which could go as far as a death sentence in the case of repeated rape offences and rape inducing coma or death. Whether this is a merit or a demerit is yet to be realized. The victim is unlikely to report the case considering it would cause much pain to the victim and family.

The rationale underlying this proposition appears to be that being raped is synonymous with being killed, and the life of a woman who has been raped has no value.

"The seriousness of rape as a crime cannot be discounted. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the "ultimate violation of self." It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist.

Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is public injury as well. Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape, by definition, does not include death."[29]

Rape does not necessarily destroy a person, and a person's value is not affected by their having been raped unless, of course, they are only valued for not having been involved in socially-unsanctioned sexual activity, whether or not that activity has occurred with their consent.

Life is over for the victim of the murderer; for the rape victim, life may not be nearly as happy as it was, but it is not over, and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such, does not take human life.[30]

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[29] Coker v. Georgia - 433 U.S. 584 (1977)

[30] *Gregg v. Georgia*, 428 U.S. at 428 U. S. 187

Prior convictions, even of rape, do not change the fact that the instant crime being punished is a rape not involving the taking of life.[31]

Limiting the ability of rapists to rape requires limiting their access to potential victims, not killing them.

3.2) IS DEATH PENALTY JUSTIFIED FOR OFFENCE UNDER SEC 376E?

"The question of whether the death penalty is an appropriate punishment for rape is surely an open one. It is arguable that many prospective rapists would be deterred by the possibility that they could suffer death for their offense; it is also arguable that the death penalty would have only minimal deterrent effect.

It may well be that rape victims would become more willing to report the crime and aid in the apprehension of the criminals if they knew that community disapproval of rapists was sufficiently strong to inflict the extreme penalty; or perhaps they would be reluctant to cooperate in the prosecution of rapists if they knew that a conviction might result in the imposition of the death penalty.

Quite possibly, the occasional well publicized execution of egregious rapists may cause citizens to feel greater security in their daily lives; or, on the contrary, it may be that members of a civilized community will suffer the pangs of a heavy conscience because such punishment will be perceived as excessive. We cannot know which among this range of possibilities is correct."[32]

"In a period where the frequency of [rape] is increasing alarmingly, it is indeed a grave event for the Court to take from the States whatever deterrent and retributive weight the death penalty retains."[33]

Consistent with evolving standards of decency and the teachings of our precedents we conclude that, in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murders on the one hand and non-homicide crimes against individual persons, like rape, on the other. The latter crimes may be devastating in their harm, as here, but "in terms of moral depravity and of the injury to the person and to the public, they cannot be compared to murder in their "severity and irrevocability".

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[31] Coker v. Georgia - 433 U.S. 584 (1977)

[32] *Furman v. Georgia*

[33] *Furman v. Georgia*

Although capital punishment does bring retribution, and the legislature here has chosen to use it for this end, its judgment must be weighed, in deciding the constitutional question, against the special risks of unreliable testimony with respect to this crime. The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application.[34]

"In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense. Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim.

Those who believe that deterrence justifies the execution of certain offenders bear the burden of proving that the death penalty is a deterrent. The overwhelming conclusion from years of deterrence studies is that the death penalty is, at best, no more of a deterrent than a sentence of life in prison. The Ehrlich studies have been widely discredited.

In fact, some criminologists, such as William Bowers of Northeastern University, maintain that the death penalty has the opposite effect: that is, society is brutalized by the use of the death penalty, and this increases the likelihood of more murder. Even most supporters of the death penalty now place little or no weight on deterrence as a serious justification for its continued use."[35]

The death penalty is not a deterrent because most people who commit murders either do not expect to be caught or do not carefully weigh the differences between a possible execution and life in prison before they act. Frequently, murders are committed in moments of passion or anger, or by criminals who are substance abusers and acted impulsively.

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[34] Coker v. Georgia - 433 U.S. 584 (1977)

[35] The Death Penalty: No Evidence for Deterrence, John J. Donohue and Justin Wolfers.

Once in prison, those serving life sentences often settle into a routine and are less of a threat to commit violence than other prisoners. Moreover, most states now have a sentence of life without parole. Prisoners who are given this sentence will never be released. Thus, the safety of society can be assured without using the death penalty."[36].

The penalty for committing a capital murder (if one is caught) is already extraordinarily high—being locked in a cage for the rest of one's life without possibility of parole. So what is the marginal deterrence of an infrequently administered additional sanction of death, many years later? Indeed, executions are so rare and appeals so lengthy that it is not even clear that being sentenced to death reduces the life expectancy of a criminal.

"The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." Unless the death penalty, measurably contributes to one or both of these goals, it "is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment. We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken. Instead, it seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation."[37]

Considering the above arguments regarding the highly improbable deterrence value of death penalty; regarding the same being a punishment of highest degree with an element of life itself involved in it; the irrevocability nature of the punishment, it is suggested that concentration must be more on limiting such offences. That imprisonments for life without an opportunity for flee should be extended for those who commit such offences- both for the second time and which cause the victim to into a vegetative state and even death.

4. MODE OF EXECUTION

Once the debate on the legality of death penalty is done the next most debatable topic is the method of executing the guilty. The committee has made a detailed study on two major forms of execution, Lethal Injection and Hanging. It has looked at international practices and viewed medical reports to arrive at a suitable suggestion.

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36 http://deathpenaltycurriculum.org/ Last visited on 21st June 2014

37 *Fisher v. United States*

4.1 LETHAL INJECTION

The Royal Commission which was relied on in *Deena vs. Union of India* had recommend that, in the 'present circumstances', lethal injection should be substituted for hanging since they were not satisfied that executions carried out by the administration of lethal injections would bring about death more quickly, painlessly and decently in all cases. The Commission, however, recommended, unanimously and emphatically, that the question should be periodically examined, especially in the light of the progress made in the science of anaesthetics. This was the opinion in the year 1983. Since then a lot of progress has been made in the science of anaesthetics and if one notices the 187th Law Commission report and Justice Bhagwati's judgement in the *Bachan singh* case he can see that the judiciary is slowly changing its stance with regard to hanging being considered as the most humane way.

4.1.1 PROCEDURE FOR EXECUTION THROUGH LETHAL INJECTION

When the method of lethal injection is used, the condemned person is usually bound to a gurney and a member of the execution team positions several heart monitors on this skin. Two needles (one is a back-up) are then inserted into functional veins, usually in the prisoners' arms. Long tubes connect the needle through a hole in a cement block wall to several intravenous drips. The first is a harmless saline solution that is started immediately. Then, at the warden's signal, a curtain is raised exposing the inmate to the witnesses in an adjoining room. Then, the inmate is injected with sodium thiopental - an anesthetic, which puts the inmate to sleep. Next flows pavulon or pancuronium bromide, which paralyzes the entire muscle system and stops the inmate's breathing. Finally, the flow of potassium chloride stops the heart. Death results from anesthetic overdose and respiratory and cardiac arrest while the condemned person is unconscious. Medical ethics preclude doctors from participating in executions. However, a doctor will certify the prisoner is dead or not.

4.2 HANGING

The Royal Commission on Capital Punishment in 1949-53 concluded that hanging is the most humane way of executing a convict. In Japan in the case of *Ichikawa v. Japan* the Japanese Supreme Court had held that hanging by the neck does not constitute a "cruel punishment". But as time has passed the societies definition of what constitutes 'humane' has changed. There are cases where death doesn't occur.

4.2.2 PROCEDURAL FLAWS

In cases where the prisoner has strong neck muscles, is very light, if the 'drop' is too short, or the noose has been wrongly positioned, the fracture-dislocation is not rapid and death results from slow asphyxiation. If this occurs the face becomes puffy, the tongue protrudes, the eyes pop, the body defecates, and violent movements of the limbs occur. These observations were made by Justice Bhagwati in the case of *Bachan Singh vs. State of Punjab.* He concluded that hanging by the neck is *"undoubtedly accompanied by intense physical torture and pain."*

These observations of Justice Bhagwati are clear in light of the fact that most of the developed as well as developing countries have replaced the mode of execution by hanging by the modes of intravenous lethal injection or by shooting. *The description of these methods of executions proves that the death penalty by hanging involves immense pain and suffering.* It is with these views and the observations made in relation to the various other modes of execution that the lethal injection becomes acceptable as the most humane method of execution of the death sentence. This mode involves less pain and suffering to the convict undergoing the death sentence

4.3 RECOMMENDATIONS

4.3.3 REASONS FOR ALTERNATE METHOD

Death by hanging does not satisfy any of the criteria laid down by the apex court or the general view taken by the judiciary and the international community. Yet it continues to be the only mode of execution in the country, apart from death by shooting as under the Army, Navy and Military Acts.In 1995, the Supreme Court of India struck down a provision in the Punjab and Haryana Prison Manual that stated that the body of the person executed should be kept hanging for half-an-hour. *The apex court held that a dead body too should be treated with dignity.*[38]

There have been several cases reported where hanging has not immediately resulted in a broken neck, and the convict is left to slowly strangle to death. In cases where the neck is in fact broken, the rope often tears large portions of the convict's flesh and muscle from the side of the face where the knot is. *In many cases, the convict ends up urinating and defecating on himself before he actually dies. The prisoner remains hanging from the end of the rope for*

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38 State of Orissa v. Brudaban Sharma (1995) 3 SCC 248

8 to 14 minutes before a doctor climbs up a small ladder, listens for a heartbeat with a stethoscope, and pronounces him dead. Given these facts, it is clear that hanging is neither quick and simple nor a decent method of execution as it involves mutilation of the body and, in some cases, prolonged suffering and torture before death.

4.3.4 ADOPTING LETHAL INJECTION INSTEAD OF HANGING

In the case of *Baze vs. Rees*[39] the Supreme Court of the United States upheld the constitutional validity of the lethal injection. The judgment elaborates the procedure followed by the Kentucky correctional department; *"First, sodium thiopental, induces unconsciousness when given in the specified amounts and thereby ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs, pancuronium bromide and potassium chloride. Among other things,*

Kentucky's lethal injection protocol reserves to qualified personnel having at least one year's professional experience the responsibility for inserting the intravenous (IV) catheters into the prisoner, leaving it to others to mix the drugs and load them into syringes; specifies that the warden and deputy warden will remain in the execution chamber to observe the prisoner and watch for any IV problems while the execution team administers the drugs from another room; and mandates that if, as determined by the warden and deputy, the prisoner is not unconscious within 60 seconds after the sodium thiopental's delivery, a new dose will be given at a secondary injection site before the second and third drugs are administered.

4.4. CONCLUSION

"This procedure makes sure that a qualified medical professional is always present to oversee the execution which minimizes the risk of having a botched up execution. The judgment also noted that cases in which lethal injection has resulted in a painful death have happened mainly due to the wrong administration of the drugs, not because of medical fallibility of the procedure. He holds hanging has inhumane, since death by hanging is caused by strangulation and this causes immense pain to the criminal. The shift would uphold the ECOSOC principle of inflicting minimum pain while executing a criminal[40] One cannot deny the fact that all the modes of execution involve pain and suffering but of all the methods

[39] 553 U.S. 35 (2008)

[40] 1996/15. Safeguards guaranteeing protection of the rights of those facing the death penalty

available, lethal injection appears to be the quickest and least painful. ***Hence we would suggest that execution using lethal injection is far better than hanging.***

CONCLUDING REMARKS ON CAPITAL PUNISHMENT

The spirit with which the guidelines in Bachan Singh's case were laid down was to urge the judiciary to treat cases of this nature with immense subjectivity considering the impact that the punishment would have on the accused, taking away what is most important to him which is his life.[41] This is the main reason why no statutory regulations on the guidelines for imposing the death penalty can be made as it would only generalize crimes carrying the punishment of the death penalty contained in the CrPC and increase the scope within which the punishment can be awarded. ***However, enacting statutes forming a judicial bench specifically for the death penalty and laying down guidelines to ensure that the punishment cannot be pronounced without unanimity would greatly benefit the administration of capital sentencing.***

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[41] (1982) 3 SCC 24, 1983 1 SCR 145