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CHOICE BETWEEN 'DEATH' AND 'LIFE' FOR CONVICTS: SUPREME COURT OF INDIA'S VACILLATION *SANS* NORMS*

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Abstract

Death penalty is retained in the Indian legal system. The Indian Penal Code, 1860 and other few Acts do provide for death penalty. However, wherever death penalty is provided, life imprisonment, as an alternative, is also provided. The Code of Criminal Procedure, 1973 mandates that death penalty be inflicted for 'special reasons' to be recorded in the judgment. Hence, life imprisonment is the rule, and death sentence an exception. However, in the absence of any statutory or accepted judicial guidelines, the death sentence jurisprudence has become 'judge-centric' rather than 'principle-centric'. The paper delves into the death sentencing jurisprudence in India and pleads for principle-centric sentencing. It stresses for judicial objectivity and deliberates on a possible way out.

I Introduction

THE INDIAN Penal Code, 1860[1] (hereinafter IPC) drafted by Thomas Babington Macaulay and his colleagues[2] in the first Indian law commission still operates in India as the major substantive criminal law. Criminal law prohibits acts that are actually or potentially dangerous or harmful to certain identified social 'interests' or 'values'[3] that the state, in its wisdom, wants to preserve and protect. It puts these so-called social interests and values in well articulated definitional bounds and subjects perpetrators thereof to the stipulated (or range of) 'punishments'. Nevertheless, criminal law has to set a balance between the 'social interests' and the 'individual interests'. Legislature,

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1 Act 45 of 1860. It came into force on Jan. 2, 1862.

2 John Macpherson Macleod, George William Anderson and F Millett.

3 K I Vibhute, *PSA Pillai's Criminal Law* ch. 1: "Nature of crime" (Lexis Nexis, 2014).

while criminalising any human conduct, therefore, needs to follow certain fundamental values and principles and show respect to certain basic human rights and freedoms.[4]

IPC, like any other national criminal law, *inter alia*, defines various 'offences' and provides 'punishment' therefor. It has made certain thematic clusters of these offences and put them under different specific chapters.[5]

The IPC enumerates six forms of punishment that can be inflicted on offenders. They are: (i) death; (ii) imprisonment for life; (iii) simple imprisonment; (iv) rigorous imprisonment; (v) forfeiture of property; and (vi) fine.[6] A cursory glance at the IPC reveals that the punishment[7] provided for different offences is not uniform. The punishment stipulated for an offence, in essence, matches with the 'harm' it intends to prevent and the social value attached thereto. Some of the offences are subject to minimum punishment (custodial or pecuniary or both), whereby the court is mandated to award it once it finds the accused guilty of the offence; while others are made subject to a range of punishments by prescribing the minimum and maximum punishments and thereby conferring discretion on the court to 'fix' or 'quantify' punishment to match with the harm caused.

Some of the serious offences are subject to sentence of death or imprisonment for life, as an alternative thereto, and the court is empowered to opt for either of the sentences. For such offences, death penalty is the highest and the sentence of life imprisonment is the lowest in the prescribed penal range. But when a court is inclined to inflict death sentence, it is required to find 'special reasons' for doing so and record them in its judgment. However, there are no statutory guidelines in vogue for the courts to follow or look at.

This paper attempts to highlight some of the 'special reasons' often used by the Supreme Court of India for inflicting/not inflicting death penalty or commuting it to imprisonment for life and to possibly crystallise some 'norms' or 'guidelines' therefrom.

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4 Andrew Ashworth, *Principles of Criminal Law* ch. 3: "Principles and policies" (Oxford University Press, 2009).

5 Ch. I-IV deal with preliminary aspects; ch. VI to XV deal with public matters between individuals and the state; ch. XVI to XXII are primarily concerned with the offences committed by individuals against individuals or legal persons other than the state, and ch. XXIII with attempts.

6 IPC, s. 53.

7 They, depending upon the gravity of the offence and penal policy in vogue, are punished with from death to pecuniary fines.

II Sentence of death or imprisonment for life: Legislative framework

India is one of the few countries in the world that still retains death penalty in the penal statutes although there is not a single offence in the IPC that is subjected to mandatory death sentence.[8]

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8 IPC, s. 303 dealing with mandatory death sentence for murder committed by a life-convict has been declared unconstitutional by the Supreme Court as it violated the guarantee of equality assured in art 14 of the Constitution and also the right to life guaranteed in art. 21 of the Constitution. It reasoned that the said provision removes the scales of justice from the hands of the judge as soon he pronounces the accused guilty of the offence. It takes away the judicial discretion in awarding the lesser punishment, *i.e.* imprisonment for life (which is available to the courts under s. 302 of the IPC). The sentence of death provided under the provision, which is so final, so irrevocable and so irresistible, with no involvement of the judicial mind cannot be said to be fair, just and reasonable. It becomes arbitrary and oppressive, and hence, becomes void. See *Mithu* v. *State of Punjab*, AIR 1983 SC 473.

But see *Saibanna* v. *State of Karnataka* (2005) 4 SCC 165, wherein the accused, who was serving life imprisonment for killing his wife, when on parole, brutally assaulted and killed his second wife and minor daughter. He was charged under s. 303 IPC (even though it was declared unconstitutional and struck down by the Supreme Court in *Mithu*), but sentenced to death under s. 302 of the IPC, by treating the dual killings as rarest of the rare case. The high court confirmed the death sentence. The apex court, on appeal, affirmed it. The apex court reasoned that the appellant sentenced to life imprisonment is bound to spend his life in prison, unless the sentence is commuted or remitted and, therefore, second life imprisonment becomes meaningless. It, therefore, thought the appellant-convict deserved death sentence. The reasoning of the apex court, in effect, makes mandatory death sentence in terms of s. 303 of the IPC, which is already declared unconstitutional, relevant. However, subsequently, the Supreme Court in *Aloke Nath Dutta* v. *State of West Bengal* (2007) 12 SCC 230, doubted propriety of *Saibanna*. And in *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra* (2009) 6 SCC 498, it observed that *Saibanna* has not only effectively made death punishment mandatory for the category of offenders serving life sentence but was also inconsistent with *Mithu*.

However, s. 307(2) of the IPC, dealing with attempt to commit murder by a convict under sentence of life imprisonment, provides for death sentence if hurt is caused in attempting murder.

Interestingly, the mandatory death sentence provided in Narcotic Drugs and Psychotropic Substances Act, 1985, s. 31A for repeat offender is done away with in 2014 by the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2014, s. 15. However, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 under s. 3(2)(i) still retains the mandatory death sentence for giving false evidence against an innocent member of the scheduled castes or tribes in a capital offence and he, as consequence of the false testimony, is executed. The Arms Act, 1959, s. 27(3) provides for mandatory death sentence for a person who uses any prohibited arms or ammunition or does any act contrary to s. 7 thereof and such use or act results in the death of any other person. It is however, declared unconstitutional by the Supreme Court in *State of Punjab* v. *Dalbir Singh* (2012) 3 SCC 346, para 91. The Suppression of Unlawful Acts against Safety of Marine Navigation and Fixed Platforms on Continental Shelf Act, 2002, under s. 39(g)(i) also provides for mandatory death sentence. The Air Force Act, 1950, the Border Security Force Act, 1958, and the Geneva Conventions Act, 1960 also provide for mandatory death sentence.

There are 12 offences in the IPC which are made punishable by death or imprisonment for life, as an alternative thereto. They are: (i) criminal conspiracy to commit an offence punishable by death (section 120B); (ii) waging war against the Government of India or attempt or abetment thereof (section 121); (iii) abetment of mutiny, if mutiny is committed in consequence of the abetment (section 132); (iv) perjury resulting in the conviction (of a capital offence) and execution of an innocent person in consequence thereof (section 194, part 2); (v) threatening a person to give false evidence and an innocent person, as a consequence of such evidence, is convicted and sentenced to death or imprisonment for a period of more than 7 years (section 195A, part 2); (vi) committing murder (section 302); (vii) abetment of suicide by a minor or an insane or intoxicated person (section 305); (viii) attempted murder by a life convict, if hurt is caused (section 307); (ix) causing death or an act resulting in persistent vegetative state in the course of committing rape (section 376A); (x) repeat offender of committing rape or causing death in the course of rape or gang rape (section 376E); (xi) kidnapping for ransom (section 364A); and (xii) dacoity accompanied with murder (section 396).

These offences/provisions vest discretion in the courts to opt either of the two sentences, death or life imprisonment. The court is, however, required to record 'special reasons' for imposing death sentence, in preference to the sentence of life imprisonment, and to get it confirmed from the high court to which it is subordinate.

Section 354(3) of the Code of Criminal Procedure, 1973 (hereinafter CrPC), mandates a sentencing court to record 'special reasons' for its choice of death sentence. It reads:

> [W]hen 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.

A plain reading of the provision reveals that imprisonment for life, an alternative punishment to death sentence, is the rule and the sentence of death is an exception. A sentencing court is required to find 'special reasons' for awarding death sentence and has to record them in its judgment.

Significance of section 354(3) of the CrPC can be realised if one takes a pause to look into its corresponding provision in the pre-1973 CrPC, *i.e.,* section 367(5) of the CrPC, 1898. Section 367(5) of the old CrPC, prior to amendment brought therein in 1955, read as:

> [I]f 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.

It thus stipulated that the sentencing court was required to state the reasons for not awarding the death sentence. It was not required for the court to give reasons for awarding life imprisonment to the convict. Hence, unlike today, in case of capital offences, sentence of death was the norm and life imprisonment an exception. However, the sub-section was deleted in 1955 and the sentencing court, for capital offences, was allowed to pass, on facts of the case at hand, in its discretion, for reasons to be recorded, the sentence of death or life imprisonment. This, however, led to some difference of opinion whether in case of murder the normal punishment was death or imprisonment for life.[9]

Section 354(3) of the new CrPC thus exhibits a clear shift in the legislative stance from pro-death sentence to pro-life imprisonment. It reverses the legislative position prevalent under the old CrPC and requires the sentencing court to record 'special reasons' for awarding death sentence.

Further, the new CrPC mandates the sentencing court to submit the proceedings to the high court for confirmation of the death sentence and not to execute it unless it is confirmed by the high court.[10] The high court, in the confirmation proceedings, is empowered to undertake or direct the sessions court to carry further inquiry or take additional evidence on any point having bearing on the guilt or innocence of the convict sentenced to death.[11] The high court may confirm the death sentence or pass any other sentence warranted by law; annul the conviction and convict the accused of any offence of which the sessions court might have convicted him, order a new trial on the same or amended charges, or acquit him.[12] The order of confirmation of the sentence of death or imposition of any new sentence needs to be passed and signed by a bench of at least two judges of the high court.[13] In case of disagreement between

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9 Law Commission of India, 35th Report on Capital Punishment (December, 1967).

10 CrPC, s. 366(1). The high court is required to re-appraise and re-assess the facts in *toto*, examine the entire evidence on record, and to draw its own conclusions about the merits of the case and propriety of the death sentence awarded by the sentencing court. See *Kunal Majumdar* v. *State of Rajasthan* (2012) Cri LJ 4635 (SC); *Mohinder Singh* v. *State of Punjab* (2013) 3 SCC 294. The reference proceedings are in the nature of an extended trial and are original proceedings. See *Dilip Premnarayan Tiwari* v. *State of Maharashtra*, AIR 2010 SC 361.

11 CrPC, s. 367(1).

12 CrPC, s. 368.

13 CrPC, s. 369.

the two or if the judges on the bench (of more than two) are equally divided, the matter, along with the opinion of the judges, needs to be placed before another judge of the high court, and his order is to be followed.[14]

The IPC[15] and the CrPC[16] also authorise the 'appropriate government',[17] without the consent of the offender, to commute sentence of death to any other punishment provided under the IPC.[18]

The President of India and the State Governor are vested with the constitutional power to pardon or commute sentence, including death sentence, of any convict.[19] Inordinate and unjustified delay in disposal of mercy petition by the President/the

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14 CrPC, ss. 370 and 392.

15 IPC, s. 54 permits the 'appropriate government', without the consent of the offender, to commute the punishment for any other punishment provided under the Penal Code.

16 CrPC, s. 432 empowers the appropriate government , with or without conditions, to suspend the execution of any sentence of the sentenced person or remit the whole or a part of this sentence. While s. 433(a) authorises the appropriate government to, without the consent of the person sentenced, *inter alia*, commute a sentence of death, for any other punishment provided by the IPC; a sentence of life imprisonment, for imprisonment for any term not exceeding 14 years or for fine. However, s. 433A of the CrPC states that a person sentenced to life imprisonment for committing an offence for which death is one of the punishments or sentenced to death but it has been commuted, under s. 433, to imprisonment for life cannot be released from prison unless he had served at least 14 years of imprisonment.

17 The term 'appropriate government' is defined in IPC, s. 55A and CrPC, s. 432(7). Both the definitions, in essence, are almost identical. 'Appropriate government' means: (a) in cases where the sentence is for the offence against any law relating to a matter to which the executive power of the Union extends, the Central Government, and (b) in cases where the sentence is for the offence against any law relating to a matter to which the executive power of the state extends, the government of the state within which the offender is sentenced.

However, the power conferred on the state government to commute death sentence under s. 432 and s. 433(a) of CrPC, may also be exercised by the Central Government. See CrPC, s. 434.

18 For finer points of law on this aspect see *Union of India* v. *V Sriharan* (2014) 11 SCC 1.

19 The Constitution of India, arts. 72 and 161. The clemency power conferred on the President of India and the State Governor under the Constitution is absolute and it cannot be curtailed by any statutory provisions of the CrPC (*i.e.,* ss. 432, 433, 433A), the Prison Acts or rules framed thereunder. The President/the Governor is, however, obliged to act on advice of the respective council of ministers and to exercise his pardon power reasonably. See *Maru Ram* v. *Union of India* (1981) 1 SCC 107; *State (NCT of Delhi)* v. *Prem Raj* (2003) 7 SCC 121; *Ramraj @ Nabhoo @ Bhinu* v. *State of Chhattisgarh*, AIR 2010 SC 420; *Shatrughan Chauhan* v. *Union of India* (2014) 3 SCC 1.

The manner of the exercise of the power and the order rejecting mercy petition of a convict can be challenged, *inter alia*, on the ground that the President/Governor has not applied his mind or not considered all the relevant materials or considered irrelevant materials, influenced by some political or extraneous considerations, or exercised his powers arbitrarily. However, there exists limited judicial review of the exercise of the constitutional power. See *Epuru Sudhakar*

State Governor and the consequential delay in execution of death sentence becomes a relevant factor in commuting death sentence to life imprisonment.[20] Delayed execution of death sentence is presumed to be dehumanising in nature.[21] Delay in execution of death sentence, not caused at the instance of the convict himself, renders the process of execution of death sentence arbitrary, whimsical, capacious and, therefore, becomes inexecutable.[22]

Imprisonment for life means a sentence of imprisonment running throughout the remaining period of a convict's natural life, unless it is remitted or commuted.[23] It

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v. *Government of Andhra Pradesh* (2006) 8 SCC 161; *Narayan Dutt* v. *State of Punjab* (2011) 4 SCC 353. Judicial interference becomes necessary when the exercise of the clemency power lacks due care and diligence or has become whimsical. See *Shatrughan Chauhan* v. *Union of India*, *ibid.*

20 See *Vivian Rodrick* v. *State of West Bengal*, AIR 1971 SC 1584; *State of Uttar Pradesh* v. *Paras Nath Singh*, AIR 1973 SC 1973; *N. Sreeramlu* v. *State of Uttar Pradesh*, AIR 1973 SC 2551; *S. Parthasarthi* v. *State of Andhra Pradesh*, AIR 1973 SC 2699: *Ragubir Singh* v. *State of Haryana*, AIR 1974 SC 677; *Ediga Ananma* v. *State of Andhra Pradesh* (1974) 4 SCC 443; *Chawala* v. *State of Haryana,* AIR 1974 SC 1039; *Joseph Peter* v. *Goa Daman and Diu*, AIR 1977 SC 1812; *State of Uttar Pradesh* v. *Sugher Singh*, AIR 1978 SC 191; *State of Uttar Pradesh* v. *Lalla Singh*, AIR 1978 SC 368; *Sadhu Singh* v. *State of Uttar Pradesh,* AIR 1978 SC 1506; *Bhagwan Bux Singh* v. *State of Uttar Pradesh,* AIR 1978 SC 34; *Rajendra Prasad* v. *State of Uttar Pradesh*, AIR 1979 SC 916; *State of Uttar Pradesh* v. *Sahai*, AIR 1982 SC 1076; *T. V. Vatheeswaran* v. *State of Tamil Nadu,* AIR 1983 SC 361; *Javed Ahmed* v. *State of Maharashtra,* AIR 1985 SC 231; *Triveniben* v. *State of Gujarat* (1986) 4 SCC 574. But see, *Rishideo* v. *State of Uttar Pradesh*, AIR 1955 SC 331; *Bharawnd Mepadnna* v. *State of Bombay,* AIR 1960 SC 289; *Nachiar Singh* v. *State of Punjab*, AIR 1975 SC 118; *Maghar Singh* v. *State of Punjab*, AIR 1975 SC 1320; *Lajar Mashi* v. *State of Uttar Pradesh*, AIR 1976 SC 653; *State of Maharashtra* v. *Champalal*, AIR 1981 SC 1675; *Mahendra Nath Das* v. *Union of India* (2013) 6 SCC 253; *Shatrughan Chauhan* v. *Union of India*, *supra* note 19; *Ajay Kumar Pal* v. *Union of India* (2014) 13 SCALE 762.

21 *Shatrughan Chauhan* v. *Union of India*, *supra* note 19; *V Sriharan @ Murugan* v. *Union of India* (2014) 4 SCC 242.

22 See K I Vibhute, "Delay in execution of death sentence as an extenuating factor and the Supreme Court of India: Jurisprudence and jurists' prudence" 35 *Journal of the Indian Law Institute* 122 (1993). In addition to the cases discussed in the cited paper also see, *Jagdish* v. *State of Madhya Pradesh* (2009) 9 SCC 495; *Mahendra Nath Das* v. *Union of India*, *supra* note 20; *Shatrughan Chauhan* v. *Union of India*, *supra* note 19; *Ajay Kumar Pal* v. *Union of India*, *supra* note 20.

23 See *Gopal Vinayak Godse* v. *State of Maharashtra* (1961) 3 SCR 440; *Maru Ram* v. *Union of India*, *supra* note 19, wherein the respective constitutional benches of the Supreme Court ruled that imprisonment for life meant imprisonment till remainder life of the convict, unless it is curtailed by any commutation, remission or reprieve according to (constitutional and/or statutory) law. Also see *Ashok Kumar @ Golu* v. *Union of India* (1991) 3 SCC 498; *Laxman Naskar* v. *Union of India* (2000) 2 SCC 595; *Shri Bhagwan* v. *State of Rajasthan* (2001) 6 SCC 296; *Swamy Shraddananda (2) @ Murali Manohar Mishra* v. *State of Karnataka* (2008) 13 SCC 767; *Union of India* v. *V Sriharan* (2016) 7 SCC 1 (hereinafter *V Sriharan (2)*); *Muthuramalingam* v. *State* (2016) 8 SCC 313. Also see Law Commission of India, 39th Report on Punishment for Imprisonment for Life under the Indian Penal Code (July, 1968).

is not simple imprisonment, but a rigorous imprisonment till the last breath of the convict.[24] There is no provision either in the IPC or the CrPC whereby life imprisonment can be equated to an imprisonment for 14 or 20 years.[25] It does not automatically expire at the end of 20 years, including remission.[26]

III Judicial choice between 'death sentence' and 'life imprisonment' for 'special reasons': Constitutional *vires* and vibe

As mentioned earlier, in a set of grave offences the IPC provides for death penalty and, in the alternative, imprisonment for life, and the sentencing court is vested with the judicial discretion to opt for either of the two once the guilt of the accused is proved. By virtue of section 354(3) of the CrPC, the court, however is required to record in its judgment 'special reasons' for imposing death penalty. But, neither the provisions of IPC nor CrPC offers any guidelines or stipulates situations to be considered or norms to be employed by the sentencer for the exercise of the discretion. What a sentencing court, by virtue of section 354(3) of the CrPC is required to do is to record 'reasons' if it imposes life imprisonment on the convict and to record 'special reasons', if it awards death sentence to him.

In *Bachan Singh* v. *State of Punjab*,[27] a constitutional bench of the Supreme Court was called upon to adjudge the constitutional propriety of, *inter alia*, the discretionary sentencing procedure embodied in section 354(3) of the CrPC. One of the issues that figured in the case was whether the sentencing procedure provided in section 354(3) of the CrPC is *ultra vires* the Constitution as it invests the sentencing court with unguided and untrammelled discretion and allows it to arbitrarily or freakishly impose death sentence on a person found guilty of murder or any other capital offence punishable under the IPC with death or, in the alternative, with imprisonment for life. The provision, to be precise, was assailed on the grounds that it: (i) delegates to the court the power to legislate in the field of 'special reasons' for choosing between 'life' and 'death' of the convict, and (ii) permits it to impose death penalty in an arbitrary and

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24 *K M Nanavati* v. *State of Maharashtra*, AIR 1962 SC 605; *Naib Singh* v. *State of Punjab*, AIR 1983 SC 855; *Mohd Munna and Kartik Biswas* v. *Union of India* (2005) 7 SCC 417; *Mohinder Singh* v. *State of Punjab*, *supra* note 10; *Shankar Kisanrao Khade* v. *State of Maharashtra* (2013) 5 SCC 546.

25 *Mohd Munna and Kartik Biswas* v. *Union of India*, *ibid., Rameshbhai Chandubhai Rathod* v. *State of Gujarat* (2011) 2 SCC 764; *State of Uttar Pradesh* v. *Sanjay Kumar* (2012) 8 SCC 537. In IPC, ss. 370(6), 376A, 376D and 376E, the legislature has explicitly stated that 'imprisonment for life' is meant 'imprisonment for the remainder of that person's natural life'.

26 *State of Madhya Pradesh* v. *Ratan Singh* (1976) 3 SCC 470; *Subhash Chander* v. *Krishan Lal* (2001) 4 SCC 458.

27 AIR 1980 SC 898.

whimsical manner inasmuch as it does not lay down any rational principles or criteria therefor. It was further contended that if the provision is to be saved from the vice of unconstitutionality, the apex court, through its interpretation, should make the imposition of death penalty restricted[28] only to those types of grave murders and capital offences which imperil the very existence and security of the state.[29]

Refuting these grounds, it was on the other hand contended that a court is expected to exercise its sentencing discretion in a judicious manner after taking into account all the aggravating and mitigating circumstances relating to the crime and the criminal and it, in no sense, amounts to either delegation of legislative power in favour of the sentencing court nor is violative of articles 14, 19 and 21 of the Constitution.[30]

Placing reliance on *Jagmohan Singh* v. *State of Uttar Pradesh*[31] and the propositions crystalized therein and premises thereof, the apex court upheld the constitutional *vires* of section 354(3) of the CrPC. It ruled that section 354(3) of the CrPC "gives a broad and clear guideline which is to serve the purpose of lodestar to the court in the exercise of its sentencing discretion" and "the exercise of the sentencing discretion cannot be said to be untrammelled and unguided." The Parliament realising in its legislative judgment, that it is neither possible nor desirable to speculate the 'special reasons', has not restricted the sentencing discretion. Judicial discretion, the court stressed, needs to be exercised judiciously in accordance with well-recognised principles crystallised by judicial decisions, directed along the broad contours of legislative policy towards the signposts enacted in section 354(3) of the CrPC. The legislative policy embodied in the said provision is that the offence of murder (or capital offence) has to be punished with life imprisonment and the court can depart from this rule and impose death penalty only if there are, in its judgment, 'special reasons' for doing so. Such reasons need to be recorded in its judgment. And while considering the question of the sentence to be imposed, the court also has to have regard to every relevant circumstance relating to the crime as well as the criminal. If it finds that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may

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28 Krishna Iyer J confined the expression 'special reasons' to the security of state and society, public order and the interests of the general public, and stressed that the sacrifice of a life (by imposing death penalty) is sanctioned only if otherwise public interest, social defence, and public order will be smashed irretrievably. But, A P Sen J in his dissenting opinion, disfavoured such a restrictive judicial articulation of 'special reasons', which, in his opinion, will virtually abolish the sentence of death. See *Rajendra Prasad* v. *State of Uttar Pradesh*, *supra* note 20.

29 *Supra* note 27, para 142.

30 *Id*., paras 144-145.

31 AIR 1973 SC 947.

resort to death sentence.[32] The paramount beacons of legislative policy discernible from section 354(3) and section 235(2) of the CrPC, according to the court, are: (i) the extreme (death) penalty can be inflicted only in gravest cases of extreme culpability, and (ii) in making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also.[33] In fixing the degree of punishment or making the choice of sentence, the court should not confine its consideration principally or merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances relating to the criminal.

Reacting to the plea for restrictive interpretation of section 354(3) of the CrPC and standardization of norms of judicial discretion thereunder to confine it to a few grave murders and capital offences, the apex court, placing heavy reliance on the *Jagmohan Singh* dictum, ruled that "the argument merits rejection" as no murder, by laying down standards, can be "categorised beforehand according to the degree of its culpability" and "all the aggravating and mitigating circumstances cannot be exhaustively and rigidly enumerated so as to exclude all free-play of discretion."[34] Such 'standardization', it stressed, is 'well-nigh impossible' because: (i) there is little agreement among penologists and jurists as to what information about the crime and criminal is relevant and what is not relevant for fixing the dose of punishment for persons convicted of a particular offence; (ii) criminal cases do not fall into set behaviouristic patterns, even within a single-category offence; there are infinite, unpredictable and unforeseeable variations and there are countless permutations and combinations which are beyond the anticipatory capacity of human calculus; (iii) a standardisation of the sentencing process leaves little room for judicial discretion to take account of variations in culpability; and (iv) standardisation or sentencing discretion is a policy matter which belongs to the sphere of legislation, and the court should not, by over-leaping its bounds, rush to do what Parliament, in its wisdom, warily did not do in section 354(3) of the CrPC.[35] The infinite variety of cases and facets to each case make general standards either meaningless 'boiler plate' or a statement of the obvious that no jury/judge need it.[36]

Admitting that it is neither feasible nor pragmatic to visualise beforehand all the aggravating and mitigating factors as sentencing guidelines, the apex court declined to

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32 *Supra* note 27, paras 165 and 166.

33 *Id.*, para 195.

34 *Id.*, para 170.

35 *Id.*, paras 172-175. For other reasons for non-categorisations or standardisation of cases for the purposes of death sentence, see paras 169-171 and 176-195.

36 *Id.*, para 161(ii)(a).

identify and list aggravating and mitigating factors for courts to follow in future while making a choice between death sentence and life imprisonment. However, it stressed that the determination of factors pertaining to the crime and the criminal should be based on "well-recognised principles" "crystalized by judicial pronouncements." Observance of these principles not only makes death penalty 'principled' but also reduces arbitrariness in making the choice between death and life of the convicts. Death sentence, it stressed, should be imposed only when analysis of aggravating and mitigating circumstances reveals some exceptional reasons. However, it advised the courts to give liberal and expansive construction to the scope and concept of mitigating factors in accord with the sentencing policy reflected in section 354(3) of the CrPC and award death sentence only in the 'rarest of the rare cases' when alternative option (of life imprisonment) is 'unquestionably foreclosed'.

However, three years after *Bachan Singh*, a three-judge bench of the Supreme Court in *Machhi Singh* v. *State of Punjab*[37] has done what the constitutional bench in *Bachan Singh* was reluctant to do. It listed five categories of cases for which death penalty becomes more appropriate. The enumerated distinct categories are: (i) murder committed in an extremely brutal, grotesque, diabolical, revolting or drastic manner so as to arouse intense and extreme indignation of the community; (ii) murder committed for a motive which evinces total depravity and meanness; (iii) murder that arouse social wrath (like homicide of a person belonging to SC/ST or a minority community, dowry-death etc.); (iv) multiple murders of a family or a large number of persons of a particular caste, community, or locality; and (v) murder of an innocent child or a helpless woman or a person rendered helpless by old age or infirmity; murder of a person by the murderer who is in a position of domination or trust or murder of 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.[38] Further, it in one of the four propositions[39] 'culled out' in the backdrop of guidelines

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37 AIR 1983 SC 957.

38 *Id*., paras 33-36.

39 See the fourth proposition in the list of propositions 'culled out' from *Bachan Singh*. It says: (iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before the option is exercised. The other three are: (i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'. (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether

in *Bachan Singh* stated that a just balance-sheet between aggravating and mitigating circumstances has to be drawn up before a choice between death sentence and life imprisonment is made.[40]

Machhi Singh thus accorded much importance to 'crime' factors, rather than to both, 'crime' and 'criminal', and insisted on a 'just balance' between the two for opting death sentence or life imprisonment. It is, however, important to recall here that a constitutional bench in *Bachan Singh* discarded the suggestion given earlier in *Jagmohan Singh*,[41] that "the discretion in the matter of sentence is to be exercised by the judge judicially, after balancing all the aggravating and mitigating circumstances of the crime."[42] What the constitutional bench emphatically stressed was that the judge while "making choice of the sentence, in addition to the circumstances of the offence" must give "due regard to the circumstances of the offender also."[43] But a three-judge bench in *Machhi Singh* has read this proposition in terms of "balancing of aggravating and mitigating circumstances" (in the sense of *Jagmohan Singh*) and revived it as one of the propositions 'culled out' from *Bachan Singh*. It has read the statutory requirement of 'special reasons' in terms of aggravating and mitigating circumstances and (arguably) insisted on their 'just balancing' for imposing death sentence in the cases where life imprisonment is unquestionably foreclosed.

Further, it opined that death sentence may justifiably be imposed where the 'collective conscience' of society is "so shocked that it will expect the holders of the judicial power centre to inflict death penalty."[44] According to the court, "the community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or socially abhorrent nature of the crime or magnitude of the crime."[45]

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inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life is cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances. See *id*., para 37.

40 For applying these guidelines, it advised the courts to ask and answer two questions: (i) is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence? ; and (ii) are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender? See *id.,* para 38.

41 *Supra* note 31.

42 *Supra* note 27, para 161(iv)(a).

43 *Id*., para 195.

44 *Id*., para 32.

45 *Ibid.*

IV Identification and balancing of aggravating and mitigating factors: Judicial ambivalence

Machhi Singh has seemingly not only considerably enlarged the scope for imposing death penalty beyond the sphere envisaged by *Bachan Singh* but has also moved away from the doctrinal framework of 'special reasons' and the central formulation of "balancing of aggravating and mitigating factors" articulated therein for making a choice between the sentence of death and of imprisonment for life.

Nevertheless, sentencing/appellate courts, by placing their reliance on the *Machhi Singh* dictum, in quite a large number of judicial pronouncements,[46] have given emphasis on the circumstances, nature, manner and motive of the crime, without taking into account the circumstances relating to criminals or the possibility of their reformation or rehabilitation (stressed and required under the *Bachan Singh* framework), for deciding whether the case at hand is or is not a rarest of rare case and the perpetrator thereof deserves death penalty or not.

Classic examples of judicial emphasis and heavy reliance on circumstances relating to, or revolving around, the crime, with no or superficial reference to the factors relating to criminal, for opting for 'death penalty' or 'imprisonment for life' are *Dhananjoy @ Dhana* v. *State of West Bengal*[47] and *Ravji @ Ram Chandra* v. *State of Rajasthan*.[48] In the former case the apex court stressed that the measure of punishment in a given case must depend upon the atrocity of the crime, the conduct of the criminal and the defenceless and unprotected state of the victim. And justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime.[49] In the latter, the court was more emphatic when it ruled that it is the nature and gravity of the crime and not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The punishment to be

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46 See *Dhananjoy Chatterjee @ Dhana* v. *State of West Bengal* (1994) 2 SCC 220; *Ravji @ Ram Chandra* v. *State of Rajasthan*, AIR 1996 SC 797; *Kamta Tiwari* v. *State of Madhya Pradesh* (1996) 6 SCC 250; *Sudam @ Rahul Kaniram Jadhav* v. *State of Maharashtra* (2011) 7 SCC 125; *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra, supra* note 8; *Shivu* v. *Registrar General, High Court of Karnataka* (2007) 4 SCC 713; *Ankush Maruti Shinde* v. *State of Maharashtra*, AIR 2009 SC 2609; *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra* (2012) 4 SCC 37; *Mohd Mannan* v. *State of Bihar* (2011) 5 SCC 317; *Sandeep* v. *State of Uttar Pradesh* (2012) 6 SCC 107; *Ajitsingh Harnamsingh Gujral* v. *State of Maharashtra* (2011) 14 SCC 401.

47 *Ibid.*

48 *Supra* note 46.

49 Subsequently, in *Rameshbhai Chandubhai Rathod*, *supra* note 25, and *Shankar Kisanrao Khade, supra* note 24, the Supreme Court has expressed its reservations about the death penalty imposed on *Dhananjoy Chatterjee* as no mitigating circumstances therein were considered by the courts.

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 strikingly interesting to note that *Ravji* was not only considered but also relied heavily as an authority (for the proposition that for imposing punishment in heinous crimes, circumstances pertaining to the criminal are not pertinent) in six decisions (rendered by the Supreme Court itself).[50] In these cases, death penalty for the convicts were approved without considering any mitigating circumstances (circumstances relating to the criminals) at the sentencing phase. Further, in none of these six cases, contrary to the assertion of the constitutional bench in *Bachan Singh*, death sentence was imposed/approved without ascertaining that the alternative option of imprisonment for life was 'unquestionably foreclosed'. In fact, in *Santosh Kumar Satishbhushan Bariyar,*[51] the apex court has rendered all the six cases *per incuriam* as the *Bachan Singh ratio*[52] was not followed. It further asserted that all the courts, trial courts, high courts and the Supreme Court, are required to ensure that the *ratio* laid down in *Bachan Singh* is followed. Before imposing death penalty, they are bound to consider the aggravating and mitigating circumstances of the case at hand, to arrive at a conclusion as to the respective weight to be attached thereto, and to ensure that the

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50 Those six cases are: *Shivaji @ Dadya Shankar Alhat* v. *State of Maharashtra*, AIR 2009 SC 56; *Mohan Anna Chavan* v. *State of Maharashtra* (2008) 11 SCC 113; *Bantu* v. *State of Uttar Pradesh* (2008) 11 SCC 113; *Surja Ram* v. *State of Rajasthan*, AIR 1997 SC 18; *Dayanidhi Bisoi* v. *State of Orissa*, AIR 2003 SC 3915, and *State of Uttar Pradesh* v. *Sattan @ Satyendra* (2009) 4 SCC 736.

For further comments on these cases see, Law Commission of India, 262nd Report on the Death Penalty (August, 2015), paras 5.2.11-12; 5.4.12-5.4.15; 6.6.15**;** Asian Centre for Human Rights, *India: Death Without Legal Sanction* (Asian Centre for Human Rights, New Delhi, 2015) 39 *et seq*.

51 *Supra* note 8 at para 68. It was ratified by the Supreme Court in *Dilip Premnarayan Tiwari* v. *State of Maharashtra*, *supra* note 10, and *Rajesh Kumar* v. *State through Govt of NCT of Delhi* (2011) 13 SCC 706. But *Ravji*, even after it was held judgment *in percuriam* in *Santosh Kumar Bariyar*, is referred to, and seemingly relied thereon, in *Jagdish* v. *State of Madhya Pradesh*, *Supra* note 22; *Sunder Singh* v. *State of Uttaranchal* (2010) 10 SCC 611 and *Ajitsingh Harnamsingh Gujral* v. *State of Maharashtra*, *supra* note 46.

It is further interesting to note that *Santosh Kumar Bariyar* has not noticed *Ankush Maruti Shinde* v. *State of Maharashtra*, *supra* note 46, delivered by the Supreme Court about a fortnight before it was delivered, in which the court, placing reliance on *Ravji* sentenced 6 persons to death.

52 In *Bachan Singh* the constitutional bench has ruled that in fixing the degree of punishment or making the choice of sentence for various offences the court should not confine its consideration principally or merely to the circumstances connected with the particular crime but also give due consideration to the circumstances of the criminal.

alternative punishment to death sentence, *i.e.*, life imprisonment, is unquestionably foreclosed. Mere compliance with the test of the rarest of the rare category, the apex court stressed, is not sufficient for awarding death sentence. The sentencing/approving/appellate court is also required to satisfy itself that the convict is not fit for any kind of reformatory and rehabilitation scheme. In fact, the apex court insisted that the prosecution needs to prove to the satisfaction of the sentencing court that there is no possibility of reformation or rehabilitation of the convict. The court needs to be convinced that all possible avenues of his reformation are foreclosed and no rehabilitative or custodial sentence would reform him or it would be a mere futile exercise. That, he is beyond reformation or rehabilitation. He has become so incorrigible that no reformative measure will improve him in future. Compliance with the twin limbs of the *Bachan Singh*'s fundamental doctrine of the rarest of rare case justifies imposition of death sentence.

In *Sangeet* v. *State of Haryana*,[53] a two-judge bench of the Supreme Court doubted propriety of the 'balancing test' as a right test in deciding whether capital punishment should be awarded or not. It expressed a view that *Machhi Singh* was incorrectly decided and its balance-sheet (of aggravating and mitigating circumstances) approach was mistaken. *Machhi Singh* (and the cases relied thereon) has given primacy to the nature of the crime, and the circumstances of the criminal, referred to in *Bachan Singh*, have taken a bit of back seat in the sentencing process. It also felt that: (i) *Bachan Singh* has not endorsed the approach of aggravating and mitigating circumstances, but it is followed in several cases. The aggravating and mitigating circumstances approach and the necessity of its adoption needs a fresh look in light of the conclusions in *Bachan Singh*. There is little or no uniformity in the judicial outlook. (ii) A balance-sheet of 'aggravating circumstances', which relate to the 'crime', and 'mitigating circumstances', which relate to the 'criminal', cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. (iii) In sentencing process, both the crime and the criminal are equally important.[54]

Further, *Machhi Singh* and subsequent cases[55] have injected in the rarest of rare case doctrine and the death penalty jurisprudence some nebulous standards, like (shock

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53 (2013) 2 SCC 452.

54 *Id.*, para 80.

55 See *Jumman Khan* v. *State of Uttar Pradesh* (1991) 1 SCC 752; *Laxman Naik* v. *State of Orissa* (1994) 3 SCC 381; *Dhananjoy Chatterjee @ Dhana* v. *State of West Bengal*, *supra* note 46; *Ravji* v. *State of Rajasthan*, *supra* note 46; *Govindasami* v. *State of Tamil Nadu* (1998) 4 SCC 531; *Kamta Tiwari* v. *State of Madhya Pradesh*, *supra* note 46; *Jai Kumar* v. *State of Madhya Pradesh* (1999) 5 SCC 1; *Om Prakash* v. *State of Haryana*, AIR 1999 SC 1332; *State of Uttar Pradesh* v. *Shri Kishan*, AIR 2005 SC 1250; *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, *supra* note 8; *State*

to the) 'collective conscience' (of the community); 'social abhorrence'; '(social) cry for justice'; 'public abhorrence (of the crime)'; 'public opinion', and 'extreme indignation and antipathy to crime', as the touchstone for deciding whether to impose death penalty or not. These notions and meanings attributed thereto have not only altered/expanded the *Bachan Singh* formulation of the rarest of rare case[56] but have also added some confusion thereto.

The use and relevance of some of these expressions are doubted by none other than judges of the Supreme Court itself. In *Santosh Kumar Satishbhushan Bariyar,*[57] S. B. Sinha J felt that 'public opinion' hardly fits in the rarest or rare matrix. People's perception, according to him, is neither an objective circumstance relating to crime nor to the criminal. It is extraneous to conviction and capital sentencing as articulated in *Bachan Singh*. Further, judges are to keep reminding themselves of the *Bachan Singh* dictum that life imprisonment is the rule, and death penalty an exception, and they, in the backdrop of the constitutional perceptions and values in terms of fairness, reasonableness, and equal treatment reflected in in article 14 (equality) and article 21 (personal liberty and life), are not permitted to have a re-look at the public policy on death penalty and meet the society's cry for justice. Public opinion may go against the values of rule of law and constitutionalism by which the court is bound. Focusing on public opinion therefore carries the danger of capital sentencing becoming a spectacle in the media. If media trial is a possibility, sentencing by the media cannot be ruled out.[58]

However, in spite of these observations highlighting the dangers or illegality associated with the use or influence of community reaction and public opinion in the capital sentencing process, a two-judge bench of the Supreme Court in *Vasant Sampat Dupare* v. *State of Maharashtra*[59] has stressed that 'shock of', 'collective conscience and judicial conscience', and the diabolic manner in which crime was committed, invites 'abhorrence of the collective', 'the collective conscience' or 'cry of the community for justice' and it becomes duty of the court to treat the case as the rarest of the rare. And

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of Uttar Pradesh v. *Sattan @ Satyendra*, *supra* note 50; *Ankush Maruti Shinde* v. *State of Maharashtra*, *supra* note 46; *Jameel* v. *State of Uttar Pradesh* (2010) 12 SCC 532; *State of Madhya Pradesh* v. *Basodi* (2009) 12 SCC 318; *Bantu* v. *State of Uttar Pradesh*, *supra* note 50; *Mohd Mannan* v. *State of Bihar*, *supra* note 46 ; *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra*, *supra* note 46; *Vasant Sampat Dupare* v. *State of Maharashtra* (2015) 1 SCC 253.

56 *Haresh Mohandas Rajput* v. *State of Maharashtra* (2011) 12 SCC 56; *Vasanta Sampat Dupare* v. *State of Maharashtra*, *ibid.*

57 *Supra* note 8.

58 *Id.*, paras 86 and 91.

59 *Supra* note 55. But see, *Kalu Khan* v. *State of Rajasthan* (2015) 7 SCALE 195.

the bench, in fact, used the community reactions and public opinion as premise for confirming the death sentence.[60]

Further, the Supreme Court, from time to time, purportedly in the backdrop of the facts and circumstances of the case at hand, has also relied upon, or been influenced by, a variety of factors for affirming/restoring the death sentence or commuting/altering it to life imprisonment. The factors that are figured/used by the apex court in its judicial pronouncements for confirming/restoring death sentence or commuting/altering it to life imprisonment for committing rape on minor with murder, referred to in *Shankar Kisanrao Khade*[61] are: diabolic or cruel nature of crime;[62] public abhorrence or shock to the conscience of the community or judiciary;[63] young age of the perpetrator;[64] the possibility of reforming/rehabilitating the accused;[65] criminal

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60 *Id*., paras 56 and 59.

61 *Supra* note 24.

62 In *Jumman Khan* v. *State of Uttar Pradesh*, *supra* note 55; *Dhananjoy Chatterjee @ Dhana* v. *State of West Bengal*, *supra* note 46 ; *Laxman Naik* v. *State of* Orissa, *supra* note 55; *Kamta Tiwari* v. *State of Madhya Pradesh supra* note 46; *Nirmal Singh* v. *State of Haryana* (1999) 3 SCC 670; *Ankush Maruti Shinde* v. *State of Maharashtra*, *supra* note 46; *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra*, *supra* note 46, the apex court confirmed death sentence of the accused persons primarily on the ground of diabolic and cruel nature of crime.

63 See *Dhananjoy Chatterjee @ Dhana* v. *State of West Bengal*, *supra* note 46; *Jai Kumar* v. *State of Madhya Pradesh* (1999) 5 SCC 1; *Ankush Maruti Shinde* v. *State of Maharashtra*, *supra* note 46, and *Mohd Mannan* v. *State of Bihar*, *supra* note 46, in which the apex court confirmed the death sentence on the ground that the crime resulted in public abhorrence or shocked the conscience of the community and/or of judiciary.

64 In *Amit* v. *State of Maharashtra* (2003) 8 SCC 93 (20 years); *Mohd Chaman* v. *State of NCT of Delhi* (2001) 2 SCC 28 (30 years); *Bantu* v. *State of Madhya Pradesh* (2001) 9 SCC 615 (22 years); *Surendra Pal Shivbalakpal* v. *State of Gujarat* (2005) 3 SCC 127 (36 years); *Rahul* v. *State of Maharashtra* (2005) 10 SCC 322 (24 years); *Amit Singh* v. *State of Punjab* (2006) 12 SCC 79 (31 years); *Santosh Kumar Singh* v. *State* (2010) 9 SCC 747 (24 years); *Rameshbhai Chandubhai Rathod* v. *State of Gujarat*, *supra* note 25 (28 years); *Amit* v. *State of Uttar Pradesh* (2012) 4 SCC 107 (28 years); *Ramnaresh* v. *State of Chhattisgarh* (2012) 4 SCC 257 (21 years), death sentence imposed for committing rape and killing the victims was altered to life imprisonment. But see *Dhananjoy Chatterjee @ Dhana* v. *State of West Bengal*, *supra* note 46 (27 years); *Jay Kumar* v. *State of Madhya Pradesh* (1999) 5 SCC 1 (22 years); *Shivu* v. *Registrar General, High Court of Karnataka*, *supra* note 46 (20 and 22 years), wherein the age of the convicts was not given importance or considered irrelevant in commuting death penalty imposed for committing rape and murder (of the victims) to life imprisonment.

65 In *Bantu* v. *State of Uttar Pradesh*, *supra* note 50; *Haresh Mohandas Rajput* v. *State of Maharashtra*, *supra* note 56; *Santosh Kumar Singh* v. *State*, *ibid*, and *Amit* v. *State of Uttar Pradesh*, *ibid*, the possibility of reform of the accused influenced the court to commute their death sentence to life imprisonment. But in *Jay Kumar* v. *State of Madhya Pradesh*, *ibid*; *B A Umesh* v. *Registrar General*, *High Court of Karnataka* (2011) 3 SCC 85; *Mohd Mannan* v. *State of Bihar*, *supra* note 46; *Mohd Chaman* v. *State of NCT of Delhi*, *ibid*; *Surendra Pal Shivbalakpal* v. *State of Gujarat*, *ibid*, the apex court declined to give them the benefit of the ray of hope for reformation for commuting

antecedents of the accused,[66] and prior-planning for commission of the offence.[67]

Analysis by the court of catena of its judicial pronouncements referred to in *Shankar Kisanrao Khade* and the premise used by it for treating a case to be a rarest of the rare or not, reveals that the categorisation is predominantly premised on the judges who authored the judgment. The Supreme Court, elsewhere, has admitted that "there is a very thin line on facts which separates the award of a capital sentence from life imprisonment (in the case of rape and murder of a young child by a young man) and the subjective opinion of individual judges (as to the morality, efficacy or otherwise of a death sentence) cannot be entirely ruled out."[68]

In some of the judicial pronouncements, the Supreme Court interestingly has not referred to aggravating and mitigating circumstances while making its choice between 'death' and 'life' of the convict. It has imposed/upheld/commuted death penalty without referring to,[69] or referring to but not applying,[70] the rarest of rare case formulation.

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their death sentence to life imprisonment. In *Dayanidhi Bisoi* v. *State of Orissa*, *supra* note 50; *Holirom Bordoloi* v. *State of Assam*, AIR 2005 SC 2059; *Karan Singh* v. *State of Uttar Pradesh* (2005) 6 SCC 342; *Renuka Bai @ Rinku @Ratan* v. *State of Maharashtra*, AIR 2006 SC 3056, the apex court rejected the possibility of reform and rehabilitation though there was no evidence to the contrary.

66 Absence of prior criminal record of the accused entailed them to commute their death sentence to life imprisonment in *Nirmal Singh* v. *State of Haryana*, *supra* note 62; *Bantu* v. *State of Uttar Pradesh*, *supra* note 50; *Amit* v. *State of Maharashtra*, *supra* note 64; *Surendra Pal Shivbalakpal* v. *State of Gujarat, supra* note 64; *Amit* v. *State of Uttar Pradesh*, *supra* note 64.

67 In *Akhtar* v. *State of Uttar Pradesh* (1999) 6 SCC 60; *Raju* v. *State of Haryana* (2001) 9 SCC 50; *Amrit Singh* v. *State of Punjab*, AIR 2007 SC 132, the absence of premeditation of the crime influenced the court to commute the death sentence to life imprisonment. But see *Molai* v. *State of Madhya Pradesh* (1999) 9 SCC 581.

68 *Rameshbhai Chandubhai Rathod* v. *State of Gujarat*, *supra* note 25 at para 8. Similar approach of the apex court is also evident in non-sexual assault cases. For example, *State of Maharashtra* v. *Dhanu* (2000) 6 SCC 269l and *Sushil Murmu* v. *State of Jharkhand* (2004) 2 SCC 338; the apex court in the former refused to affirm the death penalty imposed for killing three children as human sacrifice for recovering hidden treasure (even though it held the killings 'the horrendous acts', but 'motivated by ignorance and superstition'), but in the latter, it did it even when the accused sacrificed one child (as the accused was not possessed of the basic humanness and completely lacked the psyche or mind set which can be amenable for any reformation).

69 See *State of Uttar Pradesh* v. *Satish* (2005) 3 SCC 114; *Lokpal Singh* v. *State of Madhya Pradesh*, AIR 1985 SC 891; *Darshan Singh* v. *State of Punjab* (1988) 1 SCC 618; *Ranjeet Singh* v. *State of Rajasthan*, (1980) 1 SCC 683.

70 See *Mukund* v. *State of Madhya Pradesh* (1997) 10 SCC 130; *Ashok Kumar Pandey* v. *State of Delhi* (2002) 4 SCC 76; *Farooq* v. *State of Kerala* (2002) 4 SCC 697; *Acharaparambath Pradeepan* v. *State of Kerala* (2006) 13 SCC 643.

It is pertinent to note that in the recent past the Supreme Court, on occasions more than one, has admittedly highlighted the fact that sentencing in capital offences has become 'judge-centric' rather than 'principle-centric'. In *Swamy Shraddananda (2)*,[71] it, in no unclear terms, has admitted that the question of award, confirmation or commutation of a death sentence by the apex court, as a matter of truth, is 'not free from the subjective element' of the deciding judge/bench and it depends on his/their 'personal predilection'.[72] Again, referring to the observation pertaining to a 'judge-centric' sentencing process made in *Swamy Shraddananda (2)*, the apex court, in *Santosh Kumar Satishbhushan Bariyar*,[73] has endorsed it as a 'serious admission' on the part of the highest court of the land. It also observed that "the balance-sheet of aggravating and mitigating circumstances approach invoked on a case-by-case basis has not worked sufficiently well so as to remove the vice of arbitrariness from our capital sentencing system" and "the *Bachan Singh* threshold of the rarest of rare cases has been most variedly and inconsistently applied by the High Courts and the Supreme Court."[74] The sentencing policy introduced by *Bachan Singh*, it seems, 'in view of the inherent multitude of possibilities', has not been 'effectively implemented', and it has 'lost in transition'.[75]

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71 *Swamy Shraddananda (2) @ Murali Manohar Mishra* v. *State of Karnataka*, *supra* note 23.

72 *Id.* at para 33. In this context it is worth recalling certain striking observations made by P N Bhagwati J in his dissenting opinion in *Bachan Singh, supra* note 27 at para 289 that: "... unguided discretion conferred upon the court to choose between life and death ... is bound to be influenced by the subjective philosophy of the judge ... and on his value system and social philosophy. ... No doubt the judge will have to give 'special reasons' if he opts in favour of inflicting the death penalty, but that does not eliminate the arbitrariness and caprice, ... because there being no guidelines provided by the Legislature, the reasons which may appeal to one judge as 'special reasons' may not appeal to another, and because reasons can always be found for a conclusion that the judge instinctively wishes to reach and the judge can bonafide and conscientiously find such reason to be 'special reason'. It is now recognised on all hands that judicial conscience is not a fixed conscience; it 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'.... Judges like to cling to the myth that every decision which we make in the exercise of our judicial discretion is guided exclusively by legal principles and we refuse to admit the subjective element in judiscial decision making. But that myth now stands exploded and it is acknowledged by jurists that the social philosophy of the judge plays a not inconsiderable part in moulding his judicial decision and particularly the exercise of judicial discretion. 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. Every judgment necessarily bears the impact of the attitude and approach of the judge and the social value system."

73 *Supra* note 8 at para 56.2 (A).

74 *Id.*, para 117.

75 *Sangeet* v. *State of Haryana*, *supra* note 53, paras 32 and 33.

Because of this 'personal predilection' and varied interpretation of the rarest of rare formulation, there has been a lot of confusion, contradictions and aberrations on the part of the apex court in making its judicious choice between death and life for convicts of capital offences.[76]

It needs to be emphatically recalled here that *Bachan Singh* has neither anticipated nor approved of 'judge-centric' sentencing. It mandated 'principle-centric' death sentencing. It obligated courts to identify circumstances pertaining to the crime and the criminal and offer 'exceptional reasons' (in terms of statutory expression 'special reasons' in section 354(3) of the CrPC) founded on the 'exceptionally grave circumstances' of the case at hand relating to both, the crime and the criminal. And it is expected to do this in accordance with the 'well-recognised principles', and not according to the whim or wish of the judge. By these 'well-recognised principles', the constitutional bench in *Bachan Singh* obviously meant the "principles crystalized by judicial decisions" (illustrating as to what were regarded as aggravating or mitigating circumstances in those cases), "directed along the broad contours of legislative policy towards the signposts enacted in section 354(3) of the CrPC" (*i.e.,* the death penalty can be inflicted in gravest cases of extreme culpability, and in making choice of the sentence of death and life, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also). It stressed that sentencing discretion must be exercised judicially in the light of the precedents.[77]

But neither the 'broad principle' of the rarest of the rare case laid down in *Bachan Singh* nor the (extended) 'principle' crystalized in *Machhi Singh* is uniformly followed by the courts, be it the trial courts, the high courts or the Supreme Court. There is no uniformity of precedents, to say the least. In most cases, death penalty has been imposed/confirmed/affirmed by the sentencing and appellate/constitutional courts without laying down any ascertainable legal principle. Even if, there be one, it is neither followed consistently nor refined through judicial pronouncements. In fact, it is illustrated by none other than the apex court itself that courts in almost identical/similar fact-scenarios, by adopting different criteria, have taken contrary views on (imposing/affirming/commuting) death penalty. Different benches also have taken

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76 See Amnesty International-India and People's Union for Civil Liberties (Tamil Nadu and Puducherry), *Lethal Lottery: the Death Penalty in India - A Study of Supreme Court Judgments in Death Penalty Cases 1950-2006* ch. 1-4 (Amnesty International, 2008); Surya Deva, "Death Penalty in the 'Rarest of Rare' Cases: A critique of judicial choice-making", in Roger Hood and Surya Deva (eds), *Confronting Capital Punishment in Asia: Human Rights, Politics, and Public Opinion* 238, (Oxford University Press, 2013); Law Commission of India, *supra* note 50, paras 5.2.71-5.2.72

77 *Bachan Singh* v. *State of Punjab*, *supra* note 27, para 197.

different views on the death penalty in similar situations. They have applied different criteria for affirming or commuting a death sentence.[78] Hitherto, the Supreme Court has not evolved a sentencing policy in clear-cut terms.[79] It has not been able to either indicate the precise 'categories' of the so-called 'aggravating' and 'mitigating' circumstances[80] nor the ascertainable 'techniques' or 'principles' for 'balancing' the aggravating and mitigating circumstances.

In fact, the Supreme Court admittedly observed that 'disparity in sentencing' by different judges 'flowing out of varied interpretations to the rarest of rare expression' based on their 'personal considerations', the 'precedent on death penalty' is "crumbling down under the weight of disparate interpretations." [81]

An immediate consequence of the judicial ambivalence is obviously arbitrary or unauthorised[82] imposition or confirmation or affirmation of a death sentence. It amounts to illegal or unjust extinction of life.[83] Consequences of such arbitrary or unauthorised imposition of death are seemingly severe.[84] Unequal treatment of convicts,

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78 *Aloke Nath Dutta* v. *State of West Bengal*, *supra* note 8, para 76-84.

79 *Id.* at para 90. But in *Sunil Dutt Sharma* v. *State (NCT of Delhi)* (2013) 12 SCALE 473, the Supreme Court has observed that the principles of sentencing are fairly well-settled. The difficulty is not in identifying them, but lies in the application thereof.

80 However, in some judicial pronouncements the court has attempted to list the aggravating and mitigating circumstances and the principles that may be deduced therefrom. See *Ramnaresh* v. *State of Chhattisgarh*, *supra* note 64; *Brajendrasingh* v. *State of Madhya Pradesh* (2012) 4 SCC 289; *Sangeet* v. *State of Haryana*, *supra* note 53.

81 *Mohd Farooq Abdul Gafur* v. *State of Maharashtra* (2010) 14 SCC 641, para 12.

82 The six judicial pronouncements premised on *Ravji @ Ram Chandra* v. *State of Rajasthan*, *supra* note 46, as mentioned earlier, are declared judgments *per incuriam*, and thereby, in strict sense of the term, become 'judicial mistake', illegal and unauthorised.

It is further interesting to note that K T Thomas J, who headed the Supreme Court bench that confirmed the death sentence awarded to the three convicts of the Rajiv Gandhi assassination case, said in press that it was a judicial error on his part to confirm the death sentence without looking into antecedents of the convicts. Arun Janardhanan, "Constitutionally incorrect to hand the three, says judge who confirmed death for Rajv killers" *Times of India*, Feb. 24, 2013.

83 It is reported that two convicts sentenced to death through *Ravji* and the decisions relied thereon were executed before *Ravji* and other judicial pronouncements were declared *judgments per incuriam* in *Santosh Kumar Satishbhushan Bariyar*. Ravji was executed on May 4, 1996 and Surja Ram was put to the gallows on April 7, 1997. The remaining 12 convicts sentenced to death on the flawed reasoning of *Ravji* continue to languish on death row. See Justice S B Sinha, "To kill or not to kill: The unending conundrum" 24 *National Law School of India University Review*" 203 (2013).

84 Fourteen retired judges of the Supreme Court, in an unprecedented step, petitioned the President of India seeking commutation for 13 death-row convicts. These convicts, they pleaded, had been wrongly sentenced to death in pursuance of erroneous judicial precedents. Wrongful

placed in the similar fact-scenario, as illustrated by the Supreme Court itself, cannot be ruled out. Imposition of death sentence or commuting it to life imprisonment becomes a sort of judicial lottery, depending upon philosophical justifications and perceptions of the purposes of punishment of the judge or the bench of judges, theories of punishment he/they holds/hold dear or convincing or relevant, and his/their outlook towards the aggravating and mitigating circumstances. Serious philosophical conflict between different judges of the Supreme Court and within the same bench has kept the 'principled-sentencing' far from reality. Judges use diverse justifications to exercise their choice. Some judges, accordingly, may be labelled as 'lenient' while others 'harsh', depending upon their continued choice for, or judicial outlook towards life or death of the convict before him/them. Sentencing becomes uncertain and unpredictable.[85]

V The *Bachan Singh* fundamental framework of 'special reasons': Alternative judicial formulations

Responding to the 'judge-centric', rather than 'principle-centric' capital sentencing, the Supreme Court, in the recent past through its judicial pronouncements, has come up with two alternative formulations, namely, (i) the fixed term of life imprisonment (with or without statutory remission), and (ii) the crime test, the criminal test and the rarest of rare test. Let us, in brief, have a look at each of them and their legal propriety.

Life imprisonment of a fixed term (with or without statutory remission) or life imprisonment with no remission

In *Swamy Shraddananda (2)*,[86] a three-judge bench of the Supreme Court, recalling the unsound (and mechanical) way in which remission in cases of life imprisonment is actually allowed (that normally makes the sentence of life imprisonment an

executions, they felt, will "undermine the credibility of the criminal justice system and the authority of the State to carry out such punishments in future." The retired judges felt compelled to take such a public stand against the errors of an institution they had honourably served is a telling reminder of what is at stake there. See V Venkatesan, "A Case against the Death Penalty" *Frontline* (Aug.-Sep., 2012).

85 S B Sinha J with a view to bringing consistency in identification of various relevant circumstances, and minimising arbitrariness in considering aggravating and mitigating circumstances, suggested that the court should engage itself in a comparative analysis of the case before it and other similar cases. Then it should undertake a careful scrutiny of aggravating and mitigating circumstances in the case at hand and compare them with those from the comparable pool and attach weight thereto, along with the reasons therefor. See *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, *supra* note 8, paras 141-143.

86 *Supra* note 23. The matter came up before the three-judge bench of the Supreme Court as a two-judge bench in *Swamy Shraddananda (1)* v. *State of Karnataka* (2007) 12 SCC 288, affirmed the conviction of the appellant-accused, but differed on the question of sentence to be imposed on him, one member of the bench insisted for infliction of death penalty, while another recommended imprisonment till the end of his life with no remission.

imprisonment for a term of 14 years) and the situations wherein the higher courts are reluctant to endorse the death penalty imposed by the trial courts because the case, in their opinion, is not of the rarest of the rare category but feel that life imprisonment (with remission) will be grossly disproportionate and inadequate, the bench apprehends that the courts, in such a situation having no option but to opt for either death sentence or life imprisonment (which for all intents and purposes is not more than 14 years), may feel 'tempted' and find themselves 'nudged into endorsing the death penalty.' Either of the options, the bench feels, is indeed disastrous. In such a situation, it, as *via* media, ruled, death penalty may be substituted by the sentence of imprisonment for life or imprisonment for a term more than 14 years and to put that sentence (of imprisonment) beyond the application of statutory remission.[87] Such a course, the bench argued, is not merely 'a far more just, reasonable and proper' but the court, as a matter of fact, has legitimate claim to expand its options and "take over the vast hiatus between 14 years' imprisonment and the death sentence," if the facts of the case at hand so justify. However, it advised the courts to take recourse to this expanded option 'primarily' when in the backdrop of the facts of the case at hand, the sentence of 14 years' imprisonment would amount to 'no punishment at all'. Further, the expanded category of sentence, the bench stressed, will, in tune with, and spirit of *Bachan Singh*, keep the sentence of death confined to 'really rarest of the rare cases'.[88] The judicial dictum, in other words, is primarily based on the premise that the sentence of imprisonment for life, though in theory is till the rest of the life or remainder of life of the convict, in practice is equal to imprisonment for a period of not more than fourteen years, and in the cases that do not warrant death penalty (because they do not fall in the category of the rarest of rare cases) but sentence of life imprisonment (which because of remission practically turns out to be imprisonment for fourteen years) becomes grossly disproportionate and inadequate, the courts are justifiably authorised to inflict imprisonment for life or for a term in excess of fourteen years and put it beyond statutory remission by the 'appropriate government'.

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87 No provisions of the CrPC and the Prison Act (as well as rules framed thereunder) will be made applicable to the convict for his pre-mature release. However, the power of the President of India and the State Governor, under arts. 72 and 161 of the Constitution respectively, to grant pardon, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence, remains intact. *Id.*, para 56.

88 *Id.* at paras 66 and 67. In pursuance of its juridical articulation of the special category of imprisonment (for life or a fixed term with no application of statutory remission), it substituted the death sentence of the appellant-convict, Swamy Shraddananda, by imprisonment for life with a direction that he must not be released from prison till the rest of his life. It also directed that no provision of the CrPC, the Prisons Act as well as rules framed thereunder dealing with commutation, remission, or suspension of sentence will be made applicable to him for his pre-mature release. *Id.*, para 69.

However, in *Sangeet*,[89] a two-judge bench of the apex court doubted the correctness of the dicta of *Swamy Shraddananda (2)* and of other cases in which a sentence of imprisonment for a fixed term was inflicted. It argued that the courts by awarding such a fixed term of imprisonment have deprived the 'appropriate governments' of their power of remitting sentences for the period specified therein. Questioning the legal propriety of such restraint by judicial pronouncement on the 'appropriate governments', it stressed that it is impermissible to tell either the appropriate governments that they are precluded from granting remission or the convicts that they are not permitted to seek remission in their sentences till the specified term of imprisonment is completed. Further, the bench felt that the view taken in *Swamy Shraddananda(2)* that a convict of a capital offence and serving life imprisonment has, on remission, an indefeasible right to get released on completion of either 14 or 20 years' imprisonment is a misconception.[90] The exercise of remission power by the 'appropriate government' is subject to certain restrictions. Adequate safeguards against an arbitrary exercise of the power are also in place.[91] The bench, therefore, opined that the *Swamy Shraddananda (2)* dictum requires further discussion.[92]

In *Sahib Hussain @ Sahib Jan* v. *State of Rajasthan*,[93] another bench of two judges of the apex court, however, ruled that the reservations expressed in *Sangeet* by the division bench of two judges of the court over a well-reasoned dictum of a three-judge bench of the court in *Swamy Shraddannada (2)* is unwarranted and jurisprudentially improper.

In *Gurvail Singh @ Gola (2)* v. *State of Punjab*,[94] the appellant-convict, through a writ petition, placing reliance on *Sangeet*, urged the Supreme Court to convert his sentence of imprisonment for a term of 30 years without remission to imprisonment for life and declare that the apex court is not competent to fix particular number of years' imprisonment, with or without remission, when it commutes death sentence to life imprisonment, while upholding conviction under a capital offence. A two-judge bench of the apex court, relying on *State of Uttar Pradesh* v. *Sanjay Kumar*[95] and *Sahib*

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89 *Supra* note 53. Interestingly, the bench in *Sangeet* was the one that authored *Shankar Kisanrao Khade* dictum, and one of whom articulated the triple-test therein.

90 *Id.*, para 74.

91 See CrPC, ss. 432 and 433A. Also see *Sangeet* v. *State of Haryana*, *supra* note 53; *Mohinder Singh* v. *State of Punjab*, *supra* note 10; *Yakub Abdul Razak Memon* v. *State of Maharashtra* (2013) 13 SCC 1.

92 *Id.*, para 58.

93 (2013) 9 SCC 778.

94 (2013) 10 SCC 631.

95 *Supra* note 25.

Hussain @ Sahib Jan v. *State of Rajasthan*,[96] wherein similar issues have been dealt with and negatived by the Supreme Court, and the *Sangeet* observations (relied on by the present petitioner) are termed unwarranted, ruled that the Supreme Court is competent to issue directions that convicts must serve particular minimum sentence of imprisonment with or without remission when it commutes death sentence to life imprisonment and no further discussion on the issue is required.[97] It thus, has not only neutralised the *Sangeet* perception but has also foreclosed forever the possibility of further judicial deliberation on the issue.

The matter, however, rested uncontested and followed until a three-judge bench of the Supreme Court in *Union of India* v. *Sriharan @ Murugan*,[98] formulated, *inter alia*, a question as to whether a court is permitted to, on the principles enunciated in *Swamy Shraddananda (2)*, impose instead of death, imprisonment for life or for a term exceeding 14 years and put it beyond remission, for consideration and decision of a constitutional bench.

A five-judge constitutional bench of the apex court, in *Union of India* v. *V Sriharan @ Murugan*,[99] delved into the question and answered it in the affirmative. Fakir Mohamed Ibrahim Kalifulla J in his lead judicial opinion (in concurrence with H L Dattu, the then CJI, and Pinaki Ghosh J), showing concurrence with the reasoning given in *Swamy Shraddananda (2)*, endorsed the 'well-thought out and reasoned' *Swamy Shraddananda (2)* dictum carving out a special category of sentence (of imprisonment).[100] He, with approval, extensively quoted from the concurrent opinion of Fazal Ali J in *Maru Ram*[101] and relied heavily thereon to stress the need to resort to deterrent punishment to protect life and liberty of all citizens and justify the special sentence of imprisonment carved in *Swamy Shraddananda (2)*. In the backdrop of the hard reality that the state machinery is not able to protect or guarantee the life and liberty of common man, he apprehended that any further lenience in imposition of sentence, at least in respect of capital punishment or life imprisonment, will only lead to further chaos and there will be no rule of law. Only anarchy will rule the country enabling the criminals and their gangs to dictate terms. 'Any sympathy', he asserted, shown will only amount to a misplaced one which the courts cannot afford to take. He, applying these well thought out principles, endorsed that the conclusions drawn, and the special category of sentence

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96 *Supra* note 93.

97 *Supra* note 94, para 9.

98 *Supra* note 18. For exact text of the referral questions see para 48.

99 *Supra* note 23.

100 *Id.*, paras 69, 71 and 72.

101 *Maru Ram* v. *Union of India*, *supra* note 19.

of imprisonment with no remission, instead of death penalty, carved in *Swamy Shraddananda (2)* are 'well founded'.[102] He asserted that there is no prohibition either in the IPC or any of the provisions of the CrPC where death penalty or life imprisonment is provided for, that imprisonment cannot be imposed for any specific period within the said life span. When life imprisonment means the whole life span of the convict, the court which is empowered to impose the sentence of life imprisonment, he contended, is justified to specify the period upto which the said sentence of life should remain befitting the nature of the crime committed, when its conscience does not persuade it to confirm the death penalty.[103] Even when section 433A of the CrPC imposes a restriction of 14 years, the court, he stressed, is within its right to extend the period of imprisonment to 20, 30, or 40 years in the interest of public at large.[104] It also specifically overruled the *Sangeet* dictum by holding that the view expressed therein (that the special sentence of imprisonment for a fixed term and putting it beyond the application of remission deprives the 'appropriate government' from exercising its remission power) is 'not in consonance with the law'.[105] However, recalling the nature of the constitutional clemency power vested in the President/State Governor, it ruled that the right of a convict to seek remission, commutation, or reprieve provided under article 72/161 of the Constitution remains intact and it cannot be touched by the courts.[106] It, however, ruled that the power to impose the modified expanded punishment of incarceration for any specific term or till the end of the convict's life, as an alternate to death penalty, can only be exercised by the high courts (in the confirmation or appellate proceedings) and the Supreme Court (in further appellate proceedings) and not by any lower court.[107]

However, Uday U Lalit J in his dissenting opinion (concurred by Abhay Manohar Sapre J), reflecting on the question, stressed that it is neither open to the apex court to create a 'special category of sentence', though prompted by the fact that death sentence, with remission granted on unsound grounds invariably ends up with the incarceration for a period of 14 years, in substitution of the death penalty and to put it beyond application of statutory remission. It is impermissible for the court to stipulate any mandatory period of actual imprisonment inconsistent with the one prescribed under section 433A of the CrPC.[108] He stressed that courts, by stipulating such mandatory

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102 *Id.,* paras 73, 78, 79 and 106.

103 *Id.*, para 89.

104 *Id.*, paras 78-79.

105 *Id.*, para 105.

106 *Id.*, paras106 and 178.

107 *Id.*, paras 102-104.

108 *Id.*, para 287.

period of confinement, cannot (and ought not) deny a prisoner the benefit to be considered for remission of his sentence. The convict will ultimately be condemned to live in the prison without any ray of hope for release.[109] Further, the convict is unjustifiably denied the benefit of sections 432/433 of the CrPC which even the convicts sentenced to death can possibly get.[110] Questioning the premise on which the *Swamy Shraddananda (2)* is constructed, he argued that the assumption that imprisonment for life, on remission, gets reduced to imprisonment for a period not more than 14 years and thereby it amounts to be minima, and therefore considering a hiatus between 14 years and the death sentence, the maxima, is a misconception. And remission granted in an unsound manner, he contended, can be corrected in exercise of judicial review, but it cannot by itself either nudge a judge in endorsing death penalty or justify the court to create a new form of punishment and put it completely beyond remission or extend it to a period more than that mentioned in section 433A of the CrPC.[111] If a statutory provision is abused or misused, the judge argued, it is for the legislature to amend, modify or repeal it; and not for the judiciary to assume the legislative role. *Swamy Shraddananda (2)*, by creating a punishment higher than life imprisonment and lower than death penalty, he stressed, has assumed the legislative role.[112]

Against the backdrop of these judicial opinions, it, however, becomes interesting as well as pertinent to recall that in 2003 the Malimath committee on reforms in criminal justice system,[113] taking a cue from the punishment prevalent in the USA, felt the need to prescribe in the IPC a punishment higher than that of imprisonment for life and lower than that of death penalty. It accordingly recommended that section 53 of the IPC and other provisions thereof providing for imprisonment for life as an alternative punishment to death penalty be suitably amended to insert therein 'imprisonment for life without commutation or remission' as one of the punishments. And whenever such punishment for life without commutation or remission is awarded, the committee added, it should be made clear that the appropriate government is precluded from commuting or remitting his sentence.[114] What is important to note, with apt emphasis, is that the Malimath committee recommended creation of the sentence of

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109 *Id.*, paras 284 and 286.

110 *Id.*, para 280.

111 *Id.*, paras 273 and 281.

112 *Vikram Singh @ Vicky* v. *Union of India*, AIR 2015 SC 3577.

113 Government of India, Committee on Reforms of Criminal Justice System (Ministry of Home Affairs, 2003).

114 *Id.*, paras 14.7.1 and 14.7.2. However, the committee recommended that the pardon, committal or remittal powers of the President of India and the State Governors, under arts. 72/161 of the Constitution, be kept unaltered.

'imprisonment for life without commutation or remission' and putting it beyond statutory remission or commutation by the executive through legislative amendment and not by judicial pronouncement.[115]

The apex court elsewhere[116] has categorically stated that prescribing punishment is the function of the legislature and not of the courts. The fixing of prison terms for specific crimes, which involves a substantive penological judgment, is properly within the province of legislature, not courts. Courts have to show deference to the legislative will and wisdom and will have to be slow in upsetting the enacted provisions dealing with the quantum of punishment prescribed for different offences. They should not interfere with the wisdom of the legislature unless penalties are palpably inhuman or shockingly disproportionate to the gravity of the offence. Courts cannot interfere with the prescribed punishment only because the punishment is perceived to be excessive.

Even this newly carved sentence of fixed imprisonment with no remission, in place of death sentence in capital offences, leaves scope for 'subjective' quantification of the appropriate number of years (out of imprisonment for the whole natural life) that the convict must spent in prison (before seeking remission)[117] or inflicting life

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115 However, the Malimath committee's recommendation for amending s. 53 of the IPC to insert the suggested punishment therein is neither referred to, nor mentioned in, *Swamy Shraddananda (2)* judgment. But the majority judgment in *V Sriharan* refers to the Malimath committee to say that he and other members of the committee did not have the benefit of the law laid down in *Swamy Shraddananda (2)*. See *V Sriharan* v. *Union of India*, *supra* note 23, para 87.

116 *Vikram Singh @ Vicky* v. *Union of India*, *supra* note 112.

117 See *Tattu Lodhi* v. *State of Madhya Pradesh*, AIR 2016 SC 4295 (minimum 25 years in prison with no remission, for kidnapping, attempting to rape a minor girl and killing her and burning the dead body); *Vikas Yadav* v. *State of Uttar Pradesh*, AIR 2016 SC 4614 (25 years of actual imprisonment without consideration of remission for killing and burning the dead body); *Anil @ Antony Arikswamy Joseph* v. *State of Maharashtra* (2014) 4 SCC 69 (30 years imprisonment without remission, in addition to the sentence already undergone, for killing and sodomising a minor); *Ashok Debbarma @ Achak Debbarma* v. *State of Tripura* (2014) 4 SCC 747 (20 years imprisonment without remission, over and above the period of sentence already undergone, for participating in killing of 15 persons); *Albert Oran* v. *State of Jharkhand* AIR 2014 SC 3202, (30 years imprisonment with no remission, in addition to the sentence already undergone); *Amar Singh* v. *State of Uttar Pradesh*, AIR 2014 SC 2486 (minimum 30 years imprisonment without remission before consideration of his case for remission, for killing his wife and two daughters and attempting to kill another two by putting a van on fire); *Rajkumar* v. *State of Madhya Pradesh* (2014) 5 SCC 353, (minimum 35 years in jail without remission, before consideration of his case for pre-mature release, for raping a minor girl and killing her); *Gurvail Singh @ Gola (1)* v. *State of Punjab* (2013) 2 SCC 713 (30 years imprisonment without remission, for killing four persons); *Sahib Hussain @ Sahib Jan* v. *State of Rajasthan*, *supra* note 93 (20 years imprisonment, for killing five persons, including three minor children); *Neel Kumar* v. *State of Haryana* (2012) 5 SCC 766 (30 years imprisonment without remission, for raping and killing his

imprisonment (without remission).[118] Fakir Mohamed Ibrahim Kalifulla J who authored the majority judgment of the constitutional bench in *V Sriharan (2)*, has admitted that the factors that need to be taken into account or that becomes relevant in the judicious and judicial fixing of the number of years of imprisonment (in excess of 14 years for putting that period beyond application of remission) cannot be put into any straightjacket formula. He opined that the years of incarceration, however, need to be quantified by taking into account, apart from the crime itself, the angle of the commission of crime and the interests of the society at large and all other factors that cannot be ascertained in advance, apart from the crime itself.

The crime test, the criminal test, and the rarest of rare test

With a view to overcoming the problem of judge-centric sentencing in capital offences and recalling *Sangeet*, wherein the apex court asserted that the 'balancing test' (*i.e.,* balancing of aggravating and mitigating circumstances) is not the 'correct test' in deciding whether death penalty be awarded or not, one of the two-judge member bench of the Supreme Court has proposed the 'crime test' (aggravating circumstances), the 'criminal test' (mitigating circumstances) and the 'rarest of rare test'(hereinafter R-R Test)' in place of the prevalent 'balancing test' for inflicting death penalty. The triple test arguably removes the judge-centric sentencing policy in capital offences. To award death sentence, the test stresses, the aggravating circumstances (crime test) have to be fully satisfied (*i.e.,* 100%) and there should be no mitigating circumstance (criminal test 0%) favouring the accused. If there is any circumstance favouring the accused (like lack of intention to commit the crime, possibility of reformation, young age of

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minor daughter); *Sandeep* v. *State of Uttar Pradesh*, *supra* note 46 (minimum 30 years imprisonment without any remission before his case for premature release is considered, for killing his pregnant friend); *Brajendera Singh* v. *State of Madhya Pradesh*, *supra* note 80 (imprisonment for minimum 21 years, for killing his wife and three children); *Dilip Premnarayan Tiwari* v. *State of Maharashtra*, *supra* note 10 (20 years of actual imprisonment for double murder); *Ramraj @ Nanhoo @ Bihnu* v. *State of Chhatisgarh*, *supra* note 19 (20 years of imprisonment before his release for remissions is considered, for killing his wife); *Haru Ghosh* v. *State of West Bengal* (2009) 15 SCC 551 (minimum 35 years of imprisonment, for killing two persons, including a minor).

118 See *Subhash Chander* v. *Krishan Lal*, *supra* note 26 (imprisonment for the rest of life, with no further commutation or premature release under s. 401, CrPC); *Swamy Shraddananda (2) @ Murali Manohar Mishra* v. *State of Karnataka*, *supra* note 23 (life imprisonment with no remission, must not be released until his death in jail); *State of Uttar Pradesh* v. *Sanjay Kumar*, *supra* note 25 (life imprisonment with a direction not to be granted premature release under the guidelines framed under the jail manual, or s. 433A of the CrPC); *Sebstian* v. *State of Kerala* (2010) 1 SCC 58 (life imprisonment, with a direction that he should be confined in jail till his death, for raping and killing a minor girl); *Deepak Rai* v. *State of Bihar* (2013) 10 SCC 421 (life imprisonment till death, for double murder).

the accused, not a menace to the society, or no previous criminal record) the 'criminal test' may favour the accused to avoid death sentence. Even, if both the tests are satisfied, that is the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, the court has to finally apply the R-R test. The R-R test depends upon the perception of the society (society-centric) and not of the court (judge-centric). The sentencing judge is required to look into whether the society will approve the awarding of death sentence to the crime at hand or not. While applying the R-R test, the sentencer has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes (like rape and murder of minor girls, intellectually challenged, minor girls with physical disability, old and infirm women with those disabilities etc.). The judge, in his/her ultimate analysis, is expected to inflict the death penalty because the situation demands, and not because he desires.[119]

In *Mofil Khan*,[120] a three-judge bench of the apex court has not only endorsed the triple-test as a certain test, but has also stressed that it examines whether the society abhors such a crime and whether it shocks the conscience of the society and attracts intense and extreme indignation of the community. The triple-test obviously takes into its ambit the situations where the accused plans and meticulously executes a capital offence or shows no remorse or is of depraved mentality; or where victims of a brutal assault are innocent minor children, unarmed persons, helpless women or old and infirm persons. Infliction of death penalty is also justified when the offender is a hardened criminal or is beyond reformation or re-socialisation, or the manner in which the crime was committed by him was brutal or diabolic inviting society's cry for justice or strong social indignation.[121]

However, in *Mahesh Dhanaji Shinde* v. *State of Maharashtra*,[122] a three-judge bench of the Supreme Court, which commuted the death sentence inflicted on the appellant-convicts for killing nine persons to imprisonment for life, expressed its reservations about utility of the triple-test and followed the balancing-test. It observed that the triple-test in fact goes beyond what is laid down in *Bachan Singh*. Contrary to the caution given by the constitution bench in *Bachan Singh*, it treats the aggravating and mitigating

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119 *Shankar Kisanrao Khade* v. *State of Maharashtra*, *supra* note 24, para 28. Also see *Anil @ Antony Arikswamy Joseph* v *State of Maharashtra*, *supra* note 117 and *Birju* v. *State of Madhya Pradesh* (2014) 3 SCC 421, wherein the same judge who articulated the triple-test in *Shankar Kisanrao Khade* has followed it. However, a three-judge bench of the apex court in *Lalit Kumar Yadav @ Kuri* v. *State of Uttar Pradesh* (2014) 11 SCC 129, has referred to the triple-test, though not explicitly followed it.

120 (2015) 1 SCC 67.

121 *Id*., para 45.

122 (2014) 4 SCC 292.

circumstances in separate water-tight compartments. In some situations, the bench observed, it may be impossible to isolate the aggravating circumstances from the mitigating ones and both the sets of circumstances (aggravating and mitigating) need to be considered to cull-out the cumulative effect thereof for imposing death penalty. [123]

Nevertheless, subsequent to *Mahesh Dhanaji Shinde*, a two-judge bench of the apex court (consisting of the judge who articulated the triple-test in *Shankar Kisanrao Khade*) has followed the triple-test in *Ashok Debbarma @ Achak Debbarma* v. *State of Tripura*[124] and *Dharam Deo Yadav* v. *State of Uttar Pradesh*.[125] In both the cases, the bench, without making any reference to the *Mahesh Dhanaji Shinde* dictum, ruled that for awarding death penalty the 'crime test' has to be fully satisfied and there should be no mitigating circumstance favouring the accused, over and above the R-R test.

Recently, in *Shabnam* v. *State of Uttar Pradesh*,[126] a three-judge bench of the Supreme Court has implicitly relied upon the triple-test. Referring, *inter alia*, to attributes of the triple-test mentioned in *Mofil Khan*, it observed that "one of the most important functions court performs while making a selection between the imprisonment for life and death is to maintain a link between contemporary community values and the penal system." But it admits that the society's perceptions of crime *vis-à-vis* appropriate penalties are not conclusive. Social standards and values have always been 'progressive' and they acquire meaning as public opinion becomes enlightened by humane justice. And it reminds courts that they are required to draw meanings of community values from the evolving standards of public morality and consciousness that mark the progress of a matured society. Premised on this judicial outlook, the bench in the instant case, felt the extremely brutal, grotesque, and diabolical killing by an educated girl, with the help of her paramour, of seven members of her own family triggers intense indignation in the community. It accordingly held that she does not deserve mercy, but death sentence.

The triple-test seemingly seems to prevent the 'judge-centric' capital sentencing as it focuses on the societal response to the crime and the circumstances relating to the crime and the criminal. It expects the sentencing judges to substitute their presumptions; values and predilections, by that of the community and informed societal preferences. However, the triple-test raises a few doubts about its claim of ensuring 'principle-centric' sentencing. *Firstly*, it prevents the judge-centric sentencing by enabling the

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123 *Id*., para 24.

124 *Supra* note 117.

125 (2014) 5 SCC 509.

126 (2015) 6 SCC 632.

sentencing judge to substitute his values or predilections by that of the community (in terms of social abhorrence or indignation), but one, with no contempt, doubts his ability to do so and the means available to him for identifying or measuring the social indignation.[127] *Secondly*, the triple-test, in letter and spirit, goes against the Supreme Court's assertion in *Bachan Singh* against the formulation of categories of the offences deserving or warranting death penalty. It, through the R-R test, in ultimate analysis, predicts the types of offences that might invite 'social abhorrence' and 'extreme indignation and antipathy' and thereby creates a category of offences that justifying death penalty. *Thirdly*, it moves away from *Bachan Singh*'s fundamental doctrinal framework of the rarest of rare test by disassociating the aggravating and mitigating circumstances from the rarest of rare analysis and seeking to create a distinct list of the circumstances relating to the crime, and the criminal and evaluating them separately.[128] *Fourthly*, the test, in fact, by treating the aggravating and mitigating circumstances in separate water-tight compartments, goes beyond what is laid down in *Bachan Singh*.[129]

The triple-test thus, has neither emerged as a viable alternative to the twin-limbs of the rarest of rare case formulation nor received judicial support for further articulation and acceptance.[130] On the contrary, it seems it has added further confusion to the hitherto existent ambiguity of the fundamental doctrinal framework of *Bachan Singh* and the operational facets of the rarest of rare case formula.

VI The 'individualised' but 'principled' sentencing: The *Bachan Singh* outlook and reality

Both the judicial formulations, namely, the triple-test and fixed-term life imprisonment, articulated with the purpose of bringing some element of objectivity and thereby curtailing at least to some extent the 'judge-centric' sentencing in capital offences, are greeted with serious reservations. Unfortunately, none of the benches/judges are having reservations about the two formulations outlined above or has exhibited concern for outcomes of 'judge-centric' sentencing in capital offences. Neither

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127 In *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, *supra* note 8, the Supreme Court, as mentioned earlier, has delved into the issue and highlighted the impediments.

128 See Law Commission of India, *supra* note 50, paras 5.2.23-5.2.25. Also see Aparna Chandra, "A Capricious Noose" 2 *Journal of National Law University Delhi* 124 (2014).

129 *Mahesh Dhanaji Shinde* v. *State of Maharashtra*, *supra* note 122, para 24.

130 It is interesting to note that the judge who articulated the triple-test in *Shankar Kisanrao Khade* has in *Gurvail Singh @ Gola (1)* commuted death sentence of the appellant-convict to imprisonment for a term of 30 years with no remission.

have they come-up with alternate viable rational formulation(s) or principle(s) for streamlining or standardising the death penalty jurisprudence. These rulings also do not evince any clear-cut sentencing policy. They hardly offer any ascertainable objective and observable guiding principles or criteria that can be followed or employed in identifying the relevant factors relating to the criminal or the crime, asserted in *Bachan Singh*, for distinguishing the offenders receiving 'death' or 'no-death' sentence. We are, thus, thrown back to the *Bachan Singh* dictum and its further articulation in *Machhi Singh*. *Bachan Singh* has introduced the idea of individualized-sentencing in case of death sentence, requiring courts to balance circumstances relating to the 'crime' and the 'criminal' and stressing the imposition of death penalty in the 'rarest of rare cases' when its choice for life imprisonment is 'unquestionably foreclosed'. However, in the absence of any standardisation, judges have interpreted *Bachan Singh*'s rarest of rare case dicta according to their individual penal philosophy and objectives of punishment.[131] An arbitrary way of exercising judicial discretion has led to unjust and inconsistent outcomes. Even the guidelines relating to identification and balancing of aggravating and mitigating factors enumerated in *Machhi Singh* have not been able to remove the vice of judicial arbitrariness. Judges have opted for 'death penalty' or 'imprisonment for life' according to their personal perceptions. Individualised sentencing, as demonstrated in the preceding pages, has not only allowed judges to decide 'death' or 'no-death' for the offender on their personal predilections and philosophy but also made the death penalty a lethal lottery and 'judge-centric'. There are umpteen number of instances wherein judges of the apex court have treated equally situated convicts unequally by imposing 'death' on a few and sending others to prison for 'life'. Even the apex court, admittedly, sentenced nine convicts to death by relying upon *Ravji*, one of its judicial pronouncements delivered in ignorance of *Bachan Singh*.

However, it needs to be recalled here that in *Bachan Singh* the constitutional bench has stressed that the exercise of judicial discretion in awarding the death sentence or life imprisonment to a convict of a capital offence is not 'untrammelled and unguided'. The bench stressed that the judicial discretion needs to be exercised 'judicially in accordance with well-recognised principles crystallised by judicial decisions.' The constitutional bench, to put it in its own words, observed: [132]

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131 The *Bachan Singh* dictum is admittedly not followed uniformly or consistently. Judicial approach has not evinced uniform sentencing process. Even the balancing of aggravating and mitigating circumstances approach has been invoked variedly and inconsistently by the high courts and the Supreme Court. See *Aloke Nath Dutta* v. *State of West Bengal*, *supra* note 8; *Swamy Shraddananda (2) @ Murali Manohar Mishra* v. *State of Karnataka*, *supra* note 23; *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, *supra* note 8; *Sangeet* v. *State of Haryana*, *supra* note 53; *Shankar Kisanrao Khade* v. *State of Maharashtra*, *supra* note 24.

132 *Supra* note 27, para 166.

> [P]arliament, in its wisdom thought it best and safe to leave the imposition of this gravest punishment in gravest cases of murder, to the judicial discretion of the courts which are manned by persons of reason, experience and standing in the profession. The exercise of this sentencing discretion cannot be said to be untrammelled and unguided. It is exercised judicially in accordance with well-recognised principles crystallised by judicial decisions, directed along the broad contours of legislative policy towards the signposts enacted in section 354(3).

Further, the apex court, elsewhere,[133] placing reliance on *Bachan Singh*, has also asserted that spirit of articles 14 and 21 of the Constitution forces courts, when they choose between death penalty and life imprisonment, to adopt a 'principled approach' to sentencing. Arbitrary exercise of judicial discretion and the consequences thereof go against the tenets of these two constitutional provisions.[134] Inconsistency in sentencing in like cases leads to inequality of treatment, unfairness and injustice. And when a sentence is imposed, it should be imposed on sound principles.[135]

In the post-*Bachan Singh* period, the Supreme Court unfortunately has not been able to develop any concrete 'well-recognised principles'[136] or evolve/stipulate any rational sentencing 'guidelines'.[137] Whenever it is called upon to delve into a case involving death sentence or imprisonment for life or to have a choice between the two, it invariably, referring to, or relying upon, its earlier judicial pronouncements, enumerates the factors that generally needs to be considered while inflicting death penalty or awarding life imprisonment.[138] And, in the backdrop of these factors and fact-scenario

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133 *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, *supra* note 8, para 84.

134 P N Bhagwati J, in his dissenting opinion in *Bachan Singh*, observed: 'the question may well be asked by the accused: Am I to live or die depending upon the way in which the Benches are constituted from time to time? Is that not clearly violative of the fundamental guarantees enshrined in arts. 14 and 21?' See *Bachan Singh* v. *State of Punjab*, *supra* note 72.

135 *OMA @ Omprakash* v. *State of Tamil Nadu*, AIR 2013 SC 825.

136 It is observed that the constitutional bench of the apex court in *Bachan Singh* has not encouraged the standardisation and categorisation of crimes and even otherwise it is not possible to standardize and categorise all crimes. See *Shankar Kisanrao Khade* v. *State of Maharashtra*, *supra* note 24, para 24; *Sangeet* v. *State of Haryana*, *supra* note 53, para 80.

137 See *Aloke Nath Dutta* v. *State of West Bengal*, *supra* note 8. But it is to be remembered that the constitutional bench has observed that the court is empowered to lay down 'broad guidelines' consistent with the policy indicated in s. 354(3) of the CrPC. See *Bachan Singh* v. *State of Punjab*, *supra* note 27, para 178.

138 Generally these factors are: the nature and motive of the offence; prior-planning and mode of execution of the offence; the kind of weapons used and the manner of their use; the relation between the accused and the victim; vulnerability of the victim; the gravity of injuries caused;

of the case at hand, it identifies and narrates the aggravating and mitigating circumstances and picks up, or place reliance on, a few therefrom, depending, of course, on subjective perception of the judge/bench, for inflicting death penalty or for awarding life imprisonment to the convict. In the process, the judge/bench hardly specifies the factors that influence him/it the most and the reasons therefor.[139] Instead of searching an interpretation for the precedential decisions, almost every case of the apex court dealing with the choice between 'life' and 'death' for the convict follows a 'cookie-cutter analysis' approach. It mechanically reiterates legal principles talked about in its earlier decisions without taking serious efforts to apply them to the factual-matrix at hand. A number of times courts "simply cut and pasted, word for word, the entirety of a lengthy legal analysis about weighing and balancing, the rarest of the rare doctrine, extreme circumstances, severe punishment, aggravating and mitigating factors," and came to a rote conclusion.[140] If reasons or analysis for the choice are adduced, they are too imprecise to deduce any sound principle or proposition therefrom.[141] In the absence of explicit reasons for picking up a few and relying thereon for deciding death or life for the convict, it obviously becomes difficult to appreciate as to whether the *Bachan Singh* dicta (that imprisonment for life is the rule and the death sentence an exception, to be resorted to only when the former is unquestionably foreclosed and the chances of the convict getting reformed or rehabilitated are next to impossible) is followed or not. In quite a few judicial pronouncements of the apex court, wherein a fact-situation relating to or having prominent nexus with the crime and/or the criminal, which, in an earlier decision was treated as an aggravating or mitigating factor, has not been treated as aggravating or mitigating factor, respectively in the identical fact-scenario in the case at hand, the court has not offered any explicit justification for its 'treatment' of the aggravating or mitigating factor, as the case may be, or judicial discourse thereon. Truncated judicial discourse, in the light of the purportedly preferred penal theory/philosophy/object by the judge/bench, hardly led to formulating or theorising sentencing propositions or principles.

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the degree of cruelty, brutality and depravity involved; impact of the offence committed; age and background of the accused; criminal antecedents of the offender; extent of shock to the conscience of the community, etc.

139 See K N Chandrasekharan Pillai, "The quagmire of confusion in sentencing" 3(1) SCC (2013).

140 See A G Noorani (ed), *Challenges to Civil Rights Guarantees in India* ch. 4: "Death penalty" 124 (Oxford University Press, 2012) .

141 See *Ashok Kumar Pandey* v. *State of Delhi*, *supra* note 70; *Farooq @ Karatta Farooq* v. *State of Kerala*, AIR 2002 SC 1826; *Acharaparambath Pradeepan* v. *State of Kerala*, *supra* note 70; *Major Singh* v. *State of Punjab* (2007) Cri LJ 59 (SC).

Further, barring a few judicial pronouncements of the Supreme Court, in the backdrop of the fact-situation of the case dealt with therein and of earlier judgments or judicial observations referred to, or relied upon, do prominently exhibit observations or assertions of the judge/bench with regard to the multiple purport and objects for which punishment needs to be inflicted on an offender. Invariably, the court has asserted that punishment to be imposed on offender should be appropriate, adequate, just and proportionate to culpability, the nature, gravity of the crime and the manner in which the offence was executed. Punishment should not only reflect the social conscience and sentiments, but should also respond to the social cry for justice against the criminal. It should conform to, and be consistent with, the atrocity and brutality with which the crime was committed and its social impacts. Punishment should be socially relevant. Undue sympathy to offender, the apex court has kept on reminding courts, will, in due course of time, be counter-productive. It will make the public lose its faith and confidence in the justice system and undermine the efficacy of law.[142] Penal measure against the perpetrator of a crime should not merely exhibit its sensitivity to the rights of the wrongdoer, but also to the rights of victims thereof and of the society as a whole. It should reconcile and balance 'his' rights and 'their' interests.[143] Sometimes, the court, admitting that no straitjacket formula can be formulated, has given prominence to the idea of proportionality of punishment; while at other times it has stressed the need to reform the offender, and render justice to the victims of a crime. In order to draw support for its preferred stand/position, it has brought in certain philosophical or penological premises or theories and objectives of punishment, with little or no effort to link it with the fact-scenario of the case at hand. Sometimes all the premises figure in one judicial discourse.[144] This state of affairs has obviously led to judicial ambivalence and created confusion. Commenting on such a 'disappointing and sorry state of affairs', a scholar of repute[145] rightly observed: [146]

> [W]henever the question of appropriate sentence is raised it will have the usual run of restatement of the various factors and then opt for

142 *State of Punjab* v. *Rakesh Kumar* (2009) Cri LJ 396 (SC); *Mofil Khan* v. *State of Jharkhand*, *supra* note 120; *Purushottam Dashrath Borate* v. *State of Maharashtra*, AIR 2015 SC 2170.

143 See *Dhananjoy Chatterjee @ Dhana* v. *State of West Bengal*, *supra* note 46; *State of Madhya Pradesh* v. *Najab Khan* (2013) Cri LJ 3951 (SC); *Alister Anthony Pareira* v. *State of Maharashtra* (2012) 2 SCC 648; *Ram Chandra* v. *State of Rajasthan*, AIR 1996 SC 797; *Guru Basavaraj* v. *State of Karnataka* (2012) 8 SCC 734; *Purushottam Dashrath Borate* v. *State of Maharashtra*, *ibid*.; *Mofil Khan* v. *State of Jharkhand*, *supra* note 120; *OMA @ Omprakash* v. *State of Tamil Nadu*, *supra* note 135.

144 See *Alister Anthony Pareira* v. *State of Maharashtra*, *ibid*.

145 K N Chandrasekharan Pillai, *supra* note 139.

146 *Id.* at 5-6.

> a sentence tying it down to the facts of the case at hand. It would be fine if it specifies the factors that have influenced it most for imposing the punishment it imposes. Then it may be possible for the commoner to be convinced of the factors that contribute for a harsher or lenient sentence. — If the decision depends on the facts of each case and no straitjacket formula is possible, it is appropriate for the Court to search for the various theories of punishment and spell out the circumstances around them with reasons for their application in the situations presented by the case. It is unfortunate that the statements —- made by the Court in various cases signify the Court's confusion as to the full import of their sentencing policy.

The scholar asserts, and rightly so, that when the apex court opts for either of the penal alternatives, death penalty or life imprisonment, it is expected to justify its choice on firmer grounds and discuss the fact situation in the context of a theory (or theories) of punishment that it considered applicable in the factual-matrix of the case at hand.[147] Holding the Supreme Court responsible for this unsatisfactory 'state of affairs' (quoted above), he wonders as to why the Supreme Court does not resort to theorisation, rather than offering a mere description of the circumstances bereft of any legal principle, and quips whether it is because of its unwillingness to do so or is it because it finds description (of circumstances) is intellectually less challenging.[148]

Whatever might be the reason, the fact is that the exercise of judicial discretion in choosing 'death' or 'life' for convict in capital offences is highly subjective sans any discernable sentencing policy or principles. The extremely uneven application of the *Bachan Singh* dictum has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principles.

VII Guided discretion – A possible way out?

The apex court, on more than one occasion, has acknowledged that the judicial discretion vested in the courts for inflicting death penalty or life imprisonment on a convict in capital offences, most of the time is guided by the personal predilection of the judges, rather than sound legal propositions or principles. Philosophical justifications, penal theories they believe in or their outlook to the so-called 'aggravating' and 'mitigating' circumstances operate as 'guiding principles' which, consciously or unconsciously, dictate their choice for 'death' or 'life' for the convict. Absence of any ascertainable articulated propositions or principles, judicial or legislative, makes their

147 *Id.* at 7.

148 *Id.* at 5.

judicial discretion most unguided and allows them, individually or collectively, to have their own approach to the death penalty or alternatively to life imprisonment and invent justifications therefor. Such a sentencing process not only leads to disparity in sentencing but also becomes unfair to the perpetrator, his victim, and society as a whole. The quest of judges for ensuring a balance through punishment between just deserts, deterrence, social abhorrence, and due respect for human rights and dignity of the doer, which constitute composite and integral components of sentencing, obviously warrants certain uniform general criteria linked with the nature of crime, characteristics of the criminal, the categorisation of circumstances into aggravating and mitigating and ascertaining their cumulative bearing on opting for either of the two sentences (death penalty or life imprisonment) in place. Uniform application of such criteria, to the extent possible, not only curtails and regulates the wide judicial discretion but also ensures objectivity and parity, in tune with the spirit of articles 14 and 21 of the Constitution, in sentencing.

However, the hitherto formulated standardization of criteria and principles evolved by the Supreme Court in the rarest of rare case framework outlined in *Bachan Singh* and further refined in *Machhi Singh*, in the backdrop of section 354(3) of the CrPC, have not been able to regulate the judicial discretion in inflicting death penalty or life imprisonment and evolve standardisation of aggravating and mitigating circumstances or of the sentencing process.

Consistency and objectivity in sentencing, particularly when it involves a question of death and life of a convict, become more relevant and imperative. Unfettered judicial discretion, as outlined in the preceding pages, has created a state of uncertainty and led to denial of parity, equality, and fair deal to convicts. The judicial discretion needs to be regulated by sentencing guidelines.[149] But a million-dollar question is who has to formulate the guidelines and on what parameters or norms.

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149 'Sentencing guideline' in a broadest sense connotes 'a piece of authoritative advice issued to sentencers at large about how they should go about deciding sentences they are to impose'. They are merely a 'flexible device, designed to ensure that all sentencers take into account similar factors when determining punishment'. They seek to "limit or control discretion to achieve greater consistency and transparency in decision-making." They operate as "rules that structure the exercise of discretion by those legally authorised to make sentencing decisions without eliminating all discretion." R A Duff, "Guidance and Guidelines" 105 *Columbia Law Review* 1162 (2007); Martin Wasik, "The Status and Authority of Sentencing Guidelines" 39 *Bracton Law Journal* 9 (2007); Peter Ozanne, "Judicial Review: A Case for Sentencing Guidelines and Just Deserts" in Martin L Forst (ed), *Sentencing Reform: Experiments in Reducing Disparity* 117 (Sage Publications,1982).

The Malimath committee on reforms on criminal justice system, as early as in 2003, put forward two proposals for streamlining the sentencing process in India. It suggested that a statutory committee under the chairmanship of a former judge of the Supreme Court or a retired chief justice of a high court having experience in criminal law matters with other members representing the prosecution, legal profession, police, social activists and women representatives be constituted to lay down sentencing guidelines.[150] The committee also suggested that section 53 of the IPC be amended to insert therein a new form of punishment, *i.e.,* 'imprisonment for life without commutation or remission', as an alternative punishment to death penalty.[151]

However, a few judges of the apex court have expressed their reservations on any move for standardization of the judicial discretion. Arguing that sufficient discretion is a pre-condition of sentencing, a judge opined that strict channelizing of judicial discretion will go against the existing individualised sentencing. It will also prevent the sentencing court from identifying and weighing aggravating and mitigating circumstances and thereby determining culpability.[152] While another judge of the court felt that 'standardization of sentencing process' will tend to 'sacrifice at the altar of blind uniformity'.[153] Even the constitutional bench in *Bachan Singh* was not in favour of in standardisation of 'special reasons' and felt that all the aggravating and mitigating circumstances cannot be 'exhaustively and rightfully be enumerated so as to exclude free-play discretion'.[154]

Judicial discretion, which is vested in the courts in section 354(3) of the CrPC has to be retained to ensure that the death penalty is inflicted in the rarest of rare cases and that too when the option of awarding life imprisonment, in the opinion of the sentencers, is foreclosed. But it needs to be emphasised that the judicial discretion, in the backdrop of the provisions of section 354(3), the fundamental framework of the

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150 Government of India, Committee on Reforms of Criminal Justice System, *supra* note 113, paras 14.4.5 and 24.14. The committee on draft national policy on criminal justice (2008) has reasserted the need for statutory sentencing guidelines. However, the recommendation is not yet received attention of the legislature. However, both the committees are silent on the nature of guidelines to be framed and the norms to be used therefor.

151 *Id*., paras 14.7.1 and 14.7.2. The legislature has not given effect to the suggestion. However, the Supreme Court, through *Swamy Shraddananda (2)*, has carved it as a expanded modification of the sentence of life imprisonment.

152 *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, *supra* note 8, para 49. For debate on this issue see Andrew Ashworth, *Sentencing and Criminal Justice* (Oxford University Press, 2005); Andrew Ashworth, "Sentencing Reform Structures" 16 *Crime and Justice* 181 (1992).

153 *OMA @ Omprakash* v. *State of Tamil Nadu*, *supra* note 135, para 43.

154 *Bachan Singh* v. *State of Punjab*, *supra* note 27, para 195.

rarest of the rare case doctrine articulated in *Bachan Singh* and *Machhi Singh* and its hitherto 'judge-centric', rather than 'principle-centric' application, needs to be regulated or guided by certain guidelines. It needs to be guided primarily by basic fundamentals of parity and fairness so that the judicial choice between death penalty and life imprisonment for convicts becomes 'principled' and not 'judge-centric'. Obviously, these fundamentals need to be carefully crystalized in the form of sentencing guidelines from the hitherto identified and used (aggravating and mitigating) factors and principles,[155] in the backdrop of the extent (and causes) of the subjective element that crept in the sentencing process and opting of death penalty or life imprisonment and the avowed purposes thereof (deterrence, retribution, incapacitation or reformation, etc.).

Recalling provisions of section 354(3) of the CrPC, the dictum of the constitution bench in *Bachan Singh*, and of the apex court in *Machhi Singh*, and the manner in which different judges/benches of the Supreme Court have hitherto followed, rather moulded, the *Bachan Singh* and the *Machhi Singh* rulings, to accommodate therein their personal predilections and perceived aggravating and mitigating factors, of all the existing sentencing guidelines,[156] descriptive guidelines, in the present submission, seems to be more apt.

Any endeavour to put sentencing guidelines/principles in place involves the identification/prioritisation of aggravating as well as of mitigating factors and setting up of sentencing goal(s)/objectives for inflicting death penalty or life imprisonment.

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155 Factors and principles enumerated in *Machhi Singh* v. *State of Punjab*, *supra* note 37 and *Ramnaresh* v. *State of Chhattisgarh*, *supra* note 64, may be carefully looked into for the exercise.

156 The existing forms of sentencing guidelines are: (i) descriptive guidelines (which are based on the past sentencing norms and seek to reduce disparity in sentencing by ensuring that sentencers take note thereof in their sentencing-decisions); (ii) prescriptive guidelines (which prescribe new sentencing policy and norms for sentencing); (iii) presumptive guidelines (which lay down broad policy of sentencing and insist sentencers to follow them, unless circumstances mentioned therein allow them to depart therefrom); and (iv) voluntary guidelines (which lay down a sentencing framework and norms and leave it to sentencers to follow them or not). See Dale G Parent, *Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines* 34 (Butterworth Legal Publisher, 1988); Martin Wasik and Ken Pease, "Discretion and Sentencing Reform: the Alternatives" in Martin Wasik and Ken Pease (eds), *Sentencing Reform: Guidance or Guidelines?* 1 (Manchester University Press, 1986); Brain D Johnson, "Sentencing" in Michael Tornry (ed), *The Oxford Handbook of Criminal Justice* 696 (Oxford University Press, 2011); Lynn S Branham and Michael S Hamden, *Cases and Materials on the Law and Policy of Sentencing and Corrections* 187 (Oxford University Press, 2009); Michael Tornry, "Sentencing Guidelines and Sentencing Commissions-the Second Generation" in Martin Wasik and Ken Pease (eds) *Sentencing Reform: Guidance or Guidelines?* 22 (Manchester University Press, 1986); Brain D Johnson, "Sentencing" in Michael Tornry (ed), *The Oxford Handbook of Criminal Justice* 696 (Oxford University Press, 2011); Lynn S Branham and Michael S Hamden, *Cases and Materials on the Law and Policy of Sentencing and Corrections* 187 (West, 2009).

Obviously, the base-rule in capital offences is life imprisonment. And death sentence is permissible only when there exists an aggravating factor and no mitigating factor or when aggravating factors, in their balancing with mitigating factors, outweigh the mitigating circumstances and the sentencer's choice for life imprisonment is foreclosed. But it is difficult to identify and prioritise aggravating and mitigating circumstances from (the hitherto unscientifically identified and indiscriminately used by the apex court) an unexhausted list thereof in advance. Such identification might perpetuate the hitherto criticised disparity in sentencing. Further, the nature and forms of these aggravating and mitigating factors obviously depend on the identified primary (along with secondary, if any) justifications for punishment (death penalty or life imprisonment). Aggravating circumstances (balanced with mitigating circumstances) and relative weightage given to them increase or decrease the chances of inflicting the death penalty from the starting point of punishment (*i.e.*, life imprisonment).

Keeping in view the nature of judicial discretion conferred on judges under section 354(3) and hitherto invented and used varied aggravating and mitigating factors by the apex court, one may suggest the identification and enumeration of aggravating and mitigating circumstances that should not be considered in sentencing, rather than attempting to prepare an 'unrealistic and undesirable' exhaustive list of these factors (that have close bearing or nexus with the identified penal theory or justifications) be put in place.[157] And the penal justification in capital offences and judicial choice between death penalty and life imprisonment should be the principle of proportionality and possible reformation of convicts, and not deterrence (as it is yet to be established that death penalty has deterrent element) for the purpose of preparing a list of 'irrelevant factors'.[158]

In order to comply with the second limb of the rarest of rare case doctrine effectively, some elaborate mechanism to obtain information on the possibility of reformation and rehabilitation of convict, which has been hitherto ignored in death penalty adjudication and has been pointed out by the apex court as a source of 'judge-centric', rather than objective or evidence-based assessment need to put in place. Further,

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157 Julian V Roberts, "Punishing, More or Less: Exploring Aggravation and Mitigation at Sentencing" in Julian V Roberts (ed), *Mitigation and Aggravation at Sentencing* 1 (Cambridge University Press, 2011). This approach will help us in making certain factors that allow subjective assessment of the sentencers, collateral factors, and factors related to third parties irrelevant. It will desist sentencers to allow sympathy or mercy to creep in sentencing process and decision. See Kate Warner, "Equality before the Law: Racial and Social Background actors as Sources of Mitigation at Sentencing" in Julian V Roberts (ed), *Mitigation and Aggravation at Sentencing* 124 (2011); Andrew Ashworth, *Sentencing and Criminal Justice* 187 (Oxford University Press, 2005).

158 Law Commission of India, *supra* note 50.

serious consideration may be given to the proposition that the prosecution be put under onus to prove beyond reasonable doubt that the convict in question is beyond reformation.

Similarly, the proposition advanced by judges/benches of the Supreme Court that sentencing, affirming or commuting judges/benches should engage themselves in a comparative analysis of the aggravating and mitigating circumstances in the case at hand with those with a comparative pool, for bringing consistency in identification of various relevant circumstances and minimising arbitrariness in sentencing decisions[159] be converted into a binding precedent.

VIII Conclusion

A dozen offences in the IPC provide for the death sentence, with imprisonment for life as an alternative punishment thereto. The CrPC vests courts with the discretion to opt for either of the two sentences. However, it makes imprisonment for life a rule, and the sentence of death an exception. It insists that the sentence of death be imposed for 'special reasons' and when the possibility of life imprisonment is unquestionably foreclosed.

When a judge is called upon to exercise his judicial discretion as to whether the convict of capital offence be inflicted with death penalty or life imprisonment, he, in the absence of any concrete precedential guiding principles or norms, to a large extent, is guided by his predilections and preconceptions, value system and social philosophy. Eventually, subjective discretion and personal philosophy of judges, rather than any sound policy formulations, decide the fate of the accused/appellant, and thereby his chance to die or live, premised, of course, on discovered/identified 'special reasons'. Sentencing in capital offences, as admitted by the Supreme Court, has become 'judge-centric' rather than 'principle-centric'. Vagaries of judicial arbitrariness have made the death penalty virtually a lethal lottery. It not only undermines the rarest of rare of rare case doctrine and the requirement of 'special reasons' but also reveals that 'unguided judicial discretion' led to unjust and unfair decisions. Judicial mistakes because of arbitrary exercise of the judicial discretion have hardly been checked by the 'requirements' laid down in the foundational doctrine of *Bachan Singh*. Unfortunately, majority of the judges of the apex court, when encountered with the situations of affirming/altering/commuting a death sentence, have neither adhered to the *Bachan Singh* requirements nor refined them so that certain sentencing guidelines, hoped by

159 *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, *supra* note 8; *Shankar Kisanrao Khade* v. *State of Maharashtra*, *supra* note 24.

the constitutional bench in *Bachan Singh*, can be crystalized therefrom. They have neither been consistent in following the rarest of rare yard-sticks nor initiating or nurturing normative justifications for inflicting death sentence or awarding life imprisonment. They have hardly pursued any sound penological or theoretical propositions in their judicial pronouncements, except, most of the times, listing the aggravating and mitigating circumstances and picking a few of them, with no convincing contextual or theoretical linkage, to decide 'death' or 'life' for the convict. No discernible pattern or guiding principle for imposing death penalty is evident from the judicial pronouncements hitherto delivered by the Supreme Court. Judicial pronouncements of the apex court have not been able to lay strong jurisprudential foundation for, and design a sound paradigm of death sentencing in India. Some of the questions raised by one of the scholars[160] and doubts voiced by critiques of sentencing policy in India do indeed need judicial response of the apex court through its judicial pronouncements.

However, the sentencing formulations proposed in *Swamy Shraddananda (2)* (akin to one of the suggestions of the Malimath committee but not mentioned therein) and *Santosh Kumar Satishbhushan Bariyar* (insisting on proof from the prosecution of the fact that the convict is incorrigible) seem to have the potentials to emerge as workable tests to curtail to some extent the 'judge-centric' sentencing policy. However, judicial response in the years to follow to the *V Sriharan (2)* dictum, wherein the constitutional bench upheld the special category of punishment (*i.e.,* imprisonment for a period of more than 14 years but less than the full life span of the convict or life imprisonment, and putting it completely beyond statutory remission) in place of death sentence, though it still leaves scope for unguided exercise of judicial discretion, will authenticate the proposition.[161] The Supreme Court needs to take these formulations more seriously, rather than finding fault with them or inventing interpretative techniques to avoid or mould them.

The rarest of rare dictate seemingly offers the sentencing criteria flexibility but keeping it just and fair is a big challenge for the apex judiciary. It is hoped that the apex court takes up the challenge with utmost sincerity and commitment to have a 'principle-centric', rather than 'judge-centric', approach to its judicial discretion of opting for 'death' or 'life' for convicts of capital offences so that certain 'crystallised principles' can be set in place for the guidance of sentencing courts. Its efforts for 'theorising' sentencing guidelines are overdue.

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160 See K N Chandrasekharan Pillai, *supra* note 139 at 5.

161 But it is certain that both the formulations will make the infliction of death sentence in the rarest of the rare cases, in true sense and spirit of the phrase. It will be close to the abolition of death sentence through judicial pronouncements.

Let us stress, rather remind our esteemed judges, that "when it is said that a matter is within the discretion of the court it is to be exercised according to well established judicial principles, according to reason and fair play, and not according to whim and caprice. Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular."[162] And a "judge, even when he is free, is not to innovate at pleasure. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence."[163]

162 *Ramji Dayawala and Sons (P) Ltd* v. *Invest Import* (1981) 1 SCC 80.

163 Benjamin Cardozo, *The Nature of the Judicial Process* 114 (Yale University Press, 1921).