

THE DEATH PENALTY: A NEW PERSPECTIVE IN LIGHT OF SANTOSH BARIYAR CASE

*Autri Saha and Pritika Rai Advani**

*The recent decision of the Supreme Court in **Santosh Bariyar** is a welcome step in India's death penalty jurisprudence, in that it revisits the case of **Bachan Singh** as the defining law on the subject. The judgment calls for the prosecution to show by leading evidence that there is no possibility of rehabilitation of the accused and that life imprisonment will serve no purpose. This article essentially seeks to explore the ramifications of this judgment on India's death penalty jurisprudence. The article begins with an examination of the recent trend towards abolition of the death penalty, to mainly highlight that as the international community's consensus against the death penalty grows, India is becoming increasingly isolated in its commitment to it. Then it seeks to discuss the changing climate in the body of India's death penalty jurisprudence, by tracing the transition from 'the death penalty as the rule and life sentence as the exception', to the concept of 'rarest of rare' dictum. In the light of the above cases, the new standard laid down in the landmark **Bariyar** case will be examined and critically analyzed in light of the fact that it will have the fundamental effect of restricting the imposition of the death penalty drastically. Lastly, we will seek to answer the question whether the **Bariyar** judgment marks the end of death penalty in India.*

* 3rd and 1st Year students respectively, W.B. National University of Juridical Sciences, Kolkata. We express our gratitude towards Professor B.B. Panda and to Mr. Moiz Tundawala, 5th Year student, NUJS for their valuable suggestions and comments on various aspects of the paper.

I. INTRODUCTION

“Every saint has a past and every sinner a future, never write off the man wearing the criminal attire but remove the dangerous degeneracy in him, restore his retarded human potential by holistic healing of his fevered, fatigued or frustrated inside and by repairing the repressive, though hidden, injustice of the social order which is vicariously guilty of the criminal behavior of many innocent convicts. Law must rise with life and jurisprudence responds to humanism.”¹

The above observation of Justice Krishna Iyer seems to be the basis on which the judgment of *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*² (hereinafter *Bariyar*) has been delivered. Considered by many to be a landmark judgment, it might form the groundwork for finally rooting out the death penalty from the criminal justice system in India. The acrimonious debate over capital punishment has continued for decades. But this debate has acquired renewed vigor in the light of this recent judgment, forcing the commentators to debate again on this particular issue. The *Bariyar* judgment has been welcomed by abolitionists,³ for it has the fundamental effect of drastically restricting the application of the death penalty in India. This is a progressive judgment, which calls for the prosecution to show by leading evidence that there is no possibility of rehabilitation of the accused and that life imprisonment will serve no purpose. Only then can the judge award a sentence of death. This case adds a new dimension to the existing death penalty jurisprudence.

We seek to examine the ramifications of this judgment on death penalty jurisprudence. The first part of the article examines the recent trend towards abolition of the death penalty in the international perspective. We look into the various treaties and agreements which advocate its abolition to examine India's stance in relation to the international position. Then we go on to discuss India's changing attitude as far as death penalty is concerned. The trend has constantly been towards a restrictive interpretation of death penalty. An attempt has been made to trace these cases so as to depict the evolution of death penalty towards a more restrictive application.

¹ Krishna Iyer J., *Death Sentence on Death Sentence*, THE INDIAN ADVOCATE: JOURNAL OF THE BAR ASSOCIATION OF INDIA: V. XVIII: 28: (Jan-June, 1978), as cited in Dr. A. Krishna Kumari, *Role of Theories Of Punishment In The Policy Of Sentencing*, available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1006&context=krishnaareti> (Last visited on January 6, 2010).

² (2009) 6 SCC 498.

³ Sartaj K. Singh, *The Death Penalty and Bariyar: The Road Ahead*, August 2, 2009, available at <http://currentlegalissues.blogspot.com/2009/08/death-penalty-debate.html> (Last visited on January 8, 2010).

The next part primarily engages in an analysis of the musings of the Court regarding the *Bachan Singh v. State of Punjab*⁴ (*hereinafter Bachan Singh*) case. This is important, for the *Bariyar* court derives its judgment from its radical interpretation of *Bachan Singh* itself. The next part deals with the reform test enunciated by this court, its ramifications, impact and the possible effect. The difficulties which might be faced in carrying out the reform test are also discussed. The last segment of the paper seeks to answer the question that has been plaguing India since the judgment came out, viz., does the judgment imply the end of the death penalty in India?

II. RECENT TREND TOWARDS ABOLITION OF DEATH PENALTY

Though civilized and restricted in its application, death penalty is very much alive in India. The retention of death penalty, even when we stand in the 21st century, is contrary to the trend in the rest of the world. There has been a growing realization among the international community regarding the abolition of death penalty. These sentiments were echoed by United Nations (*hereinafter* UN) Secretary-General Ban Ki-Moon in 2007 when he stated, "I recognize the growing trend in international law and in national practice towards a phasing out of the death penalty."⁵ Governments of various countries have not merely limited themselves to rooting out capital punishment from their own judicial systems but have also contributed towards launching a global movement for the eradication of death penalty.⁶ This consensus was first acknowledged in the Universal Declaration of Human Rights⁷ (*hereinafter* UDHR) adopted by the UN General Assembly in 1948. Article 3 of UDHR says that everyone shall have the right to life.⁸ It was further elaborated in Article 5 that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.⁹ This was the beginning of international law on death penalty. Although abolition directly was not promulgated by the UDHR, the abolitionist outlook of the document was evident. Thus, the UDHR marked the first step in the international trend towards abolition of the death penalty.

Since then countries have joined the abolitionist ranks in exceptional numbers, on the ground that it is a gross violation of human rights. As a matter of fact, many countries have enshrined the abolition of death penalty in their

⁴ AIR 1980 SC 898.

⁵ Secretary-General's press conference, January 11, 2007, available at <http://www.un.org/apps/sg/sgstats.asp?nid=2407> (Last visited on January 8, 2009).

⁶ Amnesty International, *The Death Penalty: Questions And Answers*, AI Index: ACT 51/002/2007, April 2007.

⁷ Universal Declaration of Human Rights, G.A. Res. 217A (III), UN Doc. A/810 (December 12, 1948).

⁸ Article 3 states "Everyone has the right to life, liberty and security of person."

⁹ See Article 5.

constitutions to demonstrate the significance of human rights in their legal systems.¹⁰ Death penalty is viewed as a ‘premeditated’ form of killing which is carried out in the name of punishment.¹¹ It is ‘barbarous’ in nature since all the methods of execution involve a great amount of pain to the person being executed; hence it is believed that till such advanced technology has not developed that the execution can be carried out in an ‘immediate and painless’ manner, death penalty should not be administered.¹² It is also believed that death penalty does not serve as an instrument of deterrence which is regarded as its main objective by the proponents of death penalty.¹³ Death penalty is therefore futile and this is evidenced by the fact that its abolition has had no such adverse impact on the crime rates of the countries which have abolished it.¹⁴ Further, it also denies the possibility of rehabilitation and reformation of the criminal. Death penalty ‘runs the risk of irrevocable error’¹⁵ as many are denied the opportunity of a fair trial or they grapple with issues relating to inadequate legal representation.¹⁶ Hence, the international community condemns the use of death penalty on the ground of human rights violation.

According to reports of Amnesty International, a total of 131 countries have abolished the death penalty in law or practice, 66 other countries and territories retain and use the death penalty, but the number of countries which actually execute prisoners in any one year is much smaller.¹⁷ Countries that allow the death penalty are therefore, now in the minority.

In addition, the international disfavor towards capital punishment is further evidenced by numerous international treaties and resolutions that advocate its abolition. The momentum that is gathering against the abolition of the death penalty can be seen in the form of adoption of international and regional treaties.

¹⁰ Amnesty International, AI Index: ACT 50/06/96.

¹¹ See *Taylor v. Crawford*, 487 F.3d 1072, 1081 (8th Cir. 2007) (“The infliction of capital punishment is itself a deliberate act, deliberately administered for a penal purpose”). See Dawinder S. Sidhu, *On Appeal: Reviewing The Case Against The Death Penalty*, 111 W. VA. L. REV. 453, 2009, (citing *Wilson v. Seiter*, 501 U.S. 294, 300 (1991)). See also Amnesty International, *Human Rights v. The Death Penalty: Abolition And Restriction In Law And Practice*, AI Index: ACT 50/13/98, December 1998.

¹² Dawinder S. Sidhu, *On Appeal: Reviewing The Case Against The Death Penalty*, 111 W. VA. L. REV. 453, 2009.

¹³ Lawrence Katz *et al.*, *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318, 330-32 (2003) as cited in Richard B. Roper, *The Death Penalty at The Intersection Of Reality And Justice*, 41 TEX. TECH L. REV. 15.

¹⁴ *Supra* note 6. (In Canada, for example, the homicide rate per 100,000 population fell from a peak of 3.09 in 1975, the year before the abolition of the death penalty for murder, to 2.41 in 1980, and since then it has declined further. In 2003, 27 years after abolition, the homicide rate was 1.73 per 100,000 population, 44 per cent lower than in 1975 and the lowest rate in three decades. Although this increased to 2.0 in 2005, it remains over one-third lower than when the death penalty was in force).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

At the UN, evidence of this international trend further manifested itself through the International Covenant on Civil and Political Rights (*hereinafter* ICCPR).¹⁸ Paragraph 2 of Article 6 establishes the existence of abolitionist countries and invokes a relatively high standard for the imposition of the death penalty. The international trend disfavoring capital punishment is also evident in the Second Optional Protocol to the ICCPR,¹⁹ providing for total abolition of the death penalty which was adopted by the UN General Assembly in 1989. Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms²⁰ adopted by the Council of Europe in 1982, also provides a strong language for abolition of death penalty during peacetime but states that the States can retain it for wartime crimes. The Protocol to the American Convention on Human Rights to Abolish the Death Penalty²¹ adopted by the General Assembly of the Organization of American States in 1990 also provides for abolishment during peacetime. Consistent with its view on capital punishment, the United States did not ratify the Protocol. Protocol No. 13 to the European Convention on Human Rights and Fundamental Freedoms²² adopted by the Council of Europe in 2002 is concerned with abolition of death penalty in all circumstances including crimes committed during wartime. Many countries have come together in supporting these international initiatives for the universal abolition of death penalty emphasizing on its flagrant violation of human rights. Article 37(a) of the UN Convention on the Rights of the Child²³ adopted by the UN General Assembly states, “Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”²⁴ These treaties and covenants ascertain that there is a growing consensus among the international community against the administration of death penalty in most parts of the world.

In the wake of these intensifying international opinions against death penalty, the UN General Assembly in 2007 approved Resolution 62/149²⁵ which

¹⁸ International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171, 175 (March 23, 1976).

¹⁹ GA Res. 44/128, Annex, 44 UN GAOR Supp. (No. 49) at 207, UN Doc. A/44/49 (1989). (The Preambulatory clause states that abolition of the death penalty results in enhancing human dignity and progressive development of human rights and that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life).

²⁰ Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, available at <http://conventions.coe.int/Treaty/EN/Treaties/html/114.htm> (Last visited on January 9, 2010).

²¹ American Convention on Human Rights, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, (November 22, 1969), Article 4, §§ 2-6.

²² Amnesty International, *International Standards on the Death Penalty*, AI Index: ACT 50/001/2006, January 2006.

²³ Convention on the Rights of the Child, U.N. GAOR, 44th Sess., UN Doc. A/44/49 (November 20, 1989), Article 37.

²⁴ Amnesty International, *International Standards on the Death Penalty*, AI Index: ACT 50/001/2006, January 2006.

²⁵ *Moratorium on the Use of the Death Penalty*, UN General Assembly, 63rd Session, A/C.3/63/L.19/Rev.1.

called for all states to establish a moratorium on executions with a view to abolishing the death penalty.²⁶ This further strengthened the movement against death penalty since 105 countries voted in favour of it while 48 countries, including India voted against, thereby demonstrating its resolve in retaining this practice. Thus, it is imperative for India to realize that it is becoming increasingly detached and solitary in the world scenario by supporting, if not advocating the use of death penalty. India has failed to embrace the aspirations embodied in Article 6 of the ICCPR and the UN Resolutions to abolish the death penalty in due course. Though India's stance regarding retention of the death penalty is contrary to the international trend, the international inclination towards abolition could not have been completely ignored by India. India has always sought justifiable grounds to award death penalty by resorting to it only in the 'rarest of rare' cases.

III. RESTRICTIVE INTERPRETATION OF DEATH PENALTY IN INDIA

In recent years, the Supreme Court has accelerated its program to civilize the death penalty. The judges in India have long been aware that India's maintenance of the death penalty stands in stark contrast to international norms. Therefore, the courts have sought to soften India's death penalty stance to more closely align it with international standards. Judges, in most cases, have favored a restricted interpretation of death penalty. Conscious of international opposition towards capital punishment, yet unwilling to end it entirely, the courts have tried to avoid egregious applications of the death penalty by removing entire classes of cases from its reach. The following cases show how the judges have constantly favoured a restricted interpretation of the death penalty.

The constitutionality of death penalty was challenged for the first time in 1973 in the case of *Jagmohan Singh v. State of UP*²⁷ (*hereinafter Jagmohan*). It was contended that death sentence infringes all freedoms guaranteed under Article 19(1)(a) to (g) and that the unguided discretion vested in the judges was in violation of Article 14 of the Constitution; also since no procedure was prescribed in the Code of Criminal Procedure (*hereinafter CrPC*) for determining whether life imprisonment or the death penalty are to be awarded, it was in violation of Article 21.²⁸ The Five Judge Bench did not accept any of the arguments and upheld the constitutional validity of death-sentence and held that deprivation of life is constitutionally permissible. In coming to their conclusion, they mainly relied on the 35th Law Commission Report, 1967,²⁹ and on the fact that on four occasions, bills or resolutions tabled in the Parliament for abolition of death penalty had been

²⁶ Amnesty International, Draft Resolution A/C.3/63/L.19/Rev.1: *On Moratorium On Executions*, AI Index: ACT 50/020/2008, November 20, 2008.

²⁷ AIR 1973 SC 947.

²⁸ SURENDRA SAHAI SRIVASTAVA, *CRIMINOLOGY AND CRIMINAL ADMINISTRATION*, 136 (2002).

²⁹ LAW COMMISSION OF INDIA, 35th Report, 1967, *Indian Penal Code*, 69 ("Having regard to the conditions in India, to the variety of the social upbringing of its inhabitants, to the

rejected. Also, the Constitution makers had recognized the death sentence as a permissible punishment and had made constitutional provisions for appeal, reprieve and the likes. Thus, though the Supreme Court settled this controversy long back in 1973, the constitutionality of the death penalty continued to be challenged in later cases.

*Ediga Anamma v. State of Andhra Pradesh*³⁰ is the next landmark judgment which dealt with death penalty relating to female criminals. Justice Krishna Iyer reversed the punishment from death sentence to life imprisonment on the basis of factors like gender, age, socio-economic background and psychic compulsions. Here it was said that the crime committed is not the sole criterion of determining the punishment but various other factors should also be taken into account while evaluating death penalty.³¹ Justice Krishna Iyer while tracing the history of capital punishment also observed that its history “hopefully reflects the march of civilization from terrorism to humanism and the geography of death penalty depicts the retreat from country after country.”³²

The constitutionality of the death penalty was again challenged in the case of *Bachan Singh*³³ because of three new developments. The CrPC was re-enacted in 1973 and § 354(3)³⁴ was added, thereby making the death sentence the exception and not the rule as far as punishment for murder is concerned. Secondly, in the case of *Maneka Gandhi v. Union of India*,³⁵ it was held that every law of punitive detention, both on substantive and procedural aspects must pass the test of reasonableness on a collective reading of Articles 14, 19 and 21. Based on this decision, the Supreme Court in *Rajendra Prasad v. State of U.P.*,³⁶ gave detailed parameters for awarding death penalty and held that special reasons for imposing death penalty must relate not to the crime but to the criminal and that it was to be awarded only when security of state, public order compelled the course.³⁷ It was also held that life imprisonment would be a better alternative than death penalty

disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country, at the present juncture, India cannot risk the experiment of abolition of capital punishment”).

³⁰ AIR 1974 SC 799.

³¹ *Id.*, ¶ 27.

³² *Id.*, ¶ 22.

³³ *Supra* note 4.

³⁴ See CrPC, § 354(3).

³⁵ (1978) 1 SCC 248.

³⁶ (1979) 3 SCC 746.

³⁷ *Id.*, ¶ 79, (“To my mind, it is ultimately a question of respect for life and human approach to those who commit grievous hurts to others. Death sentence is no remedy for such crimes. A more humane and constructive remedy is to remove the culprit concerned from the normal milieu and treat him as a mental case. I am sure a large proportion of the murderers could be weaned away from their path and their mental condition sufficiently improved to become useful citizens”) (*per* V.R. Krishna Iyer, J.).

since it has the potential to reform the criminal, thereby upholding the right to life and human dignity.³⁸ Thirdly, India ratified the ICCPR, thereby committing itself to progressive abolition of death penalty. The main issues before the court were the constitutional validity of § 302 of the Indian Penal Code (*hereinafter* IPC) as well as constitutional validity of § 354 (3) of Cr.P.C., on the ground that it permitted imposition of death penalty in an arbitrary and whimsical manner. The Court dismissed all the arguments of the appellants and affirmed the constitutional validity of death sentence as was done in *Jagmohan*³⁹ case. Out of the five judges, Justice Bhagwati was the only one to dissent.⁴⁰

The Court explained that the requirement of § 235(2) for a pre-sentence hearing of the accused along with the requirement that the sentence of death had to be confirmed by the High Court under § 366(2) of CrPC meant that errors in the exercise of judicial discretion can be corrected by higher courts.⁴¹ It was also laid down that for ascertaining the existence or absence of “special reasons” in that context, the Court must pay due regard both to the crime and the criminal and that the relative weight has to be given to the aggravating and mitigating factors, which includes, the mental condition, the age of the accused, the possibility of his reforming, or that he acted under the orders of some superior etc.⁴² The concluding remarks of the majority opinion marked the real shift in the judicial attitude towards death penalty. It also reflected the changing perceptions of the judiciary influenced as it was by the major strides in human rights jurisprudence. The Court held, “A real and abiding concern for the dignity of human life postulates resistance to taking a life through law’s instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.”⁴³

In the case of *Machhi Singh v. State of Punjab*,⁴⁴ the Court summarized the propositions emanating from *Bachan Singh*. The Court laid down the guidelines that the sentencing court had to ask:

- Was there something uncommon about the crime, which calls for a death sentence?
- Are the circumstances of the crime such that there is no alternative, but to impose a death-sentence?

³⁸ *Id.*, ¶ 82.

³⁹ *Supra* note 27.

⁴⁰ *Supra* note 4, ¶ 210 (“I am of the opinion that Sec. 302 of the IPC in so far as it provides for imposition of death penalty as an alternative to life sentence is ultra vires and void as being violative of Art. 14 and 21 of the constitution since it does not provide any legislative guidelines as to when life should be permitted to be extinguished by imposition of death sentence”) (*per* Bhagwati J.).

⁴¹ *Supra* note 4, ¶ 195.

⁴² *Id.*, ¶ 204.

⁴³ *Per* R.S. Sarkaria, J., ¶ 207.

⁴⁴ AIR 1983 SC 957; (due to a feud between two families, 17 people, including women and children were murdered by Machhi Singh and his companions).

Thus, in both the cases of *Jagmohan* and *Bachan Singh*, the Court gave way to the legislative wisdom and was shy of striking down the death-penalty. But the similarities of the two cases end here. The assertion that the death penalty was an exception and not the rule was a very significant change which was brought about by *Bachan Singh*. The formulation of the test of the rarest of rare case was craftily devised by the court.⁴⁵ In some way it acknowledged the reformation and rehabilitation of the delinquent as one of the goals of punishment. Hence, this was a significant achievement of the abolitionists.⁴⁶

Next was the judgment of *Mithu v. State of Punjab*⁴⁷ which declared § 303⁴⁸ of the IPC as unconstitutional. § 303 was struck down as arbitrary on the ground that it was based on the assumption that life convicts are more dangerous than other humans and hence should be treated differently which contravenes the right to equality. It was held that § 303 does not only violate the guarantee of equality enshrined in Article 14, but also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law.⁴⁹ It was also struck down because it was a provision of law which took away the discretion of the court in the matter of punishment.

In *Deena v. Union of India*,⁵⁰ the constitutional validity of hanging as a method of execution was brought before the Court where it was held that it is the function of the Court to determine the constitutionality of the mode of execution and that hanging is not a cruel method of executing a death sentence and is thus not in violation of Article 21 of the Constitution. However, in 1986, the Court changed its stance regarding public hanging. In *Attorney General of India v. Lachma Devi*⁵¹ prohibiting public hanging, the Court held that, "The direction for execution of the death sentence by public hanging is, to our mind, unconstitutional and we may make it clear that if any Jail Manual were to provide public hanging, we would declare it to be violative of Article 21 of the Constitution."⁵² In *Allauddin Mian v. State of Bihar*,⁵³ the Court held that as a general rule, the trial courts after recording the conviction should adjourn the matter to a future date and call upon both the prosecution as well as the defense to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be

⁴⁵ Dr. S. Muralidhar, *Hang Them, Hang Them Not: India Travails with the Death Penalty*, 40 J.I.L.I. 143(1998).

⁴⁶ *Id.*

⁴⁷ AIR 1983 SC 473.

⁴⁸ See The IPC, 1860, § 303: "Punishment for murder by life convict- Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death."

⁴⁹ *Supra* note 47, ¶ 31.

⁵⁰ AIR 1983 SC 1155.

⁵¹ AIR 1986 SC 467.

⁵² *Id.*, ¶ 1.

⁵³ AIR 1989 SC 1456.

imposed on the offender.⁵⁴ Furthermore, Justice Ahmadi said, “It may be stated that if a Judge finds that he is unable to explain with reasonable accuracy the basis for selecting the higher of the two sentences his choice should fall on the lower sentence.”⁵⁵

*Anshad v. State of Karnataka*⁵⁶ addressed the stakes involved in subjective judicial-decision making. The Court commuting the death sentence to life imprisonment stated that the courts are expected to exhibit sensitivity in the matter while awarding a sentence especially if the case involves the question of death penalty. The manner in which the crime was committed, the weapons used and the brutality or the lack of it are some of the considerations which must be present in the mind of the court. It was further stated that the Court while taking into account the aggravating circumstances should not overlook or ignore the mitigating circumstances.⁵⁷

*Panchhi v. State of Uttar Pradesh*⁵⁸ is another important case, where it was held that brutality is not the sole criterion of determining whether a case falls under the “rarest of rare” categories, thereby justifying the commutation of a death sentence to life imprisonment. The Court opined:

“No doubt brutality looms large in the murders in this case particularly of the old and also the tender age child. It may be that the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the ‘rarest of rare cases’ as indicated in Bachan Singh’s case.”⁵⁹

In *State of Maharashtra v. Bharat Fakir Dhiwar*,⁶⁰ a moderate stand was taken by the Court, when it refused to award the death penalty even though the accused was held guilty of murder and rape, after an acquittal by the High Court. Since the accused was once acquitted by the High Court, the judges refrained from imposing that extreme penalty in spite of the fact that this case was perilously near the region of “rarest of the rare cases”. Nevertheless, since the lesser option was not unquestionably foreclosed, the sentence was altered to imprisonment for life.⁶¹

In *Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka*,⁶² it was said that if the Court finds that the case falls short of the rarest

⁵⁴ *Id.*, ¶ 10.

⁵⁵ *Id.*, ¶ 9.

⁵⁶ (1994) 4 SCC 381.

⁵⁷ *Id.*, ¶ 18.

⁵⁸ AIR 1998 SC 2726.

⁵⁹ *Id.*, ¶ 20.

⁶⁰ AIR 2002 SC 16.

⁶¹ *Id.*, ¶ 23.

⁶² AIR 2008 SC 3040.

of rare category and is reluctant to award the death penalty, but at the same time, it feels that life imprisonment, subject to remission, which is usually of 14 years is grossly inadequate, then recourse should be taken to the extended option. The Court should direct that the convict should be given life imprisonment and he must not be released for the rest of his life.⁶³ This is perhaps the first time when the Court has clearly laid down that executive clemency should not mean that the Court cannot award life sentence beyond 14 years.

From the above few judgments, it is clear that the application of death penalty has been restricted to a great extent. The *Bariyar* case is the next landmark case, which not only drastically reduces the possibility of awarding the death penalty, but can also finally root out death penalty in India.

IV. SANTOSH KUMAR SATISHBHUSHAN BARIYAR v. STATE OF MAHARASHTRA

In the present case, Santosh Bariyar, the accused along with three others, lured one Kartikraj to a particular place, tortured him for two hours and asked his family to pay a ransom of Rs. 10 lakhs, threatening to kill him, if they did not pay. Eventually they killed him and cut his body into pieces and disposed the bags at different places. All four of them were finally arrested and the trial court convicted them under § 302 and § 364B read with § 120B of the IPC and sentenced Bariyar to death and handed life imprisonment terms to the other two. In 2005, the High Court upheld the trial court's order based on the reasoning that Bariyar was the main architect of the conspiracy and the other accused committed the crime at the behest of Bariyar, which was to be considered as a mitigating circumstance. When the matter came before the Court the main question before the Court was whether the present case qualifies under the category of 'rarest of rare' cases so as to enable the courts below to award the death penalty. This forms the pivot of the whole judgment.

The Court refused to award death penalty to Bariyar, as it felt that the mitigating circumstances were sufficient enough to place it out of the 'rarest of rare' category and also because the reasons assigned by the courts below did not disclose any special reasons, as is required by § 354(3), CrPC. The Court observed that the accused were not professional killers, they did not have any criminal history and committed the crime solely out of the motive of collecting money. Though it was Bariyar who allegedly proposed the idea of kidnapping, the said plan could only be executed when all the persons involved gave their consent. The Court felt that there was nothing before them to show that the appellant cannot be reformed and rehabilitated and hence sentenced him to rigorous life imprisonment.

⁶³ *Id.*, ¶ 66-68.

A. INTERPRETATION OF BACHAN SINGH: MUSINGS OF THE COURT

The *Bariyar* judgment assumes much importance for several reasons. The case becomes distinctive as it attempts to set in a different trend and adds yet another significant dimension to the death penalty debate. It interprets *Bachan Singh*⁶⁴ in a radical manner, which if followed can have far-reaching implications. However, before moving onto the new course taken by this judgment in its finding, particularly on the sentencing aspect, a discussion of the interpretation of *Bachan Singh* and the musings of the court will be helpful in comprehending the present decision in a better light.

1. Individualized Sentencing

Justice Sinha holds that the first important value forming the groundwork of *Bachan Singh* is that of individualized sentencing. The Court emphatically denied the requirement of strict channeling of discretion and pointed out that it would go against the founding principles of sentencing, for it prevents the sentencing court from identifying and weighing factors relating to the crime and the criminal such as culpability, impact on the society, gravity of offence, motive behind the crime etc. Therefore, mandatory death penalty, which excluded judicial discretion, was declared to be unconstitutional in *Mithu v. State of Punjab*.⁶⁵

The concept of ‘individualized sentencing’, a term though not defined by the *Bariyar* court, was first addressed in the landmark United States case of *Furman v. Georgia*,⁶⁶ where the court’s commitment to individualized sentencing began as an outgrowth of their concerns about desert (the problem of over inclusion) and fairness (the problem of under inclusion).⁶⁷ Here the court said that the Eighth Amendment requires individualized sentencing in capital cases. This observation on ‘individualized sentencing’ is important for this concept was the primary basis which helped the *Bariyar* court in arriving at the decision. The court’s insistence on ‘individualized sentencing’ in capital cases is also essential for a just capital sentencing system.⁶⁸

2. Selection of the Sentence:

Like its commitment to individualized capital sentencing, the Court’s concern for heightened procedural reliability in capital cases is also primarily built

⁶⁴ *Supra* note 4.

⁶⁵ *Supra* note 47.

⁶⁶ 408 U.S. 238 (1972).

⁶⁷ Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995).

⁶⁸ Susan R. Klein and Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUPREME COURT REV. 223 (2003).

on Justice Brennan's solo concurrence in *Furman*.⁶⁹ The Court addressed the issue of insufficient procedural protections at the stage of sentencing, by pointing out that enough information needs to be generated to objectively inform the selection of penalty.

The Court's approach reveals a heightened protection for capital cases, because of their irrevocable and severe nature. Hence, the Constitution necessitates a greater degree of reliability and fairness from sentencing courts for capital sentences than for non-capital sentences.⁷⁰ At one level, the two different approaches advocated by the court in case of capital sentences and non-capital sentences is commendable because it grants capital defendants greater procedural and substantive protections. At another level, scholars feel that those who may not be strongly opposed to the death penalty, but think that it can be administered fairly gain false comfort from the fact that the Court has created higher degree of protection for the prisoners.⁷¹ According to the scholars, even these heightened protections for the prisoners on death row, fails to address all the concerns raised by capital punishment.⁷² The extra rule, almost always, does not go to the extent of addressing the core problems with the death penalty's administration. But the Bariyar court, unlike the previous cases which failed to explain as to how death sentence is different from all other punishments, other than the fact that death is irrevocable and severe,⁷³ does not stop there. It takes a pro-active effort to ensure that the procedural guarantees and safeguards available under Article 14 and 21 are observed. According to the Court, while awarding punishments, the protections guaranteed under Article 14 and 21 have to be applied in the strictest possible form.⁷⁴ Then the Court provides the laudable goal of attempting to reduce, if not eliminate discrimination and disparity in the selection of those defendants who are awarded the death penalty.

According to Justice Sinha, the Court should engage itself in a comparative analysis of the cases before it, along with other similar cases. This is because such a comparison will presuppose an identification of a pool of

⁶⁹ *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring), 286-91.

⁷⁰ *Supra* note 2, ¶ 151.

⁷¹ See Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death"*, 26 (Ohio State Univ. Moritz Coll. of Law, Pub. Law & Legal Theory Working Paper Series, Paper No. 111, 2008), available at <http://ssrn.com/abstract=1154766> ("[B]y virtue of the Court's continuous involvement in the regulation of capital punishment, the Justices' work in this arena can create the highly inaccurate impression that courts are systematically working on system-wide remedies to the various problems that continue to burden the administration of capital punishment in the United States.") (Last visited on February 8, 2010).

⁷² *Supra* note 67.

⁷³ *Shankarlal Gyarasilal Dixit v. State of Maharashtra*, AIR 1981 SC 765. ("The passing of the sentence of death must elicit the greatest concern and solicitude of the Judge because, that is one sentence which cannot be recalled").

⁷⁴ *Supra* note 2, ¶ 149.

equivalently circumstanced capital defendants.⁷⁵ The gravity, nature and motive relating to crime should play an important role in this analysis and a comparative review must be undertaken not to channel the sentencing discretion available to the courts but to bring consistency in identification of various relevant circumstances. Then the Court suggests that a careful scrutiny of the aggravating and the mitigating circumstances has to be done, after which they should be factored in a way whereby the aggravating and mitigating circumstances appearing from the pool of comparable cases can be compared.⁷⁶ The Court says that the weight that should be accorded to a particular aggravating and mitigating circumstance may vary on a case-by-case basis, but the reasons for appointing of weights can be helpful. According to the Court such a comparison will help repeal arbitrariness in future.⁷⁷ This might help minimize arbitrariness to a great extent, but cannot eliminate it fully.

The Court's refusal to assign weights to a particular aggravating and mitigating circumstance reflects a distinctive feature of capital sentencing.⁷⁸ If weights are assigned to the aggravating and the mitigating factors in the context of death penalty, it would invariably result in communicating a false sense of precision. Establishing a system of hierarchy of aggravating and mitigating factors would distort the system, which already tilts unacceptably in the direction of obscuring the moral responsibility of the capital sentence defendants.⁷⁹

The second aspect of the judgment which needs to be highlighted is that the court elaborated upon the element of pre-sentence hearing, mentioning that §§ 235(2) and 354(3) of the CrPC⁸⁰ mandates a full-fledged bifurcated hearing and recording of "special reasons" in the event of the Court inclining to award the death penalty.⁸¹ This acts as an additional safeguard thereby preventing arbitrary imposition of the death penalty and allowing the court to make an informed selection of sentence based on the information collected at this stage.⁸² The Court further elaborates that *Bachan Singh* requires a mandatory pre-sentence hearing stage where evidence on sentencing must specifically be adduced. Furthermore, the evidence must not only relate to the crime, but also the criminal, including his socio-economic background.⁸³ This again stems from the court's emphasis that capital sentencing proceedings

⁷⁵ *Id.*, ¶ 140.

⁷⁶ *Id.*, ¶ 142.

⁷⁷ *Id.*, ¶ 143.

⁷⁸ *Supra* note 68.

⁷⁹ *Id.*

⁸⁰ See CrPC §§ 235(2) and 354(3).

⁸¹ *Supra* note 2, ¶ 57.

⁸² *Id.*, See also *Santa Singh v. State of Punjab* AIR 1956 SC 526; *Malkiat Singh and Ors. v. State of Punjab* (1991) 4 SCC 341; *Allaudin Mian v. State of Bihar*, 1989 AIR SC 1456 ; *Muniappan v. State of Tamil Nadu* AIR 1981 SC 1220; *Jumman Khan v. State of U.P.*, AIR 1991 SC 345; *Anshad and Ors. v. State of Karnataka*, (1994) 4 SCC 381.

⁸³ *Supra* note 2, ¶ 59.

must be ‘individualized’ so as to allow a capital defendant to present mitigating evidence about his background, his character, or the circumstances of the crime that might offer a basis for a sentence less than death.⁸⁴

The decision of *Ram Chandra v. State of Rajasthan*,⁸⁵ was criticized by the Court, where the personal characteristics of the criminal was specifically excluded from sentencing consideration and only characteristics relating to the crime were considered important for sentencing. According to the *Bariyar* Court:

“Circumstances which may not have been pertinent in conviction can also play an important role in the selection of sentence. Objective analysis of the probability that the accused can be reformed and rehabilitated can be one such illustration.”⁸⁶

The above illustration can be slightly problematic, for the probability of the reformation of the accused, cannot possibly be objectively analyzed. The possibility of reformation is a future event, which is always uncertain. Therefore an objective analysis of this is not possible.

B. COUNTER-MAJORITARIAN CHARACTER OF THE COURT

The Court’s disregard for social necessity as the sole criteria for awarding death penalty to the convict is derived from the appreciation of the Court’s counter-majoritarian character. Justice Sinha, in this judgment, once again⁸⁷ asserts that the judiciary is a counter-majoritarian institution and that individual rights should be given more importance than the majoritarian aspirations.⁸⁸ Courts should engage with an open mind in a dispassionate analysis of the aggravating and mitigating factors, as pointed out in *Bachan Singh* and should not give way to sentiments and emotions. But this approach may be too idealistic, for after all, the judiciary is composed of human beings who like all people are susceptible to the opinions and passions of others.⁸⁹ It is almost inevitable that the clamour of the media and the public indignation especially in high-profile cases has an effect on the judge’s mind.⁹⁰

According to the Court, “Capital sentencing is one such field where the safeguards continuously take strength from the Constitution and on that end

⁸⁴ *Supra* note 67.

⁸⁵ AIR 1996 SC 787 (“It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial”).

⁸⁶ *Supra* note 2, ¶ 59.

⁸⁷ *Anuj Garg & Ors v. Hotel Association Of India & Ors*, AIR 2008 SC 663.

⁸⁸ *Supra* note 2, ¶ 89.

⁸⁹ ARUNJEEV SINGH WALIA & VINAY NAIDOO, CAN SOCIETY ESCAPE THE NOOSE?-THE DEATH PENALTY IN INDIA, 141 (2005).

⁹⁰ *Id.*, 140.

we are of the view that public opinion does not have any role to play.”⁹¹ But there has been clear evidence of judicial thought being influenced by the public opinion.⁹² In *Jai Kumar v. State of Madhya Pradesh*,⁹³ the Court has itself acknowledged that law courts exist for the society and that it must change from time to time so that it “answers the cry of the people, the need of the hour and order of the day.”⁹⁴ In *Greg v. Georgia*,⁹⁵ the Court has considered public opinion as one of the “barometers for deciding whether the death penalty violates the evolving standards of decency.”⁹⁶ The very fact that opinion polls were cited in *Furman* and *Georgia* also goes to show, that the judges, even if not influenced, are at least persuaded to consider public opinion.⁹⁷

C. ARBITRARINESS IN THE SENTENCING PROCEEDINGS:

Moving on to the next issue in *Bachan Singh* the Court points out that the sentencing discretion is also a kind of discretion, which should be exercised judicially in light of the well recognized principles crystallized by judicial decisions.⁹⁸ Then Sinha, J. attempts to throw light on the application of the “rarest of rare” dictum thereby revealing how differing and dithering the judgments have been. This is yet another aspect of this judgment which makes it significant.

The Court acknowledged that even if death penalty itself is constitutional, the manner in which it is being administered currently may not be. It took note of the fact that the varied interpretation of the “rarest of rare” doctrine leads to unguided and untrammelled discretion thereby allowing death sentence to be arbitrarily or freakishly imposed,⁹⁹ and that even the guidelines relating to the aggravating and mitigating factors enumerated in *Machhi Singh v. State of Punjab*,¹⁰⁰ could not remove the vice of arbitrariness from the criminal justice system.¹⁰¹

⁹¹ *Supra* note 2, ¶ 91.

⁹² *Supra* note 89, 141. See also dissenting opinion of J. Bhagwati, *Bachan Singh, Sher Singh and Anr. and Ujagar Singh and Anr. v. State of Punjab and Ors.*, AIR 1982 SC 1325., ¶ 65. (“It may be noted that the human mind, even at infancy, is no blank sheet of paper. We are born with predispositions and the process of education, formal and informal, and, our own subjective experiences create attitudes which affect us in judging situations and coming to decisions.... Judge is called upon to exercise his discretion as to whether the accused shall be killed or shall be permitted to live, his conclusion would depend to a large extent on his approach and attitude, his predilections and preconceptions, his value system and social philosophy and his response to the evolving norms of decency and newly developing concepts and ideas in penological jurisprudence”).

⁹³ AIR 1999 SC 1860.

⁹⁴ *Id.*, ¶ 14.

⁹⁵ 428 U.S. 153 (1976).

⁹⁶ *Id.*

⁹⁷ *Supra* note 89, 141.

⁹⁸ *Supra* note 2, ¶ 95.

⁹⁹ *Supra* note 2, ¶ 120.

¹⁰⁰ AIR 1983 SC 957.

¹⁰¹ *Supra* note 2, ¶ 115.

The *Bariyar* Court drew strength from the recent ruling in *Swamy Shraddananda v. Murali Manohar Mishra(I)*,¹⁰² acknowledging again that the question of death penalty cannot be detached from the subjective element and that awarding of the death penalty depends greatly on the personal predilection of the judges. It quotes Justice Stewart in *Furman*,¹⁰³ where he notes that the death sentences are cruel and unusual just like being struck by lightning. The Court comes to the conclusion on a sad note that:

“Today, it could be safely said in the context of Indian experience on death penalty that no standards can be culled out from the judge made law which governs the selection of penalty apart from broad overall guideline of Rarest of rare under Bachan Singh.”¹⁰⁴

The implications of pointing out the arbitrariness in the capital sentencing system can be two-fold. Firstly, it draws attention to the unsatisfactory state of law and the immediate need for legal reform. Secondly, it illustrates the indeterminate nature of judicial role in the field of death penalty and calls for proper reallocation of the judicial functions.¹⁰⁵

It is pertinent to note that the *Bariyar* judgment at various stages takes into account the fact that India’s death penalty jurisprudence is replete with the vice of arbitrariness which is prevalent with extraordinary candour in our method of capital sentencing.¹⁰⁶ However, it fails to take note of the other various forms of randomness and systematic deficiencies which infest the process. There have been several instances, where due to gross negligence on the part of the State, a person originally sentenced to death is found languishing in the jail for years,¹⁰⁷ resulting in serious mental trauma, torture and agony,¹⁰⁸ thus violating Article 21 of the Indian Constitution. Also pendency of mercy petition before the President of India, for several years is also very frequent in our capital sentencing system.¹⁰⁹ A trend has also been noticed that it is the poor and illiterate who have been singled out to be eventually executed. As observed by the Court:

“There can be no doubt that death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape from its clutches.”¹¹⁰

¹⁰² (2007) 12 SCC 288.

¹⁰³ *Supra* note 69.

¹⁰⁴ *Supra* note 2, ¶ 136.

¹⁰⁵ B.B. Pande, *Face to Face with Death Sentence: Supreme Court’s Legal and Constitutional Dilemmas*, (1979) 4 SCC (JOUR.) 39, 48-49.

¹⁰⁶ *Supra* note 2, ¶ 116.

¹⁰⁷ *Daya Singh v. Union of India*, (1991) 3 SCC 61; *Sher Singh v. State of Punjab*, (1983) 2 SCC 344.

¹⁰⁸ *Supra* note 89, 598.

¹⁰⁹ *Madhu Mehta v. Union of India*, (1984) 4 SCC 62.

¹¹⁰ *Bachan Singh, Sher Singh and Anr. and Ujagar Singh and Anr. v. State of Punjab and Ors.*, AIR 1982 SC 1325 (dissenting Judgment of Chief Justice Bhagwati in *Bachan Singh*), ¶ 77.

Also, the Court completely failed to take into account the horror of executing a person wrongfully convicted of a capital crime. Innocent persons have often been erroneously convicted of capital murder based on false and fabricated evidence.¹¹¹ This is evidenced by the fact that 100 out of the 700 cases resulted in acquittals, implying that a large number of individuals had been sentenced to death in trial courts only to have the High Court overturn the decisions.¹¹² The *Nalini* case¹¹³ serves as a good example to bring to light as to how innocent people have been sentenced to death. The Court held that none of the 26 accused could be sentenced to death under the TADA and acquitted all of them. Only four were sentenced to death and three were punished with imprisonment.

D. SOME OTHER ISSUES

Another troubling factor which surfaces from the *Bariyar* judgment is that it agrees emphatically with the stand of the court in *Dharamendrasinh v. State of Gujarat*¹¹⁴ that a crime deserves death penalty particularly when committed “for the lust of power, or for property, or in the pursuance of any organized criminal or anti-social activity”.¹¹⁵ The Court’s approach clearly shows that crimes relating to power, property and public space are considered more heinous and dangerous than crimes between acquaintances, family or relatives.¹¹⁶ But such a categorization may at times, result in a biased view leading to a total disregard to the experiences of for example women and children.¹¹⁷ They are more vulnerable to violence within

¹¹¹ See Summary Report, *The Death Penalty in India: A Lethal Lottery- A study of Supreme Court judgments in death penalty cases 1950-2006*, available at <http://www.amnesty.org/en/report/info/ASA20/007/2008>, (Last visited on August 29, 2009). See also the dissenting Judgment of C.J. Bhagwati in *Bachan Singh*, *supra* note 4, ¶ 23.

¹¹² *Rampal Pitwaha Rahidas v. State of Maharashtra*, (1994) 2 SCC 478 (The High Court upheld the sentences of five of them, but the Supreme Court acquitted them all, noting that the evidence against them was not trustworthy. The Court concluded that the witness was pressured by the police to give evidence); *Sudama Pandey and others v. State of Bihar*, AIR 2002 SC 293 (The Court noted that it was unfortunate that the High Court did not properly review the evidence. Acquitting the accused, the Supreme Court noted that both the trial court and the High Court had committed a grave error by appreciating circumstantial evidence, resulting in a miscarriage of justice).

¹¹³ *State CBI/SIT v. Nalini*, 1999 (5) Supreme 60.

¹¹⁴ (2002) 4 SCC 679 (Here the court acknowledged that the crime committed was “no doubt heinous and unpardonable” and that two innocent children lost their lives for no fault of their, but the court chose to give force to mitigating circumstances).

¹¹⁵ *Id.*, ¶ 20.

¹¹⁶ *Rajpara v. State of Gujarat*, (2002) 9 SCC 18 (In this case, the accused was convicted for murder of wife and four daughters by pouring petrol on them and setting them on fire when they were asleep. But the SC commuted the death penalty to life imprisonment); *Sheikh Ayub v. State of Maharashtra*, 1998 SCC (Cri) 1055.(Here the accused murdered his wife and five children, but again the death penalty was not awarded); *Ram Anup Singh v. State of Bihar* AIR 2002 SC 3006, (dealt with the murder of four persons including the accused’s brother and family members, but the death penalty was not awarded).

¹¹⁷ *Mohd. Chaman v. State (NCT Delhi)*, 2001 Cri LJ 725 (Here the accused brutally raped a child aged one year old, which inflicted injuries in her liver and eventually led to her death. But the SC refused to classify it as a ‘rarest of rare’ case, and awarded him life imprisonment).

the family and not necessarily for reasons of power or money. Therefore, while identifying factors of aggravating and mitigating circumstance relating to crime and the convict, the experiences of the family members, especially women and children should not be ignored. It seems that the Court in *Bariyar* seems to attach too much importance to such categorization, so much so that it declined from awarding the death penalty based on the fact that, “the accused persons were not criminals. They were friends...the motive, if any, was to collect some money. They were not professional killers.”¹¹⁸

The Court has also pointed out that brutal and heinous manner in which the crime has been committed is the only factor which the courts have mostly considered in awarding the death penalty.¹¹⁹ Here again an attempt has been made by the Court to eliminate decisions based on personal predilection of the judges. This is because, labels like “gruesome”, “brutal”, “heinous”, “violent”, which are used for describing the nature of the murder is indicative only of the degree of the court’s aversion for the nature or the manner in which the crime was committed. Hence different judges react differently to these situations. Awarding the death penalty, solely on the basis of the brutality in committing the murder, therefore has to be avoided.¹²⁰ The *Bariyar* court also agrees with the view given in *Bachan Singh* that since every murder is per se brutal, there can be other factors which may have to be taken into account.¹²¹

Applying this to the facts of *Bariyar* Case, the Court, in spite of acknowledging that the manner and method of disposal of deceased’s body was “abhorrent and goes a long way in making the present case a most foul and despicable case of murder”, said that a mere mode of disposal of a dead body may not by itself be the sole criteria for including a case within the fold of “rarest of rare” category for imposing a death sentence. The Judges held that there are other factors to be considered before handing out the capital sentence.

VI. THE REFORM TEST AND ITS RAMIFICATIONS

What makes this judgment a landmark judgment is the new standard evolved by the court at the stage of sentencing. Highlighting the objectives of punishment like detention, retribution and reformation, the Court reiterates *Bachan Singh* and states that death sentence provides no scope for any of these objectives and hence should be used only in situations where “alternative option is unquestionably foreclosed”.¹²² When the alternative punishment of life

¹¹⁸ *Supra* note 2, ¶ 182.

¹¹⁹ *Panchhi v. State of U.P.*, AIR 1998 SC 2726; *Vashram Narshibhai Rajpara v. State of Gujarat*, AIR 2002 SC 2211.

¹²⁰ *Id.*

¹²¹ *Supra* note 2, ¶ 75.

¹²² *Supra* note 4, ¶ 207.

imprisonment serves no purpose, only then can death penalty be awarded. Life imprisonment can only be futile when the aim of reformation cannot be achieved.¹²³ Hence, the Court reasoned that for satisfying the second exception to the ‘rarest of rare’ dictum, the Court should provide evidence as to why the convict cannot be reformed. The Court says that while imposing any sentence on the accused it must not only keep in mind the possibility of rehabilitation, but that also in capital cases, the prosecution has to prove that the convict is beyond reformation and hence awarding the death penalty is the only viable option. In the words of the court:

“One of the principles which we think is clear is that the case is such where two views ordinarily could be taken, imposition of death sentence would not be appropriate, but where there is no other option and it is shown that reformation is not possible, death sentence may be imposed.”¹²⁴

This stand taken by the court represents a marked departure from all the previous cases dealing with death penalty. For formulating this new standard, the court splits the ‘rarest of rare’ dictum into two parts. For imposition of the death penalty, the double qualification needs to be satisfied, that is:

1. The case should belong to the ‘rarest of rare’ category.
2. The alternative option of life imprisonment will not suffice in the facts of the case.

Since the judgment of *Bachan Singh*, the cases which qualify for the death sentence must be rationalized to fit into a judicial construct which defines them as the ‘rarest of rare’ category. The *Bariyar* case says that a murder per se was not sufficient to deserve a death penalty. Apart from rare category of murder, something else will have to be proved in order for the accused to get a death penalty. This is the impossibility of reformation and rehabilitation of the accused. Therefore, in addition to the murder coming within the pool of the ‘rarest of rare’ category, the impossibility of reformation of the convict is supposed to be the criteria for awarding the death penalty.

This new standard evolved by the Court stems from the Court’s insistence on the importance of ‘individualized sentencing’ and the personality of the convict. The death penalty, by its very nature, necessarily involves an overall assessment of convict’s moral culpability and worth as a human being. In *Woodson v. North Carolina*¹²⁵ it was held that the character and record of the individual offender and particular circumstances of the offence is a constitutionally

¹²³ *Id.*, ¶ 68.

¹²⁴ *Id.*, ¶ 184.

¹²⁵ 428 U.S. 280.

indispensable part of the process of inflicting the penalty of death.¹²⁶ The *Bariyar* court takes note of this when it says that, “Each case must therefore be analyzed and the appropriateness of punishment determined on a case-by-case basis with death sentence not to be awarded, save in the ‘rarest of rare’ case where reform is not possible.”¹²⁷

The *Bariyar* case thus further qualifies the ‘rarest of rare’ doctrine and tries to restrict greatly the application of death penalty in India. Justice Sinha introduces this factor of reformation as a serious mitigating factor. So now, a murder being in the category of the ‘rarest of rare’ is not sufficient enough to get a death penalty. Another added criterion has to be proved- the accused should also be beyond reformation. Even if there is slight chance of improvement of the accused, the death penalty cannot be awarded. Therefore only when a hardened murderer who relishes killing, murdering to such an extent that he is beyond the possibility of rehabilitation and reformation, according to the current psychotherapy or curative treatments will deserve the death penalty. This is what makes this judgment unique and ground-breaking. In all the previous cases dealing with death penalty, starting right from *Jagmohan Singh* to *Bachan Singh*, Judges based the conviction and sentencing of the accused, on his previous activities. The criminal act committed by the accused and the events connected with it were relied on by the court to arrive at the conclusion as to whether he deserved the death penalty.

It must be noted that reformation, as a theory of punishment is steadily gaining ground in India. The amendments which the CrPC has undergone in the last three decades visibly indicate that Parliament is taking note of contemporary criminological thought and movement. It is evident in the Code that there has been a definite swing away from death penalty towards life imprisonment.¹²⁸ Firstly, death sentence has been made an exception and can only be imposed after giving special reasons as is warranted by § 354(3), CrPC § 361 also makes it mandatory for the court to record “special reasons” for not applying the provisions of § 360.¹²⁹ According to Justice Chinnappa Reddy¹³⁰ the special reasons contemplated by § 361 must be such so as to compel the Court to hold that it is impossible to reform and rehabilitate the offender. This is therefore an indication that reformation and rehabilitation of offender and not mere deterrence are now among the primary objects of the administration of criminal justice in our country. Therefore, in both the cases it was held that in determining the sentence to be awarded, it would not be “wrong to assume that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform” must be considered.¹³¹

¹²⁶ *Id.*, 304.

¹²⁷ *Supra* note 2, ¶ 187.

¹²⁸ *See* CrPC, §§ 354(3), 361.

¹²⁹ CrPC, § 360 deals with the order to release on probation of good conduct or after admonition.

¹³⁰ *Bishnu Deo Shaw v. State of West Bengal*, (1979) 3 SCC 714, ¶ 26.

¹³¹ *Sushil Murmu v. State of Jharkhand* AIR 2004 SC 394, ¶ 5; *State of Rajasthan v. Kheraj Ram*, (2003) 8 SCC 224.

Even before *Bachan Singh* happened, in *Giasuddin v. State of Andhra Pradesh*,¹³¹ Justice Krishna Iyer pointed out that the modern community has a primary stake in the rehabilitation of the convict and that therapeutic rather than an “in ‘terrorem’ outlook” should prevail in our criminal courts.¹³² In *Bachan Singh*, it was laid down that the probability that the accused can be reformed and rehabilitated should be considered as a mitigating factor.¹³³ That reformation should be the dominant objective of punishment has also been laid down in many cases.¹³⁴ There have also been cases¹³⁵ in the past, where the courts have taken into account the possibility of reformation and rehabilitation of the accused. In *Shankar Gauri Shankar v. State of Tamil Nadu*¹³⁶ it was said that “the nature of the crime and the circumstances of the offender should be so revealing that the criminal is a menace to the society and the sentence of life imprisonment would be inadequate.”¹³⁷ The above cases mostly relied on the behavior of the accused, the manner in which the act was committed and decided accordingly as to whether he deserved the death penalty or not.

But, as is evident, the bar has been clearly raised by the *Bariyar* Court. Here, the possibility of reformation and rehabilitation is not to be solely considered by the judges alone, but also has to be proved by the prosecution. Also earlier, the court could have awarded death penalty solely upon the fact that the case was in the ‘rarest of rare’ category. But the change brought about by *Bariyar* is that merely the rarest of rare category will not suffice for awarding the death penalty, but the second exception to the ‘rarest of rare’ doctrine will also have to be satisfied. The Court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme.¹³⁸ However, the question whether a convict can be reformed and rehabilitated is based upon prediction, which is in the realm of future.

¹³¹ AIR 1977 SC 1926, ¶ 10; State of Gujarat and Anr. v. Hon’ble High Court of Gujarat, 1998 CriLJ 4561; Sunil Batra v. Delhi Administration and Ors. Etc, AIR 1978 SC 1675.

¹³² *Id.*, ¶ 9.

¹³³ *Supra* note 4, ¶ 204.

¹³⁴ State of Gujarat and Anr. v. Hon’ble High Court of Gujarat, AIR 1998 SC 3164; Maru Ram and Ors. v. Union of India (UOI) and Ors. AIR 1980 SC 2147; Bishnu Deo Shaw v. State of West Bengal, (1979) 3 SCC 714.

¹³⁵ Prajeet Kumar Singh v. State of Bihar (2008) 4 SCC 434 (“The brutality of the act is amplified by the manner in which the attacks have been made on all the inmates of the house in which the helpless victims have been murdered, which is indicative of the fact that the act was diabolic of the superlative degree in conception and cruel in execution and does not fall within any comprehension of the basic humanness which indicates the mindset which cannot be said to be amenable for any reformation”) ; *See also* Ram Singh v. Sonia and Ors. AIR 2007 SC 1218; Gurdev Singh and Anr. v. State of Punjab, AIR 2003 SC 4187 ; Om Prakash v. State of Haryana. (1999) 3 SCC 19; Dalbir Singh v. State of Punjab (1979) 3 SCC 745.

¹³⁶ (1994) 4 SCC 478.

¹³⁷ *Id.*, ¶ 50.

¹³⁸ *Supra* note 2, ¶ 70.

The stand taken by the Court may seem justified from the point of view that it discharges the heavy burden from the shoulders of the court in determining the possibility of rehabilitation and reformation of the convict in each and every capital sentencing case. This position can be seen as the acceptance that the judges may not always be expert in devising the possibility of reformation of the convict. According to Justice Beg:

“It is not possible for the courts to attempt on the slender evidence there generally is on this aspect to explore the murky depths of a wrapped and twisted mind so as to discover whether an offender is capable of reformation or redemption and if so, in what way. That is a subject on which only experts in that line, after a thorough study of an individual’s case history could hazard an opinion, with any degree of confidence. Judicial psychotherapy has its obvious and inherent limitations.”¹³⁹

So this stand of the *Bariyar* court does away with the possibility of error that might have occurred in deciding the possibility of reformation of the convict by the judges and thereby awarding him the death penalty. Placing the burden of proof of the possibility of reformation towards the prosecution, however desirable and ideal it might be, it is likely to present certain difficulties.

Firstly, it makes the punishment dependent upon the possibility of reformation of the convict. According to the traditional notions of criminal law, punishment is awarded because of the past criminal activity of the accused. Punishment is, in part, backward-looking and the judges look back at the intention that was formed in support of an action and the effect, the harmful consequences it had on the injured, to decide what punishment he best deserves. But here the Court makes the kind of punishment that the convict deserves depending upon the proof of a future uncertain event. Herein lies the departure from traditional notions of criminal law.

Secondly, it lays down a very high standard of proof which the prosecution will find almost impossible to discharge. The possibility of the reformation of the convict is to be assessed depending upon the manner in which the crime was committed, his age, character etc. These factors might help the judges in considering the kind of sentence that should be given to the convict, but through these factors alone, the prosecution cannot be expected to prove as to whether the accused is beyond reformation. It is not practically feasible to prove this in a court of law. In the past, the court has itself acknowledged that we “live as creatures saddled with an imperfect ability to predict future”.¹⁴⁰ There can only be a speculation and not any definitive inference that he cannot be reformed.¹⁴¹ Furthermore, as James Avery

¹³⁹ Francis v. State, (1975) 3 SCC 125, ¶ 10.

¹⁴⁰ Gurdev Singh, *supra* note 135, ¶ 29.

¹⁴¹ Dr. A. Krishna Kumari, *Role of Theories of Punishment in the Policy of Sentencing*, available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1006&context=krishnaareti> (Last visited on January 6, 2010).

Joyce says, “there is divinity in every man and no one is beyond redemption.”¹⁴² Even the Royal Commission on Capital Punishment concurred with this view, by opining that the prospects of reformation are as favorable with murderers as with those who have committed other kinds of serious crimes. Further, the released murderers who commit further crimes of violence are rare and those who become useful citizens are common.¹⁴³ According to Justice Bhagwati:

“There is no way of accurately predicting or knowing with any degree of moral certainty that murderer will not be reformed or is incapable of reformation. All we know is that there have been many successes even with the most vicious of cases. Was Jean Valjean of *Les Miserables* not reformed by the kindness and magnanimity of the Bishop? Was Valmiki a sinner not reformed and did he not become the author of one of the world’s greatest epics? ... We have also the examples of Nathan Leopold, Paul Crump and Edger Smith who were guilty of the most terrible and gruesome murders but who, having escaped the gallows, became decent and productive human beings. These and many other examples clearly show that it is not possible to know beforehand with any degree of certainty that a murderer is beyond reformation.”¹⁴⁴

Hence apart from imposing an unreasonable burden on the prosecution, which they will never be able to discharge, the court makes the imposition of death penalty in India almost redundant. In only extremely rare cases will the proof by the prosecution be possible, for example if the accused shows no remorse and threatens to do it again.

Another aspect which arises from this new standard is that the court doesn’t specifically mention whether life imprisonment would imply life imprisonment with or without the chance of remission, in case an accused, capable of reformation is sentenced to life imprisonment. In the absence of a clear indication, taking the definition of “life imprisonment” as a whole,¹⁴⁵ and following the *Swami*

¹⁴² JAMES AVERY JOYCE, CAPITAL PUNISHMENT: A WORLDWIDE VIEW, 51-52 (1961), as cited in Kumari, *supra* note 141.

¹⁴³ Balbir Singh v. State of Punjab, AIR 1979 SC 1384, 1386.

¹⁴⁴ *Supra* note 110, ¶ 38.

¹⁴⁵ The courts have consistently held that the provisions of Article 161 of the Constitution, CrPC and the IPC that life imprisonment will mean imprisonment for the entire life unless the appropriate government chooses to exercise its discretion to remit either the whole or part of the sentence, and it does not automatically expire at the end of 20 years of imprisonment, including remission: *Zahid Hussain v. State of West Bengal*, (2001) 3 SCC 750; *Bhagirath v. Delhi Admin.*, (1985) 2 SCC 580; *Sohan Lal v. Asha Ram*, (1981) 1 SCC 106; *State of Madhya Pradesh v. Ratan Singh*, (1976) 3 SCC 470; *Gopal Vinayak Godse v. State of Maharashtra*, AIR 1961 SC 600.

Shradhananda case,¹⁴⁶ one might conclude that the alternative to death penalty is life imprisonment without the chance of remission.¹⁴⁷ If such is the case, then whole purpose of reformation and rehabilitation of the offender is frustrated. Such a penalty fails to achieve the goal of the reformatory theory of punishment which aims at rehabilitating the offender to the norms of the society i.e. into law-abiding, upright man and a meaningful citizen.¹⁴⁸ This is the central drawback of this standard laid down by the *Bariyar* court.

VII. DOES THIS JUDGMENT IMPLY THE END OF DEATH PENALTY IN INDIA?

A close look at the judgment will suggest that the court is highly critical of the fact that the death penalty is still alive in India. Justice Sinha's disregard, for the existence of the death penalty in India, runs almost as a golden thread throughout the judgment. It seems that the judges in *Bariyar* did everything within their powers to restrict the application of the death penalty. If it was within the powers of the judiciary, then it would have surely opted for abolition. But the work of the judiciary is to "construe, not construct, to decode, not to make a code."¹⁴⁹ The death penalty being still present in the statute books, the judiciary as much as it wants to, cannot declare it unconstitutional. The judiciary has been therefore trying to prune the application of the death penalty in India, with the intention of restricting its use and making it more difficult to apply. The *Bariyar* case is another step towards that direction.

The Court took cognizance of the international trends and development in international customary law noting that most nations are backing away from capital punishment.¹⁵⁰ Further, it appears that the court is indicating that it is time that India does away with this pernicious and brutalizing practice of sending the convicts to the gallows.¹⁵¹ However, the judgment is tactfully written and Sinha J., refrains from commenting on the existence of death penalty as a punishment and limits himself to criticizing the varied interpretations of the court. The court further says that the dilemma arising between the Constitution prohibiting excessive punishments on one hand and permitting the existence of the capital punishment on the other hand is difficult to resolve.¹⁵²

¹⁴⁶ *Supra* note 102.

¹⁴⁷ *Id.*, ¶ 38 ("The answer lies in breaking this standardization that, in practice, renders the sentence of life imprisonment equal to imprisonment for a period of no more than 14 years.... This Court, therefore, must lay down a good and sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission").

¹⁴⁸ *Supra* note 141.

¹⁴⁹ *Maru Ram v. Union of India*, AIR 1980 SC 2147.

¹⁵⁰ *Supra* note 2, ¶ 117.

¹⁵¹ *Id.*, ¶ 159.

¹⁵² *Supra* note 2, ¶ 157.

There can be no denying of the fact that the *Bariyar* judgment does restrict drastically the scope of applying the death penalty in India. As has been said above, it is not only extremely difficult, but almost impossible for the prosecution to prove that the convict is beyond reformation. But could the court have done more? As an afterthought, it could have done more. For one, if the court is so critical about the death penalty, could it not have referred it to a higher bench to consider the constitutionality of the death penalty? Though the Court has upheld the constitutionality of the death penalty through various decisions,¹⁵³ the debate must continue and cannot be foreclosed forever on the abstract doctrine of *stare decisis*. This is because the very nature of the problem is such that the challenge to the constitutionality of the death penalty is not a onetime exercise, but should be reviewed and considered at regular intervals, so as to attune it with the evolving standards of decency in a maturing society. Reviewing the constitutionality of the death penalty assumes more importance in light of the possibility of grave human error in answering the question of life versus death and also due to the changes in contemporary criminological thought and movement, more particularly about the effects of capital punishment in national as well as international diaspora.¹⁵⁴ But the Court steers clear of any such path and acknowledges the dark reality that capital sentence still exists in India. Instead of referring the matter of constitutionality of the death sentence to a larger bench, it simply takes a roundabout way to put an end to the penalty of death by erecting a very high standard of proof for its infliction, which practically, the prosecution may never be able to establish.

Initially it appears that this judgment does impose a moratorium on death penalty, indirectly. This is because it is extremely difficult to prove that the convict is beyond reformation. Therefore, the second criteria to award the death penalty, i.e. the fact that the alternative option of life imprisonment is inadequate, remains unsatisfied. Hence the death penalty in most cases cannot be imposed. There have been commentators who have opined that, "...by laying down the requirement of such a high standard of proof, the judgment places a virtual moratorium on the death penalty."¹⁵⁵ But a closer look at the judgment suggests that the death penalty is here to stay and may not be rooted out of the criminal justice system anytime soon.

This judgment does not lay down anything which will prevent a judge from imposing the death penalty. The question as to what constitutes reformation is subjective and will be approached differently by different judges. Each judge has his own scale of values and social philosophy and hence some judges are readily and regularly inclined to award the death penalty, while some others are

¹⁵³ Jagmohan Singh, *supra* note 27; Bachan Singh, *supra* note 4; Sashi Nayar v. Union of India, (1992) 1 SCC 96.

¹⁵⁴ *Supra* note 89, 90.

¹⁵⁵ Mrinal Satish, *Death Penalty Continued*, available at <http://currentlegalissues.blogspot.com/2009/08/death-penalty-continued-comments-by.html> (Last visited on October 22, 2009).

disinclined and the rest waver from case to case.¹⁵⁶ So there is a possibility that a particular judge might consider the proof of the prosecution sufficient and award the death penalty. Even if the experts are capable of assessing accurately the possibility of reformation, it does not guarantee the wiping out of arbitrariness in sentencing, because in the past there have been cases where the court has disregarded expert opinion and given judgments based on its whims and fancies.¹⁵⁷ This is because it once again boils down to the personal predilection of the judges who constitute the bench. This might again lead to the ‘judge-centric sentencing’¹⁵⁸ approach, which this Court so vehemently condemns.¹⁵⁹

VIII. CONCLUSION

This judgment in *Bariyar* can be considered as yet another significant step which takes us closer to the abolition of death penalty. This judgment is a welcome step, which significantly tries to restrict the sentencing power of the courts, thereby attempting to bend the arc further towards abolition of death penalty.¹⁶⁰ It does not lay down something very innovative, but interprets *Bachan Singh* in a distinct manner- different from the way in which it has been interpreted by the courts so far. The case of *Bariyar* is an important step towards the concept of abolition of death penalty, or at least the minimal use of the same. It divides the test of the ‘rarest of rare’ category into two parts, indicating that the prosecution has to first prove that the case belongs to the ‘rarest of rare’ category, after which they will also have to provide clear evidence as to why the accused is not fit for any kind of reformatory and rehabilitation scheme, thereby showing that the alternative option is foreclosed. In other words, the prosecution must show that rehabilitation is impossible.

The Court also finds that *Bachan Singh* requires a mandatory pre-sentence hearing stage in cases where the death penalty might be given. At the pre-sentence hearing, evidence on sentencing must be specifically adduced. Furthermore, it says that the evidence must not only relate to the crime, but also

¹⁵⁶ *Supra* note 89, 106.

¹⁵⁷ Dr. Nikhil D. Dattar, Gynecologist, Mr. X (Identification withheld for preserving confidentiality) and Mrs. Y (Identification withheld for preserving confidentiality) being wife of Mr. X v. Union of India through its Additional Solicitor General (Western Region) and State of Maharashtra through its Govt. Pleader and Advocate General, (2008) 110 BOM. L.R. 3293.

¹⁵⁸ *Supra* note 2, ¶ 55.

¹⁵⁹ *Id.*, (“Sentencing process should be so complied with, that enough information is generated to objectively inform the selection of penalty. The selection of penalty must not require a judge to reflect on his/her personal perception of crime”).

¹⁶⁰ *Landmark Death Penalty Case: Santosh Bariyar v. State of Maharashtra*, available at <http://lawandotherthings.blogspot.com/2009/05/landmark-death-penalty-case-santosh.html> (Last visited on January 8, 2010) (There have been commentators, who have said that if this judgment is sincerely followed, then Death penalty in India is all but dead).

the criminal, including his socio-economic background. The Court's emphasis upon this is perhaps most crucial and will have far-reaching consequences. It highlights the various aspects of 'individualized sentencing', which so far no courts have done. In fact, importance on the special characteristics of an individual convict in the sentencing process runs as a central theme throughout the judgment.

The Court acknowledges that even if death penalty itself is constitutional, the manner in which it is being administered currently may not be. The judgment contributes significantly to the body of India's death penalty jurisprudence and tries to deal with the problem of arbitrariness post *Bachan Singh*. The 'rarest of rare' classification evolved in *Bachan Singh* was theoretically a classification intended to restrict the use of death penalty, but in reality it formed an amorphous category, allowing the death penalty to become more arbitrary. So the *Bariyar* court tries to come up with a solution to the problem of arbitrariness, despite acknowledging that the question of death penalty cannot be detached from the subjective element and that awarding of the death penalty depends greatly on the personal predilection of the judges.

The *Bariyar* standard, in some way does affect the standard of judicial discretion. This is because now the judges have to keep in mind and consider the possibility of reformation of the convict. Unless the prosecution is able to establish that the convict is beyond reform, the courts cannot as a matter of fact award the death penalty. Herein is the significance of the judgment. Abolitionists have therefore welcomed this judgment.

There have hardly been cases where separate evidence is required to be considered by the judges before sentencing the convict. The *Bariyar* case does not only say this, but also says that the evidence should be about the possibility of reformation and rehabilitation of the convict. This is what makes the *Bariyar* judgment significant. It is not very often, that the judges call for evidence-led policy making at sentencing. Rather judges prefer to rely on their own instinct and anecdotal understanding of evidence.

Whether this judgment does root out death penalty from the criminal justice system still remains to be seen. It is high time that the country realizes that capital punishment is truly beyond the standard of decency expected of a liberal democratic nation. It is hoped that death penalty in the country will certainly one day be a thing of the past, thus enabling the country to honour the word and intentions of its international treaty obligations that indicated the country's intention to join the rest of the world, to abolish the use of such a barbaric punishment and civilize the society by so doing.