RECENT TRENDS IN CAPITAL PUNISHMENT: JUDICIAL MISTAKES TO JUDICIAL MATURITY

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Abstract

Capital punishment is a debatable area for intellectuals of various fields. The constitutionality and desirability seems to have element of phoenix. Though constitutionality is established way back in 80s the new judicial decisions throw light on its application. The judges differ on its applicability for which the paper concentrates on critical analysis of five judgements between 2013-2016 viz Bhullar I, Bhullar II, Ajay Kumar Pal, Shabnam-I, Yakub Memon, Vyas Ram, C. Muniappan. In some cases judiciary have committed grave error but it has shown the maturity of correcting the legal wrongs. In recently decided Saaumya Killing case court has not convicted the prisoner for murder despite various pressures and arguments from strong quarters because the evidences were not convincing to judges.

Keywords: Capital Punishment, Judicial maturity, Section376 A

Capital Punishment and Intention of Parliament

The debate on death punishment has three major issues, desirability, constitutionality and proportionality. Desirability involves an exercise that implies a value judgment which needs examination of the wisdom of legislative choices. In the year 1956, 1958 and 1962, a Bill or resolution to abolish capital punishment was brought in the parliament but could not be passed even in one house of the parliament. This signifies the intention of parliament on desirability of capital punishment. A few members of political parties have expressed random thoughts in favour of abolition but the parliamentary wisdom goes in favour of retention of death sentence. Recently capital punishment was incorporated in Indian Penal Code 1860 through an amendment under section 376A in 2013.

Again through the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2014 the death sentence in section 31A was retained.[1] In 2015 Schedule Caste and Schedule Tribes

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(Prevention of Atrocities) Act, 1989 has been amended and various sections including s 3(2) has been modified. What is significant for our purpose is the fact that s 3(2)(i) contains mandatory death sentence but the parliament did not modify it.[2] The amendments were notified in 2016. Parliamentary intention is to retain capital punishment. Indeed the Law Commission of India has submitted its 262nd Report (2015) on desirability of capital punishment and in a split opinion[3] recommended that except a few cases like terrorism etc capital punishment should not be given to offenders. In other words even the Law Commission of India is not completely against death sentence. In 2016 again the parliament has rejected private members efforts to abolish capital punishment in India.[4]

Constitutionality of Capital Punishment

Constitutional validity of capital punishment is a comparatively old, much debated and over researched issue in India and world, though in the USA recently in the case of Glossip v. Gross(2015) [5] one minority judge of the US Supreme Court has raised doubts on constitutionality of capital punishment. In another case Supreme Court of USA in the case of Hurst v. Florida[6](2016) declared that Florida's capital sentencing scheme violates the Sixth Amendment.[7] The constitutionality in India has been reviewed in detail in the constitution bench decision in

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[1] 31A of NDPS provided for mandatory death sentence through 2001 amendment for repeat offenders using the words"shall be punishable with death." Bombay high court in the case of *Indian Harm Reduction Network* v. *The Union of India* MANU/MH/0822/2011 declared 31A violative of art 21 but read down 'shall' as 'may'. *Indian Harm Reduction Network* challenged the verdict in the Supreme Court through Petition(s) for Special Leave to Appeal (Crl.) No(s).114/2012. Meanwhile the parliament amended NDPS Act in 2014 and substituted the words "shall be punishable with death" by "shall be punished with punishment which shall not be less than the punishment specified in section 31 or *with death*" to expressly and statutorily acknowledge the high court verdict. The Supreme Court case ,however, is still pending in 2016 for final disposal.

[2] The Scheduled Castes and The Scheduled Tribes (Prevention Of Atrocities) Act, 1989
Chapter II Offences of Atrocities
Sec 3(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,- (i) gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any member of a Scheduled Caste or a Scheduled Tribe to be convicted of an offence which is capital by the law for the time being in force shall be punished with imprisonment for life and with fine; and if an innocent member of a Scheduled Caste or a Scheduled Tribe be convicted and executed in consequence of such false or fabricated evidence, the person who gives or fabricates such false evidence, shall be *punished with death*;

[3] There were ten members of the commission which submitted 262nd report. It seems the opinion is 6:4. Three members have clear dissenting note. Ajit Prakash Shah, Chairperson of the Commission writes:

> Certain concerns were raised by Part Time Member Prof (Dr) Yogesh Tyagi, which have been addressed to the best possible extent in the present Report; however, his signature could not be obtained as he was out of the country. Justice (retd.) Ms Usha Mehra, Member; Mr PK Malhotra, Law Secretary and Dr. Sanjay Singh, Secretary, Legislative Department, Ex-Officio Members, chose not to sign the Report and have submitted notes on the issue, which are attached to the Report as appendices.

Available at http://lawcommissionofindia.nic.in/reports/report262.pdf

[4] www.uniindia.com/rs-rejects-private-members-resolution...death-penalty/.../572267.ht, www.thehindu.com/ news/ national/ monsoon- session-of...day.../article8915568.ece, last visited on Sept 11, 2016.

[5] Decided on June 29, 2015, *available at* www.supremecourt.gov/opinions/14pdf/14-7955_aplc.pdf.

[6] Decided on January 12, 2016, *available at* www.supremecourt.gov/opinions/15pdf/14-7505_5ie6.pdf.

[7] The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. *Ring*, 536 U. S. 584. In the case of *Ring*, the court "held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in the maximum punishment."

Jagmohan Singh v. State of U.P[8], Maru Ram(1980), Bachan Singh v. State of Punjab[9] where capital punishment was found constitutionality valid on all possible grounds. One of the most important division bench judgement Machhi Singh v. State of Punjab[10] used the doctrine of "rarest of rare cases" in Indian criminal jurisprudence. From constitution bench judgement of Bachchan Singh (1980) to another constitution bench majority judgement in Mohd. Arif @ Ashfaq v Registrar, Supreme Court of India[11](2014) and a few division bench judgement like Shabnam II[12] (2015) the judiciary has evolved various guideline and legal check on death penalty and therefore, abolition of capital punishment should be left to the wisdom of parliament to decide. It has become fashionable to put 'capital punishment' in a pigeon hole of 'Human Rights violation'. One can find intellectuals and media making casual remarks that delay in disposal of mercy petition automatically and necessarily led to commutation of death sentence to life imprisonment. This wrong impression is partially due to obiter remarks of Supreme Court of India and partially due to growing obsession towards human rights concerns. Capital punishment and its impact on human rights have consistently been the most vital and intricate issue of criminal, constitutional as well as international law.

Vikram Singh

While constitutional validity of capital punishment is settled in India whether capital punishment is proportional to the offence committed have emerged as an issue distinct from the first one. Recently, the question of proportionality came before the Supreme Court in the case of Vikram Singh v. Union of India, [13] where the constitutionality of Section 364A of IPC,[14] was challenged on the ground that it is not proportionate to provide death sentence for kidnapping with ransom offence even if no death is caused. The Supreme Court acknowledged that "punishments must be proportionate to the nature and gravity of the offences for which the same are prescribed".[15] However, it held that "Section 364A cannot be dubbed as so outrageously disproportionate to the nature of the offence as to call for the same being declared unconstitutional,"[16] because capital

[8] (1973) 1 SCC 20.
[9] (1980) 2 SCC 684.
[10] (1983) 3 SCC 470.
[11] (2014) 9 SCC 737
[12] 2015 (7) SCALE 1: Date Of Judgement -May 27 2015.
[13] Vikram Singh @ Vicky v. Union of India, *MANU/SC/0901/2015, (2015)9SCC502 AIR2015SC3577*Criminal Appeal No. 824 of 2013, decided on August 21, 2015 by a full bench of *T*.S. Thakur, R.K. Agrawal and A.K. Goel, JJ. Justice Thakur delivered the verdict. Initially the case was before two judges where Justice Thakur referred the matter for three judges bench for authoritative pronouncement. This case is discussed from *Manupatra*.
[14] 364A. Kidnapping for ransom, etc.

> Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or [2] [any foreign State or international inter-governmental organisation or any other person] to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine.

[15] Vikram Singh, supra, at para 49.
[16] *Id* at para 50.

punishment would only be awarded in the rarest of rare cases. "The Court did not address the question of whether the death sentence was an appropriate punishment for a non-homicide offence, or applicable international law standards on this issue" as it was a policy question. Another significant discussion moves on the question whether it fair to give capital punishment if there is delay by executive in disposing mercy petition is also another issue which has come to court time and again. These issues are crystallising. This paper analyses five recent cases to address these issues.

Bhullar I

Facts of the case Devender Pal Singh Bhullar v. State Of N.C.T. Of Delhi. [17] are that Devender Pal Singh Bhullar was an engineer turned teacher turned terrorist. He was convicted under Section 3(2)(i) of TADA [Punishment for terrorist acts and not under Indian Penal Code,1860)] for killing more than nine persons in two different bomb blasts in 1991 and 1993. The Supreme Court confirmed death sentence on 22.03.2002 and also rejected the review petition on 17.12.2002. On 14.01.2003 the accused submitted a mercy petition to the President of India under article 72 of the constitution of India. On 30.05.2011 (after undue long delay of eight years of mercy petition) DPS Bhullar came to know that the mercy petition has been rejected. This type of undue long delay has been held to be without 'procedure established by law' in Triveniben v State Of Gujarat [18] where the operative part of the judgement of five judges constitution bench says that 'Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32'. The prisoner therefore exercised his this Triveniben's right. The most important issue was whether the court can commutate the sentence of death into life imprisonment because of delayed disposal of mercy petition under Art 72 of the constitution of India, ignoring the nature and magnitude of the crime.

Wrong application of Triveniben principle

The division bench comprising G.S. Singhvi and Sudhansu Jyoti Mukhopadhaya, JJ unanimously reiterated the legal position propounded by the constitution bench in the Triveniben's case (1988) that whenever there is inordinate delay in disposal of mercy petition, the rule is that the capital punishment ought to be reduced to life imprisonment. According to the bench this rule, however, is not absolute. This is subject to following limitatons:

i. The magnitude, manner, motive etc of the crime has to be considered.

ii. A conviction under Indian Penal Code, 1860 and a conviction under special laws like TADA is not the same thing. TADA is reasonably so different that a distinct treatment is warranted. The rule of Triveniben's case does not, therefore, applies in terrorism cases.

[17] 2013(5)SCALE 575: Date of judgement- 12.04.2013, also see-*News Letter* (April-June 2013) Indian Law Institute, New Delhi.

[18] Decided on 11 October, 1988 followed by detailed judgement on 07.02.1989 para 23, AIR 1989 SC 142, 1988 (3) Crimes 771 SC (1988) 4 SCC 574.

iii. It is not the delay in mercy petition which decides in favour of the offender. The decisive factor is what and who caused the delay? If the delay was caused putting direct or indirect pressure upon the Government by the convict through various channels viz NGO, sympathiser of the ideology or foreign government officials etc, (which happened in this case), it is not delay simpliciter.

The court further reasoned that the convict Bhullar had neither shown any mercy to the victims nor had he expressed any sense of guilt, remorse, shame or sorry for his deliberate activity. He not only planned the attack in cold blood to challenge the sovereignty and integrity of country, but also planned the delay in disposal of mercy petition which is clear from 'the fact that a substantial portion of the delay can well-nigh be attributed to the unending spate of the petitions on behalf of the petitioner by various persons.'

The division bench of the Supreme court "after examining and analyzing the materials brought on record by the Respondents, arrived at the conclusion that there was an unreasonable delay of 8 years in disposal of mercy petition, which is one of the grounds for commutation of death sentence to life imprisonment as per the established judicial precedents. However, this Court dismissed the writ petition on the ground that when the accused is convicted under TADA, there is no question of showing any sympathy or considering supervening circumstances for commutation of death sentence." Therefore, the division bench held that Triveniben is not applicable to this case ie Bhullar –I. This was followed by dismissal of Review Petition (435/2013) on 13.08.2013. On 21.01.2014, however, a three judge bench in Shatrughan Chauhan v UOI [19]refused to accept the ratio of Bhullar judgement-1 being per incuriam and held that "There is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence. Each case requires consideration on its own facts." This gave a sure shot basis for a curative petition so that this constitutional error could be repaired. This gave rise to Bhullar II.

Bhullar II

Navneet Kaur, wife of DPS Bhullar filed a curative petition known as Navneet Kaur v. State Of NCT of Delhi, (Bhullar–II).[20] The issue before the court was whether the death sentence awarded to DPS Bhullar by a division bench of the Supreme Court ought to be commuted to life imprisonment because of Shatrughan Chauhan judgement? The bench of four judges unanimously allowed the curative petition and capital punishment was commuted to life imprisonment. Two ratio decidendi forwarded by the court was, first-application of Triveniben declaring Bhullar1 as not valid law. For the second reasoning the court followed the principle

[19] MANU/SC/0043/2014 : 2014 (1) SCALE 437.

[20] (2014) 4 **SCC** 375, Decided on 31.03.2014, also see-*News Letter* (Jan-March 2014) Indian Law Institute, New Delhi.

propounded in three-Judge Bench in Shatrughan Chauhan, that "insanity/mental illness/schizophrenia is also one of the supervening circumstances for commutation of death sentence to life imprisonment." Supreme Court has improved a grave error. Has Bhullar been executed immediately after dismissal of review petition in 2013, that could be a case of judgement error leading to killing of a terrorist who did not deserve capital punishment. Delay, however, proved to be a boon in this case.

Fundamental Right Violation and Role Change

Rarest of rare case itself is a distinct class. Therefore any further classification like terrorism cases as done in Bhullar I in rarest of the rare category was found to be not worthy of consideration by the court. A prisoner is given death sentence because s/he committed criminal wrong of the gravest form against individual and State. Deceased, the family members, society and state is victim of offender's deliberate and diabolical conduct. Undue and unexplained delay by apex executive makes this type of offender victim of delay and torture. By causing the delay of various years in mercy petition for no justifiable reason, State becomes wrong doer. State represented by the office of apex executive commits wrong not only against the prisoner but also against the constitution. Initially prisoner was violator of law and State was victim but now prisoner becomes victim of State inaction and State become violator of law. Now in this situation judiciary has nothing to do with rarest of the rare case. It becomes a fresh case of violation of fundamental right under art 21 where relevant consideration is-Was there 'undue unexplained delay in disposal of mercy petition' and what is hardly relevant is how the prisoner killed whom and why? Delay shifts the status and role prisoner vis a vis State. Decision has to be taken by judiciary in the present context devoid of previous decisions on culpability.

Bhullar I vis a vis Bhullar II

While Bhullar I was more in the line of deterrence theory Bhullar II has not at all considered any theory of punishment. Bhullar II, indeed is limited to application of two previous judgements, while Bhullar I was held to be mis-application of precedents. Surprisingly Attorney General was present in Bhullar II while it was not a case of much intellectual legal debate unlike Bhullar I but was more in the nature of application of Triveniben and Shatrughan Chauhan. Bhullar I shows that this mis application was neither brought to the notice either by Attorney General office or by defence counsel.

Ajay Kumar Pal

Ajay Kumar Pal v Union of India[21] indicates that death sentence debate is not limited to retentionist versus abolitionist issue and a new area re-emerges like a spring. In this case the

[21] 2014 SCC OnLine SC 1014: Date of judgement -12 December 2014**,** also see-*News Letter* (Oct-Dec 2014) Indian Law Institute, New Delhi.

"sense and soundness" of two executive actions at the two extreme ends was in question. At one end the prison officials violated the fundamental right to personal liberty while at the other end the President's decision violated fundamental right to life. The prisoner in this case successfully argued that from prison to president article 21 has been violated. President has violated because he took 3 years 10 months in disposing of mercy petition. Prison practice has also violated the fundamental rights because he was kept in solitary confinement. In other words the much debated, deliberated and decided issue of delay in mercy petition, a new question was regarding the meaning of the words "under sentence of death" used in section 30 of Prisons Act, 1894. It was new only in the sense that for last 36 years of Sunil Batra (1978) the meaning remained inapplicable.

One of the statutory consequences results from section 30 (1) and (2) Prisons Act, 1894 says that "every prisoner under sentence of death" "shall be confined in a cell apart from all other prisoners." In the present case also Ajay Kumar Pal was awarded death sentence by a trial court of Ranchi on 09.04.2007. The prisoner was shifted into solitary confinement on that very day to observe the command of 30 (2). Is the prisoner "under sentence of death" as soon as a trial court awards capital punishment or does it apply only after mandatory confirmation by the high court or until the judicial process at the Supreme Court is over or after rejection of the mercy petition?

Application of Sunil Batra

Answering the issue of the interpretation of words 'under sentence of death' the court quoted from Sunil Batra v. Delhi Administration, (1978) 4 SCC 494 where Justice Krishna Iyer speaking for the majority held that trial court sentence of death and mandatory confirmation by High Court is not right time for the application of section 30. "Even if [the Supreme] Court has awarded capital sentence, S. 30[Prison Act 1894] does not cover him so long as his petition for mercy to the Governor and/or to the President permitted by the Constitution, Code and Prison Rules, has not been disposed". In other words as per section 30(2) of Prison Act the prisoner can be "confined in a cell apart from all other prisoners" only "once mercy petition is rejected by the Governor and the President, and on further application there is no stay of execution by the authorities, he is 'under sentence of death', even if he goes on making further mercy petitions." On these two basis of 'delay' [the Supreme court concluded that there was an inordinate and unexplained delay of 3 yrs and 10 months in disposal of mercy petition] and 'solitary confinement' the Supreme court commuted the death sentence to life imprisonment. As a matter of fact a full bench of Shatrughan Chauhan(2014)has issued 12 guidelines where the very 1st guideline is the ratio of Sunil Batra which distinguished solitary confinement from 'confined in a cell apart from all other prisoners' as used in Section 30(2) of Prison Act 1894. Executive failed to execute the direction of Sunil Batra, either because the direction of Sunil Batrai were not communicated to them or if communicated it was communicated in mechanical manner or they could not appreciate the seriousness of the implementation of the direction. They took the direction as 'one more circular'. Ajay kumar Pal did not only failed to enforce Sunil Batra (1978) but also Shatrughan Chauhan(2014).

Shabnam-I

Another legal development may be found in Shabnam v. State of U.P, (Shabnam-I).[22] The facts of this case ie Shabnam-I is a sad commentary on the conflicting views of two generations on personal matters like marriage. When a family unreasonably sticks to customary values and fails to honour the feelings of new generation, the young, in a few cases, might, not honour the value of life and go with 'no mercy' in cold blood. This reaction and retaliation in a radical manner with 'no mercy', however, boomerangs when judicial as well as executive machinery also shows 'no mercy' to the conduct of prisoner. Noted hindi poet Ram Dhari Singh Dinkar rightly said "जब नाश मनुज पर छाता है, पहले विवेक मर जाता है". [23].[24] This is a case of parricide (killing of parents or relatives). Facts of the case are that Shabnam and Saleem were residents of same village in Amroha district of UP. Shabnam was educated and employed while Saleem was uneducated and unemployed. Despite having compatibility issues Shabnam and Saleem started loving each other, developed closest intimacy and wanted to marry as "… love is blind and lovers cannot see"[The Merchant of Venice, 1596-Shakespeare]. The family members of Shabnam, however, were against their relationship. The shadow of customary practices, pseudo prestige and (may be concerned with a better future of daughter) they were too blind to see the fast changing face of Indian society brought by silent revolution of information technology. The accused/ offenders felt that the family members would not allow them to update their status from temporary impermissible relationship into a permanent, permissible relationship. The love birds found them in "a land full of thorns and weeds", where there was no space in which their love seed could grow and groom. Respectable feelings for family members were replaced by rival feelings culminating into revenge. They planned to permanently weed out their devils with a deadly deed of killing the family thinking 'all is fair in love.' Saleem managed to acquire some Biopose sedative tablets (sleeping pills). He handed ten such intoxicating tablets to Shabnam, which she administered to her family members in tea on 14/15.04.2008 night. The family members became unconscious. "Saleem reached her house with the murder weapon" [axe]. "Shabnam held the heads of her six family members, Saleem kept cutting their necks one-by-one." Shabnam has "herself throttled the seventh member who was an infant, nine month old".

The sessions court and the high court convicted both of them for murder and sentenced to death. In the Supreme court the issue regarding conviction was never raised by any lawyer though the court mentioned that the accused disputed their conviction. An amicus curae "limited his submissions only to the question of sentence" ie whether the death sentence punishment was appropriate or not.

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[22] SCC OnLine SC 492, May 15, 2015, also see-*News Letter* (April-June 2015) Indian Law Institute, New Delhi.

[23] *jab nash manuj par chata hai, pahle vivek mar jata hai*.

[24] There are two cases with same name in the same month, therefore, referred by this commentator as *Shabnam*-I and *Shabnam*-II. *Shabnam*-I is Supreme court *judgement* of full bench on correctness of capital punishment while *Shabnam*-II is Supreme court *order* by division bench. The case under comment only concentrates on judgement and not order.

"The rarest of rare dictum serves as a guideline in enforcing Section 354(3) [CrPC 1973] [25]and entrenches the policy that life imprisonment is the rule and death punishment is an exception. It is a settled law of interpretation that exceptions are to be construed narrowly." A balance sheet of "Aggravating and Mitigating Circumstances" has to be made to direct the discretion of judge. For this the judgement followed Ramnaresh v. State of Chhattisgarh[26] which provides thirteen "Aggravating Circumstances," seven Mitigating Circumstances and five Principles. The judgement discusses Mohd. Jamiludin Nasir v. State of W.B,[27] to appraise generally how delicate task is sentencing. The judgement further discusses Mofil Khan v State of Jharkhand[28] and Ram Singh v. Sonia,[29] specially on capital punishment. The court rightly acknowledges that the decision making process in case of sentencing further becomes complex because of 'conditions in India'. The judgement underlines Indian situation and admits that "one of the most important functions Court performs while making a selection between life imprisonment and death is to maintain a link between contemporary community values and the penal system." There is an obiter remark on changing legal and social thinking about 'daughters.' For example 'The modern era, led by the dawn of education, no longer recognizes the stereotype that a parent would want a son so that they have someone to look after them and support them in their old age.' The court then applied all principles and norms of rarest of the rare as discussed above to decide whether the prisoner couple deserve only capital punishment or there could be some chance of life imprisonment. The court considered conduct of criminals, conditions of victims and consequences of crime, (what may be termed as C3 rule). It also considered the consequences of death sentence as the couple had a child who would be orphan. And finally the duo were awarded death sentence by the Supreme court also.

Crime and Criminal Test Dispute

The judgement may add fuel to abolitionist and retentionist debate. But this judgement has only followed the precedents where in similar mass killings of family there is hardly any Supreme court judgement where capital punishment has not been awarded. The reference of Mofil Khan case deserves special mention here because it addresses Crime Test and Criminal Test in death punishment cases. Doubts were raised by Justice Madan B Lokure regarding Crime Test and Criminal Test in Sangeet v State of Haryana.[30]Mofil Khan seems to resolve the dispute regarding various tests for capital punishment that " The Crime Test, Criminal Test and the "Rarest of the Rare" Test are certain tests evolved by this Court. The tests basically examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community." Mofil Khan, is the full bench order

[25] CrPC 1973 354. Language and contents of judgment-(3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.
[26] (2012) 4 SCC 257.
[27] (2014) 7 SCC 443.
[28] (2015)1SCC 67.
[29] (2007) 3 SCC 1.
[30] (2013) 2 scc 452, Decided on 20 November, 2012.

and Shabnam (the case under comment) is also three judge judgement. Are these two suggesting that there is and cannot be one test to clearly find the 'rarest of the rare' cases? Are they suggesting that the complex decision making process in rarest of rare cases cannot be limited to only one test and all these tests which may be inconsistent in nature are now accepted indicators for the exercise of judicial discretion in capital punishment cases? In other words the concern raised by Sangeet case (which was a division bench judgement) seems to be diluting(or has already been diluted).

India vis a vis USA

With increasing number of Supreme court decisions leading to capital punishment, the decreasing number of countries having capital punishment, the louder vocal minority of abolitionist in India and the USA, the current discussion by Law Commission of India (2015) on capital punishment etc might rake up the issue of constitutionality of capital punishment in India. Though the judges in Apex judiciary in India have never raised doubts on the constitutionality issue, recently in the USA in the case of Glossip v. Gross (Decided on June 29, 2015) Justice Breyer of the Supreme Court of The United States comprising minority opinion of court, has raised doubts on the constitutionality of death sentence on the ground of eighth amendment (cruel and unusual measures)of the USA constitution. Justice Breyer's powerful dissent have been equally answered by Justice Scalia on the issue of inconsistency in various decisions, incapacitates out of life imprisonment, deterrence etc. On deterrence Justice Scalia[31] produces a number of research works done to indicate that "[E]ach execution results, on average, in eighteen fewer murders" per year".

In last 20 years(1995-2015) there has been 1167 executions in the USA.[32] Average 58 prisoners/year have been killed by lethal injection(or other means) in the USA. In 2016(July) itself 15 prisoners were executed in the USA.[33] In India since 1995 there has been 24 executions.[34] It is why a group of American legal and academic thinkers aggressively argue against constitutionality and desirability of capital punishment and that is understandable. The abolitionist in India trying to copy the concern raised in context of the USA. While death of every single individual is no less important, the enthusiasm of a group of Indian intellengentia batting for abolition is a reaction completely out of proportion and appears to exhibit misplaced sympathy for Mac duff type cases. This is pushing far more important socio-legal issues (like police reforms, load on judiciary, quality of legal education, justice to economically weaker section etc) on margin. Similarly other common law illustration of UK, which abolished death sentence for all purposes since 1998 is not befitting. Had UK faced half the terror threat like

[31] Justice Scalia died on Feb 13, 2016.
[32] http://www.deathpenaltyinfo.org/executions-year.
[33] http://www.deathpenaltyinfo.org/execution-list-2016
[34] There is no authentic data available. Death penalty project of NLU Delhi shows 8 executions (1995-2015)and has no data on Tamil Nadu etc. Certain unverified internet data (http://research.omicsgroup.org/index.php/List_of_offenders_executed_in_India#cite_note-DNAExecutionTrajectory-8) shows 13 executions in 1995 itself and total 24 between 1995-2015. For the sake of arguments let us suppose the figure is correct. Purpose is to indicate the ratio of executions in India in last 20 years (India-24 *vis a vis* USA 1967 executions).

India, it might have reconsidered 13th Protocol to the European Convention on Human Rights which prohibited a member state to restore capital punishment. Right from constitution bench judgement of Bachchan Singh(1980) to another constitution bench majority judgement in Mohd. Arif @ Ashfaq v Registrar, Supreme Court of India [(2014) 9 SCC 737] and we have sufficient legal check on death penalty and desirability of capital punishment should be left to the wisdom of the parliament to decide.

Yakub Memon and Late Night Petition

One of the most controversial and much debated hanging in India was regarding execution of Bombay Blast convict Yakub Mennon. Well known facts of the case Yakub Abdul Razak Memon v. State of Maharashtra[35] is that Yakub Memon has been convicted for Bombay blast(1993) and was awarded capital punishment. He used the legal and constitutional course available to him but in vain because from constitutional courts to constitutional executives his request to reconsider capital punishment was rejected. He exercised the judicial invention of curative petition for more than once. One such Curative Petition was dismissed on 21.07.2015 and as per death warrant he was to be hanged on July 30, 2015. The prisoner Yakub Memon again filed a case under criminal original jurisdiction on the basis that though his mercy petition has been rejected by the President and the Governor of Maharashtra, "one more application made to the Governor of Maharashtra is still pending." A division bench of the Supreme Court heard his arguments. The judgement was a split. One judge (Justice Dave) concluded that the "submissions made about the Curative Petition do not appeal to me as they are irrelevant and there is no substance in them." Another judge (Justice Kurian Joseph) disagreed. His reasoning was not that the petition has merit or the submission has substance. He took an entirely different course of action by concentrating on procedural matter that "I regret my inability to agree with my learned brother. During the course of admission hearing of the petition under Article 32 of the Constitution of India, a question arose as to whether the Curative Petition in this case has been decided in accordance with law. The matter was partly heard yesterday(27 July 2015) and the arguments were deferred for today(28 July 2015) on this issue." He pointed out that " the Judgment complained of (be it the order passed in the Review Petition) was passed on 9 April, 2015 by a Bench of three Judges comprising of Hon'ble Sh. Anil R. Dave, J., Hon'ble Sh. J. Chelameswar, J. and himself(justice Kurian Joseph) but the curative petition "was decided by a Bench of three senior-most Judges[Chief Justice H.L. Dattu, Justices T.S. Thakur and Anil R. Dave] on 21st July, 2015. According to justice Kurian Joseph it was not permissible under law as it was not in conformity with Rule 4(1) r/w 2(1)(k) of Order XLVIII of the Supreme Court Rules, 2013. The relevant rule is as under:

[35] 2015(8)SCALE339: MANU/SC/0825/2015, Date of judgement-July 29, 2015, also see-*News Letter* (April-June 2015) Indian Law Institute, New Delhi. There are three different petitions and therefore three different opinion dated 28, 29 and 30 July 2015.

"2.(1) In these rules, unless the context otherwise requires -

(k) 'judgment' includes decree, order, sentence or determination of any Court, Tribunal, Judge or Judicial Officer."

4(1) The curative petition shall be first circulated to a Bench of the three senior-most judges and the judges who passed the judgment complained of, if available. [Emphasis Added]

Justice Kurian Joseph held that this defect needs to be cured first. Otherwise, there is a clear violation of Article 21 of the Constitution of India in the instant case. Therefore he stayed the death warrant while Justice Dave allowed the death warrant. Due to this conflict of opinion this case came to be decided by a larger bench of three judges consisting of justice Dipak Misra, Prafulla C. Pant, Amitava Roy.

The issue before this full bench was what is the meaning and scope of the words ""judgment complained of" used in Rule 4(1) of Order XLVIII of the Supreme Court Rules, 2013. In essence the question was "whether the term 'order' which forms a part of the definition of 'judgment' as stipulated under Order I Rule 2(1)(k) would mean that the order in review or the judgment passed in the main judgment."[36]

The bench explored the reasoning through the established legal norm that "the principle of review as is known is to re-look or re-examine the principal judgment. It is not a virgin ground" After mentioning this principle the court turned to precedent and referred justice Krishna Iyer, in Sow Chandra Kante v. Sheikh Habib [37]to support the principle. The full bench used the doctrine of stare decisis by observing that "the said principle has been reiterated in many an authority." It therefore concluded that "it is luculent[38] that while this Court exercises the jurisdiction in respect of a curative petition, it is actually the principal judgment/main judgment, which is under assail" and "the curative petition is filed against the main judgment which is really complained of."

The court therefore held that justice Kurean Joseph was not right in raising procedural issue. "The curative petition that was decided by three senior-most Judges of this Court, can neither be regarded as void or nullity nor can it be said that there has been any impropriety in the constitution of the Bench."

The argument regarding procedural lapse of Supreme Court rules were never raised in the curative petition decided on 9 April, 2015. This was raised in the petition argued on 27-28 July 2015. Justice Dave was right in not considering the argument of Supreme Court rules because a

[36] Para 12. Judis.
[37] (1975) 1 SCC 674.
[38] of writing or speech clearly expressed, brightly shining.

new ground/ arguments is not permissible in this situation. If new grounds which were existing previously and known to parties are allowed the judicial process will be "lawyers heaven" and "hell for justice." Justice Dave therefore followed a principle stand. In the bunch of Yakub Memon cases decided in 2015 it was no secret that a few brilliant minds in the field of law and intellect were using the process of law to delay the sentence probably for self satisfaction. On the other hand Justice Kurean Joseph, who was aware of the intentions of petitioners took a different stand because this was a different class of punishment ie capital punishment. He gave highest honour to the life of a person. Justice Joseph tried to fight for him raising a technical issue. This indicates a great sense of human rights for a person who was convicted for terrorist activity, and used or abused process of law. The full bench made it clear that justice Kurean Joseph was wrong. He was wrong probably because he interpreted the Supreme Court rules with a big heart.

Another issue was whether "sufficient notice is to be given to the convict before issuance of death warrant by the Sessions Court so that it would enable him to consult his advocates and to be represented in the proceedings." The full bench held that sufficient notice has to be interpreted in the light of "purpose and purport behind the said principle and whether that would affect the issuance of death warrant in this case." The court found that the petitioner has sufficient notice and opportunity and therefore the purpose is served. The court made the issue of death warrant absolute. The warrant was again challenged within a few hours. The Supreme Court again expressed its willingness to hear and rectify its defects if any. It heard the petition what is known as "late night petition." The bench decided that there is no merit in any arguments and warrant could be executed. Late night petition is a new invention after curative petition. The approach of judiciary has granted it greater esteem and honour as it is willing to be accountable by rectifying its error.

Vyas Ram

Vyas Ram @ Vyas Kahar v. State of Bihar[39] suggests that the degree of evidence for conviction and sentence is different. If conviction for murder has been reached by a court on certain evidence for capital punishment greater evidence is required. In this case the offenders [Vyas Kahar alias Vyas-jee, Naresh Paswan and Bugal Mochi alias Bugal Ravidas] were lower caste people [a traditional supposition] who were found guilty of a retaliatory killing of 35 persons of upper caste in village Bara, District Gaya, Bihar on 12.02.92. They were given death sentence under Section 3(1) of The Terrorists and Disruptive Activities (Prevention) Act, 1987 and life imprisonment under Sections 302 read with 149, 364 r/w. 149, 307 r/w. 149 etc. of Indian Penal Code. This being a Death Reference Case, the Supreme Court has to decide the validity of the conviction and sentence. The court tested the evidences on the basis of FIR, eye witnesses and role played by the accused. Regarding Naresh Paswan the finding of the court was that his name

[39] MANU/SC/0975/2013: 2013(11)SCALE645, (2013)12SCC349, 2014 (1) SCJ 264: Decided on 20.09.2013, also see-*News Letter* (July-Sept 2013) Indian Law Institute, New Delhi.

was not mentioned in the FIR. Out of two injured witnesses, one Lawlesh Singh, could not attribute any role to accused. Another injured witness Birendra Singh 'stated in the dock that he had seen the appellants slitting the throats of various persons but failed to identify' Naresh Paswan in Court. Other witnesses also could not attribute any role to Naresh. None of them said that he was a member of MCC. In a previous judgement by a designated court on the same issue based on common FIR one accused Madhusudan was acquitted by designated court. Naresh Paswan, therefore, was acquitted. On the other hand there were positive evidences against Bugal Mochi and Vyas Ram. Their name was mentioned in the FIR. Both were identified by injured witness Birendra Singh in Court. Birendra Singh also attributed the role of both in slitting the throats in his oral deposition. While in the FIR the role of Bugal Mochi as slitting the throats was attributed, Vyas Ram was just named without any special role played by him in the killings. Bugal Mochi, was identified by other witnesses as a participant in the crime without specifying the part played by him. Similarly other witnesses could not attribute any particular role to Vyas Ram. The conviction of both for murder was upheld. The capital punishment, however, awarded under TADA was reduced to life imprisonment.

The point of consideration is the fact that lack of proper investigation, deficiencies in the prosecution, dissenting views in previous judgements of Supreme Court judges may be overlooked if there is one convincing evidence, just one proof beyond reasonable doubts. While delivering his opinion in Krishna Mochi v. State of Bihar,[40] which was on the same issue on common FIR, Hon'ble Justice Arijit Pasayat correctly observed in a previous judgement that "Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end... The maxim "falsus in uno falsus in omnibus" (false in one thing, false in everything) has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution." However for the purpose of sentencing especially while awarding death sentence, it seems, the above rule does not hold good. At para 32 the court, while deliberating its reasons for commuting the death sentence to life imprisonment found unsatisfactory investigation as a mitigating factor for punishment because 'the absolute irrevocability of the death penalty renders it completely incompatible to the slightest hesitation on the part of the court..' Other reasons for not treating this case as rarest of the rare was 'appellants facing the trauma of the crime and the trial all this period' of 1992 to 2013[21 yrs], nature of attack being retaliatory and that too 'by scheduled castes and exploited

[40] 2002 (6) SCC 81.

sections of society', killing not being indiscriminatory 'no harm was done to women and children'. One wonders why in previous judgement [Krishna Mochi v. State of Bihar 2002 (6) SCC 81] on the same issue on the same FIR with same victims and four different accused from same back ground the majority did not find it "advisable to fall in favour of the "rule" of life imprisonment rather than invoking the "exception" of death punishment."

C. Muniappan: Impact of Open Review

Fifth case is C. Muniappan v State of Tamil Nadu.[41] 2nd February was unfortunately last day of life for three college going girl students who were murdered by three persons (sympathizers and party workers ruling party. They were disappointed by the news of conviction of their leader and were a part of a mob which started violent agitation. Three of these offenders found a bus in Dharampuri district. The bus has various girl students of Tamil Nadu Agricultural University. The prisoners burnt the bus where three girls were killed. On 30 th August, 2010 the Supreme Court affirmed the conviction and also death sentence as awarded by both high court and trial court. The offenders filed a review petition in 2011. As per Supreme Court rules 'application for review shall be disposed of by circulation without any oral arguments'. The constitutional validity of this provision was challenged in Mohd. Arif alias Ashfaq v Registrar, Supreme Court of India. Therefore Muniappan was clubbed with a constitution bench proceedings as both have similar issues. On 2/9/2014 the constitution bench (4:1)ordered limited oral hearing of all capital punishment review petitions in open court so that the procedure is just, reasonable and fair. Making special order for the case under comment (C. Muniappan) the court directed that this 'review petition is pending since the year 2010 and since the two learned Judges who heard the appeal on merits have since retired, the entire matter should be heard afresh' as soon as possible by a bench of three Judges after giving counsel a maximum of 30 minutes for oral argument. It was therefore an application and impact of Md Arif Principle of Open Review. In this review the offenders did not challenge the conviction but sentence only. The defence advanced three arguments. One, Killing during mob violence would not be sufficient to attract the principle of `rarest of rare case" for which the defence relied on Kishori v State of Delhi,[42] Manohar Lal alias Mannu v. State (NCT) of Delhi,[43] Lokeman Shah v. State of W. B.[44] It also argued that court did not address this aspect in the judgement. Two, 'possibility of the accused being reformed and rehabilitated' is established long back but has also not been addressed before concluding that the case is rarest of rare. The defence supported the principles by new decisions

[41] MANU/SC/0412/2016, 2016(3)SCALE406, Decided on 11/03/2016 on Open review by a full bench of Ranjan Gogoi, Arun Mishra and Prafulla C. Pant, J. Also see-*News Letter* (Jan-March 2016) Indian Law Institute, New Delhi.

[42] (1999) 1 SCC 148.
[43] (2000) 2 SCC 92.
[44] [(2001) 5 SCC 235.

of Birju v State of Madhya Pradesh[(2014) 3 SCC 421] and Anil @ Anthony Arikswamy Joseph v State of Maharashtra[(2014) 4 SCC 69]. Three, there were certain discrepancies and contradictions in the evidences.

State counsel did not argue anything noticeable. 'State counsel has submitted that the matter is left for just consideration by the Court' because 'the review petitioners are only with regard to the sentence imposed.' It did not respond to the arguments of defence which is a usual practice. The unanimous order of three judges bench in the review petitions commuted the death sentence to life imprisonment.

The full bench held that the case is not fit for extreme capital punishment. Physical aspects, mental aspects and victims, the three were considered. Neither the physical aspect nor the mental aspect satisfy the strict test of rarest of rare case. One, regarding physical aspect the court found that the actus reus was committed in the course of a mob frenzy. It was not individual culpability but group psychology which made them offenders. The beginning of actus reus was destruction of public property which culminated into murder of three girls. This again shows the killing was not a part of any special design. Regarding mental aspect the court explored that mens rea of the 'accused review petitioners, all along, was to cause damage to public property.' There was no pre meeting of mind, 'premeditation or planning'. Indeed there was no time for it because it all occurred 'in the flash of a moment'. Another mental aspect is motive of the criminals which was to express displeasure, dissatisfaction and disappointment of party workers against conviction of Jayalalitha. Third, the victims were unknown persons. This means they had no special reason and animosity etc to kill the girls. The full bench reached to the conclusion that "keeping in mind the totality of the circumstances narrated above, which does not appear to have received due consideration in the judgment under review,' the punishment was reduced. Though the ratio decidendi sounds convincing it raises certain questions.

In this case the trial court, high court and Supreme Court had granted capital punishment to all three accused. In review petition the three judges have reversed all three judicial findings, that too in a very brief order which is not a good precedent. The court ignored the vulnerability of victims and reduced the culpability of offenders who were in a mob. Being ~~In~~ in mob, motive of expressing displeasure on political ground seems to have acted as mitigating factor. If above reasoning is correct, then killing of any number of strangers during mob violence is a licence for diminished responsibility.

The state counsel did not discharge his responsibility satisfactorily as he did not argue in a professional manner. This is more important because State of Tamil Nadu led by AIADMK may be interested that the murderers do not get capital punishment because the accused were AIADMK workers. AIADMK will also make special effort to get the remission of the offenders because what they did was because of Jayalalitha. The full bench should have put a capping on remission like not before 20 years.

The judgement of division bench(BS Chauhan and GS Singhvi, JJ) of the Supreme Court in 2010 which awarded capital punishment to the killers at Dharampuri accepted the fact that there were some defects in investigation. They without referring to the maxim "falsus in uno falsus in omnibus" (false in one thing, false in everything) observed that "it is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded." In other words even residuary evidence is sufficient to convict the accused if it is beyond reasonable doubts. This principle is correct so far as conviction is concerned. Can mere residuary evidence be a basis for treating the case as 'rarest of rare case'**?** The answer seems to be a clear NO. Rarest of rare case needs additional care and extra caution because it would necessarily led to death sentence which is not an ordinary punishment. It is ir-reversible. Conviction based on residuary evidence is social interest interpretation, victim oriented approach and an affirmation of crime control model because conviction need not be beyond all doubts but beyond reasonable doubts. On the other hand the Supreme Court is not putting such conviction based on residuary evidence in the pigeon hole of 'rarest of rare' as happened in this case under comment and also in previous case of Vyas Ram @ Vyas Kahar v. State of Bihar. In Vyas ram at para 32(judis.nic.in) the court while deliberating its reasons for commuting the death sentence to life imprisonment found unsatisfactory investigation as a mitigating factor for punishment because 'the absolute irrevocability of the death penalty renders it completely incompatible to the slightest hesitation on the part of the court..'. The Supreme Court seems to be interpreting in favour of individual criminal, showing regards for human rights jurisprudence led by abolitionist and an attachment for due process model. This 2016 judgement could find better ratio decendi in Vyas ram.

SoumyaI-Soumya murder case(Sept 2016)

In the cases of Govindaswamy v State of Kerala[45] (also called as Saumya murder case) the deceased victim was assaulted. The accused repeatedly hit her head on the walls of a railway compartment. She either jumped from slowly running train or was pushed by accused outside train where the accused lifting the victim to another place by the side of the track sexually assaulted her. She was hospitalized and died. A prosecution for rape and murder etc proceeded. The accused appellant(Govindaswamy) has been sentenced by the sessions court and high court(Kerala)to death under 302 and life imprisonment under Section 376 Indian Penal Code 1860. The Supreme Court acquitted him of murder charges and upheld life imprisonment for rape. For murder the Supreme Court found the prosecution could neither prove intention to kill nor knowledge to kill as required in section 300 beyond reasonable doubts because reasons of death were doubtful. The causal relation between the conduct of accused and the result of death could not be established because of medical opinion, circumstantial elements and witnesses. As every judgement attracts criticism, this judgement also was criticised. What made it 'talk of the town' among lawyers was a facebook post of one retired Supreme Court judge, Justice Markendey Katju who has two principle objections. One that the court has relied on hearsay

[45] Decided unanimously on Sept 15, 2016 by Ranjan Gogoi, Prafulla C. Pant, Uday Umesh Lalit.

evidence and two it has not considered 300(3) or (4). The blog was changed into a *suo motu* review petition with other reviews.

SoumyaII- Govindaswamy review case(Nov 2016)

In Re - Blog Published By Justice Markandey Katju In Facebook In Criminal APPEAL NOS.1584-1585 OF 2014[46] the court at first addressed the substantive significance of a review application. According to Supreme Court Rules, 2013 (Part IV – Order XLVII] for proper review there must be an error *apparent* on the face of the record. As the plea of those opposing Soumya was containing 'long process of reasoning' and 'elaborate arguments' the court observed that the error is not apparent because an apparent error could be noticed on face. First argument of acceptance of hearsay evidence that "P.W. 4 and P.W. 40 who testified before the Court in their examination-in-chief that though they wanted to stop the moving train by pulling the alarm chain they were dissuaded by a middle-aged man who was standing at the door of the compartment by saying that the victim/girl had jumped out from the train and escaped and that she was alive." This middle-aged man could not be traced and therefore could not be examined. Witnesses P.W. 4 and P.W. 40 did not themselves saw whether deceased Soumya jumped out or not. This fact was conveyed to the witnesses by this untraceable man. It was surely an hearsay evidence and could not be given weight in the court. In the review petition the court addressed this as under:

> 6. The very elaborate argument advanced on this score is capable of being answered by a reference to Section 6 and Illustration (a) thereof of the Evidence Act, 1872 which engrafts in the Evidence Act the principle of *res gestae*. The statement made by the middle-aged man to P.Ws.4 and 40 being contemporaneous and spontaneous and that also being the prosecution case and no attempt having been made to discredit this part of the evidence tendered, we are of the view that in a case where the liability of the accused is to be judged on the touchstone of the circumstantial evidence the aforesaid part of the deposition of P.Ws. 4 and 40 must go into the process of determination of the culpability of the accused to rule out any other hypothesis inconsistent with the guilt of the accused.

Second arguments of review seekers was that the court did not consider Third and Fourth clause of Section 300 of the Indian Penal Code, 1860 for which the support from Bassappa v. State[47] and Joginder Singh v State of Punjab [48] was taken. The Supreme Court examined both case and found that both are inapplicable. Therefore, the court did not accept that there was any legal mistake and the arguments of conviction under 302 followed by capital punishment was rightly rejected.

Lessons from Judicial Decisions

Vyas ram and C. Muniappan is common in the sense that both require greater degree of evidence for capital punishment. Vyas ram also indicates that Mechanical application of provisions of

[46] Suo Motu Review Petition (Crl) No.1/2016, decided by the same full bench on Nov 11, 2016.
[47] AIR 1980 MYSORE 228.
[48] (1980) 1 SCC 493.

counter terror legislations [here TADA] by executive machinery on 'caste war between the haves and the have nots' is not only an unwarranted use of discretion but also questions the very desirability of such legislations. A terrorist activity is distinguishable from a caste or communal riot for, former is a challenge to sovereignty and integrity of India while latter a law and order problem for which traditional penal law[Indian Penal Code 1860] or NSA 1980, Arms Act 1959, Unlawful Activities (Prevention) Act 1967 may be used. Vyas Ram judgement, therefore, attracts attention for another simple reason whether forward vs backward killing was a fit case to be tried under TADA.

Executive Blunders and Remedy

There are two reasons of special mention of case of Ajay Kumar Pal. One positive aspect is that the judgement consistently applied the law laid down in two constitution bench judgements of Sunil Batra and Triveniben and followed the capital punishment jurisprudence in India. Second is negative aspect of judgment. The judgement could have served the humanity better by its follow up orders. It should have directed the registrar of the Supreme court to communicate this judgement to all jail superintendents dealing with death sentence prisoners. It should have ensured the compliance of Sunil Batra order on section 30 (2) of the Prisons Act, 1894. They should have also directed that the compliance report be submitted within one month of this judgement. The error is continuing and it should be rectified as soon as possible because any death row convict in solitary confinement in the name "confined in a cell apart from all other prisoners" before final disposal of mercy petition(if any) is violation of article 21 everyday. It is a continuing violation of fundamental right.

There would be around 385 convicts of death sentence whose petition would be pending either in the judicial process or in the executive clemency proceedings.[49] It is difficult to state whether section 30 (2) the Prisons Act, 1894 is followed with the cavet of Sunil Batra or not. There are greater chances that most of these 385 prisoners are kept in solitary confinement even before prisoner's "sentence of death has become final, conclusive and indefeasible which cannot be annulled or voided by any judicial or Constitutional procedure". Recently Surender Singh Koli (Nithari case) also complained that he was in solitary confinement even after this judgement of Ajay Kumar Pal. Wrong application of section 30, violation of Sunil Batra and inordinate delay in mercy petition changes the status of prisoner from offender to victim. For judiciary "it becomes a fresh case of violation of fundamental right under art 21" independent of the legal finding that the prisoner has committed a rarest of the rare crime. Initially prisoner was violator of law and State was victim but now prisoner becomes victim of State inaction as well as gross negligence and State become violator of article 21.

[49] News papers in 2012 reported Ajmal Kasab as "the 309th prisoner on death row in India" while Asian Centre for Human Right, 22 October 2013 reports "414 death row convicts await the gallows in India" and Death penalty project of NLU Delhi identifies around 250 convicts as on 2015 January. NLU Delhi in 2016 report says death row convict in India are 385. For 2016 report visit news item at http://www.thehindu.com/data/death-penalty-india-report-most-on-death-row-in-india-are-first-time-offenders/article8566274.ece

The lesson for executive is that they must read the guidelines of judiciary carefully. This case should be a part of the training programmes for prison officials. The lesson for legislature(parliament in this case) is that they should bring an amendment in section 30 of Prison Act 1894(if parliament agrees with the judgement) adding an explanation that "under sentence of death means mercy petition, if any, is rejected and there is no stay of execution by the authorities". Had they amended suitably in 80s, various cases would not have lead to fundamental right and human rights violations. Lesson for judiciary has already been discussed.

Judicial Mistakes and Remedy

Bhullar I and II suggests that all issues covering constitutional validity ought to be decided by constitution bench as per the norms of art 145. The Chief Justice of India is not able to do it because the work load and disposal time will increase. Overburdened institution be it judiciary or academics are bound to compromise the quality of work and actual delivery will have shortcomings which could otherwise be avoidable error of substance. Bhullar I despite being a well researched opinion on constitutionality of capital punishment, fails to find the ratio decidendi of a binding precedent. It seems the mechanism to verify the citation used in the judgement also needs attention. The judgement ie Bhullar II at para 10 quotes para 57 from Triveniben,[50] while this citation shows this judgement has only three paragraph. Indeed the citation should have been (1989)SCC 1678. This, however, is very small issue. It is high time the wings of the state should think of enhancing the strength of apex court to 50+1 so that load is shared and quality judgements may be expected to come. It is because of litigation load that other judges avoid giving their opinion unless dissenting baring a few distinguished exceptions. This is more relevant because Hon'ble Justice Sudhansu Jyoti Mukhopadhaya was present in both Bhullar I and Bhullar II and he spoke nothing while two cases are two different poles. Of course, more opinion in the bench some time may create confusion for the other bench which happened in Triveniben where justice Shetty agreed from the rest of four judges but gave his own opinion. Bhullar I followed the 'opinion rendered by Shetty, J. as quoted in para 76 of the judgment in Triveniben' which later on was held by Shatrughan Chauhan(para 62) as 'minority view and not a view consistent with what has been contended to be the majority opinion'. This is the risk but the risk has to be taken for greater and better intellectual discourse.

Self Critic Judiciary

The judgement of Bhullar II and Yakub Memon shows the maturity of Indian judiciary for its willingness to modify if something goes wrong during judicial process. In the materialistic age of sharp decline in the moral standard, the two wings of state (legislature and executive) gradually losing the respect and honour is said to be an ordinary phenomenon. What is extraordinary is the fact that unlike their sister wings the judiciary especially the Supreme Court of India has earned esteem and retained honour in the eye of layman in general and lawman in particular. One factor which is responsible for this honour is the fact that the Supreme court keeps on admitting its mistakes and does not hesitate to rectify the serious constitutional wrongs. It evolved curative

[50] (1988) 4 SCC 574.

petition as an additional tool as defect rectifying mechanism after the judgement has passed finality and this case is an application of these tools. In the case of Bhullar II the tool of curative petition was applied. Judgements or orders delivered by judges is one of the means of the examining the quality and accountability of judges. This becomes more important in Indian context because of three reasons. One, the constitution mandates that "no discussions shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties…" Two, the stare decisis of judicial independence have made the judges absolutely free from executive interference in judicial appointments and three, the courts (in particular the Supreme Court) have emerged as a most powerful wing of State in India. A body which has all powers and no accountability could be a bane to democracy. The Supreme Court is conscious of this fact and therefore, time and again it has inaugurated new mechanism to ensure that the judgements and approach towards judicial process inculcates a sense of accountability. The judgements/ orders made in the case of Yakub Menon indicates the will power of the Supreme Court to ensure that justice is not only done but it must be seen to be done with responsibility.

Delay in Judicial Process

What is common in Bhullar and Yakub Menon case is the fact that judicial process was delayed for one reason or other. It was also an instance of misuse of judicial process. In these circumstances there is no point in arguing human rights issues. Indeed repeated attempt to choreograph the delay and projection of human rights concern has potential to weaken the human rights movement. This also questions the credibility of a few intellectuals and human rights organisations. This cases are judicial recognition of the hard fact that human rights movement against capital punishment has been weakened because of new forms of crime viz terrorism.

Bhullar I refers constitutionality issue in detail. One wonders what was the need to discuss these issues and cases in detail, when they were either not in the issue or decided long back? A brief reference could have served the purpose. The trend of writing lengthy judgements and unnecessary obiter remarks need to be checked to save the limited and precious judicial resources and it is high time the Supreme Court ought to come with some guidelines.

Writ compensation

Another point for discussion is that the jurisdiction of "writ compensation" has not been exercised by the Supreme Court in various cases of capital punishment where the Supreme Court agreed that fundamental right was violated. Once fundamental right is violated, especially where State is the clear violator, a constitutional tort is constituted. Why has the court not granted some compensation in those cases like Bhullar or Shatrughan Chauhan or Ajay Kumar Pal? The legal question could be whether right to claim compensation for violation of fundamental right is another right under article 32? This is a matter of further study and research.

Concluding Remarks

Capital punishment jurisprudence in India is full of inconsistencies and controversies. Executive delay in mercy petition without any convincing arguments is a routine matter for which no one is made accountable. Judiciary from 1980 inaugurated forming mandatory guidelines with rarest of rare case doctrine. It was, however, found that the doctrine has not been consistently exercised. Judicial blunders in application of rarest of rare case principle were pointed out in various cases. For example in the case of Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra,[51] it was observed that "there is no uniformity of precedents, to say the least. In most cases, the death penalty has been affirmed or refused to be affirmed by us, without laying down any legal principle."[52] The judiciary, however, repeated the mistake in Bhullar-I as discussed earlier. The maturity of judicial approach lies in the fact that mistakes were indicated in the case of Santosh Chauhan and cured by the Supreme Court in Bhullar II. Open review of capital punishment cases through Mohd. Arif is another mature thinking as this creates another check before a prisoner is hanged. Similarly the seriousness shown in Yakub Mennon case is another indication of maturity of judiciary where the court went beyond the rules to listen the late night petitions of the prisoner. It is hoped that the supreme judiciary while dealing with death punishment cases will be more cautious so that the recurrence of mistakes like Bhullar I be avoided. One of the recent developments as discussed previously is Govindaswamy v State of Kerala[53]where convict was acquitted of charges of murder but convicted of rape. One former Supreme Court judge Justice Katju has pointed out that the judges committed grave mistake because they relied on the hearsay evidence, and other provision of s 300. Accordingly, Katju insists that murder conviction was proper. The review petition rejected any mistake. It has shown the maturity of requesting Katju to explain his views. While this author agrees from Katju regarding the mistake pointed out about hearsay evidence, he disagrees with Katju that Soumya Death case was a fit case for capital punishment. The full bench in this case should have made it clear in Soumya I that the evidence is accepted not as hearsay evidence but as a part of *res gestae* which it did in review petition.[54] In any case it was not fit for capital punishment assuming hypothetically that this was a murder case and judiciary has exhibited maturity by not awarding capital punishment and court has shown maturity in that sense. Lord Denning, rightly said "The judge has not been born who has never committed a mistake." Indeed the 'free trade of ides' and intervention by legal authorities should be encouraged. Justice Katju deserve appreciation for showing his concern and appearing before the Supreme Court. If the practice of pointing mistakes of law, correcting mistakes of law and innovating new ways to correct mistakes continues in positive spirit we will find a more mature judicial decisions with negligible chances of human error.

[51] (2009) 6 SCC 498.

[52] *Id* at para 104.

[53] Decided unanimously on Sept 15, 2016 by Ranjan Gogoi, Prafulla C. Pant, Uday Umesh Lalit.

[54] The review petition was rejected on Nov 11, 2016.