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The Inevitable Inconsistency of the Death Penalty in India

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Abstract

This article is an attempt to develop the theoretical framework of 'inevitable inconsistency' to re-evaluate the desirability of the death penalty in India, and propose it as a *sui generis* ground for revisiting its constitutionality. It highlights new and robust empirical research on the administration of the death penalty including: (a) sentencing trends followed by the trial courts; (b) the judicial attitudes of judges in the Supreme Court and; (c) the disparate impact of the death sentence on the socially and economically marginalized sections of the society. These research studies dictate significant deviations from the sentencing framework evolved by the Indian Supreme Court to administer the death sentence. To establish 'inevitable inconsistency', the article ventures into hypothesizing a 'best-case scenario' that removes such deviations by infusing consistency and fairness into death sentencing, to the maximum extent possible. It then highlights how even such 'best-case scenario' fails to prevent inconsistencies or arbitrariness at a magnitude not acceptable in a rule-based system. This failure of the 'best-case scenario' leaves our search for consistency with only two options – either a mandatory death sentence, or no death sentence at all. Given, that the former already stands declared unconstitutional in India, abolition emerges as the only viable end to the search of consistency that this article embarks upon. Accordingly, the article argues that the 'inevitable

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inconsistency' framework, when coupled with the unique, irrevocable nature of the death sentence, must inform the constitutional inquiry into its retention in law.

Keywords: death penalty, inevitable inconsistency, best-case scenario, Bachan Singh, arbitrariness.

I. Introduction

The year 2021 marks forty-one years since the Supreme Court of India, by a majority of four to one (with Bhagwati J dissenting), upheld the constitutionality of the death penalty in *Bachan Singh v State of Punjab* (or 'in *Bachan Singh*').[1] The decision in *Bachan Singh* was the first attempt by the Indian Supreme Court to limit the application of the death penalty to only the most extreme cases, and to that end, the Court laid down a comprehensive sentencing framework for future courts administering the death sentence. The Court's decision in *Bachan Singh* was premised upon the perceived utility of the death penalty, but at the same time acknowledged the need to limit its application and infuse consistency into its sentencing through a sentencing framework.

I aim to highlight how the actual practice of death sentencing complies with the *Bachan Singh* sentencing framework. Instead of making an argument on abolition from the very start, I first highlight the existing gaps between the theory and the actual practice of death sentencing in India. I then evaluate how the identified gaps between the theory and practice can be possibly removed. This would involve an attempt at discovering a system where death sentence is carried out in as non-arbitrary a manner as possible. This would be followed by a critical evaluation of this supposed 'best-case scenario', and I subsequently propose to see if such scenario too leaves rooms for errors which would be unacceptable in any rule-based system. This search for non-arbitrariness (which I take to mean consistency in this context), then, would lead to only two possible alternatives, theoretically speaking – a mandatory death sentence (already abolished in India) or no death sentence at all.

This trajectory becomes worth exploring because *Bachan Singh* upheld the death penalty as it was convinced of it being administered consistently under the sentencing framework evolved by it. To not just highlight the failure of that framework but to also better upon it and still conclude the practical impossibility of a consistent application of the death penalty, even in such a 'best case scenario', would provide a stronger case for abolition and a more persuasive argument for retentionists to engage with. This shows promise to lead to a conclusion

[1] (1980) 2 SCC 684.

of 'inevitable inconsistency' which can be constructed as a larger theoretical framework to evaluate the desirability of the death penalty.

II. Legislative And Judicial History

The legislative and judicial history of death sentencing in India can be traced back to the Code of Criminal Procedure, 1898 (or 'the 1898 Code') applicable to British India. Section 367(5) thereof provided for death sentence as the default punishment for murder and required the sentencing court to provide written reasons if it were to choose a sentence of life over death.[2] This was considered to mean that the legislature regarded the death penalty to be the norm and life imprisonment to be an exception.[3] This was followed by an amendment to the 1898 Code in the year 1955 which deleted Section 367(5) altogether, and a new sub-section on an entirely different subject-area was substituted in its place.[4] It has been argued that this move reflected a shift towards the death penalty no longer being the 'norm' or the default punishment for murder,[5] or at the very least, a lack of any legislative preference between the two sentences of life and death.[6]

It was under this legislative framework that the first constitutional challenge to the death penalty was repelled by the Indian Supreme Court in the case of *Jagmohan*.[7] The Court recognised that the 1955 Amendment left it to the discretion of a sentencing judge to choose between life and death, but felt that any erroneous exercise of such discretion could be remedied within the appellate and procedural frameworks available under the existing law.[8] However, this decision soon came under reconsideration because of a significant legislative change.

In 1973, a new Code of Criminal Procedure (or 'the 1973 Code') was enacted. It repealed the 1898 Code and currently governs criminal procedure in India. Section 354(3) of the 1973 Code introduced the requirement of "special reasons" to be recorded by a sentencing court for choosing the death sentence over life imprisonment or imprisonment for a term of years, if the offence provides for

2 Code of Criminal Procedure, 1898 [Repealed], section 367(5).

3 *Bachan Singh v State of Punjab* (1982) 3 SCC 24 [20] (Bachan Singh Dissenting Opinion); Law Commission of India, 'The Death Penalty' (Government of India 2015) 262 para 2.2.5 <https://lawcommissionofindia.nic.in/reports/Report262.pdf> accessed 9 February 2021; Project 39A, 'Death Penalty Sentencing in Trial Courts' (National Law University, Delhi 2020) <https://static1.squarespace.com/static/5a843a9a9f07f5ccd61685f3/t/5ebc3dc0879c75754ab23f78/1589399023 71/Death+Penalty+Sentencing+in+Trial+Courts.pdf> accessed 10 February 2021, page 13;.

4 Code of Criminal Procedure (Amendment) Act, 1955 [Repealed], s 66.

5 Law Commission of India (n 3) para 2.2.3.

6 Project 39A (n 3) 13.

7 *Jagmohan v State of UP* (1973) 1 SCC 20.

8 ibid [26].

these alternative sentences.[9] This requirement of "special reasons" for choosing the death sentence was considered to reflect a new legislative policy: life imprisonment was now the default penalty for murder, and death sentence an exception.[10] The 1973 Code, therefore, ushered in a complete reversal of the position under the 1898 Code.

The scope of the expression "special reasons" under Section 354(3) first came to be considered by the Supreme Court in *Rajendra Prasad*.[11] The Court held that "special reasons" meant that the courts must consider only the circumstances of the criminal and not the crime (i.e., only mitigating circumstances, and not the aggravating ones) in choosing whether to apply the death sentence.[12] This was overruled when a new challenge was mounted to the constitutionality of the death penalty in *Bachan Singh*. While upholding the death sentence, the Court held that both the circumstances particular to the crime as well as the criminal must be weighed against each other;[13] and this set the groundwork for weighing both aggravating and mitigating circumstances.[14] More importantly, the Court acknowledged that the import of requiring "special reasons" was that it was the legislative policy to limit the application of the death sentence only to "exceptionally grave" or "extreme" cases.[15] To guide the sentencing courts in so administering the death penalty, the Court made the first serious attempt in the Indian death sentencing jurisprudence at laying down a comprehensive sentencing framework for future courts. This framework is discussed in some detail in Section III of the article.

However, before proceeding to what the framework lays down, a quick mention may be made of the third and final challenge to the constitutionality of the death penalty attempted in the case of *Shashi Nayar*,[16] where the petitioner requested a reconsideration of *Bachan Singh*. The Supreme Court, however, remained unmoved. It took 'judicial notice' of the worsening law and order situation in the country and simply declared that, "[t]he death penalty has a deterrent effect and it does serve a social purpose".[17] The final constitutional challenge to the death

9 Code of Criminal Procedure, 1973 (CrPC 1973), s 354 (3).
10 *Bachan Singh* (n 1) [209].
11 *Rajendra Prasad v State of Uttar Pradesh* (1979) 3 SCC 646.
12 ibid [88(9)].
13 *Bachan Singh* (n 1) [161].
14 ibid.
15 ibid.
16 *Shashi Nayar v Union of India* (1992) 1 SCC 96.
17 ibid [99].

penalty having thus been repelled, the sentencing framework laid down in *Bachan Singh* achieved finality.

III. The Bachan Singh Sentencing Framework

The Court in *Bachan Singh* provided a detailed sentencing framework to guide judicial discretion in choosing the death sentence, consistent with the legislative policy indicated in Section 354(3) of the 1973 Code.[18] Integral to this sentencing framework is the weighing of aggravating factors (relating to the crime) against the mitigating factors (relating to the criminal). In fact, the Court provided an indicative list of aggravating and mitigating factors, designedly kept non-exhaustive, so as "[n]ot to fetter judicial discretion".[19]

The aggravating factors included:

a) [I]f the murder has been committed after previous planning and involves extreme brutality; or

b) If the murder involves exceptional depravity; or

c) If the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed –

   i. while such member or public servant was on duty; or

   ii. in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant, as the case may be, or had ceased to be such member or public servant; or

d) If the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.[20]

Likewise, the Court also laid down an illustrative, non-exhaustive

[18] *Bachan Singh* (n 1) [177].
[19] ibid [203].
[20] ibid [202].

list of the following mitigating factors:

a) [T]hat the offence was committed under the influence of extreme mental or emotional disturbance.

b) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

c) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

d) The probability that the accused can be reformed or rehabilitated. The State shall by evidence provide that the accused does not satisfy conditions (c) and (d) above.

e) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

f) That the accused acted under duress or domination of another person.

g) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.[21]

It is imperative to note here the Court's crucial direction to sentencing judges to ensure that mitigating factors "[r]eceive a liberal and expansive construction".[22] Notably, no such prescription was made for aggravating factors.[23] Finally, in the event of aggravating factors outweighing mitigating factors, despite the latter being constructed 'liberally and expansively', the Court provided for a final leg of enquiry. This was the determination into whether all the sentencing options, alternative to death, stood 'unquestionably foreclosed'. If the answer to this final enquiry were to be in the affirmative, then the case was to fall under the category of "rarest of rare", meriting the award of the death sentence.[24]

It would thus seem that the sentencing framework evolved in *Bachan Singh* seemingly sets an extremely high threshold for applying the death penalty. Not

[21] ibid [206].
[22] ibid [209].
[23] Project 39A (n 3) 15.
[24] *Bachan Singh* (n 1) [209].

only are aggravating factors to be weighed against mitigating ones, but the latter are to be constructed liberally and expansively – no similar requirement has been laid down for aggravating factors.[25] Furthermore, if despite such exercise the aggravating factors outweigh mitigating factors, the Court must satisfy itself, in the final leg of the enquiry, that all sentencing options other than death, stand 'unquestionably foreclosed'.

Furthermore, subsequent decisions of the Supreme Court have strengthened the *Bachan Singh* framework by expanding the choices of alternative sentencing options available to a court, that are required to be 'unquestionably foreclosed' under the final enquiry. This has further raised the threshold of choosing a death sentence in a given case.[26] These decisions come in the wake of the real problem that under the statutory scheme of the 1973 Code, life prisoners become eligible for remission after the completion of a fourteen-year term,[27] with the practical consequence that often a sentence of life is reduced only to a sentence of fourteen years.[28] Therefore, while a case may be grave enough to merit imprisonment beyond fourteen years, it may yet not be grave enough to merit the death sentence, leaving a court with real-time sentencing dilemmas in such situations.

The Supreme Court resolved this dilemma in *Sriharan*,[29] wherein by a three to two majority, it affirmed its previous decision in *Swamy Shraddananda*[30] and clarified that where death sentence is one of the statutorily prescribed punishments, it is open to the High Courts and the Supreme Court to consider the following two alternative sentences:

1) a life sentence specified to extend till the rest of the entire natural life of the convict, without any possibility of remission; and

2) If a life sentence without remission appears to be disproportionately high, and yet a life sentence reduced to fourteen years after remission appears to be grossly inadequate, as a "middle ground"31 the Court can specify a fixed term imprisonment exceeding fourteen years but falling short of life (say for twenty, thirty, forty years, and so on), and

[25] Project 39A (n 3) 15.

[26] Centre on the Death Penalty, 'Litigating Death Penalty Cases: A Consultation' <https://criminallawstudiesnluj.files.wordpress.com/2020/08/4b439-issuesinlitigatingdeathpenaltycases.pdf> accessed 10 February 2021.

[27] CrPC 1973, s 433A.

[28] *Swamy Shraddananda v State of Karnataka* (2008) 13 SCC 767 [89].

[29] *Union of India v Sriharan* (2016) 7 SCC 1.

[30] *Swamy Shraddananda* (n 28).

[31] Project 39A (n 3) 20.

place it beyond the statutory remission.[32]

Accordingly, as alternatives to the death sentence, the High Courts or the Supreme Court may, depending upon the circumstances of the case, choose to instead impose either a life sentence beyond the scope of remissions; or a fixed-term sentence of choice between fourteen years and life, again placed beyond the scope of remissions. These two sentences further expand the scope of the 'alternative options' that are required to be 'unquestionably foreclosed' under *Bachan Singh*'s final leg of enquiry, before a sentencing court could proceed to choose the death sentence.[33]

It may also be stressed here that even where life or fixed-term imprisonment is under consideration, it may further be of two descriptions – simple, rigorous, or a combination of both. This provides additional flexibility in sentencing.[34] This has the effect of further increasing the already high threshold of the *Bachan Singh* sentencing framework by expanding the scope of the alternative sentences that must be 'unquestionably foreclosed' before the death sentence can be pronounced.

The *Bachan Singh* sentencing framework may, therefore, be encapsulated in the following flowchart:

IV. The Deviations From The Bachan Singh Sentencing Framework

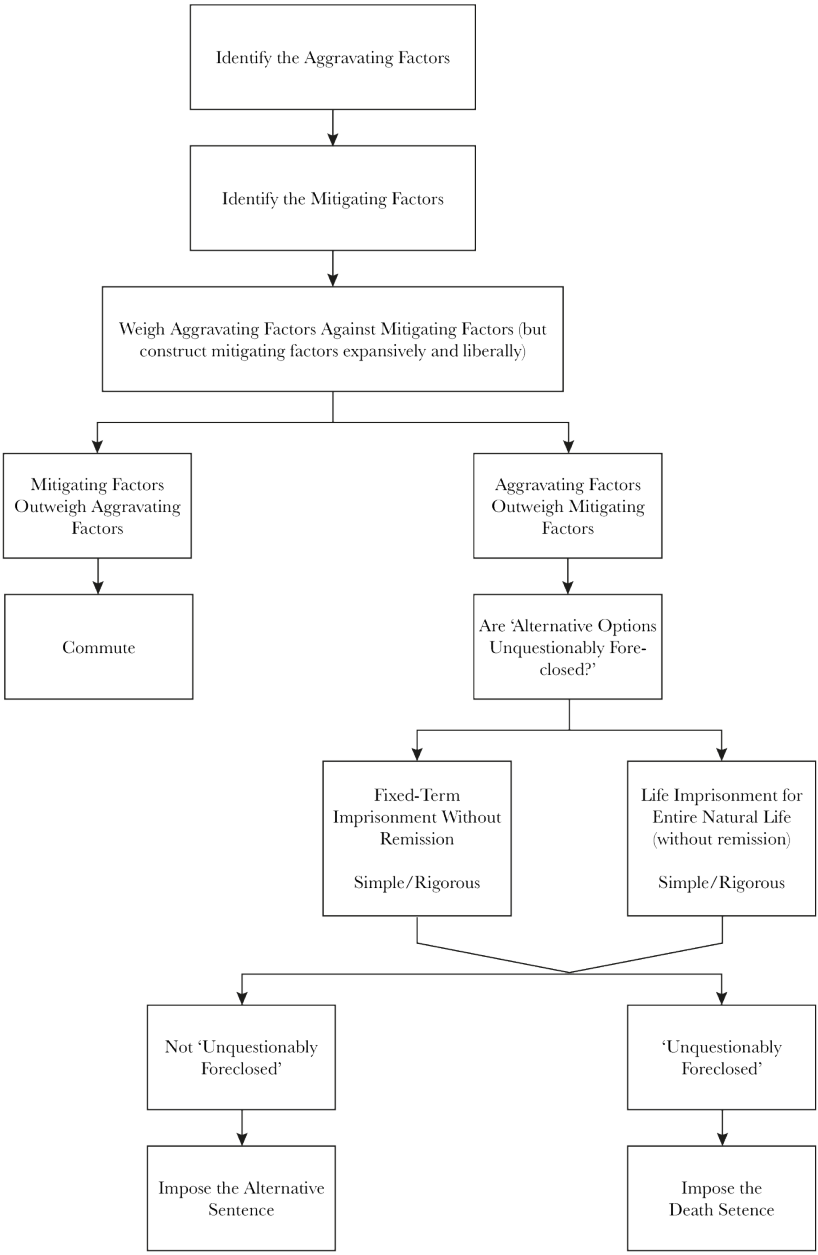
This part of the article aims to evaluate the actual application of the *Bachan Singh* sentencing framework, and analyse how such application measures against the framework's high threshold for choosing the death sentence. The specific deviations and gaps between the theory and the practice of the sentencing framework are discussed, and this analysis is supported by four primary sources of empirical evidence. The first is sentencing data from the trial courts of three major Indian states which administer the highest number of death sentences (a total of two-hundred and fifteen trial court decisions where death sentence was awarded), published in the year 2020.[35] The outcomes of this study record several deviations

[32] *Sriharan* (n 29) [106], [114]; Project 39A (n 3) 20. The constitutional powers of pardon by Governors and the President would still apply.

[33] Project 39A (n 3) 20.

[34] Indian Penal Code, 1860, section 53.

[35] Project 39A (n 3) 10.


Identify the Aggravating Factors
Identify the Mitigating Factors
Weigh Aggravating Factors Against Mitigating Factors (but construct mitigating factors expansively and liberally)
Mitigating Factors Outweigh Aggravating Factors
Aggravating Factors Outweigh Mitigating Factors
Commute
Are 'Alternative Options Unquestionably Fore-closed?'
Fixed-Term Imprisonment Without Remission
Simple/Rigorous
Life Imprisonment for Entire Natural Life (without remission)
Simple/Rigorous
Not 'Unquestionably Foreclosed'
'Unquestionably Foreclosed'
Impose the Alternative Sentence
Impose the Death Setence

from the *Bachan Singh* framework, which I report and analyse in this part of the article, and build upon to formulate a best-case scenario in Section V of this article.

The second source is the opinion study of sixty former justices of the Indian Supreme Court on their experiences in applying the death penalty.[36] Published in 2018, this is a particularly instructive source given that of the sixty judges interviewed, forty-seven had adjudicated sixty-three death penalty cases and confirmed a total of ninety-two death sentences.[37] The third and fourth sources, respectively, include the Death Penalty India Report (published in 2016);[38] and the Law Commission of India Report No. 262 (published in 2015)[39] which recommended abolition of the death penalty except for terrorism-related offences. These two form the final section of this part of the article, and reveal the consequences of the specific deviations from the *Bachan Singh* framework. These consequences take the shape of rampant inconsistencies in applying the death penalty, with a disproportionate impact upon the vulnerable sections of the society.

These four sources collectively reveal the following instances of deviations from the sentencing framework evolved in *Bachan Singh*.

A. Introduction of 'collective conscience' and crime-categories

Over the past several years, a new judicially-evolved test of the crime 'shocking the collective conscience of the society', has emerged as a significant basis for choosing the death sentence. This part explores how the new test of 'collective conscience', despite falling squarely outside the *Bachan Singh* framework, has found acceptance by, both, the Supreme Court and trial courts. Before proceeding into how this has been done, it is worthwhile to note here that not only did the *Bachan Singh* sentencing framework never provide for the criteria of collective conscience, it had, in fact, explicitly guarded against it by forewarning that "[j]udges should not take upon themselves the responsibility of becoming oracles or spokesmen of public opinion".[40]

However, this clear prohibition against courts interpreting community standards while applying the death sentence, seems to have been disregarded,

[36] National Law University, Delhi, 'Matters of Judgment: A Judges' Opinion Study on the Death Penalty and the Criminal Justice System' *Issuu* <https://issuu.com/p39a/docs/combined231117> accessed 9 February 2021.

[37] ibid 14.

[38] Centre on the Death Penalty, 'Death Penalty India Report, Volume I' (National Law University, Delhi Press) <https://static1.squarespace.com/static/5a843a9a9f07f5ccd61685f3/t/5b68a29a6d-2a73cbec1ec89f/1533584200675/Vol.I_Death+Penalty+Report.pdf> accessed 9 February 2021.

[39] Law Commission of India (n 3).

[40] *Bachan Singh* (n 1) [126], [176].

when, just three years after the decision in *Bachan Singh*, a smaller Supreme Court bench in *Machhi Singh*[41] introduced the test of 'collective conscience of the society being shocked' as the basis of imposing the death penalty. This new element of 'shocking the collective conscience' was divided into five sub-categories[42] by the Court, indicating when it comes into play. These are: (a) manner of commission of the crime (which includes brutality); (b) motive of commission of murder; (c) anti-social or socially abhorrent nature of the crime; (d) magnitude of the crime; and (e) personality of victim of the murder.

A society's 'collective conscience is shocked', therefore, depending upon the role played by the above sub-categories. *Machhi Singh* then provided an illustrative list under each of the above categories to determine when these sub-categories can be said to 'shock the collective conscience'. A closer inspection, however, reveals that this illustrative list is, in turn, a compilation of several pre-determined categories of crime.[43] For example, the second sub-category of '*motive*' includes murders by hired assassins for the sake of rewards; murders designed to inherit property, *etc.* Similarly, the third sub-category of '*anti-social crimes*' includes murder of members of Scheduled Castes or minority communities; cases of dowry-deaths, *etc.* The fourth sub-category of '*magnitude*' includes murders of multiple members of a family or a large number of persons from one caste community. The final sub-category of '*victim's personality*' includes murders of innocent children; of those rendered helpless by age, *etc.*[44] Accordingly, the resultant effect of the 'collective conscience' framework is existence of pre-set crime-categories which invite the court to impose the death sentence. For instance, if X is a crime-category that has been identified as a shock to the collective conscience of the society, then an accused A convicted of X would deserve the death sentence.

This manner of sentencing falls foul of the comprehensive sentencing framework laid down in *Bachan Singh*, which required a careful weighing of aggravating and mitigating factors unique to the crime and the criminal. It replaces such individualised sentencing with a straight-jacket factual enquiry into the existence of pre-identified crime-categories. For instance, in Madhya Pradesh[45], trial courts were found to have applied the *Machhi Singh* crime-categories as a matter of "literal adherence"[46], i.e. "[s]imilarity was drawn between the case before the court and *Machhi Singh*'s five categories. Using the circumstances of the

[41] *Machhi Singh v State of Punjab* [1983] SCC 470.
[42] ibid [33]–[37].
[43] Project 39A (n 3) 16; *Machhi Singh* (n 41) [33]-[37].
[44] *Machhi Singh* (n 41) [33]-[37].
[45] Project 39A (n 3) 41.
[46] ibid.

crime, compliance with either all or one of the categories was shown to impose the death sentence".[47]

Even generally, *Machhi Singh*'s formulation of 'collective conscience' has had a lasting legacy on how the death sentence is applied. 'Collective conscience' was found to have been invoked by the trial courts in 72% of the cases in Delhi, 43% of the cases in Madhya Pradesh, and 51% of the cases in Maharashtra.[48] Moreover, in the cases in which 'collective conscience' was invoked, it seemed to have played a determinative role in deciding the sentence.[49]

In an even bigger deviation from the *Bachan Singh* sentencing framework, the existence of 'collective conscience being shocked' has often been the cause of complete non-consideration of mitigating factors. For instance, in all the one-hundred and twelve cases in which collective conscience was a factor influencing death sentencing, no mitigating factors were considered at all in sixty-three of those cases (i.e., in roughly 56% of the cases).[50] This is a disturbing deviation from the *Bachan Singh* sentencing framework, which not only mandates weighing of both aggravating and mitigating factors, but also requires mitigating factors to be constructed expansively and liberally.

Although a perversion of the *Bachan Singh* framework, factors like 'collective conscience' and crime-categories laid down by *Machhi Singh*, have been found to hold considerable sway over judicial attitudes towards the death penalty. For instance, the opinion study of sixty former justices of the Indian Supreme Court on their experiences in applying the death sentence[51] starkly reveals judicial acceptance of the crime-categories approach, although it falls outside the sentencing framework in *Bachan Singh*. No less than thirteen former judges of the Indian Supreme Court who decided eighty death penalty appeals between them and confirmed forty-one death sentences, endorsed the 'crime-categories' approach, leaving hardly any room for mitigating circumstances.[52] Thus, for a significant number of the judges interviewed, the *Bachan Singh* sentencing framework was often understood as reducible to crime-categories or description of offences alone.[53]

Further, eleven former judges of the Court in their responses to the opinion study, considered 'collective conscience' to be a crucial aggravating factor, revealing the entrenchment of the 'collective conscience' framework in judicial

47 ibid.
48 ibid 33, 75.
49 ibid 32.
50 ibid 33, 75.
51 National Law University, Delhi (n 36).
52 ibid 59.
53 ibid 17.

attitudes towards death sentencing. These eleven judges confirmed forty-one death sentences by invoking 'collective conscience'.[54]

Therefore, *Machhi Singh*'s legacy of 'collective conscience' clearly continues to influence death sentencing in India. This repeated use of 'collective conscience', however, should not obscure this criteria's explicit exclusion, and lack of fit, in respect of the *Bachan Singh* sentencing framework which requires judges to consider only the circumstances unique to the crime and the criminal.[55] The gradual incorporation of 'collective conscience' into the Indian death penalty jurisprudence is, therefore, a significant deviation from the *Bachan Singh* sentencing framework and the principle of individualised sentencing which lies at its heart.

B. The dominance of 'brutality'

Another legacy of *Machhi Singh* is the central place given to the aggravating factor of brutality of a crime in death sentencing by trial courts. *Machhi Singh* listed brutality of the crime as the first sub-category indicative of when a society's collective conscience is shocked, and this factor has often received a central place of analysis in death sentencing, often trumping other considerations.

This part of the article highlights how brutal manner of commission of the crime has emerged as one of the main aggravating factors on the basis of which mitigating factors have been regularly dismissed – both by the Supreme Court and the trial courts. This again contravenes the *Bachan Singh* sentencing framework which did not prescribe any inherent hierarchy between aggravating and mitigating factors, except for the latter which were to be expansively and liberally constructed. It is worth remembering that the involvement of extreme brutality was just one of the many aggravating factors listed out by the Court in *Bachan Singh*. No particular aggravating factor was accorded a trumping value over a mitigating factor, and yet, that is precisely how the aggravating factor of brutality seems to have been consistently applied.

First, the influence of brutality as a key aggravating factor, on judicial attitudes within the Supreme Court, is revealed by the opinion study of the former Supreme Court judges:

> "[B]rutality of the crime emerged as a dominant theme in discussions on aggravation. For 21 judges, the nature of the crime, or the manner of its commission, were not just aggravating factors, but bordered on being determinative of the question whether the accused deserved to be sentenced to death. Additionally, for an

[54] National Law University, Delhi (n 36) 67.
[55] Project 39A (n 3) 75.

> almost equal number, the brutality of the crime weighed very heavily in the balancing between aggravating and mitigating factors. One judge who decided nearly 130 murder cases as an appellate court judge said, 'The heinous nature of the crime certainly colours our judgement".[56]

Not only does this reveal a judicial psyche that views brutality as a key basis behind choosing the death sentence, but it also reveals an attitude of suspicion towards mitigating factors in general. For instance, six of these former Supreme Court judges were reported to doubt the very concept of mitigation in cases involving extreme brutality, and for such cases, felt that the concept of mitigation itself was "irrelevant".[57] These judges often came to view mitigating circumstances as an "excuse" for the crime,[58] forgetting that "[m]itigation is not meant to have any effect on the guilt, but is instead meant to act as a tool to individualise punishment".[59]

Second, not only has this been a view influencing judicial attitudes of India's top court, but it has also 'trickled down' to sentencing courts applying the death sentence in the first instance. The data from trial courts suggests that brutality was the "[m]ost commonly argued and considered aggravating factor", having been raised in one-hundred and thirteen of the two-hundred and fifteen cases in which death sentence was awarded in the states of Delhi, Madhya Pradesh, and Maharashtra between 2000-2015 (i.e., in roughly 53% of the cases).[60] The data from the states of Maharashtra and Madhya Pradesh, in particular, suggests that the basis of awarding the death penalty has often been a trumping enquiry into the brutality of the crime, on which basis alone courts have been categorising a case as "rarest of rare".[61]

This trend of dismissing mitigating factors simply in face of one aggravating factor of brutal manner of commission of the crime, squarely falls outside the *Bachan Singh* sentencing framework. It incorrectly attaches a trumping value to one aggravating factor over all other mitigating factors, and also fails to construct each mitigating factor 'expansively and liberally', as explicitly directed by *Bachan Singh*. These decisions do not even venture into the final leg of enquiry into the alternative options being "unquestionable foreclosed". It appears that the entirety

[56] National Law University, Delhi (n 36) 67.
[57] ibid 71.
[58] ibid.
[59] ibid.
[60] Project 39A (n 3) 31.
[61] ibid 27.

of the *Bachan Singh* sentencing framework has been reduced to a single-point enquiry into the brutal manner of commission of the crime.

It must be clarified here that the argument is not that brutality cannot be a reasonable indicator in death sentencing or that it is inherently problematic, but rather that it should not be the sole indicator, that leads to a complete non-consideration of mitigation and a breakdown of the principle of individualised sentencing. The discussion above, however, reveals that sentencing judges deploy brutality to dismiss all mitigating factors, *en masse*, in a large number of cases as their default approach. This trumping value attached to brutality turns death sentencing into a single-point enquiry into the brutal manner of commission of the crime. Therefore, not only does it fail the test of the law as laid down by *Bachan Singh*, but also compromises the principle of individualised sentencing by failing to accord due weightage to mitigating factors.

Machhi Singh's sway over the death penalty jurisprudence is particularly puzzling as it seems to have substantially altered the *Bachan Singh* framework despite being a bench of a smaller strength of three judges, and being legally bound to operate within the confines of *Bachan Singh* – a Constitution Bench of five judges. *Machhi Singh*, in fact, seems to have acted in contravention of the well-settled principle that a decision delivered by a bench of a larger strength is binding on any subsequent bench of a lesser or co-equal strength.[62]

C. Inadequate consideration of mitigating factors

Due consideration of mitigating factors is integral to the sentencing framework evolved in *Bachan Singh*. Hence, it is the mitigating factors, and not the aggravating ones, that need to be constructed 'expansively and liberally'. Evidence from how trial courts impose the death sentence, however, presents a completely different picture.

The trial courts in India's three states with the highest statistics of imposing the death sentence, show a poor record of appreciating mitigating factors during sentencing hearings, relying mainly upon aggravating factors to impose the death sentence. The state that fares the worst in this regard is Madhya Pradesh where no mitigating factors were considered at all in fifty-one of the eighty-two judgements imposing the death penalty (i.e., in about a staggering 62% of cases) between 2000-2015. This is followed by Maharashtra, where forty-one out of the ninety cases showed that there was no appreciation of mitigating factors (i.e., in about 46% of the cases). Finally in Delhi, eighteen out of the forty-three cases failed to

[62] *Central Board of Dawoodi Bohra v State Of Maharashtra & Anr* (2005) 2 SCC 673; *Official Liquidator v Dayananad & Ors* (2008) 10 SCC 1; *Subhash Chandra & Anr v Delhi Subordinate Services Selection Board* (2009) 15 SCC 458.

consider any mitigating factors (i.e., about 42% of the cases).[63] This signals a near breakdown of the *Bachan Singh* sentencing framework.

What may, however, be said about the cases in which mitigating factors were actually considered? The trial courts' study does not necessarily paint an encouraging picture for such cases, either. The study finds that often where mitigating factors were pleaded to seek leniency in sentencing, this exercise was carried by defence counsels in an extremely perfunctory manner by a mere listing of the facts pertaining to the accused, without meaningfully contextualising these facts in the accused's psychological or social circumstances, or detailing how those mitigating factors actually shaped the personality of the accused or impacted their life-choices, to deserve a more lenient sentence.[64] This lack of contextualisation and mere listing of mitigating factors made it rather easy for trial courts to not duly consider them.[65] This practice was observed in forty-nine out of the ninety cases in Maharashtra (i.e., in about 54% of the cases); in twenty-five out of the forty-three cases in Delhi (i.e., in about 58% of the cases); and in thirty-one out of the eighty-two cases in Madhya Pradesh (i.e., in about 38% of the cases).[66]

For instance, in the cases where existence of dependents was argued as a mitigating factor, no arguments were advanced on either the nature of the relationship of such dependents to the accused or how they were dependent upon the accused for their survival.[67] This inadequate manner of presentation of mitigating factors severely prejudices the accused in the sentencing hearings. The perfunctory nature of such arguments does not "[c]arry weight as they do not enable the trial court to assess how the accused is placed within their family and how a death sentence would prejudice them through collateral or consequential damage"[68], and therefore, the particular mitigating factors fail to be accorded the weight they deserve.

The situation is even worse for cases involving multiple accused persons standing trial together in the same proceedings, as evidence suggests that individualized mitigating factors unique to each accused are hardly brought forth in these cases. Again, in the three states of Delhi, Madhya Pradesh, and Maharashtra, of the fifty-two cases in which multiple accused persons stood trial in the same proceedings, individual mitigating circumstances pertaining to each accused were argued in only nine cases, i.e., in only about 17% of the cases.[69] Further, where mitigating circumstances were presented for multiple accused persons, they were

63 Project 39A (n 3) 27, 70.
64 ibid 27.
65 ibid 26.
66 ibid 70.
67 ibid 26.
68 ibid.
69 ibid.

again done in a perfunctory manner without a meaningful contextualisation, just as in cases involving single accused persons.[70]

In figures that reveal the completely broken nature of mitigation hearings in Indian trial courts, where individualised mitigating factors were indeed considered for multiple accused persons standing trial together, this was done only in about 6% cases in Madhya Pradesh, 17% cases in Maharashtra, and 33% cases in Delhi.[71]

These figures conclusively prove that death sentencing in trial courts does not nearly accord the same value to mitigating circumstances that was intended by the framework evolved in *Bachan Singh* – which seems to be followed more in breach than in observance. However, these figures beg the question of why are mitigating factors not adequately presented before the courts in the first place? The answer seems to lie in the rampant practice of same-day sentencing. Section 235(2) of the 1973 Code bifurcates a criminal trial into two stages of conviction and sentencing, with separate oral arguments to be advanced for each stage.[72] The object of having an independent stage of sentencing hearing is to "[e]nable the court to have information relevant to arriving at a decision on the choice of the appropriate sentence"[73], as affirmed by the Supreme Court on multiple occasions, as well.[74] This information includes important mitigating factors that comprehensively bring into consideration the circumstances about characteristics and background of the offender.[75] The primary objective of independent sentence hearings is, therefore, to facilitate a comprehensive presentation of mitigating circumstances.

The quality of mitigation arguments, however, would be drastically reduced in cases of 'same-day sentencing' or passing of sentences on the same day when the conviction proceedings are concluded, as this leaves inadequate time for arguing on mitigating factors, let alone finding enough data to properly contextualise them in the personal circumstances of the accused. It has been found that in no less than 44% of the cases in Delhi, Madhya Pradesh, and Maharashtra, sentencing hearings took place on the same day as the pronouncement of guilt.[76] The practice of same-day sentencing was particularly rampant in Madhya Pradesh, where it was observed in 76.9% of the cases; and in Maharashtra, sentencing on the same

[70] ibid.

[71] ibid 75.

[72] CrPC 1973, s 235 (2).

[73] S Muralidhar, 'Hang Them Now, Hang Them Not: India's Travails With The Death Penalty' (1998) 40 Journal of the Indian Law Institute 143, 155.

[74] *Santa Singh vs State Of Punjab* (1976) 4 SCC 190; *Muniappan vs State Of Tamil Nadu on 18 March, 1981* (1981) 3 SCC 11; *Allauddin Mian & Ors v State Of Bihar* (1989) 3 SCC 5; *Malkiat Singh And Ors v State Of Punjab* (1991) 3 SCC 11.

[75] Muralidhar (n 73) 155.

[76] Project 39A (n 3) 26, 67.

day or with just a twenty-four-hour gap was observed in 57% of the cases.[77] In fact, the data from the trial courts establishes a direct correlation between same-day sentencing and non-consideration of mitigating circumstances, given that

> "[n]o mitigating circumstances were considered in 41 out of the 60 same-day sentencing cases in Madhya Pradesh and in 16 of the 31 same-day sentencing cases in Maharashtra. The two same-day sentencing cases in Delhi did not consider any mitigating circumstances either".[78]

The principle that becomes a casualty in same-day sentencings is that adequate time is vital to present the mitigating circumstances of an accused in a comprehensive manner. These concerns extend beyond the cases of same-day sentencing and into those where there is meaningfully very little gap between hearings on conviction and sentencing. Therefore, it has been found that even in cases where the gap between conviction and sentencing hearing was more than a day's, such time duration

> "[w]as not sufficient for an in-depth mitigation exercise. The median of duration between conviction and sentencing hearing across the three states was one day. It was 0, 2 and 7 days respectively for the state of Madhya Pradesh, Maharashtra, and Delhi".[79]

Given the central importance that the *Bachan Singh* framework attaches to mitigating factors, the practices of same-day sentencing, and insufficient time for arguments on mitigation have been criticised as the "most antithetical" to the *Bachan Singh* framework, for they prevent the mitigating factors relevant to the convict from being adequately presented before the sentencing court.[80] This has the effect of leaving out a key component of the *Bachan Singh* framework from even being considered during sentencing.

D. Summary dismissal of mitigating factors

As problematic as the inadequate consideration of mitigating circumstances is, there has been discerned an even more worrying trend of summary and whimsical dismissal of mitigating factors – an approach surprisingly legitimated by the Supreme Court itself. For instance, in the case of *Sevaka Perumal*, the Supreme

77 ibid 67.
78 ibid 69.
79 ibid.
80 ibid.

Court dismissed the mitigating factors of young age, and the convict being the 'sole bread winner' in the family, on the basis that such "[c]ompassionate grounds would always be present in most cases and are nor relevant for interference".[81] Similarly, in *Shimbhu*, the Court held that the punishment should always be proportionate to the gravity of the offence, and factors like religion, race, caste, socio-economic status of the accused "[c]annot be construed as special factors for reducing the sentence".[82] In an inexplicable development, the Court in *Krishnappa* made a sweeping declaration that "[s]ocio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy".[83] This blanket dismissal of mitigating factors is a complete reversal of the *Bachan Singh* framework which not only required due weightage to be given to mitigating factors but also required them to be construed expansively and liberally.

Further, such summary dismissal of mitigating factors by the Supreme Court set a dangerous trend which came to be perpetuated by trial courts in the name of applying precedents.[84] The approach seems to have been: if there is a precedent in which an aggravating factor A has been held to outweigh a mitigating factor M, then it gets to be relied upon by future cases to hold that A outweighs M in the latter cases too. This is done regardless of the factual complexities unique to both the cases. For instance, the abovementioned decisions of the Supreme Court in *Krishnappa*[85] and *Sevaka Perumal*[86] were frequently cited by trial courts to dismiss mitigating factors considered as irrelevant in these two decisions: *Krishnappa* was cited in five cases by the trial courts of Madhya Pradesh to dismiss the socio-economic conditions of the accused as a mitigating factor;[87] and likewise, *Sevaka Perumal* was relied upon by several trial courts of Maharashtra to dismiss young age as a mitigating factor.[88]

This manner of reliance upon precedents has usually been outcome-based in as much as it replicates the treatment of mitigating factors, without critically appreciating the facts and circumstances unique to each individual case. It goes against "[t]he grain of individualised sentencing […] given the importance of factual specificity when it comes to both the accused and the crime".[89] Moreover, it allows sentencing judges to abdicate their duty of individually weighing the

81 *Sevaka Perumal v State of Tamil Nadu* (1991) 3 SCC 471 [12].
82 *Shimbhu & Anr v State of Haryana* (2014) 13 SCC 318 [19].
83 *The State of Karnataka v Krishnappa* (2000) 4 SCC 75 [18].
84 Project 39A (n 3) 39-40, 41-43.
85 *The State of Karnataka v Krishnappa* (n 83).
86 *Sevaka Perumal v State of Tamil Nadu* (n 81).
87 Project 39A (n 3) 28.
88 ibid.
89 ibid.

aggravating and mitigating factors unique to a case, by substituting a facts-specific determination with an outcome-based reliance on precedents.

This is obviously against the prescription of the sentencing framework in *Bachan Singh* which embodies the principle of individualised sentencing through the careful weighing of aggravating and mitigating factors specific to a case, and at the cost of repetition, with the latter even being construed liberally and expansively.

E. Life imprisonment not 'unquestionably foreclosed'

It may be recalled here that the final leg of enquiry under the *Bachan Singh* sentencing framework is to satisfy that any alternative sentences in the circumstances stand 'unquestionably foreclosed'. It has also been seen how the scope of the phrase 'alternative options' (and consequently the sentencing choices available) was expanded by the Supreme Court in *Sriharan*, by holding that High Courts and the Supreme Court may impose a special category of sentence of either life imprisonment without remission, or imprisonment exceeding fourteen years but short of life, without remission.[90] While this should have had the effect of a detailed consideration by sentencing courts on the applicability of such alternative sentences, data from the trial courts reveal that such alternative options were seldom considered.[91]

It has been found that of the forty-three capital cases decided by trial courts in Delhi between 2000-2015, life imprisonment as an alternative option was 'considered' (and not necessarily chosen) in just eight cases (i.e., in only about 19% of the cases). This was also found to be the case in twenty-two out of the eighty-two cases in Madhya Pradesh (i.e., in about 27% of the cases), and in twenty-seven out of the ninety cases in Maharashtra (i.e., in 30% of the cases).[92]

What is more worrying is that in all or 100% of the cases in which life imprisonment was considered or discussed, it was dismissed on the basis of brutality of the crime alone.[93] This seems to be consistent with the trend of attaching a trumping value to the single aggravating factor of brutality, as seen previously where brutality alone was deemed sufficient by sentencing courts to dismiss a host of mitigating factors. What the above data, however, reveals is that

[90] *Sriharan* (n 29) [176]-[178].
[91] Project 39A (n 3) 35.
[92] ibid.
[93] ibid.

brutality is also used to dismiss the alternative options that *Bachan Singh* required to be 'unquestionably foreclosed' in its final enquiry.

F. Non-consideration of the probability of reformation

The *Bachan Singh* sentencing framework categorically lists the "[p]robability that the accused can be reformed and rehabilitated" as a mitigating factor to be considered during death sentencing.[94] The framework's dictum on construing mitigating factors 'expansively and liberally' applies to the probability of reformation, as well. The framework is also clear on the matter of burden of proof to establish the probability of reformation, and requires the state to prove by adducing evidence that this criterion is not met for the accused.[95]

The data from trial courts paints a rather bleak picture of the application of the above standard, revealing that the mitigating factor of probability of reformation is "[h]ardly ever considered".[96] In a finding consistent with the previous trend of attaching a trumping value to brutality, the study finds that even where the probability of reformation is considered, "[i]t is incorrectly tied to the brutality of the crime".[97]

In each and every one (i.e., in 100%) of the cases forming part of the study of trial courts in Delhi, Madhya Pradesh, and Maharashtra, the prosecution failed to discharge its burden of adducing evidence to prove that the accused is beyond the probability of reformation. Further, the trial courts too failed to take any initiative to consider the probability of reformation as a crucial mitigating factor. The figures are staggeringly high – probability of reformation was not considered in about 83% of the cases in Madhya Pradesh, 77% of the cases in Delhi, and 58% of the cases in Maharashtra.[98]

Unsurprisingly, in the cases in which probability of reformation was considered, it was mostly dismissed on the basis of the crime having been committed in too brutal a manner – another instance where brutality seemed to have gained a trumping value in death sentencing.[99]

This trend, however, does not seem to be restricted to trial courts alone, and is rather reflective of judicial psyche towards death sentencing as large. This is reflected from the opinion study of the former Supreme Court judges wherein

"10 former judges including two former Chief Justices of India, were of the view that the probability of reformation was to be deduced from the brutality,

94 *Bachan Singh* (n 1) [206(4)].
95 ibid.
96 Project 39A (n 3) 72.
97 ibid.
98 ibid 73.
99 ibid.

and heinousness of the crime […] 14 other former judges believed either that reformation generally had no role to play in penological theory, or it had no application to death penalty cases. One judge who decided nine death penalty cases in six years at the Supreme Court dismissed the entire notion, calling it 'astrology'. Another judge who presided over 13 death penalty cases in five years at the Supreme Court, did not see the point of reformation in serious crimes […]".[100]

This approach of dismissing the mitigating factor of probability of reformation (when it gets to be considered) on the basis of the aggravating factor of brutality alone, is unfortunately in line with the consistent trend of brutality enjoying a trumping value, as also discussed in the previous parts of this article. Nevertheless, that is not the mandate of the *Bachan Singh* sentencing framework, which requires the determination of the probability of reformation to be "[i]ndependent of the circumstances of the crime",[101] and done on the basis of personal circumstances unique to the accused. To that extent, the framework seems to have hardly been complied with.

A possible way forward for a sentencing reform, where due consideration is accorded to the mitigating factor of probability of reformation, and in fact to a mitigation investigation generally, is suggested by the Delhi High Court's decision in *Bharat Singh*.[102] The High Court's approach in *Bharat Singh* stands as a rare exception to the kind of cases discussed thus far in their treatment of mitigating factors, including probability of reformation. The court's approach may be briefly discussed here. *Bharat Singh* was a case concerning the rape and murder of a three-year-old girl where the trial court awarded the sentences of rigorous imprisonment for life with a fine of Rs. fifty-thousand (and in default of payment of fine, to undergo further imprisonment for one year) for the offence of rape of a minor; and sentenced the convict to death for the offence of murder, along with a payment of another fine of Rs. fifty-thousand.

Given that as per Section 366 of the 1973 Code, a death sentence passed by the trial court has to be confirmed by the High Court, the matter of *Bharat Singh*'s sentence came up for confirmation before the Delhi High Court. The court went on to appoint a Probation Officer to examine whether the accused is likely to commit such crimes in the future, and also enquire into the probability of whether the accused can be reformed and rehabilitated – these were the two specific mandates framed by the Court for the Probation Officer.[103] Moreover, the Court provided

[100] National Law University, Delhi (n 36) 74.

[101] Project 39A (n 3) 73.

[102] *State v Bharat Singh, Death Sentence Ref No 1 of 2013 And Criminal Appeal No 509 of 2013* (High Court of Delhi), Orders dated 17 April 2014 and 31 October 2014.

[103] ibid, Order dated 17 April 2014 [68]; *Anil @ Anthony Arikswamy Joseph v State of Maharashtra* (2014) 2 SCALE 554; *Birju v State Of Madhya Pradesh* (2014) 2 SCALE 293.

specific guidance to the Probation Officer for preparing and presenting a detailed report on the above two aspects, *viz*., the 'Social Investigation Report'.[104] It directed the Probation Officer to obtain a report from the jail administration about the accused's conduct in jail; seek inputs on the behavioural traits of the accused from his family and local residents in his native village; and consult two professionals with at least ten years' experience in clinical psychology, and sociology.[105]

The Court also directed the Probation Officer to take note of the United Nations Office on Drugs and Crimes' handbook on 'Prevention of Recidivism and Social Reintegration of Offenders' brought out in December 2012; and the HM Prison Service's document entitled 'Offender's Assessment and Sentence Management, 2005', published by the UK Government.[106] Additionally, the Court passed certain procedural directions to maintain the report's confidentiality, subject to the right of the defense counsel to seek instructions upon the report before making submissions.[107]

The Social Investigation Report as submitted by the Probation Officer – which relied upon interviews with the convict himself; the local residents in the convict's native town; fellow prison inmates; jail authorities; reports from the local police station; opinion of a seven-member medical board of clinical psychologists and psychiatric social workers – revealed multi-faceted aspects about the accused's personality and personal socio-economic circumstances, apart from medical evidence relating to "[m]aladaptive personality traits or disorder especially anti-social personality". The Court relied upon the Report to note the "[d]efinitive unanimous conclusion that there is nothing to suggest that the Appellant cannot be reformed and reintegrated, and put on to the reformative process through social correctional measures".[108] Significantly, even the jail authorities had submitted a positive feedback as regards "[t]he convict's conduct in jail and his preparedness to render services to his old and ailing inmates".[109] Accordingly, the Court declined to confirm the death sentence, instead sentencing the convict to life imprisonment for the offence of murder.

The manner in which the Delhi High Court ensured that a multifaceted mitigation investigation is carried out to determine the probability of reformation is a possible solution to the existing practice of the summary dismissal of this

[104] ibid, Order dated 17 April 2014.
[105] ibid [69].
[106] ibid [70].
[107] ibid [71].
[108] ibid, Order dated 31 October 2014 [8].
[109] ibid.

crucial mitigating factor. This would shape some of the discussion in the next part of the article on the 'best-case scenario'.

G. Outcomes of the deviations from the *Bachan Singh* framework

The end-result of the preceding deviations is a distortion of the *Bachan Singh* framework beyond recognition, that has removed any principled basis for death sentencing and made it an extremely subjective and judge-centric exercise. This has led to death sentencing being beset by extremely varying and inconsistent applications. The Law Commission of India has noted that in a large number of cases where the Supreme Court imposes the death sentence, there is often no unanimity among the judges themselves either on the guilt of the accused, or on whether the *Bachan Singh* framework applies, or both.[110] Therefore, it does not come across as overstating the case when the trial courts' study, on the basis of the data discussed in this section, concludes that there has been a "[c]omplete breakdown of the sentencing framework developed in *Bachan Singh*",[111] and that "[t]he lack of compliance with the requirements laid down in *Bachan Singh* shows that death penalty sentencing is no longer carried out on any principled basis".[112]

More astonishingly, *Bachan Singh*'s application has varied even in factually similar cases when heard by different judges. This problem is best illustrated by Dr. S. Muralidhar's analysis of the Supreme Court's decision in *Harbans*.[113] He highlights how the appeals of three convicts arising from the same crime were treated differently as each appeal got to be heard by three different benches each of the Supreme Court. One accused had his appeal dismissed and was subsequently executed; the second accused's death sentence was commuted; while both the appeal and the mercy petition of the third accused were dismissed, but ultimately his sentence was commuted by the Court.[114] He also analyses many instances of disparate outcomes on similar facts,[115] and powerfully remarks that "[t]he gnawing uneasiness that the same case if heard by a different set of judges may have resulted in a different punishment will always rankle in the minds of those unsuccessful death row convicts facing the noose".[116]

This inconsistency has, in particular, put the socially and economically disadvantaged sections of the Indian society at a greater risk, who cannot afford

[110] Law Commission of India (n 3) paras 5.4.19-5.4.20.
[111] Project 39A (n 3) 74.
[112] ibid.
[113] *Harbans Singh v State of Uttar Pradesh & Others* (1982) 2 SCC 101.
[114] Muralidhar (n 73) 150.
[115] ibid 150-154; Project 39A (n 3) 44.
[116] Muralidhar (n 73) 154.

quality legal representation. The Death Penalty India Report (published in 2016),[117] notes that of the approximately three hundred and sixty-seven prisoners in India who were sentenced to death between July 2013 and January 2015, a staggering 76% belonged to a population identifying with both economically backward classes and religious minorities.[118]

Similarly, the Law Commission of India has noted that in the application of the death penalty, assumptions relating to caste and class have often been made, rendering the death sentence to operate in the larger context of persistent social prejudice.[119] This view was also echoed in Bhagwati J's dissent in *Bachan Singh* when he held that death sentence has a class bias, which led him to declare it as unconstitutional for its disproportionate impact upon the socially and economically disadvantaged sections of the society.[120]

Another major outcome of the deviations is that, with the watering down of the *Bachan Singh* threshold, death sentences have come to be awarded at a disproportionately high rate by trial courts. This becomes manifestly evident when we note that an overwhelming majority of cases in which trial courts award the death sentence, end up in either acquittals or commutations at the appellate level. For instance, between 2000-2015 where trial courts had imposed the death sentence, in 62.8% of such cases the appellate courts commuted the sentence; in roughly a third of such cases, acquittals were granted at the appellate stage; and it was only in 4.3% of such cases that the death sentence was actually upheld at the appellate stage.[121] This problem of awarding of death sentences at a disproportionately high rate by trial courts is manifest evidence of the breakdown of the *Bachan Singh* framework that sought to limit the use of the death penalty to only extreme cases.

Therefore, the deviations from the *Bachan Singh* framework have clearly led to the death penalty being administered in an extremely inconsistent manner, often resulting in the socially and economically disadvantaged sections being at its receiving end. This speaks of a crisis in the administration of the sentencing framework evolved in *Bachan Singh*.

V. The Best-Case Scenario

The discussion on the death penalty, thus far, has focused on the gaps and deviations in its application, when measured against the sentencing framework laid down in *Bachan Singh*. This has been brought forth by multiple sources of empirical evidence relied upon in Section IV. Therefore, in this Section, I venture

[117] Centre on the Death Penalty (n 38).
[118] ibid.
[119] Law Commission of India (n 3), para 5.3.9.
[120] Bachan Singh Dissenting Opinion (n 3) [81] (Bhagwati J).
[121] Law Commission of India (n 3), para 5.2.70.

to hypothesize possible responses to these deviations which may be forthcoming from a retentionist perspective. Given the credible nature of empirical evidence discussed in the preceding part, I envisage a retentionist who is at the very least open to acknowledge, when presented with such evidence, that the application of the death sentence has significantly varied from what was intended in *Bachan Singh*. This acceptive attitude towards the inconsistencies in the actual practice of death sentencing, defines who I call for the purposes of the present discussion, a 'rational retentionist'. Therefore, while a rational retentionist concedes the inconsistencies in applying the existing framework, they might very well argue that such inconsistencies, at best, only reflect a wrongful application of a framework otherwise meant to work well, and this doesn't necessarily translate into an argument for abolition, *per se*. If anything, such inconsistencies and deviations call for further strengthening of the sentencing framework by removing the gaps in its application – for how can one ask for abolishing a system that has not worked at its full potential yet? It is an argument worth engaging with.

Accordingly, an engagement with the rational retentionist would presuppose the existence of a system best suited to implement the sentencing framework to its fullest potential; in other words, a best-case scenario that is capable of applying the death penalty consistently and in line with *Bachan Singh*, while preventing the deviations previously observed. It is only after the failure of such an undertaking, that a value judgement on abolition could enter the analysis, i.e., an abolitionist shall need to demonstrate that the death penalty does not work even in the best possible scenario imagined to apply it. This part of the article, therefore, endeavours to make a genuine attempt at devising a 'best-case scenario' of administering the death sentence in as consistent a manner as possible, under a system that is best suited to remove and avoid the recurrence of the deviations discussed in the preceding parts.

The shape and form of the best-case scenario, in turn, would be a response to the probable cause behind the deviations from the sentencing framework. It is my submission that such cause lies in lack of codification of the sentencing framework in a single place of reference. The origins of the framework, of course, do not lie in any legislation, but in a five-judge bench judgement of the Indian Supreme Court – an unlikely place for sentencing guidelines. Therefore, even though *Bachan Singh* laid down the sentencing framework for administering the death sentence, each step of the framework and its position upon the finer aspects of sentencing can only be culled-out after a careful reading of the two-hundred and eleven paragraphs of the majority opinion. Moreover, the framework is only complete if the *Bachan Singh* judgement is read in conjunction with other judgements such as *Swamy Shraddananda* and *Sriharan* which added strength to it

by expanding the scope of the alternative sentencing options required by *Bachan Singh* to be 'unquestionably foreclosed'. This leaves us with a scenario where there is not one single point of reference where the exact steps to be followed as part of the death sentencing framework are codified in a logical arrangement. This is compounded by the problem of contrary subsequent Supreme Court decisions which have inaccurately applied the *Bachan Singh* framework, such as in *Machhi Singh*. The net result of this judicial confusion is lack of clear guidelines and a very wide room of flexibility available to sentencing courts in interpreting and defining for themselves, what the *Bachan Singh* framework requires of them.

Accordingly, the first step in constructing our best-case scenario is to address this lack of clarity and provide a single-point of reference for what the sentencing framework requires, in clear terms. For this endeavour, the sentencing framework must first be moved out of the multitudes of judicial opinions, and into one single codified law – the usual source for sentencing guidelines. This might be achieved through the codification of the *Bachan Singh* framework through its statutory incorporation in the 1973 Code itself. For this purpose, we may envisage a hypothetical amendment to the 1973 Code where after Section 354(3), a new Section 354(*3A*) is added.

Now, this new sub-section (*3A*) added to Section 354 could be dedicated solely to incorporating the *Bachan Singh* sentencing framework, explicitly listing out the steps of the framework as illustrated in the flowchart on page 9, Section III, along with the illustrative list of aggravating and mitigating factors provided in *Bachan Singh* and reproduced on pages 5-6. Section III. This would ensure that all the steps of the *Bachan Singh* sentencing framework (including the additions made later by the Court in *Sriharan* and *Swamy Shraddananda*) are to be found in a logical arrangement in one single place, on the back of statutory authority, so as to not leave room for any confusion for sentencing courts about what the framework requires of them, and minimize unguided discretion.

For the best-case scenario to work, however, it would need to go beyond a mere statutory incorporation of what the Court held in *Bachan Singh*, rather, it must also incorporate safeguards necessary to prevent the specific deviations discussed in Section IV. These may be best be achieved through the common practice, under the Indian statutory scheme, of appending 'explanations' to legislative provisions (or in our hypothetical, the proposed new Section 354(*3A*)). These 'explanations' are incorporated as a part of the legislative provision itself and thus are very much a part of the written text of the statute. They are frequently relied upon by courts as a key internal aid for statutory interpretation. The Supreme Court has held that 'explanations' appended to statutory provisions serve as a tool to explain the meaning and effect of the main legislative provision by clarifying

doubts and removing confusions.[122] It is settled law that 'explanations' are a common way of explaining legislative intent; removing obscurity or vagueness in the main provision; and providing additional support to the dominant object of the legislative provision, to make it meaningful and purposeful.[123] Therefore, they are a useful guide for courts while applying a statutory provision or in interpreting it; and can similarly provide the necessary clarity in applying the statutorily incorporated *Bachan Singh* framework, by preventing the specific deviations previously discussed.

Accordingly, explanations can be attached to the hypothetical Section 354(*3A*) that clarifies the effect of the *Bachan Singh* framework and incorporates a statutory prohibition for each of the deviations – such as the use of collective conscience, public opinion, and crime categories; the dominance of brutality; summary dismissal and inadequate consideration of mitigating factors; inadequate time between conviction and sentencing hearings; *etc.* Each such explanation would declare how the sentencing framework is not meant to work (in addition to the main sub-section (*3A*) itself that will declare how it is meant to work), thereby addressing the deviations that the four decades of death sentencing in India, since *Bachan Singh*, have revealed to exist. This is meant to be our best-case scenario for the reason that it is a single statutorily-codified point of reference that provides clear directions to sentencing courts, as opposed to the need of referring to multiple, detailed, and often contrary judicial opinions, to 'interpret' what the sentencing framework actually requires.

Further, as far as the probability of reformation is concerned, it has been discussed in Section IV.F that the Delhi High Court's approach in *Bharat Singh* can act as a model in the best-case scenario, capable of guiding a comprehensive mitigation investigation. Therefore, the court's directions to the Probation Officer in that case may very well also be attached to Section 354(*3A*) as a proviso.

Keeping the above principles in mind, our new Section 354(*3A*) of the 1973 Code may read as follows (for the sake of continuity, Section 354(3) is also reproduced below):

> (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.
>
> *(3A)* For the purposes of sub-section (3), where a court chooses

[122] *Dattatraya Govind Mahajan & Ors v State of Maharashtra & Anr* (1977) 2 SCC 548.
[123] *S Sundaram Pillai v V.R. Pattabiraman* (1985) 1 SCC 591.

to impose the death sentence for special reasons, it shall:

1) identify the aggravating factors, including but not limited to:

   (a) whether the murder has been committed after previous planning and involves extreme brutality;

   (b) whether the murder involves exceptional depravity;

   (c) whether the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed –

      (i) while such member or public servant was on duty; or

      (ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant, as the case may be, or had ceased to be such member or public servant; and

   (d) whether the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code

2) identify the mitigating factors including but not limited to:

   (a) the offence was committed under the influence of extreme mental or emotional disturbance;

   (b) the age of the accused. If the accused is young or old, he shall not be sentenced to death;

   (c) the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society;

(d) the probability that the accused can be reformed or rehabilitated;

The State shall by evidence provide that the accused does not satisfy conditions (c) and (d) above.

(e) that in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence;

(f) that the accused acted under duress or domination of another person; and

(g) that the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

3) weigh the aggravating and mitigating factors against each other, but construct only the mitigating factors expansively and liberally.

4) commute the death sentence if the mitigating factors so constructed outweigh the aggravating factors.

5) if the aggravating factors outweigh the mitigating factors, satisfy that all the alternative sentencing options are unquestionably foreclosed. These alternative sentences include but are not limited to

5.1) life sentence for the entire natural life of the convict, without statutory remission, notwithstanding anything contained in Section 433A; and

5.2) imprisonment exceeding fourteen years but short of life, without statutory remission, notwithstanding anything contained in Section 433A.

6) choose the death sentence only if the alternative options

are unquestionably foreclosed.

Provided that an enquiry into the probability of reformation shall not be deemed to have been carried unless the sentencing court has appointed a Probation Officer to submit a Social Investigation Report, and

a) the Probation Officer has enquired from the jail administration and sought a report about the conduct of the accused while in jail. The jail authorities will extend their full cooperation to the Probation Officer in this regard;

b) the Probation Officer has met the family of the accused and the local people including from the place where the accused hails. The Probation Officer will seek their inputs on the behavioural traits of the accused with particular reference to the probability of the accused committing acts of violence as constituting a continuing threat to society; and the probability that the accused can be reformed and rehabilitated.

c) the Probation Officer has consulted and sought specific inputs from two professionals with not less than ten years' experience from the fields of Clinical Psychology, and Sociology.

d) the Probation Officer has taken note of the United Nations Office on Drugs and Crimes' handbook on 'Prevention of Recidivism and Social Reintegration of Offenders' (December 2012); and the HM Prison Service's 'Offender's Assessment and Sentence Management, 2005'.

e) the State, through the Secretary, Home Department, has made appropriate arrangements and reimbursed the expenses incurred for the Probation Officer to discharge their functions.

f) the report of the Probation Officer has been submitted within a period of ten weeks to the court in a sealed cover. As soon as the sealed cover is received, it will be opened by the court and four copies made thereof, two for the court which will be kept along with the original in the cover and resealed and two given to each of the learned counsel for the parties, both of whom shall maintain confidentiality of the said document. Nothing here shall prejudice the right of the learned counsel for the accused to seek his instructions on the report before making submissions on the

next date of hearing.

Explanation 1: For the removal of doubts, it is hereby declared that 'collective conscience' or public opinion in any form is not a relevant aggravating factor in death sentencing.

Explanation 2: For the removal of doubts, it is hereby declared that standardized and pre-determined categories of the crime are not relevant to the sentencing process.

Explanation 3: For the purposes of this sub-section, brutality or manner of commission of the crime shall not be deemed to always take precedence over mitigating factors; and shall always be weighed in the individual circumstances of a case.

Explanation 4: For the purposes of this sub-section, brutality or the manner of the commission of the crime shall be irrelevant to the enquiry into the probability of reformation.

Explanation 5: For the purposes of this sub-section, no sentence hearing shall take place unless a time of at least thirty days has lapsed since the pronouncement of the verdict on guilt.

Explanation 6: For the purposes of this sub-section, the court shall assign detailed reasons in writing to justify the apportionment of weight to each aggravating and mitigating factor; and a mere listing or mentioning of such factors shall not suffice.

Explanation 7: For the removal of doubts, it is hereby clarified that a sentencing court shall weigh aggravating and mitigating factors in the unique circumstances of each case, and not replicate the treatment of such factors simply on the basis of precedents.

VI. Inevitable Inconsistency

We have thus far discussed the deviations from the *Bachan Singh* framework and made an attempt at a best-case scenario that most closely approximates to applying the death penalty in as consistent a manner as possible, and as envisaged by *Bachan Singh*. This now equips us to engage with a rational retentionist on whether the death penalty can be consistently administered under the best possible

framework envisaged to apply it, so that the deviations from the sentencing framework are avoided.

This may be the right stage to clarify that inconsistency is not *per se* an undesirable value, and, indeed, may be welcomed in a discretion-based criminal justice system that aims to individualise justice. That each case is be treated on the merits of its own circumstances – involving a consideration of aggravating and mitigating factors unique to an accused; a personalized Social Investigation Report etc. – necessarily implies inconsistent or dissimilar outcomes. This is, in fact, reflective of the conundrum of retaining discretion in the administration of criminal law – on one hand, discretion is necessary to individualise justice and produce desirable inconsistencies, and on the other hand, it may lead to an element of unguided discretion producing unprincipled inconsistencies. The discretion conundrum is spelled out by Padfield and Gelsthorpe who have observed that

> "[t]he exercise of discretion can work in a *negative* way where it leads to unwarranted disparity and discrimination. At the same time, however, it might be suggested that discretion can be linked to justice. Decision-makers may discriminate in a *positive* way too. Thus there is an inherent tension".[124]

Therefore, while discretion has the potential to produce desirable inconsistencies, the aim of this article is to investigate the extent to which the best-case scenario leaves room for undesirable inconsistencies which would not be acceptable in any rule-based system. For instance, those inconsistencies which may make death sentencing dependent upon criteria which are irrelevant or extraneous to the law – such as personal predilections, predispositions, value-preferences or other subjective factors influencing a sentencing judge. It is this kind of inconsistency that would be considered unacceptable to the rule of law. They were found to be the reason influencing the kinds of deviations from the *Bachan Singh* framework which we explored in Section IV, and accordingly, the best-case scenario is meant to prevent this level of unacceptable inconsistencies.

The resultant argument, then, is that in the event the best-case scenario is unable to prevent such inconsistencies, we are only left to conclude the practical impossibility of applying the death sentence in a consistent manner. This is what is meant by the framework of the 'inevitable inconsistency' of the death penalty, which this article explores. The framework posits that there is something in the very nature of death sentencing that makes its application inconsistent at a large scale – which even the best-case scenario cannot salvage. This section, thus, is an

[124] Loraine Gelsthorpe and Nicola Padfield, *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond* (Taylor and Francis Group 2012) 5."

inquiry into the failures of even the best-case scenario, to the extent that it allows large-scale inconsistencies, leaving the gaps in theory and practice unamendable.

The logical import of the inevitable inconsistency framework should be a shift away from the conversation on the ways and means of infusing consistency into death sentencing, and towards arguing for its abolition on the ground that (an unacceptable level of) inconsistency involved in its application is inevitable – i.e., incapable of being salvaged through legislative or judicial safeguards internal to the criminal justice system. Therefore, the 'inevitable inconsistency' framework posits that unacceptable inconsistencies are an inevitable outcome of the retention of the death penalty in law, and on such basis alone, the death penalty is of suspect constitutionality; and its desirability should be re-evaluated.

I aim to establish the inevitable inconsistency framework in this part of the article by highlighting that the best-case scenario fails to prevent such inconsistencies in two major ways. These pertain to the exercise of weighing aggravating and mitigating circumstances – which lies at the heart of the best-case scenario; and the final leg enquiry into alternative options being unquestionably foreclosed.

A. The weighing of aggravating and mitigating factors

The first major source of inconsistency lies at the very heart of the sentencing framework, and remains seemingly unaddressed by the best-case scenario. This relates to the exercise of weighing aggravating and mitigating factors – requiring sentencing judges to apportion weight to each factor and, on a balance, make a judgement call about which set of factors 'outweigh' the other. There is, however, no objective criteria on the basis of which weights are to be apportioned to each factor in a particular case.

There is no particularly consistent or objective basis, for example, as to why the aggravating factor of brutality should outweigh the mitigating factor of young age in a particular case, unless a sentencing judge's value-preference dictates their belief that young age does not justify the brutal nature of the crime. These value judgements are bound to differ with each sentencing judge, and weights would be ultimately apportioned to each factor depending upon each judge's value-preferences, predispositions, or personal attitudes towards particular aggravating and mitigating factors. This makes the weighing exercise extremely subjective and judge-centric.

Moreover, the best-case scenario is incapable of guiding such choices without risking standardization of the sentencing process, through pre-determined weights attached to aggravating or mitigating factors. This would be antithetical to individualised sentencing which lies at the scenario's very heart. In fact, the clear prescription to the contrary is that aggravating and mitigating factors must be

weighed in the individual circumstances of each case, and pre-determined crime-categories are not relevant. This is indeed the mandate of Explanations 2[125] and 7[126] of the best-case scenario, respectively, and also what the Court in *Bachan Singh* explicitly held.[127]

The one guidance that both *Bachan Singh*, and the best-case scenario offer, is to construct mitigating factors 'expansively and liberally', but one can hardly term this as a real guidance for the weighing exercise – the requirement being sufficiently vague and nebulous. It, at best, signals to a sentencing judge that mitigating factors are more important than aggravating ones, but it does not necessarily offer any particular degree of consistency to how weights should be apportioned to each factor in individual cases.

While any sentencing framework can provide an illustrative list identifying aggravating and mitigating factors, it is nearly inconceivable for any such framework to anticipate the weight that would be apportioned to such factors in the unique facts and circumstances of every future case. Therefore, by leaving the weighing exercise to individual predispositions and sensibilities of each sentencing judge, the best-case scenario fails to prevent inconsistencies in death sentencing, rendering the death penalty to remain arbitrary in a crucial way.

B. The determination of 'unquestionably foreclosed'

The final leg of the enquiry under *Bachan Singh*, and the best-case scenario is to determine whether all the alternative sentencing options are 'unquestionably foreclosed'. An answer in the affirmative enables a sentencing court to choose the death sentence. This enquiry includes the expansive scope of the 'alternative options' available after the decisions in *Sriharan*[128] and *Swamy Shraddananda*[129], as discussed previously.

The expression 'unquestionably foreclosed' is identified here as the second major source of inconsistency, as it fails to provide guidance on when an alternative option can be considered to have been foreclosed, let alone 'unquestionably' so. These are not objective choices to make, as appeals to an alternative option being 'unquestionably foreclosed', are also appeals to individual value-judgements on whether the alternative sentences adequately respond to the perceived gravity of the crime. Inconsistencies are bound to arise when each sentencing judge is left to

[125] The bar on relying upon pre-set crime categories including on the basis of aggravating factors alone.

[126] The bar on replicating the treatment of aggravating and mitigating factors on the basis of precedents.

[127] *Bachan Singh* (n 1) [201].

[128] *Sriharan* (n 29).

[129] *Swamy Shraddananda* (n 28).

exercise personal value-judgements on whether the ends of justice in a case are served by choosing the alternative option instead of the death penalty.

Further, there is a similar lack of guidance on which alternative option is to be chosen. After the decisions in *Sriharan*[130] and *Swamy Shraddananda*,[131] two additional options of a life sentence without statutory remission, and a sentence exceeding fourteen years but falling short of life again without statutory remission, are now available to be considered in alternative to the death sentence. However, there is little to clearly define the boundaries of these two alternative sentences, and when one becomes better suited to the other. These determinations, again, narrow down on the view a sentencing judge takes on the gravity of the crime and which of the alternative options more closely respond to the same – an exercise as subjective as the determination of 'unquestionably foreclosed'.

Accordingly, as even the best-case scenario leaves room for inconsistencies at a magnitude that wouldn't be acceptable in a rule-based system, the death penalty proves itself to be inevitably arbitrary, making its consistent application a practical impossibility.

It may be also clarified here that while the charge of inevitable inconsistency may be laid against any penalty administered by a criminal justice system that relies upon judicial discretion to individualise sentencing, the presence of such inevitable inconsistency in death sentencing must be judged to a higher threshold of constitutional scrutiny. This is for the simple reason that the stakes involved in death sentencing are incomparably high with life itself facing wrongful extinguishment, which is impossibly to restore. This was acutely illustrated when in three of its decisions[132], the Supreme Court acknowledged its six previous judgements as *per incuriam*. This meant that thirteen convicts were wrongly put on the death-row; but unfortunately the decision for two of them came too late as they had already been executed by such time.[133]

VII. Concluding the Search for Consistency

Our search for consistency in death sentencing has revealed the failures of even the best-case scenario envisaged to apply the death penalty in as consistent a manner as possible. The said scenario fails because the weighing exercise and the enquiry into alternate options being 'unquestionably foreclosed', are inherently

[130] *Sriharan* (n 29).

[131] *Swamy Shraddananda* (n 28).

[132] *Santosh Kumar Satishbhushan Bariyar and Ors. v State of Maharashtra*, (2009) 6 SCC 498; *Dilip Premnarayan Tiwari & Anr v State of Maharashtra* (2010) 1 SCC 775; *Rajesh Kumar v State Through Govt of NCT of Delhi* (2011) 13 SCC 706.

[133] V. Venkatesan, 'A Case against the Death Penalty' (*Frontline*) <https://frontline.thehindu.com/cover-story/article30167180.ece> accessed 10 February 2021.

subjective and judge-centric undertakings. Moreover, this raises an unresolvable dilemma – attempts to infuse consistency into these two undertakings compromise the value of individualised sentencing and risk standardization. This unresolvable dilemma makes the best-case scenario doomed for failure, by leaving room for widespread inconsistencies at odds with the rule of law. Hence, it would appear that the inevitable inconsistency cannot be resolved, and the best-case scenario cannot be salvaged, even in other *sui generis* ways.

Now, the failure of the best-case scenario leaves us with only two options left to achieve consistency – either mandatory death sentences which are not subject to choice and discretion of sentencing judges; or no death sentence at all. Any middle-ground, even when perfected to the best-case scenario, shall produce inevitable inconsistencies not acceptable to the rule of law.

The choice between these options, however, is easily resolved in the Indian context, where the Supreme Court has already declared that mandatory death sentences for an offence are unconstitutional.[134] In *Mithu*, the Court struck down Section 303 of the Indian Penal Code, 1860, which provided the death sentence for a convict who commits murder while serving a sentence of life imprisonment. The Court reasoned:

"[T]he legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a pre-ordained sentence of death".[135]

The Court further noted that a mandatory death sentence also deprives a convict of the benefit of Section 235(2) of the 1973 Code (noted in Section IV.C) to argue on sentence and show why they should not be sentenced to death.[136] Even aside from settled law, choosing a mandatory death sentence would run counter to the principle of individualised sentencing that the *Bachan Singh* sentencing framework was keen to preserve, and arguably, put us in a situation more disadvantaged than one that the said framework unwittingly led to.

Accordingly, while the search for consistency and the failure of the best-case scenario led us to a cross-road between a mandatory death sentence and no death sentence at all, at least in the Indian context, this choice already stands resolved by virtue of the Supreme Court's decision in *Mithu*. This ends our search for consistency with abolition as the only remaining option.

The 'inevitable inconsistency' framework, therefore, provides a valuable tool to re-evaluate the desirability of the death penalty by exposing the realities of

[134] *Mithu v State of Punjab* (1983) 2 SCC 277.
[135] ibid [12].
[136] ibid.

its administration and the inescapable inconsistency in its application, that won't find place in any rule-based system. While it might be present for other penalties, given the irrevocable nature of the death sentence, 'inevitable inconsistency' is proposed to be considered as a *sui generis* ground for constitutional scrutiny of the death penalty.