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Chances of Reform as a Mitigating Factor in Death Penalty Cases in India: Issues and Challenges

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Abstract

The chances of reform or rehabilitation of the accused is one of the important mitigating circumstances in criminal sentencing. In Bachan Singh v State of Punjab (AIR 1980 SC), the Supreme Court upheld the constitutionality of death penalty in India. However, the Court restricted it to Rarest of Rare cases. The Court said that a balance sheet of aggravating and mitigating circumstances is to be prepared and due regard must be given to the chances of reform/rehabilitation as a mitigating circumstance. This paper revolves around the central theme of chances of reform as a mitigating circumstance in death penalty cases and the procedures followed by the Courts to determine the same. Since the Bachan Singh judgment, it has been noticed in several cases on death penalty that the Supreme Court has either accepted or rejected the chances of reform without conducting any due inquiry on the reformative potential of the convict. This raises a serious question on the fairness of procedure under Articles 14 and 21 of the Constitution as these two Articles also applies at the stage of sentencing. However, in some of the recent judgments of the Supreme Court and of the Delhi High Court, as a course correction exercise, some guidelines and procedures have been laid down to determine the chances of reform as a mitigating circumstance. The Courts have admitted that the task of determination of reform has not attracted serious attention of the sentencing courts in the past. Under the procedures evolved, the responsibility has been entrusted upon the Probation Officer under Probation of Offenders Act, 1958 to determine the same. This is a welcome step in the judicial administration of death penalty in India.

Keywords: Death Penalty, Balance Sheet of Aggravating and Mitigating Circumstances, Bachan Singh, Chances of Reform, Rehabilitation of the Death Convict.

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I. Introduction

The possibility of reform or rehabilitation of the convict is considered to be an important mitigating circumstance recognize universally in criminal sentencing.[2] If there are possibilities of reform of the convict, then criminal court may not impose very harsh punishment including the punishment of death.[3] This mitigating circumstance derives its sanctity from the reformative theory of sentencing which is based on the doctrine of repentance which implies that the convict has repented his past bad conduct and is pleading for meaningful integration into the society as a law abiding citizen.[4] As far as the application of reformative approach in death penalty cases in India is concerned, the Supreme Court in the landmark judgment of *Bachan Singh* case[5], while upholding the constitutionality of death sentence as a form of punishment, propounded the Rarest of Rare Test under which death could be awarded in those extreme cases wherein the *alternative option (of life imprisonment) is unquestionably foreclosed*. While talking about mitigating circumstances, the Apex Court in *Bachan Singh* held that these circumstances should be given due consideration and one of the mitigating circumstances which should receive proper consideration is chances of reform of the convict. If there is possibility of reform, death penalty should not be imposed. The Court approved in principle the list of mitigating circumstances prepared by Dr Chitaley (amicus curiae in the case). However, the Court cautiously did not lay down any exhaustive list of mitigating

[2]John Tasioulas, *Punishment and Repentance*, 81 Philosophy. 279, 316–322 (2006). Also see Sheldon B Peizer, *Correctional Rehabilitation as a Function of Interpersonal Relations*, 46 Crim. L.
Criminology & Police Sci. 632, 636–640 (1956). Also see, Farrokh Anklesaria, and Scott T. Lary, *A New Approach To Offender Rehabilitation: Maharishi's Integrated System of Rehabilitation*. 43 J Correct Educ. 6, 10–13 (1992).

[3] Tonry, Michael, *Purposes and Functions of Sentencing*, 34 J. Crim. Justice. 1, 38-43 (2006). Also see, Edgardo Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation?* 77 J Crim Law Criminol. 1023, 1060–68 (1986).

[4] Steinberger, Peter J, *Hegel on Crime and Punishment*, 77 AM. POLITICAL SCI. REV. 858, 864–70 (1983). Also see Rabinowitz, Herbert S, and Spiro B. Mitsos, *Rehabilitation as Planned Social Change: A Conceptual Framework*, 5 J Health Hum Behav. 2, 11–14 (1964).

[5]Bachan Singh v. State of Punjab AIR 1980 SC 898.

circumstances as it would fetter judicial discretion.[6] Subsequently, in *Machhi Singh* case[7], the Apex Court once again stressed upon chances of reform as an important mitigating circumstance which could tilt the scale in commuting death sentence of the convict into life imprisonment. The Court said that while drawing the Balance Sheet, due consideration needs to be accorded to chances of reform as a mitigating factor. The Court also held that the burden lies on the prosecution to prove that the convict has no chances of reform. Post *Bachan Singh* and *Machhi Singh* judgments, there are several cases wherein the Apex Court had stressed upon reformative approach to sentencing in death cases. For instance, in the case of *Sandesh*[8], while commuting the death penalty of the convict into life imprisonment, the Apex Court observed that the doctrine of rehabilitation and doctrine of prudence are the two guiding principles in criminal sentencing for proper exercise of judicial discretion. In yet another case of *Gurdev Singh*[9], the Apex Court observed, "*It is indeed true that the underlying principle of our sentencing jurisprudence is reformation….*"

In a number of death cases reaching to the Apex Court, some of the mitigating circumstances recognized by the Court are the followings:

- Chances of Reform of the convict (which is a matter of enquiry under the present paper).[10]
- No Prior Criminal Record of the convict.[11]

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[6] Dr Chitaley suggested the following mitigating circumstances: (1) That the offence was committed under the influence of extreme mental or emotional disturbance; (2) the age of the accused. It the accused is young or old, he shall not be sentenced to death; (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society; (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above; (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence; (6) That the accused acted under the duress or domination of another person; (7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.

[7] Machhi Singh v. State of Punjab AIR 1983 SC 957.

[8] Sandesh v. State of Maharashtra (2013) 2 SCC 479).

[9] Gurdev Singh v. State of Punjab ((2003) 7 SCC 258).

[10] Santosh Kumar Singh v. the CBI (2010) 9SCC 747.

[11] Mohammad Chaman v State (NCT Delhi) (2001)2 SCC 28, Raju v. State of Haryana AIR 2001 SC 2043, Nirmal Singh and Another v. State of Haryana AIR 1999 SC 1221.

- Young age of the convict.[12]

In addition, some of the other mitigating circumstances impliedly recognized by the Apex Court are as listed by Dr Chitaley in *Bachan Singh* case (see footnote 5). However, as said, this paper only focuses upon and analyzes the judicial approach towards determining the chances of reform as a mitigating factor in death cases. The need for analyzing chances of reform as a mitigating factor necessitated from the fact that it has been noted in a number of death cases that this mitigating circumstance has been applied in rather inconsistent manner without actually attempting any serious inquiry as regards the reformative/non-reformative potential of the death row convicts. At times, the answer to the question rest upon the subjective opinion of the Bench. Sometimes, the Bench applies the possibility of reform as a mitigating circumstance and commutes death into life while in other cases, on the more or less similar factual matrix, the Bench comes to the conclusion that there are no possibilities of reform and thus award/affirm death penalty. This is being done without attempting any serious inquiry on the reformative potential of the convict. This kind of approach raises the question of equality and fairness of procedure under Articles 14 and 21 of the Constitution since both these Articles apply at the stage of sentencing as held by the Supreme Court in its authoritative pronouncement in *Santosh Kumar Bariyar* case.[13] Of late, however, there has been some positive development in this direction. The Courts have started giving due attention to this aspect of mitigating circumstance. However, more concrete steps are required to be taken in order to seriously determine the chances/non chances of reform of the death row convict as it has an important bearing on the question as to whether death penalty will be affirmed or commuted into life.

In the light of the above introductory discussion, this paper centrally seeks to examine the judicial approach towards determining chances of reform as a mitigating factor in death cases.

[12] Amit v. State of Maharashtra (age 20 years) (2003) 8 SCC 93, Amit v. State of Uttar Pradesh (age 28 years) (2012) 4 SCC 107 , Santosh Kumar Singh v. the CBI (age 24 years) (2010) 9SCC 747 , Rameshbhai Chandubhai Rathod v. the State of Gujarat (28 years) AIR 2011 SC 803.

[13] Santosh Kumar Bariyar v. State of Maharashtra (2009) 6 SCC 498.

II. Reformation as a Theory of Punishment

Before going into the central topic, it would be prudent here to understand briefly the reformative model of sentencing. A rehabilitation/reformative model of sentencing aims at inner reformation of the offender in order to make him a law abiding citizen.[14] The pre-requisite for applicability of reformative model is that a criminal must regret his crime. He must be remorseful of his past conduct and hence he has taken an inner call not to go on the wrong side of the law in future. Reformation requires a changed mindset, a change of heart.[15] The aim of reformative theory is not to deter or retribute but to bring about change of heart of the offender so that he, out of his own will, choose not to commit the crime in the future.[16] He does this by becoming remorseful of his past wrongful conduct. The reformative theory derives its sanctity from a very strong argument, that is, the majority of the convicted persons are from the socially disadvantaged sections of the society and hence there is a moral duty on the part of the state to compensate by rehabilitating them rather than indiscriminately putting them behind the bar or hanging them as in the case of death penalty.[17] The implication that the reformative theory is on the criminal sentencing is that it signifies that the sentencing should be designed to meet the correctional needs of the offenders.[18] It should not be harsh. Rather, it should have a rehabilitative component. Another reason for the popularity of reformative model, now a days, is that it is compatible

[14] THOM BROOKS, PUNISHMENT 52-56 (Routledge Publication 2012).

[15], Michelle S Phelps, *Rehabilitation in the Punitive Era: The Gap between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC'Y REV. 33, 64–68 (2011). Also see, Merry A. Morash., and Etta A. Anderson, *Liberal Thinking on Rehabilitation: A Work-Able Solution to Crime*, 45 Soc Probl. 556, 559–563 (1978).

[16] Rex Martin, *Treatment and Rehabilitation as a Mode of Punishment*, 18 Philos. Top. 101, 118–122 (1990). Also See, Namita Wahi, *A Study of Rehabilitative Penology as an Alternative Theory of Punishment*, 14 STUD. BAR REV. 92, 102–104 (2002).

[17] Meyer, Joel, *Reflections on Some Theories of Punishment*, 49 J Crim Law Criminol. 595, 597–599 (1968). Also See Anna Louise Simpson, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 CAL. L. REV. 984, 1014–1017 (1976).

[18] Peter Mascini and Dick Houtman, *Rehabilitation and Repression: Reassessing Their Ideological Embeddedness*, 46 Br. J. Criminol. 822, 833-836 (2006). Also see, Dennis L. Peck, *Rehabilitation and Behaviorism Future Prospects*, 62 Int. SOC. SCI. REV. 28, 34-39 (1987).

with the modern human rights standard.[19] This holds true for the Indian Courts as well. In the past few decades, one of the major thrusts of the Supreme Court of India has been on expanding the human rights of the accused at different stages of criminal justice administration by taking recourse to Article 21.[20] This hold equally true for death penalty cases which is evidenced by the fact that the death penalty has been confined to only Rarest *of Rare* cases since the authoritative pronouncement in *Bachan Singh* case coupled with the legal obligation to provide special reasons under Section 354(3) CrPC for awarding death.[21] In context of death penalty, the human rights aspect assumes all the more significance due to the fact that the punishment of death penalty is irreversible.[22] It is primarily due to the irreversible nature of death penalty coupled with the major thrust on the human rights to dignity, the courts in India apply reformative approach, wherever possible, in death penalty cases.[23] The Court applies reformative theory by

[19] Edy Kaufman, *Prisoners of Conscience: The Shaping of a New Human Rights Concept*, 13 Hum. Rights Q. 339, 364-367(1991). Also see, James B Jacobs, *The Prisoners' Rights Movement, and Its Impacts, 1960-80*, 2 J Crime Justice. 429, 464-470 (1980). Also see K. I Vibhute, *Right to Human Dignity of Convict under 'Shadow of Death' And Freedom 'Behind the Bars' In India: A Reflective Perception*, 58 *J.I.L.I.* 15, 50–54 (2016). Also see Connie de la Vega, *Using International Human Rights Standards to Effect Criminal Justice Reform in the United States*, 41 J Hum Rights. 13, 13-16 (2015). Also see Alison Shames, and Ram Subramanian, *Doing the Right Thing: The Evolving Role of Human Dignity in American Sentencing and Corrections*, 27 Fed. Sent'g Rep. 9, 17-18 (2014).

[20]Dr. G Kalyani, '*Guidelines of Supreme Court and NHRC on Human Rights'*, http://www.wbja.nic.in/wbja_adm/files/Guidelines%20of%20Supreme%20Court%20and%20Human%20Rights%20Commission%20on%20Human%20Rights%20by%20Dr.%20G.Kalyani.pdf (last visited July 6, 2023).

[21] Law Commission of India Report No. 262 The Death Penalty (August 2015). https://lawcommissionofindia.nic.in/report_twentieth/ (last visited July. 6, 2023). Also see *Death Penalty in India: Reflections on the Law Commission Report*, 50 Econ Polit Wkly. 12, 12-15 (2015).

[22] Michael Davis, *Is the Death Penalty Irrevocable 10 Soc* Theory Pract. 143, 153-156 (1984). Also see Kevin Mullen, Violence, *and the Death Penalty*, 31 The Furrow. 505, 514-516 (1980).

[23] S Muralidhar, *Hang Them Now, Hang Them Not: India Travails With The Death Penalty*, 40 J.I.L.I. 143, 170-173 (1998). Also see Mary K Newcomer, A*rbitrariness, and the Death Penalty in an International Context*, 45 DUKE LAW J. 611, 640-649 (1995).

commuting the death sentence into life imprisonment.[24] However, if the Court feel that there are no chances of reform or if the aggravating circumstances outweigh mitigating circumstances in totality , it will confirm the death penalty if the case falls under *Rarest of Rare* test and satisfies the *special reasons* doctrine under Section 354(3) CrPC. However, the question of reformative approach in death penalty cases is irrelevant for European Union and those other national jurisdictions where death penalty has been abolished either *de jure* or *de facto*.

III. Reformation and Death Penalty

Rehabilitation or Reformation, as a theory of punishment, by its very nature, is opposed to the idea of imposition of capital punishment. It is based on the assumption that every convict has a chance of reform. As a natural corollary, reform of the offender and the imposition of capital punishment are mutually contradictory. This is obvious as we cannot reform criminals through imposition of death penalty. Hence, it is generally perceived that rehabilitative theory is incompatible with the idea of award of capital punishment. However, it is perceived by some criminologists that the imposition of the punishment of death could led to rehabilitation of the death convict during the period while he is on death row.[25] Hence, the imposition of death penalty cannot be termed as entirely antithetical or irrelevant to the idea of reformation. A person may be reformed before he meet his maker. He does not die as an unreformed or unapologetic convict. Sometime, the period between the imposition of death and actual execution of the punishment could be used for rehabilitation of the death convict where he become remorseful of his past conduct and bring change in his personality whereby he repent his past conduct.

Further, there may be a significant time gap in the award of death penalty by the lower court and the final decision by the Apex Court. Such time gaps could be utilized for rehabilitation of the offenders. This reformative behaviour or good conduct of the convict while in prison awaiting the final verdict became the reason

[24] See the judgments of the Supreme Court in Mofil Khan v. State of Jharkhand (2021 SCC Online SC 1136) and in Rajendra Pralhadrao Wasnik v. State of Maharashtra (2019) 12 SCC 460.

[25] Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS LAW REVIEW. 1231, 1231-1235 (2013).

for commutation of death into life by the Supreme Court in *Sandesh* case.[26] In this case, the Supreme Court commuted the death penalty of the murder convict into life imprisonment by taking into account his good behaviour while he was in jail post-conviction awaiting the final verdict by the Apex Court. The Court said that there was no evidence that his conduct inside the jail was not worthy of any concession. Hence, post-conviction conduct of the accused was taking into account while commuting death into life imprisonment in the instant case. Emphasizing on reformation, the Court said that doctrine of rehabilitation and doctrine of prudence are the two guiding principles for the proper exercise of judicial discretion. The Court pointed out that the prosecution had led no evidence to show that he was hardened criminal and that there was no possibility of his being reformed.

IV. Inconsistent Judicial Approach in Determining the Chances Of Reform in Death Cases

As mentioned, the constitutionality of death penalty in India was upheld by the Constitution Bench of the Supreme Court in *Bachan Singh* case. However, the Court said that the death could be awarded only in the rarest of rare cases and for that purpose a balance sheet of aggravating and mitigating circumstance is to be prepared. While doing so, the mitigating circumstances especially the chances of reform have to be given considerable weight. Then, as mentioned, comes the *Machhi Singh* judgment in the year 1983, wherein the Supreme Court categorized the list of aggravating and mitigating circumstances. In the list of mitigating circumstances, one of the important circumstances highlighted was the chances of reform of the convict. Subsequent judgments of the Supreme Court on death penalty have followed or claims to have followed these two celebrated judgments on death penalty.

A. Acceptance or Rejection of "*Possibility of Reform*" as a Mitigating Circumstance

In context of death penalty, the acceptance of pleading of chances of reform of the convict implies that death penalty has been commuted into life whereas the rejection of chances of reform implies that the death sentence has been confirmed.

[26] Sandesh v. State of Maharashtra (2013) 2 SCC 479.

For the purpose of current discussion and in order to maintain uniformity, the author will pick up those cases where the offender has committed the offences of rape and murder. Since there are multifarious cases of rape and murder decided by the Apex Court, it will be difficult to discuss all those cases due to space constraints. Hence, the author has picked up some of the cases wherein the factual matrix is more or less similar with rape and murder being primary offences committed. It is to be noted that the cases discussed in the paper are only illustrative and not exhaustive.

In some of the Apex Court judgments such as in *Santosh Kumar Singh*,[27] *Amit*,[28] and *Amit*[29], the appellant had committed the offence of rape and murder of the victim and was consequently awarded death penalty by the lower court. In appeal, the Supreme Court took into account the chances or possibility of reformation of the convict and commuted death into life imprisonment.

However, the issue in all these cases is that it is not clear as to on what basis, the Court reached to the conclusion that there are possibilities of reform of the convict. There are two pressing issues here. First, the court has not embarked on a detailed enquiry as to whether there is possibility of reform of the convict or not. The approach of the court rather appears to be mechanical or cosmetic in determining the key question of reform. Secondly, it is noted that the Court, in some of these cases, has proceeded on the basis of the assumption laid down in *Bachan Singh and Machhi Singh* cases that the State must prove by positive evidence that there are no chances of reform which imply that if the State does not bring the incriminating evidence against the convict to the effect that there are no possibilities of reform, it shall always be presumed that there are chances of reform. However, this approach appear to be wrong and cannot be justified as right methodology especially in the matter of life and death wherein the highest amount of judicial wisdom and corresponding the same level of cautionary approach is expected. The Court especially the Apex Court, in its judicial wisdom and as the highest court of justice, must do an independent enquiry in order to reach to a definitive conclusion. The Court cannot base its decision of life and death entirely on the basis of production/ non-production of the material by the

[27] Santosh Kumar Singh v. CBI (2010) 9 SCC 747.
[28] Amit v. State of Maharashtra (2003) 8 SCC 93.
[29] Amit v. State of Uttar Pradesh (2012) 4 SCC 107.

State. An independent and objective enquiry at the Court level as to the chances or no chances of reform will be the most appropriate step in the entire scheme of judicial administration of death penalty and also in the interest of fairness and justice. This is all the more so when it has been affirmatively held in *Santosh Kumar Bariyar*[30] judgment that Article 14 (equalitarian principle) as well as Article 21 (just, reasonable and fair procedure) applies at the stage of sentencing. By not conducting such a detailed enquiry, it could be safely said that convict right under Articles 14 and 21 will be hit if the Court reach to the conclusion that there are no chances of reform and consequently affirm the death.

In contrast to the cases referred above, there are list of cases, on the other side of the spectrum, wherein the Apex Court has come to the conclusion that there are no chances of reform and hence affirms the death penalty awarded to the convict. For instance, in cases *of Dhananjoy Chatterjee*[31]*, Jai Kumar*[32]*, Mohammad Manna*[33] and in *B.A Umesh* [34] the Court awarded death penalty in rape and murder case on the ground that there was no possibility of reform of the convict. However, yet again no concrete reasoning has been provided nor detailed enquiry has been undertaken as to on what basis, the Court reached to the conclusion that the convict was incapable of reform. The Court judged the non-rehabilitative potential of the convict only on the basis of the brutal and diabolical manner in which the crime was committed. That again, cannot be the sound basis for determining the rehabilitative potential of the convict as reformative theory has a futuristic dimension i.e. future element involved as against the past conduct of committing the horrendous act. If the Court base its decision on the past conduct of the convict, then the Court, in all the probability, has applied either retributive, deterrent or proportionality theory but definitely not reformative model. In reformative model, the question regarding chances of reform occupies centre stage wherein the probable future conduct of the offender is envisaged.

The curious question which quite often arises in such cases is whether the decision as regard incapable of reform was based on the subjective opinion of the Bench. It will be very apt here to quote the observation made by the Apex Court in *Swamy*

[30] *Supra* note 12.
[31] Dhananjoy Chatterjee v. State of West Bengal (1994) 2 SCC 220.
[32] Jai Kumar v. State of M.P AIR 1999 SC 1860.
[33] Mohammad Manna v. State of Bihar (2011) 5 SCC 317.
[34] B.A. Umesh v. Registrar General, High Court of Karnataka AIR 2011 SC 1000.

Shraddananda case[35], in context of subjectivity in judicial administration of death penalty, wherein it said, *" the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the judges constituting the bench.*"[36] Way back in 2006, raising the red flag, the Apex Court in the case of *Aloke Nath Dutta*[37] admitted failure on the part of the Court *to evolve a uniform sentencing policy* in death cases. These observations reflect judicial subjectivity and inconsistency in death penalty which also necessarily include the key aspect of determining the chances of reform in death cases. In *Santosh Kumar Bariyar*[38] judgments also, the Apex Court, underwent detailed analysis of the present death penalty sentencing and reached to the same conclusion that there is no consistent policy on judicial administration of death penalty and even *Bachan Singh* mandate of Rarest of Rare test has not been followed with sincerity by subsequent benches.

The real issue in all these cases where the Court has either accepted or rejected chances of reform as mitigating circumstance is, as mentioned, as to how the court determined the issue of possibility or non-possibility of reform of the convict. Is there any standard procedure evolved by the court to conduct the aforesaid enquiry? This is a serious question because on the answer to it depends whether the convict will be sent to the gallows or whether his life will be spared. In all the above mentioned cases under both the categories, no sincere inquiry was done to find out the reformative/non-reformative potential. The convicts were neither referred to the psychiatrist nor subjected to any medical or psychological or social background test to find out the reformative/non-reformative tendency. Nor any Social Investigation Report (SIR) was prepared to know the antecedent and past of the convict. Since there are no legislative guidelines regarding determining the rehabilitative potential for death penalty convicts, the onus lies on the court to undertake the exercise. The same concern was echoed by the 48th Law Commission Report wherein the Commission pointed out that lack of comprehensive information about the characteristics and socio-economic

[35]Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka AIR 2008 SC 3040.
[36] Please refer to Para 33 of the Judgment.
[37] Aloke Nath Dutta v. State of West Bengal (2007) 12 SCC 230.
[38] *Supra* note 12.

background of the offender is a serious demerit in our criminal sentencing which need to be addressed at the earliest. [39]

The chances of reform has emerged as one of the most important mitigating circumstances in death penalty jurisprudence in India especially due to the emergence of human rights jurisprudence at both national and international level and hence due attention ought to have been given to this aspect. Recognizing the importance of this mitigating circumstance, the Supreme Court in *Anil* case[40] observed that the Court should take the task of determining the rehabilitative potential very seriously and the State is also obliged to furnish materials either in favour of or against the rehabilitative potential of the convict. However, as said above, the Court decision in this critical matter of life or death should not depend solely upon the enquiry done by the State. In appropriate cases, the Court should not be hesitant in conducting its own independent enquiry as and when the situation warrants. Echoing the same sentiment, in *Birju* case[41], the Supreme Court has said that while awarding sentence and while hearing the accused under Section 235(2) of the Code of Criminal Procedure, 1973 which provides for pre-sentence hearing, serious enquiry need to be undertaken and the Court can call for a report from the Probation Officer under Probation of Offenders Act, 1958. Section 235(2) of the CrPC provides that if the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360 (of CrPC), hear the accused on the question of sentence, and then pass sentence on him according to law. The Court can then examine whether the convict is likely to indulge in future commission of crime or whether there is any probability of the accused being reformed and rehabilitated. The points pertaining to calling report from the Probation Officer are discussed in detail in later part of this paper.

In a recent judgment of 2021 in Mofil Khan and Ors [42], the Supreme Court again stressed on the importance of possibility of reform as a key mitigating factor in death cases. Highlighting its significance, the Court said that it is well settled law

[39] 48th Law Commission Report titled, *Some Question on the Criminal Procedure Code Bill 1970) (July 1972*), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080532-1.pdf (last visited, July 2023).

[40] Anil v. State of Maharashtra (2014) 4 SCC 69.

[41] Birju v. State of M.P AIR 2014 SC 1504.

[42] Mofil Khan and Ors. v. The State of Jharkhand 2021 SCC Online SC 1136.

that possibility of reformation and rehabilitation is an important factor which needs to be taken into account. There is a bounded duty cast on the courts to elicit information of all relevant factors pertaining to the possibility of reform even if the convict remain silent. The case was of review petition filed under Article 137 of the Constitution which seek to review the 2014 judgment of the Apex Court in which it has affirmed the death sentence of the appellant. The grievances of the appellant was that possible of his reformation was not given due consideration while upholding the death sentence by the Apex Court. Agreeing with the contention of the petitioner, the Supreme Court said that neither the trial court nor the High Court nor the Supreme Court in its appellate jurisdiction gave due attention to the possibility of reform of the appellant. The focus was only on the brutal and diabolical manner in which the crime was committed. There was no reference to the possibility of reformation of the appellant. Neither the State has procured any evidence to show that there was no possibility of reform nor the Court has undertaken any such exercise. In the present case, the petitioner along with others eliminated entire member of the family due to property dispute including the minor children. Eight persons lost their lives. In the review application, the Apex Court examined several factors pertaining to the appellant such as his socio-economic background, the absence of any prior criminal antecedents, affidavits filed by their family and community members and the certificate issued by the Jail Superintendent regarding the conduct of the appellant. Considering all these factors, the Court came to the conclusion that it cannot be said that there is no possibility of reformation of the petitioner. As a consequence, his death sentence was commuted into life imprisonment. But considering the gravity of the offence, he was directed to undergo 30 years imprisonment.

The Apex Court in *Mofil* case also refereed to its 2018 judgment of *Rajendra Pralhadrao Wasnik*[43] wherein the Court said that possibility of reform and rehabilitation of the convict must be seriously considered. The Court said that this is one of the mandates of the "*special reasons*" requirement under Section 354(3) of the CrPC and ought not to be taken lightly since it involves snuffing out the life of a person. The Court said, "*To effectuate this mandate, it is the obligation on the prosecution to prove to the court, through evidence, that the probability is*

[43] Rajendra Pralhadrao Wasnik v. State of Maharashtra (2019) 12 SCC 460.

that the convict cannot be reformed or rehabilitated. This can be achieved by bringing on record, inter alia, material about his conduct in jail, his conduct outside jail if he has been on bail for some time, medical evidence about his mental make-up, and contact with his family and so on. Similarly, the convict can produce evidence on these issues as well"[44]

V. Judicial Guidelines on Determining the Chances of Reform in Death Cases: A Much Needed and a Welcome Move

Of late, there has been some positive developments in determining the chances of reform of the convict. In its 2014 judgment of Bharat Singh[45], the Delhi High Court, reflecting upon the issue of reformation of the convict in death cases, admitted that many times the courts take this factor for granted. The High Court observed that the criminal courts need to seriously determine whether the accused can be rehabilitated or not in death cases. The High Court laid down some procedures for determining the chances of reform in death cases. The Court observed that in order to determine as to whether there are chances of reform or not the Court should call for a report from the Probation Officer-an Officer having statutory position under the central legislation titled Probation of Offenders Act, 1958. The Probation of Offenders, 1958 is a post-independence legislation aiming towards rehabilitation of young and first time offenders wherein the young offenders can be released on probation under certain terms and conditions instead of mandating them to undergo imprisonment in the jail. The aim is to avoid intermixing of young offenders with hard core criminals inside the jail. However, the Act is not applicable to those convicted for offences punishable with death and/or life imprisonment. However, since there is no legislative or judicial procedure in existence for determining the rehabilitative potential of the death row convict, the High Court took the noble step of resorting to the provisions under the Probation of Offenders Act, 1958 for the purpose of aforesaid exercise. As per the procedure laid down, the Probation Officer has to conduct a detailed Social Investigation Report (SIR) of the convict pertaining to his antecedent and past social and educational background. This Report is to be presented before the sentencing court. After examining the Probation Officer's report, the Court can

[44] Please refer to Para 45 of the Rajendra Pralhadrao Wasnik Judgment.
[45] State v. Bharat Singh, MANU/DE/0920/2014.

then decide as to whether the convict is likely to indulge in criminal activity in future or whether there is any probability of the accused being reformed and rehabilitated. While pointing towards the responsibilities expected from the Probation Officer, the High Court said that the two questions need to be asked from the Probation Officer: (i) Is there a probability that in future the accused would commit criminal acts of violence as would constitute a continuing threat to society? (ii) Is there a probability that the accused can be reformed and rehabilitated? In order to determine the rehabilitative and reformative tendency of the convict, the Probation Officer shall enquire from the jail administration and seek a report as to the conduct of the convict while in jail. The jail authorities will extend their full co-operation to the Probation Officer in this regard. The Probation Officer will then also meet the family of the convict and the people from the local community even if it requires travelling to the outstation place where the convict resides. He will seek their inputs on the behavioural traits of the convict with particular reference to the two issues highlighted. Thereafter the Probation Officer shall consult and seek specific inputs from two professionals with not less than ten years of experience from the fields of Clinical Psychology and Sociology. The High Court further said in Para 69 of the Judgment that for the guidance of the Probation Officer, reference can be made to the United Nations Office on Drugs and Crimes Handbook on "*Prevention of Recidivism and Social Integration of Offenders*".[46] The Handbook is useful in ascertaining the recent trend in assessment of an offender's risk of re-offending. The High Court further said in Para 70 of the judgment that the report of the Probation Officer will be 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 Registrar General and four copies be 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. The

[46]https://www.unodc.org/documents/justice-and-prisonreform/_crimeprevention/Prevention_ of_Recidivisrn _and_Social_ Reintegration_12-55107_Ebook.pdf). There is also a document titled: 'The Offender's Assessment and Sentence Management, 2005, https://www.justice.gov.uk%2Fdownloads%2Foffenders%2F psipso%2Fpso%2FPSO_2205_offender_assessment_and_sentence_management.doc &ei=OXJNU7u NDY39 rAeb4 oHQAg&usg=AFQjCNFEaLJevrNDa80zBfeIPPSokGxEw&sig2=EG176zO0eXCra yKyLj INeg&bvm= bv.64764171,d.bmk).

learned counsel for the convict can seek his instructions on the report before making submissions on the next date.

Echoing the same procedure which needs to be adopted in death cases, in its 2015 Judgment of *Mithilesh Kumar Khushawa* [47], the Delhi High Court again focused on this aspect. The High Court observed that the pre-sentencing report under Section 235(2) of the CrPC is a mandatory requirement. A Probation Officer may be appointed to prepare a Pre-Sentencing Report and he/she shall have the same obligation as mentioned in Probation of Offenders Act, 1958 though, as mentioned above, the Act does not apply to offences punishable with death or life imprisonment. The High Court said in Para 212 of the judgment that a pre-sentencing report by a professionally trained probation officer is an extremely valuable tool for the court to assess the possibility of reform and rehabilitation of the person convicted of the capital offence. Pointing towards the lack of adequate training for Probation Officer, the Court said that the Probation Officers have neither the necessary qualifications nor the requisite training to render the effective assistance to the Court on the question of possibility of reform and rehabilitation of the death row convict.

Subsequently, the same point has been emphasized by the same High Court in its 2015 judgment in *Vikas Yadav*[48] wherein the Court in Para 280 said that it is an important part of the sentencing function of the State in the trial as well as of the court to ensure that the State places materials before the trial court regarding the probability that the convict could be reformed and rehabilitated and that he would not commit criminal acts in future. However, the State has, in most cases, failed to do so. What is the court required to do, the Court asked. The Court said that Section 235(2) confers a valuable right on the convict upon conviction of a meaningful hearing and grant of an opportunity to place necessary material even by leading evidence to enable the sentencing court to impose an appropriate sentence on him, keeping not only the nature of offence but all the relevant circumstances in mind. The Court referred to *Mithilesh Kumar* case[49] wherein the Court has expressed the view that there is a dire need to revamp the training and educational qualifications for Probation Officers by following international

[47] Mithilesh Kumar Khushawa v. State (Decided on 21st September, 2015 Del High Court).
[48] Vikas Yadav and Ors. v. State of U.P. and Ors MANU/DE/0294/2015.
[49] *Supra* note 46.

standards. The Court said that apart from the knowledge of psychology, knowledge in several related fields such as sociology and criminology would be essential to equip a person for serving as a Probation Officer. The Probation Officers who are required to submit pre-sentencing reports or the Social Investigation Report must be the persons who have expertise in dealing with the unique challenges posed by cases involving the death penalty as a sentencing option. The court stressed on this aspect as the educational qualification prescribed for Probation Officer under Delhi Probation of Conduct Rule, 1960 is only a mere graduation without any requirement of specialization in sociology, psychology or criminology or any other relevant discipline. This aspect need to be addressed by the law makers on priority basis.

Due to lack of effective consideration to mitigating circumstances in death penalty cases, the Apex Court in September 2022, referred to the Constitution Bench the task of laying down a Comprehensive framework on Mitigating Circumstances for death row convicts.[50] This shall necessarily include the task of determining the chances of reform. The Apex Court registered the suo motu petition titled "*In re-framing guidelines regarding potential mitigating circumstances to be considered while imposing death sentences*" in order to streamline the processes concerning mitigating circumstances. Referring to the anomaly in death cases, the Apex Court noticed that in many cases the convict is condemned to death by a formal if not cosmetic sentencing process. The concern of the Apex Court has been that while the State is allowed the opportunity to present the aggravating circumstances against the convict during the entire process of trial, the accused is allowed to present the mitigating circumstances only after the conclusion of the trial and pronouncement of guilt which put the convict at a hopeless disadvantage tilting the scale heavily against him. Hence, the convict must be given fair opportunity to present the mitigating circumstances throughout the trial process and not only after the pronouncement of the guilt. The concern of the Court has been that death penalty, at present, is being administered casually. It would be very interesting to see the content of Comprehensive Guidelines to be framed by the Constitution Bench. The Guidelines is yet to be framed and appear in public

[50] Article, *Death penalty cases: SC refers key issue to Constitution Bench* https://www.thehindu.com/news/national/death-penalty-case-sc-refers-to-5-judge-bench-on-framing-guidelines-on-mitigating-circumstances/article65909082.ece (last visited, July, 2023).

domain. However, it is very welcoming that the Court has started giving due consideration and seriousness to mitigating factors in death cases, which ideally should have been made at center stage since the authoritative pronouncement in *Bachan Singh* case. The author is very optimistic that in the Comprehensive Guidelines due consideration and utmost seriousness would be given to the process and procedure of determining the chances of reform.

While referring the matter to Constitution Bench, the Apex Court has also raised the concern that sentence hearing in death cases sometimes happens on the same day on which the convict is pronounced guilty. This "*Same Day Sentencing*" violate the mandate of Section 235(2) CrPC which provides for pre-sentencing hearing which need to be comprehensive in nature and not just a roving enquiry. Of late, the Court has also started evaluating mental health status of the death row convicts and even expecting a prominent role of the mitigating investigator in death cases which is again a welcome move. [51]

VI. Some Suggestions

Although the guidelines laid down by the Delhi High Court in *Bharat Singh* and other cases, which derives inspiration from Supreme Court judgment in *Birju*[52], are commendable and praiseworthy, the author would suggest few measures to strengthen the existing institutional mechanism to determine the chances of reform of the death convict. These suggestions are followings:

- There is an urgent need to revamp the entire institution of Probation Officer under the Probation of Offenders Act, 1958. Highly specialized training programmes shall be organized for them on regular basis which will equip them with requisite skills and also give them the essential subject knowledge of Criminal Psychology, Sociology, Criminology and other allied discipline. Currently the minimum education qualification required for Probation Officer is a mere Graduation. It could be raised to Masters in Specialized subjects such as in Clinical Psychology, Cognitive

[51] Article, *SC enforces a landmark ruling on death penalty,* https://www.hindustantimes.com/india-news/sc-enforces-a-landmark-ruling-on-death-penalty-101646159222001.html (last visited August, 2023).

[52] *Supra* note 40.

Behavioural Therapy, Behavioural Science, Sociology, Criminology and other allied discipline.

- While conducting enquiry as to the reformative potential of the death row convicts, due attention must be paid by the Probation Officer to the socio-economic background of the convict. A comprehensive enquiry is expected from the Probation Officer in this regard. As noted by the 48th Law Commission, lack of comprehensive information about the characteristics and socio-economic background of the offender is a serious demerit in our criminal sentencing.
- In order to attract best talent as Probation Officer, the salary, terms and conditions and other emoluments shall be competitive. It is to be noted that Probation Officer has a very important role to play under Probation of Offenders Act, 1958 and also in the death penalty cases to determine the reformative potential of death row convicts. Hence, the best mind shall be attracted towards the post.
- Further, as a matter of safeguard, the Psychological Profiling of the Criminal should be avoided. The psychological profiling is the process in which the nature of crimes is used to draw inferences about the personality and the behaviour traits of the criminals. In death penalty cases, it could be used to find out whether there are chances of reform or rehabilitation of the accused or not or whether the convict has chances of relapsing back into the recidivism. The psychological profiling of the convict, although conducted scientifically, is not regarded as an accurate test. As studies done in the West, it has been found that the forensic professionals who are conducting such test, at times, become completely bias towards prosecution objectives and goals instead of giving a neutral opinion on the matter. Further, the Probation Officer are neither forensic experts nor a psychologist. Hence, it would be difficult for them to reach to the conclusion as to whether or not there are chances of reforms. There is no scientific evidence to support the reliability and validity of psychological profiling of the criminal. Hence, basing the decision of life and death by relying on the psychological profiling of the convict will not be a good idea. It is to be noted that the field of psychological profiling

of the criminal is yet to reach that level of advancement wherein it can be relied upon safely and that too in death penalty cases.

VII. Concluding Remarks

The chance of reform or rehabilitation is one of the very important mitigating circumstances in favour of the convict facing death penalty and hence all seriousness must be attributed to this mitigating circumstance. However, as critically pointed out in this paper, the difficulty arises in mechanical application of this mitigating circumstance without undertaking any sincere exercise to find out as to whether the convict has the chance of reform or not. It must be noted that the procedure which is based on whims violate fairness and equalitarian principles enshrined in Articles 14 and 21 of the Constitution of India. As mentioned, these Articles applies at the stage of sentencing also. However, the judgments of the Delhi High Court in *Bharat Singh, Mithilesh Khushawa* and *Vikas Yadav* cases are welcome steps in right direction wherein the Court has recognized the problem and have consequently made some sincere efforts to address the issue by laying down some procedures for determining the chances of reformation. This works well in the interest of the convict as well as in the interest of the justice as the courts will have clear understanding of the situation before taking the final call on the question of imposition of death penalty. This will also be in conformity with the *Bachan Singh* dictum on due emphasis being attributed to chances of reform as a mitigating circumstance. It will also be in consonance with the rule of law and our constitutional philosophy. Giving due concern and consideration to chances of reform will also be in conformity with the mandatory provision of pre-sentencing hearing under Section 235 (2) of the CrPC. It will also enable the sentencing court to decide whether the case falls under *Special Reasons* mandate under Section 354 (3) of CrPC. Hence, these recent developments in the form of guidelines to determine the chances of reform are very welcome steps in judicial administration of death penalty in India.