

## ABOLITION OR RETENTION OF DEATH PENALTY IN INDIA: A CRITICAL REAPPRAISAL

ARNIM AGRAWAL\*

*Every saint has a past, every sinner has a future*  
V. R. Krishna Iyer, J.<sup>1</sup>

### I. INTRODUCTION

There has been a long quest of human beings to curb and control deviance and promote conformity to normative behaviour in human culture since times immemorial. Various ways and means have been attempted in this direction. The criminologists, jurists, sociologists and legal professionals have dealt with various aspects of the crime and the penal systems. Death penalty is one of the most debated, ancient forms of punishment in almost every society. Despite countless studies, several researches and plenty of experiments no conclusions have been reached yet, which can be socially, morally and legally accepted. India has also been witnessing this debate.<sup>2</sup> This debate was revived in India when all the 26 defendants in the Rajiv Gandhi assassination case were sentenced to death. Recently, a court awarded death sentence to Dubai based underworld don Aftab Ansari and six others for the attack outside the American Centre that left five policemen dead.<sup>3</sup>

The execution of Dhananjoy Chatterjee<sup>4</sup>, on 14<sup>th</sup> August 2004 had once again revived this debate all over India. Dhananjoy Chatterjee was a security guard of a housing society in West Bengal who raped and murdered a school girl of that housing society.

“Public outrage brought back the debate on death penalty centre stage in a case which abolitionists found difficult to defend. However, the

\* The author is presently a student of Fifth Year, B.Com, LL.B. (Hons.)~An integrated five years graduation degree in law from the Gujarat National Law University, Gandhinagar (India).

<sup>1</sup> Pillai P.S.A., *Criminal Law*, 9<sup>th</sup> Edition, 2000, Butterworths India, New Delhi, p. 286.

<sup>2</sup> Should capital punishment be abolished? The Times of India, June 27, 2004.

<sup>3</sup> Gallows for seven in Kolkata American Centre attack, The Times of India, April 27, 2005.

<sup>4</sup> *Dhananjoy Chatterjee v. State of West Bengal* (1994) 2 SCC 220, AIR 2004 SC 3454.

aftermath of the hanging has led to a plethora of issues, which were ignored and brushed aside such as the emergence of the hangman as a role model and the number of mock hangings leading to deaths of children. The impact of punishment in brutalization of society is no more a rhetoric issue, but a reality.”<sup>5</sup>

This paper discusses death penalty comprehensively with a holistic perspective in the wake of globalization and the institutionalization of human rights. It becomes necessary to examine the relevance and legitimacy of death penalty in India.

## II. HISTORY

During the reign of Mughal emperors, barbaric methods of putting an offender to death were used. It is interesting to note that the Sikh Emperor Maharaja Ranjit Singh never hanged anyone during his reign. The British, however, used death by hanging as the only legalized mode of inflicting capital punishment. In the British era, death sentence was executed by hanging the convict by the neck till death. The same was reflected in the Indian Penal Code, 1860 (hereinafter referred to as the IPC) drafted by Lord Macaulay, which is still in force.

There have been unsuccessful attempts in independent India to abolish death penalty. A bill was introduced in the Lok-Sabha in 1956 to abolish the capital punishment, which was rejected by the House. Efforts made in the Rajya-Sabha in 1958 and in 1962 were also fruitless. The Law Commission of India in its 35<sup>th</sup> Report (1967) under the Chairmanship of Justice J.L. Kapur has supported the continuing of death penalty for serious offences.

## III. DEATH PENALTY UNDER THE INDIAN PENAL CODE, 1860

The major substantive criminal law in India of the IPC provides for death sentence and life imprisonment as alternative punishment under certain circumstances.<sup>6</sup> There is not a single offence in the IPC which is punishable with

<sup>5</sup> Sakharani, Monica and Adenwalla Maharukh, (2005): “Death Penalty: Case for its Abolition”, *Economic and Political Weekly*, Vol. XL No. 11.pp. 1023-1026.

<sup>6</sup> (a) Waging war against the Government of India, attempting or abetting thereof under Section 121.

(b) A betting mutiny by a member of the armed forces under Section 132.

(c) Fabricating false evidence leading to conviction of an innocent person and his execution under Section 194 (second para).

(d) Abetting suicide of a child, insane or intoxicated person under Section 305.

(e) Attempting murder by a person under sentence of imprisonment of life if hurt is caused under Section 307.

(f) Committing dacoity accompanied with murder under Section 396.

(g) Acts committed in furtherance of common intention under Section 34.

mandatory death penalty and Section 303 of the IPC has been repealed<sup>7</sup>. In the above-mentioned categories of offences, the death sentence sets the upper limit of punitive strategies. The statutory provisions do not provide any guidelines as to when the judges should impose capital punishment in preference to imprisonment for life, or award lesser sentence of life imprisonment. The judiciary is allowed to exercise its discretion and reasoning in the adjudication process. It has to draw up a balance sheet of aggravating and mitigating circumstances from the facts of the case as set forth by the Apex Court in the case of *Machhi Singh v. State of Punjab*<sup>8</sup>.

In addition to the IPC, other laws like the Narcotic Drugs and Psychotropic Substances Act, 1985, Explosive Substances Act, 1908, etc. also have capital punishment that can be awarded as the maximum punishment. The Air Force Act, 1957, Army Act, 1950 and the Navy Act, 1957 provide for imposition of the capital punishment.

#### IV. EXECUTION OF DEATH PENALTY

In India, the mode of execution of death sentence is hanging. Section 354 (5) of the Code of Criminal Procedure Code, 1973 (hereinafter referred to as the CrPC) provides that when any prisoner is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead. Hanging is still the most common method of executing convicts. The issue regarding the constitutionality of the Section 354 (3) first came up before the Supreme Court in *Deena v. Union of India*<sup>9</sup>. Though the Court asserted that it was a judicial function to probe into the reasonableness of a mode of punishment, it refused to hold the mode of hanging as being violative of Article 21 of the Constitution.

The issue of the mode of execution of the death sentence was once again raised in *Shashi Nayar v. Union of India*<sup>10</sup>. It was submitted that capital punishment being barbaric and dehumanizing should be substituted by less painful method. The Court held that since the issue had already been considered in *Deena* (supra), there was no good reason to take a different view.

The issue of execution of death penalty by public hanging came before the Supreme Court in *Attorney General of India v. Lachma Devi*<sup>11</sup>. It challenged the order of the Rajasthan High Court regarding the execution of the petitioner by public hanging at one of specified venues in Jaipur after giving widespread

(h) Acts committed in furtherance of common object under Section 149.

(i) Abetment under Sections 109-115.

(j) Criminal Conspiracy under Section 120-B.

<sup>7</sup> As struck down in *Mithu v. State of Punjab*, AIR 1983 SC 473.

<sup>8</sup> (1983) Cr LJ 1457; AIR 1983 SC 957; (1983) 3 SCC 470.

<sup>9</sup> (1983) 4 SCC 645; 1983 SCC (Cri) 879; AIR 1983 SC 1155.

<sup>10</sup> (1992) 1 SCC 96; 1992 SCC (Cri) 24.

<sup>11</sup> AIR 1986 SC 467.

publicity of the date, time and place of the execution. The Supreme Court held that public hanging, even if permitted under the rules, would violate Article 21 of the Constitution being “barbaric, disgraceful and bringing shame on any civilized society.”

As per Section 366 of the CrPC, after awarding death sentence to a person, the Sessions Court has to submit the entire case proceedings to the High Court for confirmation. Such a sentence of death penalty cannot be executed until confirmed by the High Court. Under Section 368 of the CrPC, the High Court may confirm the death sentence or pass any other sentence warranted by law, or may annul the conviction, and convict the accused of any offence of which the Court of Session might have convicted him, order a new trial on the same or amended charge, or may even acquit the person. All this varies from particular case to case and is largely dependent upon material facts and questions of law involved in the concerned case.

Section 415 of the CrPC provides that when a person is awarded a death sentence by the High Court and consequently he makes an appeal to the Supreme Court under Article 134 (a)/(b) of clause (1) of the Constitution, the High Court has to order the execution of the sentence to be postponed until the period allowed for preferring such an appeal has expired, or, if an appeal is preferred within that period, until such appeal is disposed of. When the Sessions Court passes a death sentence to a murderer, the convict shall be committed to jail custody as provided in Section 366 (2) of the CrPC. Accordingly, under Section 30 (2) of the Indian Prison Act, 1894 the prison authorities used to keep such convicts in a cell known as the condemned cell. But more often than not, such imprisonment actually meant solitary confinement in practice. In *Sunil Batra v. Delhi Administration*<sup>12</sup>, the Apex Court held that a convict who is awaiting death sentence cannot be subjected to solitary confinement. The same view was further reiterated by the Supreme Court in *Triveniben v. State of Gujarat*<sup>13</sup>.

**Long delay in execution:** Extensive delay in the execution of a sentence of death is sufficient to invoke Article 21 and demand its substitution by the sentence of life-imprisonment. In *Rajendra Prasad v. State of U.P.*<sup>14</sup>, Justice V.R. Krishna Iyer observed:

“This convict has had the hanging agony hanging over his head since 1973 with near solitary confinement to boot! He must, by now, be more a ‘vegetable’ than a person and hanging a ‘vegetable’ is not death penalty.”

Accordingly, the death penalty was waived on grounds of long delay in execution of the convicted person. A considerable time between imposition of the capital punishment and the actual execution is unavoidable, given the procedural

<sup>12</sup> 1978 Cr LJ 1741, at p. 1754.

<sup>13</sup> 1990 Cr LJ 1810 at p. 1822.

<sup>14</sup> AIR 1979 SC 916.

safeguards required by the courts in such cases. In fact, it is in favour of the convict. In *Sher Singh v. State of Punjab*<sup>15</sup>, the Supreme Court refused to follow the ratio of *T.V. Vatheeswaran v. State of Tamil Nadu*<sup>16</sup> case, and held that delay in execution of death penalty exceeding two years by itself does not violate Article 21 of the Constitution to enable a person under sentence of death to demand quashing of sentence and commuting it into sentence of the life-imprisonment.

**Commuting of Sentence and Clemency Appeals:** Under Article 161 and 72 of the Constitution of India, the convicted person may appeal to the Governor of the State or the President of India for clemency. The Governor or the President must act not only on their own judgment but in accordance with the aid and advice of their Council of Ministers. The Supreme Court has observed that petitions filed under Articles 72 and 161 of the Constitution or under Sections 432 and 433 must be disposed off expeditiously<sup>17</sup>.

**The Law Commission's View:** In its 35<sup>th</sup> Report on 'Capital Punishment' published in 1967, the Law Commission of India considered in paragraph 587 to 591, the question of prescribing a lesser sentence for the offences under Section 302 and 303 of the IPC. The 42<sup>nd</sup> Report of the Law Commission on the IPC published in 1971 under the Chairmanship of Mr. K.V.K. Sundaram, again considered the question of amending Section 303. But then the Commission did not recommend any change since Section 303 was very rarely applied. It felt that if there was an exceptionally hard case, it could be easily dealt by the President or the Governor under the prerogative of clemency appeal.

Finally, it was only in the case of *Mithu v. State of Punjab*<sup>18</sup> that the constitutional validity of Section 303 of the IPC was challenged. In this case, a full Bench constituted of five Judges heard the petition along with six other petitions of condemned prisoners and struck down Section 303 as being unconstitutional and violative of Articles 14 and 21 of the Constitution.

## V. CONSTITUTIONALITY OF DEATH PENALTY

In *Jagmohan Singh v. State of U.P.*<sup>19</sup>, the constitutional validity of capital punishment was challenged before the Apex Court. It was argued that the 'Right to life' was the basic Fundamental Right under Article 21 of the Constitution. The Supreme Court rejected the contention and held that capital punishment could not be said to be violative of Article 21 of the Constitution. It is noteworthy that Justice Krishna Iyer in *Rajendra Prasad v. State of U.P.*<sup>20</sup> emphatically stressed that death

<sup>15</sup> AIR 1983 SC 465.

<sup>16</sup> AIR 1983 SC 361 (2).

<sup>17</sup> *Sher Singh v. State of Punjab*, (1983) 2 SCC 344; 1983 SCC (Cri) 461, 474-475; 1983 Cr LJ 803.

<sup>18</sup> 1983 Cr LJ 811; AIR 1983 SC 473.

<sup>19</sup> (1973) 1 SCC 20; 1973 SCC (Cri) 169.

<sup>20</sup> *Supra* N. 13.

penalty is violative of Articles 14, 19 and 21 of the Indian Constitution. However, he observed that where murder is premeditated and gruesome and there are no extenuating circumstances, the offender must be sentenced to death as a measure of social defense. Accordingly, the observations of the Supreme Court in the case of *Bachan Singh*<sup>21</sup> were:

“for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through laws instrumentality. That ought not to be done save in the *rarest of rare cases*. When the alternative option is unquestionably foreclosed.”

The Apex Court emphasized upon Section 354 (3) of the CrPC saying that under it life imprisonment as punishment was the rule and death sentence was an exception to be awarded in the *rarest of rare cases*. This was the first time that the Supreme Court coined the concept of '*rarest of rare cases*'. In *Machhi Singh*<sup>22</sup>, the Supreme Court further explained the phrase '*rarest of rare cases*' in the following words:

1. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
2. Before opting for the death penalty, the circumstances of the offender also require to be taken into consideration along with the circumstances of crime.
3. Life imprisonment is the rule and death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment happens to be altogether inadequate punishment having regard to the relevant circumstances of the crime and only provided the option to impose sentence of imprisonment for life cannot be consciously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
4. A balance sheet of aggravating and mitigating circumstances has to be drawn up and doing so the mitigating circumstances have to be accorded full weightage and just balance to be struck between the aggravating and the mitigating circumstances before the option is exercised.

These guidelines laid down by the Hon'ble Supreme Court of India are to be adhered to by all the concerned courts having the requisite jurisdiction at the Sessions Court, High Court and at level of the Apex Court. Yet one more futile attempt was made in *Shashi Nayar v. Union of India*<sup>23</sup>, to get capital punishment declared unconstitutional. Besides invoking Article 21 of the Constitution and asserting that capital punishment did not serve any social purpose, it was argued

<sup>21</sup> (1980) 2 SCC 684; 1980 SCC (Cri) 580; AIR 1980 SC 898.

<sup>22</sup> *Supra* N. 7.

<sup>23</sup> *Supra* N. 9.

that the Law Commission's 35<sup>th</sup> Report of 1967, which the majority opinion cited in support of the capital punishment in *Bachan Singh*<sup>24</sup> ought not to continue to guide the Court since lot of time has elapsed since then. The Court rejected the contentions and held:

“The death penalty has a deterrent effect and it does serve a social purpose....A judicial notice can be taken of the fact that the law and order situation in the country has not only improved since 1967 but has deteriorated over the years and is fast worsening today.”

The court explained the concept of '*rarest of rare cases*' in *Mohammed Chaman v. State*<sup>25</sup>. The Court outrightly rejected the idea of laying down standards and norms before an act of murder takes place. The Court observed:

“.....Such standardization is well-nigh impossible. Firstly, the degree of culpability cannot be measured in each case; Secondly, criminal cases cannot be categorized, there being infinite, unpredictable and unforeseeable variations; thirdly, on such categorization, the sentencing process will cease to be judicial, and fourthly, such standardization or sentencing discretion is a policy matter belonging to the legislature beyond the court's function.”

The Court also laid down certain guidelines to ascertain the *rarest of rare cases*, and according to it the factors that are to be considered are, the manner of commission of murder; motive for commission of murder; antisocial or socially abhorrent nature of crime; magnitude of crime<sup>26</sup>; and personality of the victim of murder. Since then, the Supreme Court has been following the principles laid down in the above two cases. Recently, on April 8, 2005, a Division Bench of the Hon'ble Supreme Court in *Holiram Bordoloi v. State of Assam*<sup>27</sup> dismissed the appeal and upheld the Assam High Court's decision of death penalty to the appellant. Hon'ble Justice K.G. Balakrishnan analytically applied the above-discussed guidelines on the facts of the present case.

## **VI. ARGUMENTS FROM BOTH PERSPECTIVES: FOR AND AGAINST THE DEATH PENALTY**

With the increasing significance of human rights, individual liberties and civil society, there has been an international trend towards abolition of death penalty. The Supreme Court has repeatedly held that the death penalty is not unconstitutional and does not violate Article 21 of the Constitution. The Apex Court, however, has made its

<sup>24</sup> *Supra* N. 20.

<sup>25</sup> (2000) 2 SCC 29: 2001 Cr LJ 725 (SC).

<sup>26</sup> In *Anshad v. State of Karnataka*, (1994) 4 SCC 381, Dr A.S. Anand, J. held that the number of persons murdered is a consideration but that is not the only consideration for imposing death penalty unless the case falls in the category of '*rarest of rare*' cases.

<sup>27</sup> (2005) 3 SCC 793.

intentions clear by refusing to define clearly as what constitutes the '*rarest of the rare cases*' and left it to the discretion of the judges hearing the case despite knowing that the same would lead to a differing set of results. Therefore, it is vividly clear that the judges have been awarding death sentence according to their own scale of values, social philosophy and exercise of judicial discretion as per the facts of the cases. There are some very strong arguments for and against abolition of the death penalty in India and these are discussed as follows:

### A. Arguments in Favour of Abolition of Capital Punishment

#### i. Ambiguity and lack of uniformity in what constitutes the '*rarest of the rare cases*'

One of the arguments is:<sup>28</sup>

“... though the court was shocked by the manner of the offence and the fact that the security guard had raped and murdered an 18 year old girl, in case of *Dhananjoy Chatterjee*. In *Soni Thomas's* case, the Supreme Court overturned the death penalty given in the case of rape and murder of an 11 year old girl by the co-paying guest, and in *Mohd Chaman's case*<sup>29</sup>, the Court gave a life sentence for the murder and rape of a one and half year old girl. The murders were all equally brutal and shocking and arguably fulfilled the '*rarest of the rare*' criteria, but the court for reasons recorded in the judgment did not deem fit to give capital punishment. This difference in the political and legal understanding of the judges is most starkly seen in *Krishna Mochi's case*<sup>30</sup>. In this case, Justice M.B. Shah acquitted the accused for insufficiency of evidence and the majority, but Justices B.N. Agarwal and Arijit Pasayat not only found the evidence sufficient to convict but also enough to put the accused to death. According to the judges, the offence by militants which has been described by them as “caste war between haves and have-nots” was one of extreme depravity and proportional to the crime. In *Raja Ram Yadav v. State of Bihar*<sup>31</sup>, the Supreme Court held that in the case of a feud between Rajputs and Yadavs the retaliatory killings by Yadavs could not be held to be deserving of death penalty. Similarly in *Ramji Rai v. State of Bihar*<sup>32</sup> the Supreme Court held that a case of triple murder by a mob by chopping off the bodies of the victims was not the *rarest of rare cases*. In *Kishori v. State (NCT) of Delhi*<sup>33</sup>, the Supreme Court commuted the death of the accused who had murdered three members of a family during the Sikh riots in Delhi.”

<sup>28</sup> Sakharani, Monica and Adenwalla Maharukh, (2005): “Death Penalty: case for its Abolition”, Economic and Political Weekly, Vol. XL No. 11. pp. 1023-1026.

<sup>29</sup> 2000 SOL Case No 705.

<sup>30</sup> 2002 Cr LJ 2645.

<sup>31</sup> 1996(9) SCC 287.

<sup>32</sup> 1999 SOL Case No 633.

<sup>33</sup> 1999 SOL Case No 760.



The judgments do not provide a clue as to what constitutes the '*rarest of the rare cases*'. The impossibility of laying down guidelines could lead to an arbitrariness of the decision and also amount to cruel and degrading punishment. The rationale of proportionality of the crime and aggravating circumstances in practice have no objectivity as one cannot objectify that 'this' minus 'that' equals death.

### **ii. Capital Punishment is cruel, degrading and disproportionate**

Cesare Beccaria wrote in 1764<sup>34</sup> that capital punishment is founded on vengeance and retribution, and not on reformation of the criminals and prevention of future crimes, which is the purpose of punishment, *i.e.*, the deterrence argument. There is considerable evidence to support this argument. Scientific studies have consistently failed to find convincing evidence that the death penalty deters crime more effectively than other punishments. The most recent survey of research findings on the relation between the death penalty and homicide rates, conducted for the United Nations in 1988 and updated in 2002, concluded that "it is not prudent to accept the hypothesis that capital punishment deters murder to a marginally greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment".<sup>35</sup> It also concluded that "The fact that the statistics... continue to point in the same direction is persuasive evidence that countries need not fear sudden and serious changes in the curve of crime if they reduce their reliance upon the death penalty".<sup>36</sup> Thus there is no evidence to support that crime rates decrease with the imposition of the death penalty.

Recent crime figures from abolitionist countries fail to show that abolition has harmful effects. In Canada, the homicide rate per 100,000 population fell from peak of 3.09 in 1975, the year before the abolition of the death penalty for murder to 2.41 in 1980, and since then it has declined further. In 2002, 26 years after abolition, the homicide rate was 1.85 per 100,000 population, 40 per cent lower than in 1975.<sup>37</sup>

### **iii. Fallibility of Judgment in case of Capital Punishment**

The abolitionists are opposed to death penalty for reasons that utilitarian support and also for reasons of fallibility of judgment. A judgment being given by human beings based on evidence produced in courts, the possibility of human error cannot be ruled out and the irreversibility of death penalty makes it dangerous and opposed to the principles of proportionality. As human justice remains fallible, the risk of executing the innocent will never be eliminated. Justice P.N. Bhagwati in his dissent in *Bachan Singh's*<sup>38</sup> case has made two astute observations. Firstly, that it

<sup>34</sup> Cesare Beccaria, *On Crimes and Punishment* (1764), Trans H. Paolusci (1963), Indianapolis: Bobbs-Merrill.

<sup>35</sup> Roger Hood, *The Death Penalty: A worldwide Perspective*, Oxford University Press, Third Edition, 2002, p. 230.

<sup>36</sup> *Ibid.* p. 214.

<sup>37</sup> <http://web.amnesty.org/pages/deathpenalty-facts-eng>.

<sup>38</sup> *Supra* N. 20.

is impossible to eliminate the chance of judicial error. Secondly, that the death penalty strikes mostly against the poor and deprived sections of society.

**iv. Unfair Distribution of Punishment: Death Penalty discriminates between the privileged and the underprivileged-**

Justice Bhagwati in *Bachan Singh's (supra)* case pointed out in his dissent that death penalty strikes most against the poor and deprived sections of society. Most of the convicted persons are poor and illiterate, who cannot afford a competent lawyer. The defence lawyers provided by the State are often incompetent or do not take serious interest in the case. To quote Justice O. Chinnappa Reddy, experience shows that the burden of capital punishment is upon the ignorant, the impoverished and the underprivileged<sup>39</sup>. Unfair distribution of punishment is highlighted by bringing into focus the irrational racial discrimination in the USA. It writes<sup>40</sup>,

“... those who kill white persons are considerably more likely to be sentenced to death than those who kill blacks, regardless of the race of the defendant. Though only 50 per cent of homicidal victims are whites, statistics show that 80 per cent of those executed in US since 1977 were executed for having killed a white person.<sup>41</sup> This racial discrimination is further revealed by the fact that out of the 749 persons who were executed in the US between 1977 and the end of December 2001, only 11 were white persons who had killed black victims.<sup>42</sup> Moreover, the death sentence is rarely awarded when the murder victim is black: a study conducted in Texas in the 1980s observes that 13.2 per cent of black persons who killed whites were sentenced to death whereas only 2.4 per cent of whites who had killed black persons were accorded capital punishment. These figures belie the assumption that the judiciary is above bias and public pressure.”

Gary Slapper<sup>43</sup> points out that more deaths have taken place due to occupational hazards, due to negligence of private corporations than due to homicide. Most of the former were foreseen but neglected. One could illustrate this argument, with the glaring case of callous negligence on part of the Union Carbide Management in Bhopal, which resulted in the death of hundreds of innocent souls. Most of these

<sup>39</sup> “In *Bishnu Deo Shaw v. State of West Bengal*, AIR 1979 SC 964, O. Chinnappa Reddy, J. defined 'special reasons' as to those reasons which are special with reference to the offender, with reference to the constitutional and legislative directives and with reference to the times, that is, with reference to contemporary ideas in the fields of criminology and connected sciences, etc.

<sup>40</sup> Sakharani, Monica and Adenwalla Maharukh, (2005), *Op.cit.*

<sup>41</sup> Amnesty International: USA (1995). as quoted in Sakharani, Monica and Adenwalla Maharukh, (2005).

<sup>42</sup> NAACP Legal Defence and Educational Fund Inc. as quoted in Sakharani, Monica and Adenwalla Maharukh, (2005).

<sup>43</sup> Gary Slapper, “Corporate Manslaughter: An Examination of the Determinants of Prosecutorial Policy’ (1993) 2 *Social and Legal Studies* 423 at 430. as quoted in Sakharani, Monica and Adenwalla Maharukh, (2005).

deaths can be considered more calculated and cold-blooded than many 'murders', which are not even prosecuted for. The definition of crime as an individual wrongdoing where every person is punished for his wrong doing, requiring the requisite *mens rea* allows most corporate crimes to go unpunished. As Slapper puts it<sup>44</sup>,

“In orthodox morality, intention to do wrong is regarded with greater abhorrence than recklessness as to whether or not harm occurs, but as Reiman (1979: 60) has argued, a reverse formula can be just as cogent: if a person intends doing someone harm there is no reason to assume that he or she poses a wider social threat or will manifest a contempt for the community at large, whereas if indifference or recklessness characterizes the attitude a person has towards the consequences of his or her actions then he or she can be seen as having a serious contempt for society at large.”

#### **v. Long delay in execution**

It is an undisputed fact that litigation in India is a very time consuming affair. Extensive delay in the execution of a sentence of death does not serve any kind of purpose and is sufficient to invoke Article 21 and demand its substitution by the sentence of life-imprisonment.<sup>45</sup>

#### **vi. Reformatory approach**

In *Narotam Singh v. State of Punjab*<sup>46</sup> the Supreme Court has taken the following view:

“Reformatory approach to 'punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and to secure social justice.”

#### **vii. Moral Grounds**

By allowing death penalty morally nothing is achieved except more death, suffering and pain. Secondly, why should a person be allowed to die a quick, almost painless death if he murdered another person violently? Instead he must languish in prison up to his natural death. In fact, if the social values really mean that killing is wrong, then the society must abolish death penalty. Death penalty legitimizes an irreversible act of violence by the state.

### **B. Arguments against Abolition of Capital Punishment**

#### **i. Delay in executions is no ground for abolition**

A considerable time between imposition of the capital punishment and the actual execution is unavoidable, given the procedural safeguards required by the

<sup>44</sup> *Ibid.*

<sup>45</sup> *Supra* N. 15.

<sup>46</sup> AIR 1978 SC 1542.

courts in such cases. This is in fact in favour of the convict. In *Sher Singh v. State of Punjab*<sup>47</sup>, the Supreme Court refused to follow the rationale of *T.V. Vatheeswaran's* case<sup>48</sup> for commuting death penalty to a sentence of life imprisonment.

## ii. Appropriate Punishment is Imperative for Security in Society

In *Mahesh v. State of M.P.*<sup>49</sup>, the Apex Court expressing a fear observed:

“... to give the lesser punishment for the appellants would be to render the justicing system of this country suspect. The common man will lose faith in courts. In such a case, he understands and appreciates the language of deterrence more than the reformatory jargon.”

Justice demands that courts should impose punishment befitting the crime, so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminals but also the rights of the victims of the crime and also the society at large while considering imposition of appropriate punishment.<sup>50</sup> In this connection, it is pertinent to note the observation of the Supreme Court in *Ravji v. State of Rajasthan*<sup>51</sup>, which is as follows:

“The court would be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society, to which the criminal and victim belong.”

## iii. Chances of mistake by the Judiciary are not possible

Firstly, the Apex Court has confined the imposition of capital punishment to the *rarest of rare cases*<sup>52</sup> so few people, after long careful proceedings, are awarded death penalty. Secondly, the processes of ascertaining guilt and awarding sentence are separated by distinct hearings.<sup>53</sup> The sentence awarded by the Session Courts is subject to automatic confirmation by the High Court of the concerned state.<sup>54</sup> It must be borne in mind that, 95% cases go to the Apex Court.<sup>55</sup> Even thereafter, these cases are subject to an endless procession of clemency appeals, reprieves and pardons, etc. under Articles 72 and 161 of the Constitution of India. This eliminates even a single atom of judicial error, which might have remained after such a long purification process.

<sup>47</sup> *Supra* N. 14.

<sup>48</sup> *Supra* N. 15.

<sup>49</sup> AIR 1987 SC 1346; (1987) 3 SCC 80.

<sup>50</sup> Dr. A. S. Anand, J. in *Dhananjay Chatterjee v. State of West Bengal*. (1994) 2 SCC 220.

<sup>51</sup> (1996) 2 SCC 175; 1996 SCC (Cri) 225.

<sup>52</sup> AIR 1980 SC 898; (1980) 2 SCC 684. & AIR 1983 SC 957; (1983) Cr LJ 1457.

<sup>53</sup> The Code of Criminal Procedure 1973, Section 235 (2).

<sup>54</sup> *Ibid.* Section 366.

<sup>55</sup> Should Capital Punishment be Abolished? The Times of India, June 27, 2004. *op.cit.*

#### **iv. Arguments, based on the theories of Punishment Deterrence theory<sup>56</sup>**

If a convict is imprisoned for life, there is no deterrence for him to kill others since there is no harsher punishment than life-imprisonment, which already has been given to him. If one assumes that death penalty will not operate as deterrence on some criminals then no other lesser punishment can logically deter them too.

#### **v. Legal Arguments against Abolitionists**

Various arguments raised by the abolitionists, may be well-counteracted in the light of following statutory provisions and judicial precedents.

**a. Crimes under grave and sudden provocation:** For crimes committed in the heat of the moment, death penalty is either not possible or is not awarded.<sup>57</sup>

**b. Fundamental Right to Life:** In this regard, Article 21 of our Constitution clearly provides: "No person shall be deprived of life or personal liberty except according to procedure established by law". The implied meaning of Article 21 is that a person can be deprived of his life or personal liberty according to procedure established by law. Moreover, the Supreme Court in a catena of decisions has held such deprivation to be constitutional. If death penalty is infringement of the Fundamental Right to life, then logically, why should a convicted person also be given life sentence since they also have right to freedom along with right to life?<sup>58</sup>

#### **vi. The Stockholm Declaration, 1977**

The above Declaration did not stand for the abolition of death penalty but required that the penalty ought not to be awarded arbitrarily and must be confined to only to extremely heinous crimes. Thus, the Indian position is identical to the Declaration by virtue of Article 20 and 21 of the Constitution and Section 354 (3) of the CrPC.<sup>59</sup>

#### **vii. Moral Grounds**

It is a misconception that death penalty undermines the value of human life. In fact, it is by exacting the highest penalty for taking of human life that we affirm the highest value of human life.

#### **viii. Murder v. Capital Punishment**

Murder and execution are morally equivalent because both of them kill people. But this does not make sense. If that were so, it could be logically said that wrongful confinement<sup>60</sup> of an innocent person by a civilian and imprisonment of an offender by the state are morally equivalent, because they both confine a person.

<sup>56</sup> *Praveen Kumar Jain*, 'Should Capital Punishment be Given Capital Punishment? - A Capital Question', 1 DLR (S) (2004).

<sup>57</sup> The Indian Penal Code, 1860, Sec.300 Exception 1.

<sup>58</sup> The Constitution of India, Art. 19.

<sup>59</sup> AIR 1980 SC 898; (1980) 2 SCC 684.

<sup>60</sup> The Indian Penal Code, 1860, Section 300 Exception 1. & Section 299.

'Murder' term is used for unlawful killings only and capital punishment by the judiciary is not unlawful<sup>61</sup>. Moreover every type of killing even by civilians is not murder.<sup>62</sup> Thus there is a fundamental legal difference between killing innocent people (homicide) and capital punishment for murder.

## VII. CONCLUSION

In the wake of above discussion and ground realities of present day world following conclusions can be drawn:

The process of globalisation has made the world smaller and brought many problems also. One of the serious threats arising recently is the phenomenon of global terrorism. When terrorists groups strike at free will at innocent civilians and institutions of civil society then all arguments in favour of abolition of death penalty fail. These are exemplified by the December 2001 terrorist attack on the Indian Parliament, attack on Akshardham Temple, 9/11 attack on WTC in USA, train bombings at Madrid, bomb blasts in public transport in London, killing of an IIT professor emeritus in Bangalore, bomb blasts at holy places such as Varanasi temple, Mosque in Andhra Pradesh, Ajmer Sharif Dargah and at the Lord Hanuman Temple in Jaipur in May 2008. Since most of these strikes are made by suicide squads (*Fidayeen*), hence, if such culprits or their kingpins are caught, then death penalty is the only mechanism to save the civil society from the unscrupulous ideologies or evil designs of hate mongers. Does any issue of human rights stand validity for these terrorist outfit runners. In the wake of modernization, globalisation and advancement of extreme material values, there is a relative erosion of moral pressure of the community, family, religion, etc. on the individual. This has led to a situation where severe penalties such as death penalties stand justified.

In a world with so much of acute disparity in terms of development between nations, no rhetoric can work or bring reformation but for severe punishments such as death penalty. For instance, there is stark contrast between the populations living in developed countries vis-à-vis populations in sub-Saharan countries, where obscurantism, superstitions, extreme communal hatred and prejudices operate due to illiteracy, poverty, deprivation and fundamentalism. How well severe penalties work in such societies is well evident from the extremely low crime rate in Islamic countries of the Middle East. Even within India, the kind of killings take place in the name of religion (Graham Staines Murder Case), superstition (lynching of so called 'witches' in rural Rajasthan and Haryana), caste killings in Bihar, female infanticide and dowry deaths, the abolition of death penalty will be against all social, legal, moral, national, civic and cultural interests.

<sup>61</sup> *Ibid.* Section 77.

<sup>62</sup> *Ibid.* Chapter IV (General Exception) and Section 299.

On one hand, there is a demand for abolition of death penalty and on the other hand, there is an increased rhetoric for capital punishment for rape, heinous crimes against women, trade and trafficking of women and narcotics. Much of the arguments for provisions of death penalty have strong rationale on moral and social grounds. Therefore, keeping in mind the maxim '*Salus populi est suprema lex*<sup>63</sup>' a proper approach to issue perhaps will be, that death penalty must be retained for incorrigibles and hardened criminals but its use should be limited to the '*rarest of rare cases*'. The courts may make use of death penalty sparingly but its retention on the statute book seems necessary as a penological expediency. Therefore, it can be safely concluded that death penalty should not be subjected to untimely death penalty.

<sup>63</sup> The Latin maxim '*Salus populi est suprema lex*' which means the welfare of the public is the supreme law, is one of the well known laws which deals with public interest. To this maxim all other maxims of public policy must yield for the object that "all laws are to promote the general well being of society". In other words, "regard for the public welfare is the highest law". It also stands for *Let the welfare of the people be the supreme law*.

