CHAPTER V

ABOLITION OR RETENTION OF DEATH PENALTY—A DEBATE

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CHAPTER V

ABOLITION OR RETENTION OF DEATH PENALTY—A
DEBATE

1. ABOLITION OF DEATH PENALTY

‘God alone can take life because he alone gives it’.

Mahatama Gandhi

Exponents of utilitarianism like Bentham and Cesar Beccaria insisted that punishment is an evil. Cesare Beccaria, the stallion philosopher and reformer was the first to propose that death penalty sought to be abolished. He further added that the State has no right to put an individual to death because the life of the individual was not surrendered to it as a part of the consideration of social contract.1

“Thou shall not kill” said Jesus.

Victor Hugo further giving his message on death penalty said: We shall look upon crime as a disease. Evil can be treated by love and compassion, charity instead of anger; the change will be simple, impressive and grand. Embraced arms and love should replace scaffolding of execution. So the reason, conscious and experience is on the side of abolitionists.

This ideology is further reinforced by Mahatama Gandhi, when he said “hate the sin and not the sinner” in other word destruction of individual can never be a virtuous act. So accepting the Gandhian Therapy, the bench in Ediga Anamma Case2 sought to reinforce reformist, rationality and human punitive treatment, said for first time:

In any scientific system which turns the focus, at the sentencing stage, not only the crime but also the criminal, and seek to personalize the punishment so that the

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1 Crime and Punishment: Quatum of Punishment.
2 AIR 1974 sc 799
reformatory component is as much operative as the deterrent element, it is essential that facts of a social and personal nature, sometime altogether irrelevant if not injurious at the stage of fixing the guilt, may have to be brought to the notice of the court when the actual sentence is determined. It cannot be emphasized too often that crime and punishment are functionally related to the society in which they occur and Indian conditions and stages of progress must dominate the exercise of judicial discretion in the case.³

As per justice Bhagwati in the case of Bachan Singh V. State of Punjab⁴ death penalty for murder under section 302 I.P. C. read with section 354 (3) Cr.P.C., is arbitrary and unreasonable because of many reasons. Firstly because it was cruel, inhuman, disproportionate and excessive, Secondly, it was totally unnecessary and did not serve any social purpose toward the advancement of any constitutional value. Thirdly, the discretion conferred on the court to award death penalty was not guided by any policy or principle laid down by the legislature but was wholly arbitrary.

As per Justice Bhagwati’s (Minority View)⁵

No proper guidelines are provided by the legislature for imposition of death penalty. Section 302 IPC and section 354 (3) Cr.P.C are violative of Articles 14,21 of the constitution of India.⁶

Death penalty does not serve any legitimate end of punishment, since by killing the murderer it totally rejects the reformative purpose and it has no additional deterrent effect which therefore, is not justified by deterrence theory of punishment. Though retribution and denunciation is regarded by some as a proper end of punishment, but it cannot have any legitimate place in an enlightened philosophy of

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³ 2004 Criminal Law Journal “Death Sentence: repeal or Retention
⁴ AIR 1982 SC 1325
⁵ Ibid
⁶ Section 302 IPC: Punishment for murder and Section 354(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 sentence of death, the special reasons for such sentence.
punishment. Death Penalty has no rational nexus with any legitimate penological goal or any rational penological purpose and it is arbitrary and irrational and hence irrelative of Article 14 and 21 of the Indian Constitution.\(^7\)

The objective of United Nations has been and is to maintain and achieve the standard set by the world body i.e. Death Penalty should ultimately be abolished in all countries. This normative standard set by the world body must be taken into account while determining whether the death penalty can be regarded as arbitrary, excessive and unreasonable so as to be constitutionally invalid.\(^8\)

The Constitution does not in so many terms prohibit capital punishment. In fact, it recognises death sentence as one of the punishment or penalties which can or may be imposed by law. From the legislative history of relevant provisions of penal code and criminal procedure code it is found that in our country there has been a gradual shift against the imposition of death penalty. Life imprisonment is now a rule and it is only in exceptional cases and that too for special reasons, that death sentence can be imposed. The legislature has not given any guidance as to what are those exceptional cases in which, deviating from the normal rule, death sentence may be imposed. This is left entirely to the unguided discretion of the court, a feature, which has lethal consequence so far as the constitutionality of death penalty is concerned.\(^9\)

Death Penalty is irrevocable, it cannot be recalled. If a person is sentenced to imprisonment, even if it be for life and subsequently found that he was innocent and was wrongly convicted, he can be set free. But that it is not possible where a person has been wrongly convicted and sentenced to death. The execution of the sentence of death in such a case results in serious miscarriage of justice.\(^10\)

Judicial errors in imposition of death penalty would indeed be a crime beyond punishment. This is the drastic nature of death penalty, terrifying in its consequence, which has to be taken into account in determining its constitutional validity. Death is barbaric and inhuman in its effect, mental and physical upon the condemned man and

\(^7\) Para 65 (Bachan Singh's Case)
\(^8\) Ibid Para 18,19
\(^9\) Ibid Para 22
\(^10\) Ibid Para 24
is positively cruel. Its psychological effect on the prisoner in the death row is disastrous.\textsuperscript{11}

Penological goals also do not justify the imposition of death penalty for the offence of murder. The prevailing standards of human decency are also incompatible with death penalty. It is difficult to see how death penalty can be regarded as proportionate to the offence of murder, merely because the murder is brutal, heinous or shocking.\textsuperscript{12}

The historical course through which death penalty has passed in the last 150 years shows that the theory that death penalty acts as a greater deterrent than life imprisonment is wholly unfoundable\textsuperscript{13}

There being no legislative policy or principle to guide the court in exercising its discretion in this delicate and sensitive area of life and death, the exercise of the discretion of the court is bound to vary from judge to judge. What may appear as special reasons to one judge may not appear to another and the decision in a given case whether to impose a death sentence or to let off the offender only with life imprisonment world, to large extent depend upon who is the judge called upon to make the decisions. The exercise of discretion whether to inflict death penalty or not depends to a considerable extent on the value system and social philosophy of the judges constituting the Bench.

The only yardstick may be said to have been provided by the legislature is that life sentence shall be rule and it is only in exceptional cases for special reason that death penalty may be awarded. But it is no where indicated by the legislature as to what would be regarded as ‘special reasons’ justifying imposition of death penalty. It is difficult to appreciate how a law which confers such unguided discretion on the court without any standard or guidelines on so vital issue as the choice between the life and death can be regarded as constitutionally valid\textsuperscript{14}

\textsuperscript{11} Ibid Para 25, 26
\textsuperscript{12} Ibid Para 37, 38
\textsuperscript{13} Ibid Para 47,50,60,62
\textsuperscript{14} Ibid Para 73
Death Penalty in its actual operation is discriminatory, because it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape from its clutches. This circumstance also adds to the arbitrary and capricious nature of the death penalty and renders it unconstitutional as being violative of Article 14 and 21 of the Constitution.\textsuperscript{15}

Justice Bhagwati is morally against death penalty, as he himself expressed that 'I regard men as an embodiment of divinity and therefore, morally I am against death penalty.'

No doubt that the constitutionality of death penalty was challenged and accepted in \textit{Jagmohan Singh's Case}\textsuperscript{16} but it does not mean that the same cannot be rejudged and altered. Moreover, in the present case there are two other supervening circumstances which justify reconsideration of the decision in Jagmohan's Case.\textsuperscript{17}

\textbf{a)} Introduction of the new Code of Criminal Procedure in 1973 which by section 354 (3) has made life sentence the rule in case of offences punishable with death and in the alternative imprisonment for life and provided for imposition of sentence of death only in exceptional cases for special reasons.

\textbf{b)} The dimension of Article 14 and 21 was unfolded by the Supreme Court.\textsuperscript{18} This dimension renders the death penalty provided in section 302 IPC read with section 354 (3) of the Code of Criminal Procedure vulnerable to attack on a ground not available at the time when this case\textsuperscript{19} was decided.

Further more; there is one another significant circumstances, that since case was decided, India has ratified two international instruments on human right\textsuperscript{20} and particularly the \textbf{INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS}. We are therefore, not bound by the decision as given by the court in the Jagmohan Singh's Case.\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{15} Ibid Para 78
\item \textsuperscript{16} Jagmohan Singh V. State of U.P. AIR 1978 SC 597 at page 616-617
\item \textsuperscript{17} Ibid
\item \textsuperscript{18} Maneka Gandhi V. U.O.I. AIR 1978 SC 597 at page 616-617
\item \textsuperscript{19} Jagmohan Singh V. State of U.P. AIR 1973 SC 947
\item \textsuperscript{20} International Covenant on civil rights (ICESCR)
\item \textsuperscript{21} Supra note 19
\end{itemize}

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INTERNATIONAL TREND REGARDING DEATH PENALTY

There are quite a large number of countries which have abolished death penalty de jure or in any event, de facto. Report of Amnesty International on ‘The Death Penalty’ points out that the following countries have abolished the death penalty for all offences:

Australia, Brazil, Colombia, Federal Republic of Germany, Honduras, Iceland, Luxembourg, Costa Rica, Denmark, Dominican Republic, Ecuador, Fiji, Finland, Norway, Portugal, Sweden, Uruguay and Venezuela and according to this report Canada, Italy, Malta, Netherlands, Panama, Peru, Spain, and Switzerland have abolished death penalty in time of peace but retained it for specific offences committed at the time of war. The report also states that Algeria, Belgium, Greece, Guyana, and Upper Volta have detained the death penalty on their statute book but they did not conduct any executions for the period from 1973-30th May 1979. Even in United States of America there are several states which have abolished death penalty. In United Kingdom too, death sentence stands abolished from the year 1965 save and except for the offences of treason and certain forms of piracy and offences committed by members of armed forces of during war time. An attempt was made in U.K. in December, 1975 to re-introduce death penalty for terrorist offences involving murder, but it was defeated in the House of Commons and again a similar motion moved by a conservative member of Parliament that “the sentence of capital punishment should again be available to the courts.” was defeated in the House of Commons in a free vote in 1979. In these two decisions the Privy Council emphatically stressed that the award of death penalty is violative not of human rights or fundamental rights.

Death Penalty has been abolished either formally or in practice in several other countries such as Argentine, Bolivia, most of the federal States of Mexico, Nicaragua, Israel, Turkey and Australia do not use the death penalty in practice. There is a definite trend in most of the countries of Europe and America towards abolition of death penalty.

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22 Report by Amnesty International, issued on 30th May 1979
23 Ibid.
24 Eston Baker
United Nation on Death Penalty

United Nation has taken great interest in the abolition of death penalty. In the charter of United Nation signed in 1945, the founding states emphasized the value of individual’s life, stating their will to “achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction of race,sex, language or religion.”

*Though San Francisco Conference* did not address itself to the issue of death penalty specifically, the provisions of the charter provided the way for further action by United Nations bodies in the field of Human Rights, by established a Commission of Human Rights and in effect charged that body with formulating an International Bill of Human Rights. Mean while the *Universal Declaration of Human Rights* was adopted by the General Assembly in its Resolution of 10th December, 1948. Article 3 and 5 of the declaration (UDHR) provides:-

**Articles 3:** Every one has the right to life, liberty and security of person.

**Article 5:** No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

To the same effect is the **Article 6** of the Covenant as finally adopted by the General Assembly in its resolution, provide as follows:

a) “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

b) In countries which have not abolished death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

26 Resolution of UN Charter.
27 Human Right,General Assembly its Resolution 217-A (III) of 10th Dec, 1948.
28 Ibid Article 3.
29 Ibid Article 5.
c) When deprivation of life constitutes the crime of genocide. It is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

d) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, Pardon or commutation of the sentence of death may be granted in all cases.

e) Sentence of death shall not be imposed for crimes committed by persons below the 18 years of age and shall not be carried out on pregnant women.31

f) Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State Party to the present covenant

Article 7 of the Covenant corresponding to Article 5 of the Universal Declaration of Human Rights reaffirmed that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Regarding the deterrent effect of death penalty32 it contained a cautious statement. "that the deterrent effect of death penalty is to say the least, not demonstrated." The Ancel Report along with the Report of Adhoc Advisory Committee of Experts on the Preventive of Crime and the Treatment of the Offenders was examined in January, 1962 and was presented to the Economic and social Council at its 35th session.33 By this Resolution the Council urged the member governments to review the efficacy of capital punishment as a deterrent to crime in their countries and to conduct research into this subject to remove the punishments from the criminal law concerning any crime to which it is not applied or to which there is no intention to apply death penalty. It clearly shows that there was no evidence as to the deterrent effect of death penalty that is why further study and research was suggested.

31 Followed by Indian Judiciary in Nalini V. State of T.N. AIR1999 SC 2640
32 French jurist, Marc Ancel," Capital Punishment". The first major survey of problem from international stand point on the deterrent aspect of death penalty, III Chapter.
33 When its Resolution 934 (XXXV) of 9th April 1963 was adopted.
On the requisition of General Assembly, an American professor, Norval Morris prepared a report through the Economic and Social Council and pointed out that there was a steady movement towards legislative abolition of capital punishment and observed that:

With respect to the influence of the abolition of capital punishment upon the incidence of murder, all of the available data suggest that when the murder rate is increasing, abolition does not appear to hasten the increase, where the rate is decreasing abolition does not appear to interrupt the decrease, where the rate is stable, the presence or absence of capital punishment does not appear to affect it.34

The Economic and Social Council in its 50th session in 1971, contained a finding that, most countries are gradually restricting the number of offences for which death penalty is to be applied and a few have totally abolished capital offences even in war times. This discussion in the council led to the adoption of Resolution 1574 (L) of 20th May 1971 which was reaffirmed by the General Assembly Resolution 2857 (XXVI) of 29th December, 1971. This latter resolution clearly affirmed that: In order to guarantee fully the Right to Life35, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed with a view to the desirability of abolishing this punishment in all countries. The General Assembly at its 32nd Session adopted Resolution 32/61 36 and this Resolution reaffirmed the desirability of abolishing capital punishment in all countries.

Thus, the United Nations has gradually shifted its front from the mute observer to a position favouring the eventual abolition of death penalty. The objective of United Nation has been that capital punishment should ultimately be abolished in all countries.

34 Observation through its report by Norval Morris, an American Professor on Criminal Law and Criminology, "Capital Punishment Developments 1961-1965.
35 Article 3 of the Universal Declaration of Human Rights.
36 Adopted on 8th December, 1977.
This normative standard set by the world body must be taken into account in determining whether the death penalty can be regarded as arbitrary, excessive and unreasonable so as to be constitutionally invalid.

**Death Penalty in Europe**

Progress towards an eventual ending of executions in the European region has continued during the past decade. 27 of the 35 countries have now entirely abolished death penalty. Luxembourg and Norway abolished death penalty for all offence in 1981, the Netherland in 1982 and the German Democratic Republic (GDR) and Liechtenstein in 1987.

The GDR abolishing the death penalty in 1987 stated that abolition was in accordance with the recommendations of the United Nation for the gradual removal of death penalty from the lives of Nations and that by abolishing the penalty, the GDR was declaring its position on, “the right of humanity to a peaceful dignified life and on the preservation of human rights as a whole.”

Unprecedented debate on the death penalty has occurred in the USSR in December, 1988, draft penal legislation was published which reduced the number of offence carrying the penalty death from eighteen to six.

Debate on death penalty occurred in Poland and Hungary. Discussion of death finally continued in Yugoslavia in 1988. In March 1988, the President of Slovenia announced that the death penalty in Slovenia would soon be abolished.

The 1st binding International agreement to abolish death penalty in for peace time offences is the 6th protocol of EUROPEAN CONVENTION ON HUMAN RIGHTS that came into force in 1985. As on January 12, 1989, 12 of the 22 member states of the Council of Europe had ratified the protocol. These are Australia, Denmark, France, Iceland, Italy, Luxemburg, Spain, Norway, Portugul, Sweden, Switzerland, Neitherland.

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37 As per the Amnesty International Report.
38 Ibid.
39 12 countries ratified the 6th protocol resolution of 1985 for the abolition of death penalty.
ARGUMENT IN FAVOUR OF ABOLITION OF DEATH PENALTY

We shall look upon crime as disease; evil will be treated in charity instead of anger. The change will be simple, impressive and grand. Embraced arms of lane should replace scaffolding of execution. So the reason, conscious and experience is on the side of abolitionists.40

In the age of Universal Human Rights, the first right of a person is the right to life that society guarantees him. Accordingly, it becomes the first duty of the State to abstain from killing.41

In a publication of the United Nation one of the reasons put forward for abolition of Death Penalty was sanctity of human life. It was argued that since it was wrong to kill, the state should set the example and should be first to respect human life. An execution is a self-mutilation of the state, though the state had admittedly the capacity to defend itself and to command, it is not empowered to eliminate a citizen, and in doing so the state does not erase the crime but repeat it.42

"Thou shall not kill" Jesus Christ

A deep reverence for human life is worth more than a thousand executions in the prevention of murder and is in fact the great security of human life. The law of capital punishment while pretending to support this reverence does only lip service to it but in fact tends to destroy it, Retention of death penalty is not only an anachronism in the penal laws but it is a positive hindrance to right thinking upon the whole question of the treatment of crime and its abolition has become urgently needed step in the evolution of our penal method.43

Crimes of violence are on the increase because the sense of sanctity of life is lowering day by day. After going through the two world wars and numerous other bloodsheds it may seem a very small matter whether a few worthless human beings who have themselves taken life should live or die. But it is our duty who value

40 Victor Hugo.
41 Marc Ancel, Problem of Death Penalty, Sellin, p.21.
43 M.L. Agarwala, Capital Punishment Abolition Move in India AIR 1958SC Journal section, para 26 p.75
civilization not to depress further these moral and spiritual values but seek to raise them.\textsuperscript{44}

\textbf{P.R. Kapoor}\textsuperscript{45} observed in the Rajya Sabha Debates,

"It will be the creates of Dharma to do away with that which does away with life and thus give people a chance become better improved and giving them a chance to live in amity, brotherhood, love and affection."

According to \textbf{Beccaria}.

"The state has no right to put an individual to death because the life of the individual was not surrendered to it as a part of the consideration of the social contract. He further added, "By disusing death penalty we will prevent it as a crime".\textsuperscript{46}

\textbf{Dr. Annie Besant}, the eminent social reformer, who is world famed for her heroic efforts for the betterment of mankind has rightly observed\textsuperscript{47}

"The Law at the present time says to the murders that you have committed a terrible crime which you should not have done, and then proceeds to punish him by committing that crime itself through capital punishment which is but a legalized murder.

The Abolitionists strengthen their theory on the following points

(a) Death penalty is irreversible; judgment is given according to the falliable process of law by fallible human beings. It may be and actually has been pronounced on innocent people.

\textsuperscript{44} Ibid para 27, p.75.
\textsuperscript{45} P.R. Kapoor, Capital Punishment Abolition, Rajya Sabha Debates, 25\textsuperscript{th} April, 1958. Column 435.
\textsuperscript{46} Bentham Theory of Legislation, p.253-354.
There is no convincing evidence to show that death penalty does act as a deterrent. Its deterrent effect remains unproven. There are various philosophical ideologies and underpinning about the purpose of punishment. It includes among others deterrence, retribution, protecting person, punishing guilty and acquitting the innocent. Among these objectives, deterrence and retribution are prominent. Retribution is often confused with revenge but there are distinct differences. Retribution embodies the concept that an offender should receive what he rightfully deserves.

Deterrence has a two-fold objects:

(i) Relates to specific deterrence. It will deter the individual from committing the same or other offences of any kind in the future.

(ii) It relates to general deterrence. It will deter others, 'that crime does not pay'.

(iii) Retribution is the sense of vengeance is no longer acceptable and reformation of the criminal and his rehabilitation is the primary purpose of the punishment and the imposition of death penalty nullifies that purpose.

(iv) The execution for whatever purpose and whatever means is cruel, inhuman and dehumanizing and degrading punishment.

(v) As now used capital punishment neither performs the utilitarian function claimed by its supporters nor can it be made to serve such function. It is an archaic custom of primitive origin that has disappeared in most of the countries and is withering away in the rest...... As per Thorstein Sellin.

(vi) ‘Successive generation would work out afresh, its view on the problem of crime and its punishment instead of retaining law unchanged, inherited from its predecessors’......... as per Dr. Mannheim Herman.

(vii) The first who contended that the death penalty brutalizes the community. To quote him,
The death penalty cannot be useful because of the example of barbarity it gives to man...it seems to me absurd that the law which punish homicide should themselves commit it.

(viii) Moralists of different persuasion might claim that failure to punish murder by execution is a barbarous and brutalizes the community.\(^{51}\)

One cannot have any empirical data that death penalty can be deterrent than the imprisonment for life. It may be that the most killers do not engage in anything like a cost benefit analysis. They are impulsive and they kill impulsive.\(^{52}\) The paradigm of this kind of murderers cannot be properly accounted for. However, many classic experiments on the effect of corporal punishments on dogs, monkey and other animals have been conducted in psychology laboratories.

Corporal Punishment works and it has been so successful that some animals have starved themselves to death rather than taking the forbidden food. The position with the human beings is not different, it cannot differ because we see in day to day life, as between life and death one loves life. It is the loves of life with sensuous joy of companionship that moves the race and not so much the ideals. One views the death with trepidation. In fact every human being dreads death and it cannot be an exception with those on Death Row. They like all others want to live as long as they can because, the life has its own attraction and cannot have any, since it is the most mysterious of all in this world.\(^{53}\) Similarly, the views of J.J. Chinnapa Reddy and J, Krishna lyer in the cases of Bishnu Deo Shaw \(^{54}\) and Dalbir Singh \(^{55}\) showed a concern over the death sentence. As per J. Chinnappa Reddy in B.D. Shaw’s Case\(^{56}\) while delivering the judgment has emphasized that:

(a) Death sentence is worst against criminal justice, as it rejects the reformation and rehabilitation of offenders as among the most important of criminal justice.

\(^{51}\) Earnest Van dan Hang, “Punishing Criminals” 1975 at p.223.
\(^{52}\) As per Professor Jack. Greenberg.
\(^{53}\) Graeme Newman, “Just and Painful” at p.127.
\(^{54}\) Bishnu Deo Shaw V. State of W.B. AIR 1979 SC 702
\(^{55}\) Dalbir Singh and other V. State of U.P. AIR 1979 SC1384
\(^{56}\) AIR 1979 SC 702

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(b) Death penalty is against the human decency and has been abolished in several countries.

(c) Experience shows that the burden of capital punishment calls more or less on the ignorant and the under privileged.

(d) What is important is not whether death penalty has any deterrent effect on potential murderers but murderers but whether it deters more effectively than the other penalties. Its efficacy as a deterrent is unproven. \(^{57}\)

Justice Krishna Iyer while delivering the judgment in the case \(^{58}\) agreeing with Justice Desai has observed that,

> It may be realised that judicial error leading to innocent man being executed is not to reconcile a reality. Evidence in court and assessment by judges has human limitations. Justice Krishna Iyer has challenged the deterrent effect of capital punishment. He was warned against a ‘monolithic theory’ of deterrence which tends to put all the punitive eggs in the hanging basket.

Justice Sarkaria \(^{59}\) has cautioned,

> A real and abiding concern for the dignity of human life postulated resistance to taking a life through law’s instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

The Indian Penal Code (Amendment) Bill 1978 in clause 125 has proposed the idea of two degrees of murders, namely, the lower degree or the general murders for which the maximum punishment would be imprisonment would be death penalty.

\(^{57}\) As per J. Chinnapa Reddy in the case of Bishnu Deo Shaw at page 355.

\(^{58}\) Dalbir Singh V. Styate of U.P. AIR 1979 SC 1384

Murders under the following situations would be considered as higher degree murders:-

"Whoever commits murder shall:-

(a) If murder has been committed after previous planning and involves extreme brutality" or.

(b) If murder involves exceptional depravity; or.

(c) If the murder is of any member, of the armed forces, of the union or of a member of any police force or of any public servant who was on duty; or

(i) Which 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 whether at the time of such murder he was such member or a public servant, as the case may be, or had ceased to be such member or public servant; or

(d) If a murder is of a person who had acted in the lawful discharged of his duty under section 43 of the Code of Criminal Procedure, 1973 or had rendered assistance to a Magistrate or Police Office demanding his aid or requiring his assistance under section 37 or section 129 of the said code; or.

(e) if a murder has been committed by him, while undergoing sentence of imprisonment for life, and such sentence has become final".

The dowry death cases at one point of time were also considered as crimes that deserve extreme penalty of death.

Justice B.L. Hansaria in Ravinder's Case\textsuperscript{60} discussed this matter in extensive in Apex Court. His conclusion was as follow:

Dowry deaths are blood-boiling, as human blood is spilled to satisfy raw greed which has no limit.

\textsuperscript{60} Ravinder Case (1996) 4 SCC148.
Testing the murder on the ‘rarest of rare’ touchstone, the judgment seems to have taken a new course in its finding and also the reasoning regarding the categorization of the present murder as not a “rarest of rare” type.

Hansaria, J. made the following observations concerning the justification of life sentence awarded by him:

To halt the rising graph, we at one point, thought to maintain the sentence, but we entertain doubts about the deterrent effect of death penalty much though we would have desired annihilation of despicable character like the appellant before us. We therefore commute the sentence of death to one of life imprisonment.61

Now, there is no offence in the Indian Penal Code carrying mandatory punishment of death. Earlier section 303 IPC carrying the mandatory punishment of death has now been declared unconstitutional by the Supreme Court in the case of Mithu V. State of Punjab.62 Now, death sentence is awarded in minuscule member of cases.

Possibility of Mistake

Another important argument advanced in support of the abolition of capital punishment is that it is wrong to inflict an irrevocable penalty because you cannot always be certain that you are inflicting it on the guilty man. Since capital punishment as a deterrent is only to deter others from committing murders, it is obvious that the man to be hanged is used as a means to some end other than his own wellbeing. This notion at once creates a sense of abhorrence to our deep sense of morality; but always an attempt is made to justify the same on the ground of social well-being or interest of the society. But in the face of the possibility of mistake of hanging an innocent man, this justification becomes thin and shaky. Sir Gowers quotes Lord Samuel who went to the heart of the matter in his evidence to the Select committee as follows: “I do not think that one can ever say that no innocent man has been executed for murder in the past, nor we can have an absolute assurance that no innocent man will be convicted and executed in the future. The odds are thousands to

61 Ibid
one against it but that is no consolation for the one".\textsuperscript{63} It is true that judicial system of almost every civilized country have devised means to see that an innocent man is not convicted but as long as human element is there, errors cannot be ruled out and perjury and enemity can send innocent persons to the gallows.

"Moreover it is impossible to dispense with circumstantial evidence. It is seldom that any sane person knowingly commits a crime in the presence of a witness. It is, therefore in many cases the only available and also carries greater reliability. At the same time it is essentially a double edged weapon. It has in the past lead to many miscarriages of justice. Basic fault with all such evidence is that one cannot, howsoever, long or carefully one considers it, be sure of its veracity. The assumption of the truth of a certain inference drawn from facts revealed by such evidence can never be more than an assumption. And it may be an erroneous assumption. Circumstantial evidence does not allow sufficiently for abnormal elements in human nature. The majority of individuals are disposed to behave abnormally in various kinds of circumstances and to accept as evidence by belief that a given person would do something or fail to do something which appears to be a natural outcome of known facts, may lead to a grossly unjust decision. A major defect in circumstantial evidence is also that it lends itself to fabrications with all its danger to the accused.

Lord Coke mentioned a case (3 Inst. C. 104 p. 282) in which a person was chastising his niece who was heard to cry ‘oh good uncle kill me not’. The girl was not heard of later. The case for murder was brought against the uncle and he presented another child in place of his niece before the court. Deception was detected and the uncle was sentenced to death and executed. However, the real girl came home sometimes later explaining that she had run away in fear of battering from the uncle.

In India too, Mr. Justice Brodhurst in delivering his dissentient judgement in Queen Emperor Vs. Gobardhan I.L. R. 9 Allahabad 528 brought to light a case in which two persons were charged for the murder of one Mussamat Kishori at the Agra Sessions in 1885. A corpse had been produced as the corpse of the victim and one of

\textsuperscript{63} Gowers – A life for life, p. 81.
the accused confessed (obviously under torture) his guilt. It was subsequently found that the woman had returned home alive and had given an explanation of her absence.

Shri M. L. Aggarwal in his article ‘Capital Punishment abolition move in India’ appearing in AIR 1958 journal Section page 73 quotes two other such cases also. In 1923 in Manipuri District, four brothers were challaned and omitted to Sessions for the murder of their sister. They were all made to confess their guilt and the Assessors had given their verdict of guilty. Sessions judge was on the point of delivering his judgement when District Magistrate and Superintendent of Police brought to the Sessions Court the real woman for whose murder the four accused had been tried.

A touching case related to Shri M. L. Aggarwal and as recorded by him in the said article, is that of execution of eight persons. In the village there were two rival factions and person murdered had influence with both sides. He cleverly used to incite both sides against each other and thereby make them fight. One faction got to know of this position and they decided to finish him and put responsibility on the other faction. They informed the other faction about the activities of the person murdered, thereby outwardly patching up with them. In accordance with programme they held a dinner, invited the person murdered and people of the other faction. A little time later, they got the lights switched off and beat the person murdered to the point of death. While leaving the scene, one of them told him in the ear that the opposing faction had done all that to him. Later police arrived and beating given to him by the opposing faction was got recorded by him in FIR and he also gave names of eight persons of that group in the dying declaration. Chief witnesses in the case were members of one opposing faction and the said 8 persons were sentenced to death and hanged. The learned Magistrate happened to know of the true facts about the case sometimes later when he happened to go to that village during this tour.

The law itself sometimes makes it difficult to pull out innocent man from murder case proceedings under Indian Penal Code. If one of the members of an unlawful assembly commits murder, all the members are imputed with his intention and are equally liable with him for murder. In AIR 1944 F. C. 35 Varadachariar, J. expresses his doubt about accused being a member of unlawful assembly and hence
liable for murder charge just because he was one of the crowd which ran to the place where the deceased was chasing some of the rioters. However, as it was not ordinary practice of the court to interfere with inferences of fact by lower court, the judge expressed his helplessness to extricate the accused but recorded “I leave the matter there with this expression of my doubt” – really a harsh situation is created in this and such type of other cases by law.

The other type of cases where mistake is possible are where conviction is unavoidable on the circumstantial evidence but where a judge may still entertain some doubt which is not the same thing as the reasonable doubt on which the benefit of doubt is given to the accused, but which may impel a judge to give lesser sentence than the death penalty. In a case reported in AIR 1925 Allahabad 627, the dead body of the victim was not found, but a conviction of murder was based purely on circumstantial evidence. While Mears C.J. said “that if there is an element of doubt as to render a judge in the least degree uneasy of mind, the proper course is not to change the sentence but to acquit the man”. But Mukherjee J. would say that doubt arising in a man’s mind is of different degrees and there may be, as in this case, in my mind a doubt which is less than a reasonable doubt but it is still a doubt which is entitled to respect, which is entitled to ask me to be cautious in passing the sentence.”

This scintilla of doubt, we also entertain after going through majority judgement and the dissenting judgment reported in AIR 1960 Supreme Court 500 where a doctor was charged with murdering a lady during the course of railway journey by administering to her some undetectable poison. The case rests only on circumstantial evidence and the courts have inferred the guilt of the accused mainly from medical evidence and the conduct of the accused. Medical evidence by various doctors was not very consistent. Even if on the basis of the available evidence a reasonable conclusion of guilt is gatherable, still what may be called the scintella of doubt hovers in the mind after reading majority and dissenting judgements together. And the question if mistake is not possible in such a case stares us in our face. As the judges are not agreed, in such cases to award lesser punishment enhances poignancy of possible mistake.
Since public opinion, specially in democracies where education has not yet taken roots and large majorities are still illiterates, is based on prejudices and predilections and not on sound, logic, it does not reflect merits of death penalty. On the basis of statistics both of India and abroad, U.N.O. findings and other weighty arguments, we can safely conclude that death penalty is not sustainable on merits. Innately it has no reformative element. It has been proved that death penalty as operative carries no deterrent value and crime of murder is governed by factors other than death penalty. Accordingly I feel that the death penalty should be abolished. Government’s experience in dealing with it leniently in the past five decades, is quite happy. The same has not aroused any reaction from any quarter and public has accepted it just in due course. Taking clue from the same and also realizing that ignoring of logical position in regard to death penalty is harmful in ultimate analysis, the Government, if it needs sometime for ripening public opinion before declaring its abolition from statute book, may for the time being take policy decision to commute all death penalties, as was done by U.K. before enactment of Homicide Act of 1957, and silently put it to disuse. Another quite action in this direction is extension of the Children Act of 1960 to all states; it has not yet come into force in all states. By its adoption in all states, cases of person upto the age of 16 years will be taken out of death penalty provisions.

In the discussion that took place on the 21st April, 1962, in the Lok Sabha on Capital Punishment by Shri Raghunath for its abolition. The following were the grounds sought for its abolition in India, first, it was difficult to get justice; second, on humanitarian grounds; third, in difference to the tradition in India; fourth; because capital punishment was not deterrent; fifth, on the ground of ‘non-violence’ preached by Mahatma Gandhi, and sixth, because of the teachings of various religions. Christianity commanded “Thou shall not kill”, while Islam laid down that if the relative of a victim accepts compensation and pardons the offender, path” preached by Lord Buddha was supposed to support the argument to abolish capital punishment; seventh, to give another opportunity to the accused to reform; eighth, on the ground of miscarriage of justice.\footnote{Lok Sabha Debates (1962), Vol. I, pp. 307-20.}
The abolitionists have argued their case from the following angles:-

(i) Discriminatory application of death sentence.
(ii) Cruelty of execution i.e., hanging by rope.
(iii) Crimes of passion.
(iv) Sanctity of life
(v) Injustice.
(vi) Political use of death penalty.
(vii) Deficiency of legal safeguards.
(viii) Possibility of Mistake
(ix) Public opinion

There is judicial trend towards the abolition of death penalty. The legislature has introduced section 354(3) Cr. P.C. by Amending Act 26 of 1955, which is again amended in 1973, according to which infliction of death penalty is possible only if there are aggravating circumstances, which exclusively demand for the imposition of death penalty. To the same effect the Supreme Court has given its view in the case of Bachan Singh. Justice Sarkaria speaking for the court has declared that death penalty should be imposed only in the rarest of the rate cases. The life and liberty of the individual is to be respected and restored at any cost. To the same effect, there are Directive Principle of State Policy, Free Legal Aid to the indigent, poor and needy persons and to keep a check on the arbitrariness and whims and caprices of the crime controlling agencies.

B. RETENTION OF DEATH PENALTY

Death penalty has been the subject of an age old debate between the abolitionists and retentionists. In the ancient times, the punishment of death was the only punishment for almost all the crimes. Sometime it was inflicted in order to deter

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65 AIR 1986 SC 898.
others, sometimes in regard of retribution and sometimes to incapacitate the offender, meaning thereby, that the extreme penalty of law, today which is imposed by courts with due care and caution was almost the rule in the ancient times.

The position was quite similar but worst during the British Empire. The punishment of death was imported to India from the England by the British Rulers. The criminal law was codified in 1854, which was amended by two Commissions simultaneously. This constrained the penalty of death for seven offences. This came into existence in 1860. All these seven sections are still on the statute book since then. These sections are sections 121, 132, 19467, 302, 305, 307 and 396. In addition to these sections, punishment of death can be imposed under IPC for three, more offences where it is imposed by way of constructive liability under Section 34, 109, 119 and 396 I.P.C. as discussed in chapter 2.

Any how punishment of death is still imposable and imposed and the accused are still being executed inspite of all the agitations. Though the abolitionists have given it the name of cruel and unusual punishment, they call it as a barbaric and primitive punishment.

As it is still on the statute book, certainly it must be having some merits and the demerits automatically attached to it. In present chapter we are concerned with the merits of the punishment.

• ARGUMENTS IN FAVOUR OF DEATH PENALTY

Death Penalty is the extreme penalty of law imposed by the courts. Punishment must serve as an instrument for reducing the rate of crime either by deterring the offenders and others or should prevent the commission of crime by incapacitating him. Now the question is whether this extreme penalty of law should be

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66 Waging war, Attempting to wage war or Abetting waging of war against the Government of India.
67 Abetment of Mutiny.
68 Giving or fabricating false evidence with the intent to procure conviction of capita offence.
69 Abetment of suicide of child or insane person.
70 Dacoity with murder.
71 Punishment for abetment, if the act abetted is committed in consequence and where no express provision is made for its punishment.
72 Public servant concealing design to commit offence which it is his duty to prevent.
retained or not? Does it act as a deterrent to the repetition of heinous crimes such as murder, daily bride-burnings and most of the socio-economic offences in India?

These questions have been debated over centuries. A sensus is at times reached and some countries have taken the experimental measures, but as of abeyance the rate of crime increased and the death penalty is again reintroduced in some of the countries, the most recent example is New Zealand.

There are two aspects of this perennial controversy about the death penalty.

1. Abolitionists theory regarding death penalty which has been already discussed at length.

2. Retentionists view regarding death penalty which is to be discussed.

*RETENTIONISTS VIEW OF DEATH PENALTY*

The arguments should be considered in the light of the Royal Commissions Report on Capital Punishment (1949-53) and the 35th Law Commission’s Report Vol. I (1967) as far as the Indian position is concerned. Arguments, which may be valid for other countries, may not be valid for India on the following points.

I) ILLITERACY:

India is a vast country and most of the population is illiterate.

ii) DETERRENCE:

Deterrent effect of death penalty is one of the basic arguments forwarded by the retentionists. Human being is complex and actuated not only by fear but also by love, loyalty, greed, lust and by many other factors.

iii) Deterrent effect of death penalty cannot be seen directly, but it acts on the community in the form of moral consciousness.

iv) Public opinion is in favour of the death penalty. Capital Punishment is painless and humane in form and is less cruel than the punishment of life imprisonment.

vi) Because of the provisions of appeal and power of pardon vested in the President or Governor, so there is no question of miscarriage of justice.
vii) India is a poor country, so it cannot and is not able to imprison all the murderers and feed them for decades.

viii) Death penalty functions and helps in avoiding popular action.

ix) Main argument of retentionists is that even if the principle of abolitionists is accepted, the time has not yet ripe in India. Present day society has not yet matured for this reform and the community has not yet ripened to that stage.

In reply to these arguments, the abolitionists have argued their case on the following grounds:-

i) Indian ideology is based on the principle of non-violence.

ii) Death Penalty is irrevocable.

iii) Death Penalty is ‘cruel and unjust, it is a barbaric and is of the primitive nature’. Moreover, it is unjust because only the poor, indigent and illiterate are the victims of this penalty, who cannot engage lawyers for themselves. They are unable to fight the legal battle and hence unable, having smaller chance of not being executed.

iv) Difficulties of the prison administration are no arguments for its retention.

v) Atleast experiment of abolition of death penalty is worth making.

vi) The argument of public opinions holds no water.

• MISTAKE

On question of mistake the retentionists’ case has been argued by minority Report of the royal Commission on capital punishment in U.K. 1952-53. they say: we do not feel that the mere possibility of error, which can never be completely ruled out, can be urged as a reason why the right of the state to inflict death penalty can be questioned in principle. It is not possible for human authorities to make judgements which are infallible in matters which require lengthy deliberation and logical analysis. All that can be expected of them is that they take ever reasonable precaution against the danger of error. When this is done by those charged with the application of the law, the likelihood that the errors would be made descends to an irreducible minimum. If errors are then made, this is the necessary price that must be paid within
a society which is made up of human beings and whose authority is exercised not by
guilty but by men themselves. It is not brutal or unfeeling to suggest that the danger
of miscarriage of justice must be weighted against the far greater evils for which the
death penalty aims to provide effective remedy”.

The question is as to why even this price be paid when the experience based
on statistics has shown that murders are conditioned by factors other than death
penalty and retention or abolition has not changed the murder rate. On the question
being put by the Select Committee to Lord Samuel that if punishment with a
maximum deterrence is sought to have, would that punituion be capital punishment,
he replied “yes, if no less a punishment is effective for this purpose; but there is no
reason to have hundred percent deterrent if an eighty percent deterrent is sufficient to
deter”. The question whether the death penalty possess the extra 20% of the
deterrence over imprisonuon for life is a very doubtful problem and even prolonged
scientific investigations may not be able to prove this with precision as the field of
investigation itself is such which requires the study of mental attitudes and such other
psychological factors. Accordingly if a allegedly 100% doubtful death penalty can be
replaced by even 80% efficacious life imprisonuon, pragmatism should guide
replacement of the former by the latter and thereby save the innocent, whatever be
their number, from irrevocable and irreparable sentence of execution. Life sentence is
definitely revocable and can be repaired by payment of damages to a very large
extent.

Public opinion

The next important point calling for our attention is public opinion. In the
present state of civilization, before taking any step, public reaction must be gauged.
Success of the step depends on public cooperation and without taking the public
opinion along, its implementation becomes very difficult.

In cases where subsequent doubt arose concerning the guilt of the person
sentenced and executed, as happened recently in U.K. and U.S.A., veritable waves of
public opinion have been set in motion and these have sometimes provided the
abolitionist movements with additional supporters and fresh arguments. Occasionally
the reaction of public opinion has taken the form of merely a protest the execution of a particular individual.

Turning to India, so far no attempt has been made to collect systematic scientific data in respect of the public opinion in this matter. If judiciary gives any representation to public opinion, there are definite signs of change. While studying the cases under Section 302 and other sections providing for death penalty, for the year 1964 of Delhi State, it was observed that conviction took place in 21 cases and in only four of them capital punishment was ordered. Some of these four, condemned for execution may get change of sentence at higher appellate level specially in view of their young ages which were 19, 23, 30 and 34 years. This gives an indication of trend away from death penalty. This is also apparent from the fact that bills for abolition of death penalty have been introduced in Parliament of India thrice in 1949, 1958 and 1961. On the first occasion Sardar Vallabhbhai Patel, the then Home Minister, declared on the floor of the house on 29.3.49 that "the present time was inopportune for the abolition of capital punishment - the proposal has been carefully examined on a number of occasions and given up.

Pandit Govind Ballabh Pant had said that those countries which abolished capital punishment had a very low incidence of murders – not more than 4 to 5 per million as against 26 to a million population in India i.e. seven hundred percent more than the abolitionist countries. I fear that Pandit pant was not supplied with correct statistics. Murder rate was, as per report of International Cr. Police Commission for 1952, 4.7 for U.S.A., 5.2 for Finland and 2.9 for India as against population of 1,00,000. As per Uniform FBI Crime Reports, murder rate for U.S.A. in 1960 was 5.1 per 1,00,000 population, whereas rate for India was per figures in Statistical Abstract of India) was 2.5 per 1,00,000. Forestalling the ground of difference in conditions of various countries making adoption of abolition in India by following former's precedent alone, not safe for us, I may add that abolition has been experimented with, in big as also small, industrial as also pastoral, and fully developed and underdeveloped countries. Experience every where has been uniform that murder rate does not go up with the abolition of the penalty. Moreover, in a way India too has carried out a tacit experiment by reducing executions substantially during the last
fifty years. Executions are now (1961) one third of the number of 1911 but murder rate has not gone up as compared with general crime position. Accordingly on the basis of this solid experience on our own soil, question of non-dependability on experiment in other countries becomes unavailable. What is happening in other countries has been found to be not untrue in our own country.

The statements of the home ministers read with their reference to statistics about remitting death sentences nevertheless show the Government to be not very firm in their opinion. Since Government generally acts as per pulse of the public specially in democracies, we may conclude that public opinion too is no strictly on one side. The fact that the abolition bills did not succeed at the hands of members of the parliament, which is representative miniature public, would also show that Indian public opinion is not yet wholly for the abolition.

In ancient times life for life, eye for eye was the rule of criminal justice. It was supposed to have both retributive and deterrent values. In modern times however, reformist thinkers and jurists have referred that death penalty is ‘barbaric and primitive’ in origin, which does not go in tune with the modern day society. But even inspite of all these the case for retaining the death penalty is based on certain concepts of awarding adequate and commensurate punishment to the crime committed. The points are summarized as follows:-

i) Punishment should be commensurate with the gravity of the offence committed. The heinous is the crime committed by the accused, the quantum of punishment should also be in tune with the gravity of the crime committed by the accused.

ii) There are enemies of society who have proved incorrigible, who attack even the guardians of law and order, and thus pose a constant danger to the security and sanctity of life. These social enemies frequently disturb the life of innocent citizens which is in order.

iii) The famous Italian jurist said, “that capital punishment is and would be justified in two instances:-
a) If the execution would prevent a revolution against people lastly established Government.

b) If an execution was the only way to deter others from committing a crime.  

iv) For the protection of the organized society, civilized community, death penalty should be preserved as such. 

v) The general conclusion which we reach after careful review of all the evidence, we have been able to obtain as to the deterrent effect, capital punishment may be stated as follows:-

Prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other punishment, and there is some evidence that this is in fact so.

vi) There is another jurist who as it seems is not satisfied with this extreme penalty of law and he advocates for some more deterrent punishment as he says, "...some greater terror than had yet to be discovered, certainly death is no deterrent."

vii) A great jurist who was concerned with the drafting of Indian Penal Code was a great exponent of the view that capital punishment has a greatest value as deterrent for the crime of murder and other capital offences. To quote his words, "No other punishment deters men so effectively from committing the crime, as does the punishment of death."

viii) Even while recognizing that it is too stern besides being irrevocable, it is considered necessary.

These are one of those propositions which are difficult to prove simple because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole

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73 Italian jurist, Baccaria, "Crime and punishment.
74 Jean Graven.
76 Thucydides,"Anthenian Debate" (472B.C.).
experience of mankind is in the other direction. The threat of instant death is
the one to which resort has always been made when there was an absolute
necessity of producing some results.

ix) According to another Jurist, "Unless a sentence of 10 years is considered an
adequate substitute for capital punishment, I will prefer the death sentence on
the grounds of humanity to any other alternative." He again at another place
emphasized that, "I gravely doubt that whether an average man can serve more
than ten continuous years in prison without deterioration. If so slight an
alternative to death sentence is considered to be lacking in deterrence." 78

Deterrence is the main object of punishment. In criminal justice, a
punishment universally aims at achieving the following purposes or
objectives:-

i) To punish the ‘offender’.

ii) To deter others from committing the crime.

iii) To protect the society from criminal activities.

Some Sources namely the writings of eminent Criminologists and
Sociologists, the Legislative Debates, the Reports of Commissions and
Committees in favour of retention of death penalty have been include as under.

C. VIEWS OF DIFFERENT CRIMINOLOGISTS AND SOCIOLOGIST

Six eminent Criminologists authorities on the subject are:-

1. Dr. Caesare Lombroso.

2. Sir. James Fitzjames Stephen


5. Prof. Earnest Van Den Hagg.

78 Paterson, “Crime and Criminals.”
(1) **Dr Lombroso**\(^{79}\) has given his verdict on death penalty in the following words:

But when, inspite of the prison, transportation and hard labour, these criminals repeat their sanguinary crimes and threaten lives of the honest men for the third or fourth time, there is nothing left but the last selection, painful but sure-capital punishment.

He further states,

Just as the death penalty is too largely inscribed in the book of nature, so it is in the book of history; and like all other punishments, it has a relative justice.\(^{80}\)

(2) **Sir James. F. Stephen** has recommended capital punishment for some more offences, especially the political offences on the ground that attacking the existing state of society is equivalent to risking of their own lives. He also recommended capital punishment for property offences.

According to him,

A man who has shown that he is determined to live by deceiving and impoverishing others by a long series of frauds artfully, contrived of vice and dishonesty, must die.\(^{81}\)

3) Of the recent the sociologist criminologist, **Professor Sutherland** is not convinced by the statistical evidence that there is anything more than the “unimportant relation” between “the murder rate and death penalty.”\(^{82}\)

4) As a British historian writes “The sole justification for the infliction of death penalty is not only to punish the murderer but to prevent murder.”

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\(^{80}\) Ibid.


\(^{82}\) Suther and Cressey, “Principles of Criminology”1965,p.295.
5) Another criminologist Prof. Earnest Van Den Hag\textsuperscript{83} writes that,

the murderer learns through his punishment that his fellow men have found him unworthy of living, that because he has murdered, he is being expelled from the community of the living. This degradation is self inflicted. By murdering, he has so dehumanized himself that he cannot remain among the living. The social recognition of his self degradation is the punitive essence of execution.

D. LEGISLATIVE DEBATES REGARDING DEATH PENALTY

LEGISLATIVE DEBATES RELATING TO DEATH SENTENCE DURING BRITISH RULE

A careful scrutiny of the Debates in British India’s Legislative Assembly 1912, reveals that no issue was raised about capital Punishment in Assembly until 1931, when one of the members from Bihar Shri Gaya Prasad Singh sought to introduce Bill to abolish the punishment of death of the offences under the Indian Penal Code. The Bill was introduced on the 1931 and on the 17th Feb, 1931 a motion for circulation was made. The motion was negative after the reply of the then Home Minister Shri James Crerar. The mover, in support of his motion, cited the example of other countries which has abolished the death sentences, pointing out the abrogation of death penalty had not ended human society into chaos, and argued that death penalty had a demoralizing effect on the human mind.

The Home Member, however, in his reply pointed out, first, that in many countries death sentence had been restored after abolition. (He cited the example of France and Germany);

Secondly, that in the abolionists countries, the enactments abolished death sentence was made after a very long period of experiment;

Thirdly, that in his experiment as Home Member and from the familiarity he had gained with homicide throughout the length and breadth of India, he could recite

\textsuperscript{83} Earnest Van dan Hang, “Punishing Criminals” 1975at p.223.
to the House, "crime of so dreadful a charter that one is presented with the very pressing question whether in cases of that kind any punishment other than capital punishment could on any theory of crime be regard as the proper punishment."  

The Government's policy on Death Penalty in British India prior to Independence was clearly cited twice in 1946 by the then Home Member, Sir John Thorne, in the debate of the Legislative Assembly “Government doesn’t think it wise to abolished capital punishment for any type of crime for which the punishment is now provided.”

LEGISLATIVE DEBATE RELATING TO DEATH SENTENCE IN POST INDEPENDENCE PERIOD

Even after India attained Independence, the Government’s policy on capital punishment remained unchanged and the then Minister for Home Affairs declared in the Legislative Assembly of India, on 29th March, 1949, that “the present is considered an inopportune time for the abolition of capital punishment.” In the year 1956, a Bill was introduced by Shri Mukand Lal Aggarwal, in the first Lok Sabha. The Bill was discussed and was rejected on the opposition of the Government. Numerous points were put forth by Shri Aggarwal, which included a review of the position prevailing in other countries, and emphasized the futility of capital punishment as a deterrent and its primitiveness. The Government of India sought the opinion of all the States in India on the issue of the abolition of death penalty. It is learnt that all the States emphatically opposed abolition of capital punishment.

Resolution for the abolition of capital punishment were moved thrice in Parliament of India, twice in the Rajya Sabha and once in the Lok Sabha. Capital Punishment was debated in Parliament of the Indian Republic for the first time on the 25th April, 1958 when a resolution for the abolition of capital punishment was moved in the Rajya Sabha by Shri Prithivi Raj Kapoor. Out of the fourteen Members of the

84 Legislative Assembly Debates (1931) Vol.1,p949.
87 Before this, in Sh. M.A. Kazmi’s Bill to amend Sec.302,I.P.C. certain discussion took place in 1952 and 1954, and in the course of discussion, the question of abolition of capital punishment was also raised. Source:35th Report, Vol.1, p.6.
Rajya Sabha who participated in the debates, only five advocated the abolition of death penalty, while the remaining nine Members supported the retention of death sentence.

During the course of Debates on the Resolution, the Minister of Home Affairs Shri Govind Ballabh Pant while opposing the Resolution said:

Everyone who commits murder wants to escape from the sentence which he has earned, so if there is no such sentence, in all likelihood, the fear that comes in the way people's committing under will be removed. So do we want more of murders our country or do we want less in them? That is the simple proposition. If we want more murders then there should be no abolition of capital sentence. If we want less, then we have to maintain the sentence.\(^{88}\)

He further said,

"I think everyone would wish that no body was killed, no body could be hanged- but we have to look at the question from practical angle- men are murdered and some of the cases are most brutal. Now if we stop and discontinue this capital sentence, would more men be killed or would the number of men killed go slow?" I also look forward to the millennium but I do not know when it will come- it is not by abolishing the sentence that you approach this ideal.\(^{89}\)

The second time capital punishment was debated upon in the "Rajya Sabha was on the 25\(^{th}\) August, 1961. This was in the form of a resolution to abolish capital

\(^{88}\) Rajya Sabha Debates, 1958,p.458.

\(^{89}\) Ibid. 457.
This time out of nineteen Members of the Rajya Sabha who took part in the discussion, only six Members advocated the abolition of capital punishment and the rest advocated the retention of death penalty.

At the conclusion of her speech, before the debate actually started on the Resolution, Smt. Nigam said,

I want to submit that if you want to keep our pledge of non-violence, then this violence which is constantly done by the State, in the name of keeping the people safe and so on, which is entirely wrong and which I have proved by so many instances has no deterrent effect on people’s psychology, and which really never gives any security to the people, must be stopped. In spite of the fact that the provision for death penalty is there on the Statute Book, every day murders are being committed. I would like to appeal to the Hon’ble Member of this House that they should not be guided by who is right but by what is right.91

In 1961, no categorical statement was made by the then home Minister, Shri Govind Vallabh in the 1958 debate only old floppish arguments were repeated. Those Members who supported the abolition took the help of statistics and the experiments carried on in other countries. Heavy reliance was placed on the finding of the Royal Commission on Capital Punishment (1949-53). Support was also drawn from the various embodiments of the principles, theories and finding of the committees etc., like French declaration.92

The third time capital punishment figured in India’s Parliament was on the occasion when a resolution was moved in the Lok Sabha by Shri Raghunath Singh on

90 Rajya Sabha Debates Vol.XXXV, 1961,p.1681. The Resolution was “This House is of opinion that Govt. should take immediate steps to undertake legislation for the abolition of capital punishment in India” and was moved by Smt. Savitri Devi Nigam.
91 Ibid,pp.1692-93.
92 Ibid., pp.1684.
the 21\textsuperscript{st} April, 1962 for its abolition. Out of the 14 Members who participate in the debate, only five spoke for the abolition of the capital punishment.\textsuperscript{93}

With a view to avoid repetition, only the salient points that were discussed in Parliament representing both the view are summarized hereunder, commencing with the first debate held in the Rajya Sabha in the year 1958. Some of argument put forth by the Members of the House for the abolition of death penalty in the Rajya Sabha on 25th April, 1958, were that the theory of punishment was based on two premises, one that a man is a free moral agent and two, that punishment, especially capital punishment, has a deterrent effect on future law breakers. It was maintained that the theory of deterrence on close analysis was found to be ineffective and out-moded in conception. In spite of the retention of capital punishment murders did take place. The irrevocable nature of capital punishment, made the sentence of death abhorrent.\textsuperscript{94} Man on the whole is redeemable. In India, it was pointed out that there are eight crimes punishable by death under the Indian Penal Code. They were, by and large, treason and murder. The murderer is not punished with death if he could only prove that he was insane or that his reason was paralyzed at the time of commission of the crime.

It was further argued that, “there have been many cases in India and in foreign countries where people, out of mercy, have given poison or some injection to their near and dear ones to end their agony. “ Should such persons be sentenced with capital punishment?\textsuperscript{95} you must look to the criminal and not to crime itself.\textsuperscript{96} If we really want to bring down the incidence of crime, the argument preceded, must think of method other than hanging. We have to improve the social and material environment, we have to train the impulses and emotions of the people and reclaim them through proper education. The offender is circumscribed by environment by political, social and economic conditions in the country.\textsuperscript{97} Moreover, only the poor and the ignorant people get capital punishment.

\textsuperscript{94} Rajya Sabha Debates,1958,p.493.
\textsuperscript{95} Ibid.,p451
\textsuperscript{96} Ibid., p.464
\textsuperscript{97} Supra note 89,p. 1681 and 1683
In the discussion held on the 25th Aug, 1961, in the Rajya Sabha, the fear of an increase in the number of murders on the abolition of capital punishment was branded as childish and primitive. The reason for the re-introduction of capital sentence by countries which has abolished it, were “Firstly because of political controversy, Secondly, because some brutal murder aroused public sentiment and created so much sensation and the public sentiment became so strong that they had to re-introduce it.” It was further claimed that not only capital punishment failed as a deterrent but it had also been responsible for creating a very brutal sort of psychology. It was taken as “an institution to give training in sadism and cruelty.”

Capital punishment was a calculated and cold blooded murder by the state, as the date of hanging was fixed and told to the condemned person in advance. It was argued that if stealing is a crime, is it to be replied by stealing? Hanging may be a legal murder, but murder is murder. The retentionists of death penalty present their case as under:

In the debate on 25th April, 1958, it was stated that for the maintenance of Law and Order in the country capital punishment was necessary “Life and property should be made secure. At the same time one should not revert back to the old barbaric and pre-historic practice of ‘an eye for an eye’ an ‘tooth for the tooth’ and ‘a nail for a nail’ and all that. Abolition of capital punishment had been achieved in several countries, but there were also instances where they had reverted back after experimentation with abolition for a few years. Attention was drawn to the case of nine American States where they has resorted the death penalty.

98 Rajya Sabha Debates, 1958, p.470
99 Rajya Sabha Debates,1961, p.1683
100 Ibid.,p.1687
101 Ibid.,p.1691
102 Rajya Sabha Debates, 1985 p.452
The Penal Law of Ceylon abolished death penalty in 1956 but it had to be re-introduced as a measure of social defence consequent to gruesome murder of Late Prime Minister Mr. Bandaranaike a few years ago. Even from the available literature on death penalty the United States testifies that in modern time the sentence of death penalty is altogether abolished in the United States. The retention of death penalty is still considered to be morally and legally just though it may be rarely carried into practice. Recently trend in America is to restrict death penalty only to the offences of murder and rape. Some of the American decisions suggest that the courts are convinced that death penalty per se is not violative of the constitution.

The Government policy was stated by the then Home Minister, Shri Givind Ballabh Pant.

The reasons why we are not having professional murderers today were because of the deterrence of death penalty. By the abolition of capital punishment we will be “giving a sort of right to kill without punishment.” The abolition of capital punishment “may do more harm to the country than we can visualize.” A very eminent German philosopher Kant had pointed out that “ultimately the proper theory of punishment is the theory of retribution or atonement.” There are certain cases “Where a capital punishment will not be out of proportion to the nature of the crime committed.” Moreover, when capital punishment is going to be executed, when a person is going to be hanged, so many mercy petitions are submitted to the Government. It is worth consideration: “Why is it that in respect of one offence alone there are so many who come forward to ask for mercy being given to a prisoner?” This proves the deterrent effect of death penalty.

It was stated that murders were committed with pre-determination. “The dacoits in our country enter the house and rape the woman in the presence of the

103 Australian Law also provides death penalty for the offence of murder and rape.
106 Ibid., p.482.
107 Ibid., p.483.
husband. They stab them in the stomach. They kill children. Such are the heinous type of dacoits. Should such a brutal murder be pardon? 

with reference to the communal riots in India, it was stated that "in a society like ours where we have yet to show a measure of communal toleration, linguistic toleration, etc., it would be unwise for us to think in terms of the immediate abolition of capital punishment."

In a discussion about reformation and administration, it was stated that forcible reformation of the human soul is impossible." Force and reformation cannot go together. They are spiritually contradictory an inconsistent. Therefore, whatever reformatory methods they can apply, they can only decade individuals.

"Where a man goes about doing heinous things, raping children, committing murder, unsettling society, and committing arson, should he feel so secure that whole society considers his life so sacred that he will not be put to death? That security cannot be given to any individual."

"We can put certain bad criminals to death with feeling any antagonism against them and simply because his life is valueless to the society. In those circumstances it is right that society should have power to put man to death. It should not get rid of this punishment." Death sentence "should be confirmed not only in the High Court, but also by Bench of not less than three Judge of the Supreme Court. Let us take all kinds of precautions but this ultimate penalty we should have. We are willing that we should commit murder (in wars) for many purposes. But when it comes to hanging a criminal who has been convicted of grave crimes, we becomes ideal propounders of exalted human felling."

The royal commission on capital punishment (1949-53) had also stated that in India they found a very large number of murders taking place and in such circumstances the courts should see what method they should adopt for not inflicting

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109 Supra 89 p. 1733.
110 Ibid., p.1710.
111 Ibid., p.1744.
112 Ibid. pp. 17745-46.
113 Ibid., p. 1747.
as large a number of death sentences as may be consistent with the incidence of the crime.\textsuperscript{114}

“Unless and until we do away with social and economic disabilities, we cannot change this law of capital punishment. The poor man’s wife is raped by rich man. Such criminals should be awarded capital punishment”.\textsuperscript{115} So, also adulterator who kills his wife, a son kills father. Retention of death penalty creates conditions for non-commission of the crime; capital punishment has to be retained as a necessary evil.

Keeping in view the conditions prevailing in the India, abolition of death penalty is very dangerous and can be detrimental to the interests of the state. Even Sh.Giani Zail Singh said,

“I think that our law should have a provision for capital punishment and it should also be inflicted on those who indulge in raping of minor girls, adulteration and smug-gling.”\textsuperscript{116}

There are certain crimes which should have the utmost Deterrent punishment and so long as the crimes are there; there is no reason to abolish capital punishment.

The Minister of State, in the Minister of Home affairs, promised that a copy of the discussion that had taken place in the house would be forwarded to the Law Commission that was then seized of the question of the examination of the code of criminal procedure and the Indian Penal Code, with a view to consider as to whether any changes were necessary therein. The Minister promised that “the Law Commission’s Report would be placed before the house.” The result was a separate

\textsuperscript{114} Ibid., p. 1757.

\textsuperscript{115} Rajya Sabha Debates, Vol XXXV, 1961 ,pp.1771-72.

\textsuperscript{116} The former Union Home Minister, Mr Zail Singh said he personally favour death punishment for such crimes as rape but Parliament will have to pass legislation for it. The Indian Express July 11, 1980.
E. THE LAW COMMISSION ON CAPITAL PUNISHMENT

The law commission on Capital Punishment 35th Report 1961 recorded various views regarding the deterrent effect of death penalty in following terms:

a. basically, every human being dreads death.

b. death as penalty stands on a different footing or level from other punishments or imprisonment for life. The difference is one of quality, and not merely of degree.

c. those who are specially qualified to express an opinion on the subject including particularly the majority of replies received from State Government, Judges, Member Parliaments, Legislators, Members of the Bar, and the public Officers are definitely of the views that deterrent effect of death penalty is achieved in a fair measure in India.

d. As to the conduct of prisoners released from jail (after undergoing imprisonment for life) it would be difficult to come to the conclusion without studies extending over a long period of years.

e. Whether any other punishment can possess all the advantages of capital punishment is a matter of doubt.

f. Statistics of other countries inconclusive on the subject. If they are not regarded as proving the deterrent effect, neither can they be regarded, as conclusively disproving it.\textsuperscript{118}

Regarding death as punishment, the authors of the code say, we are convinced of the view that it ought to be sparingly inflicted and the purpose to employ it only in case where either murder or the highest offence against the state has been committed.\textsuperscript{119}


\textsuperscript{118} 35\textsuperscript{th} Report, para 334-70.
The most authoritative conclusion on this subject is that of the Royal Commission on Capital Punishment, 1949-53. The Commission’s conclusion is that:

“Prima facie the death sentence is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment.”

Thus, the Report of the Royal Commission on Capital Punishment found that capital punishment has a place in the criminal law of country. The American President Commission on law enforcement and administration of justice published in Feb, 1967 recommended as follow:

the question whether capital punishment is an appropriate sanction is a policy decision to be made by each state. Where it is retained, the type of offences for which it is available should be limited and the law should be enforced in an even handed and non-discriminatory manner.

The fact that death penalty was prescribed for some of the federal crimes including assassination of the President, show that capital punishments was found necessary in U.S.A. even for murder.

The New Jersey Commission on Capital Punishment, 1964 came to the conclusion that in the circumstances of that state in some cases capital punishment is deterrent. The New Jersey Commission also found that death penalty had a place in its criminal law. The Canadian Joint Committee of the senate and House of commons on Capital Punishment, 1956, asserted that “capital punishment does exercise a deterrent effect, which would not result from imprisonment or other forms of

119 Ibid.
Treason, piracy, and murder are the only three capital crimes punishable by death in the present Canadian Criminal Code. The council of Europe's Committee of 1962, constituted to enquire and report on the Death Penalty in European countries has reported that there are twelve crimes punishable with death in France. No commission or committee seems to have been appointed by France and Japan to enquire into the aspect of capital punishment so far.

The United Nations, the representative organizations of the world; gave a clear mandate the marathon discussion on Capital punishment in United Nations Organization lasted for seven years from 1957-1964. Ultimately the U.N.O had to accept the reality that death sentence may be awarded for the most serious crimes. The adoption of the Article 6 by United Nation makes it crystal clear that the conscience of the world deems capital punishment to be necessary. Subsequently, in 1963, "the committee of experts for the prevention of crime and treatment of offender" decided to suggest to the UPA that have done every thing but conscientiously repeal the legislation and corrected the on going effect of POTA. The 'repeal' as such has conceived hundred of victims of POTA to continue their existence with little hope, the 'amended POTA,' - now labeled as the 'Prevention of Unlawful Activities Act'- changed but two things namely that confessions before the police will no longer be admitted as evidence, and there would be removal of legal obstacles to the granting of bail in the first year arrest. Those who have been already been booked under POTA,' however, doesn't receive the benefit of these clauses, and so will still stand under trial under the rules of the 'Old POTA', Additionally, all the other draconian provisions of POTA basically remained in the new ordinance.

Under these acts, the accused are convicted not for the offence, but are merely of preventive nature. Under these Acts the legislative has given a new direction to the punishment of death penalty, where the penalty of death can be imposed only to

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124 Ibid Para 2 p.3.
prevent or protect the society, the United Nation Economic and Social Council (UNESCO) adopted certain measures to restrict the application of death penalty.

CRITICISM OF 35TH LAW COMMISSION REPORT

The 35th Law Commission Report came for sharp criticism in minority judgment at the hands of Justice Bhagwati in the case of Bachan Singh\(^\text{127}\) which is as under:

J. Bhagwati observes:

"So far as the first argument set out in Clause(a) is concerned, I have already shown that the circumstance that every human being dread death cannot lead to the interference that the death penalty acts as a deterrent. The statement made is clause B is perfectly correct and I agree with Law Commission that death as a penalty stands on a totally different level from life imprisonment and the difference between them is one of quality and not merely of degree, but I fail to see how from the circumstance an interference can necessarily follow that death penalty has uniquely deterrent effect. Clause(c) sets out those who are specially qualified to express an opinion on the subject have in their replies to the questionnaire stated their definite view that the deterrent effect of capital punishment is achieved in a fair measure in India. It may be a large number of persons. Who send to the questionnaire issued by the law commission might have expressed the view that death penalty does act as a deterrent in our country, but, mere expression of opinion in reply to the questionnaire, unsupported by reasons, cannot have any evidentiary value. There are quite a number of people in this country who still nurture the superstitions and irrational belief, ingrained in their minds by a century old practice of imposition of capital punishment and fostered, though not consciously, by the instinct for retribution, that penalty alone can act as an effective deterrent against the crime of murder. I have already demonstrated how this belief entertained by lawyers, judges, legislators and police officers is a myth and it has no basis in logic or reason. In fact, the statistical research to which I have referred completely falsifies this belief. Then,\(^\text{127}\) AIR 1980 SC 898."
there are the arguments in **Clauses (d) and (e)** but these arguments even according to the law commission itself are inconclusive and it is difficult to see how they can be relied upon to support the thesis that capital punishment acts as a deterrent. The law commission status in **Clause (f)** that statistics of other countries are inconclusive on the subject. I do not agree. I have already dealt with this argument and shown that the statistical studies carried out by various jurists and criminologists clearly is close that there is no evidence at all to suggest that death penalty acts as a deterrent an it must there be held on the bases of the available material that penalty does not cut as a deterrent. But even if we accept the proposition that the statistical studies are inconclusive and they can not be regarded as proving that penalty has no deterrent effect, it is clear that at the same time they also not establish that death penalty has a uniquely deterrent effect and in this situation, the burden of establishing that death penalty has an additional deterrent effect which life sentence does not have and therefore serves a penological purpose being on the state, it discharge the burden which rests upon it and death penalty must therefore be held to the arbitrary.

**LEGISLATIVE TREND TOWARDS RETAINING DEATH PENALTY**

There is a strong point in the favour of the retentionist that even in spite of all these agitation against the imposition of death penalty, section 354 (3) introduction Criminal Procedure Code, the legislative is in favour of retaining the death penalty, that is why legislature enacted two more reenactments which provide the imposition of death penalty only to prevent the commission of crime. Under these acts, the punishment of death is not imposed for the offence committed, but it is only for the purpose of preventing. The punishment inflicted is of preventive nature. These are the following Acts which provide the infliction of death penalty:-

**DEATH PENALTY UNDER NARCOTIC DRUG AND PSYCHOTOPIC SUBSTANCE ACR 1985 AS AMENDMENT RULE IN 2000**

Section 31-A inserted by section 9 of Narcotic Drug and Psychotropic Substance (Amendment) Act 1988. Section 31- A (1) (b) provide under section 32- A, that sentence awarded under the act shall not be suspended, remitted or commuted.

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Under the terrorist Act, 1987 (Prevention) Act, section 3(2) provides punishment for terrorists act and the terrorist Act, is defined section 3(1).

Section 3(2) whoever commits terrorist act, shall

If such act has resulted in death any person, be punished with death or imprisonment for life and shall also liable fro fine.

The first conviction which attracted the death penalty under the Act was in what is know as the “Parliament Attack Case” Sayed Abdul Rehman Geelani, Mohammad Afsal, and Shakat Hussain Guru have been condemned to death for their role in the Dec13, 2001 attack of Parliament House, New Delhi, when Parliament was in session. Mohammad Afsal has been pronounced death penalty by the Supreme Court but his mercy petition is yet to be decided by the President. Nalani- condemned in the ‘Rajiv Gandhi assassination case was executed with death sentence.

Both these Acts have proved the retention of death penalty in India, thereby failing the abolitionists in their aim.128

The Death penalty in India is of great importance and it should be retained as such for the crime of murder, minor’s rape and certain other crimes in which security of the state is threatened. It is a step forward towards the retention of death sentence.

F. CONCLUSION

So, in concluding remarks we can just say that no doubt we must follow the ideal of hating the crime and not the criminal and thus to end up with crime and not criminal. But this view too must be seen in the light of the atrocities, injuries, losses and innumerable mental traumas undergone by the victims of crimes. And one must not forget that the death penalty may not be workable in case of hardened criminals but it has really a deterrent impact on the first time criminal world. So, inspite of abolishing the death sentence, we must keep it in Indian Penal Code for strong

128 Arthur Bryant, British Historian
deterrent impact upon the criminals and to maintain the faith of the society by assuring them that the wrongdoers will not be spared at all and will be dealt with stringent laws providing stringent and more harsh punishments and thus providing teeth to the criminal law. Because we must not do away with Bentham’s pleasure & pain theory\textsuperscript{129} So death penalty must be retained in criminal law through it should be applied in the ‘rarest of the rare cases’.

CONCLUSION

The Capital punishment has its impact in a number of ways on the administration of criminal justice. The movement for the abolition of capital punishment is a very old one. There is a change in this respect which explains the decline of the death penalty in States that have crept in the law (some statistics about India and other countries quoted supra). We have also seen that there is a general trend towards the reduction of the number of offences punishable with death. Public executions have been eliminated, as not to make death sentence’s execution more frightening, i.e., as a deterrent to others. We have further sought for more and more quick and painless methods of killing murderers, as witness the spread at first of the electric chair, and now of the gas chamber, in place of the traditional gallows. Finally, we have abolished the mandatory capital sentence and left in the hands of judges, the choice of an alternative-life imprisonment. Further to it, the Governors and the President can grant the mercy to the accused sentenced to death.

The combined result of the polices has brought the use of capital punishment only in cases where the circumstances are not mitigating as quoted supra more than 30 cases decided by the Courts. Summary of trends in the use of capital punishment has been prepared by James A. Mc. Cafferty. It reads as follows\textsuperscript{130}:-

\textsuperscript{129} It means the accused must be given the same amount of pain as much the pleasure he has derived hurting the victim or in other words victim must be restituted with that much of pleasure by punishing the wrongdoer as much the pain he has suffered due to the criminal.

1. There is a decided trend towards repealing the death sentence by disuse or by dropping it, and substitution life imprisonment for a term of years.

2. Though we have thirty-one capital offences in this country (U.S.A.) since 1930, only seven of the offences have resulted in an execution.

3. Our laws have provided for the permissive rather than mandatory application of the death sentence in all jurisdictions having the penalty except the district of Columbia. There is evidence that the district's mandatory death provision for first degree murder may be changed to permit the jury and/or the court the responsibility of determining the sentence.

4. The trend in executions for murder continues downward. During the decade of the 1950's the average has been sixty per year as compared to 151 per year in 1930 decade.

5. There is evidence that about half of those persons sentenced to death are actually executed. Also, the periods of time between sentenced to death and execution reduced very considerably. The average number of homicides each year in about 7,000 which means, in effect, that there is one execution carried out for each 115 homicides.

6. The general public has been removed from the death chamber.

7. The form of lethal appliance is being changed to make the death penalty quicker and painless for the condemned person. Needless to say, it reduces the "dehumanizing" influences for those responsible for carrying out the task."

If we consider the changing trends towards punishment in general as introduction of Juvenile Court, probation system, parole and reformation of criminals in prisons and their rehabilitation after the release from the prisons, it appears that the days are not far when the capital punishment will not find place in our Penal Codes. It is reflected by the exceptional till final abolition.
To put it otherwise, Dr. Sheldon Glueck, Harvard Criminologist, who has spent many years studying the American crime problem, has said:

"The presence of the death penalty as the keystone of our penal system be devils the administration of criminal justice all the way down the line and is the stumbling block in the path of general reform and of the treatment of crime and criminals."