CHAPTER - VIII
CONCLUSIONS AND SUGGESTIONS

Death penalty is the symbol of terror, cruelty and irreverence for life. Death penalty is irreversible. It cannot be recalled. Even if any mistake is subsequently discovered it will be of no consequences because the executed person cannot be brought back to life. This makes miscarriage of justice irrevocable.

Justice Kuldeep Singh

Nothing is more dear than life. Love of life is a basic feature of human behaviour. One of the main obligation of the state is to protect life and liberty of the people. Those who defy the norms of the society and pose danger to the life and liberty of individuals and the society in general have to be punished with the strong arm of the state. Therefore there is a need to ensure that the criminal justice system works fairly with the view that there is a fair trial and proper punishment otherwise it may adversely affect the society at large. Right to life is a global Human Right adopted by states from time to time. Abolition of death penalty also becomes a global Human right question. The chief aim of Criminal Law is to maintain an equilibrium of law and order by punishing those who are found guilty and by doing justice to the victim and the society at large. The objective of sentencing should be to see that the crime doesn’t go unpunished and the victim of the crime and also the society has the satisfaction that justice has been done to them.

In a country, like India, where extreme social stratification and increasing social intolerance and turmoil are likely to divide the ideas and opinion of people, including judicial officers, putting in human hands the discretion to take life can be quite dangerous. Conflicts and turmoil apart, the very deep stratification of Indian society makes even handed dispensation of justice a problematic issue in the best of times. We live in the time of severe

1 Dr. Janak Raj Jai, Death Penalty, (2005), p.63
social turmoil and the ascendance of the extremely selfish and motivated politics of the fundamentalism. As this mood catches on, we find the courts silently handling out more and more harsh punishments bending backward to look at evidence from the policemen points of view and sending more and more people to the hangman.²

The law of crimes is a matter of common interest because it is associated with the safety, security, honor, dignity, status of the life of the individuals and some fundamental values, the breach of which is likely to bring about a state of complete anarchy.³ The goal of social justice is requires that social defense must be protected. There are several means to protect the society which includes punishment as one of the indispensable mean. Punishment aims to protect the society from harmful elements, by deterring potential offenders, and preventing actual offenders from committing further offences, to eradicate evils and to reform criminals and turn them into a law abiding citizens.⁴

A perfect Criminal Justice system cannot be based only on the single theory of punishment. It has to be the combination of all i.e. reformation, retribution and deterrence. Every theory has its own merits and every effort should be made to take all positive points from the theories so that the accused can be benefited by all and also justice is done.

The new approach towards the punishment and the changes in the social attitudes towards the criminal has come due to the realization that criminal is a part of society and needs a sympathetic treatment, as rightly pointed out by Mahatma Gandhi, “Hate the sin not the sinner”. This change is largely developed due to the humanitarian approach and the emergence of the concept of human rights and human dignity at national and international level. So with a view to adopt the punishment to suit each particular category

² K. Balagopal, Of Capital and other Punishments, Economic and political weekly, (1998), p.2438  
of criminal, punishment should be proportionate to the gravity of crime and the circumstances of the crime and the criminal.

The concept of punishment conflicts with the right to life as it directly affects the fundamental right of personal liberty and freedom. The fundamental right to life guaranteed under which Article 21[^5] deals with the most precious human right, and forms the arc of all other rights. The Judiciary, through judicial activism, has further tried to fulfill the dreams of the founding father of the constitution by creating a new constitutional jurisprudence to uphold basic human rights. Under Article 21, the State is given the power to take away the life of a person according to the procedure established by law. This procedure has been interpreted to mean a fair, just and reasonable procedure. With the time, the judiciary has evolved its own jurisprudence in evaluating cases considered to be fit for awarding capital punishment. Thus, capital punishment is awarded only in ‘rarest of rare’ cases, but it is very difficult to find out what constitutes ‘rarest of rare’, rather the analysis of some judicial decisions, reveal it as a myth since there are no uniform guidelines and the punishment is also irreversible, therefore one is further led to the question as to whether capital punishment should be retained or not.

The issue about death penalty is one of the endless debates of modern times. This debate always crops up, whenever a convict is awarded capital punishment as it involves both legal and moral issues.

Those who advocate capital punishment, look upon it as the only deterrent to heinous crimes. They feel this punishment has been in vogue since time immemorial, and therefore, there is no ground for doing away with it. David Anderson supported in his book *The Death penalty- A Defence* the deterring effect of the capital punishment by saying that we humans are, as a rule, afraid to place ourselves in mortal danger. And the death penalty mean obvious mortal danger. By this simple reason, it is reasonable to believe that the death penalty has a strong deterring effect on some presumptive

[^5]: Concept of Right to Life and Personal Liberty under Article 21 of Constitution of India, (1950), discussed in detail in chapter III.
criminals. Even mild sanctions usually have a deterring effect. If there would not be the slightest sanction when one were to hand in a fraudulent income tax return, or ride a bicycle in a dark without a light or drive negligently or break the speed limit, or shoplift then all of these crimes would be very frequent. But when these violations are seriously prosecuted many people will be deterred and if a few days in a prison or a fine are deterring, it is unthinkable if death would not deter some presumptuous criminals from committing various crimes.6

Deterrence always has been and always will be one reason why every state governed by law in the world has penalties such as imprisonment or fines. It is commonly accepted principle of jurisprudence that penalties have a general preventing and deterring effect even if one disagrees to the extent of it. It is therefore unrealistic and even a lack of judgement to claim that the death penalty alone is the only exemption from the rule and that it does not have general preventive value. Since the death penalty to some is deterring, it is also an effective form of punishment. The gain is invaluable if only one of one hundred presumptuous criminal would be deterred from heinous crime only due to death penalty.7

They further stress upon the point that the modern judicial system has become so fool proof that the chances of innocent person being hanged are extremely rare as it is possible to reach with almost 100% surety as to who is guilty by using various scientific means of investigation like, DNA analysis, finger printing, foot prints and other highly developed methods. According to retentionist, if an innocent person was really executed it is not the death penalty in itself that is the root cause but flaws with in legal system.

Retentionist further stressed that the death penalty is the only punishment for violent criminals and murderers if justice is to be administered. No other punishment can be called fair and just if proportion to the crime committed is to be maintained, and defended and respected. They further

7 Ibid.
argue that it does not violate the “right to life” as the “right to life” does not apply unconditionally for all people under all circumstances. No felon should be allowed to roam our societies carrying abuse, rape and murder in his luggage, always saving his own life by referring to this human right. If this happens the “right to life” principle will be transformed to an inhuman principle, to a defender of the criminal and then this principle has become somewhat of an enemy of humanity.\(^8\) They perceive justice from the victims point of view, they argue that the victim of crime had a inviolable value, but the violent criminal and the murderer ruthlessly stepped on it through their crime and if we refuse to use the capital punishment, it partly neglects the inviolable value of the victim by not giving the victim full justice.\(^9\)

They further argue that in a civilized country it is not the death penalty but the deeds of the violent criminal and the murderer that should be viewed as barbaric. In this sense capital punishment helps in inculcating value to have the highest regard for the lives of innocent and law abiding citizens. Additionally it reinstates the respect and dignity of all victims of crime. It is not barbaric to remove a violent criminal or murderer who has injured and killed fellow humans. It is not barbaric to make the earth a somewhat more safe, calm and just place. On the other hand it is barbaric to let the murderer to spend the few years in prison and then give him freedom and the possibility to walk on the grave of his victims and may continue to terrify and torture people. It is not the one who commits the most heinous crime who would count of taking part of the humanity of the state governed by law. It should be those who are bitten and killed and the relatives of the afflicted, who should take part of the solidarity and humanity of society.\(^10\)

The violent criminal and the murderer have rejected all the humanity and respect of his fellow men. He has made his choice, and has placed himself at a distance of the human fellowship through his barbaric act. If the state governed by law “reward” this person by giving a lenient sentence this

\(^8\) Supra Note 6
\(^9\) Ibid.
\(^10\) Ibid.
would some ways mean an acceptance of the barbaric crime, while the death penalty would express the opposite- the greatest abhorrence of the criminal act. It is correct that the capital punishment does not declare the gospel of humanity to the violent criminal and the murderer. The death penalty declares the gospel of justice, and it is the humane gospel to the victim who is then placed in the centre of our care and concern.  

Retentionists believe that there is no other punishment except death penalty for the person who commits heinous crime. They believe that someone may suggest that lifetime prison term as an alternative but this does not mean justice. Even if it were a lifetime sentence without parole or mercy, the convict would get used to his new life in prison. He would soon adjust to this new world that he in a limited way can form so that the existence still becomes fairly decent for him. The prison term cannot be made unbearable for him, because then the prison become like a torturing pain, which would be inhuman. The prison term must therefore be made tolerable and humane by the state governed by law. But then justice falls flat on the ground.  

The deceased victim doesn’t get to participate in life not even a fraction of what the lifetime convicted criminal takes part of. The victim’s lot in comparison to the convict’s cannot even be compared, the difference is so complete. One got death, the other life, even if it is the life with limited freedom. No one can call this justice. On the contrary it is scornful and rude in justice and means that the victim’s dignity and value in comparison to the convict becomes exceedingly small. As long as the punishment bears no proportion to a crime the justice is weak and deadly sick there is therefore no alternative to the death penalty for the violent criminal or the murderer. Every measure against him from the state’s side, which replaces the death penalty, means complete justice is not performed so a lost human life can only be fully compensated through the death penalty.  

Moreover, the retentionist of capital

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12 <http://01.155.telia.com/~4/5525040/ny_sida_4.htm>
punishment believe that it should be continued in order to maintain the sovereignty of the state.\textsuperscript{13}

Those who are against this practice have their own viewpoints. According to them it fails to serve any penological purpose and does not act as a deterrent. Since hardened criminals believe that they will never be caught or punished. This further supported their view point that the capital punishment should be abolished because it is legalized, revengeful and cruel destruction of God's most wonderful creation, the human being. It is immoral, inhuman and barbarous. It extinguishes the flame of life forever and is plainly destructive of the right to life, the most precious right gifted to all.\textsuperscript{14} In eliminating the criminal, it is stated; the state does not erase the crime, but repeat it.\textsuperscript{15}

The society resorting to death penalty encourages disrespect to human life and slaughter of their fellow human beings. Beccaria viewed that it is "abused that the laws which detest and punish homicide should themselves commit it and that to deter citizens from murder they order a public one."\textsuperscript{16} It hardens more than it corrects him. A society which does not hesitate to kill a criminal a member and a product of the same society lacks the necessary moral stamina to ask the criminal to reform himself. It is better to prevent crime than to punish them. The true design of all punishments being to reform and not to exterminate mankind. Humanity demands that capital punishment comes to an end.

Capital Punishment imposes a definitive penalty on a man whose culpability is often relative. It devises the condemned man his natural right to live and a chance to make amends. But without such a right, moral life itself would be imperilled. Hence the imperative of abolishing the death penalty.\textsuperscript{17}

\textsuperscript{13} Moin Qazi, \textit{Banning Capital Punishment}. A question that continues to hang, Lexetjuris, (1990), p.30
\textsuperscript{15} Canadian Report p.12, para 37, quoted in 35th Law Commission Report, p.59.
\textsuperscript{17} <http://www/timesofindia.indiatimes.com/article>, (speaking tree capital punishment kills compassion) show/insid-10393078.
Death penalty is a form of cruelty and inhumanity unworthy of human civilisation, even the most efficient methods of execution does not result in instantaneous and painless death\(^\text{18}\).

Capital sentence is against the Gandhian Philosophy of life, “God alone can take life because he alone gives it…..” Its ideology is based on non-violence and if we have any regard and respect for him then we should removed death sentence. Shri M.L. Aggarwal advocating for the abolishing of capital punishment observed that “if a country physically and morally in shambles, as was Germany in 1948, could abolish the death penalty without any ill effects, this country of ours, the land of Lord Mahabir and Buddha- and of Mahatma Gandhi the apostle of peace and of Ahimsa…… should need the continued protection of the hang man”?\(^\text{19}\)

The true design of all punishments should be to reform and not to exterminate mankind. We must cure our criminals, not kill them. Crime is a social disease pointing out the mal-adjustments in society. Like any other diseased persons, the criminals must also be treated instead of being punished. Time has come when the jailor and the prison guard have to be replaced by a psychiatrist and a nurse. To open a school is to close a prison. A criminal can be cured by perfect education. Criminals are not normal and healthy human beings and that crime is in great measure the product of physical and mental abnormality and degeneracy. The Modern clinical school like the Italian school studies the criminal rather than the crime accept as that crime is symptomatic of underlying personality difficulties.\(^\text{20}\) Death penalty wasted human material which is the principle asset of the state.

Capital punishment is an irrevocable punishment. Nobody can claim that our laws are flawless in all respects. Any error in this context is to cost human life beyond reclamation. The human mind is yet to discover the scheme of faultless legislation. If, later on, the decision is discovered to be

\(^{19}\text{Thirty fifth Law Commission Report, p.60.}\)
wrong, it cannot rectified. It further supports their opinion that capital punishment leads only to the destruction of sinner and not the sin at all. When there are other modes of punishment available, what is the justification for such brutal punishment.\textsuperscript{21} Several factors helps in explaining why the judicial system cannot guarantee that justice will never be miscarried. These include an over zealous and sometimes motivated prosecution, mistaken or perjured testimony, faulty investigation, forced confessions, incompetent defense and seemingly conclusive circumstantial evidence. To retain the death penalty in the face of such demonstrable failures of the system would be unfair, especially when there are no strong over riding reasons to favour death penalty.

The sentence of death injures the family of the offenders and thus imposes suffering on the persons who have done nothing to deserve the suffering. It is also clear that criminal law barks at both-rich and poor, but bites the weak only. Capital sentence sometimes, though not generally, is proved to be class biased. The poor runs a greater risk because of lack of means and legal awareness on his part.\textsuperscript{22} Mr. B.K.P. Sinhe said in Rajya Sabha debates, “we would hardly find the rich or affluent person going to the gallows. Who ever has a long purse. Who ever can borrow or hire the services of great talent has reasonable chance of escaping the gallows though he has really committed a murder. It is only the poor, the resource less people who have nobody to support them who usually go to gallows. The death penalty in its operation is discriminatory.”\textsuperscript{23} So also Governor Disalle of Ohio state speaking from his personal experience with the death penalty said “During my experience as a Governor of Ohio, I found the man in death row had one thing in common, they were penniless. There were other common denominators, no mental capacity, little or no education, few friend, broken home, but the fact that they had no money was a principle factor in their being condemned death.”\textsuperscript{24} So, it is the poor people who run greater risk of capital punishment.

\textsuperscript{21} Smt. Svitry Devi Nigam, Rayya Sabha Debates (1968), p.483
\textsuperscript{23} Rajya Sabha Debets, April 25, 1958, col. 449
\textsuperscript{24} AIR 1982 SC 1325 p. 1388
and rich are always able to avoid it on account of the influence and money. Thus the abolitionists contended that the capital punishment is not serving any social purpose.

The civilised goal of criminal justice is the reformation of the criminal and death penalty means abandonment of this goal for those who suffer it. Obviously death penalty can not serve the reformatory goal because it extinguishes life and put an end to any possibility of reformation. In fact, it defeats the reformatory end of punishment. But the answer given by protagonists of death penalty to this argument is that though there may be a few murderers whom it may be possible to reform and rehabilitate, what about those killers who can not be reformed and rehabilitated? Why should the death penalty be not awarded to them? Justice Krishna Iyer provides the answer to this question. He says:

"Since every saint has a past and every sinner a future, never write off the man wearing the criminal attire but remove dangerous degeneracy in him, restore his retarded human potential by holistic healing of his fevered, fatigued or frustrated inside by repairing the repressive though hidden, injustice of social order which is vicariously guilty of the criminal behaviour of many innocent convicts. Law must raise with life and jurisprudence respond to humanism."25

Further, the arguments raised in the previous Paras can not be sustained as there is no way of accurately predicting or knowing with any degree of moral certainty that a murderer will not be reformed or is incapable of reformation. All we know is that there have been many successes even with the most vicious of cases. Was Valmiki a sinner not reformed and did he not become the author of the one of the world's greatest epics? Were the dacoits of Chambal not transformed by the saintliness of Vinoba Bhave and Jai Parkesh Narayan? We have also the examples of Nerthan Leopold, Paul Crump and Edger Smith who were guilty of the most terrible and gruesome murders but who having escaped the gallows became decent and productive human beings. These and many other examples clearly show that it is not possible to know before hand with any degrees of certainty that a murderer is

beyond reformation. Then would it be right to extinguish the life of a human being mere on the basis of speculation and it can only be speculation and not any definitive inference, that he can not be reformed. There is dignity in every man no one is beyond redemption. The hope of reforming even the worst killer is based on experience as well as faith and legitimate the death penalty even in the so-called exceptional cases where a killer is said to be beyond reformation would be to destroy this hope by sacrificing it at the alter of superstition and irrationality.

The Royal commission on Capital Punishment (1949-53) observed:

"Not that murderers, in general are incapable of reformation, the evidence plainly shows the contrary. Indeed the experience of countries without capital punishment indicates that the prospects of reformation are at least as favourable with murders as with those who have committed other kinds of serious crimes".

Sir Earnest Gowers, chairman of the Royal Commission on capital punishment also emphasized the disturbing implication of the argument favouring eliminating of a killer who is a social monster and uttered the following warning:

"If it is right to eliminate useless and dangerous members of the community why should the accident of having committed a capital offence determine who should be selected. These are only a thing proportion and not necessarily the most dangerous...... It can lead to Nazism".

This theory that a killer who is believed to be a social monster or beast should be eliminated in defence of the society can not therefore be accepted and it can not provide a justification for imposition of death penalty even in this narrow class of cases. The criminal always remains a human offender, and as human he is always free to learn new values and new adaptation. The

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26 AIR 1979 SC 916
imposition of punishment is justified only by its ability to re-educate on offender and thereby to return him to society as an integral human being.\textsuperscript{28}

Another question is whether there is some merit in the deterrent justification for capital punishment or not? Is capital punishment is most desirable and most effective instrument for protecting the community from violent crimes? Does the death penalty really and appreciably decreases murder. These are questions which need serious consideration before answering.

To some segments of the population, execution may deter killings, conversely, to some segments of the population, execution may encourage killings. Deterrence may indeed be an indispensable corner stone of our criminal justice system, but when it comes to capital punishment, this theory and justification lacks empirical support. The statistics and various studies make it clear that in reality death penalty has failed as a deterrent for several reasons.\textsuperscript{29}

a) A punishment can be effective deterrent only if it is consistently and promptly employed. Capital punishment cannot be administered to meet these conditions. The proportion of first degree murderers who are sentenced to death is small, and of this group, an even smaller proportion of people are executed. Of all those convicted on a charge of criminal homicide, only 3 percent are eventually sentenced to death. In most cases, death sentence is executed after ten to fifteen years even more from the date of the commission of the crime. Bombay Bomb Blast case is a clear example of it. Crime was committed in 1994 and now first court has given punishment after 14 years. Further long time is likely to be taken by the Supreme Court and then the President of India before any of those sentenced may finally face the gallows.

\textsuperscript{28} Supra Note 24
b) Persons who commit murder and other crimes of personal violence either might or might not have premeditated their crimes. When crime is planned, the criminal ordinarily concentrates on escaping detection, arrest and conviction. Such crimes continue to be committed not because award of death penalty is rare but because criminal thinks he is too clever to be caught. The threat of even the severest punishment will not discourage those who expect to escape the detection and arrest. It is impossible to imagine how the threat of any punishment could prevent a crime that is not premeditated.

c) Most capital crimes are committed in the heat of the moment. Most capital crimes are committed during moments of great emotional stress or under the influence of drugs or alcohol, when logical thinking has been suspended. In such cases, violence is inflicted by the persons without thinking of the consequences to themselves as well as to others. Furthermore the death penalty is futile threat for the political militants and their likes who claim usually to act in the name of ideology that respect its martyrs.

d) If, however, it is true that severe punishment can deter crime, then life imprisonment is sever enough – rather more severe then death penalty – to deter any rational person from committing a violent crime.

The Law Commission has discussed this issue at length. The augments of the Law Commission regarding the deterrent effect of capital punishment are as follow:

(a) Basically every human being dreads death.

(b) Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment. The difference is one of quality and not merely of degree.
Those who are specifically qualified to express an opinion on the subject including particularly the majority of the replies received from state governments, judges, Member of Parliament and legislatures and member of the Bar and notice officers are definitely of the view that the deterrent object of capital punishment is achieved in a fair measure in India.

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

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

Statistics of other countries are in conclusive on the subject. If they are not regarded as proving the deterrent effect, neither can they be regarded as conclusively disproving it.

In the report various factors were considered such as: social upbringing, disparity in moral and educational standards, vastness of country, diversity of the population, need to maintain law and order which justify retention of capital punishment. But these factors would always continue to exist, as long as human life exists on this subcontinent and so these will always continue to be “risks” in abolishing capital punishment. What does the Law Commission mean to suggest, whether social up-bringing, moral and educational standards and the diversity of the population be ever made uniform?

Bhagwati. J. in his dissenting judgement has criticized the findings of the Law Commission. According to him the arguments based mere on fear psychosis than on record. He further added it is difficult to see how any of these factors referred to by the Law Commission, barring the factor relating to

\[\text{Supra Note 19, Para 334-370}\]
the need to maintain law and order, can have any relevance to the question of deterrent effect of capital punishment.\textsuperscript{31}

Various studies conducted in different countries which have abolished the death penalty show that death penalty has little deterrent effect i.e. the rate of commission of crimes punishable with the death has not increased after the abolition. The reason is not that punishment has no relation to crime but rather that the two are not so simply and linearly related – like the two sides of a balance that when the ones goes up the other goes down to the same extent. Between crime and punishment there lies the other factors also which plays an important role in the rate of commission of crime. These factors are human existence, social, economic, political and cultural.\textsuperscript{32}

The Indian Penal Code has defined the offences and prescribed in most cases the maximum punishments. The judiciary has been given a wide discretion in the matter of awarding the quantum of punishment. It may award the maximum or a less punishment. The sentencing process has not been uniformed as the quantum of punishment given by different courts for the same or similar offence varies apart. There are no uniform guidelines in the sentencing process. There are various factors which play important role in deciding the appropriate sentence. The decision in \textit{Santa Singh v. State of Punjab}\textsuperscript{33} highlights the sentencing policy and guidelines in assessing the appropriate quantum of punishment. The Supreme Court, observed, "The purpose of hearing, before passing the sentence is to direct the court's attention to such matters as the nature of the offence, the circumstances, extenuating or aggravating of the offence, the prior criminal record if any, of the offender, the age, the record as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment emotional and mental conditions of the offender, the prospects for rehabilitation, the possibility of return to normal life in the community, the possibility of treatment or training of the offender, the

\textsuperscript{31} Supra Note 14
\textsuperscript{32} R. Hood, \textit{The Death Penalty, A world wide perspective} (1990), p.190-212
\textsuperscript{33} AIR 1975 SC 2386.
possibility, that the sentence may serve as a deterrent to crime to the offender or to others and the current community needs, if any, for such a deterrent in respect to the particular type of offence". So the learned magistrate when convicting the offender has to think these "Sentencing Factors" as mentioned in this judgment which will help him to arrive at the most appropriate sentence. The sections 235(2) and 248 (2) are obligatory on the criminal court to hear the accused on the question of sentence before punishing them. The answers given by them, help the learned court to impose the correct and most appropriate sentence on the convict. It also enable the convict to place other factors that support a plea for lesser sentence, that the provision for hearing him in section 235(2) Criminal Procedure Code was introduced. If these factors are not properly taken into consideration, it will results in differential and arbitrary sentence.

Another controversial question which relates to death sentence is mode of its execution. In Deena v. Union of India34 Supreme Court of India laid down provides that the execution of death punishment should satisfy the threefold test viz;

1. The act of execution should be as quick and simple as possible and free from anything that unnecessarily sharpens the poignancy of the prisoner’s apprehension.
2. The act of the execution should produce immediate unconsciousness of the person passing quickly into the death.
3. It should be decent.
4. It should not involve mutilation.

In this case, question raised was weather hanging by neck to execute a capital punishment could be held to be violative of Article 21, on the ground that it is a cruel, degrading and painful method of taking life. The court unanimously held that the method prescribed by the section 354 (5) for executing the death sentence by hanging by rope does not violate Article 21 of the Indian Constitution. The Court held that section 354 (5) of the Criminal

34 (1983) 4 SCC 645
Procedure Code which prescribed hanging as mode of execution lays down fair, just and reasonable procedure within the meaning of Article 21 and hence is constitutional. Relying on the report of U.K. Royal Commission, 1949, the opinion of the Director General of Health Services of India, The thirty fifth report of the Law Commission, opinion of prison advisors and forensic medicine, the Court held that hanging by rope is the best and least painful method of carrying out the death sentence than any other method. The Judges declared that neither electrocution, nor lethal gas, or shooting, nor even the injection has any distinct advantage over the system of hanging by rope.

To find out a more human method of executing the death sentence the Law Commission of India came out with a consultation paper on the subject in 2003. The commission is of the view that administering the lethal injection should be provided as an alterative mode to execution of death sentence along with existing mode execution of death sentence by 'hanging by neck till death' as provided in section 354(5) of Cr.P.C. 1973. It may not be appropriate at this juncture to wipe out all together the present mode of execution of death sentence i.e. 'hanging by neck till death'. So Law Commission is of the view that the present mode of execution be retained and further provision be added permitting an alternative mode of execution of death sentence by lethal injection.35 It is worth mentioning here that there is a significant increase in the number of countries which have adopted a method of execution by lethal injection36.

To analyse the discretion exercised by judges in awarding capital punishment some important cases from the year 1995 to 2006 have been examined. These cases further have been categorized into different heads37 like:

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36 Ibid, There are 35 States use this method
37 In the cases analysed, where more than one accused were involved, I have considered the punishment awarded in each case to calculate different punishment awarded i.e. out of five accused, if two are awarded Life Imprisonment and two are awarded death penalty and one is
Conclusions and Suggestions

(i)  **Rape and Murder** – I have analysed fifteen cases of rape and murder in which death penalty is awarded. Out of fifteen cases analysed, death penalty is awarded in 86.67% of the cases by the Trial Court, 73.33% by the High Court and in 33.33% cases by the Supreme Court and Life imprisonment is awarded in 6.67% of the cases by the Trial Court and 60% by the Supreme Court.

(ii) **Robbery and Murder** – I have analysed eleven cases of robbery and murder in which death penalty is awarded. Out of eleven cases analysed, death penalty is awarded in 90.9% of the cases by the Trial Court, 100% by the High Court and in 54.54% cases by the Supreme Court and Life imprisonment is awarded in 18.18% of the cases by the Trial Court as well as by the High Court and 45.45% of the cases by the Supreme Court.

(iii) **Multiple murders and land dispute / personal enemity / revenge** – I have analysed twenty six cases of multiple murder committed on account of land dispute, personal enemity and revenge in which death penalty is awarded. Out of twenty six cases analysed, death penalty is awarded in 96% of the cases by the Trial Court, 80.76% by the High Court and in 46% cases by the Supreme Court and Life imprisonment is awarded in 15.38% of the cases by the Trial Court and 23.07% of the cases by the High Court and 61.53% of the cases by the Supreme Court.

(iv) **Greedy / Suspicious husbands and Murder** – I have analysed nine cases of greedy and suspicious husbands who were awarded death penalty for murder of their wives out of nine cases analysed, death penalty is awarded in 66.66% of the cases by the Trial Court, 77.77% of the cases by the High Court and in 33.33% of the cases by the Supreme Court. Life imprisonment is awarded in 22.22% of the cases by Trial Court, 11.11% of the cases by the High Court and 77.7% of the cases by the Supreme Court.

(v) **Superstition and Murder** – I have analysed three cases of superstition and murder in which death penalty is awarded. Out of three cases analysed, death penalty is awarded in 100% of the cases by the Trial Court, 66% by the High Court and in 33% of the cases by the Supreme Court and Life imprisonment is awarded in 66% of the cases by the Supreme Court.

acquittal then death penalty is counted while calculating the percentage of death penalty and life imprisonment is also counted to calculate the percentage of life imprisonment.
(vi) **Terrorism and Murder** - I have analysed five cases of terrorism and murder in which death penalty is awarded. Out of five cases analysed, death penalty is awarded in 80% of the cases by the Trial Court, 60% by the High Court and in 100% cases by the Supreme Court. Life imprisonment is awarded only in 20% of cases by Trial Court.

The above cases show that except in cases of terrorism, trial courts have greater tendency towards awarding capital punishment but as the cases move in appellant stages, some of the cases got more sympathetic ear and lesser punishment. The Supreme Court takes into consideration various mitigating factors and by applying the formula of 'rarest of rare case' further softens its attitude towards awarding capital punishment. But in cases involving terrorism, specially related to assassination of popular political leaders the court has invariably opted for capital punishment considering them rarest of rare category as involved in Bachan Singh\(^38\) Case.

The analysis of decisions, given during the period 1995-2006 makes it clear judges have been awarding death penalty or refusing to award it according to their own scales of value and social philosophy and there is no consistent approach in the judicial decision making. Even Bachan Singh's\(^39\) case has created more confusion than clarity by giving room for individual discretion and subjective opinion. One of the reasons given by the courts in a number of cases for imposing death penalty is that the murder is brutal, cold blooded, deliberate, unprovoked, fatal, gruesome, wicked, callous heinous or violent. But use of these labels for describing the nature of the murder is indicative only of the degree of the courts aversion for the nature or the manner of the commission of the crime and it is possible that different judges or different bench of judges may react differently to these situations. If a case comes before one bench consisting of judges who believe in the social efficacy of capital punishment, the death sentence would in all probability be confirmed, but if the same case comes before another bench, consisting of judges who are morally and ethically against the death penalty, the death

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\(^38\) *Supra* Note 14

sentence is most likely to be commuted to life imprisonment. It is likely that one bench may, having regards to its perceptions, think that there are special reasons in the case for which death penalty should be awarded, while another bench may conscientiously take a different view and hold that there are no special reasons and that only life imprisonment should be imposed and it may not be possible to assert objectively and logically as to who is right and who is wrong.

The judgments do not provide a clue as to what constitutes the rarest of rare case. The impossibility of laying down guidelines could lead to an arbitrariness of the decision and also amount to cruel and degrading punishment. The rationale of proportionality of the crime and aggravating circumstances in practice have no objectivity as one cannot objectify that ‘this’ minus ‘that’ equal death.40

Every crime is revolting to an ordinary mind. But a convict sentenced to death may well say why me and not he who escaped with a lesser punishment. Judicial discretion exercised in ordinary matters one way or the other, even if faulted, is understandable and may be accepted. But in matter of life and death, can one well be asked by the accused, Am I to live or die depending upon the way on which the benches are constituted from time to time? Is that not clearly violative of fundamental guarantees enshrined Article 14 and 21 of the Constitution.41

Suggestions

It is said that the time of one’s death is uncertain, but the time of death of a condemned prisoner can made certain by the ‘Human God’. Extinguishing the life of a man is repugnant and repulsive and it is against all the cannons of civilized society which is marked by fellowship, tolerance culture and refinement. So, there is an urgent need of formulating some

41 Supra Note 1
ground rules to end the Bench to Bench play with the life of those whose fait is decided by it.

In the interest of individualized justice, it is necessary to vest sentencing discretion in the court so that appropriate sentence may be imposed by the court in the exercise of its judicial discretion, having regard to the peculiar facts and circumstances of a given case, otherwise sentencing process would cease to be just and rationale. But at the same time, the sentencing discretion conferred upon the court cannot be all together uncontrolled or unfettered specially in the cases where the court has to choose between life and death. Some of the suggestions which can be taken into consideration to reduce disparity in sentencing are as follow:

- Though the sentencing disparity cannot be eliminated altogether, yet efforts should be made for reducing it to the minimum. The strategies which may be employed are the better training of judicial personnel and coordination of the sentencing policy through sentencing councils. An effective technique employed in the USA to achieve coordination among the different judges of a multijudge court. The judges meet in the sentencing council to discuss the punishment to be awarded in the cases pending before them. From such a discussion a consensus on sentencing standards emerges. However, the ultimate responsibility for determining sentence rests with the judge to whom the case is assigned, although the discussion and need to state reasons for a sentence tends to restrain the imposition of unreasonably severe or lenient sentences. In the sentencing council, the pre-sentence report for each offender is circulated and each judge recommends a sentence. The advantage of the council is that the judges can hear the other judges' opinion which may lead to the less sentencing

42 Supra Note 14
disparity. But the judges are also free to ignore the comments of their colleague. Based on a study of sentencing councils in New York and Chicago, there is evidence that sentencing disparity is reduced by about ten percent as a result of the role of the sentencing councils. It has also been suggested that the job of sentencing should be taken away either wholly or partly from the judicial personnel and the same should be entrusted to the boards consisting of experts trained in disciplines like social work, psychiatry and allied disciplines. However, it would depend upon the integrity, honesty and impartiality of the members of the Board, whether such a system could generate trust and ensure proper functioning of the Board.

- At the appellant stage, in the Supreme Court, the Bench of at least five judges should decide the cases where the death penalty has to be awarded so that discretion can be used wisely and uniformly. If possible one specific Bench may be constituted only to deal with the cases of capital punishment. This will decrease the disparity in the award of sentence. In this context it may be suggested that both at the stage of confirmation by the High Court and final appeal to the Supreme Court, every capital punishment case should be finally decided by a full Bench which should come to a unanimous conclusion about the award of capital punishment. If they are not unanimous in their decision then life imprisonment should be awarded.

- Certainty of detection and conviction is more conducive to the reduction of crime than the actual severity of punishment. Proper, scientific and quick investigation followed by speedy trial resulting in less punishment like life sentence is more deterrent than leisurely judicial death award with liberal interpretation of

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43 Surpa Note 11, p. 54
executive clemency. Equally effective but far less inhuman is a life imprisonment without the possibility of parole can be another solution to this problem. Even the abolitionists do not want to take away the right of the state to punish the offenders. They would like to punish those who offend against the state or any person. But the truth is, that because of capital punishment offender escape unpunished.

In the whole we can say that retaining capital punishment in our legal system demands a full and open debate and clear guidelines that would be in consonance with the modern penological thinking and emerging constitutionalism. There is no legal system that is flawless. No judge gives a perfect judgement. Judges are not divine but human beings of flesh and blood that sometimes make flawed analysis, reach incorrect conclusions and give a wrong decisions particularly when they have to base their finding of guilt or otherwise on the basis of tardy, motivated, non-scientific investigation unable to give fool proof evidence. No legal system can provide complete justice in all cases. In order that the tendency of violence and murder is reduced a variety of steps have to be taken, death penalty being one of them. If society is to develop in a good way and in order to see the criminal tendencies are minimised the citizens of society and the government have to focus and fight the following diseases in the society: unemployment, poor economic growth, political instability, social problems, racial and cultural conflicts, ineffective police force, a legal system that lacks the trust of the people, mental sickness, child abuse etc. The development in these areas is for the better, it would bring forth a more flourishing social climate as a whole, and thereby create the conditions needed to see the crime statistics going downward.

Profitability from criminality and social acceptance of criminal in political and other social spheres of society has resulted in multiplication of criminal activities, which in a way has not only effect individual victim but has made the society as a whole a victim. Undisputedly, if not elimination, the minimisation

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of crimes in the society is very essential for the growth of individuals as well as the development of the nation as a whole. Thus criminal needed to be punished to deter others but at the same time following reformative policies those who have already deviated from the accepted norms of the society should be made to fall in line with the rules of the game and thus enable to play a positive role in the society. However, at the same time since punishment has to be awarded and in some cases even death penalty, where the continuation of such person existence amidst the law abiding citizen is dangerous for the life and the liberty of the others but in such cases justice and fair play demands as much equal treatment as the circumstances may admit and therefore in the exercise of discretion by an individual or individuals empowered by the state system to award punishment, objectivity and least subjectivity should be the norm. All effective appropriate measures should be thought of and efforts made to apply them so that the exercise of discretion does not result in generating a sense of injustice and unfairness because of the discriminatory nature of the manner of the exercise of discretion authority. Some of the suggestions given above, it is evoked, may help in achieving this ultimate goal of judicial justicing system.