

# CAN CAPITAL PUNISHMENT EVER BE JUSTIFIED: A CRITICAL STUDY

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## ABSTRACT

The debate of “should death sentence be allowed in modern world” is secondary aspect to be discussed in the context of Indian Criminal Justice system. The first and the foremost question relevant in the Indian Context is “Can Death Sentence Be Executed in India in Reality”. To our dismay, it’s quite difficulty at least procedurally (if not technically) to execute death sentence in India. The concept of death sentence has been a subject matter of debate for long period of time in and across the world. Majority opinion of public is that death penalty must be abolished as it violates the Human Rights at large. Modern jurists are of the opinion that if killing is wrong, nothing can make it right either the legal or social sanction. If it is wrong for a man to kill another man, so it is even for the State to do. It is debated that death penalty has had no visible effect as a deterrent and has utterly failed to reduce the number of murders, which, accordingly makes the inflection of capital punishment completely useless. The accused in India under the safeguards of the Indian Criminal Justice system has lot of options to delay his execution after the apex court finds him guilty of offence, namely Review Petition, Curative Petition, Mercy Petition simultaneously to Governor and the President and then delay in disposing Mercy petition also gives him ground to commute his sentence. This article discusses this issue in detail.

**Keywords:** Pardon, Death sentence, Human Rights Commission, Capital Punishment, Mercy Petition.

## INTRODUCTION

Let's begin our discussion by comparing the concurrent powers of President of India and the Governors of the State over the issue of pardoning the death sentence. It is a settled proposition that Art 161 of the Constitution of the India confers on the governor of a state the power to grant pardons .....or to commute the sentence of any person convicted of any offence (under any law time being in force in India) relating to any matter to which the executive power of the state extends and Art 162 of the Constitution of India in crystal words clarifies that executive power of the state extends to the matters with respect to which the legislature of the state has power to make law. On a fine appraisal of these two articles of the Constitution of India along with the entry 1 under list III, (i.e. the concurrent list which provides state legislature authority to make law on criminal matters including all matters included in the IPC), one can unequivocally conclude that the Governor has the authority to pardon even the "Death sentences". But according to the dictate of the article 72 of the Constitution, which manifests that along with others, the President of India has the requisite authority to award pardon in all cases of Death Sentences (Capital punishment) and the Governor shall have the authority to suspend, remit or commute the sentence of death, now it became easier said than done to conclude that whether the Governor has the power to pardoned the "sentence of death" or not<sup>1</sup>.

The death penalty debate has gathered much heat in the present times. While the protagonists of death sentence claim that it must be awarded to the most heinous of crimes, the persons who advocate human rights are dead against the notion of the continuance of death penalty as they allege it to be in violation of the basic human rights of an individual. This paper will go on to

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<sup>1</sup> Pardoning power is a superior power, it rescinds both the sentence and the conviction and absolves the offender from all sorts of disqualifications & punishments as if he has taken a holy dip in a River Ganga while others (commutation, remission etc.) only reduce the sentence or change the character of punishment from one form to another without absolving the conviction.

elucidate the reasons as to why the existence of death penalty is material to achieving justice in the State.

Before delving into an explanation of the reasons for the continuance of death penalty, it is first vital to note the meaning of death sentence, its connotations, and when it can be awarded with respect to the present times. First, death penalty is the sentence, which legally terminates the natural life of a person. This means that a person's life can be terminated legally by taking recourse to law. This connotes that a person's life is cut short from the natural span of that person's life. Second, as according to Indian law, death penalty is awarded only in the rarest of rare cases. This indicates that death penalty is given only for the most heinous of crimes. In the 2007 Judgment (*Omprakash & Anr. v. State of Tamil Nadu*), the Court reiterated that the death sentence could be invoked in the rarest of rare cases.<sup>2</sup>

Death penalty is not a contemporary concept; it has been in existence since the ancient times. In the ancient times the death penalty ( usually involved beheading the person ) was awarded by the King for the explicit non – compliance of by any person of any command issued by the King or the non – compliance with any moral obligation imposed upon that person. It was later incorporated into the Indian Penal Code, 1860, leading to its legal incorporation and has been in legal existence in India, ever since. In the 20th century, there was a movement for the abolition of death penalty, which lead to many States complying with the movement and going ahead to abolish death penalty. However, in India the death penalty has continued to exist. This has opened the ground for great discussion and debate, with the human right activists coming out with strong reasons for the abolition of death penalty.

In any country in the world, the average length of time a condemned man or woman can expect to spend awaiting execution is 14 years and 10 months.<sup>3</sup> The delay between the convict being sentenced to death and being put to death is in theory designed for the condemned to appeal their sentence. In practice, the condemned are subject to years of confinement on 'death row' – isolated in a high security prison, contemplating their impending fate. The dehumanizing experience of confinement prior to execution has been defined by criminologists and

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<sup>2</sup> Criminal Appeal No. 143 Of 2007.

<sup>3</sup> Snell, Tracy., "Capital Punishment, 2010 – Statistical Tables", *Bureau of Justice Statistics*, US Department of Justice: NCJ 236510, 2011.

condemned alike as a 'living death'<sup>4</sup>, but the psychological effects of this confinement are rarely taken into account when weighing the death penalty.

## HISTORY

In India, Death sentence is as old as the Hindu society. It was prevalent during in India from the time immemorial. The references about death penalty in our ancient scriptures and law books. The Hindu law givers did not find anything abhorrent in awarding death sentence to wrongdoers, they have justified it in the cases involving serious offences against the individuals and the state. Generally, the death penalty was always accompanied with an infliction of torture and was applied indiscriminately to all the offenders. The ancient law of crimes in India provided death sentence for quite a good number of offences. The Indian epics viz, the Mahabharata and the Ramayana also contain references about the offender being punished with vandal and which meant amputating the criminals to death are known to have existed which included changing and imprisonment of the offender. During the medieval period of Mughals in India, the sentence of death revived in its crudest form. At times the offender was made to dress in the tight robe prepared out of freshly slain buffalo skin and thrown in the scorching sun. The shrinking of the law hide eventually caused death of the offender in agony, pain, suffering death penalty was by hailing the body of the offender on walls. These modes of putting an offender to death were abolished under the British system of criminal justice administration during early decades of nineteenth century when death by hanging remained the only legalized mode of inflicting death sentence.

It is interesting to note that the Sikh Emperor Maharaja Ranjit Singh never hanged anyone during his reign. The British, however, used death by hanging as the only legalized mode of inflicting capital punishment. In the British era, death sentence was executed by hanging the convict by the neck till death. The same was reflected in the Indian Penal Code, 1860

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<sup>4</sup> Johnson, Robert., *Death Work: A Study of the Modern Execution Process*, (2nd ed.) Belmont, CA: Wadsworth, 1998; Chessman, Caryl W. *Cell 2455, Death Row*, Prentice-Hall, Inc, New York, 1954.

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

## **EXECUTION OF DEATH PENALTY**

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

The issue of the mode of execution of the death sentence was once again raised in *Shashi Nayar v. Union of India*.<sup>6</sup> It was submitted that capital punishment being barbaric and dehumanizing should be substituted by less painful method. The Court held that since the issue had already been considered in *Deena (supra)*, there was no good reason to take a different view.

The issue of execution of death penalty by public hanging came before the Supreme Court in *Attorney General of India v. Lachma Devi*.<sup>7</sup> It challenged the order of the Rajasthan High Court regarding the execution of the petitioner by public hanging at one of specified venues in Jaipur after giving widespread publicity of the date, time and place of the execution. The Supreme

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<sup>5</sup> (1983) 4 SCC 645; 1983 SCC (Cri) 879; AIR 1983 SC 1155.

<sup>6</sup> (1992) 1 SCC 96; 1992 SCC (Cri) 24.

<sup>7</sup> AIR 1986 SC 467.

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

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

Section 415 of the CrPC provides that when a person is awarded a death sentence by the High Court and consequently he makes an appeal to the Supreme Court under Article 134 (a)/(b) of clause (1) of the Constitution, the High Court has to order the execution of the sentence to be postponed until the period allowed for preferring such an appeal has expired, or, if an appeal is preferred within that period, until such appeal is disposed of. When the Sessions Court passes a death sentence to a murderer, the convict shall be committed to jail custody as provided in Section 366 (2) of the CrPC. Accordingly, under Section 30 (2) of the Indian Prison Act, 1894 the prison authorities used to keep such convicts in a cell known as the condemned cell. But more often than not, such imprisonment actually meant solitary confinement in practice. In *Sunil Batra v. Delhi Administration*<sup>8</sup>, the Apex Court held that a convict who is awaiting death sentence cannot be subjected to solitary confinement. The same view was further reiterated by the Supreme Court in *Triveniben v. State of Gujarat*.<sup>9</sup>

## **LONG DELAY IN EXECUTION**

Extensive delay in the execution of a sentence of death is sufficient to invoke Article 21 and demand its substitution by the sentence of life-imprisonment. In *Rajendra Prasad v. State of U.P.*<sup>10</sup>, Justice V.R. Krishna Iyer observed: “This convict has had the hanging agony hanging

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<sup>8</sup> 1978 Cr LJ 1741, at p. 1754.

<sup>9</sup> 1990 Cr LJ 1810 at p. 1822.

<sup>10</sup> AIR 1979 SC 916.

over his head since 1973 with near solitary confinement to boot! He must, by now, be more a 'vegetable' than a person and hanging a 'vegetable' is not death penalty." Accordingly, the death penalty was waived on grounds of long delay in execution of the convicted person. A considerable time between imposition of the capital punishment and the actual execution is unavoidable, given the procedural safeguards required by the courts in such cases. In fact, it is in favour of the convict. In *Sher Singh v. State of Punjab*<sup>11</sup>, the Supreme Court refused to follow the ratio of *T.V. Vatheeswaran v. State of Tamil Nadu* case<sup>12</sup>, and held that delay in execution of death penalty exceeding two years by itself does not violate Article 21 of the Constitution to enable a person under sentence of death to demand quashing of sentence and commuting it into sentence of the life-imprisonment.

## DISCUSSIONS AND FINDINGS

S.M. Seervai in his book *Constitutional Law of India* raised a contention based on the provisions of the Code of Criminal Procedure Of 1898. Mrs Seervai said that the Governor has two pardoning powers:

- First is Statutory power under Section.402 (1) of old CrPC of 1898, According to which the Governor may, without the consent of the person sentenced, commute any one of the following sentences for any other punishment mentioned after it:-
  - ✓ Death,
  - ✓ Transportation,
  - ✓ Rigorous imprisonment for a term not exceeding that to which he might have been sentenced,
  - ✓ Simple imprisonment for a like term,
  - ✓ Fine.
  
- Constitutional power under Article-161, which enables him to pardon all offences against all laws relating to a matter to which the legislature authority of the state extends. (concurrent list III, entry 1,IPC)<sup>13</sup>

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<sup>11</sup> AIR 1983 SC 465.

<sup>12</sup> AIR 1983 SC 361 (2).

<sup>13</sup> H. M. Seervai, "Constitutional law of India", Universal Law Publishing, 2015, p. 787

He said that the article 72(1) (c) [Power of the President to *grant pardons, suspend, remit or commute* a sentence of Death] read with proviso contained in Art 72(3)[Power to *suspend, remit or commute* a sentence of Death by Governor under any other law in force is not affected by the provision of the Article 72(1)(c) ], raised a question that whether the Governor of states also has the power to pardon a sentence of death. He contended that the express provision 72(1)(c) was provided to authorize president to pardon sentence of death passed for an offence in respect of law made in respect of matters in list II.

Conferment of this express power *impliedly repealed* the statutory power of Governor under Sec.402.(1) of CrPC 1898<sup>14</sup> or under Sec.432 and Sec.433 of CrPC 1973 which empower Governor power to *suspend, remit or commute* a sentence of Death and thus Article 72(3) expressly save such statutory power of Governor under Criminal law and as far as the Constitutional power is concerned the Governor derives it from Article 161 of the Constitution and hence he *has power to pardon even the death sentences*.

While expressing a different opinion Prof. D.D.Basu in his book “Introduction to the constitution of India”, clearly stated that the only authority which can pardon a Death Sentence is the President and although the Governor of the State has no power to pardon a capital punishment, he has, under Section.54 of Indian penal code and SS.432-433 of the Criminal procedure code 1973, the power to suspend, remit or commute a sentence of death in certain circumstances. It is this power which is left intact by the constitutional provision of article 70(2) so that as regards commutation, remission or suspension, the Governor shall have a concurrent jurisdiction with the president.<sup>15</sup>

Next question to be discussed is that “**Can Pardoning Power be exercised pending confirmation of sentence**”

***In Re: Maddela Yerra Channugadu and Ors[20]:*** In this case all the condemned prisoners, whose conviction by the Session Court have been referred to for the confirmation of sentences under Section.368 of the CrPC by the High Court, have been released as a result of a general

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<sup>14</sup> Now we are following “Cod of Criminal Procedure 1973”, which talks about Sec.402(1) statutory powers under Sections. 432-433.

<sup>15</sup> Dr. D.D.Basu, *Introduction to the constitution of India*, 20<sup>th</sup> edition, Lexis Nexis, 2013



amnesty granted by the Government of Andhra Pradesh. The question then arose, does this amount to an act of interference with the due and proper course of justice.

Ruling on the point that whether pardon can be granted pending the confirmation of sentence, court by comparing and contrasting the power of pardon in US and erstwhile UK came to the conclusion that power of pardon may be exercised at any time after the commission of an offence, either before legal proceedings are begun or during their pendency, and either before or after conviction.<sup>16</sup>

Court in this case also clearly mentioned distinction made by the Sutherland J. between the Judicial and Executive power over the subject matter of Death Sentences.

“While giving Judgment is a judicial function, carrying that into effect is an executive function and that remitting a sentence by way of clemency is an executive power which abridges the enforcement of the judgment but does not alter it qua judgment.”

***Nanavati Case*<sup>17</sup>:**

The Court reiterated its stand taken in “In Re: Maddela Yerra Channugadu”, that similar to US & UK in India also the power of pardon could be exercised before, during, or after trial. But as far as difference between executive and judicial function is concerned court was of the opinion that “The field in which that power is exercised does not depend upon the authority exercising the power but upon the subject matter and hence there can be no hesitation in affirming that under Art.161, the executive power of the State & under Art.142, the judicial power of the Court can within definite constricted limits be worked out in the same field.

***Sarat Chandra Rabha’s case:***

This case made distinction between Executive and Judicial power: Executive power of remission only reduces the length or the amount of sentence, leaving the order of conviction by the court and the sentence passed by it untouched. On the other hand if the appellate court or the revisional court as the case may be passed an order under Art.142 the whole sentence got changed. Court in this case followed distinction made by Sutherland J.

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<sup>16</sup>Pardoning Powers under the Constitution of India; Available at: [http://shodhganga.inflibnet.ac.in/bitstream/10603/128311/16/10\\_chapter%203.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/128311/16/10_chapter%203.pdf). Accessed on 23<sup>rd</sup> Nov, 2017.

<sup>17</sup> “Kamas Maneckshaw *Nanavati v. State of Maharashtra*”, 1961 AIR 112

Now the next question is, “Can pardoning power be exercised only after the conviction or Can it be exercised even before the conviction”

Point of determination here is should pardoning power be given narrow interpretation as required by the constitution (Can only be exercised after the conviction) or be given broader interpretation (Can be exercised even before the conviction) as has been held by the court in *In Re: Maddela Yerra Channugadu* and was later affirmed in the cases of *K.M. Nanavati v. State of Bombay* and *Ramdeo Chauhan v. State of Assam*.

The contention was that it amounts to interference in the functioning of the judiciary, but the fact that if executives do not want a case to be decided by the Judiciary, they always has an option of not placing it before the court or even after doing so they can anytime under Sec.321 of CrPC withdraw the prosecution and there is no review of such decision.

In no. of cases court couldn't reached the decision because prosecution had not placed requisite evidence before it. So if not theoretically, practically executives have 3 options:

- ✓ Not to place case for prosecution
- ✓ Withdrawal of prosecution (Sec. 321 CrPC)
- ✓ Not to implement the order ( mercy petition)

Now let's see Different cases in which Death sentence was awarded and mercy was sought but execution inordinately delayed.

### *Nalini's case*<sup>18</sup>

- ❖ Nalini<sup>19</sup> was the convict in the Rajiv Gandhi assassination that took place on May 21, 1991.<sup>20</sup>
- ❖ On Jan, 28, 1998 she was given the death sentence along with other 3 including her husband Murugan.

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<sup>18</sup> *State Of Tamil Nadu Through Superintendent Of Police, Cbi/si V.Nalini & 25 Ors*

<sup>19</sup> Nalini case is not for pardon rather for commutation of death sentence. Commutation merely substitutes one form of punishment for another of lighter character e.g. death commuted into rigorous imprisonment

<sup>20</sup> Assassination of Rajiv Gandhi; Available at: [http://en.wikipedia.org/wiki/Assassination\\_of\\_Rajiv\\_Gandhi](http://en.wikipedia.org/wiki/Assassination_of_Rajiv_Gandhi). Accessed on 23 Dec, 2017

- ❖ Year 1999, Date- May 11, - Supreme Court confirmed the death penalty awarded to them by the trial court.
- ❖ The four convicts than applied for the review petition before Supreme Court.
- ❖ On Oct 8, Year 1999-Supreme Court rejected their review petitions.
- ❖ In the Same Year Rajiv Gandhi's widow and the then Congress president Sonia Gandhi filled mercy petition for clemency to the then president K R Narayanan asking him to commute the capital punishment awarded to the three men and Murugan's wife Nalini. (Considering the fate of Nalini's daughter to whom she gave birth in the prison)<sup>21</sup>
- ❖ In another incident, On April 25, 2000, all the four convicts petitioned for clemency to the Governor of Tamil Nadu.
- ❖ The Governor acting on the petition as per the advice tendered to him by the then CoM of the State government, commuted the death sentence on Nalini to life term and rejected the petitions of the remaining three convicts.
- ❖ And On April 26, 2000- They sent mercy petitions to the President K.R. Narayana.(who fortunately or unfortunately never responded)
- ❖ After 10 Straight Years In Year 2010, Nalini moved to the High Court of Madras seeking her release as she had already served around 20 years in prison
- ❖ Looking at the gravity of the issue in the same year on 21 January, the Tamil Nadu government constituted advisory board
- ❖ The advisory board so constituted on March 29, rejected the premature release of Nalini<sup>22</sup>.
- ❖ After four months on 12<sup>th</sup> August the President Pratibha Patil rejected the mercy pleas of three men convicted and thus paving the way for their execution (after 11 years of their conviction)<sup>23</sup>
- ❖ The convicts then appealed to the Madras High Court against this verdict on the justification that the President's office showed "an inordinate and unexplainable delay"

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<sup>21</sup>Death Row Appeal; Available at: <http://www.indianexpress.com/news/death-row-appeal-cites-sonia-letter-asking-for-pardon-for-all-four/840997/>. Accessed on 30<sup>th</sup> Dec, 2017

<sup>22</sup>Premature Release of Nalini-Rajiv Gandhi Murder Convict; Available at: [http://articles.timesofindia.indiatimes.com/2010-01-21/india/28126770\\_1\\_premature-release-vellore-prison-nalini](http://articles.timesofindia.indiatimes.com/2010-01-21/india/28126770_1_premature-release-vellore-prison-nalini). Accessed on 21<sup>st</sup>, Dec, 2017.

<sup>23</sup>Mercy plea of Rajiv Gandhi Convict; Available at: <http://www.ndtv.com/article/india/president-rejects-mercy-plea-of-rajiv-gandhi-s-murderers-126034>. Accessed on 20<sup>th</sup> Dec, 2017.

in deciding their mercy petitions and hence violate their Fundamental Right to life and personal liberty (Article 21 of the Constitution)<sup>24</sup>.

- ❖ Considering the situation the Tamil Nadu Assembly on 30<sup>th</sup> Aug 2011, adopted a unanimous resolution urging the President Patil to re-evaluate the mercy petitions.
- ❖ 30 Aug 2011- The Madras High Court suspended the execution, scheduled for September 9, by eight weeks<sup>25</sup>
- ❖ On May1, 2012 Supreme Court said it would hear the three petitions.
- ❖ Feb, 2014 Nalini made representation to Tamil Nadu Government to release her under Sec.161 of the Constitution.
- ❖ On the 18<sup>th</sup> Feb, 2014 The Supreme Court Commuted the Death sentence on the grounds of inordinate delay in disposing their mercy pleas. The Court said that the state Government may consider releasing them under Article 161.
- ❖ On the very next day the state cabinet decides to release Nalini and 6 others and sent its decision to centre under Section 435CrPC.
- ❖ The decision of the State to release the convicts was dismissed by the Constitutional Bench of the Supreme Court on 2, Dec, 2015. The Bench ruled out that state doesn't have powers to release convict in cases investigated by the central agencies.
- ❖ June 2016, The Madras High Court was informed by the T.N. government that it has yet to take a decision on the premature release of Nalini, since her case with other co-convicts are pending before the Supreme Court.
- ❖ On 23, Oct, 2016 Nalini has written to the National Commission for Women, seeking its intervention in securing an early release for her.
- ❖ November 16, 2017, The Plea for premature release was rejected by the T.N. government.

From the Year 1991 to Year 2018, it's around 27 years the petition for release is yet to be decided and is with the Court. This case in harsh language speaking the truth of Justice Delivery in India.

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<sup>24</sup>Staying Execution in Rajiv Case, High Court to hear cruelty plea; Available at: <http://www.thehindu.com/news/national/tamil-nadu/staying-execution-in-rajiv-case-high-court-to-hear-cruelty-plea/article2411422.ece>. Accessed on 24<sup>th</sup> Dec, 2017.

<sup>25</sup> Death convict to be hanged on Dec,9; Available at: <http://www.thehindu.com/news/death-convicts-to-be-hanged-on-september-9/article2400888.ece>. Accessed on 30<sup>th</sup> Dec, 2017.

Let's discuss Bhullar's case where court made new distinction between terrorist related cases and general murder

***Mercy petition of Devinder Pal Singh Bhullar<sup>26</sup> :***

- **Sept, 1993:** Bhullar<sup>27</sup> triggers a bomb blast in Delhi which killed nine persons and injured 25 others, including then Youth Congress president M S Bitta.
- After Supreme Court dismissed his review and curative petition,
- **14 Jan, 2003,** he filed mercy petition to the President.
- **May 25, 2011:** The then President Pratibha Patil rejects Bhullar's mercy plea.
- He moves SC seeking commutation of his death sentence to life term on the ground of delay in rejection of his mercy plea.
- **April 12, 2013:** SC dismisses Bhullar's plea for commutation of his death sentence to life imprisonment.
- Rejecting both pleas: Long delay and mental condition, The Bench said it was of the view that earlier apex court rulings that long delays could be one of the grounds for commutation of death sentence into life imprisonment "cannot be invoked in cases where a person is convicted for offences under TADA (Terrorists and Disruptive Activities Prevention Act) or similar statutes

***Afzal Guru's case<sup>28</sup>***

- **Dec 13, 2001:** Five terrorists enter Parliament complex and open indiscriminate fire, killing nine people and injuring over 15.
- **Dec 18, 2002:** Death sentence given to Afzal Guru
- **Aug 4, 2005:** The Supreme Court confirmed the death sentence of Afzal Guru.
- **Sept 26, 2006:** Delhi court orders Afzal Guru to be hanged.
- **Oct 3, 2006:** Afzal Guru's wife Tabasum Guru files a mercy petition with the then President A.P.J. Abdul Kalam.

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<sup>26</sup> Afzal Guru – Death Convict; Available at: <http://www.hindu.com/thehindu/thscrip/print.pl?file=20051118002005000.htm&date=f12223/&prd=fline&>. Accessed on 30<sup>th</sup> Dec, 2017.

<sup>27</sup> Devender Pal Singh Bhullar & Anr v. State Of NCT Of Delhi, 12 April, 2013.

<sup>28</sup> Afzal Guru- A chronology of events; Available at: <http://www.thehindu.com/news/national/afzal-guru-a-chronology-of-events/article4396402.ece>. Accessed on 30<sup>th</sup> Dec, 2017.

- **January 12, 2007:** The Supreme Court dismisses Afzal Guru's plea seeking review of his death sentence, saying "there is no merit" in it.
- **May 19, 2010:** Delhi government rejects Afzal Guru's mercy petition; endorses capital punishment awarded to him by the Supreme Court.
- **February 3, 2013:** President Pranab Mukherjee rejects Afzal Guru's mercy petition
- **February 9, 2013:** Afzal Guru hanged in Tihar Jail.

Just within 6 days after President dismiss his mercy petition he was hanged. Criminals deserve to be punished and, if their crimes warrant it, with severity. But even harshness has its limits, which are dictated by conceptions of justice and a respect for human life and dignity.

Looking at the chronological order of Afzal Guru's case mentioned above 3 things can be concluded:

- Even when mercy petition is pending before the President a review petition can be filed in the Supreme Court
- Even when petition has already been filed with the President a subsequent petition can be filed before Governor. That means both have concurrent Jurisdiction.
- Any person on behalf of convict can file mercy petition.

*A look at the chronology of the Dhananjay Chatterjee case<sup>29</sup>:*

- **January 1994-** High Court of Calcutta confirmed the death sentence
- **2February, 1994-** Mercy petition filed to the Governor
- **16 February, 1994-** The Governor rejected the mercy petition
- **March 1994-**Special Leave Petition against HC's order in SC
- **1994-** Supreme Court dismissed the SLP
- **23 June, 1994-**President rejected the first mercy petition
- **14 November, 2003-** The court dismissed the convict's writ petition challenging the rejection of the mercy petition by the Governor.
- **January 8, 2004.-**The accused then filed a writ petition seeking a stay of execution and commutation of the death sentence. The Division Bench of the High Court dismissed this petition as well
- Accused then appealed against the High Court's order in the Supreme Court.

<sup>29</sup>Dhananjay Chatterjee – A chronological order; Available at: <http://www.frontline.in/navigation/?type=static&page=flonnet&rdurl=f12117/stories/20040827005102200.htm>  
Accessed on Nov, 11, 2017

- **26 March, 2004**- Apex Court agreed with the petitioner's contention that the State government had not placed before the Governor material facts, including the mitigating factors in this case. The Court, therefore, ordered the State government to again put up the mercy petition to the Governor, and convey all relevant facts to the notice of the Governor for an appropriate decision
- **2 June, 2004** - Governor once again dismissed the mercy petition. Accused's relatives then filed another mercy petition before the President.
- **24 June, 2004**- President directed the State government to stay the execution until a final decision.

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

With the increasing significance of human rights, individual liberties and civil society, there has been an international trend towards abolition of death penalty. The Supreme Court has repeatedly held that the death penalty is not unconstitutional and does not violate Article 21 of the Constitution. The Apex Court, however, has made its intentions clear by refusing to define clearly as what constitutes the 'rarest of the rare cases' and left it to the discretion of the judges hearing the case despite knowing that the same would lead to a differing set of results. Therefore, it is vividly clear that the judges have been awarding death sentence according to their own scale of values, social philosophy and exercise of judicial discretion as per the facts of the cases. There are some very strong arguments for and against abolition of the death penalty in India and these are discussed as follows:

### **a. Arguments in Favour of Abolition of Capital Punishment**

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

One of the arguments is: "... though the court was shocked by the manner of the offence and the fact that the security guard had raped and murdered an 18 year old girl, in case of Dhananjay Chatterjee.<sup>30</sup> In Soni Thomas's case, the Supreme Court overturned the death penalty given in

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<sup>30</sup> Sakharani, Monica and Adenwalla Maharukh, "Death Penalty: case for its Abolition", *Economic and Political Weekly*, Vol. XL No. 11, 2005, pp. 1023-1026.

the case of rape and murder of an 11 year old girl by the co-paying guest, and in Mohd Chaman's case<sup>31</sup>, the Court gave a life sentence for the murder and rape of a one and half year old girl. The murders were all equally brutal and shocking and arguably fulfilled the 'rarest of the rare' criteria, but the court for reasons recorded in the judgment did not deem fit to give capital punishment. This difference in the political and legal understanding of the judges is most starkly seen in Krishna Mochi's case.<sup>32</sup> In this case, Justice M.B. Shah acquitted the accused for insufficiency of evidence and the majority, but Justices B.N. Agarwal and Arijit Pasayat not only found the evidence sufficient to convict but also enough to put the accused to death. According to the judges, the offence by militants which has been described by them as "caste war between haves and have-nots" was one of extreme depravity and proportional to the crime. In *Raja Ram Yadav v. State of Bihar*<sup>33</sup>, the Supreme Court held that in the case of a feud between Rajputs and Yadavs, the retaliatory killings by Yadavs could not be held to be deserving of death penalty. Similarly in *Ramji Rai v. State of Bihar*<sup>34</sup>, the Supreme Court held that a case of triple murder by a mob by chopping off the bodies of the victims was not the rarest of rare cases.

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

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

Cesare Beccaria wrote in 1764 that capital punishment is founded on vengeance and retribution, and not on reformation of the criminals and prevention of future crimes, which is the purpose of punishment, i.e., the deterrence argument.<sup>35</sup> There is considerable evidence to support this argument. Scientific studies have consistently failed to find convincing evidence that the death penalty deters crime more effectively than other punishments. The most recent survey of research findings on the relation between the death penalty and homicide rates,

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<sup>31</sup> 2000 SOL Case No 705.

<sup>32</sup> 2002 Cr LJ 2645.

<sup>33</sup> 1996(9) SCC 287.

<sup>34</sup> 1999 SOL Case No 633.

<sup>35</sup> Cesare Beccaria, *On Crimes and Punishment* (1764), Trans H. Paolusci (1963), Indianapolis: Bobbs-Merrill.



conducted for the United Nations in 1988 and updated in 2002, concluded that “it is not prudent to accept the hypothesis that capital punishment deters murder to a marginally greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment”.<sup>36</sup> It also concluded that “The fact that the statistics... continue to point in the same direction is persuasive evidence that countries need not fear sudden and serious changes in the curve of crime if they reduce their reliance upon the death penalty”.<sup>37</sup> Thus there is no evidence to support that crime rates decrease with the imposition of the death penalty.

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

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

### **iv. Unfair Distribution of Punishment**

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

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<sup>36</sup> Roger Hood, *The Death Penalty: A Worldwide Perspective*, Oxford University Press, Third Edition, 2002, p. 230.

<sup>37</sup> *Ibid.* p. 214.

<sup>38</sup> 1990 Cr LJ 1810 at p. 1822.

<sup>39</sup> “In *Bishnu Deo Shaw v. State of West Bengal*, AIR 1979 SC 964, O. Chinnappa Reddy, J. defined 'special reasons' as to those reasons which are special with reference to the offender, with reference to the constitutional

Gary Slapper points out that more deaths have taken place due to occupational hazards, due to negligence of private corporations than due to homicide.<sup>40</sup> Most of the former were foreseen but neglected. One could illustrate this argument, with the glaring case of callous negligence on part of the Union Carbide Management in Bhopal, which resulted in the death of hundreds of innocent souls. Most of these deaths can be considered more calculated and cold-blooded than many 'murders', which are not even prosecuted for. The definition of crime as an individual wrongdoing where every person is punished for his wrong doing, requiring the requisite mens rea allows most corporate crimes to go unpunished. As Slapper puts it, "In orthodox morality, intention to do wrong is regarded with greater abhorrence than recklessness as to whether or not harm occurs, but as Reiman (1979: 60) has argued, a reverse formula can be just as cogent: if a person intends doing someone harm there is no reason to assume that he or she poses a wider social threat or will manifest a contempt for the community at large, whereas if indifference or recklessness characterizes the attitude a person has towards the consequences of his or her actions then he or she can be seen as having a serious contempt for society at large."<sup>41</sup>

**v. Long Delay In Execution**

It is an undisputed fact that litigation in India is a very time consuming affair. Extensive delay in the execution of a sentence of death does not serve any kind of purpose and is sufficient to invoke Article 21 and demand its substitution by the sentence of life-imprisonment.<sup>42</sup>

**vi. Reformatory Approach**

In *Narotam Singh v. State of Punjab*, the Supreme Court has taken the following view: "Reformatory approach to punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and to secure social justice."<sup>43</sup>

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

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and legislative directives and with reference to the times, that is, with reference to contemporary ideas in the fields of criminology and connected sciences, etc.

<sup>40</sup> Gary Slapper, "Corporate Manslaughter: An Examination of the Determinants of Prosecutorial Policy", Vol.2 *Social and Legal Studies*, 423 at 430, 1993. as quoted in Sakharani, Monica and Adenwalla Maharukh, (2005).

<sup>41</sup> Ibid.

<sup>42</sup> AIR 1983 SC 465.

<sup>43</sup> AIR 1978 SC 1542.

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

A considerable time between imposition of the capital punishment and the actual execution is unavoidable, given the procedural safeguards required by the courts in such cases. This is in fact in favour of the convict. In *Sher Singh v. State of Punjab*<sup>44</sup>, the Supreme Court refused to follow the rationale of *T.V. Vatheeswaran's case*<sup>45</sup> for commuting death penalty to a sentence of life imprisonment.

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

In *Mahesh v. State of M.P.*, the Apex Court expressing a fear observed: "... to give the lesser punishment for the appellants would be to render the justicing system of this country suspect. The common man will lose faith in courts. In such a case, he understands and appreciates the language of deterrence more than the reformatory jargon."<sup>46</sup> Justice demands that courts should impose punishment befitting the crime, so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminals but also the rights of the victims of the crime and also the society at large while considering imposition of appropriate punishment.<sup>47</sup> In this connection, it is pertinent to note the observation of the Supreme Court in *Ravji v. State of Rajasthan*<sup>48</sup>, which is as follows: "The court would be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society, to which the criminal and victim belong."

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

Firstly, the Apex Court has confined the imposition of capital punishment to the rarest of rare cases<sup>49</sup> so few people, after long careful proceedings, are awarded death penalty. Secondly, the processes of ascertaining guilt and awarding sentence are separated by distinct hearings.<sup>50</sup> The sentence awarded by the Session Courts is subject to automatic confirmation by the High Court of the concerned state.<sup>51</sup> It must be borne in mind that, 95% cases go to the Apex Court.<sup>52</sup> Even

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<sup>44</sup> AIR 1979 SC 916.

<sup>45</sup> AIR 1983 SC 465.

<sup>46</sup> AIR 1987 SC 1346; (1987) 3 SCC 80.

<sup>47</sup> Dr. A. S. Anand, J. in *Dhananjay Chatterjee v. State of West Bengal*. (1994) 2 SCC 220.

<sup>48</sup> (1996) 2 SCC 175; 1996 SCC (Cri) 225.

<sup>49</sup> AIR 1980 SC 898; (1980) 2 SCC 684. & AIR 1983 SC 957; (1983) Cr LJ 1457.

<sup>50</sup> The Code of Criminal Procedure 1973, Section 235 (2).

<sup>51</sup> *Ibid.* Section 366.

<sup>52</sup> "Should Capital Punishment be Abolished?" *The Times of India*, 27<sup>th</sup> June, 2004. op.cit.

thereafter, these cases are subject to an endless procession of clemency appeals, reprieves and pardons, etc. under Articles 72 and 161 of the Constitution of India. This eliminates even a single atom of judicial error, which might have remained after such a long purification process.

#### **iv. Arguments, based on the theories of Punishment Deterrence theory<sup>53</sup>**

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

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

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

##### **a. Crimes under grave and sudden provocation:**

For crimes committed in the heat of the moment, death penalty is either not possible or is not awarded.<sup>54</sup>

##### **b. Fundamental Right to Life:**

In this regard, Article 21 of our Constitution clearly provides: “No person shall be deprived of life or personal liberty except according to procedure established by law”. The implied meaning of Article 21 is that a person can be deprived of his life or personal liberty according to procedure established by law. Moreover, the Supreme Court in a catena of decisions has held such deprivation to be constitutional. If death penalty is infringement of the Fundamental Right to life, then logically, why should a convicted person also be given life sentence since they also have right to freedom along with right to life?<sup>55</sup>

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

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<sup>53</sup> Praveen Kumar Jain, “Should Capital Punishment be Given Capital Punishment? - A Capital Question”, I DLR (S), 2004.

<sup>54</sup> The Indian Penal Code, 1860, Sec.300 Exception 1.

<sup>55</sup> The Constitution of India, Art. 19.

The above Declaration did not stand for the abolition of death penalty but required that the penalty ought not to be awarded arbitrarily and must be confined to only to extremely heinous crimes. Thus, the Indian position is identical to the Declaration by virtue of Article 20 and 21 of the Constitution and Section 354 (3) of the CrPC.<sup>56</sup>

### **vii. Moral Grounds**

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

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

Murder and execution are morally equivalent because both of them kill people. But this does not make sense. If that were so, it could be logically said that wrongful confinement<sup>57</sup> of an innocent person by a civilian and imprisonment of an offender by the state are morally equivalent, because they both confine a person. ‘Murder’ term is used for unlawful killings only and capital punishment by the judiciary is not unlawful.<sup>58</sup> Moreover every type of killing even by civilians is not murder.<sup>59</sup> Thus, there is a fundamental legal difference between killing innocent people (homicide) and capital punishment for murder.

## **CONCLUSION**

The very question that we have raised in our topic that can death sentence be executed in reality in India seems to be answered in negative. A brief discussion of four most crucial and important death sentence cases has so far dictated in clear terms the idea that the criminal justice system

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<sup>56</sup> AIR 1980 SC 898; (1980) 2 SCC 684.

<sup>57</sup> The Indian Penal Code, 1860, Section 300 Exception 1. & Section 299.

<sup>58</sup> Ibid. Section 77

<sup>59</sup> Ibid. Chapter IV (General Exception) and Section 299.

has certain lacunas and loopholes that are being exploited by these convicts and thus its need of hour to streamline our Criminal Justice system. The real meaning of deterrence does not lie in only convicting the culprit but to punish them. The punishment should be executed so as to bring the requisite deterrence in the mind of wrongdoers. After the discussion, an inference can be drawn that an accused has lot of time before he be given punishment for his offence and thus an inordinate delay in execution which ultimately result into commutation of death sentence has made this picture clear that in India although capital punishment is although not theoretically abolished but in practice or in reality the criminal justice system of the country ensure that hardly any convict be hanged till Death, which is both good and bad.

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

In a world with so much of acute disparity in terms of development between nations, no rhetoric can work or bring reformation but for severe punishments such as death penalty. For instance, there is stark contrast between the populations living in developed countries vis-à-vis populations in sub-Saharan countries, where obscurantism, superstitions, extreme communal hatred and prejudices operate due to illiteracy, poverty, deprivation and fundamentalism. How well severe penalties work in such societies is well evident from the extremely low crime rate in Islamic countries of the Middle East. Even within India, the kind of killings take place in the

name of religion (Graham Staines Murder Case), superstition (lynching of so called 'witches' in rural Rajasthan and Haryana), caste killings in Bihar, female infanticide and dowry deaths, the abolition of death penalty will be against all social, legal, moral, national, civic and cultural interests.

Good if we look from the prospective of different Nations and Human Rights Commission which considers capital punishment not ideal in today's world and argue for abolishing death penalty and

Bad because the deterrence that is sought to be created by death penalty is not creating any deterrence as hanging seems to be too distant reality.

From the date of crime to the date of execution a convict has long way to travel.

- Conviction by Session Court and considering case to be rarest of the rare awarding of Death sentence
- Confirmation of this conviction by High Court under S.368 of CrPC.
- Appeal to the Divisional Bench of the High Court.
- Appeal to the Supreme Court from the order of the High Court.
- Death sentence by Supreme Court
- Review petition in Supreme Court
- Curative petition in Supreme Court
- Mercy petition before President (by any number of people)
- Mercy petition before Governor
- Challenging the president's dismissal order in SC on different grounds
- Challenging the Governor's dismissal order in HC and
- then challenging HC order in SC (as been done in case of Dhananjay Chatterjee)
- Finally delay in disposal -A ground for commuting the death sentence into life imprisonment<sup>60</sup>

On one hand, there is a demand for abolition of death penalty and on the other hand, there is an increased rhetoric for capital punishment for rape, heinous crimes against women, trade and trafficking of women and narcotics. Much of the arguments for provisions of death penalty

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<sup>60</sup> Constitution Bench Judgment in the "Smt. Triveniben & Ors vs State Of Gujarat & Ors (1989)

have strong rationale on moral and social grounds. Therefore, keeping in mind the maxim ‘Salus populi est suprema lex’<sup>61</sup> a proper approach to issue perhaps will be, that death penalty must be retained for incorrigibles and hardened criminals but its use should be limited to the ‘rarest of rare cases’. The courts may make use of death penalty sparingly but its retention on the statute book seems necessary as a penological expediency. Therefore, it can be safely concluded that death penalty should not be subjected to untimely death penalty.

**Well, someday, things may change and must have an ending at least somewhere.....**

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<sup>61</sup> The Latin maxim ‘Salus populi est suprema lex’ which means the welfare of the public is the supreme law, is one of the well known laws which deals with public interest. To this maxim all other maxims of public policy must yield for the object that “all laws are to promote the general well being of society”. In other words, “regard for the public welfare is the highest law”. It also stands for Let the welfare of the people be the supreme law.



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