DEATH PENALTY: CASE FOR ITS ABOLITION

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"Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment... If the security guards behave in this manner who will guard the guards? The faith of the society by such a barbaric act of the guard, gets totally shaken and its cry for justice becomes loud and clear. The offence was not only inhuman and barbaric but it was a totally ruthless crime of rape followed by cold blooded murder and an affront to the human dignity of the society...a cold blooded preplanned brutal murder, without any provocation, after committing rape on an innocent and defenceless young girl of 18 years, by the security guard certainly makes this case a "rarest of the rare" cases which calls for no punishment other than the capital punishment"

Thus spoke Justice A.S. Anand while confirming the death penalty given to Dhananjoy Chatterjee (Dhananjoy Chatterjee vs. State of West Bengal[1]. These sentiments were shared by the majority of the people and the media ten years after they had been uttered. Public outrage brought back the debate on death penalty centrestage in a case which abolitionists found difficult to defend. Death penalty has been awarded in several other cases and not awarded in many more, but none of the cases have in recent times generated this extreme reaction of support for the victim and bloodthirstiness for the offender. However the aftermath of the hanging has led to a plethora of issues which were ignored and brushed aside such as the emergence of the hangman as a role model and public hero and the number of mock hangings leading to deaths of children. The impact of brutal punishment in brutalisation of society is no more a rhetoric issue but a reality.

However can one question the legality of Dhananjoy's death penalty? Was it not a rarest of the rare case? India has retained the death penalty on the ground that it will be awarded only in "the rarest of the rare cases " and for "special reasons".[2] In fact, India is one of the 78 retentionist countries (118 are abolitionist either completely or partially) and has even retained death penalty for political offences. This in a land which has seen several freedom fighters being given death penalty. Though the Courts have sought to categorise these cases, ultimately the decision as to who will hang and who will not remains subjective. Death penalty was challenged as being unconstitutional in the Supreme Court in Bachan Singh's case[3] which argument was rejected by the Supreme Court. The Courts have repeatedly held that death penalty is not unconstitutional and does not offend Article 21 of the Constitution of India. In *Machhi Singh v. State of Punjab*[4], a 3-Judge Bench of this Court following the decision in Bachan Singh, observed that in rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment in the following circumstances:

I. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance, when the house of the victim is set aflame with the end in view to roast him alive in the house when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death; and when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. When the murder is committed for a motive which evinces total depravity and meanness. For instance when a hired assassin commits murder for the sake of money or reward or a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or a murder is committed in the course for betrayal of the motherland.

III. When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances. etc., which arouse social wrath. For instance when such a crime is committed in order to terrorise such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a

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[1] 1994 SOL Case No. 275

[2] Section 354(3) of the Code of Criminal Procedure

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

[4] 1983(3) SCC 470

view to reverse past injustices and in order to restore the social balance. In cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another man on account of infatuation.
IV. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.
V. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

The Court further observed that in this background the guidelines indicated in the case of Bachan Singh will have to be culled out and applied to the facts of each individual case and where the question of imposing death sentence arises, the following proposition emerge from the case of Bachan Singh:
(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'
(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

The Court thereafter observed that in order to apply these guidelines the following questions may be answered:
(a) Is there something uncommon about the crime, which renders sentence of imprisonment for life inadequate and calls for a death sentence?
(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

The Supreme court however has made its intentions clear by refusing to lay down a clear distinction of what constitutes "rarest of the rare case" and left it to the discretion of the judges hearing the case despite knowing that the same would lead to disparity of results. The Court observed in Dhananjoy's case, "Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one." Thus ultimately each judge's conscience and political beliefs dictates the dictum.

Thus 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 Soni Thomas's case the Supreme Court overturned the death penalty given in the case of rape and murder of an 11 year old girl by the co-paying guest and in Mohd. Chaman's case[5], the court gave 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[6]. In this case, Justice M.B. Shah acquitted the accused for insufficiency of evidence and the majority of Justices B.N. Agarwal and Arijit Pasayat found the evidence not just sufficient to convict but to put the accused to death. According to the judges, the

[5] 2000 SOL Case No. 705
[6] 2002 Cr. L.J. 2645

offence by militants which has been described as "caste war between haves and have nots" by them was one of extreme depravity and proportional to the crime. However in Kishori vs State (NCT) of Delhi[7] the accused who had murdered three members of a family during the Sikh riots in Delhi commuted the death penalty to life imprisonment holding that, "It is not doubt true that the high ideals of the Constitution have to be borne in mind, but when normal life breaks down and groups of people go berserk losing balance of mind, the rationale that the ideals of the Constitution should be upheld or followed, may not appeal to them in such circumstances, nor can we expect such loose heterogeneous group of persons like a mob to be alive to such higher ideals. Thereafter, to import the ideas of idealism to a mob in such a situation may not be realistic. It is no doubt true that courts must be alive and in tune with the notions prevalent in the society and punishment imposed upon an accused must be commensurate with the heinousness of the crime. We have elaborated earlier in the course of our judgment as to how mob psychology works and it is very difficult to gauge or assess what the notions of society are in a given situation. There may be one section of society which may cry for a very deterrent sentence while another section of society may exhort upon the court to be lenient in the matter. To gauge such notions is to rely upon highly slippery imponderables and, in this case, we cannot be definite about the views of society. " In *Raja Ram Yadav & ors. v. State of Bihar,*[8] 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 vs State of Bihar[9] 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 case. In State of Punjab vs Gurmej Singh[10] the triple murder by the brother of his brother and his family to whom he had lent money was not held to be rarest of the rare, while in Amrutlal Someshwar Joshi vs State of Maharashtra[11] the triple murder by the domestic worker was held to be "rarest of the rare". In Sushil Murmu vs State of Jharkand[12], the Supreme Court recently gave death penalty for carrying on child sacrifice before deity as he was held to be "not possessed of the basic humanness" and "psyche or mindset which can be amenable for any reformation" and the act was found to be "disbolic of most superlative degree in conception and cruel in execution" and held that "no amount of superstitious colour can wash away the sin and offence".

Thus the judgments do not provide a clue as to what constitutes the "rarest of the rare". The impossibility of laying down guidelines could lead to 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 whereas the absence or addition of a factor could result in the alternative punishment. Abolition of death penalty has been argued mainly within the liberal legal framework as it fails to achieve the stated objectives of punishment, i.e. deterrence and just deserts. Cesare Beccaria wrote in 1764[13] 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. The Retributivists also argue that capital punishment is cruel and degrading and disproportionate and opposed to the original social contract, which does not give the state the right to take life. There is considerable evidence to support these arguments. Scientific studies have consistently failed to find convincing evidence that the death penalty deters crime more effectively than other punishments. The most recent survey of research findings on the relation between the death penalty and homicide rates, conducted for the United Nations in 1988 and updated in 2002, concluded that "it is not prudent to accept the hypothesis that capital punishment deters murder to a marginally greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment"[14]. 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"[15]. Thus there is no evidence to support that crime rates decrease with the imposition of death penalty. Recent crime figures from abolitionist countries fail to show that abolition has harmful effects. In Canada, the homicide rate

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[7] 1999 SOL Case No. 760
[8] 1996(9) SCC 287
[9] 1999 SOL Case No. 633
[10] 2002 SOL Case No. 378
[11] 1994 SOL Case No. 100
[12] 2004 Cr. L.J. 658
[13] Cesare Beccaria, "On Crimes and Punishment (1764), Trans. H. Paolucci (1963), Indianpolis: Bobbs-Merrill
[14] Roger Hood, The Death Penalty: A Worldwide Perspective, Oxford University Press, Third Edition, 2002, at pg. 230
[15] Ibid, 214

per 100,000 population fell from a peak of 3.09 in 1975, the year before the abolition of the death penalty for murder, to 2.41 in 1980, and since then it has declined further. In 2002, 26 years after abolition, the homicide rate was 1.85 per 100,000 population, 40 per cent lower than in 1975.[16] From the Retributivist or Just Deserts argument too, which focuses on the morality of punishment and justifies the same as it is given for moral wrongs committed by autonomous individuals who are morally accountable for their actions, punishment should be for the offence committed and should be commensurate with the same. While Retributivists do not deny that punishment has certain consequentialist concerns like prevention of crime, it is not the sole purpose of punishment. The main purpose of punishment is 'censure' for a moral wrong or 'burden' for the unfair benefit gained from the crime. The punishment should not only be such as to negate the benefit of the crime, but also proportionate to the offence. The Retributivists are opposed to death penalty for reasons that utilitarians support and also for reasons of fallibility of judgment. 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. Since 1973, 113 prisoners have been released from death row in the USA after evidence emerged of their innocence of the crimes for which they were sentenced to death. Some had come close to execution after spending many years under sentence of death. Recurring features in their cases include prosecutorial or police misconduct; the use of unreliable witness testimony, physical evidence, or confessions; and inadequate defence representation. Other US prisoners have gone to their deaths despite serious doubts over their guilt. The then Governor of the US state of Illinois, George Ryan, declared a moratorium on executions in January 2000. His decision followed the exoneration of the 13th death row prisoner found to have been wrongfully convicted in the state since the USA resumed executions in 1977. During the same period, 12 other Illinois prisoners had been executed. In January 2003 Governor Ryan pardoned four death row prisoners and commuted all 167 other death sentences in Illinois.[17] In India where torture as a means of evidence gathering is in practice, the number of convicts who are actually innocent can be only imagined. In Joginder Singh vs. State of U.P[18] the Supreme Court while dealing with the issue of custodial torure, quoted the National Police Commission's Third Report which while referring to the quality of arrests by the police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails.

However the problem with the liberal legal discourse is that the same argument could be used to argue the normatively opposed value. And this is seen as deterrence and proportionality principle are used by retentionists too. There is no value in the argument. This is most glaringly seen in the two judgments of the American Supreme Court. In Furman v. Georgia[19], the Court struck down death penalty stating that it was cruel and unusual punishment in violation of Eighth and Fourteenth Amendments. However in Gregg vs. Georgia[20] the same court held that death penalty was constitutional and held that capital punishment for the crime of murder cannot be viewed as invariably disproportionate to the severity of that crime and that the concerns expressed in Furman that the death penalty not be imposed arbitrarily or capriciously can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance, concerns best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of that information. The views expressed in Gregg's case could be well that of our Supreme Court. This also reveals the circular use of binary opposites to justify any end. The same liberal argument can be used to support and to oppose death penalty. Thus death penalty is demanded most vociferously in the case of a poor offender for whom imprisonment is not considered a harsh enough penalty as his life outside prison may be harder than life imprisonment. Reformation is also opposed for this reason- it is seen as a reward for punishment. Hardship as a normative value in punishment will support harsh penalties for the poor whose lives are harder. The statistics also lead one to pose the crucial question: would one support the death penalty had they supported death penalty. Put in another way, would one not be able to justify death penalty awarded in at least some of the cases by the Supreme Court using the "rarest of the rare cases" criteria laid down by the court.

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[16] http://web.amnesty.org/pages/deathpenalty-facts-eng.
[17] Ibid
[18] 1994 Cri.L.J. 1981
[19] 408 U.S. 238 (1972)
[20] 428 US 123 (1976)

Death penalty has to be opposed on not just moral grounds but also because of the political economy of crime and punishment. Normative theories which advocate justice and equal respect for all individuals overlook the systemic inequities which exist and target different individuals in different manner. This appears to be a systemic failure but is a more institutionalized response and is embedded in the nature and role of the state. Social disadvantage is an irrelevant fact in law. Individualization of crime helps maintain the façade of neutrality of crime and punishment. Marxist Criminologists Rusche and Kirchheimer state that the penal practice of a society is functionally adapted to the needs of the labour market: changing forms and uses of punishment can be explained by reference to the changing character of the economy and to oscillations in the labour market. Blue-collar illegalities are thus brought in the domain of criminal law and white collar illegalities constitute the field of civil law. The biases in the criminal legal system against the poor is thus inbuilt in the system. Industrialization and urbanization due to capitalism led to greater segregation between the classes and greater perceived threat by the upper classes of the lower classes and the need for disciplining them through the agency of the criminal law administration, and its administrators- the Police. From the substantive and procedural laws relating to crime to the administration of justice all reflect the biases in the system. This has been reflected in many studies and is apparent in the reading of the death penalty judgments. A study of Chicago Tribune quoted in Hood's book of the 131 death row inmates executed during George Bush's tenure as Governor of Texas reflected that 43 of them were represented by defence advocates who were publicly sanctioned for misconduct, 40 of them presented no evidence to the court or provided only one witness on their client's behalf and 29 used psychiatric testimony condemned as untrustworthy by the American Psychiatric Association[21]. Justice P.N. Bhagwati in his dissent in Bachan Singh's 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.

Hood's book on the basis of studies and data has noted that "those who kill white persons are considerably more likely to be sentenced to death than those who kill blacks, regardless of the race of the defendant." Though only 50% of homicidal victims are whites, statistics show that 80% of those executed in U.S.A. since 1977 were executed for having killed a white person[22]. This racial discrimination is further revealed by the fact that out of the 749 persons who were executed in the U.S.A. between 1977 and the end of December 2001, only 11 were white persons who had killed black victims[23]. Moreover, the death sentence is rarely awarded when the murder victim is black : a study conducted in Texas in the 1980s observes that 13.2% of black persons who killed whites were sentenced to death whereas only 2.4% of whites who had killed black persons were accorded capital punishment. These figures belie the assumption that the judiciary is above bias and public pressure. They too are prey to their value system, responses and social philosophy as observed by Bhagwati J. in his dissent in Bachan Singh's case.

Does that mean that one condones any crime. Bonger, another Marxist Criminologist argues that capitalist society breeds crime. Criminality according to him has its sources in need and deprivation on the part of the disadvantaged sections of society and motives of greed and selfishness which are generated and reinforced in competitive capitalist societies. Societies which encourage lumpensation of the people cannot "morally" express "moral indignation" at the lumpen acts of the lumpen society created by it. According to studies of the 1.3 million criminal offenders handled each day by some agency of the United States correctional system, the vast majority (80 percent) are members of the lowest 15 percent income level[24]. Gary Slapper points out that more deaths have taken place due to occupational hazards due to negligence of corporations than due to homicide. Most of the former were foreseen but neglected as the 'costs' of these deaths still made the lack of measures cost-effective. Most of these harms, which can be considered more calculated and cold-blooded than many 'murders', are not even prosecuted. The definition of crime as an individual wrongdoing where every person is punished for his own wrongdoing requiring the requisite mens rea allows most corporate crimes get away with it. As Slapper puts it, "It can therefore be argued that many thousands of one of the most serious crimes on the criminal calendar are not being prosecuted as such. Some are left as 'accidents' while others are dealt with as administrative offences. The fact that there is no intention to kill in these cases should not lessen the aversion with which they are treated. In orthodox morality intention to do wrong is regarded with greater

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[21] *Op. cit. supra* note 14

[22] Amnesty International : U.S.A. (1995)

[23] NAACP Legal Defense and Educational Fund Inc.

[24] Jeffrie G. Murphy, "Marxism and Retribution" in Anthony Duff and David Garland (eds.) *A Reader on Punishment* (Oxford: Oxford University Press) (1994) 47 at pg 60

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 actions then he or she can be seen as having a serious contempt for society at large."[25]

Criminologists have also pointed out that though criminal conduct is no lower class monopoly and in fact does not do as great social harm in terms of monetary loss and physical injury and death as crimes committed by the rich, the same is not true of distribution of punishment which falls, overwhelmingly and systematically on the poor and disadvantaged. The administrative division of investigation and prosecution gives tremendous power to the police and other investigative agencies and the courts have to act on the basis of the evidence collected by these agencies leaving scope for corruption and caste, class, religious and racial biases to go unchecked. Discriminatory decision making throughout the whole criminal justice system ensures that the socially advantaged are regularly filtered out: they are given the benefit of doubt, or are defended as good risks or simply have access to the best legal advice[26]. Rusche and Kirchheimer point out that penal regimes have to be made "less eligible" than the lives of the poorest and in a country like India where the majority are poor, making life "less eligible" after punishment would leave little option apart from death as social disadvantage is seen as dangerousness of the criminal to the society at large. Public opinion, viz., sentiment, is portrayed by governments as the reason for retention of the death penalty, but this is a mere sop by government's who in principle want to retain this tool for use in furtherance of their ends as is evident in Krishna Mochi's case.

Death penalty may not have achieved any of its stated objectives and may have led to the killing of many innocent people but is popular as it performs many functions- it expurges the criminal from society leaving its free, it drains "dangerous criminals" of their power completely and permanently, it has a symbolic function as it warns other deviants of the same result, diverts the public mind from the real issues of unequal distribution and controls the poor by instilling in them moral indignation against the offender and making them internalize and institutionalize the narrow and sectarian concepts of justice and morality, which stops the questioning of its values and basis and has an action function of the reinforcing the power and supremacy of the state which includes its power to take away life at will.[27]

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[25] *Gary Slapper*, 'Corporate Manslaughter: An Examination of the Determinants of Prosecutorial Policy' (1993) 2 *Social & Legal Studies* 423 at 430

[26] Anthony Duff and David Garland (eds.) *A Reader on Punishment* (Oxford: Oxford University Press) (1994) at pg 306. Most of the references to Criminologists views are from the present book.

[27] These categories have been adapted from Matheison quoted in ibid.