

SHOULD INDIA RETAIN DEATH PENALTY?

Concept Note

The debate on death penalty in India has gathered more steam following the 262nd report of the Law Commission that came out in August 2015. It concludes that death penalty should eventually be abolished in India except in cases of terrorism and waging of war against the state to safeguard national security. In its previous major review in 1967, the commission had concluded that India could not risk the “experiment of abolition of capital punishment.” This time around “the Commission feels that the time has come for India to move towards abolition of the death penalty”.

The major reasons why capital punishment should be abolished in India according to the Law Commission are: (1) times have changed; (2) it is not a deterrent anymore; (3) sentencing is arbitrary; (4) administration of capital punishment is vulnerable to misapplication; (5) mercy powers have failed to act as the final safeguard against miscarriage of justice; (6) long delays in trials and appeals and final execution is almost torture; and (7) India is in a minority on death penalty as 140 countries have abolished it.

Practically, judges in India can impose death penalty in the “rarest of rare” of cases, including treason, mutiny, murder, abetment of suicide and kidnapping for ransom. In 2013, an amendment to the law permitted death as a punishment in cases where rape was fatal or left the victim in a persistent vegetative state; as well as for certain repeat offenders. Following the execution of Mumbai terror attack convict Yakub Memon, the Supreme Court has said capital punishment is not inhuman or barbaric and will not violate the right to life and liberty in heinous crimes. However, in Shankar Khade’s case, the apex court in 2013 observed that there was no fair process of ‘conferring’ death penalty, and the application of the ‘rarest of the rare’ principle was exceptionally friable.

An empirical study reveals that out of around 385 existing prisoners sentenced to death for terror offences 93.5 per cent belong to Dalit and religious minority communities. Even in other cases, there is a predominance of people from lower castes and religious minority communities. They also have very low level of education – 24 per cent of them have never stepped into school and belong to the most marginalised sections of society. Moreover, the results of death penalty cases from 2000 to 2015 are equally startling: for every 100 death sentences that trial courts give, only 4.5 are confirmed by the higher courts. About 30 per cent are acquitted and the rest are commuted. This basically highlights the overuse of the award of death penalty.

To take this important debate further, the *Liberal Studies* journal invited opinions of three eminent policy analysts, scholars, and practitioners – A. Prasad, Jyotsna Yagnik, Binod C. Agarwal – to give their opinion on the constitutionality, human rights, law and order, and socio-psychological implications of death penalty as a form of punishment in the Indian context.

Fall in Line with the World Community

—A. Prasad*

With the hanging of Yakub Memon in August 2015, the much-debated question of the need to retain death penalty in our legal system has been pushed to the centre-stage yet again. There has been a raging controversy, of late, with both sides coming out with arguments for and against it with equal conviction. But the matter is still hanging fire with the Law Commission recommending its abolition, except in cases of terrorist attacks. The matter now rests with the Government of the day to decide.

While on the subject of hanging a human being, even for the rarest of rare crimes like pre mediated murder, one must probe deep into the human character. It is always interesting to read the statements of people who knew, for example, a mass murderer. All of them invariably express complete bafflement that a person who seemed so kind and normal could do something so violent and horrendous. I remember reading about one Robert Bales, who was accused of massacring 16 Afghan civilians. His friends and teachers described him as a caring, gregarious and self confident human being before he, as is normally said, ‘snapped’. Friends of Robert Bales commented, “That is not our bobby, something horrible must have happened to him.” All of us would be shocked if someone we knew and admired killed children. We are then left mute and confused. But, of course, such incidents happen all the time. This buttresses the view that even those people who contain reservoirs of compassion and neighbourliness also possess a latent potential to commit the most horrific crimes.

David Buss of the University of Texas had conducted a study wherein he asked his students if they had ever seriously thought of killing someone. And if so, they must write out their homicidal fantasies in an essay. The good Professor was shocked that almost 91 per cent of the boys and 84 per cent of the girls had detailed and vivid homicidal fantasies! Some had even taken

* The author is a retired Indian Administrative Service (IAS) officer.

certain steps to carry it out. Prof Buss came to the conclusion that such violently criminal thoughts do not come to the mind just because many watch violent movies or from playing violent video movies. He commented that human beings are descended from creatures that killed to thrive and survive. We human beings are natural born killers and the real question is not what makes people kill but what prevents them from doing so.

Professor Buss concluded that there is no such thing as an ordinary person. Each person sitting next to you, for example in a bus, is capable of extraordinary horrors and extraordinary heroism. We are a mix of virtue and depravity. If the latter prevails then even formerly good men are capable of monstrous acts that shock the soul and sear the brain.

It is under such a background of human character that we should look at the various ramifications of the legality and moral fairness of the death penalty.

Since the hanging of Yakub Memon many Indians have wondered if we actually achieved anything by hanging him. Some are worried that we may have made Yakub into a martyr, among certain sections. Others believe that justice has been done sending a powerful signal to potential terrorists. But the Law Commission has strongly argued that the State must never be guilty of killing an innocent person. Also, the Commission says there is no link between the death penalty and the amount of crime. Death sentences are also inherently arbitrary and there is no principled method to remove such arbitrariness. But then a large majority also feel that keeping a person alive in maximum security and in solitary confinement with no prospect of bail is a far greater punishment than death.

Human beings have for long wrestled with the right relationship between crime and punishment. In tribal societies individuals and clans avenged crimes. After we moved into civil society we gave the state the monopoly power to punish crimes under due process of law. Thirst for revenge is a powerful instinct in human beings.

Such a mental attribute of revenge is at the root of the judicial provision with regard to capital punishment. The real issue, however, is that commuting a death sentence, is now not a matter of judicial decision-making. It has become a matter of political decision-making. Just as in every sphere of governance India's political executive has ceded space to the judiciary, in the case of death penalty too, the political executive has been taking shelter behind judiciary. Worldwide there are precedents of convicts being pulled out of

death row when new facts come to light. If there is no political will to change the death penalty, there has to be at least, political courage by which death penalty could be commuted, even at the last minute when new facts are brought to light. In the absence of such a milieu the final sentence becomes arbitrary. Or else the reason for non commutation has to be explained with very cogent reasons.

Under the IPC there are several offences which may attract the death penalty or life imprisonment. These include murder (section 302), waging war (section 121) and mutiny (section 132). Bomb explosions and loss of life as a result of terrorist attacks are completely different in nature. Here the objective is not to target someone in particular, but to destabilise society, and threaten the security of the nation. Awarding someone death penalty for terrorist acts is qualitatively different from awarding death penalty to someone for having committed other crimes. Even here many argue that death penalty in such cases of terrorist attacks, should be abolished as it is a violation of human rights and an inhuman form of punishment.

In the widely reported case of Bachan Singh, the majority judgment of the Supreme Court upheld the constitutional validity of death penalty for murder under section 302 of the IPC. But in a vigorous dissent Justice PN Bhagwati, held that section 302 of IPC is unconstitutional and void, and section 302 of IPC read with section 354 of CrPC as being violative of articles 14 and 21 of the constitution. But he made it clear that his view applies only to murder cases and not to cases of treason and acts which threaten the security of the state. These words from the strongest votary against the death penalty are very revealing. Justice Bhagwati, therefore, endorsed death penalty for terrorist acts, but not for murder.

There is, however, a large body of opinion which strongly rebuts the argument that death penalty must be awarded in cases of terrorist attacks as they feel that the award of such a sentence could be counterproductive. They also feel that when terrorists are awarded death sentences they may become martyrs, which may influence many other misguided youngsters to espouse a similar cause. Many youngsters who are fed on the theory of 'after life' and endless pleasures awaiting them in heaven may take to terrorist attacks irrespective of the likely death sentence. Also it is argued that incarcerating a terrorist may benefit the law enforcing agencies as a terrorist could turn out to be a store house of valuable information. All these arguments are trotted out to support the view that a terrorist should not be awarded death sentence.

Here it is worth citing Jessica E Stern, an expert on counter terrorism and a lecturer at Harvard University, who was also on the National Security Council in the USA. She had asked that although USA as a nation has decided that terrorism results in loss of life and should face the possibility of death penalty, whether or not it is a wise decision, after all. She adds that the execution of terrorists, especially the minor operatives, has effects that go beyond retribution or justice. Such executions, she says, play right into the hands of the adversaries of a nation and it turns criminals into martyrs, invite retaliatory strikes and enhance the fund raising capabilities and strategies of the terrorists. In the UK, for example, in 1973 the House of Commons debated the issue of repealing death penalty in Northern Ireland. By a margin of nearly three to one, the House of Commons decided that executing terrorists, whose goal is only to martyr themselves, only increased violence and put the police, soldiers and the general public at greater risk. It was a clear decision in the House of Commons at that time that threat of death only increased incidence of terrorism manifold.

Alan Dershowitz, a well known American lawyer, a life long opponent of capital punishment, wrote in the Guardian in 2013, that the Boston marathon bomber should not face death penalty. The lawyer argued that execution of the surviving bomber would only turn him into a martyr and his face would appear on recruiting posters for suicide bombers and also those seeking paradise through martyrdom would see the serial bomber as a role model. This is of course just the opinion of the well known lawyer and there could be various counter arguments.

Here one is reminded of Mohammed Bouyeri, the notorious 27-year-old killer of the Dutch filmmaker Van Gogh, in 2013. The killer was the son of Moroccan immigrants in Amsterdam. He stated in court that he acted on conviction and not out of hate and that he would do a similar act once again in the same manner. He added that he killed Van Gogh because the filmmaker had insulted God by making a provocative film about the abuse of women, which was broad cast on Dutch TV. When the final order of execution was passed, the accused Mohammed told the mother of Van Gogh in the court that he did not feel her pain and he hoped that she may derive some mental comfort from his execution. Mohammed had no regrets at all and he welcomed his conviction by the court fully convinced that he did the right thing by defending the honour of his God which had been sullied by the Dutch filmmaker. This is how it is with terrorists and execution for them is only a quick and welcome step to untold heavenly comforts. Putting to death such fanatical persons has no meaning at all.

In this contest it would be interesting to know how crime and punishment are treated in the Mahabharata. The central theme of the character Ashwatthama is crime and punishment. This character was a fine young man brought up in luxury in the company of princes and kings. He was also confident, young and modest. This son of the great Drona, finds himself on the wrong side (depending on how you look at it) when war broke out between the Pandavas and the Kauravas. He fights a brave battle, but accepts defeat gracefully. But he cannot just get over the fact of his father having been killed in a deceitful manner by the Pandavas. He is obsessed with the thought of revenge and the settling of scores with the Pandavas on this score. With this mental makeup he sets fire to the sleeping and victorious armies of the Pandavas in which all the children of Draupadi were burnt to death. This good lady in turn cries for immediate revenge in equal measure. Ashwattama is finally captured and brought before the assembly of Krishna and the Pandavas. They debate over the most appropriate punishment and they all agree that death would be a very lenient punishment. At this time Krishna came up with the right solution and pronounces the sentence. Krishna decreed that Ashwattama shall wander on this earth for 3000 years, alone and invisible, stinking of blood and pus. One can come to the conclusion that even Mahabharata lays down that death is not the right punishment for horrendous crimes. However, this again is a matter of debate, in modern times when we have different legal systems and different thought processes altogether.

In India we have long been ambivalent about death penalty. As a result, very few executions have taken place in independent India. Actually the figure is 57 in 68 years. Most of the world has abolished death penalty and only 36 have not and this includes India and the USA. The UN resolution has averred that such a penalty ‘undermines human dignity’. If one looks at the whole matter a little deeper through case studies one would find that the most serious argument for its abolition is that it is almost impossible to implement it fairly. It is well established that politically well connected criminals and rioters run scot free in our country, no matter the degree of their crime. Just to take an example the killers of Rajiv Gandhi and Beant Singh were shown clemency, merely because they have political backing of a couple of Governments. Such a dispensation tilts the whole case of quantum of punishment in favour of the well connected and brings in an unwelcome degree of unfairness.

Also such executions turn down the well-argued prospect of reformation of a convict. This is a matter which has to be studied in depth and used to the

maximum extent. Keeping a person alive brooding and suffering over his deed, is far greater a punishment than death. In the recent case of Yakub Memon he had already spent two decades in solitary confinement. Such an existence could be worse than death. By no means can one suggest that Yakub was innocent. He had actually involved himself in a deadly and serious crime. Amnesty International had observed that there is a strong perception that the death penalty in India is often arbitrary, disproportionate and discriminatory, as death penalty seems to be reserved for the minorities and the poor and the Dalits. The National Law University carried out a recent study and came to the conclusion that a high percentage, (which was pegged at 94 per cent) of the death row convicts are the poor, Dalits or Muslims.

It can very well be argued that terror attacks are the most reprehensible form of violence. But at the same time we have to bear in mind that such heinous offences do not breed in isolation. They are mostly politically and socially driven, manufactured realities that stem from the failure of a fair system. Here one has to allude to the widely reported case, the Akshardham terror strike in 2002, in which 33 innocents died. After 12 long years the Supreme Court honourably acquitted six Muslim men on all charges and sharply pulled up the police for a very shoddy investigation. These six men were to hang and their lives hung on a slender thread. But for the very forceful and decisive intervention of the Supreme Court in the matter these six innocents would have lost their lives. Nothing can atone for the merciless torture that these six men, falsely accused, had to face under a very violent system. A close reading of the Supreme Court judgment in this matter would reveal botched up trials, contaminated evidence, false witnesses and forced confessions. The whole point in referring to this case is that unless we have a fair and just system of investigation and trial, death penalty could result in an unjust verdict. Renowned lawyer Shanti Bhushan states that in the terrorist cases the investigators' claims have to be tested rigorously at every stage. Bhushan states that in the Parliament attack case he was able to convince the Supreme Court on the absurdity of claims by the police of the forced confessions. He highlighted the tragedy of forced police confessions even in terrorist cases, which could easily lead to gross miscarriage of justice. It has to be clearly understood that even in terrorist cases the more force is used to suppress them, the more virulent the counter attacks become, as we have seen in the expanding writ of the jihadist group, and the IS across a wide swathe of West Asia. These are die-hard fundamentalists for whom death penalty does not matter at all.

Also, as a progressive democratic nation on the world stage, we must appear to the entire world as believers of the dictum that we have rule of law in place and not rule by law. Rule by law could become an instrument of oppression as under the Nazis, considering it could lead to the enactment of laws grossly violating human rights. Respect for basic human rights and dignity should become the core of our legal framework and our laws should not become a capricious instrument in the hands of the Government of the day to interpret the law as it pleases. Anti-terror laws must not contain provisions which impair basic human rights. A law that permits the killing of a suspected terrorist or enables indefinite detention without prior hearing, within the absolute discretion of the executive, is destructive of the rule of law. When John Adams used the historic phrase 'a government of laws and not of men' to support the importance of rule of law, what he meant was that law and not the whimsicality, or caprice, should govern the conduct and affairs of people. Such a philosophy should inform with diligence all our dealings with cases of capital punishment for terrorists.

It would be worthwhile to read about the American national Kia Scherr, who in November 2008, watched in horror when she saw on Indian TV, the murder of her husband Alan, and her 13-year-old daughter Naomi, during the 26/11 massacre at the Oberoi Hotel in Mumbai. Kia was in Florida at that time, and she was numb with sorrow but her first reaction was to tell her mother that she must forgive the terrorists. For her, she states, it was the most difficult moment in her life, but she adds that the moment she uttered those words out loud, she felt a ray of peace enter her. Kia maintained that by forgiving the terrorists, she could go on living, and loving, since there is already so much of hate in this world. This is the lesson the American lady has to give the country when it comes to the treatment of terrorists.

Closer home, we have the case of Avantika Maken whose parents were mercilessly gunned down before her very eyes, by three hot headed Sikh youths, when she was just six years old. The murder was related to the 1984 Delhi riots in which hundreds of Sikhs were massacred. Her father was the son of Ex President Shankar Dayal Sharma. For several years she nursed a great urge to take revenge on the killers, but later she turned away from such thoughts and she pardoned the killers, as the killer admitted that he had taken the wrong path and he was feeling guilty about the act. He had already spent some years in jail and Avantika felt that he had suffered enough since our jails are worse than death. She felt that the death of the killer would not make things better for her in any way. She was fully at peace when she forgave the killers of her parents.

That brings us to the quality of mercy. Most of the terrorist activities are the product of an action and a reaction. Like the Barbri Masjid, which led to the Mumbai riots in which thousands died and then came the act of ‘retribution’ with the train bombing. It was all a matter of a particular action resulting in a reaction. Unless all those who are guilty are punished – all those involved in the whole sordid episode – in equal measure, we cannot claim to have delivered fair justice. It is in this context and taking into account the fact that keeping a terrorist in permanent incarceration could result in an act of reformation that we must think of abolishing death penalty for all. Solitary confinement till death, with no hope of parole is such a devastating prospect that a terrorist or any convicted criminal would welcome death. It is, therefore, better to keep the terrorist in confinement which may also yield a whole lot of information about the real people behind such dastardly acts. A dead terrorist is dead to any further probe. In all other cases too, like IPC 302, death penalty must be abolished, as recommended by the Law Commission. If India is to appear as a progressive nation which is keen to move with the times, in step with the international community, we have to think logically, purposefully and generously and fall in line with the international body of opinion and world community, which most vociferously supports the abolition of death penalty.

Is it the Right Time?

—Jyotsna Yagnik*

Why the Debate?

The gist of recent news item in *The Atlantic* authored by Andrew Cohen is titled as ‘Glenn Ford’s First Days of Freedom After 30 years on Death Row’. His release from the ill-famed prison – Angola, the most deplorable and inhumane prison which had to be declared as unconstitutional by the courts, had become international news for all those who are concerned with human rights as the paramount right of every human existence on this planet. He passed 30 years of his life in a tiny cage with living conditions of an animal as he was a condemned prisoner. His precious 30 years were taken away by the legal system of his country. The entire episode squarely answers the issue of whether or not we should continue death penalty in our law books? Is it the right time to abolish it or not? A person imprisoned in 1983 has been released in 2014 by spending 30 years as being held murderer by the system and facing agony for execution of his death. He had to undergo the sentence of 30 years for the crime of murder of a man named Isadore Rozeman, which he had never committed even as per the system of the country which put him on the death row.

What is astonishing is while Glenn Ford came out of prison, the state, which wrongly charged, convicted and sentenced him to death penalty, gave him nothing beyond 20 dollars in compensation. When he stepped out of jail he was 64 years old and suffering from various ailments. Any law abiding mind would pose several questions on his future: What about his job, his livelihood, his rehabilitation, his physiological and social position, his inability to regain position of trust among his countrymen, possibility for him to settle himself without any fiscal base and in absence of compensation or job which should have been offered by the state that has put him in an irreversible

* The author is former Principal Judge, City Civil & Sessions Courts, Ahmedabad, Gujarat, is at present Director of Unitedworld School of Law, Gandhinagar, Gujarat.

situation? The questions are many, but answers none. His wrongful conviction and incarceration will send wrong signals to society and that itself raises a million dollar question against rule of law. The loss of life opportunities to him, his human dignity, his physiological and social setback and the conditions in which Glenn Ford had been put by the system counsels that ‘No more death penalties.’

Supreme Court of India on Death Penalty

To understand the applicable principles laid down by the Supreme Court of India, vide its different judgements, needs quick perusal. To enlist the guidelines that would be taken as deciding factors by the respective courts to decide whether death penalty should be imposed on the accused or not, the following judgements needs to be kept in mind:

In the matter of *Swamy Shraddananda @ Murali Manohar Mishra versus State of Karnataka* reported at AIR 2008 SC 3040, Supreme Court was pleased to hold ratio decidendi that, “On conviction for murder and other capital offences punishable in the alternative with death under the penal code, the extreme penalty should be imposed only in extreme cases.”

In the matter of *Machhi Singh and Others Versus State of Punjab* reported at AIR 1983 SC 957, Supreme Court was pleased to hold that, “when community feels that for sake of self preservation the killer had to be killed, community may withdraw protection by sanctioning death penalty – community may entertain such sentiment when the crime viewed forms platform of motive, manner of commission of crime, anti social or abhorrent nature of crime, magnitude of crime and personality of victim. Before application of the rarest of rare rule, following questions must be answered – firstly, is there something uncommon about crime calling for death sentence and rendering sentence of imprisonment for life inadequate – secondly, are circumstances of crime such that there is no alternative but to impose death sentence even after according maximum weightage to mitigating circumstances which speaks in favour of offender. The court should award death sentence if upon taking overall global view of all circumstances in light of above two questions circumstances of case are such that death sentence is warranted.”

In the matter of *Purushottam Dashrath Borate and Anr versus State of Maharashtra* reported at AIR 2015 SC 2170, Supreme Court was pleased to hold Accused No 1 and No 2 (of the case) did not show any regret, sorrow or repentance at any point of time during commission of heinous offence, nor

thereafter, rather they acted in a disturbingly normal manner after commission of crime; manner in commission of offence was so meticulously and carefully planned coupled with sheer brutality and apathy for humanity in execution of offence, in every probability they have potency to commit similar offence in future. It was clear that both the accused would prove to be menace to society which strongly negates probability that they could be reformed or rehabilitated – mitigating circumstances were wholly absent in present factual matrix. Offence was committed by accused persons not under influence of extreme mental or emotional disorder, nor was it case where offence may be argued to be crime of passion or one committed at the spur of the moment. There was no question of accused persons believing that they were morally justified in committing offence on a helpless and defenseless young woman. It was a gruesome act of raping the victim who had reposed her trust in the accused followed by cold-blooded and brutal murder of the said victim thus would attract no lesser sentence than death penalty.

In the matter of Darshan Singh and Anr versus State of Punjab reported at AIR1988SC747, Supreme Court was pleased to hold ratio decidendi: “No death sentence shall be awarded unless the crime has been committed brutally with motive.”

In the matter of Ravji alias Ram Chandra versus State of Rajasthan reported at AIR 1996 SC 787, Supreme Court was pleased to hold that the accused who was charged with offence of committing five murders and attempting to kill two others including his mother, committed most heinous crime by killing his wife in an advanced stage of pregnancy, three minor children and his neighbour for no fault on their part; an axe used in the murder was recovered at the instance of accused; the accused, therefore, can be convicted without establishing motive for crime if there is reliable evidence about commission of such crime. This was found a fit case for death penalty.

In the matter of Mohan Anna Chavan versus State of Maharashtra reported at (2008)7, SCC 561, Supreme Court was pleased to hold the case to be of the rarest of rare category.

In the matter of Gurmukh Singh versus State of Haryana reported at (2009)15, SCC 635, Supreme Court was pleased to hold ratio decidendi: Proper and appropriate sentence to the accused is the bounded obligation and duty of the court. The endeavour of the court must be to ensure that the accused receives appropriate sentence; in other words, sentence should be according to the gravity of the offence.

In the matter of Mohinder Singh versus State of Punjab reported at AIR 2013 SC 3622, Supreme Court was pleased to hold ratio decidendi, “No Accused shall be awarded death penalty unless case falls within category of rarest of rare.”

In the matter of State of Madhya Pradesh versus Saleem @ Chamaru and Anr reported at AIR 2005 SC 3996, Supreme Court was pleased to hold that, the Court will 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. The punishment to be awarded for a crime must not be irrelevant but should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and should respond to the society’s cry for justice against the criminal.

While adjudging constitutional validity of death sentence it has been held in the matter of Jagmohan Singh versus The State of UP reported at AIR 1973 SC 947, Supreme Court was pleased to hold that before amendment of Section 367 (5) the normal rule was to sentence accused to death on conviction for murder and to impose lesser sentence of imprisonment for reasons recorded in writing – after amendment condition changed; now it is left to circumstances of each case and judicial discretion of Court whether or not death sentence must be imposed or not. In present case murder was wholly established and proved – imposition of death sentence held valid as imposed after proper trial in accordance with procedure established by law.

Reiterating on the principle of ‘appropriate punishment’ Supreme Court was pleased to give finding in the matter of State of MP versus Basodi reported at [2009]7, SCR 1166, proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilised societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But, in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

As reproduced from different judgments of Supreme Court, due importance needs to be given to extreme cases, rarest of rare cases, circumstances of crime, intention, motive and manner of commission of crime, mitigating circumstance, conduct of the accused before and after crime, the type of the weapon used, absence of any provocation by the victim, gravity of the crime, relevancy of punishment and principle of proper punishment. However, wherever it was needed, Supreme Court was second to none to set aside improper or out of proportion sentence, but the moot question remains in search of an answer that whether any consideration calls it the rarest of the rare theory or any other is capable to justify subsistence of death penalty in our law books? My humble but firm answer is negative. It is based on a simple proposition that no death penalty has controlled the crime or deterred the criminal. In this scenario one questions oneself that if the goals are not achieved why must one continue with death penalty?

Views of the Author

Based on extensive academic research it can be stated that death penalty has not created any deterrence in criminals or society and has thus failed to achieve the goal which is being projected as the goal of such punishment and even its justification.

Justification and opposition of death penalty known as capital punishment are being advanced based on different theories of punishment.

It is said that commission of brutal and heinous crimes can only be answered by death penalty. The high pitched push for death penalty has no answer to questions of whether or not we really give any importance to theories based on the principles that, “hate the crimes and not the criminals”, that every criminal could be a victim of some circumstances and hence, the punishment should be imposed keeping in mind rehabilitation of the criminals; retributive theories are age old and have no room in modern principles of penology and that the agonies and pains of the family of the one who had been done away with does not end by awarding death penalty, etc.

Another point has special reference with the working of Indian justice delivery system where the accused suffers agony of waiting for years for adjudication and waiting of this period itself is an additional punishment not provided by any law. The country where speedy trial more remains in books of law, the principles of penology there should be applied accordingly.

Even condemned prisoners have to wait for years to exhaust all the remedies provided to them under the law. The delay usually caused in execution

is an unawarded punishment which the justice delivery system cannot forget. Moreover, it is killing by state which no civilisation should ever permit as it is blatant violation of human rights of the accused which the state has a responsibility to protect. I'm afraid that we have thrown the society to the theme of "murder for murder" by continuing death penalty in our laws.

If death penalty could have served the purpose for which it was introduced, not a single victim would have been murdered till the day, not a single terrorist would have committed the terror spreading crime or none would have been tried for waging war against the state.

Universal declaration of human rights provides that – "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Ardent advocates of death penalty forget that any kind of killing, even if by most sophisticated means, is still bound to subjecting the criminal to torture and that it is degrading and cruel punishment.

I am of the humble but firm view that abolishing death penalty for any offence is the call of human rights jurisprudence which must be attended to with the seriousness it deserves. Carving out any exception to it like the offences of terrorism or waging war is not a modern, progressive and human way to implement principles of penology. It must also be noted that death penalty does not kill the condemned prisoner alone but also kills the innocent family members of such a prisoner.

I believe abolition of death penalty should have been considered long back, although it is never too late. Let us wake up. Let death penalty be abolished from all the law books on this planet.

Let the dawn of human values rule our generation, let there be no more killing by the state. Let us abolish death penalty forever.

Further Contemplation Required

—Binod C Agarwal*

It is a very thought provoking and interesting reading of 262 Law Commission Report on “Death Penalty.” It raises a very fundamental question: “Should India Retain the Death Penalty”? The author has a very mixed feeling on the issue. At the same time, the issue has created a sense of despair, disappointment and depression, in the midst of much more pressing problems of human exploitation, extreme poverty and internal and external continued conflicts political, social and religious arena. Also the recurring threat of war with the neighbours and riots like situation on minor provocation between religious groups within the country are much important daily concern for an average citizen. All these events have made life of the ordinary citizens a miserable one though there is still a ray of hope that democratic India will find its ways for survival and strengthening ways to give equal justice to all its citizens. It is in this context that a number of socio-cultural questions can be raised related to Capital Punishment. These include some of the questions indicated below:

How long can a sovereign, independent ancient civilisation like India continue to follow oppressive, exploitative and imperial British Colonial rules of justice? These were imposed by the Colonial power to prove their supremacy and were heavily drawn from Judo-Christian tradition. The singular aim was to control and suppress citizens living in British India that too as a white man’s burden. It should be mentioned that these laws covered only about two third of independent India, where as remaining territory of India was under the rule of the princely states and they largely followed their own laws of justice.

* The author is an Anthropologist and former Vice Chancellor of Himgiri Zee University, Dehradun, India.

What is the value of a human life in multi-cultural, multi-linguistic and multi-religious South Asia particularly in democratic India?

What is the cost of administering justice and seeking justice and what should be an ideal duration for administering the justice between time of committing the crime and by the time the judgment is pronounced after following due process of justice?

Historical Context

In ancient India, much before Christian era, Kautilya prescribed death penalty for verity of crimes using different methods of carrying out death penalty within *Sanatan Dharma* (L.N. Rangarajan, *Kautilya: The Arthshastra*, Penguin: 1985, pp. 494–495). In the ensuing centuries, there have been great deals of debates and discussions on the issue of death penalty. Then Mughal Empire introduced Islamic rules and Islamic method of justice for death penalty. It was in vogue from the 14th century onward followed by enactments and compounded by the imposition of alien Judo-Christian or European method of justice brought in by British colonial rulers related to death penalty.

The present method of administering justice emanates out of these historical events and as counter reaction of local and regional traditions of justice. The main thrust of the argument is that India has had multiple rules of governance, definition of ‘wrong’ and ‘right’, crime and punishment and variety of methods of administering justice including death penalty. Hence, there is need to re-examine the issue of death penalty within the flexible multi-religious, multi-lingual and multiregional perspective prevalent practices in each linguistic region and geographic region. It would require opening up of broader scope for equitable justice to all.

Value of Human Life

Today, in economic terms the value of human life has been very small so is punishment and fine to the wrong doers. The punishment bar must be raised to the extent that an individual before hurting or killing a human in any form of conflict encounter or revenge must be fearful for her/his own life. It would deter an average person while contemplating any reckless crime. Similarly, today in the country, the cost of seeking justice is very high for an average person of modest means. It was earlier reinforced and inculcated in the British colonial days who created an army of middle professional cadre to mediate between justice seeking person and accused known as *Vakil* in the British

courts (Michael Edwardes, *British India 1772–1947*, Delhi: Rupa and Co., 2011) In independent India skill and smartness of these *Vakils* in proving ‘right’ to ‘wrong’ and ‘wrong’ to ‘right’ by manipulating the witness or flooring the innocent witness are well depicted in popular visual media like television and cinema. There is a social requirement to bring about fundamental changes by over throwing the archaic British colonial laws from the law books of independent India. Those laws were enacted to serve the purposes to control vast territory of India. Now the need is to evolve pro-citizens laws away from preventive and control laws. The new laws will be helpful in and day life of an average citizen across the country and not only in favour of the ruling elites, reinforcement authorities and law makers.

Need Review Witness Centred Justice

In a “witness” Centred method of justice and judgment within the cultural context and social fabric of the ancient civilisation of India which was invaded and plundered several times, there is a lurking sense of suspicion in the civil society witness centred method of administering justice. It has made civil society and its citizen inward that lacked trust, truthfulness and worthiness of the justice pronounced by the Indian courts at several layers from Trail Court to Supreme Court. They are suspicious of court of law, law enforcement authorities especially police force and other enforcement authorities, uniform police personal gives a sense of fear and citizens like to avoid them as a legacy of British colonial rule. The police are seen as adversary instead of a friend of the citizen. In the prevailing circumstances, the democratic governance is perceived as rule of the alien. There is a very high chance of misinformation in such circumstances. Hence, there is need to device culturally compatible, socially acceptable and humane method of soliciting and extracting “truth” from the witness for administering justice which should be seen as true justice.

Citizens’ Cost of Justice

Given the economic base of the country, rapidly increasing cost of keeping a culprit in jail or detention, snail pace in disposing court cases, mounting number of pending cases in courts and individuals awaiting for justice without trial is matter of great concern and shame for democratic county like India. There is an urgent need to device new methods to administer justice and quick method of disposing of the court cases especially in case if involves review of death penalty.

Glaring Gap between Judgment and Execution

There is a great deal of variation between actual numbers of executions recorded by the Government of India and the statistics provided by The People's Union of Civil Liberties. However, death sentences by trial courts in India have been much larger compared to the actual capital punishment confirmed by the higher courts. What are the sociological implications of the difference between trial court death sentences and actual executions? One can argue that there is a gap in the individual interpretation of the law, technical method of administration of law or a possible flaw in the witness based judgement and Judo-Christian philosophy of justice, which says to save one innocent if required 99 accused may be set free. At the same time, judges belong to several regions of the country who have been socialised and raised in the Indian multiple values and cultural traditions. So, it is possible that they interpret laws within their own world view. 'Capital Punishment' has multiple meanings in different parts of the country. It ranges from 'Eye for an Eye' and a variety of methods of forgiveness described and explained in mythological and folklores of country. It is no accident or reflection of modernisation that the Law Commission 2015 report has recommended the abolition of Capital Punishment for all crimes in India except those who were against the nation or involved themselves in terrorism offenses.

In the Pages of History

In recorded history, Capital Punishment was presented in the British Colonial law under Indian Panel Code (IPC) 1860. The law covered no more than two-third of India and was not enforceable or accepted by princely states and larger independent states like Jammu & Kashmir, Baroda (Vadodara), and Hyderabad to mention a few who followed their own methods of Capital Punishment. In addition, the Colonial rulers recognised traditional and religious laws prevalent at that time in the country, which were at variance with the Judo-Christian Laws of Capital Punishment. For example, in a northeast region, the Scheduled Tribes followed and continued to follow their age-old methods of punishment and are administered often without going to courts. In Independent India without much deliberation, Indian Panel Code propounded by British Colonial rulers became applicable to all citizens of independent India.

Socio-cultural Review

The judgements of the Supreme Court of India and a number of legislations enacted by the Parliament of India after independence by and large points out that the judgement and legislation had implicit philosophy that Death Penalty should be imposed only in 'the rarest of rare cases'. However, death penalty as a reaction to inhumane social practices of 'Sati' was enacted and considered as crime punishable with death under The Commission of Sati (Prevention) Act, 1987. Similarly, mandatory death penalty has been prescribed for second time offenders of large scale narcotics trafficking. It should be mentioned that narcotics trafficking has been rampant on most international borders of the country. Similar punishment has been prescribed under the Punishment of Atrocity Act 1989 against the atrocities of Scheduled Casts and Scheduled Tribes.

The contention of the foregoing brief analysis is that Capital Punishment is in the ancient civilisation of India and contemporary democratic India continues to be unresolved issue of debate, discussion and deliberation on moral, social and value premises emanating out of *Sanatan Dharma, Jainism and Buddhism*. Even Islamic laws imposed by Mughal Emperors left the door open for discussion in spite of clear Islamic verdict on the issue of Capital Punishment. It was further compounded by the colonial rulers by imposing method of justice directly drawn from the then existing of British Laws. Hence, it is author's contention that the whole issue of Capital Punishment requires further contemplation, deliberation and reflection before the same could be laterally decided by anyone concerned.

Changing Demography and Perception of Capital Punishment

Statistics of actual execution has either declined or remained stable in spite of the fact that the population of independent India was a little over 300 million in 1947 which has increased to 1200 million plus showing fourfold increase today. Logically even if the rate of crime remained constant there should have four fold increase in Capital Punishment in India but that is not so. Secondly, most of the offenses for which the prisoners were executed in one way or the other related to women and property.

These problems have increased over a period of time in the country reflected in the number of reported atrocities on women including rapes and disputes of property even then capital punishment has not increased. Is because the numbers of courts have not increased? Or is it because justice has not provided to grieved parties as reflected in the large number of pending court

cases at all levels in the country? Or high degree of corruption, loss of faith in judiciary and helplessness of the poor for seeking justice has led to this situation. Should there be a remedy for this issue as projected population of India is going to be much larger in 2050 taking over China. It is projected that India will become the world's largest democratic country. Hence, the debate on Capital Punishment must be given second priority compared to evolving better methods of giving justice to the citizens of this country.