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DEATH PENALTY: A CRITIQUE

WITH EMPHASIS ON INTERNATIONAL & INDIAN CONTEXT

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ABSTRACT

Death penalty in recent times has captured the attention of numerous jurists all over the world and the debate of its legality has been shaping up in all the spheres in these recent years. Some countries are insisting on the enforcement of death penalty for such crimes which are grossly shocking to the society while many nations feel that this is most inhuman and cruel form of punishment, transgressing international customary laws. We in this article, intend to look into the subject of death penalty, discussing various aspects of International law and municipal laws prevalent in India. We start off by discussing the International legal principles which govern this kind of punishment, which will include the views prescribed by United Nations, American Convention of Human Rights, European Convention of Human Rights and various international treaties. After which we will go over the worldwide scenario of death penalty, arguments in support and against it. Then we will delve into the Indian context where we will discuss landmark cases like Jagmohan Singh and Bachan Singh to name a few and the doctrines laid down in these cases. We complete our article with a critical analysis of the present Indian scenario.

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Two decades after Gregg, *it is apparent that the efforts to forge fair capital punishment jurisprudence have failed. Today, administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency.*

-American Bar Association (1997)

INTRODUCTION:

Death penalty in recent times has got the attention of many jurists all around the world and the debate of its legality has been shaping up in all the spheres in these recent years. As some of the of the countries in the world are insisting on more use of this form of penalty for more crimes other than murder and rape, some countries have banned this form of punishment in all forms .Though in this century most of the nations fill that this is most inhuman and cruel form of punishment available some countries are still reluctant to abolish this penalty in which includes India as it is still not against the applications of international customary laws. This practice is in

vogue for many centuries now and even though in many spheres it has faced oppositions as there are many international documents against this practice it is still applied and used in many countries. Criminologists and penologists along with leading social workers, judges, jurists are doing intensive research all around the world to answer some basic questions regarding this form of punishment which are

A. Whether capital punishment obliges the aims of Punishment?

B. Whether complete abolition of criminals through capital punishment will eradicate crime from humanity?

C. Whether comprehensive abolition of crime from humanity is at all thinkable or comprehendible?

Inspecting the scopes of death penalty in more depth it should be cited that few abolitionist countries have brought it back after eradicating it. Eradication was probably implemented because to political change, when countries moved from dictatorship to democracy or due to some other reasons. In United States of America some states while have abolished it some states still uses it.

One needs to understand that human beings are not angel and thus there will be criminals in the society whatever rules and laws are made. As criminal are very much part of the society. The attitude should change towards them so that they can enjoy their life as normal humans with reasonable restrictions .here one have to also consider and look into the situation from the victims point of view .if they fell that there are not enough strong laws they will be keen to take the laws in their own hand and their will come down absolute anarchy so there should be strong laws and punishments but it should be reasonable enough.

GOVERNING INTERNATIONAL LEGAL PRINCIPLES RELATING DEATH PENALTY

I) United Nation's Views on Death Penalty in a Nutshell:-

In 1948, the implementation of the Universal Declaration of Human Rights motioned the first international report toward the death penalty. It describes the privileges and freedoms of individuals in detail. As demarcated by the United Nations Charter, the universal frame was created after the World War II to avoid unnecessary death, while the Universal Declaration further explains that goal, affirming in third article that "everyone has the right to life."[2] Since the Declaration's approval in December 1948, 118 Member States have eradicated the death penalty, either in law or in practice, and many member nations are inspiring others to eliminate it as well.[3] Those that acknowledged of the Declaration anticipated to make a requisite legal basis eradicating the death penalty. In 1966, the International Covenant on Civil and Political Rights (ICCPR) was approved, entering into power ten years later; it now has 152 authorizations. The Covenant stalwartly emboldens all UN Member States to eradicate the death penalty, but permits that the "sentence of death may be executed only for the most serious crimes."[4] It also created a observing body, the Human Rights Committee, as a method of keeping track of the execution of the Covenant.[5] In 1989, the General Assembly accepted a Second Optional Protocol to the Covenant, aimed at the elimination of the death penalty. The Optional Protocol, which arrived into force in 1991, was formed because many member States alleged that "abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights". It agrees only for the practice of the death penalty during time of war and within reasonable reason—"no reservation is admissible … except …in time of war". It also requires member nations to submit intelligences to the Human Rights Committee on "measures that they have adopted to give effect to the present Protocol."[6] Individuals below the age of 18 who have committed a crime, known as child offenders, are excused from capital punishment under the Convention on the Rights of the Child, which arrived into force within a year of its adoption in

[2] http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng

[3] http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries

[4] http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

[5] http://www.ohchr.org/en/hrbodies/hrc/pages/hrcindex.aspx

[6] http://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx

1989.[7] The Convention, sanctioned by 192 countries, is "the most universally accepted human rights instrument in history"; however, two countries have yet to sanction it—Somalia and the United States. In addition to the Universal Declaration, the International Covenant, the Second Optional Protocol, and the Convention on the Rights of the Child, there are over fifty determinations accepted by the United Nations General Assembly, the Economic and Social Council, and the UN Commission on Human Rights, eliminating the death penalty; many more are in the recruiting stage. Other exertions towards eliminating the death penalty are delimited by the UN Commission on Human Rights.

II) Universal Declaration of Human Rights (1948) With Emphasis on Article 3:-

The Universal Declaration of Human Rights (UDHR) is law to admiration the requirements of agreements to which they are parties, and to do nothing to overthrow the object and purpose of treaties which they have sign up. This article deals with Right to life which states that, "Every human being has the inherent right to life. This right shall be protected by law. No human being shall be arbitrarily deprived of his life."[8]

III) International Treaties Providing for Abolition of Death Penalty:-

The municipal of nations has accepted four international treaties providing for the elimination of the death penalty. One is of universal scope; the rest are regional. Subsequent are short accounts of the four treaties [States may become parties to international treaties either by acceding to them or by ratifying them. Signature indicates an intention to become a party at a later date through ratification. States are bound under international European Convention on Human Rights can become a party to the Protocol.

[7] http://www.ohchr.org/en/professionalinterest/pages/crc.aspx
[8] http://www.claiminghumanrights.org/right_to_life_definition.html

IV) Second Optional Protocol to the International Covenant on Civil and Political Rights:-

The Second Optional Protocol to the International Covenant on Civil and Political Rights, targeting at the elimination of the discussed penalty, accepted by the UN General Assembly in 1989, is of international scope. It delivers for the entire elimination of the death penalty but permits state parties to hold the death penalty in period of war if they make a registration to that effect at the time of approving or assenting to the Protocol. Any state which is a part of the International Covenant on Civil and Political Rights can become a party to the Protocol. In this protocol Article 1 states that Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction. Whereas Article 2 states that,

i. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.
ii. The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.
iii. The State Party having made such a reservation shall notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory. And finally Article 6 states that without prejudice to the possibility of a reservation under Article 2 of the present Protocol, the right guaranteed in Article 1, Paragraph 1, of the present Protocol shall not be subject to any derogation under article 4 of the Covenant.[9]

V) Protocol to the American Convention on Human Rights:-

The Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted by the General Assembly of the Organization of American States in 1990, affords for the full elimination of the death penalty but permits states parties to recall the death penalty in times of war, if they make a registration to that effect at the time of approving or assenting to the

[9] http://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx

Protocol. Any state party to the American Convention on Human Rights can convert a party to the Procedure. Article 1 states abolition of Death penalty whereas Article 2 states about the reservations available during war.[10]

VI) Protocol No. 6 to the European Convention Human Rights:-

Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms regarding the elimination of the death penalty, approved by the Council of Europe in 1982, delivers the elimination of the death penalty in amity; states parties may recall the death penalty for crimes "in time of war or of imminent threat of war". Any state party to the European Convention on Human Rights can become a part to this. Article 1 state about abolition of death penalty and Article 2 talks about death penalty during war.[11]

VII) Protocol No. 13 to the European Convention on Human Rights:-

Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms regarding the elimination of the death penalty in all situations, approved by the Council of Europe in 2002, delivers for the elimination of the death penalty in all situations, counting time of war or of imminent threat of war. Any state party to the say that in a case fit for the maximum possible punishment that punishment should not be the death penalty because a state that compliments life as being sacrosanct should not lawfully assassination, however serious the offence and conditions neighbouring it may be. It is, indeed, a moral question as to whether the state should adopt the sensitivity of retribution that a society or a casualty may feel for the wrongdoer. Even though the society may be objectionable to the criminal and want him to die, justly. The modern human rights movement and the widespread global order is moving towards a morality that condemns lawful murder by the state, It is for an distinct state, as a policy

[10] http://www.oas.org/juridico/english/treaties/a-53.html
[11] http://conventions.coe.int/Treaty/en/Treaties/Html/114.htm

decision, to decide what moral stand it will take. Most law lords can arbitrate upon particular judgments to see if constitutional protections and other criminal justice deliberations have been taken into account. The Indian judiciary has supported high level of carefulness in approving a death sentence, to the extent that it will not shy away from scrutinizing a President's word on pardon, if it reverberates randomness or mala fides.[12]

VIII) International Covenant on Civil and Political Rights (1966):-

This key international treaty on civil and political rights, also recognized as ICCPR, is very precise about the right to life and the death penalty. Article 6 reads as follows: "1. every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The ICCPR precisely allows for the employment of the death penalty and confinement as a part of a criminal justice system. Article 6 clause 2 delivers that "…In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This price can only be carried out pursuant to a final judgment rendered by a capable court. Clause 4 of the similar Article also shapes that "... Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases." Article 4 of the ICCPR advance declares that states are not able to derogate from the Article 6 even in eras of a public crisis.[13]

IX) Trend towards World Abolition:

[12] http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=187
[13] http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

In 1986, 46 countries had eradicated the death penalty for regular crimes.[14] Sixteen years later, the number of countries in the same class had almost doubled over to 89.[15] Furthermore, another 22 countries had still using the death penalty in exercise, taking the total of non-death penalty countries to 111, far more than the 84 countries which hold a dynamic death penalty. Roger Hood, in his book about world growths in the death penalty, noted that: "The annual average rate at which countries have abolished the death penalty has increased from 1.5 (1965-1988) to 4 per year (1989-1995), or nearly three times as many.[16] "International law professional, William Schabas, noted that fifty years ago this topic did not even exist because there were virtually no abolitionistcountries.[17]

For a world in which the death penalty has been experienced almost all over the place for centuries, this is a melodramatic turnaround. Although official elimination of the death penalty dates as far rear as 1867 for Venezuela and 1870 for the Netherlands, and even previous for the state of Michigan (1846), most of the undertaking towards removal of capital punishment has been justly fresh.[17]

X) Human Rights as a Basis of Abolition and Reform:-

The explanations why countries have eliminated the death penalty in swelling numbers vary. For some nations, it was a comprehensive indulgent to human rights. Spain unrestricted the last ruins of its death penalty in 1995, stating that: "the death penalty has no place in the general penal system of advanced, civilized societies . . . What more degrading or afflictive punishment can be imagined than to deprive a person of his life . . . ?[18]"In the same way, Switzerland eradicated the death penalty because it established "a flagrant violation of the right to life and dignity. . . ."Justice Chaskalson of the South African Constitutional Court, stated in the significant opinion

[14] See Amnesty International, United States of America: The Death Penalty 228 (Appendix 12) (1987) (exclusive of crimes committed under military law or in time of war).
[15] See Amnesty International, "Facts and Figures on the Death Penalty," http://web.amnesty.org/rmp/dplibrary.nsf/index?openview (June 2002).
[16] R. Hood, The Death Penalty: A World-wide Perspective 8 (2d edit. 1996).
[17] See Schabas, The Abolition of the Death Penalty in International Law 1 (1997). [17] See Schabas, note 4, at 5-6.

exclusion the death penalty under the new-fangled constitution that: "The rights to life and dignity are the most important of all human rights . . . . And this must be demonstrated by the State in everything that it does, including the way it punishes criminals." [19]

THE WORLDWIDE SCENARIO OF DEATH PENALTY

According to Amnesty International, 140 countries have abolished the death penalty. In 2012, only one country, Latvia, abolished the death penalty for all crimes. In 2011, 21 countries around the world were known to have carried out executions and at least 63 to have imposed death sentences.

Death Penalty Outlawed (year)[18]

- Albania (2000)
- Andorra (1990)
- Angola (1992)
- Argentina (2008)
- Marshall Islands (1986)
- Mauritius (1995)
- Mexico (2005)
- Micronesia (1986)

N.A. : Data not available

[18] If death penalty was outlawed for ordinary crimes before it was outlawed in all cases, the earlier date is given.

- Armenia (2003)
- Australia (1984)
- Austria (1950)
- Azerbaijan (1998)
- Belgium (1996)
- Bhutan (2004)
- Bosnia-Herzegovina (1997)
- Bulgaria (1998)
- Burundi (2009)
- Cambodia (1989)
- Canada (1976)
- Cape Verde (1981)
- Colombia (1910)
- Cook Islands (2007)
- Costa Rica (1877)
- Côte d'Ivoire (2000)
- Croatia (1990)
- Cyprus (1983)
- Czech Republic (1990)
- Denmark (1933)
- Djibouti (1995)
- Dominican Republic (1966)
- Ecuador (1906)
- Estonia (1998)
- Finland (1949)
- France (1981)
- Gabon (2010)
- Georgia (1997)
- Germany (1949)
- Moldova (1995)
- Monaco (1962)
- Montenegro (2002)
- Mozambique (1990)
- Namibia (1990)
- Nepal (1990)
- Netherlands (1870)
- New Zealand (1961)
- Nicaragua (1979)
- Niue (N.A.)
- Norway (1905)
- Palau (N.A.)
- Panama (1903)
- Paraguay (1992)
- Philippines (2006)
- Poland (1997)
- Portugal (1867)
- Romania (1989)
- Rwanda (2007)
- Samoa (2004)
- San Marino (1848)
- São Tomé and Príncipe (1990)
- Senegal (2004)
- Serbia (2002)
- Seychelles (1993)
- Slovakia (1990)
- Slovenia (1989)
- Solomon Islands (1966)
- South Africa (1995)

- Greece (1993)
- Guinea-Bissau (1993)
- Haiti (1987)
- Honduras (1956)
- Hungary (1990)
- Iceland (1928)
- Ireland (1990)
- Italy (1947)
- Kyrgyzstan (2007)
- Kiribati (1979)
- Latvia (2012)
- Liechtenstein (1987)
- Lithuania (1998)
- Luxembourg (1979)
- Macedonia (1991)
- Malta (1971)
- Spain (1978)
- Sweden (1921)
- Switzerland (1942)
- Timor-Leste (1999)
- Togo (2009)
- Turkey (2002)
- Turkmenistan (1999)
- Tuvalu (1978)
- Ukraine (1999)
- United Kingdom (1973)
- Uruguay (1907)
- Uzbekistan (2008)
- Vanuatu (1980)
- Vatican City (1969)
- Venezuela (1863)

Death Penalty Outlawed for Ordinary Crimes[19] (year)

- Bolivia (1997)
- Brazil (1979)
- Chile (2001)
- El Salvador (1983)
- Fiji (1979)
- Israel (1954)
- Kazakhstan (2007)
- Latvia (1999)
- Peru (1979)

De Facto Ban on Death Penalty[20] (year)[21]

[19] Death penalty is permitted only for exceptional crimes, such as crimes committed under military law or in wartime.

[20] Death penalty is sanctioned by law but has not been the practice for ten or more years.
[21] Year of last execution

- Algeria (1993)
- Benin (1987)
- Brunei (1957)
- Burkina Faso (1988)
- Cameroon (1997)
- Central African Republic (1981)
- Congo (Republic) (1982)
- Eritrea (N.A)
- Gambia (1981)
- Ghana (N.A)
- Grenada (1978)
- Kenya (N.A)
- Korea, South (1997.)
- Laos (N.A)
- Liberia (N.A)
- Madagascar (1958)
- Malawi (N.A)
- Maldives (1952)
- Mali (1980)
- Mauritania (1987)
- Morocco (1993)
- Myanmar (1993)
- Nauru (1968)
- Niger (1976)
- Papua New Guinea (1950)
- Russia (1999)
- Sierra Leone (1998)
- Sri Lanka (1976)
- Suriname (1982)
- Swaziland (N.A)
- Tajikistan (N.A)
- Tanzania (N.A)
- Tonga (1982)
- Tunisia (1990)
- Zambia (N.A)

Death Penalty Permitted

- Afghanistan
- Antigua and Barbuda
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
- Belize
- Botswana
- Lesotho
- Libya
- Malaysia
- Mongolia
- Nigeria
- North Korea
- Oman
- Pakistan
- Palestinian Authority

- Chad
- China (People's Republic)
- Comoros
- Congo (Democratic Republic)
- Cuba
- Dominica
- Egypt
- Equatorial Guinea
- Ethiopia
- Guatemala
- Guinea
- Guyana
- India
- Indonesia
- Iran
- Iraq
- Jamaica
- Japan
- Jordan
- Kuwait
- Lebanon
- Qatar
- St. Kitts and Nevis
- St. Lucia
- St. Vincent and the Grenadines
- Saudi Arabia
- Singapore
- Somalia
- South Sudan
- Sudan
- Syria
- Taiwan
- Thailand
- Trinidad and Tobago
- Uganda
- United Arab Emirates
- United States
- Vietnam
- Yemen
- Zimbabwe

ARGUEMENTS IN SUPPORT OF DEATH PENALTY

The state has inflicted death as a punishment, on its subjects since the ancient times. These were times when the state and the dominant religious establishment (in some cases, the ‘church’) were hand-in-glove. Hence, some conduct was interpreted as offence against the ruler, as well as an offence against God. The separation of the state and religion, in the Enlightenment years, has

seen theories of punishment incorporate many different perspectives, as why the state punishes, what it seeks to achieve thereby, and hence what method and procedure criminal punishment should take account off. Capital punishment is the lawful infliction of death as a punishment. The Bible prescribes death for murder and many other crimes including kidnapping and witchcraft. By 1500 in England, only major felonies carried the death penalty - treason, murder, larceny, burglary, rape, and arson. When a man who does not have the power to create life on earth, takes away another man's life, he commits the most brutal and ultimate form of crime imaginable. He should be punished for that, with death.

I) The Theories of Punishment:

With change in the social structure the society has witnessed various punishment theories and the radical changes that they have undergone from the traditional to the modern level and the crucial problems relating to them. In the words of Sir John Salmond -The ends of criminal justice are four in number and with regard to the purposes served by them; punishment can be divided as under:

a) Deterrent theory:-

Since the Code of Hammurabi in Babylon the ancient history of Punishment before all things was deterrent, and the chief end of the law of crime is to make the evil-doer an example and a warning to all that are like-minded with him. One of the primitive methods of punishments believes that if severe punishments were inflicted on the offender it would deter him from repeating that crime [J. Bentham, the founder of this theory, states: "General prevention ought to be the chief end of punishment as its real justification. If we could consider an offence, which has been, committed as an isolated fact, the like of which would never recur, punishment would be useless”]. Those who commit a crime, it is assumed, derive a mental satisfaction or a feeling of enjoyment in the act. To neutralize this inclination of the mind, punishment inflicts equal quantum of suffering on the offender so that it is no longer attractive for him to carry out such committal of crimes. The basic idea of deterrence is to deter both offenders and others from committing a similar offence.

b) Retributive theory:-

The most stringent and harsh of all theories retributive theory believes to end the crime in itself. This theory underlines the idea of vengeance and revenge rather than that of social welfare and security. Punishment of the offender provides some kind of solace to the victim or to the family members of the victim of the crime, who has suffered out of the action of the offender and prevents reprisals from them to the offender or his family.

c) Preventive theory:-

Unlike the former theories, this theory aims to prevent the crime rather than avenging it. Looking at punishments from a more humane perspective it rests on the fact that the need of a punishment for a crime arises out of mere social needs that is, while sending the criminals to the prisons to prevent the offender from doing any other crime and thus protecting the society from any antisocial elements.

d) Reformative theories:-

The most recent and the most humane theory, of all theories is based on the principle of reforming the legal offenders through individual treatment. Not looking to criminals as inhuman this theory puts forward the changing nature of the modern society where it presently looks into the fact that all other theories have failed to put forward any such stable theory, which would prevent the occurrence of further crimes. Though it may be true that there has been a greater onset of crimes today than it was earlier, but it may also be argued that many of the criminals are also getting reformed and leading a law-abiding life altogether. Reformative techniques also possess some elements of deterrent techniques.

II) Deterrence: Prevents Future Murderers

Society has always used punishment to discourage would-be criminals from unlawful action. Since society has the highest interest in preventing murder, it should use the strongest punishment available to deter murder, and that is the death penalty. If murderers are sentenced to death and executed, potential murderers will think twice before killing for fear of losing their own life.

For years, criminologists analyzed murder rates to see if they fluctuated with the likelihood of convicted murderers being executed, but the results were inconclusive. Then in 1973 Isaac Ehrlich employed a new kind of analysis which produced results showing that for every inmate who was executed, 7 lives were spared because others were deterred from committing murder. Similar results have been produced by disciples of Ehrlich in follow-up studies. Moreover, even if some studies regarding deterrence are inconclusive, that is only because the death penalty is rarely used and takes years before an execution is actually carried out. Punishments which are swift and sure are the best deterrent. The fact that some states or countries which do not use the death penalty have lower murder rates than jurisdictions which do is not evidence of the failure of deterrence. States with high murder rates would have even higher rates if they did not use the death penalty. Even though statistical demonstrations are not conclusive, and perhaps cannot be, capital punishment is likely to deter more than other punishments because people fear death more than anything else. They fear most death deliberately inflicted by law and scheduled by the courts. Whatever people fear most is likely to deter most. Hence, the threat of the death penalty may deter some murderers who otherwise might not have been deterred.

III) Retribution: Justice is better served

When someone takes a life, the balance of justice is disturbed. Unless that balance is restored, society succumbs to a rule of violence. Only the taking of the murderer's life restores the balance and allows society to show convincingly that murder is an intolerable crime which will be punished in kind. Retribution has its basis in religious values, which have historically maintained that it is proper to take an "eye for an eye" and a life for a life. Although the victim and the victim's family cannot be restored to the status which preceded the murder, at least an execution brings closure to the murderer's crime (and closure to the ordeal for the victim's family) and

ensures that the murderer will create no more victims. For the most cruel and heinous crimes, the ones for which the death penalty is applied, offenders deserve the worst punishment under our system of law, and that is the death penalty. Any lesser punishment would undermine the value society places on protecting lives.

IV) DNA testing and other methods of modern crime scene science can now effectively eliminate almost all uncertainty as to a person's guilt or innocence:-

One of the biggest arguments against the death penalty is the possibility of error. Sure, we can never completely eliminate all uncertainty, but nowadays, it's about as close as you can get. DNA testing is over 99 percent effective. And even if DNA testing and other such scientific methods didn't exist, the trial and appeals process is so thorough it's next to impossible to convict an innocent person. A jury of 12 members must unanimously decide there's not even a reasonable doubt the person is guilty. The number of innocent people that might somehow be convicted is no greater than the number of innocent victims of the murderers who are set free.[22]

V) It contributes to the problem of overpopulation in the prison system:-

Prisons across the country face the problem of too many prisoners and not enough space & resources. Each additional prisoner requires a portion of a cell, food, clothing, extra guard time, and so on. When you eliminate the death penalty as an option, it means that prisoner must be housed for life. Thus, it only adds to the problem of an overcrowded prison system. [23]

VI) Provides Closure for Victims:-

[22] http://www.balancedpolitics.org/death_penalty.htm
[23] Ibid

There are many victims of a single murder. The criminal gets caught, tried, and convicted, and it is understood that the punishment will be severe. But the person he has killed no longer has a part to play in this. Unfortunately, the murderer has deprived his family and friends of a loved one. Their grief begins with the murder. It may not end with the murderer's execution, but the execution does engender a feeling of relief at no longer having to think about the ordeal—a feeling which often fails to arise while the murderer still lives on. A system in place for the purpose of granting justice cannot do so for the surviving victims, unless the murderer himself is put to death.[24]

ARGUEMENTS FOR THE ABOLITION OF DEATH PENALTY

"The taking of life is too absolute, too irreversible for one human being to inflict on another, even when backed by legal process."

-Ban Ki-moon, United Nations Secretary General

Capital Punishment is often conflicting on the grounds that every criminal justice system is fallible, innocents will inevitably be executed by mistake and death the most severe form of punishment and most importantly, it is irreversible. Innocent people may get executed and there would be no possible way of compensating them for the miscarriage of justice. The death penalty is also most commonly debated to be a violation of the right to life or of the "sanctity of life". Many national constitutions and international treaties assure the right to life. However heinous the offence may be, most convicts undergo the most traumatic time, awaiting the result of several appeals and their chances of evading execution are better if they are prosperous or powerful. Therefore we see that it is the poor who are sent to the gallows whereas the affluent escape

[24] http://toryreformgroup.tumblr.com/post/10790236076/jack-blackburn-against-capital-punishment

justice by draining their coffers. It is often argued that death penalty sends out a serious message to would-be offenders and that it is acceptable to kill based on the theories of retribution, prevention and deterrence. The arbitrariness and the discriminatory aspects make this a bane in the modern society where human rights are given predominance. The above mentioned situations and circumstances and discussed below in details:

I) Right To Life:-

No one has the right to violate the inalienable right to life. This argument is fully affirmed by the Universal Declaration of Human Rights (UDHR) on Article 3, which has firstly been embraced by the United Nations General Assembly in 1948 and is nowadays identifiable as a customary law, binding on all nations. Human rights are secured through this Universal Declaration, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as well as a significant number of regional conventions (European Convention on Human Rights, American Convention on Human Rights). Human rights' magnitude augments more and more due to cultural, social, political, humanitarian and economic crisis. So their infringement constitutes a deplorable act, even deriving from others, even from the states. The medieval philosopher and theologian Thomas Aquinas tried to make this point more clear by saying that "therefore if any man is dangerous to the community and is subverting it by some sin, the treatment to be commended is his execution in order to preserve the common good… Therefore to kill a man who retains his natural worthiness is intrinsically evil, although it may be justifiable to kill a sinner just as it is to kill a beast, for, as Aristotle points out, an evil man is worse than a beast and more harmful." Even though a bad act (killing) can turn into a good act (killing under specific circumstances so as to protect the common good), no one should have the right to violate someone else's right to life for any reason.

II) It is not a Proven Deterrent to Future Crimes:-

Those who are of the opinion that deterrence justifies the execution of certain offenders bear the burden of proving that the death penalty is a deterrent. The overwhelming conclusion from years

of deterrence studies is that the death penalty is, at best, no more of a deterrent than a sentence of life in prison. In fact, some criminologists, uphold that the death penalty has the contrary effect, that is, society is brutalized by the use of the death penalty, and this enhances the likelihood of more murders. Even most supporters of the death penalty now place little or no weight on deterrence as a significant justification for its continued use. The death penalty is not a deterrent because most people who commit murders either do not expect to be caught or do not carefully weigh the differences between a possible execution and life in prison before they act. Often, murders occur in moments of passion or anger, or by criminals who are substance abusers and acted impulsively. There is no definite proof that the death penalty acts as a better deterrent than the threat of life imprisonment. Once imprisoned, those serving life sentences often settle into a routine and are less of a threat to commit violence than other prisoners. Moreover, most states now have a sentence of life without parole. Prisoners who are given this sentence will never be released. Thus, the safety of society can be assured without using the death penalty.

"Executions, especially where they are painful, humiliating, and public, may create a sense of horror that would prevent others from being tempted to commit similar crimes... ... In our day death is usually administered in private by relatively painless means, such as injections of drugs, and to that extent it may be less effective as a deterrent. Sociological evidence on the deterrent effect of death penalty as currently practiced is ambiguous, conflicting, and far from probative."

- Avery Cardinal Dulles, Catholicism and Capital punishment, First Things 2001[25]

III) Arguements against the Retributive Theory:-

Retribution is equivalent to revenge. Although our first instinct may be to mete out immediate pain on someone who wrongs us, the standards of a mature society demand a more considered reaction. The emotional impetus for vengeance is not a sufficient justification for summoning a system of capital punishment, with all its complementary problems and perils. Our laws and criminal justice system should lead us to higher principles that display a complete respect for

[25] http://www.prodeathpenalty.com/ornellaspaper.htm

life, even the life of the murderer. Encouraging our basest motives of revenge, which culminates in another termination of life, widens the chain of violence. Consent to executions, sanctions killing as a form of 'pay-back.' Many victims' families condemn the exercise of the death penalty. Using an execution to try to right the wrong of their loss is an affront to them and only inflicts more pain. Vengeance is a powerful and natural emotion. But it has no position in any system of justice. The notion of 'an eye for an eye', or a life for a life, is a simplistic one which our society has never certified. We do not permit torturing the torturer, or raping the rapist. The "eye for an eye" way of thinking will never resolve anything. A revenge philosophy inevitably leads to an endless cycle of violence.

IV) Miscarriage of Justice:-

One of the most undeniable and universal arguments is that involving the execution of the innocent. Due to flaws in the system, innocent people will inevitably get killed. Witnesses, prosecutors, and jurors all make errors, as they are human beings. According to Amnesty International, “The death penalty legitimizes an irreversible act of violence by the state and will inevitably claim innocent victims. As long as human justice remains fallible, the risk of executing the innocent can never be eliminated”. Capital punishment imposes an irrevocable sentence. When an inmate is executed, nothing can be done to make penance if a mistake has been made. There are considerable evidences which shows that many mistakes have been made in sentencing the wrong people to death. A recent study by Columbia University Law School found that two thirds of all capital trials contained serious faults. When the cases were retried, over 80% of the defendants were not sentenced to death and 7% were completely acquitted. There are several documented cases where DNA testing showed that innocent people were sentenced to death by the government. We have an imperfect justice system where poor defendants are given minimal legal attention by often lesser qualified individuals. Some would blame the court system, not that death penalty itself for the problems, but we can't risk mistakes. Last year, 14 eminent retired judges wrote to the President, pointing out that the Supreme Court had erroneously given the death penalty to 15 people since 1996, of whom two were hanged. The

judges called this “the gravest known miscarriage of justice in the history of crime and punishment in independent India.” Some argue that the death penalty is the only way to discourage atrocious crime, especially violence against women and children. But a comprehensive study done last year in the United States found that there is no credible evidence that the death penalty has any deterrent effect on crime. The “Innocence Project” in the United States [a national litigation and public policy organization dedicated to exonerating wrongfully convicted individuals through DNA testing and reforming the criminal justice system] has found, on the other hand, several cases where innocent people were given the death sentence. Lawmakers in India find it convenient to hold up the death penalty as a symbol of their resolve to deal with crime, and choose to ignore more difficult but more effective solutions like social education and police or judicial reform. The certainty of punishment, not severity, is the real deterrent.[26]

V) Financial costs to taxpayers of capital punishment are several times that of keeping someone in prison for life. Most people don't realize that carrying out one death sentence costs 2-5 times more than keeping that same criminal in prison for the rest of his life. How can this be? It has to do with the endless appeals, additional required procedures, and legal wrangling that drag the process out. It's not unusual for a prisoner to be on death row for 15-20 years. Judges, attorneys, court reporters, clerks, and court facilities all require a substantial investment by the taxpayers. [27]

VI) It is useless because it doesn't bring the victim back to life. Perhaps the biggest reason to ban the death penalty is that it doesn't change the fact that the victim is gone and will never come back. Hate, revenge, and anger will never cure the emptiness of a lost loved one. Forgiveness is

[26] http://www.thehindu.com/todays-paper/tp-opinion/why-the-death-penalty-mustend/article4782815.ece

[27] http://indialawyers.wordpress.com/category/death-penalty/

the only way to start the healing process, and this won't happen in a revenge-focused individual.[28]

DEATH PENALTY: AN INDIAN OVERVIEW WITH JUDICIAL DECISIONS

S.367(5) of the Criminal Procedure Code,1898 ,prior to the amendment in 1955 ,requisite a court sentencing a person sentenced of an offence punishable with death to a punishment other than death to state the reasons why it was not granting death sentence .The amendment removed the provision but there was no suggestion in either the Criminal Procedure Code or the Indian Penal Code,1860 as to which cases called for life in imprisonment and which the alternate that is death penalty .The law commission of India in 1967 commenced a study of death penalty and succumbed its 35th report to the government .it justified its conclusion for retention of death penalty thus [29]"Having regard …to the circumstances in India, to the variety of social upbringing of its inhabitants.to the disparity in the level of morality and education in the Country, to the vastness of its area, to the diversity of its population and to paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment."

[28] Ibid
[29] 35th Report of the Law Commission of India,p.354.

JAGMOHAN SINGH v. STATE OF UTTAR PRADESH:- [30]

A constitutional bench of the Supreme Court repelled the initial challenge to the constitutionality of death penalty as a form of punishment in this case of Jagmohan Singh v. State of U.P. The argument in support of death penalty was this kind of punishment quenches all the freedoms assured under article 19(1)(a) to (g) and was arbitrary and not in public interest. Secondly, the preference vested in judges to grant either of the punishments was not based on any legislative policy or usual or constituted an resignation by the legislative of its important functions attracting the vice of unnecessary assignment .Thirdly, the unguided sentencing choice in judges rendered its dishonoured article 14 since two persons found guilty of murder could be treated in a different way –one sentenced to life another sentenced to death. And fourthly, there was no process recognized by CrPC for regulate which of the two punishments should be given, thus absenteeism of a process of law under which life could be quenched is in abuse of Article 21.

The Five judges Bench refused to be inclined by the decision of the US supreme Court in Furman v. Georgia[31] declaring death penalty to be in abuse of the Eight Amendment, which forbade cruel and unusual punishments .the Indian court held that "social conditions are different and so also the general intellectual level".it was held that deficiency of life was constitutionally permitted as it was executed after a trial in harmony with procedure recognized by law.

POST JAGMOHAN SINGH:-

Three developments took place after Jagmohan .The CrPC was rebuilt in 1973 and section 354(3) required that the decision recording verdict for an offence carrying a punishment of death shall state singular reasons for such sentence.7 thus death punishment became the exception and not the rule as far as penalty for murder was concerned .

[30] (1973)1 SCC 20
[31] 33 l Ed 2d 346

Secondly, in Maneka Gandhi v. Union Of India[32], required that every law of penal imprisonment both in procedural and subsequntial aspects must past test of rationality on a cooperative analysis of article s 21, 19 and 14. Based on this understanding, The Supreme Court had in Rajendra Prasad V. U.P [33] held that the special reasons compulsory for striking the death penalty must relate not to the crime but to that of criminal .It could be granted only if the safety of the state and society, public order and the benefits of the general public obliged that course. The Third expansion was that India had agreed the ICCPR came into force on December 16, 1976 10.By ratification of the treaty, India had dedicated itself to broadminded elimination of death penalty.

BACHAN SINGH CASE:-[34]

The guiding law for giving the death penalty can be found in Section 354(3) of the Criminal Procedure Code 1973. In Bachan Singh, the Court observed that, "the normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence."

The Supreme Court recognized in Bachan Singh that this requirement of "special reasons" was very loose and left it open to the courts to execute the death penalty in a subjective and original manner. But the Court refused to get drawn into design the types of grave murders and other capital offences that would charm death penalty rather than the different punishment of imprisonment for life. While normalization or sentencing pleasure belonged to the legislative domain, asking the Court to state "special reasons" for presenting the death sentence was "an exercise of judicial discretion on well-established principles and on the facts of each case".

To assist courts in this "exercise of judicial discretion", Bachan Singh laid down certain broad illustrative guidelines in the hope that courts would discharge their "onerous

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[32] 1978(2) SCR 621

[33] (1979) 3 SCC 646

[34] 1982 AIR 1325, 1983 SCR (1) 145

functions with scrupulous care and humane concern" to fulfil the intent of the legislation that "for persons convicted of murder, life imprisonment is the rule and death sentence an exception". Such a sentence of death ought to be given only in the "rarest of rare" cases and it should be given only when the option of awarding the sentence of life imprisonment is "unquestionably foreclosed".

The substantial influence of Bachan Singh was that it brought in a shift in the penalising policy from the crime to the crime and the criminal. In doing so, it removed references to weighing the provoking and qualifying circumstances of a crime that existed under the old Criminal Procedure Code of 1898. But the Supreme Court itself in Machhi Singh and Ors. v. State of Punjab[35], revived the balancing of provoking and mitigating circumstances through a balance sheet theory in which the maddening circumstances concerning to the crime was compared with the mitigating circumstances affecting the criminal. The Court in Sangeet observed that a balance sheet cannot be drawn up of two distinct and different ingredients of an instance.

APPLYING THE TEST OF THE DOCTRINE OF 'RAREST OF RARE:-

Machhi Singh requires the trying court to draw up a balance sheet of the maddening and explanatory circumstances and opt for the supreme penalty only if even after giving the supreme weightage the mitigating situations, there is no alternative but to impose death penalty. The reasons gave by the court for either authorizing death sentence or altering it appear to invariably turn on the nature of the crime or an the role of the offender in the crime .The circumstantial of the offender and the prospect of his reformation or rehabilitation is occasionally looked into.

Kuljeet singh v. Union of India[36] was a decision concentrated in a writ petition by the accused Ranga and BIlla after their special leave petitions were terminated by the Supreme Court .They were penalised to death for killing a teenaged girl and her younger brother after giving them a lift

[35] 1983 SCR (3) 413
[36] (1981)3 SCC 324.

in a embezzled car while moving in the roads of Delhi .The court found out that the death of the children was a result of "savage planning" which bore a specialized stamp .it said, "the survival of an orderly society demands the annihilation of life of persons like Ranga and Billa who are a threat to social order and sanctuary.[37]

In another instance ,the Supreme Court was discouraged that the sentencing court had adopted a not too serous approach in deciding whether the defendant deserved to die .The sessions Judge had observed "the defendant has devoted a terrific double murder and so no sympathy can be shown to him"[38] The supreme court criticized of this and said "The reasons given by the learned Sessions Judge for imposing the death sentence are not special reasons within the meaning of S.354(3)…and we are not sure whether if he was cognizant of his high responsibility under this Provision, he would have necessarily imposed the death sentence."

SIMILAR CRIME, DIFFERENT PUNISHMENT:-

While certain kinds of crime have unvaryingly been looked upon with strictness and have consistently invited extreme sentence –these includes rape and murder of minor girls[39] [40] ;the kidnapping and murder of a male child or the pitiless killing of a sister in law and her children [41] –these are several instances where a similar crime need not summons the same punishment .The best case being Harbans Singh v. State of U.P[42] .Harbans and three others were convoluted in the murder of four persons .While one died in the police encounter other three stood for trial and was penalized to death by sessions court which was established by the High Court .

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[37] A subsequent questioning the rejection of their mercy petition by the President was also dismissed:Kuljit Singh v.
Lt.Governor of Delhi(1982)1 SCC 417

[38] Muniappan v. State of Tamil Nadu (1981) 3 SCC 11

[39] Dhananjay Chatterjee v. State of West Bengal(1994)2 SCC 220;Laxman Naik v. State of Orissa(1994)3 SCC

[40] ;Kamta Tiwari V. stae of M.P(1996) 6 SCC 250.

[41] Javed Ahmed Pawla v. State of Maharashtra (1983)3 SCC 39;
Jai Kumar v. State of M.P (1999)5 SCC1
But see State of Tamil Nadu v. Suresh (1998)2 SCC 72, where the passage of time helped to commute the sentence.

[42] 1982 SCR (3) 235

What followed was Jeeta Singh was disliked on April 15, 1976, he was implemented on October 6, 1981.Kasmira's SLP sent from the jail was diverted and on April 10, 1977 a different Bench of Bhagwati and Fazal Ali converted his sentence to life in imprisonment. So when Harban's mercy petition was prohibited by the president when he was punished to death he filed a writ petition under Article 32 to the Supreme Court. A.N Sen specified that "It will be a sheer Travesty of justice and the course of justice will be perverted, if for the very same offence, the petitioner has to …pay for the extreme penalty of death sentence imposed on his co-accused for the very same offence is commuted. However since the President had disallowed the mercy petition, the court felt "in the interest of comity between the powers of this court and the powers of the president of India, it will be more in fitness of things if we were to recommend that the president may be good as to exercise his power under Article 72…to commute the death sentence imposed upon the Petitioner into imprisonment for life."

PARDON:-

The decisions where death sentence have been converted do not appear to be based on any set of shape of punishing .This dispossesses the decision of real precedential value and provisions communicating arguments for justification of sentence not on the basis of past practice but constrained to the evidences of the case.

In Pachhi v. state of U.P[43] four members of the family of the respondent became killers of four members of another family following upon a long history of disagreement. The suspect made 27 attacks with axes and daranti on the departed. The three surviving suspect included a septuagenarian, a youth in his prime age and a mother who had given birth to a child even while undertaking the sentence. The death sentence specified by the sessions court was established by the High Court .The Supreme Court commuted the sentence for all the three affirming "no doubt brutality looms large in the murders in this case particularly of the old and also the tender age of the child .it may be that the manner in which the killings were perpetrated may not itself show any lighter side but that is not very peculiar or very special in these killings .Brutality of the manner in which a murder was perpetrated may be a ground but not sole criterion for judging

[43] 1998 CriLJ 3305

whether the case is one of the "rarest of the rare cases" apart from declaring that a desire for retribution was a possible motive for the crime. The court was totally soundless on what vindicating factors had weighted with it .[44]

In Raja Ram Yadav v. State of Bihar[45] where six murders had been committed in a cold diabolical manner, the court altered the sentence on the accused to life imprisonment on account of the superior fact that the sole eye observer to the crime was a child aged 9 years .This was an occurrence where the court did not transportable outside the record to seek factors that would weigh with it for a decision on the fitting ruling.

DEATH PENALTY AS A CRUEL PUNISHMENT IN INDIA:-

The Bachan Singh court transferred the argument that death by hanging established an irrational, cruel and infrequent punishment. The Court noted that notwithstanding the U.S Supreme Court in Furman v. Georgia holding the penalty to be a cruel and unusual punishment in violation of 8th and 14th amendments, the legislatures of no less than 32 states .In the following decision in Gregg v. Gerogia[46] it read down the concerns spoken in Furman and held "as a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is appraised of the information relevant to the implosion of sentence and providing with standards to guide its use of the information .

The cruel nature of death sentence by hanging set by a Section 354 of Cr.P.C was again inspected by the Supreme Court in Deena v. Union of India[47]. Here the court said "the systems of hanging is as painless as is possible in the circumstance, it causes no greater pain any known method of executing the death sentence and it involves no barbarity, torture or degradation."

[44] This case attracted wide attention since one of those on death row was a women with a suckling child. Significantly ;the Supreme Court rejected the plea of the National Commission of Women for intervening the case "for the obvious reason that under the CrPC,the National Commission for Women or any other organization cannot have a locus standi in this murder case".
[45] 1996 AIR 1613
[46] 428 U.S. 153 (1976)
[47] 1984 SCR (1) 1

Later in Pt. Parmanad Katara v. Union of India[48] the court was only set to hold that allowing the body to remain on the noose beyond the point of death dishonoured the self-esteem of the human body and was unconstitutional. Nevertheless, the question of brutality attaching the act of hanging has been totally spoken by the South African Constitutional Court.[49]In Smt. Triveniben v. State of Gujarat[50] a constitutional bench observed the disputation of death row convicts that their sentence should be converted on the ground of extended delay in the implementation of death sentence. It was pointed out that the convicted prisoner experiences in human suffering and mental torture in the long wait to execution. The court held that judicial delay in discarding of the appeal finally wound not reduce the death sentence unconstitutional.

In Madhu Mehta v. Union of India[51],a public interest litigation thrived in persuasion of the court to commute death sentence given to one Gyasi Ram to life custody. It held the postponement of eight years of his mercy petition had produced him to agonize the "mental agony of living under the shadow of death for long, far too long"

SANTOSH KUMAR SATISHBHUSHAN BARIYAR v. STATE OF MAHARASHTRA:-

In the present case[52], Santosh Bariyar, the accused along with three others, lured one Kartikraj to a particular place, laboured him for two hours and asked his family to pay a ransom of Rs. 10 lakhs, intimidating to kill him, if they did not pay. Finally they killed him and cut his body into pieces and predisposed the bags at dissimilar places. All four of them were finally detained and the trial court sentenced them under Sec 302 and Sec 364B read with Sec 120B of the IPC and condemned Bariyar to death and gave life imprisonment standings to the other two. In 2005, the High Court supported the trial court's order based on the perceptive that Bariyar was the main planner of the scheme and the other accused dedicated the crime at the request of Bariyar, which

[48] 1989 SCR (3) 997

[49] In the State v. T. Makwanyane, the court referred to description of the execution of the death penalty by Professor Chris Barnard as follows:

The man's spinal cord will rupture at the point where it enters the skull, electrochemical discharges will send his limbs failing in a grotesque dance, eyes and tongue will start from the facial apertures under the assault of the rope and his bowels and bladder may simultaneously void themselves to soil the legs and drip on the floor..."(Rand Daily Mail. June 12,1978)

[50] 1989 SCR (1) 509

[51] 1989 SCR (3) 774

[52] 2008 (7) SCC 561

was to be measured as a justifying situation. When the matter came before the Court the main question before the Court was whether the present case succeeds under the class of 'rarest of rare' cases so as to permit the courts below to award the death penalty. This forms the fulcrum of the whole judgment.

The Court denied to award death penalty to Bariyar, as it felt that the qualifying circumstances were necessary enough to place it out of the 'rarest of rare' class and also because the reasons allotted by the courts below did not unveil any special reasons, as is required by Sec 354(3), CrPC. The Court detected that the accused were not professional killers, they did not have any criminal history and dedicated the crime solely out of the motive of gathering money. Though it was Bariyar who supposedly proposed the idea of kidnapping, the said plan could only be performed when all the persons complicated gave their consent. The Court felt that there was nothing before them to show that the appellant cannot be reformed and transformed and hence punished him to rigorous life imprisonment.

SANTOSH BERIYAR: DOES THIS JUDGMENT IMPLY THE END OF DEATH PENALTY IN INDIA?

A close look at the decision will propose that the court is highly hazardous of the fact that the death penalty is still alive in India. Justice Sinha's disrespect, for the survival of the death penalty in India, runs almost as a golden thread all over the judgment. It seems that the judges in Bariyar did everything within their powers to limit the claim of the death penalty. If it was within the powers of the bench, then it would have surely opted for elimination. But the work of the judiciary is to "construe, not construct, to decode, not to make a code."[53] The death penalty being still present in the statute books, the judiciary as much as it wants to, cannot declare it unconstitutional. The judges has been therefore trying to thin the submission of the death penalty in India, with the intent of checking its use and making it more difficult to apply. The Bariyar case is another step towards that direction.

The Court took awareness of the universal trends and development in international customary law noting that most nations are support away from capital punishment.

[53] Maru Ram v. Union of India, AIR 1980 SC 2147

Further, it appears that the court is indicating that it is time that India does away with this pernicious and dehumanizing practice of sending the convicts to the scaffolds. However, the judgment is discreetly written and Sinha J., refrains from commenting on the existence of death penalty as a punishment and limits himself to censuring the varied explanations of the court. The court further says that the dilemma arising between the Constitution barring unnecessary punishments on one hand and allowing the presence of the capital punishment on the other hand is tough to resolve. There can be no denying of the fact that the Bariyar judgment does restrict extremely the scope of applying the death penalty in India. As has been said above, it is not only exceptionally difficult, but almost unbearable for the trial to prove that the convict is beyond renovation. But could the court have done more? As an addendum, it could have done more. For one, if the court is so serious about the death penalty, could it not have mentioned it to a higher bench to consider the constitutionality of the death penalty? Though the Court has upheld the constitutionality of the death penalty through various decisions, the debate must continue and cannot be excluded repeatedly on the intangible doctrine of stare decisis. This is because the very nature of the problem is such that the encounter to the constitutionality of the death penalty is not a onetime exercise, but should be revised and measured at regular intervals, so as to attune it with the growing standards of civility in a budding society. Revising the constitutionality of the death penalty assumes more standing in light of the likelihood of grave human error in responding to the question of life versus death and also due to the changes in current criminological thought and movement, more particularly about the properties of capital punishment in national as well as international diasporas. But the Court directs clear of any such path and recognizes the dark reality that capital sentence still exists in India. Instead of mentioning the matter of constitutionality of the death sentence to a larger bench, it simply takes a indirect way to put an end to the penalty of death by founding a very high standard of proof for its infliction, which basically, the prosecution may never be able to establish.

Initially it appears that this judgment does impose a suspension on death penalty, circuitously. This is because it is extremely difficult to prove that the convict is beyond improvement. Therefore, the second principle to honor the death penalty, i.e. the fact that the substitute option of life imprisonment is insufficient, remains unconvinced. Hence the death penalty in most cases cannot be enforced. There have been reporters who have opined that, "…by laying down the requirement of such a high standard of proof, the judgment places a virtual moratorium on the

death penalty." But a closer look at the judgment advises that the death penalty is here to stay and may not be entrenched out of the criminal justice system anytime soon.

This decision does not lay down anything which will prevent a judge from striking the death penalty. The question as to what constitutes improvement is personal and will be advanced differently by different judges. Each judge has his own scale of values and social viewpoint and hence some judges are willingly and frequently inclined to award the death penalty, while some others are unwilling and the rest hesitate from case to case.[54] So there is a likelihood that a particular judge might consider the proof of the suit sufficient and award the death penalty. Even if the specialists are capable of evaluating precisely the possibility of restoration, it does not guarantee the spreading out of unpredictability in sentencing, because in the past there have been cases where the court has overlooked expert opinion and given decisions based on its impulses and fancies.[55] This is because it once again boils down to the personal preference of the judges who are in the bench. This might again lead to the 'judge-centric sentencing' approach, which this Court so passionately denounces.

A CRITICAL ANALYSIS AND CONCLUTION

Demand for retribution is not new. Death penalty is the ultimate assertion for heinous crimes. This explains the popular demand of death for rape in the wake of high incidences of rapes in the country, as in case of kidnapping for ransom (Section 364A) providing for death penalty in 1993.[56]

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[54] ARUNJEEV SINGH WALIA & VINAY NAIDOO, CAN SOCIETY ESCAPE THE NOOSE?-THE DEATH PENALTY IN INDIA, 141 (2005).

[55] Dr. Nikhil D. Dattar, Gynecologist, Mr. X (Identification withheld for preserving confidentiality) and Mrs. Y
(Identification withheld for preserving confidentiality) being wife of Mr. X v. Union of India through its Additional Solicitor General (Western Region) and State of Maharashtra through its Govt. Pleader and Advocate General, (2008) 110 BOM. L.R. 3293. [62] (2009) 6 SCC 498

[56] Ins. In I.P.C (W.e.f. 22-5-1993) by criminal Law (Amendment) Act, 1993, sec. 364A, I.P.C was ins. By Act 42 of 1993, sec. 2(w.e.f 22-5-1993).

It's not so distant past, when the Rajasthan High Court in 1986 keeping in view the gravity and heinous nature of dowry offences had ordered for public hanging of Lachma Devi,[57] a mother in law, who was found guilty of causing a dowry death. However, the death sentence was commuted to life imprisonment by the Supreme Court. Surprisingly, a recent study by the Law Commission of India[58] showed that 51% respondent opted for public hanging as against 49% for hanging in jail; and in Times of India SMS survey 67% respondents suggested for public hanging. Two passages from the earlier decisions of the Supreme, often quoted by later benches; also reflect this popular trend of thinking in the direction in Dhananjay Chatterjee v. Union of India,[59] wherein the court said:

"The measure of punishment in given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the court responds to the society's cry for justice against the criminals." The 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 criminal, but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

Similarly, in Mahesh v. State Of Madhya Pradesh,[60] which was a case of multiple murders committed in brutal manner, the apex court said:

It will be a mockery of justice if appellants are permitted to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give a lesser punishment for the appellants would be rendering the justice system of this country suspect. The common man will lose faith in the courts. In such cases he understands and appreciates the language of deterrence more than the reformative jargon.

The execution of Dhananjay Chatterjee on 14th August, 2004 for rape and murder of a teenage girl after a de facto moratorium on executions since 1990 has once again stated a debate among

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[57] Attorney general of India v. Lachma Devi, AIR 1986 SC 467, the Supreme Court stated"….A barbaric crimes does not have to be visited with a barbaric penalty with such a public hanging"

[58] Repost of Law Commission of India, 3 rd October, 2003, p. 187.

[59] (1998) 4 SCC 456 (462) The accused a liftman in an apartment raped and murdered a 14 year old girl Hetal Parekh. According to the post mortem report, her nose was broken and her windpipe crushed before being raped.

[60] (1987) 3 SCC 80 (82) Followed in Mahendra Nath Das v. State of Assam, 1999 SCALE 700

scholars, jurists, judges and has aroused the public attention as to whether death sentence should be abolished since it does not serve any purpose in view of the world wide trends towerds abolition.[61] The opinion is divided on his complex question of life and death. The pragmatic reasons put forward against capital punishment are:

1. Capital punishment reinforces the idea of retributive justice a mediaeval concept that must have no place in the civilized society. It is argued that a person who has committed a heinous crime, such as murder must be likewise deprived of life.
2. Capital punishment has no deterrent value; its use has not been shown to bring about a significant decrease in crime. It is perhaps that certainty of punishment that has the effect of deterring crime, not the quantum of punishment.
3. Capital Punishment is irrevocable, once carried out it cannot be undone. This is crucial in view of recent developments, such as the use of DNA testing in some cases have proved previously convicted persons being innocent.
4. There is a possibility that the retention of death punishment may be possibly lead to a failure of justice in some cases and to be acquittal of guilty persons.
5. Thousands of murders are committed each year and to check murders, national interest demands that the guilty persons should not escape justice. The best deterrent sentence would be one of life imprisonments,[62] and that should mean imprisonment practically for the whole life, and not just for 14 or 20 years as at present.[63]

Those in favour of death penalty put forward the following contentions in their support:

i. Death Penalty is the ultimate assertion of society's highest form of disgust for humanity's worst crime. Death Penalty, after a civilized, legally scrutinized and successively tested judicial proceeding, is intrinsic and instinctive to society's right to exist.

ii. The enormous limitations and safeguards surrounding it provide the best of the both worlds namely, for its retention in extreme situations when the judge feels that he has no option but to award death sentence in a particular case, otherwise he awards life imprisonment as a rule.

[61] The Death Penalty World Wide Development in 2004 Amnesty International
[62] State of Madhya Pradesh v. Ratan Singh, AIR 1976 SC 1552
[63] K.N.Katju Life Imprisonment should replace death penalty, Northern India Patrika, 10 February, 1963

iii. The Apex Court had reduced imposition of death penalty to the "Rarest of the rare" cases of exceptional nature. Guidelines have confined and limited it to the exclusive domain of the truly despicable and shockingly heinous crimes.

iv. The process of ascertaining guilt and awarding sentence are separated by distinct hearings, under section 235(2) of the Cr.P.C, 1973, that confer sufficient safeguards against the possible error of judgement in awarding sentence.

v. Murder cases in general to go to the apex court for final verdict in one way or another. That ensures sufficient safeguards against possible injustice, and error of judgement.[64]

vi. Mandatory death sentences having been struck down by the Apex Court (section 303, IPC);[65] the possibility of the innocent person being sent to gallows has been reduced to zero.

Taking into account the potent arguments by protagonists of an "eye for an eye" philosophy who demand "death for death" and the humanist, who on the other hand press for the other extreme, namely "death in no case", perhaps a middle approach may be adopted on experimental basis, which can be summarized as below.

The current state of affairs requires a thorough review of the entire provisions of both substantive and procedural law on capital punishment. To begin with, death sentence may be suspended on an experimental basis for a period of five years as in case of and comparing the data of murders committed before and after the suspension of death sentence, a final decision as to its abolition or retention be taken after a national debate, both inside and outside of the parliament on this important question of life and death. This will set at rest the controversial issue to the satisfaction of all.

[64] Abhishek Singhvi should Death Penalty be Abolished, Times of India, 27th June, 2004, p.11
[65] Mithu Singh v. State Of Punjab, AIR 1983 SC 473