

HOW THE CAPITAL PUNISHMENT CURBING RIGHT TO LIFE? Pooja*

I. Introduction

The issue of death sentence has become complex due to the emergence of the concept of human rights and dignity¹ on a national² as well as international level.³ The hanging of Dhananjay Chatterjee⁴ in India and Saddam Hussain in Iraq⁵ has once again revived the controversy about the necessity or otherwise the retention of capital punishment on the statute book. In spite of the fact that international community favours abolition of this extreme penalty which is evident from various international documents and the regional documents, yet capital punishment is still in use in many countries. Death sentence invariably constitutes "cruel, inhuman and degrading punishment",⁶ regardless of its practice, whether in India or in other countries. This punishment has been severely criticized due to the inhuman nature of the punishment. In fact, the two issues i.e., the guilt and the punishment are not synonymous but are two distinct and separate issues and must not be confused with each other.

The abolition of capital punishment assumed so much of the importance in these days because it affects the most valuable fundamental rights of a human being, namely, "right to life". This right is the basic of all other human rights. In other words, it can be said that these other rights are nothing but for the better enjoyment of one's right to life. This is the reason almost all the constitutions of the nations provide the right to their people⁷ but at the same time they retain capital punishment in their statute with the sole reason that it can solve their urgent social or political problems by executing their prisoners.

India has ratified International Convention on Civil and Political Rights, in 1979, thereby committing itself to further restrict on the use of death penalty. Instead of curtailing its scope, the government of India has decided to extend its scope to non-

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¹ The Right to life includes the "right to die with human dignity" and capital sentence nullifies this purpose. See Article 1 of protocol to the American Convention on Human Rights.

² Recently a National Seminar on "Death Penalty in India" was organised on 12th March 2005, in Mumbai. Majority of the speakers spoke in favour of abolition of Death Penalty.

³ Article 4 of protocol to the American Convention on Human Rights, Article 1 of Protocol No.6 to the American Convention on Human Rights; Second optional protocol to the International Covenant on Civil and Political Rights, 1989; E.U. Policy towards the "third world" countries on Death Penalty, 1998; U.N. Resolution 287 (XXVI) passed in December 1971; U.N. Assembly Resolution 32/61 of 8th December 1977; Recommendation 1246 (1994), adopted on 4th October 1994 by Parliamentary Council of Europe. For more information visit <http://web.amnesty.org/library/Index/ENGACT500101998> accessed on 2nd November 2006.

⁴ In *Dhananjay Chatterjee Vs. state of West Bengal* (1994) SCC220 he was executed after 14 years in 2004 for the rape and murder of a school going girl Hetal Parekh.

⁵ Saddam Hussain was sentenced to death and subsequently hanged for ordering the death of 148 Shias in 1982. He was hanged secretly in spite of strong opposition by the international community, including EU and UN. His execution has once again highlighted the weakness of international community in enforcing international humanitarian law, which prohibits death penalty in all circumstances.

⁶ See, Article 1 of Universal Declaration of Human Rights, 1948, In *Furman Vs. Georgia*, 408 US 238 (1973), "regardless of the nature of the offence or the procedure followed in imposing sentence, the death sentence is a cruel punishment". Similarly in *State Vs. T. Makwanyane and Mohnunu*, 16 HRLJ, 133 (1995), "it is a cruel Punishment."

⁷ See, Article 3 of Universal Declaration of Human Rights, 1948; Article 6 of International Covenant on Civil and Political Rights 1979; Article 4 of American Convention on Human Rights, 1978; Article 6 and 7 of Rome Statute of the International Criminal Court, 1998; International Convention on the Elimination of all forms of Racial Discrimination 1965; Article 4 of African Charter of Human Rights and People's Right, 1981; Article 2 of European Convention on Human Rights, 1949; Article 5 of Arab Charter on Human Rights, 1994.

violent crimes like economic crime, drug related crimes, rape etc. Without having the comprehensive information regarding the death sentence,⁸ the vast majority of Indian population supports retention of death penalty.⁹

II. Constitutional validity of Capital Punishment in India

In India, criminal trial is based on accusatorial system, and accordingly, the accused is presumed to be innocent unless his guilt is proved beyond reasonable doubt.¹⁰ The burden of proving guilt lies on the prosecution and not on the accused. To quote Supreme Court judgment on the *Presumption of Innocence*:

It is true that wrongful acquittal are undesirable and shake the confidence of the people in the Judicial system, much worse however is the wrongful conviction of an innocent person, the consequences cannot but be felt in a civilized society.¹¹

Starting from the investigation, during the trial and even after conviction of an accused, there are elaborate safeguards, which ensures the fulfillment of above principle.¹² Moreover, in criminal trial the degree of probability of guilt is very higher than civil law. If there is any slightest doubt on the guilt of an accused, the benefit of it has to be given to the accused, which might result in his acquittal. As observed by the Supreme Court, if the case is wholly based on circumstantial evidence, then all the circumstances brought out by the prosecution must be inevitable and exclusive, and should point to the guilt of the accused and there should be no circumstances which may reasonably be considered consistent with.¹³

⁸ <http://web.amnesty.org/report/2006/ind> summary accessed on 4th January 2007.

⁹ Recently an acquittal was converted into death sentence because of large public and media support. See *Priyadarshani Mattoo vs State*, (2006)

¹⁰ *K.M. Nanavati Vs State of Maharashtra*, AIR 1962 SC 605; *Kali Ram Vs. State of Himachal Pradesh*, 1973) 2 SC 808. See Article 14 (2) of International Convention on civil and Political Rights, 1979.

¹¹ *Dharam Das Vs. State of Uttar Pradesh*, (1974) 4SC 267.

¹² *Following safeguards are provided under the Indian Evidence Act, 1872* - Under section 54 previous bad character on an accused is not relevant in criminal trial except in reply; Under Section 24 confession caused by inducement, threat or promise is irrelevant; Under Section 25 confession to police officer is irrelevant; Under Section 26 confession caused while in police custody is irrelevant; Under Section 59 and 60 hearsay evidence is no evidence; Under Section 104 and 105 burden of proof always lies on the prosecution; Under Proviso to section 162 the statement given to police officer under section 161 of the code of criminal procedure, 1973 can only be used to contradict the witness and cannot be used for corroboration; Under Section 137, 145 and 146 the provision for cross-examining the witness produced by the opposite party; under section 165 judge is given ample power to ensure that fair trial take place and he can ask any question at any time.

Following Safeguards are provided under the constitution of India, 1950- Immunity from double prosecution under Article 20; Right to life Under Article 21, Right Against Preventive Detention under Article 22, Rights to Seek Pardon in case of death sentence under Article 72; Right to commute etc., death sentence under Article 161; Right to prefer appeal to Supreme Court if acquittal is reversed into death sentence by the High Court under Article 134 (a).

Following Safeguards are provided under the Indian Penal Code, 1860: General exceptions are provided under Chapter-IV from Section 76 to 106; only the gravest form of culpable homicide is defined as murder under Section 299 and 300; Five exceptions are provided under proviso to Section 300, viz, grave and sudden provocation, exceeding private defence, murder with consent, murder in a sudden fight in a heat of passion, murder by public servant exceeding the power given to him by law. Following safeguards are provided under the code of criminal procedure, 1973 examination of an accused to enable him personally to explain the circumstances appearing in the evidence against him under section 313; a sentence of death shall not be executed unless it is confirmed by the high court under section 366; If such confirmation proceedings are submitted the high court may examine itself or direct further inquiry or the taking of additional evidence Under section 367; High court may confirm, annul the conviction or acquit the accused or pass any other sentence under section 368; An accused can file appeal against his conviction under section 374 and 379.

¹³ Dr. Avtar Singh "Principles of the Law of Evidence", (13th ed) 2002, p.21; Batuk Lal, "The Law of Evidence" (15th ed.) 2001 p.12.

Moreover, in India the capital punishment is constitutionally¹⁴ as well as legally valid¹⁵ because it is applied in accordance with the procedure established by law¹⁶. Accordingly, the State can take action against a person by convicting him/her, but there is a procedure for conviction of a person and that procedure has to be established by law itself.¹⁷ The discretion to inflict this extreme punishment depends upon the facts and circumstances surrounding the commission of each particular offence. The facts and circumstances of one case need not necessarily be similar or same as another case. So, it is not possible to lay down an exhaustive list of the cases in which death sentence can be awarded. However, this discretion has to be applied rationally and judicially i.e., only when the circumstances call for a deterrent punishment and not otherwise.¹⁸ To quote Supreme Court, it was observed that:

A Balance Sheet of aggravating and mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before the option to award the death sentence is exercised.¹⁹

The Apex Court articulated more limitations on the frequent use of death sentence by laying down the doctrine of "rarest of rare" cases. Accordingly, this extreme punishment can be awarded rarely, only when the culpability assumes the proportion of extreme depravity. This landmark decision has made "life imprisonment as a rule and death sentence is an exception."²⁰ Moreover, death sentence is not the only punishment²¹ for murder, but an alternative one, so it is not unreasonable under Article 14 of the Constitution of India.²² Infact, international instrument is abolished death penalty under the optional protocol II of the ICCPR, as well the Courts in India are not awarding death sentence in all circumstances but the principle *rarest of rare cases* is strictly followed and by this way complying the international law.²³ In this context, it is

¹⁴ *Jagmohan Singh Vs. State of Uttar Pradesh*, AIR 1973 SC 947; *Gregg Vs. Gerogia*, 428 US 195 (1976).

¹⁵ *Shanker Vs State of Tamil Naidu*, 1994, Cr LJ.925

¹⁶ According to Article 21 of the Constitution (Protection of Life and Personal Liberty) reads, as "No person shall be deprived of his right and personal liberty except according to procedure established by law."

¹⁷ In *Menaka Gandhi Vs. Union of India*, (197) 2 SCR 621. The Supreme Court held that the phrase "Procedure established by law" meant that every law limiting personal liberty had to be "fair, just and reasonable" in both its procedural and substantive provisions".

¹⁸ *Eidga Anmma Vs State of Andhra Pradesh*, AIR 1974 SC 797; *Amba Ram Vs State of Madhya Pradesh*, AIR 1976 SC 2196; *Balwant Singh Vs State of Punjab*, AIR 1976 SC 230.

¹⁹ In *Macchi Singh Vs State of Punjab*, (1983) 3 SCC 470, The Supreme Court held that before awarding death sentence, the court should look into the manner of the commission of crime, motive, Anti social or socially abhorrent nature of the crime, magnitude of the crime. Further, the death sentence could be impose only if it is compelled by the state security, public order and interest of the general public.

²⁰ *Bacchan Singh Vs State of Punjab*, AIR 1980 SC Para 199; *Jumman Khan Vs. State of Tamil Naidu*, AIR 1989 SC 396; *Kishor Vs. State of Delhi*, 2000 Cr.L.J 756 (SC) Para 13, 14; *Om Prakash Vs. State of Haryana*, (1999) 3 SCC 19.

²¹ Under section 367(5) of the old code of criminal procedure, 1898, a person convicted for murder was to be sentenced to death as a normal rule and if a lesser punishment was intended to be imposed, special reason were to be recorded in writing. Accordingly, death sentence was the rule and life sentence was an exception. This section was amended. According to new section 354 (3) of the Criminal Procedure Code, 1973, if the judge awards death sentence he has to give special reasons, which means special facts and circumstances justifying the imposition of this extreme penalty. Now death sentence is an exception and life imprisonment as a rule.

²² According to Article 14 of the Constitution of India, 1950, "the state shall not deny to any person equality before the law or the equal protection of law within the territory of India."

²³ In *Bacchan Singh Vs State of Punjab*, AIR 1980 SC 898, the apex court held that International law does not prohibit or abolish death penalty totally but made an option available to the member states to go for abolition in their countries. Further, Article 21 of the constitution of India and Article 6, clause (1) and (2) of the international convention on civil and political rights, 1979 are same. In fact, judiciary in India, is fulfilling its international obligations as this extreme penalty is not applied in every case, but rarely i.e. it is not arbitrarily

worth to mention that the 35th report of the Law Commission of India, which is the basis of retention of capital punishment on the statute book. It reads as:

Having regard to the condition in India, to the variety of social upbringing of its inhabitants, to the disparity in the level of morality and education, emergence of terrorism on a large scale in the country and the paramount need for maintaining of law and order in the country, India cannot risk the abolition of capital punishment.²⁴

III. Critical analysis of Indian Law in the verge of International Instrument

The careful analysis of the Indian law is revealing, how India is flouting its international obligations, that capital punishment is awarded not only in the *rarest of rare cases* but also on a wide variety of the cases.²⁵ Infact, the doctrine of *rarest of rare case* is superfluous as it is vague and incomplete. The Apex Court held that death penalty is awarded in the *rarest of rare* cases only but it is not further defined. The judiciary has evolved its own jurisprudence in evaluating which cases are to be considered as "*rare*" and which are not on an inconvincible reasoning. A close analysis of various decisions in which capital punishment was upheld on the basis of above doctrine would reveal that no uniform guidelines exist for its application. Its application is largely dependent on the subjective satisfaction of an individual judge. The quantum of punishment varies according to the nature of a judge. In other words, subjective satisfaction of a Judge plays an active role in awarding "death" or "life".

A significant number of legislative acts provides death sentence as an option. Moreover, the above-mentioned doctrine only covers those offences, which are

inflicted and it is imposed only for the serious crimes as required by international law; See also, Four Geneva conventions, 1949, provides death penalty but with restrictions; second optional protocol to the international convention on civil and political rights (adopted by general assembly in 1989) Article 1 provides total abolition but Article 2 allows state party to retain it if they make reservation to that effect at the time of rectifying or acceding it, Protocol 6 to the European convention for the protection of Human rights and fundamental freedom (adopted by council of Europe in 1982) Article provides for abolition of death penalty in peace time but Article provides that the state party may retain it for crime in a war or threat of war; protocol to the American Convention of Human rights (adopted by General assembly of the organisation of American States in 1990) Provides abolition of death penalty but allows state party to retain it if they make reservation to that effect at the time of rectifying or acceding it; Post-World War-II, the statute of Nuremberg and Tokyo Tribunals provided mandatory death penalty; Article 5 of European convention of Human Rights (1949) provides death penalty in a time of war. Article 4 of American Convention on Human Rights(1978);Article 6(2)of International Covenant of Civil and Political Rights(1978).

²⁴ 35th Report of the Law Commission of India (1967); Shashi Nayar Vs. Union of India, AIR 1992 SC 395.

²⁵ Under the Indian Penal Code, 1860, the following offences are punishable with death; under section 149 for abetting any death eligible offence; under section 121 waging war against the government of India; under Section 132 abetting mutiny actually committed; Under Section 194 Giving or fabrication false evidence upon which an innocent person suffers death; under section 302 for murder, Under section 303 for murder by a life convict (now abolished); under Section 305 for Abetment of suicide of a minor or insane or intoxicated person, under section 307 for attempt to murder by a person under sentence of imprisonment of life, if hurt is caused. Section 34 of the Army Act, 1950, shamefully abandoning a post; under section 37 for mutiny, under section 38 for desertion; under section 66 for abetment of offences punishable with death which have been committed. The Air force Act, 1950, under Section 35 for shamefully abandoning a post; 37 for mutiny; 38 for derision; 68 for abetment of offences punishable with death.

Under the Navy Act, 1956, under Section 35 for failing to prepare for action against the enemy, Section 36 for discouraging action; Section 37 for desertion a post or sleeping on watch; section 38 for spying for enemy; section 39 for assisting enemy; section 43 for mutiny; section 44, seducing Naval personnel from allegiance; section 49 for desertion to the enemy; section 56 for failing to defends ships etc; section 59 for arson; section 76 abetment of offences punishable with death; similarly death sentence is also provided under the arms act 1959; under schedule castes and schedule tribes (Prevention of Atrocities Act); under prevention of terrorism Act, 2002 (now abolished).

punishable under Indian penal code. Therefore, it is inapplicable on those offences, which are covered under the other acts. In India, special courts also award death penalty summarily. In such cases even the basic provisions of criminal law has been diluted, for example, presumption of innocence, confession, burden of proof etc.²⁶ In fact, the government of India is trying to widening its scope to less serious offences²⁷ which does not even come within the frame work of rarest cases and is against international humanitarian law as well.²⁸ In many acts capital punishment is mandatory.²⁹ The mandatory nature of the capital punishment offence is the cannon of criminal jurisprudence as well as the principle of natural justice, *Audi Alteram Partem*. It totally excludes judicial discretion, as the court has no other option to impose any other sentence. Once it is proved that the accused has committed the crime, the court is bound to award death sentence only and nothing more or nothing less than that. Moreover, in many cases, the court has applied this extreme punishment for punishing political murders.³⁰ Conviction of an accused can be solely based on an uncorroborated testimony of an accomplice who himself is a participant in crime.³¹ The court can award death sentence purely on circumstantial evidence³² or even on plead guilty of an accused.³³

Though legislation on a specific field is a matter of law and not of prudence, but it has proved otherwise. It is one of the essential functions of the legislature that decide the category of cases in which the capital punishment could be imposed. But instead of deciding this crucial issue the legislature has left this task on the sweet will of the judiciary. Therefore, the court has a very wide discretion in the matter of fixing the quantum of punishment. Moreover, the legislature has not provided any guidelines within which this extreme discretion could be applied. As it was rightly observed by Justice P.N. Bhagwati, that though the trial system in India is based on the principle of legal equality before the court, yet it has proved otherwise particularly under the existing conditions in India. A significant number of accused are illiterate and poor. They do not afford to engage affluent lawyers for their defence. Moreover, they do not have the

²⁶ International community on various occasions urged to follow strictly "procedural safeguards" for these serving death sentences. See, Article 8 of the American Convention of Human Rights; Article 7 of African Charter on Human and People's Rights; Article 14 of I.C.C.P.R. 1979; The United Nation Economic and Social Council (ECOSOC) adopted safeguards guarantying protection of the rights of those facing the death penalty, 1984; General Assembly Resolution 2393 (XXII) of 26 Nov. 1968; Resolution 1989/64, adopted on 24th May 1989 and Resolution 1996/ 15 adopted on 23 July, 1996 by the UNECOSOC.

²⁷ <http://web.amnesty.org/report/2006/ind-summary.eng>, accessed on 10.11.2006.

²⁸ Various international and regional instruments say that "Death sentence shall be applied only for more serious crime and it shall not be extended to those crimes to which it does not presently apply." See, Article 4(2) of American convention on Human Rights; Article 2 of Second Optional Protocol to the ICCPR, 1989; Article 2 of protocol to the American Convention on Human Rights; Article 2 of protocol to the convention of the protection of human rights and fundamental freedom; under Article 10 of Arab Charter on Human rights, 1994.

²⁹ Under the *Arms Act 1959*, who ever uses any prohibited arms which resulted in death of any person; Under the *Schedule Casts and Schedule Tribes (Prevention of Atrocities Act) 1989*, whoever fabricates false evidence which resulted in conviction of an innocent member of a schedule caste etc.; Section 31A of the *Narcotic Drugs and Psychotropic Substance Act 1985* (now abolished), If a person who has been convicted in an offence relating to narcotic drugs and he subsequently do or attempt to the offence again. Under the commission of *Sati (prevention) Act, 1987*, if any person either directly or indirectly abets the commission of sati shall be punished with death. Similarly death sentence is also mandatory in the *Prevention of Terrorism Act (2002)* (now abolished) for causing death by using bombs etc

³⁰ *Kehar Singh Vs Delhi Administration*, AIR 1988 SC 1183, *State Vs. Nalini*, 1995 (5) SC 60; It is said that "Death penalty shall not to be applied for political offences or economic crimes". See Article 4(4) of American Convention on Human Rights; Article 11 of Arab charter on Human Rights, 1994; un special rapporteur on extra judicial summary or arbitrary execution, UN document no.e/cn.4/1997/60, 24 December 1996.

³¹ See, Section 114 of Indian Evidence Act, 1872.

³² *Dhananjay Chatterjee Vs State of West Bengal* (1994) 2 SCC 220; *Kehar Singh Vs Delhi Administration*, AIR 1988 SC 1183, *State Vs. Nalini*, 1995 (5) SC 60.

³³ See, section 229, 241 and 252 of the Code of Criminal Procedure, 1973.

knowledge of law and professional skills to defend themselves before the court, while an experienced prosecutor conducts the prosecution. Though, the accused has right to free legal aid at the state expenses,³⁴ yet this right is of no value if competent lawyers are not selected to defend him.³⁵

Justice P.N. Bhagwati also said that in fact, the trial system in India violates the concept of equality. According to the concept of equality, every body equal before law and has equal protection of law. The guarantee of equal protection applies against the substantive as well as procedural law. It includes absence of arbitrary discrimination in the administration of law, equal treatment in similar circumstances both in privileges conferred and liabilities imposed by law. In short, all litigants who are similarly situated can avail themselves of the same procedural rights.³⁶ But the application of death penalty nullifies this concept. Two persons who are found guilty of murder may be treated differently, one of them may get death and the other may get only life sentence or pardon or acquittal. So, unguided discretion to award either of two punishments violated legal equality.

There is no uniformity in the decision of Supreme Court.³⁷ In some cases even the delay of more than two years in the execution of death sentence was considered so grave that it resulted in commutation of death sentence into life imprisonment. But in many other cases the apex court was not obliged to commute death sentence into life even though there was delay of more than fourteen years in execution of death sentence.³⁸ The Supreme Court itself said that "between the funeral fire and mental worry, it is the latter which is the most divesting, for funeral fire burns only the dead body while mental worry burns the living one." There fore, it can be submitted that too much delay and uncertainty in applying criminal law would render even the best penal law as useless. Further, though speedy trial in criminal cases is not a fundamental right of an accused but it is one of the important attribute of a criminal jurisprudence. As quick sentencing and conclusion of trial within a limited period is one of the first requirements of criminal justice. So, every effort should be made to avoid delay in not only during investigation or trial but also in the disposal of mercy petition before the president.

In India, the only authority that can give pardon³⁹ to an accused in case of confirmation of death sentence by the Supreme Court is the President of India. He is the only person who has the exclusive authority to save the life of a convicted prisoner. The object of giving pardoning power to the President is that "...to correct judicial errors for no system of judicial administration can be free from imperfection. It is an attribute of

³⁴ Article 39A of the Constitution of India, Section 303 and 304 of the Code of Criminal Procedure, 1973; *Hussainara Khatoon Vs. State of Bihar*, (1980) ISCC98105, *Khatri II Vs State of Bihar* (181), SCC 627, The Legal Service Authority Act, 1986.

³⁵ Mostly free legal aid is provided to an indigent accused by inexperienced lawyers. Who are new entrants at bar as dealing with complex case would give them exposure before the court. These lawyers lack capability to deal with complex cases like murders. Moreover, the funds provided to them by the state government is very insufficient, viz Rs. 300 per hearing. Therefore, they do not pay head to the case. Moreover a mistake committed by them at the trial stage could be very rarely corrected at the appellate stage. In such a situation the life of an accused would be jeopardized.

³⁶ *State of West Bengal Vs. Anwar Ali*, 1952 SC P289.

³⁷ *S. Triveniben Vs. State of Gujrat*, 1989 CrLJ 870; *Javed Ahmed Vs State*, 1984 CrLJ 1909 (SC); *Madhu Mehta Vs. Union of India*, AIR 1989 SC 2299; *Khemchand Vs. State*, 1990 SCALE 1; *State of U.P. Vs. Samman Das*, 1972 CrLJ 487, *State of Maharashtra Vs Mangalya*, 1972 CrLJ 570 SC. *Vatheeswaran Vs State*, 1983 CrLJ 481 (SC) *Pratt Vs. Morgen Vs Attorney General of Jamaica* (1993) 4 ALL E.R. 769.

³⁸ *Dhananjay Chatterjee Vs. State of West Beganl* (1994) 2 SCC 220 at 239 (even delay of fourteen years in execution of death sentence was not condoned); See, *Manohar herum Shah Vs State*, 1973 CL 971 SC; *Sher Singh Vs. State*, 1973, CrLJ 803 SC

³⁹ Article 72 of the Constitution of India, 1950, provides pardoning power of President in case of death sentence; similarly governor has power to commute death sentence under Article 161 of the constitution.

sovereignty to release a convict from a sentence which is mistaken, harsh and disproportionate to the crime⁴⁰

Ironically, this sacrosanct purpose itself is of no avail to the accused. The fact is that the President has to act on the advice of the government in power.⁴¹ If he remits the mercy petition to the government for reconsideration and the government confirms the death penalty, the President has no power or other option but to confirm the sentence, as he is bound by the recommendation of government. Further, the decision of the President on the mercy petition is subjected to limited judicial review.⁴² It is submitted that the President should have an unfettered power of pardon in case of mercy petition he should be required to decide the petition within a limited time without any interference by the executive.

In a murder trial, it is a State who prosecutes against the accused on behalf of the society and at the same time it is the State which decides that whether mercy petition address to the President should be allowed or not. It is just mockery of justice and hence submitted that there should be proper demarcation of the power of executive. Executive should not interfere within the frame work of judiciary as separation of power is the "basic feature of the Constitution,⁴³ and which should be maintained strictly.

Moreover, we can say capital punishment is morally wrong. It is submitted that when the killing of a human being by another human being is a homicide and therefore punishable than the killing of a condemned prisoner through the instrumentality of State is also homicide which should be equally punishable. Judiciary cannot justify its in human act by mere saying that capital punishment is "according to the procedure establish by law" and it is awarded "to preserve the public confidence in the judicial system".

Further, application of this brutal punishment on deterrent theory is baseless. There had been no relation between the crime rate and the capital punishment. There is no convincing evidence to show that the crime rate has increased in those countries, which have abolished capital sentence. It is submitted that brutality or severity of punishment hardly deters. It is the surety, effectiveness and uniformity of punishment, which deters. Death penalty is not effective deterrent.⁴⁴ Moreover, it is not applied uniformly. Further, being an irreversible punishment there is every chance of mistake in its application. Death sentence leaves no scope for correction if there is even a slightest mistake in the identity of the accused. Moreover, no body would realize the brutality as his behaviour once he is gone from the world.

Death sentence has been criticized on humanitarian ground as well.⁴⁵ Accordingly, no body is born criminal. It is the circumstances, which may turn a human

⁴⁰ Durga Das Basu, Introduction to the Constitution of India (18th ed., 1997), p.180.

⁴¹ Article 74 (1) of the Constitution (after 44th amendment, 1978) provides "There shall be a council of minister at the head to aid and advice the president who shall in exercise of his function, act in accordance with such advice. Provided that the president may require the council of minister to consider such advice, either generally or otherwise, and the president shall act in accordance with such advice tendered after such reconsideration."

⁴² *S.R. Bommai Vs. Union of India* (1994) 3 SCC1. Para 73 held that court can interfere only when the President's decision is totally irrational, arbitrary, malafide or discriminatory." See, for Pardoning rights of an accused under Article 6(4) of ICCPR; Article 10 of Arab Charter on Human Rights, 1994; Safeguard 7 of the Safeguards guaranteeing protection of the Rights of those facing death penalty adopted by UN (ECOSOC) 1984; Resolution 1989/ 64, adopted on 24th May 1989 by UN, ECOSOC.

⁴³ *Keshavanand Bharti Vs. State of Kerala*, A.1973 SC 1461.

⁴⁴ Roger Hood "The Death Penalty" A worldwide perspective (Oxford, third edition, 2002), p.230.

⁴⁵ In *Deena Vs. State*, 1983 CrLJ 1602 (SC) and In *Shashi Nayar Vs. Union of India*, AIR 1992 SC 395. The apex court held that the provision "To be hanged till death" Under Section 354(5) of the code of criminal procedure, 1973, is not "cruel, in human or degrading method". Whereas Article 5 of Universal Declaration of

being into a deadened criminal. In fact, a human being does not cease to be a human being even if he has committed a monstrous act, which has shocked the consciousness of society. Crime should be treated as "Mental disorder, which can be cured not only by brutal punishment but by sympathetic treatment on the humanitarian ground". Therefore, reformation and rehabilitation should be the core purpose of the punishment. Death penalty nullifies such purpose of reformation and rehabilitation.

IV. Conclusion and Suggestion

In conclusion we can quote Justice Bhagwati on reformatory aspect of punishment. He said, "Civilization has progressed too far to tolerate the primitive law of a tooth for a tooth and eye for an eye. Today the accent in penology is more on the reformation rather than retribution or deterrence. To be condemned prisoner death means liberation from life long sufferings. The capital sentence in reality punishes the dependant, kith and kin of a dead convict, for no fault of theirs. As we move towards twenty first century, this abominable sentence should be abolished by law for life is noble, continuing capital sentence is irrational.⁴⁶ The criminal trial in India is far from satisfactory regarding the death sentence and therefore, it needed a sharp revive on the basis of the above said critiques. The various developments in the international law prompted a new wave of constitutional jurisprudence in death penalty.⁴⁷ Infact, international laws do provide abolition of this extreme penalty totally and globally.⁴⁸ However, the punitive strategy of penal law in India does not reflect the modern tendency of reformatory treatment.⁴⁹ To quote Manu, the great law giver, on the object of punishment as under "Punishment governs and preserves life".⁵⁰ It is submitted that life of persons in the society can be very well preserved by sending the offenders to jail rather than taking their lives mercilessly.⁵¹ Further, no doubt the judiciary cannot question the wisdom of executive in retaining to the death penalty on the statute book, but it can certainly "restrict the number of offences on which death penalty may be imposed"⁵² or "establish a moratorium on execution"⁵³ with a sole object of deleting this extreme penalty from the statute book. Moreover, it is submitted that decision of international community should have binding force on the entire world.

Human Rights, 1948 and Article 7 of ICCPR, 1973, Provides, "No one shall be subjected to torture or to cruel, in human, degrading treatment" meant that execution shall be carried out in such a way to cause the least possible physical and mental sufferings; See *Soering Vs. U.K.* (1989) 11 EHRR 439.

⁴⁶ *Narotoem Singh Vs. State of Punjab*, AIR 1978 SC 1542.

⁴⁷ In an international conference on death penalty in Stockholm, Sweden, in 1977, just 16 countries had abolished death sentence, but today approximately 121 countries has abolished it in law or practice.

⁴⁸ Protocol 13 of the European Convention of Human Rights (adopted in 2002) is the first legal document which prescribe for the total abolition of death penalty in all circumstances including war; Article 77 of International Criminal Court, Article 24 of International Criminal Tribunal for Former Yugoslavia (1993), Article 24 of International Criminal Tribunal for Rwanda do not provide death penalty even for the most heinous crime, viz., Genocide; Article 6(6) of ICCPR, see general comments on article 6 of ICCPR adopted at its 378th meeting (16th session) on 22 July, 1982 by Human rights committee set up under ICCPR, 1978.

⁴⁹ As observed by Krishna Iyer J. while commenting upon the unhappy aspect of our penal system in *Shivaji vs. State of Maharashtra* (1973) CRLJ 1753(SC). Further there are 13 judges per million people, 3 Crores pending cases in the district and subordinate courts, 35.6 lakhs pending cases in high courts, Over 9000 in the Supreme court (Hindustan Times 2nd December 2006 page 10).

⁵⁰ Institute of Hindu Law (translated by Haughton, G C 1835), Chapter 7, para 18, p 189.

⁵¹ "Even the terrorists have the right to life as they are human beings" as rightly said by Jean Allian, class lectures on human rights law (part 1), 2006, Queen University Belfast, N.I.(UK).

⁵² See resolution 32/61 adopted on 8 December 1997 by General assembly; resolution 1044(1994) adopted on 4 October 1994 by parliamentary Assembly of Europe; UN High Commissioner for Human Rights, Press conference at the death penalty information center, 12 October 1999; See <http://www.hri.ca/forth record 2002/death chr.html>.

⁵³ See, resolution 1097(1996) adopted on 28 June 1996 by parliamentary of Europe; resolution 1998/8, adopted on 3 April; 1998 by UN Commission on Human Rights.

