MERCY, FAIRNESS AND DEATH PENALTY IN INDIA- A CRITICAL ANALYSIS

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LUCKNOW

CERTIFICATE

This is certified that **Ms. Shiwangi Gupta,** Student of LL.M. II Semester **ROLL NO. 1190997048**, **Babu Banarasi Das University, Lucknow** has written dissertation entitled **MERCY, FAIRNESS AND DEATH PENALTY IN INDIA- A CRITICAL ANALYSIS** under my supervision. This dissertation embodies the authentic and genuine work done by her.

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DECLARATION

I, **Shiwangi Gupta,** student of LL.M. (Criminal and Security Law), School of Legal Studies, **Babu Banarasi Das University**, declare that the work embodied in this LL.M. Dissertation is my own bonafide work, carried out by me, under the supervision of **Prof**. **Dr. Tarak Nath Prasad** (Head & Dean, School of Legal Studies, BBDU). The matter embodied in this dissertation has not been submitted previously for the award of any degree or diploma in any other University or Institute.

I declare that I have faithfully acknowledged, given credit, and referred to the authors wherever their works have been cited in the dissertation.

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LIST OF ABBREVIATIONS

AIR	=> All India Reporter
Cr.P.C.	=> Criminal Procedure Code
C.P.C.	=> Civil Procedure Code
COI	=> Constitute Of India
FIR	=> First Information Report
FBI	=> Federal Bureau of Investigation
GLR	=> Gujarat Law Reporter
ICOC	=> International Code of Conduct
IPC	=> Indian Penal Code
ILR	=> Indian Law Reports
JCC	=> Judicial Case Conference
NGO	=> Non-Governmental Organization
POTA	=> Prevention of Terrorism Act
PR	=> Public Relations
SCR	=> Supreme Court Reports
SCC	=> Supreme Court Cases
SC	=> Supreme Court
UNO	=> United Nations Organization
UPA	=> United Progressive Alliance
Vs.	=> Versus
VOL.	=> Volume

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INTRODUCTION

CHAPTER- I

INTRODUCTION

The global movement towards abolition of Death Penalty seems insufficient to influence the slanted justifications and stubborn attitude of Indian Courts and government authorities. The callous and uncooperative attitude of the government coupled with intermittent steps towards hiding real figures of executions, raise doubts about the sensitivity and seriousness of the government towards this immensely delicate issue.[1] For instance, while it is believed that the last execution prior to 2004 took place in 1997, even the name of the person executed in 1997 is not confirmed, as material released by the NCRB only provides state-wise numbers and no names or other indicators were therein.[2]

India remains balanced between the present trend of abolition and the practice of execution by following a moratorium on the execution. By 2012, India has more than 400 convicts on death row. However, the National Crime Records Bureau (NCRB) does not clarify whether these figures refer to sentences passed by a Trial Court or those already upheld by a High Court or the Supreme Court, or those, whose Mercy Petitions are pending or have been rejected.

The human rights of the individuals must be respected as sacrosanct and inalienable rights bestowed on every human being. As Krishna Iyer J. says "I am a human being and nothing pertaining to a human is alien to me". The misdeeds of a person, howsoever heinous or monstrous cannot devoid him of few basic entitlements. The State must not abhor and discriminately inflict arbitrary punishments on a 'wicked soul'. While speaking of his notion of true patriotism, Gandhi says:

"All humanity is one undivided and indivisible family, and each one of us is responsible for the misdeeds of all the others. I cannot detach myself from the wickedest soul ".

Further, speaking on the desirability of Death Penalty, he observes: "I do regard Death Sentence as contrary to ahinsa. Only he takes it who gives it. All punishment is repugnant to ahinsa. Under

[1] The United Nations Special Reporter on Extrajudicial, Summary or Arbitrary Executions noted India's reluctance and discrepancies in the figures of execution. See, UN Doc. E/CN.4/2006/53/Add.3.

[2] Lethal Lottery", a report prepared by Amnesty International, India and Peoples Union for Civil Liberties (PUCL), Tamil Nadu and Pondicherry in 2008.

a State governed according to the principles of ahinsa, therefore, a murderer would be sent to a penitentiary and there given a chance of reforming himself. All crime is a kind of disease and should be treated as such... "

Every society recognizes and adopts some measures to maintain the social order and thus takes steps to minimize deviation from standard social behaviour. Theories of punishment provide different perspectives to deal with a crime and thus the punishments prescribed by a legal system also reflects its approach towards the accused, the victim and other stakeholders in a crime. Different forms and types of punishment may be adopted by a legal system for different crimes depending on the nature and seriousness of the crime in question.

Talking about Indian scenario, Capital Punishment is granted for different crimes like murder, initiating war against government, acts of terrorism and many other offences as prescribed under various provisions. In India, Capital Punishment is officially permitted though it is to be used only in the "rarest of rare cases".[3]

The retention of Death Penalty as a form of punishment caused a sharp debate even in the constituent assembly and the house was divided on this issue. Particularly, many lawyer members of the assembly (which were many) registered their disagreement on retention because of their experience with the 'effectiveness' and reasonableness of our justice system. One of the members Prof. Shibbanlal Saxena, who had himself been on a death row for his role in the 1942 independence movement and was also a lawyer by profession, suggested that at least there "must be made a provision that those who are condemned to death shall have an inherent right of appeal to the Supreme Court." Responding to this suggestion, Dr. Ambedkar concluded the debate by highlighting his personal opinion:

"rather than have a provision for conferring appellate power upon the Supreme Court to whom appeals in cases of Death Sentence can he made, I would much rather support the abolition of the Death Sentence itself, That, I think, is the proper course to follow, so that it will end this controversy. After all, this country by and large believes in the principle of non-violence by and large believes in the principle of non-violence. It has been its ancient tradition, arid although people may not be following it in actual practice, they certainly adhere to the principle of non-violence as a moral mandate which they ought to observe as far as they possibly can and I think

[3] A rule as evolved in the Bachan Singh v. State of Punjab.

that having regard to this fact, the proper thing for this country to do is to abolish the Death Sentence a together.[4]

Thus, the issue of Death Penalty was temporarily compromised and was left to the wisdom of the successors of the assembly to decide. A sensitive issue like abolition of Death Penalty receives arguments, both- for and against it, and the intellectual positioning is devoid of unanimity.

Though, the most prominent grievance, which the abolitionists have from the Death Penalty, is expressed in terms of human rights violations, but the bigger concern is the alarming scope of arbitrariness which is involved while choosing between Death Penalty and life imprisonment as alternative punishment. The varying predilections, preoccupied notions and individual perceptions of the judges, leave the judicial system bereft of any objective sentencing policy in this regard. Even in the constituent assembly, several members raised concern about the arbitrariness, inherent in retaining the Death Sentence when left to the vagaries of subjective satisfaction of individual judge.

The legal systems envisaging for 'Death Penalty' as punishment, exhibit a sense of punitive justice guarded by deterrence and revenge. On the other hand, the principles of retribution and rehabilitation advocate following the dictum that "one should hate the sin and not the sinner".

Amnesty International, India and Peoples Union for Civil Liberties (PUCL), Tamil Nadu & Pondicherry undertook this important issue of Death Penalty in India and published its extensively researched and brilliantly presented report, "Lethal Lottery" in 2008. The title of the report is apt and justified as it concludes that the vagaries of judicial arbitrariness make the Death Penalty virtually a "lethal lottery".

In the early decades of established of the Supreme Court, Capital Punishment had been awarded in a wide arrays of situations. For serious offences like murder, Death Penalty was the rule and life imprisonment was exception. In the bulk of Supreme Court's judgments in this era, there is hardly any discussion on sentencing. The 1973 amendment to the Cr.P.C. introduced a paradigm shift in the sentencing policy and now 'special reasons' were to be recorded for awarding Capital Punishment.

This 180 degree shift in the direction of law was reflected in the landmark judgment of **Bachan Singh v. State of Punjah**[5] (hereinafter 'Bachan Singh'), where the Court held that Death Penalty

[4] Constituent assembly of India, Vol. 8, 3"* June, 1949, as referred to in Lethal Lottery.
[5] (1980) 2 SCC 684.

can be imposed only in "rarest of rare cases". The Court explained the 'aggravating' and 'mitigating' factors which must be considered while deciding on sentencing.

Unfortunately, many of the judgments seem to be result of misreading or ignoring the **Bachan Singh Case**. Cases of Death Penalty demonstrate the inconsistency with which the Supreme Court has dealt with the issue after Bachan Singh. While in one case, age could be a mitigating factor, sufficient to commute, in another it did not carry enough weight; while in one case, the gruesome nature of the crime could be sufficient for the Court to ignore mitigating factors, in another it was clearly not gruesome enough. Recently, every decision pushes the sentencing policy on a zigzag course and the ambiguity in the understanding of the rules and guidelines leaves the Court with no 'sentencing policy' to follow, in **Aloke Nath Dutta and Ors. vs. State of West Bengal**[6], the Court succinctly voiced this concern:

Death Penalty can be awarded only if in the opinion of the Court, the case answers the description of rarest of rare cases. What would constitute a rarest of rare cases must he determined in the fact situation obtaining in each case. We have also noticed hereinbefore that the different criteria have been adopted by different benches of this Court, although the offences are similar in nature. Because the case involved offences under the same provision, the same by itself may not be a ground to lay down any uniform criteria for awarding Death Penalty or a lesser penalty as several factors, therefore, are required to be taken into consideration.

Despite the Death Penalty, being a subject of intermittent topical interest in India, a heated debate is occasionally initiated around the time of particular high-profile cases. In the nine years from January 1, 2000, to December 31, 2009, the Supreme Court gave the Death Sentence in 30 cases. At least 14 of them were defended on legal aid, and many more had legal-aid lawyers at the earlier stages. Twelve of the 14 prisoner wrongly sentenced to death in the **Ravji Case**, including Ravji himself, who be, been executed, were represented on legal aid. Even earlier, most of the convicts executed in India, have been from lower class/caste of the society and these concerns

were raised even by **Krishna Iyer J.** in **Rajendra Prasad v. State of U. P.**[7] Thus, the wide discretionary powers of the judges have has mostly been used, advertently or inadvertently, against the accused who are at the lower rung of the socio-economic ladder of our Indian society.

[6] 2006(11) SCALE 440.
[7] (1979)3 SCR 646

Imposition of Capital Punishment in these cases is blatantly arbitrary and is result of unguided discretionary powers of the Court. **Justice Bhagwati** in his dissenting judgment in **Bachan Singh Case** said:

"The question may well he asked by the accused: Am I to live or die depending upon the way in which the Benches are constituted from time to time? Is that not clearly violative of the fundamental guarantees enshrined in Articles 14 and 21?"(Emphasis added).

In the beginning, offences against religion and morality attracted Capital Punishment. However, the primitive societies soon grew up into kingdoms and consequently Criminal Law also changed quickly. Whether it was West or East, offences against the King were considered as more serious. Thus, the political offences were also added to the religious and moral offences and Capital Punishment was prescribed for such offences also. With the advent of industrialization and advancement of civilization, Capital Punishment was prescribed for offences against the property and human body. Now, in the modem world, capital offences further covered drug-trafficking, hijacking the aeroplanes, bribery etc., Some Muslim countries like Saudi Arabia even want to add "artificial insemination" also to the list of capital offences.

Among the theories of punishment namely, retributive theory, deterrent theory, preventive theory and reformative theory, the first two theories support Capital Punishment without any reservations. The last theory namely reformative theory does not support Capital Punishment. Those who argue for the retention of Capital Punishment are called retentionists and those who advocate the abolition of Capital Punishment are called abolitionists.

Retentionists of Capital Punishment argue that Capital Punishment is necessary to maintain peace in the world since it acts as a deterrent to potential offenders. In the beginning, public opinion was also in favour of Capital Punishment in preference to life imprisonment. On the otherhand abolitionists argue that Capital Punishment failed as a deterrent and no major work of any researcher ever proved its efficacy.

Further they maintain that it is an inhuman punishment arbitrarily imposed on the poor, the minority, the uneducated and the downtrodden. The conflict of opinion between the abolitionists

and retentionists over Capital Punishment generated a debate throughout the world about the utility of Capital Punishment in the modem world, where great importance is attached to basic human freedoms. At the International level, every instrument dealing with human rights such as Universal Declaration of Human Rights, International Covenants on Civil and Political Rights etc., were very critical about the Capital Punishment and suggest an alternative punishment to Death Penalty. The divergent opinions on Capital Punishment prompted the researcher to undertake an indepth study on Capital Punishment.

Amnesty International surveyed in detail the use of the Death Penalty in 180 countries around the world. It shows that nearly half of the countries in the world have already abolished the Death Penalty or discontinued its use. Inspite of this ray of hope, the number of executions worldwide are not less in number.

In the year 1985 alone, 1,125 executions were carried out in 44 States. This was substantially less than the 1984 figure of 1,153. But, the statistics are not to be believed. The true number of executions may be probably much higher. This is apart from the lock-up deaths and the fake encounters by the police.

Every year the number of executions are increasing inspite of the human rights movement. This fundamental human right which is the basic right to other fundamental human rights such as freedom of speech, freedom of movement etc., is used capriciously, arbitrarily and disproportionately against the poor and minorities. It is the only irrevocable punishment which cannot be corrected in case of miscarriage of justice.

Over the past decade, an average of at least one country a year has abolished Death Penalty, affirming respect for human life and dignity. Yet, too many governments still believe that they can solve urgent social or political problems by executing a few hundred of their prisoners. Too many citizens in too many countries are still unaware that the Death Penalty offers not further protection but further brutalization.

As far as England is concerned, some 450 years before Christ, the early Britons used to drown their malefactors. In the tenth century Britain, mutilation also appeared on the scene. Canute's rule which lasted from 1016 to 1035 was blessed with peace and public security without any capital offences. But, his son Rufus reintroduced Capital Punishment. Henry I and Henry II who ascended the throne after him punished the offenders capitally for murder, treason and a few

property offences. On 6 July, 1189 Richard I ascended the throne. In 1241, "drawing, hanging and quartering" occurred for the first time in England.

By the end of fifteenth century, ecclesiastical Courts started punishing people spiritually. They could not inflict Death Penalty. Taking advantage of this, not alone clergymen even the door-keepers of the exorcists also started claiming this privilege. Because priests were among the few literate people, the test of one's membership of holy order was to read the first verse of the fifty-first psalm. Because it saved people from death, it was known as neck-verse. In practice it amounted to reprieve. By the time Henry VII came to the throne, the whole Europe was experiencing a movement towards severity and brutality of sentence.

During the sixteenth century, Tyburn became a notorious place of execution. In fact, the executions rose to such an alarming stage that a beam had to be erected for carrying hundreds of executions. But, in Charles I reign Tyburn executions dropped to ninety per year. His successor to the throne, Charles II took some interest in penal reforms.

When Queen Anne died in 1714, there were thirty two capital offences in England. By the time George came to the throne in 1743 this number increased to one hundred and sixty. In 1799 London averaged one execution every fortnight. By 1819, the number of capital offences on Britain's Statute Books was two hundred and twenty embracing all kinds of crimes. Even children of seven years and eight years were also executed for stealing spoons, colours, shoes etc.,

Protests against Capital Punishment can be traced back to Saint Augustine or to the writings of New Testament itself. Some would carry the beginning of the crusade against Capital Punishment to the literature of Old Testament. For the Modem Period, the starting point is the year 1764, with Cesare Beccaria's essay "On Crime and Punishments". Through Jereny Bentham and Samuel Romily, Beccaria's ideas seeped into English thought. From 1810 until his death in 1818, Romily devoted his time in influencing the Parliament to repeal Capital Punishment for theft. After his death, Sir James Mackintosh took the torch and saw to it that a Select Committee was appointed to study Capital Punishment in 1819. After him, John Bright and William Ewart carried the movement towards abolition of Capital Punishment. In 1837, there were thirty seven capital offences on Statute Books. Lord John Russel sponsored a Bill for the removal of the Death Penalty for twenty one offences and to restrict its use in the remaining sixteen offences, and he was success- fill.

In twentieth century the movement was taken up by Howard League for Penal Reforms. In 1925, a National Council for the abolition of Death Penalty, with Roy Clavery as its first secretary was founded.

Thereafter several Select Committees and Royal Commissions were appointed to study Capital Punishment in other countries. The cases of Rowland, Timothy John Evans and Dereck Bentley rose public emotions and public showed some concern. In 1957, an Act was passed which retained Capital Punishment for certain types of murders, although it eliminated three-fourths of those offences formerly subjected to Death Penalty. By 1960, under the New Law, the rate of executions is four per annum. Ultimately, the Murder (Abolition of Death Penalty) . Act, 1965 abolished the Death Penalty for murder for a five year experimental period.

Since the Death Penalty was abolished for murder, motions to reintroduce it have been defeated in the House of Commons on a number of occasions. A vote on an amendment to the Criminal Justice Bill to reintroduce the Death Penalty for murder was held in 1988 and was defeated by 341 votes to 218.

American Criminal Law took its shape directly from English Criminal Law of the sixteenth and seventeenth centuries. But unlike England, Criminal Law was not uniform throughout America. Masachusettes, Pennsylvania, North Carolina - every colony had its own Criminal Law though the variation is very slight. Though technically, thirty-one separate offences carry Death Penalty, only seven crimes, namely murder, kidnapping, rape, armed robbery, burglary, aggravated assault and espionage have actually been punished with death.

Benjamin Rush was the father of the movement to abolish Capital Punishment in The United States. He also was inspired by Beccaria's "Crime and Punishments". He was supported by Franklin and William Broadford. After Rush, it was Edward Livingston (1764-1836) v/ho prepared a revolutionary penal code for Louisiana, insisted on total abolition of Capital Punishment. By 1830, the legislatures in several states were besieged each year with petitions in favour of abolition from their constitutions. In 1845, an American Society for the Abolition of Capital Punishment was organized. With the efforts of many abolitionists in 1846, the Territory of Michigan replaced Capital Punishment with life imprisonment. Taking cue from Michigan, many states including Rhodes Island and Wisconsin abolished Death Penalty.

Between the peak of the progressive Era and the year when women got vote, eight states namely,

Kansas, Minnesota, Washington, Oregaon, North and South Dakota, Tennessee and Arizona abolished Capital Punishment. Inspite of the efforts of individuals and other social sendee organisations, Capital Punishment is there in the Statute Books of many American States.

Capital Punishment has been prevalent in India from times immemorial. It is as old as the Hindu Society. The administration of criminal justice as an integral part of the sovereign function of the State did not seem to have emerged in India till the smriti period. The credit goes to smritis, mainly Manu, secondly to the Artha Sastra of Kautilya. However, Artha Sastra was not a Penal Code, hence it lacks a coherent schematization.

In Buddhist texts also, references to Death Penalty were found. Idu Batuta in his writings, painted the picture of India as it was in the 14th century. Capital Punishment was in vogue for the offences of moral turpitude.

Muslim period marks the beginning of a new era in the legal history of India. The social system of Muslims was based on their religion. Muslins, after conquering India, imposed their criminal law on Hindus whom they had conquered.

The sources of Muslim Law were Qoran, Sunna and Sunnies. The traditional Muslim Criminal Law broadly classified crimes under three heads:

- **(i)** Crimes against God,
- **(ii)** Crimes against Sovereign and
- **(iii)** Crimes against private individuals, and prescribed Capital Punishment for the offences namely, disturbance of public peace, highway robbery, extortion on the pretext of collection of public taxes and needless to say for murder.

The policy of the British being to interfere as little as possible with the Muslim Penal Law, only such modifications were made as were required to remove glaring defects. Motive played a vital role in the capital offences than the manner of committing the offence. The **Nand Kumar Case**[8] was a glaring example for the miscarriage of justice.

For the first time in 1846, the Law Commission under the Chairmanship of Lord Macaulay prepared Indian Penal Code and it was adopted on 6th October, 1860. The Indian Penal Code, 1860 defines the' substantive offences and prescribes punishments. After Independence also the same Indian Penal Code has been in operation.

[8] Hanging of Raja Nand Kumar was the first judicial murder in British India.

At the outset, the Indian Penal Code prescribes Capital Punishment for eight categories of offences namely, waging war against the Government of India (Section 121), abetting mutiny by a member of the armed forces (Section 132), fabrication of false evidence with intent to procure conviction of a capital offence, with the Death Penalty applicable only if an innocent person is infact executed as a result (Section 194), murder (Section 302), murder committed by a life convict (Section 303), abetting suicide of a child or insane person (Section 305), attempted murder actually causing hurt, when committed by a person already under sentence of life imprisonment (Section 307) and dacoity with murder (Section 396), while Criminal Procedure Code provides the procedure to be followed while awarding and executing Death Penalty.

The administration of justice through Courts of law is part of the constitutional scheme and under that scheme it is for the judge to pronounce judgment and sentence and it is for the executive to enforce them.

Article 72 and 161 of the Indian Constitution empowers the President or the Governor as the case may be to grant pardon and also to suspend, remit or commute sentence in certain cases. This power can be exercised by the executive heads, before, during or after the trial.

The mode of execution was challenged as ultra vires of the Eighth Amendment guarantee against cruel and unusual punishment. In **Wilkerson**[9] and **Kemmler**[10] the mode of execution of Death Penalty by shooting and electrocution was challenged as "cruel and unusual punishment". In both the cases, the Court negatives the plea and held that the mode is not contrary to Eighth Amendment guarantee.

Furman Case[11] came before the Supreme Court of America with a direct attack on the Capital Punishment basing on the Eighth Amendment guarantee against cruel and unusual punishment. The American Supreme Court which initially inclined not to interfere with the mode of execution of Death Penalty heavily came down against Capital Punishment and declared it as violative of Eighth Amendment guarantee against cruel and unusual punishment. Furman divided the judges of the American Supreme Court clearly as abolitionist and retentionist judges and the abolitionist judges utilised Furman to bury the Capital Punishment in America.

[9] Wilkerson vs. State of Utah, 99 US 130 (1879)
[10] In re kemmler, 136 US 436 (1890)
[11] Furman vs. Georgia, 408 US 238 (1972)

But, the wisdom of Furman was shortlived when the retentionist judges gained score in Profit, Jurek and Gregg which had overruled Furman and these decisions revalidated Capital Punishment.

It may be noted that the Capital Punishment is not banned in the United States and it has judicial approval also. However, imposition of Capital Punishment is much less and its implementation is very rare, indeed. As far as Indian Supreme Court is concerned, after Independence to the country, several times Bills were introduced in both the Houses to amend the law regarding Capital Punishment. But, every time they were negative on the ground that the time is not ripe to abolish Capital Punishment in this country.

After the Legislative attempts failed in both the Houses of Parliament to abolish Death Penalty, the abolitionists turned to Indian Supreme Court with the hope that it would declare Death Penalty as unconstitutional as was done by the United States Supreme Court in the case of Furman.

But, the Supreme Court in **Jagmohan Singh Case** [12] declared that Death Penalty is constitutionally valid and it is not violative of the fundamental rights guaranteed under Article 14, 19 and 21 of the Constitution. In that case the Indian Supreme Court did not agree the decision of the American Supreme Court in Furman. The Supreme Court in Rajendra Prasad Case while commuting the Death Penalty into life imprisonment pleaded for the abolition of Death Penalty. The Court in **Rajendra Prasad Case**[13] extensively quoted the observations of the American Supreme Court in Furman and did not refer to its subsequent decisions which had overruled Furman. Rajendra Prasad dictum did not have any impact on the Capital Punishment. Later came Bachan Singh Case before the Supreme Court in which reconsideration of its opinion expressed in Jagmohan's case on Death Penalty was pleaded. It was contended that reconsideration of Jagmohan opinion is necessitated because of the new interpretation given by the Court to Article 21 in **Maneka Gandhi Case**[14]. Such an interpretation was not available at the time when the Court decided Jagmohan. The majority of the Court in Bachan Singh approved Death Penalty, but with a rider. The Court declared in Bachan Singh that Death Penalty be awarded only in "rarest of rare cases". It is to be noted that the Court in **Bachan Singh Case**[15]

[12] Jagmohan Singh Vs. State of Uttar Pradesh, AIR 1973 SC 947
[13] Rajendra Prasad Vs. State of Uttar Pradesh, 1979 (3) SCR 646
[14] Maneka Gandhi Vs. Union of India, AIR 1978 SC 597
[15] Bachan Singh vs. Ststе of Panjab, 1980 (2) SCC 684

did not explain the scope of the doctrine "rarest of rare cases". However, the Supreme Court in **Machhi Singh Case**[16] elaborately explained the scope of "rarest of rare cases". In **Mithu Case**[17], Supreme Court declared mandatory Death Penalty as prescribed under Section 303 of IPC as unconstitutional on the ground that it offends the test of reasonableness and fairness under Article 14 and 21 of the Indian Constitution.

[16] Machhi Singh Vs. State of Punjab, AIR 1983 SC 957
[17] Mithu Vs. State of Punjab, AIR 1983 SC 473

CHAPTER- II

LITERATURE REVIEW

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CHAPTER- II

LITERATURE REVIEW

Bhumika N. (2012) had written in her article whether Death Penalty violating under Article 19, 14 and 21of the Indian Constitution. **Krishna Iyer** judge express their view in **Rajendra Prasad Case** Death Sentence is violated under Article 21, 19 and 14 of Indian Constitution. One more **Jagmohan Singh Case**[18] Death Penalty could not violated under Article 19 of the Indian Constitution. One must agree with the Hon'ble Krishna Iyer.

Death Penalty is violated under Article 21, 19 and 14 of the Constitution of India. Capital Punishment is not rule it is an exception of judgments and today we need to unanimous judgment to secure and protect the people and society.

Shallu B.A. (2010) has written in her article criminal or any person should not be leave without except when he might be more dangerous of set free after some period under Article 21 of Indian Constitution and it postulates person depressed of life in procedure, the Death Penalty is fair, reasonable and practical. Dr. Shallu has explained **Rajiv Gandhi Assassination Case**[19] 1991, in this case twenty six accused guilty committing crime under the POTA Act 1987 Death Sentence to them in the year 1998. Rajiv Gandhi's killer is waiting still for their execution. The president has not yet taken any decision on Mercy Petition or the social economical background of the person. One of the point delays the Capital Punishment it is delay in the execution Mercy Petition disposal against the principle of Rule of law.

M.B.Biradar (2012) has written in his article about the rights of a man such as social right and cultural right, natural right as well as right to live, Death Sentence condemns or curtails most of these rights. The human rights organization tries to improve the quality of life rather than to finish life .Death Penalty is not necessary because no person is ever born criminal and everyman is born as a good child some circumstances or fanatism compel him there to commit crime. The criminal jurisprudence says 'Hate the crime and not the criminal'. There are many reasons in Death Penalty against the human rights as well as the abolition of Capital Punishment. Offence

[18] Jagmohan Singh Vs. State of Uttar Pradesh, AIR 1973 SC 947
[19] S. Nalini Vs. State of Tamil Nadu, AIR 1999 SC 2640

under the punishment is murder, highway dacoit, robbery, atrocities on women and child gang rape internet obscenity and economical offences or white collar offences. The first sentence will be to award life imprisonment and not Death Sentence India has retained the Capital Punishment in certain cases but the basic human right to life is well protected under the Constitution.

Prerna D. S. (2013) has written in her article Death Sentence is the law and the policy of 'the rarest of the rare' she has referred to Bachan Singh case law and Human right activities and NGOs are against the Death Sentence I.C.O.C.and P.R. suggest to abolish punishment countries move abolition of crime is correct to define that motive of the punishment ought to abolish crime and not the criminals Capital Punishment us exceptional and life imprisonment is the rule .She further give example of few cases which have been declared as 'rarest of the rare 'case . Secondly in **Swamy Shraddananda Case**[20] Court held that accused murdered his wife cold blooded and it had been pre-planned. The Court should consider and investigate the reasons behind the crime. Capital Punishment should be considered as the last option and should not awarded first for public pressure and political significance the cold blooded manner murder and crimes against women, especially from personal religion, caste based reasons and revengeful attitude must be very severely punished.

Anoop K. (2013) had written in his article the society has an angry cry for justice against the criminal, sexual offenders are often termed as monster, beasts and sex friends. By the society the special wrath against the social harmony trouble by sexual offences as rape are all inhuman acts. That the shake the root of the whole society, and so the society demands Death Penalty. The sexual offences are the most barbaric and brutal acts. Anoop kumar has explained rape and murder in detail he gives example of the Supreme Court case law in **Surendra Pal Case**[21]. The trial Court originate the accused was responsible of the offence of rape. He was sentenced to death and it was definite by the High Court. But the Supreme Court transformed punishment of death to life imprisonment on the ground case did not fit in to the rarest of the rare type.

Srivastava S.& Srivastava P.K. (2011) have written in their article some countries such as Britain and Germany are against the Capital Punishment they had abolished Death Sentence but India and America have retained Death Sentence and impose suggestion exceptional crime and

[20] Swamy Shraddananda@Murali... Vs. State of Karnataka, 2007 (13) SCC 767
[21] Surendra Pal Vs. State of Gujarat, (2004) 3 GLR 628

special reasons. Death Sentence is deprivation of one's life which has been protected by under Article 21 the Constitution of India. Court of law up held the constitutionality of Capital Punishment award in rarest case and special reasons. Death Penalty could be awarded only in white collar offenders anti social offences and against the hardened criminals. **Justice Bhagwati** in **Bachan Singh Case** held Death Penalty as unconstitutional and violating of under Article 21, 19 and 14 the Constitution of India. It is brutal and cruel. Capital Punishment is arbitrary and there is no Legislative policy. Justice Bhagwati express his view it extend Death Penalty appears from the point of Indian Constitution as if it were against the Death Penalty and a violating under Article 14, 19 and 21 of the Constitution. Special reasons justifying Death Penalty and the rarest of the rare types of cases are yet to totally and exactly defines approximations give a special perspective as per the respectively of the concerned judges.

Srivastava S.& Srivastava P.K. (2011) have written in their article some countries such as Britain and Germany are against the Capital Punishment they had abolished Death Sentence but India and America have retained Death Sentence and impose suggestion exceptional crime and special reasons. Death Sentence is deprivation of one's life which has been protected by under Article 21 of the Constitution of India. Court of law up held the constitutionality of Capital Punishment award in rarest case and special reasons. Death Penalty could be awarded only in white collar offenders anti social offences and against the hardened criminals. **Justice Bhagwati** in **Bachan Singh Case** held Death Penalty as unconstitutional and violating of under Article 21, 19 and 14 of the Constitution of India. It is brutal and cruel. Capital Punishment is arbitrary and there is no Legislative policy. Justice Bhagwati express his view it extend Death Penalty appears from the point of Indian Constitution as if it were against the Death Penalty and a violating under Article 14, 19 and 21 of the Constitution. Special reasons justifying Death Penalty and the rarest of the rare types of cases are yet to totally and exactly defines approximations give a special perspective as per the respectively of the concerned judges.

Rustam S. (2012) has written in his article the Mahatma Gandhi is the thrust of the reformative theory of punishment .One line "An eye for an eye and the whole world blind" it was an old jungle law criminals as inhuman this theory is slowing the nature of the modern society . Rustam Singh has written in his article use phrase Vr. Krishna Iyer J. An innocent person is a crime against society, a man cruel, callous, preprogrammed when murdered. Such person forfeits his

rights to life A.P. Sen. J. these two statements figure out that in Indian judiciary regarding the imposition of punishment upon the convicts.

Suhas C. (2013) has written in his article Asian Centre For Human Rights in short (ACHR) he has written in his article **Afzal Guru case**[22] the death row convicts .In the prison manual by the home ministry the disappointment to information to the family members. The government of India total of 1455 offenders were sentenced to death during an average year 132.27 criminals 2001 to 2011, Suhas Chakma gives (ACHR) One offender was given the Death Penalty in India as every third day on average less. He has explained the state wise by table of the Death Penalty in 2001 to 2011.

Murlidhar S. (1998) has written in his book constitutional validity of Death Penalty .The law commission of Indian 1967 submits 35th Report to the government. It is not justified to retain the death and has also referred to about Jagmohan case law earlier .The Death Sentence extinguished all freedom guarantees under Article 19(1)(a) to (g) unreasonable. The second judge awarded either of the tow Legislation, policy or standard set of penalties or abolition thirdly judges it violated under Article 14 the Constitution of India since tow person were create culpable of murdered and suggested they must be treated different. The lack of established procedures under the law of life can be extinguished due to a violation of Article 21.

Autrisaha & Pritika R. A. (2009) had written in book. The Supreme Court had suggested well come steps in Indians Jurisprudence the revisits the **Bachan singh Case** has written life imprisonment is rule and Death Penalty is exception and to the consent of rarest of rare saying in Santosh Bariayar case accused convict under Section 302, 364B and 120B of I.P.C. Bariyar to Death Sentence but two other Hon'ble judges declared the life imprisonment. The High Court observes that bariyar was the main architect the Court observed that. In view of the history of any criminal offense in Court, they are not professional killers nothing before them to show that reformed and rehabilited, sentence him to life impresentment this judgment is a well come step in the direction of abolition of Death Penalty.

[22] Mohd. Afzal Guru & Ors Vs. State, 2003 VIIAD Delhi 1, 2003 (3) JCC 1669

Rajindar S. (2013) had written in his article Dr. Ambedkar were opposed to Death Penalty he has respectfully follow them **Kasab**[23] was involved in the terror attack.

Two and expressed his desire to see his mother all this could be avoided before hanging. The family member was not given opportunity to meet the accused. That there are so many issues arising before the Indian government and judiciary is not taking any proper procedure. The basic problem remains whether such a hardened criminal be hanged for his cruelty against a country or he should be excused for his age and his religions ambitions whatever.

Hood (2002) pointed out, research literature almost exclusively focuses on the use of Capital Punishment for murder . Death Penalty extensively (see , however , Avio 1979 and Layson 1983 Canadian study and the UK study Wolpin 1978) is where the vast majority of studies , the United States of America has been dealt with .

Shivam vij(2013) had written in his article. Death Sentence does not serve beyond doubt two third of the world to abolish Death Sentence Indian judges sentence death and other have been life and still others are acquitted form Death Sentence is nothing but only a legal lottery .Committee for protection of democratic right held in favour of closing down death punishment. It is no specific rule and procedure to adopt in India, to pronounce the death punishment. At times the conviction or the acquittal is a matter of fate only.

Venkatesan V. (2011) had written about **Ajit Singh Harnamsingh Gujral case**[24]. The Supreme Court judgment says the most heinous and barbaric murder invariably the rarest of rare case burden of death. He had written in the case of Bachan Singh that the life imprisonment is rule. He refers to law commissions 35th report has surveyed hard data and said we study prisoner released from jail Supreme Court studies data of commission. The Court power wishes to abolish Death Penalty it has not so for good quality of the prisoners who are out of prison after their respective punishments one may think in this article the Parliament has power but does not act while the Death Penalty Court wishes to avoid Death Penalty but has no power.

[23] Mohd. Azmal Amir Kasab Vs. State of Maharashtra, AIR 2012 SC 3565
[24] Ajitsingh Harnamsingh Gujral Vs. State of Maharashtra, AIR 2011 SC 3690

Justice S .K. had written in his article. He has referred the case law of **Ramnaresh Case**[25] relevant extract from the judgment the Court provides certainty and a greater clarity and also the special reason, and rarest of rare case the Court keep in brainpower that it is being sufficiently punitive and purposefully preventive. He refers to **Bachan Singh**, **Machi Singh** and **Naresh Giri**[26] cases, in these cases crime is heinously committed in spite of that Death Sentence is replaced by to life imprisonment. One feels in this article that there are many case laws that define that Death Penalty's conversion to life imprisonment is adopted because rarest of rare is not defined to pronounce Death Penalty hence it option for life imprisonment- Justice Swatanter Kumar(2012).

Shantanu J. & Hirdesh S. (2013) had written in his article and raised the issue whether the Death Penalty be abolished, whether **Afzal Guru Case** is relevant other judicial decisions, whether Death Penalty alternative punishment for murder under Section 302 of I.P.C., whether under Section 302 of I.P.C. apposite nation of under Article 19 and 14 of the Constitution of India these issue been vigorously debated on national in addition to international levels. He had written that Indian jury is a mix together of reformative and deterrent theories. He had written that English had abolished Death Penalty, Death Penalty Act 1965 and Soviet Union Death Penalty was abolished in 1947. French Penal Code 1810 amends in 1959 retained Death Sentence. The Capital Punishment is a part of Indian law. In the international view the Capital Punishment should abolished there is no specific provision to define that Capital Punishment should not be imposed.

Rajendar S. (2010) had written in his article and gives some important expression some thought by important personality Gandhiji who said "I do Ahinsa" contrarily feel like a punishment. He, who gives it and takes, Dr Ambedkar said "I have in this country is the right thing to do would be to abolish the Death Penalty completely". He had written that in Canada Death Penalty was abolished in 1976, in U.K. 1965 and in South Africa 1995. A.P.J. Kalam said why all those on death row were the poorest of the poor.

[25]Ramnaresh Vs. State of Chhattisgarh, (2012) 4 SCC 257
[26]Naresh Giri Vs. State of M.P., (2001) 9 SCC 615

Remain well known only for the sake of official unacknowledged. One has to think over the fact great philosophers and many countries are against death punishment. From human point of view it should be abolished sooner or later.

Soutik B. (2012) had written in his article India allows Death Penalty in rarest of rare crimes had written and explained Ajmal Kasab's attack on Mumbai and Bhartiya Janta party (B.J.P.) demanded execution of death for him for his war against country hence no Mercy Petition be allowed. The Capital Punishment says there is refusal proof to explain the death punishment deters crime. According amnesty international impose Death Sentence. It seems the countries against penalty are tow third of the whole world they favour of Death Penalty it is against the humanity no one has right to take life for one is able to give life to a dead person.

Chandrika P.S. (2004) had written Benthan and Cesare Beccaria express sentence is an evil in South Africa the first judgment in 1995 to abolish the Capital Punishment in cruel, inhuman, degrading, today 68 countries have abolished the Capital Punishment for crimes. Whether the Capital Punishment has deterrent quality or not answer that Capital Punishment should have maximum deterrent effect. The retention of Capital Punishment is more effective than any other penalty. Question there is always a as for as attitude is related it arises whether the Death Penalty or retention we cannot be constantly adopted.

Rajindar S. (2012) had written the worlds abolish the Death Penalty. The United nation passed a resolution on 20/11/2010 that all nation of on Death Penalty if they do not agree to abolish Death Penalty. He had presented one case Balwant singh award Death Penalty for murder of the Punjab chief minister Beant Singh in 1995. The ultimate denial of human right and it violates the rights to life. The punishment of death will be life imprisonment. It is crystal clear that Justice Rajendar Prasad catches the starting point to put an end to the Capital Punishment there are so many cases but the government and Parliament observed to abolish death punishment.

Yog M.C. (2013) had written in his article that there are three social institutions, the police which gather evidence machinery and the Court which adjudicates guilt and poses sentence, the executive which thinks over Mercy Petition. He had written in his article India is disgracefully corrupt, false and criminalized police force and the evidence is obtainable in the Court by the police officer. The Court considers evidence adjudicates or not he gives examples of many cases.

It appears the Court can take cognizance to the point of view and nature of the case but some corrupted police officers never send correct reports.

Karthikeyan D.R. (2013) had written in his article and questions that Death Penalty retention or abolition? Man lives the society to protect the deviant of the society how for "eye for an eye" and "tooth for tooth" emerged it is a jungle law. Innocent person also found guilty and convicted for it is based on wrong evidence and misconception of the circumstantial evidence. It seems that Death Penalty in India retention or abolish many question arising whether Death Penalty retention or abolish.

Mr.Gajendra S. (2013) had written in his article "Capital Punishment for rape". He had written Hindu dharma talks of Narak for evil doors, Muslim talks of Jahannum and Christianity of hell every religion talks of reforms the act of rape is most heinous crime against human therefore the punishment should also be very painful. It seems that the crime and it is physical assault on a woman she has to face mental torture, too along with physical injury. Indian Court rules the 'rarest of rare' cases the person who has committed offence of rape must be led death.

Ahmad I.G. (2013) had written in his article Capital Punishment applied with special reason brutal murder and the gravest offences against state. He had written penological aspect deterrent theory, preventive theory, retributive theory, reformative theory and rehabilitative theory .He had written Indian scenario define the **Mithu Case**. The Apex Court declared that under Section 303 of I.P.C. is unconstitutional. It is not tune Article 14 and 21 of the Constitution of India. He had given example of **Jagmohan sing Case** and **Rajendra Prasad Case**, it seems that society wants peace, security and cleanliness for crime, there is no solution. Death Penalty is not the solution of crime or to control the crime.

Sapre & Karmarkar M.D. (2012) had written in their article **Ajmal kasab**, **Sarobjeet singh** and **Afzal guru** cases had written Death Penalty is commonly used in cases of heinous crimes. Capital Punishment awarded under Section 121, 132, 194, 302, 303, 305 and 396 of I.P.C. They had define mode of execution in death question arise Capital Punishment retention or abolition. Third person point of view India peace loving country of the world our culture, traditional forget guilty and chance to give reform himself.

Suhrith P. (2013) had written Beccaria treatise publish treatise has two views. Objectives of punishment states right to take life of a citizen opposed to the society drive its sovereignty lord Macaulay drafted the Indian penal code in 1860. The only reason of murder was punishable with death rope was punishable mere imprisonment cannot be placed on the same class of murder the law reverts to deterrence and reformation for justification. It seems that we change the law for rape or any crimes and awarded the Death Sentence for the rapist.

STATEMENT OF RESEARCH PROBLEM

The research proposes to study the provisions of law in India which provides the Capital Punishment, the prevalent arguments on record about the Capital Punishment with reference to human rights of individuals, the procedural safeguards available to an accused in India and the reflection of socio-economic conditions of the accused on the sentencing policy of the Supreme Court.

RESEARCH QUESTIONS

1. Whether is Capital Punishment awarded only under the Indian Penal Code?

2. Whether is there unanimity in abolishing the Capital Punishment?

3. Whether the Supreme Court has contributed in reinstatement of Human Rights of the accused at various stages of Criminal Justice Administration?

4. Whether the Supreme Court has followed a uniform sentencing policy with reference to Capital Punishment?

5. Whether does Capital Punishment not violate human rights of the accused?

6. Whether are the socio-economic conditions of the accused reflected in award of Capital Punishment?

RESEARCH METHODOLOGY

The nature of the research questions suggests that the data is on record, hence the source thereof is secondary such as Statutes, books, reported cases, law reports, law journals, articles, magazines, Newspapers, websites. Hence the research cards have been used for data collection. The data have been classified with reference to the question responded by them.

CHAPTER- III

STATUTORY PROVISIONS

FOR/OF

DEATH PENALTY

CHAPTER- III

STATUTORY PROVISIONS FOR/OF DEATH PENALTY

Criminal Law provides the ultimate means to the society for the protection of individuals and its institution. Criminal Law has to be strong enough, both in its contents as well as in its implementation, without being harsh or arbitrary. The penal law in force in India is to be found in the various statues enacted by the central and state legislature. The general substantive Criminal Law, operative throughout the country is laid down in the Indian Penal Code enacted in the year 1860. Statutory provisions relating to Death Penalty under Indian Penal Code are following:

I) THE INDIAN PENAL CODE AND DEATH PENALTY

Indian Penal Code is the substantive law, providing penalties for all the criminal wrongs done by any criminal. Section 53 deals with different kinds of punishments, out of which 'Sentence of Death' is the most stringent punishment inflicted upon an accused. A detailed study of different provisions touching this penalty has been discussed at length in the chapter.

A) CAPITAL OFFENCE UNDER THE PENAL CODE

The Penal Code provides for the imposition of Death Sentence in several places.

SECTION 121: Waging or attempt to wage war, against the Government of India. Whosoever wage war against the government of India, or attempts to wage such a war, or abets the waging of such a war, shall be punished with death, or imprisonment for life and shall also be liable to fine.

SECTION 132: Abetment of mutiny, if mutiny is committed in consequence thereof. Whosoever abets, the committing of mutiny by an officer, by soldier, sailor or airman in the Army, Navy or Air Force respectively, of the Government of India, shall, if mutiny be committed in consequence of that abetment either description for a term which may extend to ten years, and shall also be liable to fine.

SECTION 194: Giving or fabricating false evidence with intent to procure conviction of capital offence. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it, to be likely that he will thereby cause, any person to be convicted of an offence which is capital by the law, for the time being, in force in India shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

If innocent person be thereby convicted and executed:- If an innocent person be convicted and executed, in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.

SECTION 302: Punishment for murder, whoever commits murder shall be punished with death imprisonment for life and shall also be liable to fine.

SECTION: 303: Punishment for murder by life convict, whoever being under sentence of imprisonment for life commits murder, shall be punished with death.

SECTION 305: Abetment of suicide of child or insane person If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the commission of such suicide, shall be punished with death or imprisonment for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

SECTION 307:- Attempt to murder by life convict. Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extent to ten years, and shall also be liable to fine and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is here in before mentioned.

In most of these cases Capital Punishment is available merely as the upper limit of a full range of punitive strategies. But Section 121(war) and Section 302(murder) present the judge, with a limited dichotomous choice between only two possibilities, death and life imprisonment; and Section 303 makes the Death Sentence mandatory[27] for a person who commits murder while under sentence of imprisonment for life. Generally, however, the only content in which Capital Punishment is of any practical importance is that of Section 302, which provides "Whoever commits murder shall be punished with death or imprisonment for life and shall also be liable to fine." The authors of Penal Code say: [28]

We are convicted that it ought to be very sparingly inflicted and we propose to employ it only in cases where either murder or the highest offence against the State has been committed. To the great majority of mankind nothing is as dear as life. And we are of the opinion that to put

[27] The provision has been struck down by the Supreme Court in Mithu V. State of Punjab AIR 1983 SC 473.

[28] There are as many as 51 Sections of the Indian Penal Code which provide for the sentence of life imprisonment.

robbers, ravishers and mutilators on the same footing with murderers is an arrangement which diminishes the security of life. These offences are almost committed under such circumstances that the offender has it in his power to add murder, to his guilt. As he has, almost always, the power to murder, he will often have strong motive to murder, in as much as by murder he may often hope to remove the only witness of the crime which he has already committed. If the punishment of the crime which he has already committed be exactly the same with the punishment for murder, he will have no restraining motive. A Law which imprisons for rape and robbery and hangs for murder holds out to ravishers and robbery a strong inducement to spare the lives of those whom they have injured. A law which hangs for rape and robbery, and which also hangs for murder, holds out, indeed, if it be rigorously carried into effect, a strong motive to determine from rape and robbery, but as soon as a man has ravished or robbed, it holds out to him, strong motive to follow up his crime with a murder.[29]

B) DEATH PENALTY AS EXCLUSIVE OR ALTERNATIVE PUNISHMENT

The judicial choice on the matter of sentence is predicated by the normative boundaries set by the measures:

(a) which prescribe particular punishment or punishments for specific crime situations, and

(b) which set procedural guidelines for working the punitive norms. Section 302 of the Indian Penal Code which provides a choice between the Death Penalty and life imprisonment for the offence of murder and Section 235.

The Criminal Procedural Code which obligates the giving of a hearing on the question of a sentence after the issue of conviction is decided which is crucial for Death Sentence issue, makes it obligatory for the judiciary. To record "special reasons" in case of choice of death provides the legal frame work relevant for the application of the Death Sentence.

Section 235(2) of Criminal Procedure Code When the conviction is for an offence punishable with death or, in the alternative with imprisonment for term of years, the judgment shall state the reasons for the sentence awarded and in the case of sentence of death, the special reasons for such a sentence.

[29] Draft Penal Code, 1836 Source: Ratan Lai and Dhiraj Lai, Law of Crimes.

The sentencing discretion accorded by Section 302 can be understood in two ways. The first relates to the rage of sentencing alternatives, and the second relates to the absence of proper rules or guidelines to operate the choice. The Indian Penal Code provides the Death Penalty in three distinct patterns. The first pattern Section 303 and 307 relates to, two offences for which the Death Penalty where Death Penalty is the sole form of punishment with Section 302 is second pattern where Death Penalty is only one alternative that is life imprisonment. The third pattern is followed in respect of offences under Sections 132 and 194 etc. where Death Penalty is the maximum to be applied along with wide range of other maximum sentences. In respect of the rules or guidelines for the operation of the choice put of the range of sentence the penal code is fairly bold. The question of when or why is left to judicial discretion in every case.

The awesome either or of the section spells out no specific indicators and law in this fatal area cannot afford to be conjectural. Guided missiles, with lethal potential, in unguided hands, even judicial, are a grave risk where the peril is mortal though tempered by the appellate process. The flame of life cannot flicker uncertain[30] and so Section 302 Indian Penal Code must be invested with pragmatic concreteness that inhibits and hominem responses of individual judges and is in Penal conformance with constitutional norms and world conscience.

The principle behind existing capital offences may not show any common element at first sight, but a close analysis reveals that there is a thread linking of all these offences, namely, the principle that the sanctity of human life must be protected It is the "willful exposure" of life to peril that seems to constitute the basis of provision for the sentence of death.

[30] Pande, B.B. "Face to face with Death Sentence", SC Cases, P.47

II) DEATH PENALTY UNDER CRIMINAL PROCEDURE CODE: PROCEDURAL SAFEGUARDS

In view of the grave consequence of the Death Sentence, it also become necessary to see the procedural safeguards provided for the imposition of this extreme penalty. The Death Penalty is administered according to the legal provisions containing the Code of Criminal Procedure 1973. This Code contains a number of provision to safeguards the interest of the accused. The object of these safeguards is to eliminate any chance of eliminating a person.

A) HEARING THE ACCUSED ON QUESTION OF SENTENCE

According to Section 235(2) of the Code of Criminal Procedure 1973, the accused shall be heard on the question of sentence. This Section provides as follows:- If the accused is convicted, the judge shall unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence him according to law.

This provision is in conformity with the modem penology which regards the offence and the offender as equally material in deciding the appropriate sentence.

This appropriate sentence in any given case is governed by various factors such as the nature of the offence, the extenuating and aggravating circumstances of the offence, the background of the offender with reference to the educator employment, home, life, sobriety, social adjustment, emotional and mental condition of the offender, prospects for rehabilitations, and so on. Further, there may be many circumstances is given case which may be altogether irrelevant at the stage of fixing the guilt, but these circumstance become relevant in determining the appropriate sentence.

The present provision which casts a statutory duty on the Court to hear the accused on the question of sentence is of special importance in capital cases where the Court has to choose from the alternatives of life and death. The duty of the sentencing judges is not discharged by putting a formal question to the accused as to what he has to say on the question of sentence. They must make a genuine effort to elicit from the accused all that will eventually bear on the question of sentence and thus bring out the true scope of his provision.[31]

[31] Rajendra Prasad Vs State of U.P. 1979 SC 916 and Muniappon Vs State of T.N. AIR 1981 SC 1220 10 S. 367 (5) of Cr.P.C. 1898 prior to its amendment in 1955.

B) SPECIAL REASONS FOR AWARDING DEATH PENALTY

There has been a significant change in thinking and approach to the subject of Death Penalty Since India become free prior to the amendment of Section 5 of the Code of Criminal Procedure 1898 by Act 26 of 1955, the normal rule was to impose sentence of death on person convicted for capital offence and, if a lesser sentence was to be imposed, the Court was required to record reason in writing[32]. In 1955, this provision was deleted and the result was that the Court became free to award either Death Sentence or the lesser sentence, under the new Criminal Procedure Code 1973, a provision has been made in this respect in Section 354(3). This section requires the Court to record 'special reason' for imposing the sentence of death. It provides as follows:

When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded and, in the case of sentence of death, the special reasons for such sentence.

By the enactment of this Section, the entire policy with regard to Death Penalty has been completely changed. Death Sentence is now an exceptional sentence which is to be imposed after recording the 'Special reasons' for its imposition.

The duty cast by this provision on the Court to give 'special reason' for awarding sentence of death in a capital case enables the High Court to judge whether the lower Court has exercise its discretion judicially and also provides material to the authorities concerned at the times of considering the Mercy Petition of the condemned person.

In view of the change, there is no doubt that Death Penalty has ceased to be general punishment. The policy is very clear in Section 354(3) of C.P.C. 1973, that it should be imposed only in extreme cases. And, therefore, special reasons need to be recorded. But the expression 'special reason' has not been defined in the code and it has been left for the judicial interpretation. Perhaps, this is the right steps as it is not possible to exhaustively, enumerate all the factors which may be taken as 'special reason'. No doubt this provision has vested some discretion in the judges, but it is inevitable.

[32] S. 367 (S) of Cr.P.C. 1898 Prior to its amendment in 1955

C) PROCEDURE AFTER THE IMPOSITION OF DEATH PENALTY

The Court of Session sentencing the accused to death is required to inform him of the time period within which he may prefer the appeal that lies from such judgment as of right. This is provided under Section 363(4) of Cr.P.C. which says:

When the accused is sentenced to death by any Court and an appeal lies from such judgment as of right, the Court shall inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

Again, when the sentence of death is awarded by the trial Court, it cannot be executed unless it is confirmed by the High Court a reference is to be made by the Trial Court to the High Court is this respect[33]. The legal provision regarding reference to the High Court for the confirmation of Death Sentence is mandatory and is applicable irrespective of at the appeal if any, filed by the accused. In the meantime, the person convicted has to be committed to the jail custody under warrant.[34]

In the proceedings submitted in the Court for the confirmation of Death Sentence, Section 367 (1) of Criminal Procedure Code 1973 empowers the High Court to make further inquiry or take additional evidence, bearing on the guilt or innocence of the convicted person, if it thinks necessary. The High Court may be so either itself or direct the Court of Session. Section 367 (1) of Criminal Procedure Code provides:

If when such proceeding are submitted the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself or direct it to be made or taken by the Court of Sessions.

When the inquiry is not made or the evidence is not taken by the High Court itself the result of such inquiry or evidence shall be certified to such Court. The presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken, unless the High Court directs otherwise.

The confirmation proceedings are taken up by a Division Bench of the High Court and the confirmation of the sentence or any new sentence or order passed by the High Court is required to be signed by atleast two judges.

[33] 366(1) of Cr.P.C
[34] 366(2) of Cr.P.C.

Further, Section 370 of the code provides; That where any such case is heard before a Bench of judges and such judges are equally divided in opinion, the case shall be decided in the manner provided by Section 392. In any case submitted by the Trial Court for confirmation of sentence of death. The High Court (a) may confirm the sentence or pass any other Sentence warrant.

(b) may annul the conviction, and convict the accused of any offence of which the Court of Session might have convicted him, or order a new trial on the same can amendment charge, or (c) may acquit the accused person however no order of confirmation shall be made until the period allowed to performing an appeal has expired, or if an appeal is presented within such period until such appeal is disposed of a person[35] sentenced to death by the Sessions judge file an appeal under Section 374(2) to the High Court. Normally, the appeal again the sentence of death is filed in the High Court by the convicted person and the survey of the practice followed in various High Courts reveals that the confirmative proceedings and the appeal are taken up together, for hearing[36]. The High Court has come to its own conclusion as to the guilt or innocence of the accused by appraising the entire evidence and merits of the case, independently of the finding the trial Court[37].

Where the High Court has passed a sentence of death after setting aside larder of acquittal of the accused, the accused has a constitutional entitlement to prefab an appeal as of right to the Supreme Court.

The Right to appeal to the Supreme Court in such a case is granted und Article 143(1) (a) of the Constitution. Such a safeguard is also provided by Section 379 of the Criminal Procedure Code 1973. The person under the sentence of death can also file an appeal to the Supreme Court if the sentence has been confirmed reference or upheld in appeal[38]. The High Court after upholding the sentence mi give a certificate for appeal to the Supreme Court if it deems the case fit for the same if no certificate for appeal to the Supreme Court is given, this does not mean that appeal shall lie. The Supreme Court can grant special leave to appeal under Article 136(1) of the Constitution[39] of India. The confirmation of Death Sentence or upholding of without observing the guidelines of the Supreme Court on Death Penalty will be a fit case for the intervention of the Supreme Court to prevent miscarriage of justice.

[35] S. 368 of Cr.P.C.
[36] Kelkar, R.V. Outlines of Criminal Procedure, Lucknow, Eastern Book Company 1984, 404
[37] Balak Ram vs. State of Uttar Pradesh, AIR 1974 SC 2165 and Kartorey Vs. State of Uttar Pradesh, AIR 1976 SC 76
[38] Article 132 (1) , 134 (1) and 134A of the COI
[39] Sub Section (1) of Article 136

D) EXECUTION OF DEATH SENTENCE

The Code of Criminal Procedure, 1973 also contains the procedure for the execution of Death Sentence. The procedure has been briefly described here.

According to Section 413 of the Code, when the Court of Session receives the order of confirmation or other order of the High Court in a case submitted by it to the latter for the confirmation of Death Sentence, it causes such order for be carried out into effect by issuing a warrant or taking other necessary steps.

In case the Death Sentence is confirmed, the Court of Session would issue a warrant in the prescribed form to the officer in charge of the prison for the proper execution of the sentence. When the sentence of death has been executed, the officer executing it shall return the warrant to the Court issuing it with an endorsement in his hand certifying the manner in which the sentence has been executed. According to Section 414 of Criminal Procedure Code, if the High Court passes a sentence of death in appeal in revision, the Court of Session in receiving the order of the High Court causes the sentence to be carried out issuing a warrant. The Court of Session issues the warrant in the same manner as discussed above.

Execution of the Death Sentence may be postponed in case of appeal to the Supreme Court. Section 415 of the Criminal Procedure Code empowers The High Court to postpone the execution of Death Sentence in case an appeal lies to Supreme Court from its judgment, or if the convicted person makes an applicant to the High Court for the grant of a certificate to appeal to the Supreme Court, or if it is satisfied that the accused intends to present a petition for special leave to appeal in the Supreme Court.

The execution may lie postponed till such period allowed for appeal expires or till the application made to the High Court is disposed of or till the period it considers sufficient to enable the convicted person to present a petition in the Supreme Court for special leave to appeal. In case the convicted person prefers an appeal, the execution of Death Sentence is postponed till such appeal is disposed of[40]. The provision safeguards the interest of the condemned prisoner who may ultimately be acquitted or his sentence reduces by the Supreme Court. The High Court may also postpone the execution of the Death Sentence imposed on a pregnant woman.

[40] Section 415 of Cr.P.C.

In this connection, Section 416 of Criminal Procedure Code provides: If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to imprisonment for life.

Thus, under the law, only High Court has been empowered to put off the execution of Death Penalty confirmed by it.

III) PROVISION FOR PARDON, REMISSION OR COMMUTATION OF DEATH PENALTY

Apart from providing various safeguards in the procedure for the imposition of Death Sentence, law also vests the power to grant pardons, reprieves etc, in the executive. Because of the irreversible nature of Death Penalty, there should not be the remotest possibility of executive an innocent person. This power helps to take into account all realistic factors and circumstances of the case once again before executive a person. Therefore, the vesting of such powers in the executive seems to be based on pragmatic approach. In India, the provisions for pardon, commutation, reprieves and remission of the sentence of death are continued in the Indian Penal Code, Criminal Procedure Code and Constitution.

A) PROVISION UNDER THE INDIAN PENAL CODE

Under the Penal Code, the appropriate Government has been empowered to commute the sentence imposed on a person to any sentence, though it may be the lowest sentence of fine. Section 54 and 55 of the Penal Code deal with the commutation of sentences. However, only Section 54 deals with commutation of Death Sentence. It provides as follows:

In every case in which sentence of death has been passed, the appropriate Government may, without the consent of the offender, commute the punishment for any other punishment provided by this code Thus the legislature has conferred the unqualified power on the executive to commute the sentence of death. No indication is given as to the reason for, or circumstances under which this power shall be exercised.

B) PROVISION UNDER CRIMINAL PROCEDURE CODE

The Code of Criminal Procedure 1973 provides for suspension, remission or commutation of sentences. Section 432 vests the executive with the power to suspend or remit sentences. Section 433 vests the executive with the power to commute the sentence. Under Section 432, the appropriate Government is empowered to suspend or remit whole or any part of the punishment imposed on any person convicted of an offence, with or without any condition attached to such

suspension or remission. The condition or which a sentence is suspended or remitted may be one to be fulfilled by the person in whose favour the sentence has been suspended or remitted or one independent of his will. The appropriate government, under this Section is also empowered to make rules or issue direction as to the suspension of sentence and the conditions on which petitions should be presented and dealt with. Section 433 of the code empowers the appropriate Government commute the sentence of the person convicted of an offence. This section specifies to what types of sentence should be commuted to what extent. Under this Section Death Sentence imposed on a person may be commuted to any other punishment provide by the Penal Code.

The exercise of power by appropriate Government under Section 432 and 43 is not subject to control by the Court. These sections empower the appropriate Government to suspend or remit or commute a punishment with or without any conditions. The power given to the executive by these Section is purely discretionary and the law does not enjoin upon the Government to give reason for its order, however, the appropriate Government must exercise this power fairly, and not arbitrarily. The order which is the product of extraneous or malafide factors will vitiate the exercise of the power

C) PROVISION UNDER THE INDIAN CONSTITUTION

Under the Constitution, the power to grant pardon, reprieve, etc and suspend, remit or commute sentences has been confined on the President of India and the Governors of the States by Article 72 & 161 respectively. The President of India or the Governors of the States can pardon, reprieve or respite the sentence of datives though he has exhausted all legal remedies available to him. The Courts have interpreted those constitutional provisions in a number of cases. The Supreme Court has held that this constitutional power vested in the heads of executed has to exercised justifiably and not arbitrarily on the advice of his Council of Ministers.

Time and again the issue of formulation of specific guidelines to regulate the exercise of the power under Article 72 has been raised before the Supreme Court has been urged that this would avoid the vice of discrimination in the exercise of the pardoning power. This issue was finally settled by the Supreme Court in **Kehar Singh Vs UOI[41].** The Court held that there was sufficient indication in the terms of Article 72 and in the history of power enshrined in that provision as well as the case law on the point. Therefore, specific guidelines need not be spelled out. The

[41] AIR SC 964

futility and insufficiency of any attempt to formulate such guidelines was also pointed out by the Court. Speaking for the Court **Chief Justice Pathak** observed:

Indeed it may not be possible to lay down any precise, clearly defined and sufficiently Channelized guidelines, but we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in constitutional scheme. In the **Kehar Singh Case**, a five judge Bench of the Supreme Court has examined in detail the scope of the President's pardoning power under Article 72. The petitioner Kehar Singh was convicted of an offence of murder for assassinating the P.M Smt. Indira Gandhi and Sentenced to death which was confirmed by High Court and his appeal to the Supreme Court also dismissed.

Thereafter, he presented a petition to the president for the grant of pardon. He prayed that his representative may be allowed to see the resident personally on order to explain his case. The president rejected his petition on the advice of the Union Government without going into the merits of the decision of the Supreme Court confirming the Death Sentence. The Court held that while exercising his pardoning power it was open to the President to scrutinize the evidence on the record and come to a different conclusion both on the guilt of Kehar Singh and the sentence imposed upon him. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact. Kehar Singh has no right to be heard by the President. The Court need not spell out specific guidelines for the exercise of power under Article 72 this is so because the power under Article 72 is the "widest amplitude" and can contemplate a myriad kinds and categories of case with facts and situations varying from case to case. The President cannot be asked to give reasons for this order. The power of pardon is part of the constitutional scheme. The order of the President cannot be subjected to judicial review on its merits. Accordingly it was held that the President must consider the matter as fresh accordance with the law laid down in the present case.

Thus, the Court held that the power to pardon belongs exclusively to the President and the Governors. The Courts could not ask the reasons for the President's orders. They could go into

Lastly, the Court made it clear that where there was no right in the condemned person to insist on an oral hearing before the President as the proceeding was of an executive character. The manner

of consideration of the petition lay within the discretion of the President and it was for him to decide now best he could acquaint himself with all the information that was necessary for its proper and effective disposal, if necessary, he could even given an oral hearing to the parties. The matter was entirely in the discretion of the President.[42]

Oral Hearing from the President

There is no right in the condemned person to insist on an oral hearing before the President. The proceedings before the President are of an executive character, and when the condemned person files his petition, it is for him to submit with it all the requisite information necessary for the disposal of the petition. He has no right to insist on presenting an oral argument. The manner of consideration of the petition lies within the discretion of the President and it is for him to decide how best he can acquaint himself with all the information that is necessary for its proper and effective disposal. The President may consider sufficient the information furnished before him in the first instance or he may send for further material relevant to the accused which he considers pertinent, and he may, if he considers, it will assist in treating with the petition, give an oral hearing to the parties. The matter lies entirely within his discretion. For the exercise of power under Article 72 of the Constitution, no specific guidelines can be spelled out by the Court as Article 72 itself provides sufficient guidelines.[43]

It may be pointed out that if Article 72 clemency power as a part of the 'Constitutional Scheme' is subject to the discipline of Article 21 then the accused convicted to die must have Fundamental Right to personal hearing; to say, as the Court does, that such an accused has no right to insist on presenting an oral argument is to say that Article 72 is not simply a part of the constitutional scheme (For the Court has insisted on such a right in all kinds of context where a decision (regarding of how it is named, whether "executive" " ministerial", or "quasi-judicial") affects the constitutional rights of the accused. It has even recognized the right to a post decisional hearing. In Capital Punishment situations, such hearing ought to be, under Article 21(a) constitutional imperative, if clemency power is a part of the constitutional scheme[44].

[42] Legislative Assembly Debates (1931).Vol 1, p.949 Quoted in the law commission of India -35th Report on Capital Punishment 1967 Vol.1, 5.
[43] Kehar Singh V. State, AIR 1989 SC 653.
[44] See Upendra Baxi "Clemency Erudition and Death, J.I.L.I., 1988,501 at 503.

A right to personal hearing would certainly set right or at least make visible the various factors (including the play of power, pull or prejudice and push of influence) and provide the matrix of the ultimate decision. The clemency power, in its final operation shows wide variation statistically[45].

Power to Pardon: Justifiability

The order of the President cannot be subjected to the judicial review on its merits except within certain limitations. However, the function of determining whether the act of a constitutional or statutory functionary fells within the constitutional or Legislative conferment of power, or is vitiated by self denial on an erroneous appreciation of the fell attitude of the scope of the power is a matter for the Court. The power to pardon belongs exclusively to the President and the Governor under the Constitution. There is also no question involved of asking for the reasons for the President's order. The Courts are the constitutional instrumentalities to go into the scope of Article 72 but cannot analyze the exercise of the power under Article 72 on its merit. The question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the Court by way of judicial review.

Power to Pardon: No interference by the Courts. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilized societies regarded seriously and recourse, either under express constitutional provisions or through Legislative enactment is provided to the judicial organ. But, the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power to some high authority to scrutinize the validity of the threatened denial of life or the threatened or the continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State. The power to pardon is a part of the constitutional scheme and it should be so treated in the India Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys High Status. The power to pardon rests on the advice tendered by the Executive to the

[45]See Upendra Baxi, "Capital Punishment", The Govt., of India Encyclopedia of Social Work in India, vol. 1 p. 51, at 54-55.

President, who subject to the provisions of Article 74(1) must act in accordance or with such advice.

Power to Pardon: Different From Judicial Power

It is open to President in the exercise of the power vested in him by Article 72 of the Constitution (in case of Governor of State under Article 161) to scrutinize the evidence on the record of the criminal case and come to a different conclusion from that recorded by the Court of record to the guilt of, and sentence imposed on the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in s wholly different plan from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it and this is so, notwithstanding that the practical effect of the presidential act is to remove the stigma of guilt from the accused to remit the sentence imposed on him. The legal effect of a pardon is wholly different from a judicial suppression of the original sentence. It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. The President is entitled to go into the matter of the case notwithstanding that it has been judicially concluded by the consideration given to it by the Supreme Court.

It is submitted that in Kehar Singh's case, a strange situation appears to have allowed proceeding. The Court was not averse to the grant of pardon by the President under Article 72 of the Constitution, and was shifting the judicial burden on the President. While passing the order the Supreme Court did not dismiss the writ Petition (Criminal) Nos. 526-27 of 1988 for want of jurisdiction, etc, but on the other hand, granted no relief to Kehar Singh as in Antuley's case. But the Supreme Court provided indirect indication to the President for clemency while is observed finally:

"..We hold that the petition invoking that power (Article 72) shall be deemed to be pending before the President to be dealt with and disposed of afresh. The sentence of death imposed on Kehar Singh shall remain in abeyance meanwhile."

It is further submitted that Prof. Upendra Baxi has right commented when he observed:

"Quite clearly, Kehar Singh fells to persuade as an act of reasoned discourse. This then raises deeper questions concerning judicial behavior. Why did the Court admit a Writ Petition against the President's order? Why then did it decide as it did? An answer suggests itself if we bear in full review the intensity of outraged public opinion at the Supreme Court's decision awarding Capital Punishment to Kehar Singh of which even the author had some access, through International media coverage, as far as Australia during his academic sojourn there.[46],

It is also relevant to quote that **Kehar Sing Case** might have different outcome, had it been decided by the Supreme Court after the change of the Government in 1989 or the same was decided by the President under Article 72 in the said circumstances. It reminds us the case of Sanjay Gandhi son of Late Mrs. Gandhi convicted in 'Kissa Kursi Ka' case who was acquitted by the Supreme Court when the regime at the Centre was changed. The Kehar Singh's case decision is likely to be termed as a political decision rather than judicial decision and reminds the Death Sentence and execution of **Raja Nand Kumar**. It has been quoted in M.P. Jain's Outline of Indian Legal History 122-126 (2nd Edn. 1966) which described the view of James Fitzjames Stephen that the Calcutta Supreme Court's trial was unfair especially in its reliance on circumstantial evidence and grave mistake of law. Keith described the Death Sentence and execution of Raja Nand Kumar as an 'odious crime' committed by the Supreme Court decision of 1878 trial was also described as "judicial murder". M.P. Jain also agrees with the overall view that the Nand Kumar's trial was vitiated. The view taken by Upendra Baxi about Kehar Singh's case Death Sentence and execution has a reference to the Death Sentence and execution of Nand Kumar's case in the following words:

"Just as we today, nearly two hundred and fifty years later discussed the judicial behavior in Raja Nand Kumar's case.

Indian posterity will now be burdened with a searching moral examination of Kehar Singh. But for the present, Kehar Sigh means just this Article 21 will remain the custodian of the due process rights of people in high places charged with corruption. It would not exist, even in its most attenuated forms, for the accused in cases of high political assassination. Convicted wholly on circumstantial evidence, even of most doubtful veracity, Kehar Singh emerges as a monument

[46] See Upendra Baxi "Clemency Erudition and Death, J.I.L.I. 1988, 501 at 506.

dedicated to the reason of State in India. The prospects for just governance in India depend on its rift and through going demolition.[47]"

It is submitted that if, as Supreme Court maintains, clemency power is a part of the "constitutional scheme", then Article 21 rights and standards assuredly extend to its exercise. Regardless of the issue whether it is discretionary power of the President or one on which he must act on the aid and advice of Council of Ministers, clemency power being a creature of the Constitution, must remain subject to Article 21 discipline. Even the history of this power, so elegantly traced by **Chief Justice Pathak**, has to be construed in India in the light of the sovereignty of Article 21 so well asserted in Antuley Case[48] Supreme Court is wholly reticent to apply the Antuley standard of Article 21 solicitude in Kehar Singh case. Deftly the Court returns the final burden to the executive and it hopes that its elegant and erudite discourse will provide a functional substitute for not allowing a Writ Petition challenging the constitutional validity of the conviction and sentence of **Kehar Singh**[49].

The power to grant pardon, reprieves etc and to suspend, remit or commute sentences, vested in the President and the Governors is very wide. The power is not affected by Sec 433(A) Criminal Procedure Code 1973. However since Sec 433(A) has been passed by the Parliament itself it seems that while exercising the powers under Article 72 & 161 of the Constitution, neither the President nor the State Government is likely to defeat the object of Section 433(A).

Although, the Supreme Court in **Kehar Singh Case** has ruled out the formulation of guidelines by the executive for the exercise of the pardoning power, need for the speedy disposal of petition filed under Article 72 and 161 of the COI or under Section 432 & 433 of Cr.P.C., 1973 cannot be denied. The Supreme Court has itself admitted that long and interminable delays in the disposal of these petitions are a serious hurdle in the dispensation of justice and such delays tend to shake the confidence of the people in the very system of justice. Therefore, the Court suggested that the executive authorities should rigorously follow a self imposed ruled that every such petition shall be disposed of within a period of three months from the date on which it was received.

[47] Ibid., at 506.
[48] A.R. Antuley vs. R.s. Nayak, (1988) 2 SCC 602
[49] Ibid., at p. 506.

IV) DEATH PENALTY UNDER OTHER LAWS

A) AIR FORCE ACT, 1950

SECTION 34: Offence in relation to the enemy and punishable with death Any person subject to this Act who commits any of the following offences, that is to say:-

• Shamefully abandon or delivers up any garrison, fortress, post, place or guard, committed to his charge, or which it is his duty to defend, or uses any means to compel or induce any commanding officer or other person to commit the said act; or

• Intentionally uses any means to compel or induce any person subject to military, naval or air force law to abstain from acting against the enemy, or to discourage such person from acting against the enemy; or

• In the presence of the enemy, shamefully cast away his arms, ammunition, tools or equipment or misbehaves in such manner as to show cowardice; or

• Treacherously holds correspondence with, or communicates intelligence to, the enemy or any person in arms against the Union; or

• Directly or indirectly assists the enemy with money, arms, ammunition, stores or supplies; or

• Treacherously or though cowardice sends a flag of truce to the enemy; or

• In time of war or during any Air Force operation, intentionally occasions a false alarm in action, camp or quarters or spreads reports calculated to create alarm or despondency; or

• In time of action leave his commanding officer or his post, guard, piquet, patrol or party without being regularly relived or without leave; or

• Having been made a prisoner of war, voluntarily serves with or aids the enemy; or

• Knowingly harbors or protects an enemy not being a prisoner; or

• Being a sentry in time or war or alarm, sleeps upon his post or is intoxicated; or

• Knowingly does any act calculated to imperil the success of the military, naval or Air forces of India or any forces co-operating therewith or any part of such forces; or

• Treacherously or shamefully causes the capture or destruction by the enemy of any Aircraft belonging to the force; or

• Treacherously uses any false air signal or alters or interferes with any air signal; or

• When ordered by his superior officer or otherwise under orders to cany out any Air Forces operations, treacherously or shamefully foils to use his utmost exertions to carry such orders into

effect; Shall on conviction by Court-martial, be liable to suffer death or such less punishment as is in this Act mentioned.

B) DEATH PENALTY UNDER ARMY ACT, 1950

SECTION 34: Offences in relation to the enemy and punishable with death Any person subject to this Act who commit any of the following offences, that is to say:-

• Shamefully abandons or delivers up any garrison, fortress, post, place or guard, committed to this charge, or which it is his duty to defend, or uses any means to compel or induce any commanding officer or other person to commit any of the said acts; or

• Intentionally uses any means to compel or induce any person subject to Military, Naval or Air force law to abstain from acting against the enemy, or to discourage such person from acting against the enemy, or to discourage such person from acting against the enemy; or

• In the presence of the enemy, shamefully casts away his arms, ammunition, tools or equipment or misbehaves in such manner as to show cowardice; or

• Treacherously holds correspondence with, or communicates intelligence to, the enemy or any person in arms against the Union; or

• Directly or indirectly assists the enemy with money, arms, ammunition, stores or supplies; or

• Treacherously or though cowardice sends a flag of truce to the enemy; or

• In time of war or during any Air force operation, intentionally occasions a false alarm in action, camp or quarters or spreads reports calculated to create alarm or despondency; or

• In time of action leave his commanding officer or his post, guard, piquet, patrol or party without being regularly relived or without leave; or

• Having been made a prisoner of war, voluntarily serves with or aids the enemy; or

• Knowingly harbors or protects an enemy not being a prisoner; or

• Being a sentry in time or war or alarm, sleeps upon his post or is intoxicated; or

• Knowingly does any act calculated to imperil the success of the Military, Naval or Air forces of India or any forces co-operating therewith or any part of such forces; or

Shall on conviction by Court-martial, be liable to suffer death or such less punishment as is in this Act mentioned,

C) DEATH PENALTY UNDER COMMISSION OF SATI (PREVENTION) ACT, 1987

SECTION 4: Abetment of Sati:-

Notwithstanding anything contained in the Indian Penal Code (45 of l860), if any person commits Sati, whoever, abets the commission of such Sati, either directly or indirectly, shall be punishable with death or imprisonment for life and shall also liable to fine.

D) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT 1985 AND DEATH PENALTY

SECTION 31(A): Death Penalty for certain offences after previous conviction:-

Notwithstanding anything contained in Section 31 if any person who has been convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, any of the offences punishable under Section 27(A) is subsequently convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy commit, an offence relating to-

• Engaging in the production, manufacture, possession, transportation, import into India or transshipment, of the narcotic drugs or psychotropic substances specified under column (1) of the Table below and involving the quantity indicated against each such drug or substance, or

• Financing, directly or indirectly, any of the activities specified in Clause (a), shall be punishable with death.

E) THE PREVENTION OF TERRORISM ACT (POTA) AND THE DEATH PENALTY

The Prevention of Terrorism Act (POTA) is the latest to join the bandwagon of the Death Penalty debate. The Act makes a terrorist act punishable with death.

SECTION 3(1): Defines a terrorist act as:

• Whoever with the intent to threaten the unity, integrity, security o sovereignty of India or strike terror in people by using bombs, dynamite or other explosive substances or inflammable substances or firearms or lethal weapon or poisons or noxious gases or any chemical of hazardous nature in such manner which will cause or likely to cause death or injury to any persons or loss or damage of any property or any equipment used to defense of India or any state government, or any other agencies or detains an threatens to kill or injure any person in order to compel the govt. or any other person to do or abstain from doing any act is; or

• continues to be a member of any association declared unlawful under the unlawful activities (prevention) Act or is voluntarily aiding or promoting any object of such association and in either of die case is in possession of any firearms, ammunition, explosive or other instrument

which may cause mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any person has committed a terrorist act.

SECTION 3 (2): Punishment for terrorist acts;

Whoever commits a terrorist act, shall-

• If such act has resulted in death of any person, be punishable with death or imprisonment for life and shall be liable to fine; or

• in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to life imprisonment and shall be liable to fine.

The first conviction which attracted the Death Penalty under the Act was in what know as the 'Parliament Attack Case' Sayed Abdul Rehman Geelani,

Mohammad Afzal, and Shaukat Hussain Guru have been condemned to death for then role in the December 13, 2001, attack on Parliament House, New Delhi, when Parliament was in session. Mohammad Afzal is been condemned to death by the Supreme Court and his death was to be executed on 14th Oct, 2006 but his clemency petition is pending before the President of India.

Nalini, Murugan, China Sathan and Perarivalan were also condemned in the "Rajiv Gandhi Assassination" case.

But what is the actual legal practice cannot be ignored in the modem system of criminal administration of justice. The real tussle, whether a person is guilty of murder begins to develop in the Court room, where the skilled defense lawyer can save a first degree murdered because of the facts that prosecution failed to prove the guilt of the accused beyond reasonable doubt. Even otherwise the Court after holding the accused guilty of murder may determine to choose lesser punishment than death keeping in view other factors and individual circumstances. It is well known that the number of women murderers sentenced to death is disproportionately low compared with the proportion of male murderers so sentenced. There was uproar in our Parliament and several members in the Lok Sabha agitated over reports that a Naxalite woman prisoner Miss Molina Dhak was awaiting execution in a Calcutta Jail. A large number of M.P.s appealed to the President to commute the Death Sentence awarded to Miss Molina Dhak and Miss Renu Mukherjee, in West Bengal Jails. In a statement they said, "We may have our differences with the Naxalite philosophy but we cannot agree with this extreme punishment meted out to these two young ladies." In a letter to Mr. Jatti, the then officiating President, Mr.

Chandra Shekhar, President, Janta Dal Party had said: "In India no woman political worker had been hanged yet. To do so now, when freedom has been so recently restored, would be most unfortunate". But after Rajiv Gandhi's assassination by a women criminals with any philosophy whatsoever.

In addition to political attitude regarding political workers and female murders, if a sentence of death is finally imposed there is still the matter of commutation by Governors or President. Whether or not a Death Sentence will actually be executed depends on the particular attitude towards the Death Penalty held by them. One Governor opposed to this punishment, may commute every sentence, another who holds the opposite view may commute few of them. Bias or adventurous circumstances may also exert an influence.

Capital Punishment is a complicated issue. If requires to be studied otherwise also. We may abolish it for a limited time in our country to make a thoughtful and practical study to reach the conclusion whether it is abolished or not. The suicide killers could not be deterred so far from committing murders including of high dignitaries for the protection of whom the imposition of Death Sentence is a basic argument.

V) STATUS OF DEATH PENALTY

STATUS OF CAPITAL PUNISHMENT - A WORLD PROSPECTIVE INTRODUCTION

According to Hume, 72,000 great and petty thieves were executed during the reign of Henry VII of England. In 1533, it is reported, Henry VIII had 27 Protestants burned because they would not acknowledge him as head of the Church[50], the Nuremberg Malefactor's Books reveal the following samples of the use of Capital Punishment: a cloth maker who strangled his own mother was burned in oil (1392); 18 Jews were burned alive on Jew Hill for murdering four Christian boys (1497); after 1571, an assault frequently sent the offender to the gallows; women thieves were hanged, although death by the sword (considered less shameful) was sometimes allowed; deliverance from the shameful rope (hanging) and substitution of execution by the sword were a matter of great gratitude; the penalty for stealing goods valued over a gulden was death in around 1552); persons who sent letters of defiance or threat were beheaded; wanton lewdness, adultery, and incest were punished by execution; swindlers, seducers and petty thieves were executed by the sword; a witch was tied to the pole, strangled and burned for conspiring

[50] Griffiths, the Chronicles of New Gate, p. 45.

with the devil (1659); perpetrators of treasure stoves were executed; insurrectionists and rioters were beheaded, especially peasants and reformers; the disturbers of the peace were executed.

CAPITAL PUNISHMENT IN ANCIENT ROME AND GREECE

In ancient times the law administrators unflinchingly executed murderers because they believed that "the life of each man should be sacred to each other man[51]". They realized that it is not enough to proclaim the sacredness and inviolability of human life, it must be secured as well, by threatening with the loss of life of those who violate what has been proclaimed inviolable the right of innocent to live. Murder, being the worst of crimes must deserve the highest penalty which is Death Sentence. This shall also be in accordance of the principle that punishment must be proportionate to the gravity of the crime."

Ancient Romans accepted the deterrent value of Death Penalty, under the Roman Criminal Law the offender was put to public ridicule and his execution took the form of a festival. Death was caused to the condemned person in a most tortuous manner. For example, one who killed his father was sewn in a sack along with a live dog, cat and a cobra and thrown into river. The object was to make him die most painfully. The Sentence of death could be awarded even to a debtor who was unable pay to off the debt of his creditor, Thus a creditor who found that his debtor was unable to pay off the debt could vent his wrath upon the debtor by marching him up the Trepan rock and hurling him from there to death.

The Greek penal system also provided Death Sentence for many offences. The offenders were stripped, tarred and feathered to death publicly. Execution of Death Penalty in public places was favoured because of its deterrent effect.

CAPITAL PUNISHMENT IN ENGLAND

The history of crime and punishment in England during the medieval period reveals that infliction of Death Penalty was commonly practiced for the elimination of criminals. Henry VUI who reigned in England for over fifty years[52] was particularly famous for his brutality towards the condemned prisoners. He used to boil the offenders alive. His daughter Queen Elizabeth who succeeded him was far stiffer in punishing the offenders. The offenders were not put to death at once but were subjected to slow process of amputation by bite so that they suffered maximum pair and torture. The condemned offenders were often executed publicly. These brutal methods

[51] "Homo homini res sacra.

[52] Henry VIII ruled over England from 1491 to 1541 Ad.

of condemning the offenders were, however, abandoned by the end of the eighteenth century when the system of transporting criminals to American Colonies at their option was firmly established.

Prof. Fitzgerald observed that the history of Capital Punishment in England for the last two hundred years recorded a continuous decline in its incidence. During the later half of the eighteenth century as many as two hundred offences were punishable with Death Penalty. The obvious reason for the frequency of execution was the concern of the ruler to eliminate criminals in absence of adequate police force to detect and prevent crimes. The methods of putting offenders to death were extremely cruel, brutal and torturous.

As the time passed the severity of Capital Punishment was mitigated mainly in two ways: Firstly, his sentence could be avoided by claiming the 'benefit of clergy' which meant exemption from Death Sentence to those male offenders who could read and were eligible for holy order. Secondly, the prisoners who were awarded Death Sentence could be pardoned if they agreed to be transported to the American Colonies.

Thus by 1767 condemned felons could be transported for seven years in lieu of Capital Sentence. In course of time death punishment for felony was abolished[53] and in 1853 the system of transporting criminals also came to an end and a new punishment of penal servitude was introduced.

Commenting the frequency of executions during the eighteenth century Donald Taft observed that during no period in the history of western civilization were more frantic Legislative efforts made to stem crime by infliction of Capital Punishment as in that century[54]. In his opinion the growing importance of this punishment was owing to the agrarian and industrial changes in the English society resulting into multiplicity of crimes which had to be suppressed by all means. Supporting this view Prof. Radzinowicz observed that more than 190 crimes were punishable with death during the reign of George III in 1810.

In nineteenth century, however, the public opinion disfavoured the use of Death Penalty for offences other than the heinous crimes. Bentham and Bright, the two eminent English law reformers opposed frequent use of Death Penalty. Sir Samuel Romilly also advocated a view that the use of Capital Punishment should be confined only to the cases of willful murder.

[53] In subsequent years this benefit was extended to women also. It was finally abolished in 1927.
[54] Death as a punishment for felony was abolished in 1827.

The irrevocable and irreversible nature of Death Penalty gave rise to a number of complications which invited public attention towards the need for abolition of this sentence. Consequently the British Royal Commission on Capital Punishment was appointed in 1949 to examine the problem. As a result of the findings of this commission Death Sentence was suspended in England and Wales for five years from 1965 and was finally abolished by the end of 1969.

However, the constant rise in the incidence of crime in recent years has necessitated Britain to reassess its penal policy regarding Death Penalty. The two latest decisions[55] of the Privy Council emphatically stressed that the award of Death Sentence is not violative of human rights or fundamental rights. It was only at the commencement of the twentieth century that the actual exemption from Death Penalty began. In 1908, with the passing of the Children's Act, persons under sixteen were exempted from Capital Punishment[56]. Still another reduction was effected in 1922. This time it was infanticide committed by women which came to be exempted from Capital Punishment under the Infanticide Act 1922. In 1930 the Select Committee of Parliament debated a proposal for the abolition of Capital Punishment for an experimental period of five years, but to no purpose, because six out of the fifteen members of the Select Committee did not agree, In 1938, however, as a result of the pressure of public opinion, a private motion to abolish the Death Penalty for an experimental period of five years was passed in the House of Commons. But the Government of the day did not implement it. A similar private motion was passed in 1948 and the then Government felt compelled to appoint the now famous Royal Commission on Capital Punishment in 1949. After profound deliberations and interviews with experts in several fields, the Royal commission came to the conclusion that "prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment". It, however, opined that "The outstanding defect of the law of murder is that it provides a single punishment for a crime widely varying in culpability" It further concludes that this rigidity was the main defect in the law of murder[57]. In 1957, the Homicide Act was passed which excluded some of the murders from the category of crimes punishable with Capital Punishment. Thus, it is seen that it took almost a century for the law regarding Capital Punishment in England and Wales to be really modified in a manner similar to that first proposed in 1864.

[55] Taft & England: Criminology (4th Edn.) p. 297.
[56] "Report from the Select Committee on Capital Punishment," 1929-30, H.M.S.O., London, 1931, p,. xlvi.
[57] Ibid., p. 6.

In 1965, England and Wales abolished Capital Punishment for murder temporarily as an experiment for a period of 5 years. Capital Punishment for murder was finally abolished permanently from the Statute Book of England and Wales in the month of July 1970 vide. The murder (Abolition of Death Penalty) Act, 1970.

CAPITAL PUNISHMENT IN U.S.A.

Available literature on Capital Punishment in the United States testifies that in modem times the sentence of death is being sparingly used in that country. This, however, does not mean that Capital Punishment is altogether abolished in United States. The retention of Death Penalty is still considered to be morally and legally just though it may be rarely carried into practice. The American penologists justify the retention of Capital Punishment for two obvious reasons. Firstly, from the point of view of protection of the community, Death Penalty is needed as a threat or warning to deter the potential murderers. Secondly, it also accomplishes the retributive object of punishment inasmuch as a person who murders another has perhaps forfeited his claim for life. It is, however, generally argued that the risk of being executed in fact serves no deterrent purpose because the murderers often plan out their crime in such a way that the chances of their detection are rare and they are almost sure of their escaping unpunished. The retention of Death Penalty for capital murderers is justified on the ground that if not executed, they will remain menace and potential danger to society.

Recent trend in America is to restrict Capital Punishment only to the offence of murder and rape.[58] Another noticeable trend during the recent years is to make the process of execution private, painless and quick as against the old methods of public execution which were brutal, painful and time consuming. At present, the common modes of inflicting Death Penalty in United States are electrocution, hanging, asphyxiation with lethal gas and shooting. Several States have abolished death punishment with beneficial results. More recently **Mr. Justice Brennan** and **Mr. Justice Marshall** of the U.S. Supreme Court in a well-known decision **Furman vs. The State of Georgia**[59] observed that Death Penalty should be outlawed on the ground that it was an anachronism degrading to human dignity and unnecessary in modem life.

But most of the judges did not agree with the view that the eighth Amendment of the American Constitution which prohibits Capital Punishment for all crimes and under all circumstances is a

[58] Australian law also provides Death Penalty for the offence of murder and rape.
[59] (1972) 408 US 238.

good law. Some of the recent American decisions suggest that the Courts are convinced that Death Penalty is not violative of the Constitution. However, in some parts of the United States the Death Penalty has been retained only for murder of a prison officer by a life convict.

An international survey carried out in 1962 by the United Nations, however, confirmed that neither suspension nor abolition of the Death Penalty had any immediate effect in increasing the incidence of crimes punishable with sentence of death. The countries which had abolished Capital Punishment, notably, Germany, Austria, Scandinavia, Netherlands, Denmark and some Latin American States reported no ill-effects of abolition.

It is significant to note that with the abandonment of the torturous and barbarous methods of inflicting Death Penalty the meaning of the term 'Capital Punishment' now extends only to Death Sentence for murder or homicides.

Particularly, in western countries rape is no longer serious crime for two main reasons. Firstly, with general laxity in morality the gravity of this offence is fast declining. In the second place the scientists have established rape as a mere passive surrender by the victim because in their opinion it is practically impossible to commit rape unless the victim is made unconscious. Likewise, treason being exclusively a war time offence, it is futile to enlist it as a peace time offence and to provide Death Penalty for it.

In the modem reformative era the retributive principle of 'tit for tat' does not serve any useful purpose. Retribution can only do more harm than good to the criminals and can never be an effective measure of suppressing crime. Retaliation and retribution, apart from being outdated are also against the accepted norms of modem criminal justice Beccaria was perhaps the first criminologist who raised a crusade against Capital Punishment in 1764. He strongly protested against the use of cruel and barbarous modes of punishing the offenders and emphasized the need of individualized treatment. He expressed a view that death as a sentence symbolizes man's cruelty and insignificance of human life. In course of time mens rea became the guiding principle for determining the guilt and punishment of the offender. It is, however, true that in certain cases it is difficult to determine mens rea of the offender.[60] Yet another reason for discarding retribution as a principle of criminal justice to be found in the fact that putting a person to death

[60] Dr. VimlaDevi V. Delhi Administration, AIR 1963 SC 1572.

virtually amounts to killing him deliberately. That apart, experience has shown that more than eighty percent of the deliberately.

That apart, experience has shown that more than eighty percent of the persons committing murders are not really murderers but are persons who have fallen a prey to this heinous crime due to circumstances such as passion, provocation, jealousy, sexual impulsiveness, poverty or intoxication. Obviously, Death Sentence is hardly an appropriate punishment for such offenders. Prof. Scot has expressed doubts about the adequacy of Capital Punishment as it involves the risk of innocent person being sent to guillotine. Mistakes of judgment as to guilt are known to have occurred. If an innocent person is hanged due to miscarriage of justice, his life is lost forever and the loss is irredeemable. Perhaps it is for this reason that slightest doubt about the guilt of the accused entitles him for an acquittal on the plea of 'benefit of doubt[61]' under the Criminal Law of most countries.

It is quite often argued that Death Penalty "brutalizes" human nature and cheapens human life. Thus it vitiates the humanitarian sentiments concerning the sacredness of human life[62]. It is for this reason that David Pannick strongly argues that Death Penalty should be declared unconstitutional as cruel and violation of due process of law.

The American view point for and against Death Sentence may be summarized as follow:-

Pro-Arguments

1. Elimination of murderers by execution is fair retribution and saves potential future victims.

2. Punishments must match the gravity of offence and worst crimes should be severely punished.

3. Societies must establish deterrents against crime. Death Sentence serves as a good deterrent.

4. Death is a just punishment and Death Penalty has been held constitutionally valid to ensure justice for condemned offenders.

Con-Arguments

1. An execution arising out of miscarriage of justice is irreversible.

2. Capital Punishment is lethal vengeance which brutalizes the society that tolerates it.

3. Capital Punishment does not have deterrent effect. Hired murders take the risks of the criminal justice system whatever the penalties.

[61] Daiya Moshya Bhil V. State of Maharasthra, AIR 1984 SC 1730.

[62] D. Dressier : Reading in Criminology and Penology (2nd Reprint), p. 486.

4. Thus it has no rational purpose. Death Penalty is unjust and often discriminatory against poor who cannot defend themselves properly.

CAPITAL PUNISHMENT IN CANADA

Canada is today perhaps the only country which, after a good deal of deliberation and prolonged investigation and examination of the aspects of Capital Punishment through the Joint Committee of the Senate and House of Commons specifically appointed for the purpose, decided to retain Capital Punishment in 1956.

In spite of this, however, we find disinclination prevalent in the Administration of Justice to award Capital Punishment as seen in Statement 3 overleaf. The Statement indicates that on an average about one person in sixteen lakhs sixty six hundred of people got the award of Death Sentence for murder in 1965 in Canada.

For further enlightenment, we shall now see the State of affairs in two other countries, one of Europe, France, the country which after the revolution gave to the world the famous tenets of liberty, equality and fraternity and another of Asia, our neighbour, Japan, to acquire a proper perspective of the subject.

Till the early eighteenth century, French law authorized infliction of the Death Penalty for more than one hundred distinct offences. The French Code of 1810 listed 36 crimes punishable by death. During the period from 1832 to 1842, gradual removal of several crimes from the list of those punishable by death brought down the number of such offences. By 1962, the number of capital crimes came down to 14.69 They included espionage, murder, treason, crimes against the country's integrity (independence).

CAPITAL PUNISHMENT IN JAPAN

In Japan Death Penalty is mandatory for the offence of "inducement of foreign aggression" by a "person who in conspiracy with a foreign State uses the Armed Forces against Japan[63]". It is discretionary for the offences of "assistance to enemy, setting fire to dwellings, destruction by explosives, death or wounding through robbery, death resulting from rape in the course of robbery and homicide[64]". Killing of "his or her own spouse's lineal ascendant shall be punished with death or imprisonment at forced labour for life". In all, there are twelve capital offences in Japan. They include arson, espionage, murder, treason, homicide accompanied by or resulting

[63] "The Constitution and Criminal Statutes of Japan," Ministry of Justice, Japan, 1960, p. 40.
[64] Patricrk, L. H., Ibid,p. 398.

from another serious crime, illegal use of explosives, etc. Statement 5 illustrates the disinclination to award Capital Punishment by the Administration of Justice in Japan during the year to year period from 1961 to 1966. Statement 5 indicates that on an average about one person out of every hundred lakhs of people got the award of Death Sentence for murder by the Administration of Justice in Japan in the year 1965.

CHAPTER- IV

MERCY AND FAIRNESS IN INDIA

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MERCY IN INDIA

The convicted person may file the petition soughting for the mercy as per the Constitution of India because the President of India and the Governor of each State in India have power of Mercy which is evident and proved by the following parts of the Constitution of India.

PRESIDENT'S POWER OF MERCY IN INDIA

1. **Article-72(1)** of the constitution of India says as under:-

   The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence-

   (a) In all cases where the punishment or sentence has been given by a Court martial,

   (b) In all cases where the punishment or sentence has been given for an offence against any law relating to a matter to which the executive power of the Union extends and

   (c) In all cases where the punishment is **Death-Penalty**.[65]

2. **Article-74(1)** of the Constitution of India says as under:-

   There shall be a Council of Ministers with the Prime Ministers at the head to aid and advise the President who shall, in the exercise of function, act in accordance with such advice:

   Provided that the president may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsiderations.

3. **Article-74(2)** of the Constitution of India says as under:-

[65] Mohd. Azmal Amir Kasab vs. State of Maharashtra, AIR 2012 SC 3565.

The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court.

GOVERNOR'S POWER OF MERCY IN INDIA

4. **Article-161** of the Constitution of India says as under:-

   The Governor of the State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

5. **Article-163** of the Constitution of India says as under:-

   (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of functions except in so far as he/she is by or under the Constitution required to exercise his/her functions or any of them in his /her discretion.

   (2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under the Constitution require to act in his/her discretion, the decision of the Governor in his/her discretion shall be final, and the validity of any thing done by the Governor shall not be called in question on the ground that he/she ought or ought not to have acted in his/her discretion.

   (3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not inquired into in any Court.

NOTE

The petition soughting for Mercy shall be processed and disposed[66] by following the Constitutional procedure stated above.

[66] Mohd. Azmal Amir Kasab Vs. State of Maharashtra, AIR 2012 SC 3565 and Bachan Singh Vs. State of Punjab, 1980 (2) SCC 684.

FAIRNESS IN INDIA

The fairness of the Rule of Law in India is praised and appreciated in world also because the Constitutionalism is India that is India has its world-famous Constitution accepted and to be followed by the citizens of the Indian. The fairness in India is well evident and proved by the following established facts in India:-

1. The Constitutionalism and written Constitution is in India. Its Article-51A (a) says that it shall be the fundamental duty of every citizen of India to be abide by the constitution and respect its ideas and institutions, the National Flag and the National Anthem.

2. There is a Preamble of the Constitution of India and the aim of this Preamble can never be changed at all.

3. As per the Preamble of the Constitution, the Constitution of India is to secure to its all citizens:
   Justice in social, economic and political matters,
   Liberty in thought, expression, belief, faith and worship,
   Equality in status and opportunity, and
   Fraternity assuring the dignity of the individual among them.

4. **Part-II (Article-10)** of the Constitution of India says as under:-
   Every person who is or is deemed to be a citizen of India shall continue to be such citizen subject to the provisions that may be made by the Parliament of India in this regard.

5. **Part-III (Article-12)** of the Constitution of India sys as under:-
   For Fundamental Rights contained in the Part-III of the Constitution, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and Legislative of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

6. **Part-III (Article-13)** of the Constitution of India says as under:-
   (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of Part-II of this Constitution, shall be void to the extent of such inconsistency.
   (2) The State shall not make any law which takes away or abridges the rights conferred by the Part-III of this Constitution and a law made in contravention of this Clause shall be void to the extent of the contravention.

7. **Part-III (Article-14)** of the Constitution of India says as under:-

The State shall not deny to any person equality before the law or the equal protection of the law within the territory of India.

3(a) "law" includes any ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law.

3(b) "law in force" includes laws passed by a Legislature or other competent authority in the territory of India. (In India, Parliament and State's Legislatives are law maker.)

8. **Part-III (Article-15)** of Constitution of India says as under:-
   - **(1)** The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them.
   - **(2)** No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-
   - **(a)** Access to shops, public restaurants, hotels and places of public entertainment or
   - **(b)** The use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State's Fund or dedicated to the use of general public.

9. **Part-III (Article-16)** of the Constitution of India says as under:-
   - **(1)** There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
   - **(2)** No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

10. **Part-III (Article-17)** of the Constitution of India says as under:-
    "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

11. **Part-III (Article-18)** of the Constitution of India says as under:-
    - **(1)** No title, not being a military or academic distinction, shall be conferred by the State.
    - **(2)** No citizen of India shall accept any title from any foreign State.

12. **Part-III (Article-19)** of the Constitution of India says as under:-
    - **(1)** All citizens shall have the right-
      - **(a)** to freedom of speech and expression,
      - **(b)** to assemble peaceably and without arms,
      - **(c)** to form associations or unions or co-operative societies,
      - **(d)** to move freely throughout the territory of India,
      - **(e)** to reside and settle in any part of the territory of India, and

(f) to practice any profession, or to carry on any occupation, trade or business in the territory of India.

13. **Part-III (Article-20)** of the Constitution of India says as under:-
    (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
    (2) No person shall be prosecuted and punished for the same offence more than once.
    (3) No person accused of any offence shall be compelled to be a witness against himself/ herself.

14. **Part-III (Article-21)** of the Constitution of India says as under:-
    No person shall be deprived of his life or personal liberty except according to procedure established by law[67]. (Protection of Life and Personal Liberty)

15. **Part-III (Article-21A)** of the Constitution of India says as under:-
    The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

16. **Part-III (Article-22)** of the Constitution of India says as under:-
    (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his/her choice. (Protection against arrest and detention)
    (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to Court of the magistrate and no such period without the authority of a magistrate.

17. **Part-III (Article-23)** of the Constitution of India says as under:-
    (1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
    (2) State shall, in imposing compulsory service for public purpose, not make any discrimination on grounds only of religion, race, caste or class or any of them.

18. **Part-III (Article-24)** of the Constitution of India says as under:-

[67] Bachan Singh vs. State of Punjab, 1980 (2) SCC 684 and Madhu Mehta vs. Union of India, AIR (1989) SCC 62.

No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

19. **Part-III (Article-25)** of the Constitution of India says as under:-
Subject to public order, morality and health and to other provisions of Part-III of the Constitution, all persons and are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

20. **Part-III (Article-26)** of the Constitution of India says as under:-
Subject to public order, morality and health, every religious denomination or any Section there of shall have right-
(a) To establish and maintain institutions for religious and charitable purposes,
(b) To manage its own affairs in matters of religion,
(c) To own and acquire movable and immovable property, and
(d) To administer such property in accordance with law.

21. **Part-III (Article-27)** of the Constitution of India says as under:-
No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.
22. **Part-III (Article-28)** of the Constitution of India says as under:-
No religious instruction shall be provided in any educational institution wholly maintained out of State's Fund.

23. **Part-III (Article-29)** of the Constitution of India says as under:-
No citizen shall be denied admission into any educational institution maintained by the State receiving aid out of State Fund on grounds only of religion, race, caste, language or any of them.

24. **Part-III (Article-32)** of the Constitution of India says as under:-
(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by the Part-III of the Constitution of India is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs including writs in the nature of Habeas Corpus, Mandamus, Pobibistion, Quo Warranto and Certiorari which ever may be appropriate for the enforcement of any of the right coffered by the Part-III of the Constitution of India.
(The right guaranteed by this Article shall not be suspended)

NOTE: - Article-226 of the Constitution of India has conferred by the such powers as stated above to each and every High Court of India. However, the Article-141 of the Constitution of India says that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. And the Article-144 of the Constitution of India says that all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.

25. Articles 309, 3011, 315 etc. also assure and ensure the world-wide appreciable Fairness in India. Article-315 is regarding the UPSC and State-PSC while Article-309 to 3012 are regarding the protection of Govt. Servants from unfair, arbitrary and discriminatory actions of their employers/ Departments. This is also Fairness in India.

FAIRNESS AS PER SECTIONS-34 AND 35 OF IPC

The Sections-34 and 35 of IPC also assure and ensure the Fairness in India. These sections of IPC are as under:-

Section-34:- When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him/her alone.

Section-35:- Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for that act in the same manner as if that act were done by him/her alone with that knowledge or intention. (This also Fairness in India.)

FAIRNESS AS PER THE JURISPRUDENCE

In India, neither allegater nor allegated can be judge. Similarly, the person connected to any party of the case, blood related or friend or enemy or relative or boss etc, can never be the judge or member of the Court for that case so that the Fairness in India could not be adversely affected at all. This is also Fairness in India.

CHAPTER- V

METHODS FOR EXECUTION

OF

DEATH PENALTY

CHAPTER- V

METHODS FOR EXECUTION OF DEATH PENALTY

The Great Emperor Ashoka once said that State should not penalize with reprisal.

Death Penalty has been a method of punishment since the time immemorial. Not much has changed over the years in the support or against the Death Penalty.

Civilization is formed when both the punishment and the crime correlate to the culture from which they emerge with the advent of various civilizations. The methods used for execution of Death Penalty have observed substantial humanized changes.

Although in India not much has been deliberated on the issue of mode of execution of Death Penalty. The countries around the globe that practice the Death Penalty as a form of punishment execute the Death Sentence by different methods as the Death Penalty of the land. Since the time immemorial Capital Punishment had being used to end life and draw as exemplary punishment to bring a deterrent effect in the society.

The methods of execution can be divided broadly into two categories[68]- Traditional methods and Modern methods.

Traditional Methods

Traditional methods are those methods of execution that were used is the more barbaric manner and were basically to deter crime and give an exemplary methods of awarding death[69]. Such as, scaphism, guillotine, republic marriage, cement shoes, execution by elephant, walking the plank, bestiarii, mazzatillo, sawing, flaying, blood eagle, the gridiron, crushing, breaking wheel, the Spanish tickler, burning at the stake, bamboo, premature burial, ling chi, seppuku, brazen bull, Colombian necktie, crucifixion, drawn hanged and quartered, etc.

1. SCAPHISM

Scaphism is an ancient Persia method of execution. It was a method where the accused person was placed in a tree trunk with only the head, hands and feet posturing while he was stripped naked. And later they are forcefully nurtured milk and honey waiting for them to have a severe

[68] 187th Report of the Law Commission of India on 'Mode of Execution of Death Sentence and Incidental Matters

[69] ist25.com/25-of-humanitys-most-brutal-methods-of-execution

diarrhea problem. To enhance the torture honey was spread over their body to fascinate insects while they are left in a motionless pond to float. In this method death would take more than 15 days and most likely it would result of hunger and thirst that turns into dehydration and shock. This method of execution is no more in practice among any of the countries of the world.

2. GUILLOTINE

It was one of the first methods of execution that was invented is the late 1700 keeping mind the intention to end the life rather than inflict pain. It has been banned is France now and the execution by Guillotine was in 1977 for the last time.

3. CEMENT SHOES

It was a method of execution similar to republican marriage under it the person was not tangled to someone of opposite gender but on the contrary his feet were place in blocks made up of cement and then the person was thrown into the river to drown and die in agony.

4. EXECUTION BY ELEPHANT

It was a very Common method of execution in South East Asia under it the accused was placed before the giant elephants that were trained to prolong the death of the accused by crushing him under the powerful foot of the elephant. By using this method the ruler ordering it just wanted to display that the sovereign is even in command of the nature.

5. WALKING THE PLANK

It was a method mainly used by pirates and rogue seafarers to execute the people by simply throwing the accused in the middle of the sea where they did not even had enough time to drawn but before that the sharks and big fishes that tended to follow the ships just finished them off.

6. BESTIARII

There was a group of people who would fight beasts in the days of Ancient Rome and bestiarii referred to this group, although occasionally this act was voluntarily accomplished for money or recognition and many times bestiarii were political detainees who were sent armless and stripped to the arena and they could not defend themselves.

7. MAZZATILLO

It was a popular method of execution of Death Penalty in Papal States during the 18th Century. It is so-called because of the instrument used in execution which is usually a mallet. The Person who is being executed would be taken to the scaffolding in a public square where there is nothing more than the executioner and coffin. The executioner would than use his full strength to put the mallet with the great strike on the head of the prisoner and would lead to very painful death.[70]

Modern Methods

Modern methods are those methods that are used is the modern era and are more humane and less brutal but still serve as an exemplary method of awarding death. Such as, Lethal injection, the electronic chair, gas chamber, single person shooting, firing squad, beheading, stoning, hanging, etc. The Report of Royal Commission on Capital Punishment 1949-1953 deeply discussed the widespread modes of execution of Death Punishment. Since then various modern methods of execution have evolved just in order to fulfill the three Conditions as given under the report on methods of execution 1949-1953 the Royal commission, which are as follows

(a) The process should be as quick as possible

(b) It should be least painful as far as possible

(c) It should have least mutilation as possible.

The modern methods of execution have been studied in detail as below[71]:-

1. LETHAL INJECTION

The process of execution by a lethal injection starts with preparation of the prisoner or accused for his death which starts with shower changing of clothes and the last meal. Then the prisoners is proceeded towards the execution room or chamber and once he settles himself on the execution bed two IN tubes are injected in his arms through which a saline solution is injected. There is a separate antechamber which is formed to control and executed the Death Sentence, the tubes are connected to the anteroom and once the proceedings are ready to begin the curtains are drawn back for the eyewitnesses to see the execution and then the inmate is asked to make his last statement, there is a telephone in the anteroom which is directly connected to those officials

[70] 187th Report of the Law Commission of India on 'Mode of Execution of Death Sentence and Incidental Matters'

[71] Death Penalty information center (2016)

who can stay the execution, But until and unless the execution is stayed till the last minute of fixed time for execution the execution process begins. The number of executioners is not fixed and there can be one or more number of the executioners also. The executioner are not known or shown to the prisoner or witnesses as well.

There are possibilities of a machine to deliver the lethal drugs but there is a possibility of mechanical failure and therefore the drugs are generally administered by the human executioner only.

The drug of lethal injection is processed in the given order only:

a) Sodium Thiopental –The other name for it is Pentothal which is a barbiturate and is used as a surgical anesthetic. The usual dose for a patient is of about 150 mg in a surgery which is administered to the patient for making him unconscious while for execution the dose is raised up to 5000 mg which is a very high dose of anesthesia which makes the prisoner completely unconscious. And once the dose is pushed into the body the prisoner will not feel anything if he is still alive.

b) Pancuronium Bromine –The other name used for it is Pavulon, this is given in a strong enough dose to paralyze the diaphragm and lungs as it has the properties of a muscle relaxant. When it is used for medical purpose the normal dose is 40-100 mcg per kilogram while the dose is extended to up to 100mg per kg when execution is to be done and the result is visible within 2-3 minutes of injecting.

c) Potassium Chloride- It is the third drug which is toxic agent that induces cardiac arrest but it is not used by many states as the first two drugs are sufficient to complete the execution process and bring about death. Between each dose during the process of administering the two doses saline solution is used to flush the IV. The doctor declares the prisoner dead within the period of 2-3 minutes after the final dose is given. The next step after the declaration of death is of sending the body to the coroner for verification and at times an autopsy is also done. At the end the body is handed over to the family for burial or if no one comes up the state can also perform the burial.

2. THE ELECTRONIC CHAIR

The invention of electric chair was done by Harold P. Brown when he was investigating the uses of electricity for executive. The chair was adopted for execution for the first time in 1889 and the first execution by electric chair was done in 1890 in New York.

The process of execution by electric chair begins by bringing the convict to the chamber where the chair is kept after primary preparations of last shower & last meal etc.

Once the prisoner is ready he is tied to the chair with metal straps and wet sponge is kept on his head in order to intensify& support the conductivity. A close circuit is prepared by placing the electrodes on the head and leg. Keeping in mind the physical state of the prisoner two currents of different levels and for different durations are applied for execution. Generally a 2,000 volt current is passed in the first round for about 15 second in order to cause unconsciousness and to stop the heart the subsequent round of current pulls down usually upto 8 amps.

This process of passing the current generally causes severe injury to internal organs due to the high body temperature which can raise upto 1380°F that is 590ºC. Although body becomes unconscious within one or two seconds and exceptionally may take bit more time and after that the body hardly feels anything due to unconsciousness but the post execution cleanup tasks are not very pleasant to be done as the skin can also melt at times due to such high temperature.

This method of execution has been quite popular since years in countries like Germany, USA and Japan etc. and has been used since last many years and still the prisoners are given a choice between Gas Chamber and lethal injection in some State of USA.

3. GAS CHAMBER

The process of execution by gas chamber is similar to lethal injection with some basic differences. Once the primary preparations are done the executioner places a small compartment containing pellets of the Potassium Cyanide (KCN) under the execution chair. The prisoner is asked to enter the chamber and confirm be seated on the chair once this container is placed then the position of the convict is secured by the straps on the seat. After this the chamber is sealed and a sufficient quantity of concentrated sulfuric Acid (H_2SO_4) is poured into the chamber with the help of a tube which leads to the container leaving potassium Cyanide. Once this preparation is done the curtains are drawn back and the eyewitnesses are permitted to see the prisoner making his last statement. As the last statement is recorded once more a level of gases is passed and now the chemical reaction takes place when the acid mixes with the cyanide pellets lethal Hydrogen Cyanide (HCN) gas is generated. The prisoners are asked to take deep breadth to help the execution process and death be less painful but generally the prisoners do not take breadth, and by stopping breadth finally delaying unconsciousness and increasing the pain and suffering. The death by Hydrogen Cyanide is painful and unpleasant.

The gas is expelled from chamber and it neutralized with anhydrous ammonia (NH_3) once the prisoner is dead. The gases that are Ammonia and acid that are removed are very hazardous and proper precautions are taken to remove it. In order to remove the dead body from the chamber the guards still take oxygen masks to be safeguarded.

Once the doctor examines the body and declares it dead it is handed over to the family for burial.

4. SINGLE PERSON SHOOTING

One to one person shooting has been the most common method of execution used in more than 70 countries in the world. Soviet Russian and China used a single bullet policy to shoot the prisoner. In country like Taiwan the prisoner is first injected by anesthesia to reduce the suffering while contrary to it in China the Govt. ask the family of the criminal to pay for the bullet which is being used to shoot the person.

5. FIRING SQUAD

The method of execution is considered to be honorable and it was generally not use for war criminals. Under this method a squad of about 4 to 5 people were ordered to fire on a single man targeting his head or heart which would generally result in strikes and death, not many countries recommend this method anymore.

6. BEHEADING

It is still a method of execution in the countries that follow the Islamic Sharia law. Saudi Arabia is one of the Islamic Country where beheading is a common method of execution by Islamic Law[72]. A curved single edged sword is used to behead the prisoner and Friday evening are specially decided to do the beheading at the central square which is the biggest prayer spot where maximum people witness the execution which somehow affects like a deterrent factor for the offenders of crimes like rape, murder, apostasy etc. which are taken up as serious offences in Islamic Countries.

7. STONING

It is one of the most common methods of execution in the Islamic countries for crimes like adultery and other social crimes. In countries like Saudi Arabia stoning is common and in the process of stoning the prisoner is buried in land upto waist if prisoner is a male and for female prisoner upto her neck so that there is no scope of rescue and the stones to be used shall not be too big to kill in one or two strikes and as well as they should not be too small to be called

[72] Amnesty international report (2016)

pebbles hence the size of the stone should be adequate enough to cause severe injuries which are resulting into a painful death.

8. HANGING

Hanging is one of the most common methods used to execute prisoner and deterrent crimes. There are many ways in which hanging is done such as the short drop hanging, suspension hanging, the standard drop hanging and the long drop hanging. Many countries around the world are using hanging as the most appropriate method for execution of Death Penalty.

COMPARISON

Based on the discussion in the chapter it can be said that the methods used for execution since the time immemorial to the present day have been exemplary and had been an effective source to generate deterrence for the criminals and common man in the society. After the study of above given methods of execution which are prevalent and commonly used by different countries of the world an effort has been done to compare the most used methods and finally reach a deduction as to the comparatively better method of execution. The method that seems to be most appropriate in the present day is execution by intravenous lethal injection as although the ultimate end is the death of the prisoner but it is the most simple and quickest method. The person hardly feels the pain and hardly has any suffering. So to conclude it can be stated that intravenous lethal injection is one of the best method for execution[73].

[73] 187th Report of the Law Commission of India on 'Mode of Execution of Death Sentence and Incidental Matters'.

CHAPTER- VI

DEBATE ON ABOLITION AND RETENTION OF DEATH PENALTY

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ABOLITION OF DEATH PENALTY

"*God alone can take life because He alone gives it*", Mahatma Gandhi.

Exponents of utilitarianism like Bentham and Cesar Beccaria insisted that punishment is an evil. Cesare Beccaria, the stallion philosopher and reformer was the first to propose that Death Penalty sought to be abolished. He further added that the State has no right to put an individual to death because the life of the individual was not surrendered to it as a part of the consideration of social contract.[74]

"Thou shalt not kill" said Jesus.

Victor Hugo further giving his message on Death Penalty said: We shall look upon crime as a disease. Evil can he treated by love and compassion, charity instead of anger; the change will be simple, impressive and grand. Embraced arms and love should replace scaffolding of execution. So the reason, conscious and experience is on the side of abolitionists.

This ideology is further reinforced by Mahatma Gandhi, when he said "**Hate the sin and not the sinner"** in other word destruction of individual can never be a virtuous act. So accepting the Gandhian Therapy, the bench in **Ediga Anamma Case** [75] sought to reinforce reformist, rationality and human punitive treatment, said for first time:

In any scientific system which turns the focus, at the sentencing stage, not only the crime but also the criminal, and seek to personalize the punishment so that the reformatory component is as much operative as the deterrent element, it is essential that facts of a social and personal nature, sometime altogether irrelevant if not injurious at the stage of fixing the guilt, may have to be brought to the notice of the Court when the actual sentence is determined. It cannot be emphasized too often that crime and punishment are functionally related to the society in which they occur and Indian conditions and stages of progress must dominate the exercise of judicial discretion in the case. As per **Justice Bhagwati** in the case of **Bachan Singh V. State of Punjab**

[74] Crime and Punishment: Quantum of Punishment.
[75] AIR 1974 sc 799

Death Penalty for murder under Section 302 I.P.C. read with Section 354(3) Cr.P.C. is arbitrary and unreasonable because of many reasons. Firstly because it was cruel, inhuman, disproportionate and excessive. Secondly, it was totally unnecessary and did not serve any social purpose toward the advancement of any constitutional value.

Thirdly, the discretion conferred on the Court to award Death Penalty was not guided by any policy or principle laid down by the legislature but was wholly arbitrary.

As per **Justice Bhagwati's**:

No proper guidelines are provided by the legislature for imposition of Death Penalty. Section 302 IPC and Section 354(3) Cr.P.C are violative of Articles 14 and 21 of the Constitution of India.

Death Penalty does not serve any legitimate end of punishment, since by killing the murderer it totally rejects the reformative purpose and it has no additional deterrent effect which therefore is not justified by deterrence theory of punishment.

Though retribution and denunciation is regarded by some as a proper end of punishment, but it cannot have any legitimate place in an enlightened philosophy of punishment. Death Penalty has no rational nexus with any legitimate penological goal or any rational penological purpose and it is arbitrary and irrational and hence irrelative of Article 14 and 21 of the Indian Constitution.

The objective of United Nations has been and is to maintain and achieve the standard set by the world body that is Death Penalty should ultimately be abolished in all countries. This normative standard set by the world body must be taken into account while determining whether the Death Penalty can be regarded as arbitrary, excessive and unreasonable so as to be constitutionally invalid.[76]

The Constitution does not in so many terms prohibit Capital Punishment. In fact, it recognizes Death Sentence as one of the punishment or penalties which can or may be imposed by law. From the Legislative history of relevant provisions of penal code and Criminal Procedure Code it is found that in our country there has been a gradual shift against the imposition of Death Penalty. Life imprisonment is now a rule and it is only in exceptional cases and that too for special reasons, that Death Sentence can be imposed. The legislature has not given any guidance as to what are those exceptional cases in which, deviating from the normal rule, Death Sentence may be imposed. This is left entirely to the unguided discretion of the Court, a feature, which has

[76] Ibid Para 18, 19

lethal consequence so far as the constitutionality of Death Penalty is concerned.[77] Death Penalty, is irrevocable, it cannot be recalled. If a person is sentenced to imprisonment, even if it be for life and subsequently found that he was innocent and was wrongly convicted, he can be set free. But that it is not possible where a person has been wrongly convicted and sentenced to death. The execution of the sentence of death in such a case results in serious miscarriage of justice[78]. Judicial errors in imposition of Death Penalty would indeed be a crime beyond punishment. This is the drastic nature of Death Penalty, terrifying in its consequence, which has to be taken into account in determining its constitutional validity. Death is barbaric and inhuman in its effect, mental and physical upon the condemned man and is positively cruel. Its psychological effect on the prisoner in the death row is disastrous.

Penological goals also do not justify the imposition of Death Penalty for the offence of murder. The prevailing standards of human decency are also incompatible with Death Penalty. It is difficult to see how Death Penalty can be regarded as proportionate to the offence of murder, merely because the murder is brutal, heinous or shocking.

The historical course through which Death Penalty has passed in the last 150 years shows that the theory that Death Penalty acts as a greater deterrent than life imprisonment is wholly unfoundable.

There being no Legislative policy or principle to guide the Court in exercising its discretion in this delicate and sensitive area of life and death, the exercise of the discretion of the Court is bound to vary from judge to judge. What may appear as special reasons to one judge may not appear to another and the decision in a given case whether to impose a Death Sentence or to let off the offender only with life imprisonment world, to large extent depend upon who is the judge called upon to make the decisions. The exercise of discretion whether to inflict Death Penalty or not depends to a considerable extent on the value system and social philosophy of the judges constituting the Bench.

The only yardstick may be said to have been provided by the legislature is that Life Sentence shall be rule and it is only in exceptional cases for special reason that Death Penalty may be awarded. But it is no where indicated by the legislature as to what would be regarded as 'special reasons' justifying imposition of Death Penalty. It is difficult to appreciate how a law which

[77] Ibid Para 22
[78] Ibid Para 24

confers such unguided discretion on the Court without any standard or guidelines on so vital issue as the choice between the life and death can be regarded as constitutionally valid Death Penalty in its actual operation is discriminatory, because it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape from its clutches. This circumstance also adds to the arbitrary and capricious nature of the Death Penalty and renders it unconstitutional as being violative of Article 14 and 21 of the Constitution Justice Bhagwati is morally against Death Penalty, as he himself expressed that "I regard men as an embodiment of divinity and therefore, morally I am against Death Penalty".

No doubt that the constitutionality of Death Penalty was challenged and accepted in **Jagmohan Singh Case** but it does not mean that the same cannot be rejudged and altered. Moreover, in the present case there are two other supervening circumstances which justify reconsideration of the decision in Jagmohan's Case. a) Introduction of the new Code of Criminal Procedure in 1973 which by Section 354(3) has made life sentence the rule in case of offences punishable with death and in the alternative imprisonment for life and provided for imposition of sentence of death only in exceptional cases for special reasons.

b) The dimension of Article 14 and 21 was unfolded by the Supreme Court. This dimension renders the Death Penalty provided in Section 302 of IPC read with Section 354(3) of the Code of Criminal Procedure vulnerable to attack on a ground not available at the time when this case was decided. Furthermore, there are one another significant circumstances, that since case was decided, India has ratified two international instruments on Human Right and particularly the International Covenant on Civil and Political Rights**.** We are therefore, not bound by the decision as given by the Court in the Jagmohan Singh's Case.

INTERNATIONAL TREND REGARDING DEATH PENALTY

There are quite a large number of countries which have abolished Death Penalty dejure or in any event, defacto. Report of Amnesty International on 'The Death Penalty' points out that the following countries have abolished the Death Penalty for all offences:

Australia, Brazil, Colombia, Federal Republic of Germany Honduras, Iceland, Luxembourg Costa Rica, Denmark, Dominican Republic, Ecuador, Fiji, Finland, Norway, Portugal, Sweden, Uruguay and Venezuela and according to this report Canada, Italy, Malta, Netherland, Pannama, Peru, Spain and Switzerland have abolished Death Penalty in time of peace but retained it for

specific offences committed at the time of war. The report also states that Algeria, Belgium, Greece, Guyana and Upper Volta have detained the Death Penalty on their Statute Book but they did not conduct any executions for the period from 1973-30th May 1979. Even in United States of America there are several States which have abolished Death Penalty.[79]

In United Kingdom too, Death Sentence stands abolished from the year 1965 save and except for the offences of treason and certain forms of piracy and offences committed by members of armed forces of during war time. An attempt was made in U.K. in December, 1975 to re-introduce Death Penalty for terrorist offences involving murder, but it was defeated in the House of Commons and again a similar motion moved by a conservative member of Parliament that "the sentence of Capital Punishment should again be available to the Courts" was defeated in the House of Commons in a free vote in 1979.[80] In these two decisions[81] the Privy Council emphatically stressed that the award of Death Penalty is violative not of human rights or fundamental rights.

Death Penalty has been abolished either formally or in practice in several other countries such as Argentine, Bolvia, most of the federal States of Mexico, Nicaragua, Israel, Turkey and Australia do not use the Death Penalty in practice. There is a definite trend in most of the countries of Europe and America towards abolition of Death Penalty.

UNITED NATION ON DEATH PENALTY

United Nation has taken great interest in the abolition of Death Penalty. In the Charter of United Nation signed in 1945, the founding States emphasized the value of individual's life, stating their will to "achieve international cooperation in promoting and encouraging respect for Human Rights and for fundamental freedoms for all without distinction of race, sex, language or religion".

Though San Francisco Conference did not address itself to the issue of Death Penalty specifically, the provisions of the Charter provided the way for further action by United Nations bodies in the field of Human Rights, by established a Commission of Human Rights and in effect charged that body with formulating an International Bill of Human Rights. Mean while the

[79] Report by Amnesty International, issued on 30* May 1979
[80] Ibid.
[81] Eston Baker

Universal Declaration of Human Rights was adopted by the General Assembly in its Resolution of 10th December, 1948. Article 3 and 5 of the declaration (UDHR) provides:-

Article 3: Everyone has the right to life, liberty and security of person.

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

To the same effect is the Article 6 of the Covenant as finally adopted by the General Assembly in its resolution, provide as follows:

a) 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.

b) In those countries which have not abolished 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 penalty can only be carried out pursuant to a final judgment rendered by a competent Court.

c) When deprivation of life constitutes the crime of genocide. It is understood that nothing in this Article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

d) 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.

e) Sentence of death shall not be imposed for crimes committed by persons below the 18 years of age and shall not be carried out on pregnant women.

f) Nothing in this Article shall be invoked to delay or prevent the abolition of Capital Punishment by any State Party to the present covenant Article 7 of the Covenant corresponding to Article 5 of the Universal Declaration of Human Rights reaffirmed that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Regarding the deterrent effect of Death Penalty[82] it contained a cautions statement "that the deterrent effect of Death Penalty is to say the least, not demonstrated." The Ancel Report along

[82] French jurist, Marc Ancel," Capital Punishment". The first major survey of problem from International stand point on the deterrent aspect of Death Penalty, III Chapter.

with the Report of Adhoc Advisory Committee of Experts on the Preventive of Crime and the Treatment of the Offenders was examined in January, 1962 and was presented to the Economic and social Council at its 35th session[83]. By this Resolution the Council urged the member governments to review the efficacy of Capital Punishment as a deterrent to crime in their countries and to conduct research into this subject to remove the punishments from the Criminal Law concerning any crime to which it is not applied or to which there is no intention to apply Death Penalty. It clearly shows that there was no evidence as to the deterrent effect of Death Penalty that is why further study and research was suggested.

On the requisition of General Assembly, an American professor, Norval Morris prepared a report through the Economic and Social Council and pointed out that there was a steady movement towards Legislative abolition of Capital Punishment and observed that:

With respect to the influence of the abolition of Capital Punishment upon the incidence of murder, all of the available data suggest that when the murder rate is increasing, abolition does not appear to hasten the increase, where the rate is decreasing abolition does not appear to interrupt the decrease, where the rate is stable, the presence or absence of Capital Punishment does not appear to affect it.

The Economic and Social Council in its 50th session in 1971, contained a finding that, most countries are gradually restricting the number of offences for which Death Penalty is to applied and a few have totally abolished capital offences even in war times. This discussion in the council led to the adoption of Resolution 1574 (L) of 20th May 1971 which was reaffirmed by the General Assembly Resolution 2857 (XXVI) of 29th December, 1971. This latter resolution clearly affirmed that: In order to guarantee fully the Right to Life[84], the main objective to be pursued is that of progressively restricting the number of offences for which Capital Punishment may be imposed with a view to the desirability of abolishing this punishment in all countries.

The General Assembly at its 32nd Session adopted Resolution 32/61 and this Resolution reaffirmed the desirability of abolishing Capital Punishment in all countries.

Thus, the United Nations has gradually shifted its front from the mute observer to a position favouring the eventual abolition of Death Penalty. The objective of United Nation has been that Capital Punishment should ultimately be abolished in all countries.

[83] When it's Resolution 934 (XXXV) of 9th April 1963 was adopted.

[84] Article 3 of the Universal Declaration of Human Rights.

ARGUMENT IN FAVOUR OF ABOLITION OF DEATH PENALTY

We shall look upon crime as disease; evil will be treated in charity instead of anger. The change will be simple, impressive and grand. Embraced arms of lane should replace scaffolding of execution. So the reason, conscious and experience is on the side of abolitionists.

In the age of Universal Human Rights, the first right of a person is the right to life that society guarantees him. Accordingly, it becomes the first duty of the State to abstain from killing.

In a publication of the United Nation one of the reasons put forward for abolition of Death Penalty was sanctity of human life. It was argued that since it was wrong to kill, the State should set the example and should be first to respect human life. An execution is a self-mutilation of the State, though the State had admittedly the capacity to defend itself and to command, it is not empowered to eliminate a citizen, and in doing so the State does not erase the crime but repeat it "**Thou ShalT Not Kill" Jesus Christ**.

A deep reverence for human life is worth more than a thousand executions in the prevention of murder and is in fact the great security of human life. The law of Capital Punishment while pretending to support this reverence does only lip service to it but in fact tends to destroy it, Retention of Death Penalty is not only an anachronism in the penal laws but it is a positive hindrance to right thinking upon the whole question of the treatment of crime and its abolition has become urgently needed step in the evolution of our penal method.

Crimes of violence are on the increase because the sense of sanctity of life is lowering day by day. After going through the two world wars and numerous other bloodsheds it may seem a very small matter whether a few worthless human beings who have themselves taken life should live or die. But it is our duty who value civilization not to depress further these moral and spiritual values but seek to raise them.

POSSIBILITY OF MISTAKE

Another important argument advanced in support of the abolition of Capital Punishment is that it is wrong to inflict an irrevocable penalty because you cannot always be certain that you are inflicting it on the guilty man. Since Capital Punishment as a deterrent is only to deter others from committing murders, it is obvious that the man to be hanged is used as a means to some end other than his own wellbeing. This notion at once creates a sense of abhorrence to our deep sense of morality; but always an attempt is made to justify the same on the ground of social well-being

or interest of the society. But in the face of the possibility of mistake of hanging an innocent man, this justification becomes thin and shaky. Sir Gowers quotes Lord Samual who went to the heart of the matter in his evidence to the Select committee as follows: "I do not think that one can ever say that no innocent man has been executed for murder in the past, nor we can have an absolute assurance that no innocent man will be convicted and executed in the future. The odds are thousands to one against it but that is no consolation for the one"[85]. It is true that judicial system of almost every civilized country have devised means to see that an innocent man is not convicted but as long as human element is there, errors cannot be ruled out and perjury and enmity can send innocent persons to the gallows.

"Moreover it is impossible to dispense with circumstantial evidence. It is seldom that any sane person knowingly commits a crime in the presence of a witness.

It is, therefore in many cases the only available and also carries greater reliability. At the same time it is essentially a double edged weapon. It has in the past lead to many miscarriages of justice. Basic fault with all such evidence is that one cannot, howsoever, long or carefully one considers it, be sure of its veracity. The assumption of the truth of a certain inference drawn from facts revealed by such evidence can never be more than an assumption. And it may be an erroneous assumption.

Circumstantial evidence does not allow sufficiently for abnormal elements in human nature. The majority of individuals is disposed to behave abnormally in various kinds of circumstances and to accept as evidence by belief that a given person would do something or fail to do something which appears to be a natural outcome of known facts, may lead to a grossly unjust decision. A major defect in circumstantial evidence is also that it lends itself to fabrications with all its danger to the accused.

Lord Coke mentioned a case[86] in which a person was chastising his niece who was heard to cry 'oh good uncle kill me not'. The girl was not heard of later. The case for murder was brought against the uncle and he presented another child in place of his niece before the Court. Deception was detected and the uncle was sentenced to death and executed. However, the real girl came home sometimes later explaining that she had run away in fear of battering from the uncle.

[85] Gowers - A life for life, p. 81.
[86] 3 Inst. C. 104 p. 282

In India too, Mr. Justice Brodhurst in delivering his dissentient judgment in **Queen Case**[87] brought to light a case in which two persons were charged for the murder of one Mussamat Kishori at the Agra Sessions in 1885. A corpse had been produced as the corpse of the victim and one of the accused confessed (obviously under torture) his guilt. It was subsequently found that the woman had returned home alive and had given an explanation of her absence.

Shri M. L. Aggarwal in his article 'Capital Punishment abolition move in India' appearing in AIR 1958 journal Section page 73 quotes two other such cases also. In 1923 in Manipuri District, four brothers were challenged and omitted to Sessions for the murder of their sister. They were all made to confess their guilt and the Assessors had given their verdict of guilty. Sessions judge was on the point of delivering his judgment when District Magistrate and Superintendent of Police brought to the Sessions Court the real woman for whose murder the four accused had been tried.

A touching case related to Shri M. L. Aggarwal and as recorded by him in the said article, is that of execution of eight persons. In the village there were two rival factions and person murdered had influence with both sides. He cleverly used to incite both sides against each other and thereby make them fight. One faction got to know of this position and they decided to finish him and put responsibility on the other faction. They informed the other faction about the activities of the person murdered, thereby outwardly patching up with them. In accordance with programmed they held a dinner, invited the person murdered and people of the other faction. A little time later, they got the lights switched off and beat the person murdered to the point of death. While leaving the scene, one of them told him in the ear that the opposing faction had done all that to him. Later police arrived and beating given to him by the opposing faction was got recorded by him in FIR and he also gave names of eight persons of that group in the dying declaration. Chief witnesses in the case were members of one opposing faction and he said 8 persons were sentenced to death and hanged. The learned Magistrate happened to know of the true facts about the case sometimes later when he happened to go to that village during this tour.

The law itself sometimes makes it difficult to pull out innocent man from murder case proceedings under Indian Penal Code. If one of the members of an unlawful assembly commits murder, all the members are imputed with his intention and are equally liable with him for

[87] Queen Empress Vs. Gobardhan, (1887) ILR 9 ALL 528

murder. In **Rajagopalan Case**[88], Varadachariar J. expresses his doubt about accused being a member of unlawful assembly and hence liable for murder charge just because he was one of the crowds which ran to the place where the deceased was chasing some of the rioters. However, as it was not ordinary practice of the Court to interfere with inferences of fact by lower Court, the judge expressed his helplessness to extricate the accused but recorded "I leave the matter there with this expression of my doubt" - really a harsh situation is created in this and such type of other cases by law.

The other type of cases where mistake is possible are where conviction is unavoidable on the circumstantial evidence but where a judge may still entertain some doubt which is not the same thing as the reasonable doubt on which the benefit of doubt is given to the accused, but which may impel a judge to give lesser sentence than the Death Penalty. In the **Raggha Case**[89], the dead body of the victim was not found, but a conviction of murder was based purely on circumstantial evidence. While Mears C.J. said "that if there is an element of doubt as to render a judge in the least degree uneasy of mind, the proper course is not to change the sentence but to acquit the man". But Mukherjee J. would say that doubt arising in a man's mind is of different degrees and there may be, as in this case, in my mind a doubt which is less than a reasonable doubt but it is still a doubt which is entitled to respect, which is entitled to ask me to be cautious in passing the sentence."

This scintella of doubt, we also entertain after going through majority judgment and the dissenting judgment reported in **Anant Chintaman Lagu Case**[90], where a doctor was charged with murdering a lady during the course of railway journey by administering to her some undetectable poison. The case rests only on circumstantial evidence and the Courts have inferred the guilt of the accused mainly from medical evidence and the conduct of the accused. Medical evidence by various doctors was not very consistent. Even if on the basis of the available evidence a reasonable conclusion of guilt is gatherable, still what may be called the scintella of doubt hovers

in the mind after reading majority and dissenting judgments together. And the question if mistake is not possible in such a case stares us in our face. As the judges are not agreed, in such cases to award lesser punishment enhances poignancy of possible mistake.

[88] Rajagopalan Vs. Emperor, AIR 1944 FC 33
[89] Raggha Vs. Emperor, AIR 1925 ALL 627
[90] Anant Chintaman Lagu Vs. State of Bombay, AIR 1960 SC 500

Since public opinion, especially in democracies where education has not yet taken roots and large majorities are still illiterates, is based on prejudices and predilections and not on sound, logic, it does not reflect merits of Death Penalty. On the basis of statistics both of India and abroad, U.N.O. findings and other weighty arguments, we can safely conclude that Death Penalty is not sustainable on merits.

Innately it has no reformative element. It has been proved that Death Penalty as operative carries no deterrent value and crime of murder is governed by factors other than Death Penalty. Accordingly I feel that the Death Penalty should be abolished.

Government's experience in dealing with it leniently in the past five decades is quite happy. The same has not aroused any reaction from any quarter and public has accepted it just in due course. Taking clue from the same and also realizing that ignoring of logical position in regard to Death Penalty is harmful in ultimate analysis, the Government, if it needs sometime for ripening public opinion before declaring its abolition from Statute Book, may for the time being take policy decision to commute all death Penalties, as was done by U.K. before enactment of Homicide Act of 1957, and silently put it to disuse. Another quite action in this direction is extension of the Children Act of 1960 to all States; it has not yet come into force in all States. By its adoption in all States, cases of person upto the age of 16 years will be taken out of Death Penalty provisions.

In the discussion that took place on the 21st April, 1962, in the Lok Sabha on Capital Punishment by Shri Raghunath for its abolition. The following were the ground sought for its abolition in India; first, it was difficult to get justice; second, on humanitarian grounds; third, in difference to the tradition in India; fourth, because Capital Punishment was not deterrent; fifth, on the ground of 'non-violence' preached by Mahatma Gandhi; and sixth, because of the teachings of various religions. Christianity commanded "Thou shalt not kill", while Islam laid down that if the relative of a victim accepts compensation and pardons the offender, path preached by Lord Buddha was supposed to support the argument to abolish Capital Punishment; seventh, to give another opportunity to the accused to reform; eighth, on the ground of miscarriage of justice.

NUTSHELL:-

The abolitionists have argued their case from the following angles:-

(i) Discriminatory application of Death Penalty.

(ii) Cruelty of execution that is, hanging by rope.

(iii) Crimes of passion.

(iv) Sanctity of life.

(v) Injustice.

(vi) Political use of Death Penalty.

(vii) Deficiency of legal safeguards.

(viii) Possibility of Mistake

(ix) Public opinion

There is judicial trend towards the abolition of Death Penalty. The legislature has introduced Section 354(3) Cr.P.C. by Amending Article 26 of 1955, which is again amended in 1973, according to which infliction of Death Penalty is possible only if there are aggravating circumstances, which exclusively demand for the imposition of Death Penalty. To the same effect the Supreme Court has given its view in the Bachan Singh Case, **Justice Sarkaria** speaking for the Court has declared that Death Penalty should be imposed only in the rarest of the rate cases. The life and liberty of the individual is to be respected and restored at any cost. To the same effect, there are Directive Principle of State Policy, Free Legal Aid to the indigent, poor and needy persons and to keep a check on the arbitrariness and whims and caprices of the crime controlling agencies.

RENTENTION OF DEATH PENALTY

Death Penalty has been the subject of an age old debate between the abolitionists and retentionists. In the ancient times, the punishment of death was the only punishment for almost all the crimes. Sometime it was inflicted in order to deter others, sometimes in regard of retribution and sometimes to incapacitate the offender, meaning thereby, that the extreme penalty of law, today which is imposed by Courts with due care and caution was almost the rule in the ancient times.

The position was quite similar but worst during the British Empire. The punishment of death was imported to India from the England by the British Rulers.

The Criminal Law was codified in 1854, which was amended by two Commissions simultaneously. This constrained the penalty of death for seven offences. This came into existence in 1860. All these seven Sections are still on the Statute Book since then.

These Sections are 121, 132, 194, 302, 305, 307 and 396 of I.P.C. In addition to these Sections, punishment of death can be imposed under IPC for three, more offences where it is imposed by way of constructive liability under Section 34, 109, 119 and 396 of 1.P.C.

Anyhow punishment of death is still imposable and imposed and the accused are still being executed inspite of all the agitations. Though the abolitionists have given it the name of cruel and unusual punishment, they call it as a barbaric and primitive punishment.

As it is still on the Statute Book, certainly it must be having some merits and the demerits automatically attached to it. In present chapter we are concerned with the merits of the punishment.

ARGUMENTS IN FAVOUR OF DEATH PENALTY

Death Penalty is the extreme penalty of law imposed by the Courts.

Punishment must serve as an instrument for reducing the rate of crime either by deterring the offenders and others or should prevent the commission of crime by incapacitating him. Now the question is whether this extreme penalty of law should be retained or not? Does it act as a deterrent to the repetition of heinous crimes such as murder, daily bride-burnings and most of the socio-economic offences in India?

These questions have been debated over centuries. A census is at times reached and some countries have taken the experimental measures, but as of abeyance the rate of crime increased and the Death Penalty is again reintroduced in some of the countries, the most recent example is New Zealand.

There are two aspects of this perennial controversy about the Death Penalty.

1. Abolitionists theory regarding Death Penalty which has been already discussed at length.

2. Retentionists view regarding Death Penalty which is to be discussed.

RETENTIONISTS VIEW OF DEATH PENALTY

The arguments should be considered in the light of the Royal Commissions Report on Capital Punishment (1949-53) and the 35th Law Commission's Report Vol. I (1967) as far as the Indian position is concerned. Arguments, which may be valid for other countries, may not be valid for India on the following points.

i) Illiteracy, India is a vast country arid most of the population is illiterate.

ii) Deterrence, deterrent effect of Death Penalty is one of the basic arguments forwarded by the retentionists. Human being is complex and actuated not only by fear but also by love, loyalty, greed, lust and by many other factors.

iii) Deterrent effect of Death Penalty cannot be seen directly, but it acts on the community in the form of moral consciousness.

iv) Public opinion is in favour of the Death Penalty. Capital Punishment is painless and humane in form and is less cruel than the punishment of life imprisonment.

vi) Because of the provisions of appeal and power of pardon vested in the President or Governor, so there is no question of miscarriage of justice.

vii) India is a poor country, so it cannot and is not able to imprison all the murderers and feed them for decades.

viii) Death Penalty functions and helps in avoiding popular action.

ix) Main argument of retentionists is that even if the principle of abolitionists is accepted, the time has not yet ripe in India. Present day society has not yet matured for this reform and the community has not yet ripened to that stage.

In reply to these arguments, the abolitionists have argued their case on the following grounds:-

i) Indian ideology is based on the principle of non-violence.

ii) Death Penalty is irrevocable.

iii) Death Penalty is 'cruel and unjust, it is a barbaric and is of the primitive nature'. Moreover, it is unjust because only the poor, indigent and illiterate are the victims of this penalty, who cannot engage lawyers for themselves. They are unable to fight the legal battle and hence unable, having smaller chance of not being executed.

iv) Difficulties of the prison administration are no arguments for its retention.

v) Atleast experiment of abolition of Death Penalty is worth making.

vi) The argument of public opinions holds no water.

MISTAKE

On question of mistake the retentionists' case has been argued by minority Report of the royal Commission on Capital Punishment in U.K. 1952-53. They say: "we do not feel that the mere

possibility of error, which can never be completely ruled out, can be urged as a reason why the right of the State to inflict Death Penalty can be questioned in principle. It is not possible for human authorities to make judgments which are infallible in matters which require lengthy deliberation and logical analysis.

All that can be expected of them is that they take ever reasonable precaution against the danger of error. When this is done by those charged with the application of the law, the likelihood that the errors would be made descends to an irreducible minimum. If errors are then made, this is the necessary price that must be paid within a society which is made up of human beings and whose authority is exercised not by angles but by men themselves. It is not brutal or unfeeling to suggest that the danger of miscarriage of justice must be weighted against the far greater evils for which the Death Penalty aims to provide effective remedy".

The question is as to why even this price be paid when the experience based on statistics has shown that murders are conditioned by factors other than Death Penalty and retention or abolition has not changed the murder rate. On the question being put by the Select Committee to Lord Samuel that if punishment with a maximum deterrence is sought to have, would that punishment be Capital Punishment, he replied "yes, if no less a punishment is effective for this purpose; but there is no reason to have hundred percent deterrent if an eighty percent deterrent is sufficient to deter". The question whether the Death Penalty possess the extra 20% of the deterrence over imprisonment for life is a very doubtful problem and even prolonged scientific investigations may not be able to prove this with precision as the field of investigation itself is such which requires the study of mental attitudes and such other psychological factors. Accordingly if a allegedly 100% doubtful Death Penalty can be replaced by even 80% efficacious life imprisonment, pragmatism should guide replacement of the former by the latter and thereby save the innocent, whatever be their number, from irrevocable and irreparable sentence of execution. Life sentence is definitely revocable and can be repaired by payment of damages to a very large extent.

PUBLIC OPINION

The next important point calling for our attention is public opinion. In the present state of civilization, before taking any step, public reaction must be gauged.

Success of the step depends on public cooperation and without taking the public opinion along its implementation becomes very difficult.

In cases where subsequent doubt arose concerning the guilt of the person sentenced and executed, as happened recently in U.K. and U.S.A., veritable waves of public opinion have been set in motion and these have sometimes provided the abolitionist movements with additional supporters and fresh arguments. Occasionally the reaction of public opinion has taken the form of merely a protest the execution of a particular individual.

Turning to India, so far no attempt has been made to collect systematic scientific data in respect of the public opinion in this matter. If judiciary gives any representation to public opinion, there are definite signs of change. While studying the cases under Section 302 of IPC and other Sections providing for Death Penalty, for the year 1964 of Delhi State, it was observed that conviction took place in 21 cases and in only four of them Capital Punishment was ordered. Some of these four, condemned for execution may get change of sentence at higher appellate level especially in view of their young ages which were 19, 23, 30 and 34 years. This gives an indication of trend away from Death Penalty. This is also apparent from the fact that bills for abolition of Death Penalty have been introduced in Parliament of India thrice in 1949, 1958 and 1961. On the first occasion Sardar Vallabh bhai Patel, the then Home Minister, declared on the floor of the house on 29.3.49 that "the present time was inopportune for the abolition of Capital Punishment - the proposal has been carefully examined on a number of occasions and given up.

Pandit Govind Ballabh Pant had said that those countries which abolished Capital Punishment had a very low incidence of murders - not more than 4 to 5 per million as against 26 to a million population in India that is seven hundred percent more than the abolitionist countries. I fear that Pandit Pant was not supplied with correct statistics. Murder rate was, as per report of International Cr. Police Commission for 1952, 4.7 for U.S.A., 5.2 for Finland and 2.9 for India as against population of 1,00,000. As per Uniform FBI Crime Reports, murder rate for U.S.A. in 1960 was 5.1 per 1,00,000 population, whereas rate for India was per figures in Statistical Abstract of India) was 2.5 per 1,00,000. Forestalling the ground of difference in conditions of various countries making adoption of abolition in India by following former's precedent alone, not safe for us, I may add that abolition has been experimented with, in big as also small, industrial as also pastoral, and fully developed and underdeveloped countries. Experience everywhere has been uniform that murder rate does not go up with the abolition of the penalty.

Moreover, in a way India too has carried out a tacit experiment by reducing executions substantially during the last fifty years. Executions are now (1961) one third of the number of 1911 but murder rate has not gone up as compared with general crime position. Accordingly on the basis of this solid experience on our own soil, question of non-dependability on experiment in other countries becomes unavailing. What is happening in other countries has been found to be not untrue in our own country.

The statements of the Home Ministers read with their reference to statistics about remitting Death Sentences nevertheless show the Government to be not very firm in their opinion. Since Government generally acts as per pulse of the public especially in democracies, we may conclude that public opinion too is no strictly on one side. The fact that the abolition bills did not succeed at the hands of members of the Parliament, which is representative miniature public, would also show that Indian public opinion is not yet wholly for the abolition.

In ancient time life for life, eye for eye was the rule of criminal justice. It was supposed to have both retributive and deterrent values. In modem times however, reformist thinkers and jurists have referred that Death Penalty is 'barbaric and primitive' in origin, which does not go in tune with the modem day society. But even inspite of all these the case for retaining the Death Penalty is based on certain concepts of awarding adequate and commensurate punishment to the crime committed. The points are summarized as follows:-

i) Punishment should be commensurate with the gravity of the offence committed. The heinous is the crime committed by the accused, the quantum of punishment should also be in tune with the gravity of the crime committed by the accused.

ii) There are enemies of society who have proved incorrigible, who attack even the guardians of law and order, and thus pose a constant danger to the security and sanctity of life. These social enemies frequently disturb the life of innocent citizens which is in order.

iii) The famous Italian jurist said, "that Capital Punishment is and would be justified in two instances:-

a) If the execution would prevent a revolution against people lastly established Government.

b) If an execution was the only way to deter others from committing a crime.

iv) For the protection of the organized society, civilized community, Death Penalty should be preserved as such.

v) The general conclusion which we reach after careful review of all the evidence, we have been able to obtain as to the deterrent effect, Capital Punishment may be stated as follows:-

Prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other, punishment, and there is some evidence that this is in fact so.

vi) There is another jurist who as it seems is not satisfied with this extreme penalty of law and he advocates for some more deterrent punishment as he says,".. .some greater terror than had yet to be discovered, certainly death is no deterrent."

vii) A great jurist who was concerned with the drafting of Indian Penal Code was a great exponent of the view that Capital Punishment has a greatest value as deterrent for the crime of murder and other capital offences. To quote his words, "No other punishment deters men so effectively from committing the crime, as does the punishment of death."

viii) Even while recognizing that it is too stem besides being irrevocable, it is considered necessary.

These are one of those propositions which are difficult to prove simple because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity of producing some results.

ix) According to another Jurist, "Unless a sentence of 10 years is considered an adequate substitute for Capital Punishment, I will prefer the Death Sentence on the grounds of humanity to any other alternative." He again at another place emphasized that, "I gravely doubt that whether an average man can serve more than ten continuous years in prison without deterioration. If so slight an alternative to Death Sentence is considered to be lacking in deterrence."

Deterrence is the main object of punishment. In criminal justice, a punishment universally aims at achieving the following purposes or objectives:-

i) To punish the 'offender'.

ii) To deter others from committing the crime.

iii) To protect the society from criminal activities.

Some Sources namely the writings of eminent Criminologists and Sociologists, the Legislative Debates, the Reports of Commissions and Committees in favour of retention of Death Penalty have been include as under.

VIEWS OF DIFFERENT CRIMINOLOGISTS AND SOCIOLOGIST

Six eminent Crimologists authorities on the subject are:-

1. Dr. Caesare Lombroso.

2. Sir. James Fitzjames Stephen

3. Prof. Edwin.H. Sutherland.

4. Sir. Arthur Bryant.

5. Prof. Earnest Van Den Hagg.

LEGISLATIVE DEBATES REGARDING DEATH PENALTY

LEGISLATIVE DEBATES RELATING TO DEATH PENALTY DURING BRITISH RULE

A careful scrutiny of the Debates in British India's Legislative Assembly 1912, reveals that no issue was raised about Capital Punishment in Assembly until 1931, when one of the members from Bihar Shri Gaya Prasad Singh sought to introduce Bill to abolish the punishment of death of the offences under the Indian Penal Code. The Bill was introduced on the 1931 and on the 17th Feb, 1931 a motion for circulation was made. The motion was negative after the reply of the then Home Minister Shri James Crerar. The mover, in support of his motion, cited the example of other countries which has abolished the Death Sentences, pointing out the abrogation of Death Penalty had not ended human society into chaos, and argued that Death Penalty had a demoralizing effect on the human mind.

The Home Member, however, in his reply pointed out, first, that in many countries Death Sentence had been restored after abolition. (He cited the example of France and Germany); Secondly, that in the abolionists countries, the enactments abolished Death Sentence was made after a very long period of experiment; to the House, "crime of so dreadful a Charter that one is presented with the very pressing question whether in cases of that kind any punishment other than Capital Punishment could on any theory of crime be regard as the proper punishment."

The Government's policy on Death Penalty in British India prior Independence was clearly cited twice in 1946 by the then Home Member, Sir John Thome, in the debate of the Legislative

Assembly " Government doesn't think it wise to abolished Capital Punishment for any type of crime for which the punishment is now provided"[91].

LEGISLATIVE DEBATE RELATING TO DEATH PENALTY IN POST INDEPENDENCE PERIOD

Even after India attained Independence, the Government's policy on Capital Punishment remained unchanged and the then Minister for Home Affairs declared in the Legislative Assembly of India, on 29th March, 1949, that "the present is considered an inopportune time for the abolition of Capital Punishment." In the year 1956, a Bill was introduced by Shri Mukand Lai Aggarwal, in the first Lok Sabha[92]. The Bill was discussed and was rejected on the opposition of the Government. Numerous points were put forth by Shri Aggarwal, which included a review of the position prevailing in other countries, and emphasized the futility of Capital Punishment as a deterrent and its primitiveness. The Government of India sought the opinion of all the States in India on the issue of the abolition of Death Penalty. It is leant that all the States emphatically opposed abolition of Capital Punishment.

Resolution for the abolition of Capital Punishment was moved thrice in Parliament of India, twice in the Rajya Sabha and once in the Lok Sabha. Capital Punishment was debated in Parliament of the Indian Republic for the first time on the 25th April, 1958 when a resolution for the abolition of Capital Punishment was moved in the Rajya Sabha by Shri Prithivi Raj Kapoor. Out of the fourteen Members of the Rajya Sabha who participated in the debates, only five advocated the abolition of Death Penalty, while the remaining nine Members supported the retention of Death Sentence.

During the course of Debates on the Resolution, the Minister of Home Affairs Shri Govind Ballabh Pant while opposing the Resolution said:

Everyone who commits murder wants to escape from the sentence which he has earned, so if there is no such sentence, in all likelihood, the fear that comes in the way people's committing under will be removed. . So do we want more of murders our country or do we want less in

[91] Ibid, Vol. IV, 1946, p.2770.

[92] Before this, in Sh. M.A. Kazmi's Bill to amend Sec.302,I.P.C. certain discussion took place in 1952 and 1954, and in the course of discussion, the question of abolition of Capital Punishment was also raised. Source:35lh Report, Vol.l, p.6.

them? That is the simple proposition. If we want more murders then there should be no abolition of Capital Sentence. If we want less, then we have to maintain the sentence.

He further said, "I think everyone would wish that no body was killed, no body could be hanged, but we have to look at the question from practical angle, men are murdered and some of the cases are most brutal. Now if we stop and discontinue this capital sentence, would more men be killed or would the number of men killed go slow?" I also look forward to the millennium but I do not know when it will come- it is not by abolishing the sentence that you approach this ideal.

The second time Capital Punishment was debated upon in the "Rajya Sabha was on the 25th August, 1961. This was in the form of a resolution to abolish Capital Punishment[93]. This time out of nineteen Members of the Rajya Sabha who took part in the discussion, only six Members advocated the abolition of Capital Punishment and the rest advocated the retention of Death Penalty.

At the conclusion of her speech, before the debate actually started on the Resolution, Smt. Nigam said, I want to submit that if you want to keep our pledge of nonviolence, then this violence which is constantly done by the State, in the name of keeping the people safe and so on, which is entirely wrong and which I have proved by so many instances has no deterrent effect on people's psychology, and which really never gives any security to the people, must be stopped. In spite of the fact that the provision for Death Penalty is there on the Statute Book, every day murders are being committed. I would like to appeal to the Hon'ble Member of this House that they should not be guided by who is right but by what is right.

In 1961, no categorical statement was made by the then home Minister, Shri Govind Vallabh in the 1958 debate only old foppish arguments were repeated.

Those Members who supported the abolition took the help of statistics and the experiments carried on in other countries. Heavy reliance was placed on the finding of the Royal Commission on Capital Punishment (1949-53). Support was also drawn from the various embodiments of the principles, theories and finding of the committees etc., like French declaration.

The third time Capital Punishment figured in India's Parliament was on the occasion when a resolution was moved in the Lok Sabha by Shri Raghunath Singh on the 21st April, 1962 for its

[93] Rajya Sabha Debates Vol.XXXV, 1961,p.l681. The Resolution was " This House is of opinion that Govt, should take immediate steps to undertake legislation for the abolition of Capital Punishment in India" and was moved by Smt. Savitri Devi Nigam.

abolition. Out of the 14 Members who participate in the debate, only five spoke for the abolition of the Capital Punishment.

With a view to avoid repetition, only the salient points that were discussed in Parliament representing both the view are summarized hereunder, commencing with the first debate held in the Rajya Sabha in the year 1958. Some of arguments put forth by the Members of the House for the abolition of Death Penalty in the Rajya Sabha on 25th April, 1958, were that the theory of punishment was based on two premises, one that a man is a free moral agent and two, that punishment, especially Capital Punishment, has a deterrent effect on future law breakers. It was maintained that the theory of deterrence on close analysis was found to be ineffective and out-moded in conception. In spite of the retention of Capital Punishment murders did take place. The irrevocable nature of Capital Punishment, made the sentence of death abhorrent[94]. Man on the whole is redeemable. In India, it was pointed out that there are eight crimes punishable by death under the Indian Penal Code. They were, by and large, treason and murder. The murderer is not punished with death if he could only prove that he was insane or that his reason was paralyzed at the time of commission of the crime.

It was further argued that, "there have been many cases in India and in foreign countries where people, out of mercy, have given poison or some injection to their near and dear ones to end their agony. " Should such persons be sentenced with Capital Punishment?[95]" you must look to the criminal and not to crime itself." If we really want to bring down the incidence of crime, the argument preceded, must think of method other than hanging. We have to improve the social and material environment, we have to train the impulses and emotions of the people and reclaim them through proper education. The offender is circumscribed by environment by political, social and economic conditions in the country. Moreover, only the poor and the ignorant people get Capital Punishment.

In the discussion held on the 25th Aug, 1961, in the Rajya Sabha, The fear of an increase in the number of murders on the abolition of Capital Punishment was branded as childish and primitive[96]. The reason for the re-introduction of Capital Sentence by countries which has abolished it, were " Firstly because of political controversy, Secondly, because some brutal murder aroused public sentiment and created so mush sensation and the public sentiment became

[94] Rajya Sabha Debates,1958,p.493.
[95] Ibid.,p451
[96] Rajya Sabbha Debates, 1958.p.470

so strong that they had to re-introduce it. It was further claimed that not only Capital Punishment failed as a deterrent but it had also been responsible for creating a very brutal sort of psychology. It was taken as "an institution to give training in sadism and cruelty." Capital Punishment was a calculated and cold blooded murder by the State, as the date of hanging was fixed and told to the condemned person in advance. It was argued that if stealing is a crime, is it to be replied by stealing? Hanging may be a legal murder, but murder is murder. The retentionists of Death Penalty present their case as under:

In the debate on 25th April, 1958, it was stated that for the maintenance of Law and Order in the country Capital Punishment was necessary "Life and property should be made secure. At the same time one should not revert back to the old barbaric and pre-historic practice of 'an eye for an eye' an 'tooth for the tooth' and 'a nail for a nail' and all that. Abolition of Capital Punishment had been achieved in several countries, but there were also instances where they had reverted back after experimentation with abolition for a few years. Attention was drawn to the case of nine American States where they has resorted the Death Penalty.

The Penal Law of Ceylon abolished Death Penalty in 1956 but it had to be reintroduced as a measure of social defense consequent to gruesome murder of Late Prime Minister Mr. Bandaranaike a few years ago. Even from the available literature on Death Penalty the United States testifies that in modem time the sentence of Death Penalty is altogether abolished in the United States. The retention of Death Penalty is still considered to be morally and legally just though it may be rarely carried into practice. Recently trend in America is to restrict Death Penalty only to the offences of murder and rape. Some of the American decisions suggest that the Courts are convinced that Death Penalty per se is not violative of the Constitution. The Government policy was stated by the Home Minister Shri Givind Ballabh Pant,[97] the reasons why we are not having professional murderers today were because of the deterrence of Death Penalty. By the abolition of Capital Punishment we will be "giving a sort of right to kill without punishment". The abolition of Capital Punishment "may do more harm to the country than we can visualize". A very eminent German philosopher Kant had pointed out that "ultimately the proper theory of punishment is the theory of retribution or atonement." There are certain cases where "a Capital Punishment will not be out or proportion to the nature of the crime committed. Moreover, when Capital Punishment is going to be executed, when a person is going to be

[97]Rajya Sabha Debates, 1958, p.457, 458 and 462.

hanged, so many Mercy Petitions are submitted to the Government. It is worth consideration: "Why is it that in respect of one offence alone there are so many who come forward to ask for mercy being given to a prisoner?" **This proves the deterrent effect of Death Penalty.**

It was stated that murders were committed with pre-determination. "The dacoits in our country enter the house and rape the woman in the presence of the husband. They stab them in the stomach. They kill children. Such are the heinous type of dacoits. Should such a brutal murder be pardon?" with reference to the communal riots in India, it was stated that "in a society like ours where we have yet to show a measure of communal toleration, linguistic toleration, etc., it would be unwise for us to think in terms of the immediate abolition of Capital Punishment.

In a discussion about reformation and administration, it was stated that forcible reformation of the human soul is impossible." Force and reformation cannot go together. They are spiritually contradictory an inconsistent. Therefore, whatever reformatory methods they can apply, they can only decade individuals."

"Where a man goes about doing heinous things, raping children, committing murder, unsetting society, and committing arson, should he feel so secure that whole society considers his life so sacred that he will not be put to death? That security cannot be given to any individual. "We can put certain bad criminals to death with feeling any antagonism against them and simply because his life is valueless to the society. In those circumstances it is right that society should have power to put man to death. It should not get rid of this punishment." Death Sentence "should be confirmed not only in the High Court, but also by Bench of not less than three Judge of the Supreme Court. Let us take all kinds of precautions but this ultimate penalty we should have. We are willing that we should commit murder (in wars) for many purposes. But when it comes to hanging a criminal who has been convicted of grave crimes, we become ideal propounders of exalted human felling. The Royal Commission on Capital Punishment (1949-53) had also stated that in India they found a very large number of murders taking place and in such circumstances the Courts should see what method they should adopt for not inflicting as large a number of Death Sentences as may be consistent with the incidence of "Unless and until we do away with social and economic disabilities, we cannot change this law of Capital Punishment. The poor man's wife is raped by rich man. Such criminals should be awarded Capital Punishment"[98]. So, also adulterator who kills his wife, a son kills father. Retention of Death Penalty creates

[98] Rajya Sabha Debates, Vol XXXV, 1961, pp.1771-72.

conditions for noncom mission of the crime; Capital Punishment has to be retained as a necessary evil.

Keeping in view the conditions prevailing in the India, abolition of Death Penalty is very dangerous and can be detrimental to the interests of the State. Even Sh.Giani Zail Singh said,

"I think that our law should have a provision for Capital Punishment and it should also be inflicted on those who indulge in raping of minor girls, adulteration and smuggling."

There are certain crimes which should have the utmost Deterrent punishment and so long as the crimes are there; there is no reason to abolish Capital Punishment.

The Minister of State, in the Minister of Home Affairs, promised that a copy of the discussion that had taken place in the house would be forwarded to the Law Commission that was then seized of the question of the examination of the Code of Criminal Procedure and the Indian Penal Code, with a view to consider as to whether any changes were necessary therein. The Minister promised that "The Law Commission's Report would be placed before the House." The result was a separate Law Commission Report on Capital Punishment, submitted to the Government in September 1967.

THE LAW COMMISSION ON CAPITAL PUNISHMENT

The law commission on Capital Punishment 35th Report 1961 recorded various views regarding the deterrent effect of Death Penalty in following terms:

a) Basically, every human being dreads death.

b) Death as penalty stands on a different footing or level from other punishments or imprisonment for life. The difference is one of quality, and not merely of degree.

c) Those who are specially qualified to express an opinion on the subject including particularly the majority of replies received from State Government, Judges, Member Parliaments, Legislators, Members of the Bar, and the public Officers are definitely of the views that deterrent effect of Death Penalty is achieved in a fair measure in India.

d) As to the conduct of prisoners released from jail (after undergoing imprisonment for life) it would be difficult to come to the conclusion without studies extending over a long period of years.

e) Whether any other punishment can possess all the advantages of Capital Punishment is a matter of doubt.

f) Statistics of other countries inconclusive on the subject. If they are not regarded as proving the deterrent effect, neither can they be regarded, as conclusively disproving it.

Regarding death as punishment, the authors of the code say, we are convinced of the view that it ought to be sparingly inflicted and the purpose to employ it only in case where either murder or the highest offence against the state has been committed.

The most authoritative conclusion on this subject is that of the Royal Commission on Capital Punishment, 1949-53. The Commission's conclusion is that:

"Prima facie the Death Sentence is likely to have a stronger effect as a deterrent to normal human beings than 190 any other form of punishment."

Thus, the Report of the Royal Commission on Capital Punishment found that Capital Punishment has a place in the Criminal Law of country. The American President Commission on law enforcement and administration of justice published in Feb, 1967 recommended as follow:

The question whether Capital Punishment is an appropriate sanction is a policy decision to be made by each State. Where it is retained, the type of offences for which it is available should be limited and the law should be enforced in an even handed and non-discriminatory manner.

The fact that Death Penalty was prescribed for some of the federal crimes including assassination of the President, show that Capital Punishment was found necessary in U.S.A. even for murder.

The New Jersey Commission on Capital Punishment, 1964 came to the conclusion that in the circumstances of that State in some cases Capital Punishment is deterrent[99]. The New Jersey Commission also found that Death Penalty had a place in its Criminal Law. The Canadian Joint Committee of the senate and House of commons on Capital Punishment, 1956, asserted that "Capital Punishment does exercise a deterrent effect, which would not result from imprisonment or other forms of punishment". Treason piracy and murder are the only three capital crimes punishable by death in the present Canadian Criminal Code. The council of Europe's Committee of 1962, constituted to enquire and report on the Death Penalty in European countries has reported that there are twelve crimes punishable with death in FRANCE. No commission or committee seems to have been appointed by France and Japan to enquire into the aspect of Capital Punishment so far.

[99] "Report of New Jersey Commission on Capital Punishment''1964 p.9.

The United Nations, the representative organizations of the world gave a clear mandate the marathon discussion on Capital Punishment in United Nations Organization lasted for seven years from 1957-1964. Ultimately the U.N.O had to accept the reality that Death Sentence may be awarded for the most serious crimes." The adoption of the Article 6 by United Nation makes it crystal clear that the conscience of the world deems Capital Punishment to be necessary. Subsequently, in 1963, "the committee of experts for the prevention of crime and treatment of offender" decided to suggest to the UPA that have done everything but conscientiously repeal the legislation and corrected the ongoing effect of POTA The 'repeal' as such has conceived hundred of victims of POTA to continue their existence with little hope, the 'amended POTA', now labeled as the 'Prevention of Unlawful Activities Act', changed but two things namely that confessions before the police will no longer be admitted as evidence, and there would be removal of legal obstacles to the granting of bail in the first year arrest. Those who have been already been booked under POTA, however, doesn't receive the benefit of these Clauses, and so will still stand under trail under the rules of the 'Old POTA', additionally, all the other draconian provisions of POTA basically remained in the new ordinance. Under these Acts, the accused are convicted not for the offence, but are merely of preventive nature.

Under these Acts the Legislative has given a new direction to the punishment of Death Penalty, where the penalty of death can be imposed only to prevent or protect the society, the United Nation Economic and Social Council (UNESCO) adopted certain measures to restrict the application of Death Penalty.

CRITICISM OF 35th LAW COMMISSION REPORT

The 35th Law Commission Report came for sharp criticism in minority judgment at the hands of Justice Bhagwati in the **Bachan Singh Case**[100] which is as under:

J. Bhagwati observes: "So far as the first argument set out in Clause (a) is concerned, I have already shown that the circumstance that every human being dread death cannot lead to the interference that the Death Penalty acts as a deterrent.

The statement made is Clause (b) is perfectly correct and I agree with Law Commission that death as a penalty stands on a totally different level from life imprisonment and the difference between them is one of quality and not merely of degree, but I fail to see how from the

[100] AIR 1980 SC 898.

circumstance an interference can necessarily follow that Death Penalty has uniquely deterrent effect. Clause (c) sets out those who are specially qualified to express an opinion on the subject have in their replies to the questionnaire stated their definite view that the deterrent effect of Capital Punishment is achieved in a fair measure in India. It may be a large number of persons who send to the questionnaire issued by the law commission might have expressed the view that Death Penalty does act as a deterrent in our country, but, mere expression of opinion in reply to the questionnaire, unsupported by reasons, cannot have any evidentiary value.

There are quite a number of people in this country who still nurture the superstitions and irrational belief, ingrained in their minds by a century old practice of imposition of Capital Punishment and fostered, though not consciously, by the instinct for retribution, that penalty alone can act as an effective deterrent against the crime of murder. I have already demonstrated how this belief entertained by lawyers, judges, legislators and police officers is a myth and it has no basic is logic or reason. In fact, the statistical research to which I have referred completely falsifies this belief. Then, there are the arguments in Clauses (d) and (e) but these arguments even according to the law commission itself are inconclusive and it is difficult to see how they can be relied upon to support the thesis that Capital Punishment acts as a deterrent. The law commission status In Clause (f) that statistics of other countries are inconclusive on the subject. I do not agree. I have already dealt with this argument and shown that the statistical studies carried out by various jurists and criminologists clearly is close that there is no evidence at all to suggest that Death Penalty acts as a deterrent an it must there be held on the bases of the available material that penalty does not cut as a deterrent. But even if we accept the proposition that the statistical studies are inconclusive and they cannot be regarded as proving that penalty has no deterrent effect, it is clear that at the same time they also not establish that Death Penalty has a uniquely deterrent effect and in this situation, the burden of establishing that Death Penalty has an additional deterrent effect which Life Sentence does not have and therefore serves a penological purpose being on the State, it discharge the burden which rests upon it and Death Penalty must therefore be held to the arbitrary.

LEGISLATIVE TREND TOWARDS RETAINING DEATH PENALTY

There is a strong point in the favour of the retentionist that even in spite of all these agitation against the imposition of Death Penalty, Section 354 (3) introduction Criminal Procedure Code,

the Legislative is in favour of retaining the Death Penalty, that is why legislature enacted two more reenactments which provide the imposition of Death Penalty only to prevent the commission of crime. Under these Acts, the punishment of death is not imposed for the offence committed, but it is only for the purpose of preventing. The punishment inflicted is of preventive nature. These are the following Acts which provide the infliction of Death Penalty: -

DEATH PENALTY UNDER NARCOTIC DRUG AND PSYCHOTROPIC SUBSTANCES ACT 1985 AS AMENDMENT RULE IN 2000

Section 31-An inserted by Section 9 of Narcotic Drug and Psychotropic Substance (Amendment) Act 1988. Section 31 (A) (1) (b) provide under Section 32 (A), that sentence awarded under the Act shall not be suspended, remitted or commuted.

DEATH PENALTY UNDER THE TERROIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1985 POTA

Under the terrorist Act, 1987 (Prevention) Act, Section 3 (2) provides punishment for terrorists and the terrorist Act, is defined Section 3 (1). Section 3 (2) whoever commits terrorist act, shall:
If such act has resulted in death any person, be punished with death or imprisonment for life and shall also liable for fine.

The first conviction which attracted the Death Penalty under the Act was in what is known as the "**Parliament Attack Case**" Sayed Abdul Rehman Geelni,.

Mohammad Afsal, and Shakat Hussain Guru have been condemned to death for their role in the Dec l3 2001 attack of Parliament House, New Delhi, when Parliament was in session. Mohammad Afsal has been pronounced Death Penalty by the Supreme Court but his Mercy Petition is yet to be decided by the President. **Nalani** condemned in the 'Rajiv **Gandhi Assassination Case** was executed with Death Sentence. Both these Acts have proved the retention of Death Penalty in India, thereby failing the abolitionists in their aim.' The Death Penalty in India is of great importance and it should be retained as such for the crime of murder, minor's rape and certain other crimes in which security of the State is threatened. It is a step forward towards the retention of Death Sentence.

CHAPTER- VII

CONCLUSION AND SUGGESTIONS

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The power to grant mercy, to remit punishment and pardon offences, is an archaic but recognized and being practiced in all most the all countries except China across the globe. The concept of pardon remains pivotal in the scheme of dispensation of justice vis-a-vis the administration of criminal justice until we carve out perfect system of justice. The absence of pardoning power may make the "justice" disdain and further sanguinary and viciousness.

The power of pardon is of quasi-judicial vis-a-vis administrative nature. It needs to be exercised sparingly but with discreet to reprieve, respite or remit the punishment or to suspend, remit or commute the sentence of any person convicted of any offence. However, it is not a charity albeit it is being treated as boon to the offenders. It shall be employed with due adherence of due process of law. The institution of clemency, in the annals of administration of criminal justice, seems to have had more to do with power than justice. Justice Holmes opined the pardon as "private act of grace from an individual happening to possess power". In other words the power of mercy towards prisoners is exercised by the Sovereign, which emerged from notions of divinity of kings. It encompassed with varied kind of powers like - power to declare war and make peace, the power to adjudicate disputes and to grant mercy to offenders.

It is advocated that sovereign power of pardon might be germane during the days of kingdoms as the king was deemed as fountain of justice. With the emergence of democratic polity it is being viewed in a different pedestal, although there was a cry across the world to prescribe the pardoning power, by annihilating omnipotent exercise. The pardoning power is aiming to save individual from unjust laws and possible judicial lapses, since no system of judicial administration, in this heavenly world, is free from imperfections. The philosophy underlined herein is that everyone born with dignity and equal rights, no environ shall make him as culprit for the reason of unjust laws or omissions and commissions of the administration.

The Law Commission[101] of India justified the existence of the prerogative of mercy in the executive. It spelled thus "there are many matter which may not have been considered by Courts.

[101] The Law Commission of India, Report on Capital Punishment (19678),pp.317-18.

The hands of the Court are tied down by the evidence placed before it. A sentence of death passed by a Court after consideration of all materials placed before it may yet require reconsideration because of: facts not placed before the Court, if placed but not in the proper manner; facts discovered after passing the sentence; events developed after the passing of the sentence and other special features. Consequently, this institution remains an integral part of the Constitutional scheme in almost every jurisdiction".

In British Indian regime, Death Penalty was enjoined as one of the punishments in the Indian Penal Code, 1860 (IPC). Nevertheless, there is an argument nothing to prove the fact that extreme measure of Death Sentence reduces crime rates in contemporary society; rather Death Sentence has failed as a deterrent. On one hand, there is a demand for abolition of Death Penalty and on the other hand, there is an increased rhetoric for Capital Punishment for rape, heinous crimes against women, trade and trafficking of women and narcotics. Much of the arguments for provisions of Death Penalty have strong rationale on moral and social grounds. Therefore, keeping in mind the maxim "Saluspopuliest suprema lex" a proper approach to issue perhaps will be, that Death Penalty must be retained for incorrigibles and hardened criminals but its use should be limited to the "rarest of rare cases". The Courts may make use of Death Penalty sparingly but its retention on the Statute Book seems necessary as a penological expediency. Therefore, it can be safely concluded that Death Penalty should not be subjected to untimely Death Penalty.

In due deference to the mythological ethics, man shall be merciful to all living creatures, the legislature endowed the President or the Governor[102], as the case may be, with a power to grant pardons, reprieves, respites or remission of punishment or suspend, remit or commute the sentence of any person convicted of any offence. The President has exercised power, vide: Article 72, in large number of cases for commutation of Death Sentence into life imprisonment except when the accused was found guilty of committing gruesome and/or socially abhorrent crime. The Law Commission of India in its 262nd report on "The Death Penalty" recommended that "the Death Penalty be abolished for all crimes other than the terrorism related offences and waging war". Even if the legislature acts upon the recommendations of the Law Commission of India the Death Penalty still remains in the Statute Books in India for offences related to

[102] Articles 72 and 161 of the Constitution of India.

terrorism and waging war. The President of India do have voice in liberating the convict from the clutches of Death Sentence and Article 72 and 161 of the Indian Constitution entails remedy to all the convicts and not limited to only Death Sentence cases and must be understood accordingly.

The Constitutional monarch, in United Kingdom, is vested with the power to pardon or shower mercy to a conviction on ministerial advice. He/she may act upon before conviction or after conviction. It is an executive act. The pardon granted by an executive is final and irrevocable. However, the discretionary power to pardon is made subject to certain standards, which in turn would limit the scope of such discretion. But no Legislative action can limit or control the discretionary power to pardon in England. However, the Parliament is enjoying absolute supremacy in the matter but the scope for judicial review is restricted.

The President, in United States of America, may exercise the power to grant reprieves or pardons for offences. He can go for this power only in case of violation of Federal law. This power is unrestricted and can be exercised in case of all the offences against United States except in case of impeachment. The extent of the pardon power is broad: The President may pardon at any time after the offence has been committed, either before or after trial or conviction; and this power is neither amenable to judicial review nor Legislative control albeit it has not been considered as a private act, but found place in the constitutional scheme.

The researcher opined that the practice in United States of America needs to adjust a sentence to better fit the crime. The gravity of offence committed could be ascertained only when the trail is completed. Any attempt to evaluate the extent of offence committed and its influence on the society may deduce wrong inferences. Thus, it may be appropriate to initiate the process of pardon only on the conclusion of trial. The Code of Federal Regulations enjoins waiting period to avail the advantage of pardon which may run between five to seven years after conviction. This eligibility criterion does prevent the convicts from seeking the pardon. The decision of the President or the Governor is final and absolute. No appeal or revision will be entertained against the decision of the President or the Governor. Hence, the determination of the President or the Governor shall be a reasoned decision. The Code of Federal Regulations needs a re-look.

The system in Canada orchestrates objectivity in the exercise of pardoning power. It has undue the inbuilt flaws existed here before on learning lessons from others. Canadian Pardons are considered by the Parole Board of Canada (PBC) under the Criminal Records Act, the Criminal

Code and several other laws. For Criminal Code crimes there is a five-year waiting period for summary offences, and a ten-year waiting period for indictable offences. Completing a Canadian pardon application is a complex and time-consuming process, and any error in the application may cause needless and costly delays.

Clemency is granted by the Governor-General of Canada or the Governor in Council (the federal cabinet) under the Royal Prerogative of Mercy. Applications are also made to the Parole Board of Canada. Clemency may involve the commutation of a sentence or the remission of all or part of the sentence, a respite from the sentence (for a medical condition) or a relief from a prohibition. Like other Prerogative powers, Canada has slowly opened the prerogative of mercy to judicial review.

The power bestowed on the President vis-a-vis the Governor is construed as a Constitutional responsibility which is not, fettered with statutory bounds, amenable to alteration, modification or interference. Thus, it remains an everlasting and immutable Constitutional Scheme.

With regard to stage of exercise of pardoning power, the plain reading of Article 72 would give impression that the power of pardon can be exercised by the President only for persons "convicted of an offence" and not to under trials, but, Indian Courts, by the influence of American Court held that "it may be exercised at any time after the commission of an offence, either before legal proceedings are begun or during their pendency, and either before or after conviction." The Hon'ble Courts, in reaching this conclusion have ignored the core principle of interpretation of a constitutional text. It is not doubted that in England, the Royal Prerogative to pardon offences could be exercised by the King at any time. As stated in Halsbury's Laws of England, "Pardon may in general be granted either before or after conviction". Further, in the United States, too, the power of pardon has been held to be available to the President at any stage, either before or after conviction of the offender. The British Crown was in the nature of a prerogative that is "something out of the course of the ordinary common law". Whereas, in India, the pardoning power vested with the President is an integral part of the constitutional scheme. The President of India has no prerogatives, but do act in due deference to the Constitutional Scheme. The Scheme contemplated herein is extended only to 'punishments 'and 'sentences'. Thus, it could be exercised only after the infliction of punishment that is when a person has been tried and found guilty.

The legal effect of a pardon exercised under Article 72 is quite distinct from a judicial suppression of the original sentence. The President acts under a Constitutional mandate which is relatively diverse from the judicial power but not an extension of it. He can examine the record of evidence of the criminal case and determine whether the case is one deserving the grant. In doing so, the President cannot amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. It is only a test out entrusted to the executive for special cases. Therefore, there is no interference with the functions of the judiciary.

The concept of pardon is founded on public good. Accordingly, the power of pardon needs to be exercised for the promotion of public welfare, which is an avowed object of all punishments, by a suspension of execution of the sentences. It is neither a matter of grace nor a matter of privilege but is an important constitutional responsibility reposed by the people with the highest authority. The President or the Governor, as the case may be, in due exercise of power, under Article 72 and 161 respectively, may examine the evidence afresh and it is clearly independent of the judiciary. Supreme Court, in many instances, clarified that the executive is not sitting as a Court of appeal rather the power of President/Governor to grant remission of sentence is an act of grace and humanity in appropriate cases that is distinct, absolute and unfettered in its nature. Correspondingly, it was held that there were enough indications as to how the power was to be exercised from the terms of the Article 72. No specific guidelines need be spelled to regulate the exercise of the power by the President. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelized guidelines, since the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passage of time.

It is submitted that there is little basis for the supposition that it is impossible to lay down guidelines. It is respectfully submitted that it would be possible to at least make broad categories of cases, and draw guidelines for the same. For those special cases, that may require different consideration, the use of discretion may be permitted The Apex Court held that no condemned person does have the room for oral hearing before the President. The proceeding before him is of an executive character, and when the petitioner files his petition, it is for him to submit with it all the requisite information necessary for the disposal of the petition. He has no right to insist on presenting oral argument. Since the principles of natural justice have been applied at each stage

of the sentencing procedure, it may legitimately be done away with at the executive stage. However, this stand has not been endorsed in **Maneka Gandhi Case** as executive clemency is subject to Article 21 and, indisputably, the accused must have a minimal right to personal hearing. This constitutional imperative cannot be undermined by a judicial order and it may be said, if the power to pardon is exercised in an indiscriminate manner, then it may undermine the precedential value of judicial decisions and upset the equilibrium that should ideally exist between executive and judicial action. Unless the President and Governors exercise a certain degree of self-restraint while making decisions under the power of pardon, the use of this power could potentially destabilize the authoritativeness of decisions made by the judiciary, and have a negative impact on the deterrent effect sought through such judgments. Therefore, there is a dire need to frame procedure to have more transparent and fair deal to arrive at a reasoned decision and to ensure uniformity in granting pardon.

The adage "justice delayed, justice denied" is aptly applies even in case of seekers of clemency. The judicial verdict criticized that in ordinate delay in the disposition of Mercy Petition made the convicts to wait -with a ray of hope of pardons, reprieves, respites or remission of punishment or suspend, remit or commute the sentence -behind the gallows for years together. Unreasonable, unexplained, inordinate delay in disposal of Mercy Petition has been considered as violation of fundamental right to life guaranteed under Article 21 of the Constitution of India[103]

The process of granting pardon is simpler but because of the lethargy of the government and political considerations, disposal of Mercy Petitions is delayed. The process lacked transparency in that it was carried out behind closed doors and the criteria by which applications were assessed were largely unknown and inaccessible. Further, the Constitution does not stipulate any hierarchy of the Mercy Petition and Supreme Court also held that the rejection of one Clemency Petition does not exhaust the power of the President or the Governor. It will be an endless exercise. If the Governor of a State entertains a second Mercy Petition from a death row convict after his first Mercy Petition is rejected by the President. What will happen, if the Governor takes a contrary view and thus embarrass the President. Repeated Mercy Petitions are filed and citing the delay in disposal of such petitions commutation of Death Sentence is sought. It must be stopped and there must be finality to the case after the President/Governor rejects their mercy pleas and Courts also dismissed their appeals.

[103] Shatrughan Chauhan v. Union of India,(2014)3 SCC 1.

If this continues then the whole procedure will be endless and it is a misuse of the provisions.

The observation of the Supreme Court enjoins the executive to set a time limit and limit the multiplicity of petitions and unveil a policy for the disposal of Mercy Petition to shun political interference.

The Scheme engrafted in the Constitution of India provides a prudent checks and balances between the President and Governor and the Council of Ministers. At the outset, although the power of the President and Governor, as the case may be, appears to be absolute, he cannot act upon independently in the absence of aid and advice of the Council of Ministers. It is deemed that the aid and advice tendered by the Council of Ministers would always be congruous to Constitutional Scheme. Notwithstanding of such presumption, what happens if the aid and advice tendered by them is imprecise?[104] Creeping of such an absurdity cannot be ruled out as the framers of the Constitution did not anticipate anything like a Coalition Government. In a coalition government, the interest of different political parties, forming the Government, are often in conflict. It may be fallacious to deduce a presumption that the Cabinet will offer a true, just, reasonable and impartial opinion to the President.

The anguish, mentioned above, is not limited to Coalition Government. It may be found even in case of a Government with single party. This could be noticed in **Kehar Singh Case** who was involved in **Assassination of Smt. Indira Gandhi**, the Prime Minister and leader of Congress. When he filed Mercy Petition case the President rejected on the aid and advice of the cabinet. The story with **Mohammed Afzal Guru Case**[105] Clemency Petition was not different. Wherein, the UPA Government repeatedly delayed its decision on the petition and made the President act upon its advice. These two instances indicate that such an absurd advice renders the entire constitutional edicts nugatory. Further, the oath undertaken, spelling that I "preserve, protect and defend the Constitution and the Law", by the President and the Governors would mock at.

Thus, it is pertinent to weed out disgusting political interference to entail the President and Governor, as the case may be, to act upon in free and fair environ.

[104] Mukharji. P.B, „The Critical Problems of the Indian Constitution', Bombay: Bombay University, (1969), p.25

[105] State (N.C.T. of Delhi) v. Navjot Sandhu alias Afsan Guru, (2005)11 SCC 600;AIR 2005 SC 3820.

What happens if the President does not act on or ignores the "aid and advice" of the Council of Ministers? The Supreme Court opined thus "the exercise of power by the President under Article 72 is primarily a matter for his discretion and the Courts would not interfere with his actual decision on the merits. But this discretion, is commonly understood, is not independent of the advice of the Council of Ministers". Thus, no acceptance or rejection of Mercy Petition is made, by the President, in contradiction to the advice of Council of Ministers. The other way to disregard their advice is either to sit over it or cause delay in taking a decision until his or her stepping down. This is called 'Pocket Veto' which has not been echoed in the Constitution of India. These attitudes of him/her may leads to cruel and undue punishments and end in commutation of sentences.

The factors mentioned before make us to re-visit the Constitutional Scheme to make comprehensive changes, than effecting a few cosmetic changes, to uphold the command of human rights vis-a-vis Article 21 of the Constitution of India.

It is true the Constituent Assembly did not set a time frame for the disposition of Mercy Petition. It does not imply that he could deal it at his sweet will. One has to act within a reasonable time with due diligence in the best interest of the society and to uphold the human values. Any inordinate delay, owing to inexplicable reasons, in the disposal of Mercy Petition shall be subjected to judicial scrutiny.

Indeed, exercise or non-exercise of power of pardon will not immune from the judicial review. The judiciary may examine the decision or order when it is passed - without application of mind or malafide or arbitrarily or irrationally or on some extraneous and/or discriminatory considerations like political loyalty, religion, caste etc. This kind of judicial activism was exhibited in **Shatrughan Chauhan Case** by setting new standard of decency in mercy jurisprudence. The Supreme Court held, herein, that it is incoherent to fundamental rights of the death row convict and accepted delay in execution of Death Penalty by keeping it suspended for inordinate period of time pending disposal of Mercy Petition as one ground for violation of fundamental right to life. Further it spelled that it is unethical to make the death row convicts to wait till their last breath. And thus, it has taken thereby a step towards abolition of Death Penalty. This finding of Supreme Court has drawn the attentions of the nations across the globe placing the Country in forefront.

The following rulings pronounced by the Supreme Court, in various cases, on pardoning power of the President are as under;

1. The petitioner for mercy has no right to an oral hearing before the President;

2. The President may examine the evidence afresh and take a deviation from views of the Court and the President may provide relief not only from a sentence, which he regards as unduly harsh, but also from an evident mistake;

3. The President shall exercise the power on the advice of the Council of Ministers;

4. The President need not pass a reasoned order;

5. There is no need to lay specific guidelines for the exercise of pardoning power by the President;

6. Exercise or non-exercise of pardoning power by the President shall not be subjected to judicial review unless it is of arbitrary, irrational, malafide or discriminatory;

7. The rejection of one Clemency Petition does not exhaust the power of the President or the Governor; and

8. Where the earlier Petition for Mercy has been rejected by the President, stay cannot be obtained by filing another petition.

The concept of pardon is the reflection of volkgiest underlining the human values of a civilized society. The people bestowed the power - to grant pardons, reprieves, respites or remission of punishment or suspend, remit or commute the sentence of any person convicted of any offence on the Head of the State.

In the Indian context this power is vested with the President and Governors. They are expected to exercise this power in due deference to the Constitutional mandates to uphold dignity and equal rights of the civilians. Thus, become responsible for the promotion of human rights and welfare and wellbeing of the civic society.

SUGGESTIONS

In the light of the above study and the conclusion deduced, the following suggestions are made to make the system of the pardoning power more transparent and effective in dealing with the Mercy Petition-

Guidelines for the Exercise of Pardoning Power: A concrete guidelines shall be promulgated to make the exercise of pardoning power flawless to enable the President and the Governor, as the case may be, with due diligence and devoid of malafide or arbitrariness or irrationality or some extraneous and/or discriminatory considerations like political loyalty, religion, caste etc;

Time Frame: Our Constitution is silent regarding any specific time to be taken in deciding such Mercy Petitions. The Mercy Petitions of convicts were pending for time varying from 6 and half years to 12 years, some of them have even served in jail for a time span of 15-20 years. At this juncture, it is suggested that a "time-cap" shall be prescribed for the disposition of the Mercy Petition from the desk of the Office of the President and the Governor, as the case may be;

Speaking Order: since no appeal or revision could be placed against the decision of the President or the Governor, any pardon and any refusal to pardon should be accompanied by a written account of the reasons for the decision.

Ensure Openness and Transparency: An office procedure needs to be evolved to attend the Mercy Petition by the office of the President and the Governor, as the case may be, to ensure transparency, reliability and uniformity. Because the process lacked transparency in that it was carried out behind closed doors and the criteria by which applications were assessed were largely unknown and inaccessible.

Audi Alteram Partem: The principle of natural justice shall be scrupulously observed while attending the Mercy Petition; that is efficient fair hearing and disposal of the Mercy Petition is very much necessary.

Judicial Review: It is said "Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men." Thus, it is, at the same time dangerous to accord

absolute discretionary, unquestionable and unfettered power to the President and Governor, as the case may be, to grant pardons, reprieves, respites or remission of punishment or suspend, remit or commute the sentence of any person convicted of any offence. Because, the chances of misuse or abuse of power cannot be ruled out and it may also grossly affect functions of the judiciary.

Thus, the judicial review of the decision of the Head of the State must be widened by the Apex Court, since no system is free from imperfections, to examine whether the procedure in deciding the Clemency Petition has been duly complied with in a free and fair manner.

Advisory Board: The Pardoning power of the President is not an absolute one but is governed by the advice of the Council of Ministers, it is the opinion of the present researcher that the Executive (Council of Ministers/Ministry of Home Affairs) shall not be allowed to meddle with pardoning power of the President and the Governor, as the case may be, to enable him to act independently and impartially. It is suggested that an independent 'Advisory Board' may be constituted for transparent, effective and broad-based process of Mercy Petition and advice the President and Governor as the case may be, to arrive swift and judicious decision in disposal of Mercy Petition.

The Advisory Board shall comprising of representatives from judicial as well as non-judicial members; the Board may consists of the following persons; Retired High Court or Supreme Court Judge/Jurist, Senior Counsel, Senior Police Officer, Academician, Psychiatrist, Sociologist, Criminologist, Doctor, Person of Public Stature, Woman representative, member from civil society, to assess the offender's/victim's societal interest before rendering advice to the President or the Governor, as the case may be, to arrive at a right decision in the best interest of the civilians.

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