"DEATH PENALTY AND HUMAN RIGHTS"

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INTRODUCTION

In all parts of the world death penalty was in existence from the most ancient times. In primitive conditions of society death by violence was an ordinary phenomena. Tribal or group warfare were often the very conditions of existence. In such a state life was very cheap. personal vengeance dominated the theme of punishment. Death and exile were two principal devices to eliminate dangerous elements from the group. Hence death sentence in those days was the quickest mode of retribution as well as deterrence.

Robertson Smith has said, "in an early society, we may safely affirm that every offence to which death is attached was viewed primarily as a breach of Holiness, for example, marrying within the kin and incest, are branches of the holiness of the tribal blood which would be supernaturally avenged, if men overlooked them.

Death penalty is the strictest penalty. Punishability, as a rule, by and large, depends on the degree of culpability of criminal act and the danger posed by it to the society and also the depravity of the offender. The risk of penalty is the cost of crime which the offender expects. When this cost (sufferings) is high enough, relative to the benefit which the crime is expected to yield, it will deter a considerable number of people. This is also true in respect of crimes punishable with death. This fact is also undoubtedly admitted that death penalty is justified only in extreme cases in which a high degree of culpability is involved causing grave danger to society.

In primitive society the feelings of retaliation used to be very high and to pay in the same coin by the kith and kin of the victim was regarded as an honourable act and the respect for life was not upto the mark and the society was not developed into a body of responsible citizens, but ever since the societies have come under the organization of State and the State has assumed the role of the guardian of people, it has to answer and satisfy the wounded feelings of the family members of the victim or murdered by punishing appropriately the murderer who had no regard for the life of the victim. Further, the State has to and can ensure security to people only by punishing the guilty appropriately. It is true that “eye for an eye” cannot be the vision of modern penology but at the same time modern penology should take note of the point that those who have taken the mission of committing murders for gain

(Political or pecuniary) and bodily lust (rape resulting in death) and thereby endanger the lives of others cannot expect to enjoy life and smile in jail.

DEATH SENTENCE

(a) Death Sentences under the Hindu Law

Death sentence in India, it is as old as the Hindu society. It has been prevalent in India form times immemorial. We find references to the penalty of death in our ancient scriptures and law books. Hindu law givers did not find anything abhorrent in it, they justified it in the cases of certain serious offences against the individuals and the state. Generally, the death penalty was accompanied with the infliction of torture and was applied indiscriminately. Though, the ancient Indian civilization knew of death sentence its desire at some point of time in history has been effected because:-

"The people were most truthful, soft hearted and benevolent and to them vocal remonstrance sufficed. But in the event of failure of these measures corporal punishment and death sentence were involved to protect the society from violent criminals.

(b) Death Sentence under The Muslim Law

The concept of crime and punishment is ancient and goes back to unwritten history, though much of it has reached us through the revealed sacred books and the written laws over a period of 35 centuries or more. According to Islamic law, the punishment should be deterrent. An accused, once found guilty should be punished at a public place in order to open the eyes of a potential criminal. Islam has prescribed death sentence for a premeditated murder. This point is illustrated through *verse 179 Sura II* from the Holy Quran.

"On wise person (here is safety for your lives in death penalty and we hope that you would never violate and would always abide by this law of tranquility. "

Punishment is a natural reaction directly following a physical injury to any living creatures as a natural defence or resistance to the wound and pain. Aggression against a human being (murder or bodily injuries), the crime of adultery, rape and defamation, the crimes of aggression against property (robbery; highway robbery), are crimes specified in both the revealed doctrines and the manmade laws, both of which are oriented towards the -welfare of mankind, and the social system and implementation of right and justice. This is clear from the verses of the Holy Quran:

First Category: Crimes with an impact on social lives.

Under this category fall all those crimes that badly affect the society. These are further sub-divided into two kinds, whereof each is subject to a distinct injunction. *First Kind of Crime* Crimes affecting social existence comprise offences liable to *hudood* (punishments ordained by Allah). They are seven in number:

(1) Adultery or Fornication

(2) Imputation of Adultery

(3) Larceny

(4) Drinking of Wine

(5) Shedding of Blood

(6) Apostasy and

OBJECTIVES

Keeping the above hypothesis and the objectives in view research has been conducted with the following aims and objectives:-

(1) To note the important elements of crime and criminal justice;

(2) To expound the concept of Capital Punishment in the larger perspective of legal sanctions for dealing with conduct which is in contravention of the law;

(3) To study the theories propounded by the social and legal reformers with regard to the system of inflicting various kinds of punishments in general and the system of capital punishment in particular;

(4) To study the provisions of the general law of crimes and those of the special law of crimes adopted for inflicting the capital punishment;

(5) To examine the provisions of the Human Rights Law on the system of capital punishment in general and the trend at the international level for abolishing the system of capital punishment;

(6) To study the cases in which Courts examined the validity of capital punishment in the light of the principles enshrined in the Constitution of India;

(7) To examine the nature of criminal process in India and note how far it is fair in its approach to the question of punishing the offenders by capital punishment;

(8) To note the movement for the abolition of Capital Punishment and the controversies which have arisen in this regard in the wake of recent judgments of the Supreme Court and

the High Court.

HYPOTHESIS

On a preliminary observation of the developments at the national and international levels with regard to the law on capital punishment the hypothesis formulated for study is that the system of Capital Punishment continues to be in the same form as it was years ago despite the emerging norms in modem penology.

While there is the demand from various quarters for the abolition of capital punishment there is at the same time demand for extending the system of capital punishment to various new offences, particularly those affecting the life of individuals and the security and integrity of the State.

Apart from the question of abolishing the system of death penalty from the Statute book there are also new standards laid down with regard to the enforcement of law, the arrest, the investigation and the standard of evidence etc. which call for a comparison of the present day system with the system contemplated by modem criminology and penology.

METHODOLOGY

The above hypothesis has been tested by studying the relevant data as found in the resource centers. This research basically is a Library Research the data for which has been collected from the library of the University. The methodology followed is the one of Historical and Analytical method of research.

CHAPTER 2

LITERATURE REVIEW

Talk about use of death penalty, have been shaped by factors such as age class, race, & gender Women are inherently good & therefore, , women generally were not executed. Women have been playing quite few cases, such as witchcraft or they pleaded guilty to crimes as civil disobedience.

In 2005, United States Supreme Court held that capital punishment forced on persons who were less than 18 years old can't be justified (Roper v. Simmons)

As of late, another gathering of persons has been excluded from death penalty and madness or mental hindrance who meet prerequisites have been classified. In 1986, Ford v. Wainwright (477 U.S. 399), Supreme Court banned execution of crazy persons.

CHAPTER - 3

CONCEPTUAL STUDY OF PUNISHMENT AND THE NEED FOR PENAL REFORM

In a research work of this type which is concerned with the system of punishments and the need for penal reform in India, the first few things that need to be investigated relate to the concept of punishment and the factors which necessitate a change in the system of punishments. As in any research work the initial steps to be taken in pursuing the subject require an investigation into the phenomena of punishments and the factors which call for a change in the system of punishments. In other words, the two preliminary things that call for investigation relate to (i) the theoretical conception and (ii) the operational conception.

The theoretical conception has the notion of what the meaning and definition of punishment is in general, and the operational conception is related to the actual problem on hand, namely, the different kinds of punishment that are imposed under the provisions of the criminal law of our country, the kinds of punishments, the history of punishments, and the objectives with which the punishment is imposed.

The methodology followed in presenting the discussion on the matters covered by this chapter therefore is: Section A deals with the theoretical conception of Punishments, and Section B deals with the operational conception. The discussion then in Section C follows on the notion of penal reform and the institutions which have the responsibility of striving for reform.

The two important themes expounded in this chapter therefore are: (i) the Concept of Punishment, and (ii) the need for penal Reform. Both the themes are related to the system of criminal justice; hence they are explained in one and the same chapter focusing the subject matter in relation to the system of criminal justice.

SECTION A - THE THEORETICAL CONCEPTION OF PUNISHMENT

I. THE MEANING AND DEFINITION OF CRIMINAL JUSTICE

Justice is defined as a moral stand commonly considered being the end which law strives to achieve. The function of law generally is to adjust the conflicting interests of society. From this point of view justice is defined as the harmonious blending of the selfish interest of man with the well being of the society.

Justice is broadly divided into two kinds, one civil and the other criminal. Civil Justice is concerned with the enforcement of citizens.' and residents' rights and the procedure laid down for enforcement of the rights. through courts of civil jurisdiction by granting the remedies like the remedy of damages, specific performance, injunction declaration etc, criminal jurisdiction by awarding punishment such property etc.

The primary goals of criminal justice are the enforcement of criminal law, maintaining the social order, protecting the individuals from injustice.

CRIMINAL JUSTICE SYSTEM:

The concept of criminal justice refers to certain theoretical prepositions which are implemented through legal precepts and the administrative apparatus. The theoretical propositions and the administrative machinery established for implementing the idea of criminal justice together constitute a system known as the system of criminal justice.

Keeping in view the objectives of criminal justice the basic functions of the System of Criminal Justice pertain to (i) determining whether a crime has been committed; (ii) detecting possible offender; (iii) apprehending the suspect; (iv) providing for a review of evidence by the prosecutor to determine whether the case against the alleged offender a merits prosecution; (v) providing for a review of the prosecutor's decision by an independent agency such as a judge of the courts of justice; (vi) providing for determination by a judge as to the guilt of the offender, and (vii) sentencing the offender to punishment when he has been found guilty of the offence

Law enforcing police , the adjudicating courts, the Prosecutors and the prisons together comprise the criminal justice system. Prisons enforce the basic rules of society as expressed in its criminal law. These agencies discharge the most vital function of government. Without an effective system of criminal justice there can be no government in any real sense; anarchy prevails in the country and no man can be secured in his person or property by having an effective system of criminal justice government can operate in all its areas of authority efficiently, and order can be maintained.

The Criminal Justice System of a country may be considered from at least three perspectives:

1. First it can be considered as a normatic system that is a body of legal rules expressing social values through prohibitions backed by pean sanctions against conduct viewed as wrongful or harmful. The normative system has its basics first in the constitution which proclaim is the objectives of securing justice to the people, and sanctions the establishment of courts to administer justice to the people.

The statutes enacted by virtue of the constitutional authorizations supplement the object of the legal system and set out the procedure to be followed for the purpose;

2. Secondly the Criminal Justice System can be regarded as an administrative system. This view comprehends the official apparatus for enforcing the Criminal law including the Police and theory frontline enforcement agencies procutorial authorities the courts and the Prisons including the penal correctional facilities and services.

3. Third, Criminal Justice can be considered as a decimal system. In this perspective, defining and responding the criminal conduct involves all elements of society. This definition of criminal conduct includes not only the penal law enacted but the legislature by also the way in which the citizens interpret the provisions at various levels.

Criminal Justice System and Criminal Justice Process:

The Criminal Justice Process is not the same thing as Criminal Justice System. The system of criminal justice is structured on certain institutions, and agencies that have the responsibility of applying the rules of Criminal law. Criminal Justice Process on the other hand refers to the steps taken by various agencies of criminal justice system according to the procedure which is relevant to the system of criminal justice. The criminal justice process can be identified with the procedure pertaining to the actions of the agencies and institutions manning the system of criminal justice.

THE FRAMEWORK OF CRIMINAL JUSTICE SYSTEM:

The scheme of distribution of subjects giving law making power under the constitution is divided between the Centre and the states. The seventh schedule appended to the constitution has three lists 1) Union List 2) State list 3) Concurrent list. The subject’s crime and criminal

procedure are mentioned in concurrent list in number 2. In theory it is held that laws made by parliament take precedence over state laws made by state legislatures. In reality however the laws in India surprisingly topple and frustrate the constitutional provisions spelt out in article 162 .The Maharashtra Control of Organized crimes Act (section 17) overrides section 25 of Indian Evidence Act.

For example Article 19 of the constitution gives the citizens right to assemble peacefully and protest against some action by the legal authority as agent of the state. Apprehending that there is likely to be protest the district magistrate of the area in advance declares a prohibitory order that more than three/five persons should not assemble in a place covered by the Prohibitory Order and provision in the order makes the breach of order as punitive. It clearly means that district magistrate is deliberately and arbitrarily proclaiming prohibitory order to frustrate the right of citizens to demonstrate. Can the District magistrate decide the fate of citizens' right to liberty and freedoms as part of that liberty granted under article 19 of the constitution with a preconceived pro-government and anti-people stand? Certainly not. This arrangement of discretionary use of declaring certain area as prohibited in the matter of Article 19 frustrates and fails the constitution and tells the world that the regime is oppressive.

Instead of taking the side of protestors who are real masters of the nation the district magistrate is taking the side of the state under the pretext of possible collapse of public order. People are not worker ants that they always maintain order meekly by instinct.

In Coates v. Cincinnati (1971) the United States Supreme Court said that breach of prohibitory Order proclaimed by the local authority cannot be a crime since the original freedom granted by the constitution is used by the person who defied the order. Using freedom cannot be a crime anywhere.

The facts of the case are that Coates was a student. In City of Cincinnati there was prohibitory order proclaimed by the local authority. Coates and two others demonstrated by giving slogans and holding placards. The breach was punishable with 50$ as monetary fine and one month in prison. Coates challenged the fine and imprisonment saying that he used the freedom given to him by first and fourteenth amendments.

Prohibitory order was proclaimed by a smaller office not equaling or surpassing constitutional provisions proclaiming freedom. The Local authority at the most stops the

citizen but cannot slap punishment. Certain crimes are simple cases of disobedience and they fall in to the category of stoppable not the in the category of punishable.

The Indian penal code was drafted by a British legal expert Thomas Babington Macaulay during British India rule and was operative from 1862. The Indian penal code and the criminal procedure code were originally conceived as laws for natives made by a master race. These laws are applicable to Indian citizens, residents who are not citizens and Indian citizens committing crime abroad. Law was drafted more than a century ahead of constitution of India came in to being. The subtle oppressive regime can be seen if deeper analysis is done.

Indian penal code is classified for the convenience of law enforcing police, prosecutors, defense lawyers adjudicating judges and the common public. The code categorizes offences against state,, offences relating to Army Navy Air Force , offences against tranquility , offences against men women and children , offences relating to immovable and movable property Offences relating to religion , offences relating to public health, marriage , morality. crimes defined by the code are classified further as cognizable and non-cognizable just like crimes are categorised as misdemeanours and felonies in USA. Non-cognizable offences as crimes are less serious for which bail is not demanded. The felony is a class of more serious crime the punishment for which is more than twelve months of imprisonment. Misdemeanor is a class of less serious crimes the punishment for these crimes is less than twelve months.

Punishments are categorised by the law makers as per the seriousness of the crime. Punishment includes monetary fines simple jail term with hard labour, jail term for life and capital punishment , simple imprisonment, imprisonment with hard labour. There is provision of solitary confinement in Indian Penal code and also jail manual but in **Sunil Batra v. Delhi Administration** WP 2202 of 1977 the supreme court said in 1078 that Solitary confinement may well be on the statute book but it is not in conformity with the human rights regime of modern times. When the question of abolition of capital punishment came for debate in United Nations, India took the stand the in India Rarest of the rare murder doctrine has been evolved and that death sentence is awarded only for those murders which were committed in most evil, cruel manner, outrageously devilish and inhuman and for crimes such as assassinations and collative murders including murders of children.

Constitutional arrangement of crime Control: Under the power sharing scheme of the constitution of India the power of governance including public order has been in share of the provincial governance. Policing including apprehension of criminals is performed

by the enforcement agencies of the state. . When there is major breakdown of law and order the constitution of India allows the central government to participate in regaining the public order by joint police operations and sending central reserve police. The central government takes part in police organizations of the states by allotting to states Indian Police service Officers and the state to have the central police officers.

The constitution of India additionally authorizes the Central government to maintain apart from the military, the para military forces which are necessary to safeguard security and integrity of the nation. The central police offices and establishments located in states in spite of the protest of a state government if the state government belongs to a different political party and not the same as having power in state.

Adjudication of criminal matters generally happens in full public view with visitor galleries. However hearing of matters related to war waged on state by terrorists, happens in camera trials. As a democratic element appeal exists at higher forums. After conviction or acquittal by trial courts. In Many cases the verdict of the trial court is reversed. There are instances in which verdict of the high court is also reversed by the Supreme Court.

Though there is academic question mark and criticism about independence of Indian judiciary; .there is unified hierarchical court system in India having independence at each stage of hierarchy. There is Supreme Court at the top below which are 24 high courts in India. The high courts have power of supervising the district courts in their territorial jurisdiction headed by principal district judges who monitor the work of civil judges ,executive magistrates and trial judges at district level. Panchayat courts also function in some states of India under names like Nyaya Panchayat ,Panchayat Adalat , Gram Kacheri etcetera for deciding civil and criminal disputes of petty and local nature.

The ministry controls central police administration and their functions. Intelligence gathering surveillance and reconnaissance agencies are operated and administered by the Home Department of the central government. The Home department headed by a minister for internal affairs is concerned with peace and tranquillity pertaining to the entire nation. The recruitment of top class administrative and top class police personnel is done by the independent agency known as Union Public service commission. The Central Home ministry decides and can change the boundaries of the state and union territories. The union Home ministry also decides the name of the state and the union territory and can change the name so decided. .

There are also para military forces under the central government the central home ministry runs the administrative officers academy at Missouri and an academy at Hyderabad to train top class Police officers The prime investigative agency Central Bureau of Investigation is not established by central Home ministry but it was established under Delhi Police Establishment Act 1946.it now functions under Department of Personnel and Training, government of India., This agency can be directed by high court of a state or the supreme court of India to file offences and enquire .against anybody however so big. The Central Home Department also is the parent department of the Para military organizations viz. central reserve police force, Assam Rifles , Indo tibetan border police.

The Police forces in India draw their style of working and hierarchy from the Police Act 1861. The Police organization in each state has a distinct uniform , equipment , and resource base in terms of funding etc. but yet on a broader scale there appears marked similarity in pattern and functioning.

A Director General of Police (acronym DGP) in each state heads the Police organization. He must report to the Home Secretary of the state. . National Capital Territory of Delhi does not have its own police. The Central Police is deployed in NCT Delhi and it is headed by commissioner of Police, Delhi.

Under the director general of police in each state a number of police ”ranges” composed of three to six districts, headed by Special Inspector General of Police. arse created. The high officers gives orders to the lower officers and they have discretionary powers. They are also responsible for the all types of criminal investigations. All districts also have Additional Superintendents Assistant Superintendents and several deputy superintendents of Police. Police stations are headed by Police Inspector. In metropolitan cities there are Police commissioners Deputy Police commissioners and Assistant Police commissioner.

Because the police force is inadequate always, the Home Guards are called who are poorly paid and who have poor diet and consequently poor physical strength.

In all the states there are civil as well as the armed police divisions. The formers are attached to police stations, do the job of investigation, answer and redress routine complaints of citizens, manage traffic on roads , and patrol the town and its lanes. Policemen usually carry batons called lathis made by bamboos or plastics.

The division of armed police in each state are divided in to two groups, 1) armed police attached to District Police Headquarter and 2) the state Reserve Police. The armed police in the district are organized as per the military rules. They are posted temporarily by rotation to police stations and do the protection of citizens and the state property. Presently even there are many women working in the police department.

They were first time introduced by union Public service commission in 1972. Kiran Bedi was the first IPS officer who rose to the rank of IGP and created an imprint on contemporary society. Woman officers like Addl. DGP Maharashtra state Meeran Chaddha Borwanker are holding important offices. However their numbers is comparatively small.

The enforcement of law and management of law and order and it is security, prevention of offence and detection of offence are necessarily enforced the police authority. The role and performance of police is governed by the following three major laws:

Indian penal code, 1860
Indian evidence act, 1872
Code of criminal procedure 1973.

Apart from these, to cater to various specific needs, several new laws have been enacted. As such several Special laws - applicable to a particular subject i.e. Arms Act, Narcotics Drugs and Psychotropic Substances Act, etc-and Local laws-applicable to a particular part of India-have been enacted from time to time to meet the growing crimes prevention needs.

SECTION B – THE OPERATIONAL CONCEPTION THE SYSTEM OF PUNISHMENTS

The expression: ‘system of punishments’ refers to the body of rules and regulations which represent the principles of justice and the procedures of deterrence oriented retribution. The system of punishments is concerned with such types of punishments by which the criminals are punished with, judicially by fines, imprisonment, deportation etc.

Though the expression ‘punishment’ is wide enough to refer to any kind of unpleasant consequence the specific area envisaged in this research however is the work relating to the courts of law with the object of securing due compliance with the laws.

In the specific area of criminal justice punishment refers to the work of the criminal courts whereby certain kinds of punishments as specified in the law of crimes are imposed on persons for contravening the penal laws.

Relating the system of punishments to the concept of justice it may be pointed out that there are two types of justice, one civil and the other criminal, which means there are two types of wrongs, one known as civil wrongs and the other known as criminal wrongs. Criminal wrongs are public wrongs while civil wrongs are private wrongs.

A crime is an act which is deemed by law to be harmful to the society in general, even though its immediate effect is on an individual. The proceedings against such persons who commit crime are taken by the state and if convicted they are punished. In the case of civil wrongs only the rights of the individual wronged are infringed and therefore the remedies are sought by the aggrieved parties themselves. Legal consequences of crimes and civil wrongs are different from each other.

Civil justice is administered according to one set of forms and criminal justice according to another. Civil justice is administered in one set of courts criminal justice in somewhat different set of course. The outcome of the proceedings too, is different generally.

Successful civil proceedings result in the award of damages, or a penalty or a specific restitution or in specific performance etc. While criminal proceedings when successful result in one of a number of punishments ranging from a fine to hanging.

There are two incidents of punishment, it can be regarded as a method of protecting society by reducing the occurrence of criminal behaviour or it can be regarded as an end in itself. Punishment can protect society by deterring potential offenders, by preventing the actual offender from committing further offences and by turning and reforming him into a law-abiding citizen. Various theories of punishment have been propounded to justify ends of criminal justice and punishment details of which have been described in the research report. The application of the provisions of criminal law to new types of crimes and the new procedures has raised the question of reforming the system of punishment.

Though punishment is a kind of power exercised by various institutions apart from the courts, the specific area envisaged in this proposal is the work belonging to the courts of law. The need for reform of the law has arisen owing to new kinds of crimes about which the existing system of punishment is found to be inadequate and the rising trend of criminality

about which the existing system of prevention is found to be ineffective. The significance of this research is that it will be meeting the acute necessity which has arisen of dealing with the crime problem by revising the laws on the system of prevention and punishment of crime. The subject of these two branches of criminal law viz .prevention and punishment are clubbed together. Punishment by courts follows culpability. Without culpability proved beyond reasonable doubt, there can be no punishment given by courts.

The punishments which the courts of criminal jurisdiction may award are of two kinds, one which is provided for in the Indian penal code 1860 and the other punishments which are provided for in the Special laws of crime.

As far as punishments provided by the Indian penal code 1860 are concerned, they are the punishments of Death, Imprisonment for life, Imprisonment which may be simple or rigorous, Solitary Confinement, Forfeiture of Property and Fine.

As far as punishments provided by the special laws are concerned they are of a wide variety; some of them may be described as Disqualification from holding an office, Disqualification from contesting an election, internment etc.

There is demand for introducing various new punishments for certain crimes with a view to improve the system of criminal justice and make the criminal law strong enough to deal with criminality. This is where the need arises of making a thorough study keeping in view what was the system of punishment previously and what it is at present.

Punishment generally is the name of something unpleasant or undesirable imposed upon an individual by a legal authority for his or her behaviour which is in violation of the norms already laid down by the authority, Punishment is intended for enforcing good behaviour by the concerned authority. Although punishments are administered for various purposes, the one particular purpose for which it is inflicted is to bring the behaviour of the wrong-doer in conformity with the prescribed rules of conduct. In this sense, even the family members of tender age children, parents, guardians, and teachers, are also punished by their rules.

The theoretical conception of Punishment is it is a kind of power exercised by the appropriate authority besides several other institutions of state to bring a person to account for his misbehaviour and to do justice to other members of society. There are a good number of institutions and officers besides private agencies which perform the work of imposing punishment on persons for their behaviour which is contrary to the norms of that institution.

The object of punishment by these institutions and agencies is to enforce the rules of discipline and set right the behaviour of a person. Punishment is inflicted on the violator with the intent to secure the observance of discipline by rest of the people in the society.

CHAPTER - 4

INTERNATIONAL PERSPECTIVES ON CAPITAL PUNISHMENT'

The background regarding the death penalty both in terms of international law as well as state practice has changed in the last decades. As compared to 1967, when the 35th Report of the Commission was issued, and in 1980, when the Bachan Singh[1] judgement was delivered, a majority of the countries in the world have abolished the death penalty. Even those who retain this penalty, bring out far fewer executions than the situation before some decades ago.

The conversion in the international scenery over the past decades and the marked trend towards abolition in both international and domestic laws is through a study of appropriate international law, political promises and state exercise.

According to Amnesty International, countries are categorized on their capital punishment status, as follows:[2]

• Death penalty Abolished for all crimes.

• Death penalty Abolished for ordinary crimes[3]:

The death penalty has been abolished for all ordinary offences committed, such as those contained in the criminal encryption or those predictable in common law such as robbery, dacoity, murder, kidnapping and rape. The Capital Punishment is retained only for some exceptional surroundings, such as military offences in time of war, or crimes against the State, such as treason, terrorism or armed rebellion.

• Abolitionist de facto[4]: It states that "the punishment of death remains lawful and where this punishment may still be prominent but where executions have not taken place for 10 years", or states "that have carried out executions within the previous 10 years but that have made an international commitment through the establishment of an official suspension" Amnesty International follows a slightly different definition that the countries which retain the death penalty for ordinary crimes such as murder but can be deliberated abolitionist in practice that

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[1] (1980) 2 SCC 684

[2] Annex II, Amnesty International, Death Sentences and Executions in 2014, ACT 50/001/2015

[3] Capital punishment and implementation ofthe safeguards guaranteeing protection of the rights of thos e facing the death penalty, Report ofthe Secretary - General, E/2015/49 at page 4.

[4] 2 ReportoftheSecretary-General,AmnestyInternational,DeathSentencesandExecutionsin2014,ACT 50/001/2015

they have not executed anyone during the last 10 years and are believed to have a policy or established practice of not carrying out executions.

• Retentionist: means that the death penalty in practice for some defined offences. Fifty eight countries are considered as retentionist, who have the death penalty on their statute book, and have used it in the recent past.[5]

At the end of 2015, ninety eight countries were abolitionist of death penalty for all offences, seven countries were abolished death penalty for ordinary crimes only, and thirty five were abolitionist in practice, making 140 countries in the world abolitionist in law or practice. The list of nearly one hundred forty countries includes some ofthem formally abolished the death penalty in 2015.314 While only small number of countries retains the death penalty, includes some of the popular nations in the world, including United Nations, China, India and Indonesia, making a majority ofpeople in the world tentatively subject to this punishment.

In future number of execution may rise in of death penalty, however, because it is often marked by the population growth, which has restrained the rise in retentionist countries. In Japan, Korea, Taiwan, and America death penalty has only been developed in democratic countries, death penalty is a tool of political pressure that often works on a grand scale and the death penalty is in the poor, autocratic and authoritarian states. In 1980s, the democratization of Latin America had a record of slave states. In Asia, on the other hand, rapid industrialization, democratization ar democratic and developed countries are increasing in favour of abolishment.

Developments in the International Human Rights Law Framework an Death Penalty

Death penalty has been systematized in the international Human Rigl Framework with various Protocols or treaties.

Death Penalty in International Human Rights Treaties

Death Penalty has been arranged in international human rights treaties as one aspec of the right to life, as enclosed in the International Covenant on Civil and Political Rights. Some facets of the imposition and application of death penalty have also beei creating to violate the prohibition against unpleasant, inhuman, and degrading conduct and punishment. After the

[5] The Economist, Available at www.economist.com/news/intemational (visited on 12/09/2015) at 01:00 PM

Second Optional Protocol to the ICCPR coming into force the international community saw the first International legal instrument that aimed at abolishing the Capital Punishment.

The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights ('ICCPR') is one of the important documents conferring the imposition of death penalty in international human rights law. The ICCPR does not abolish the use of the death penalty, but Article 6 contains guarantees about the right to life and covers vital safeguards to be followed by parties who retain the death penalty.

Article 6(2) states:

"In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and .Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court"[6]

Article 6(4) requires states to ensure that

"Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases"

Article 6(5) mandates that a

"Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. "

The UN Human Rights Committee argued Article 6 of the ICCPR in detail in its General Comment in 1982. The Committee clarified that while the ICCPR did not clearly want the abolition of the death penalty, abolition was desirable, and the Committee would reflect any move towards abolition as progress in the enjoyment of the right to life m. The Committee also said that "Capital punishment should be an exceptional measure. It restated important procedural safeguards including that the death penalty can only be imposed in accordance with the law in force at the time of the commission of the crime and that the right to a fair

[6] Article 6(2) of ICCPR, 1966

hearing by an independent tribunal, the presumption of innocence, minimum guarantees for the defence and the right to review by a higher tribunal must all be harshly observed."[7]

The Committee also reviews timely reports of state-parties to the ICCPR, and has often stated to abolition of the death penalty in its observations on reports of retentionist states. For example, in 2014, it recommended that Sierra Leone should expedite its efforts to abolish the death penalty and to ratify the Second Optional Protocol to the Covenant[8]. In 2009, it noted that while Russia had a de facto suspension on executions since 1996, it should take the necessary measures to abolish the death penalty de jure at the earliest possible moment, and consider granting to the Second Optional Protocol to the Covenant. In other cases, the Committee has als restated the importance of following the safeguards listed in Article 6 and oth« provisions of the ICCPR, and provided a roadmap to abolition. For example, in its 2008 review of Japan, the Committee recommended:

"Regardless of opinion polls, the State party should favourably consider abolishing the death penalty and informs the public, as necessary, about the desirability of abolition". Similarly, in 2006 the Committee asked the United States to "revive federal and state legislation with a view to restricting the number of offences carrying the death penalty the State party should place a moratorium on capital sentences bearing in mind the desirability of abolishing death penalty"[9]

At present, one hundred and sixty eight states, including India, are parties: to the International Covenant on Civil and Political Right. The Committee revised India's report in 1996 and recommended that India "abolish by law the imposition of the death penalty on minors and limit the number of offences carrying the death penalty to the most serious crimes, with a view to its ultimate abolition."[10]

The Second Optional Protocol to the ICCPR

The Second Optional Protocol to the International Covenant on Civil and Political Right, targeting at the abolition of the death penalty is the only treaty directly concerned with

[7] 7 Human Rights Committee, General Comment No 6 (1982) at Para 7, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GENM\Rev.I at 6 (1994)
[8] UN Human Rights Committee, Concluding observations on the initial report of Sierra Leone.
[9] UN Human Rights Committee, Concluding observations of the Human Rights Committee: United States of America, 15 September 2006, CCPR/C/USA/CO/3.
[10] UN Human Rights Committee, Concluding observations of the Human Rights Committee: India, 4 August 1997, CCPR/C/79/Add.81 at para 20.

abolishing the death penalty, which is open to signatures from all the countries in the world. It came into force in 1991, and has 81 states parties and 3 signatories. India has not signed this treaty.

Article 1 of the Second Optional Protocol states that "No one within the jurisdiction of a State Party to the present Protocol shall be executed", and that "Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction." No reservations are permitted to the Second Optional Protocol, "except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime."[11] Some state parties have made such reservations.

The Convention on the Rights of the Child

Similar to the ICCPR, Article 37(a) of the Convention on the Rights of the Child (CRC) explicitly prohibits the use of the death penalty against persons under the age of eighteen. As of July 2015, 195 countries had ratified the CRC. Article 37(a) states:

''States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age. "

The Committee on the Rights of the Child has explained that while some presumed the rule only prohibited the execution of persons below the age of eighteen, death penalty may not be imposed for a crime committed by a person under 18 regardless of his/her age at the time of the trial or sentencing or of the execution of the sanction.

The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment

There is an analysis of the penalty of death as violating norms against torture and cruel, inhuman, and degrading treatment or punishment. In this context, the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention)

[11] Article 2 (1), Second Optional Protocol to the ICCPR, aiming at the abolition ofthe death penalty

and the UN Committee against Torture have been sources of jurisprudence for limitations on the death penalty as well as necessary safeguards.

The Torture Convention does not esteem the imposition of death penalty per se as a form of torture or cruel, inhuman or degrading treatment or punishment However, some methods of execution and the phenomenon of death row have been seen as forms of CIDT by United Nation bodies. In its Concluding Observations or Kenya's report, the Committee against Torture said that it remained concerned about the uncertainty of those who serve on death row, which could amount to ill-treatment, and advised Kenya to take the necessary steps to establish an official and publicly known moratorium of the death penalty with a view of eventually abolishing the practice"[12]

While reviewing China's periodic report, the Committee against Torture expressed concern "at the conditions of detention of convicted prisoners on death row, in particular the use of shackles for 24 hours a day, amounting to cruel, inhuman or degrading treatment"

In the context of Japan, the Committee found that unnecessary secrecy and arbitrariness surrounding the time of execution and principle of solitary confinement after the final sentence is handed down could amount to CIDT. While India has signed the Torture Convention, it has yet not ratified it.

International Criminal Law

The international movement towards abolition of the punishment of death is also perceptible in the development of international criminal law. The penalty of death was an allowable punishment in the Nuremberg and Tokyo[13] tribunals, both of the countries were well- known following World War II. Subsequently, however, International criminal courts - including the Statute of the International Criminal Tribunal for the former Yugoslavia, the Statute of the International Criminal Tribunal for Rwanda, the Statute of the Special Court for Sierra Leone and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia [14] exclude the death penalty as an

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[12] UN Committee against Torture, Concluding observations ofthe Committee against Torture: Kenya, 19 January 2009

[13] University of Virginia, The Tokyo War Crimes Trial: A digit al exhibition, available at: http://lib.law.virginia.edu/imtfe/tribunal (visited on 20/08/2015) at 2:10 PM

[14] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, mailable at: www.eccc.gov. (visited on 15/08/2015) at 2: 30 Pm

allowable punishment. The same is true for the Rome Statute of the International Criminal Court, where judges may only impose terms of imprisonment. It must be noted that these tribunals do not use the death penalty, notwithstanding routinely dealing with the most serious crimes under international law, including genocide, war crimes, and crimes against humanity. It is pertinent to that India is not signatory to the Rome Statute.

International Treaty Obligations in Indian Law

India has ratified the International Covenant on Civil and Political Right and the CRC, and is signatory to the Torture Convention from the above discussed treaties but has not ratified it. Under the international law, treaty requirements are binding on states once they have ratified the treaty. Even where a treaty has been signed but not ratified, the state is bound to refrain from acts which would defeat the object and purpose of a treaty ,

In India, local legislation is required to make international treaties enforceable in Indian law.[15] The Protection of Human Rights Act, 1994, incorporates the ICCPR into India law through section 2(d) and 2(f).

Section 2 (d) states that, "human right means the rights relating to liberty equality and dignity of the individual guaranteed by the Constitution embodied in the International Covenants and enforceable by courts in India."

Section 2(f) states that, "International Covenants "means the International Covenant on Civil and Political Rights and the International Covenant o Economic, Social and Cultural rights adopted by the General Assembly of the Unite Nations on the 16th December, 1966."

Further, according to Article 51(c) of the Indian Constitution, the stat shall endeavor to foster respect for international law and treaty obligations in the dealings of organized peoples with one another.

While this does not make all of India's treaty commitments automatically binding on India, courts have respected rules of international law where there is no contradictory legislation in India. For example, the Supreme Court, of India said Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions, e.g., Articles 14, 15,19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee.

[15] 0Jolly George Verghese & Anr v. The Bank OfCochin, 1980 AIR 470

Safeguards regarding Capital Punishment in International Law

Resolutions, comments and reports by the bodies of the United Nation by special procedures, have also contributed to international law standards regarding the penalty of death and essential safeguards where it is being used. The trend in most of these instruments is towards limiting the scope of the death sentence globally and inspiring abolition where possible.

The ECOSOC Safeguards

The main body of United Nation, Economic and Social Council (ECOSOC) has delivered several resolutions advising safeguards regarding how the death penalty should be imposed in countries where it is not abolished. These safeguards include important limitations to the scope and application of the death penalty in international law.

“The first ECOSOC resolution titled Safeguards guaranteeing protection of the rights of those facing the death penalty was adopted in 1984, and contained the following nine safeguards:

1. In countries which have not abolished the penalty of death, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely serious consequences.

2. Death penalty may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.

4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for alternative explanation of the facts.

5. Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which

capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

7. Anyone sentenced to death shall have the right to seek pardon, or commutative of sentence; pardon or commutation of sentence may be granted in all cases capital punishment.

8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation the sentence.

9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering."

A 1989 ECOSOC resolution added "more safeguards, including encouraging transparency in the imposition of the death penalty (including publishing information; and statistics on the issue); the establishment of a maximum age beyond which person cannot be executed; and abolishing the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution."[16]

In 1996, a third ECOSOC resolution "encouraged states to ensure that each defendant facing a death sentence is given all guarantees to ensure a fair trial. I specifically urged states to ensure that that defendants who do not sufficiently understand the language used in court are fully informed of the charges against them and the relevant evidence, and that they had enough time to appeal their sentence and ask for clemency. It also asked states to ensure that officials involved in decisions to carry out an execution are fully informed of the status of appeals and petitions for clemency."

Reports by the Special Reporter on extrajudicial, summary or arbitrary executions

Where the imposition and execution of a death sentence does not follow norms of international law, it can be measured an extrajudicial execution by the state and the Special Rapporteur on extrajudicial, summary or arbitrary executions has, over time, commented on several aspects oft he capital punishment debate.

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For example, in 2006, the Special Rapporteur on Extrajudicial, summary or arbitrary execution released a report On transparency in the use of the death" penalty."[17] In 2007, "the Special Rapporteur on Extrajudicial, summary or arbitrary execution, in a survey of existing treaty obligations, jurisprudence, and statements by UN treaty bodies, said "the death penalty can only be imposed in such a way that it complies with the stricture that it must be limited to the most serious crimes, in cases where it can be shown that there was an intention to kill which resulted in the loss of life."[18]

42.2.3 The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

The Special Rapporteur on torture has specifically discussed whether penalty of death can be considered cruel, inhuman or degrading punishment. In his report on the issue, the Special Rapporteur noted the developments in jurisprudence by international bodies, which had found that corporal punishment often amounted to Cruel Inhuman or Degrading Treatment, because of its impact on human dignity. While the Special Rapporteur did not go so far as to say that "death penalty probably the most extreme form of corporal punishment always amounted to CIDT, he noted that the permissibility of the death penalty is increasingly being challenged by obvious inconsistencies deriving from the distinction between corporal and capital punishment and by the universal trend towards the abolition of capital punishment.[19]The Special Rapporteur has also urged certain states to impose moratoriums on death sentences."

Political commitments regarding the Death Penalty globally

The trend towards abolition of the penalty of death is also evident in a series oi political commitments made at the United Nation, through resolutions at bodies suet as the General Assembly and the United Nation Human Rights Council.

General Assembly Resolutions

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[17] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Transparency and the Imposition of the Death Penalty, Available at: www.daccess -ddsnv.un.org (visited on 3/08/2015) at 05:24 PM
[18] 6Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/4/20, 29 January 2007, at para 53, available at: www.daccess-ddsnv.un.org (visited on 3/08/2015) at 05:25 PM
[19] 7Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, available at: www.daccess-ddsnv.un.org (visited on 3/08/2015) at 05:27 PM

Several resolutions of the United Nation General Assembly (UNGA) have called for a suspension on the use of the death penalty. In 2007, the UNGA called on states to "progressively restrict the use of the death penalty, reduce the number of offences for which it may be imposed" and "establish a moratorium on executions with a view to abolishing the death penalty." In 2008, the GA reaffirmed this resolution, which was reinforced in subsequent resolutions in 201.0,351 2012, and 2014.[20] Many of these resolutions noted that, "a moratorium on the use of the death penalty contributes to respect for human dignity and to the enhancement and progressive development of human rights."

These resolutions have been increasing support from countries over time; 117 states voted in favour of the most recent resolution in 2014, as compared to 104 in 2007. India has not voted in favour of these resolutions.

United Nation Human Rights Council

The UN Human Rights Council in recent times started a new enquiry on the death penalty, using the human rights of children of parents sentenced to the death penalty or executed as an initial point. In a 2013 resolution, the Human Rights Council acknowledged:

"The negative impact of a parent's death sentence and his or her execution on his or her children, advised States to provide those children with the protection and assistance they may require, and mandated a study on this specific issue." It also called on states "to provide those children or, where appropriate, giving due consideration to the best interests of the child, another member of the family, with access to their parents and to all relevant information about the situation of their parents."[21] A 2014 Human Rights Council resolution noted that "States with different legal systems, traditions, cultures and religious backgrounds have abolished the death penalty or are applying a moratorium on its use" and deplored the fact that "the use of the death penalty leads to violations of the human rights of those facing the death penalty and of other affected persons. The Human Rights Council states to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights."

Death Penalty and the Law of Extradition

[20] Resolution adopted by the General Assembly "Moratorium on the use of the death penalty" A/RES/69/18 6,4 February 2015.
[21] Ibid

The law of extradition has been another tool for countries assertive for the abolition of the Capital Punishment. For example, “those countries that abolish the death penalty put pressure on those countries that retain the death penalty by rejecting extradition requests for persons wanted for offences carrying the penalty. Several abolitionist countries either require guarantees that retentions extraditing countries not impose the death penalty, or have included such a clause in bilateral extradition treaties.” For example, China has signed extradition treaties with Spain, France and Australia, saying it will not impose the death penalty on individuals extradited from these countries. Abolitionist countries are often bound to ensure this. For example, Article 19(2) of the Charter of Fundamental Rights of the European Union states:

“No one may be removed, expelled or extradited to a State where there is serious risk that he or she would be subjected to the death penalty, torture or oth< inhuman or degrading treatment or punishment.”

Several courts have made important statements on the issue. For example, i the case of **Soering v. UK,**[22] **“the European Court of Human Rights** held that the extradition of a person from the UK to Virginia, a state in USA which imposed the' death penalty, would violate the European Convention of Human Rights because the very long period of time spent on death row in such extreme conditions, with the eve present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant’s extradition to the United State would expose him to a real risk of treatment going beyond the threshold set by Article3 on Prohibition of Torture.”

In the case of US v. Burns,[23] the Apex Court of Canada held that in cases of extradition to a country that retain the death penalty, pledges “that the death penalty would not be imposed, or, if imposed, would not be carried out were essential in all but exceptional cases.”

Similarly, in the case of **Mohamed and Another v. President of the Republic of South Africa**[24] & South African constitutional court held that “a ‘deportation’ or ’extradition’ of Mohamed without first securing an assurance that he would not be sentenced to death or, if so sentenced, would not be executed would be unconstitutional,” adding that such an extradition

[22] Application no. 14038/88, available at: www.hudoc.echr.coe.int/eng?i=001 -57619 (visited on 20/08/2015) at 05:50 PM
[23] US v. Burns, [2001] 1 SCR 283
[24] 2001 (3) SA 893 (CC).

violated his “right to life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment.”

Similar jurisprudence can also be found in **International law. In Judge v. Canada**[25] the United Nation Human Rights Committee, dealing with a man deported from Canada to the United States, held that “Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, violated the author's right to life under article 6, by deporting him to the United State, where he is under sentence of death, without ensuring that the death penalty would not be carried out.”[26]

India’s Extradition Act, 1962, reflects this principle in Section 34C: ‘'Notwithstanding anything contained in any other law for the time being in force, where afugitive criminal, who has committed an extradition offence punishable with death in India, is surrendered or returned by a foreign State on the request of the Central Government and the laws of that foreign State do not provide for a death penalty for such an offence, such fugitive criminal shall be liable for punishment of imprisonment for life only for that offence. ”

International Trends on the Death Penalty

The position and practice of the death penalty today advises a distinctive trend towards abolition of the penalty. When the United Nation was formed in 1945, only seven countries in the world had abolished the penalty of death. In disparity, as of 31 December 2014, one hundred and forty countries in the world had abolished the punishment of death m law or practice.

The United Nation Secretary General, issues a periodic report on the status of the penalty of death worldwide; the up to date of these reports surveyed the international situation between 2009 and 2013.366 In this period, the number of fully abolitionist states increased by six, and almost all retentionist countries reported reductions in the number of executions and the number of crimes subject to the penalty of death. Amongst retentions countries, only 32 carried out judicial executions. This report confirmed “the continuation of a very marked trend towards abolition and restriction of the use of capital punishment in most countries”.

[25] Roger Judge v. Canada, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003)
[26] IDBI

The trend is also evident from the signatories to the Intimation; Covenant on Civil and Political Rights Second Optional Protocol, aiming at abolishing the death penalty, to which 81 states have signed or acceded.

Regional Trends regarding the Death Penalty

The Americas

The American Convention on Human Rights 1969 pointedly restricts the application of the penalty of death. Article 4 of this convention states that "it can only be imposed for serious crimes following a fair trial, it cannot be inflicted for political offences or related common crimes, it cannot be re-established in states that have abolished it, and it cannot be imposed on persons under the age of 18, over 70 o pregnant women."

The Americas also have a specific convention on abolishing the punishment of death. Under Article 1 of the Protocol to the American Convention or Human Rights to Abolish the Death Penalty which is ratified by 13 countries,

"The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction."

Notwithstanding some till now keeping it in law, number of countries in the America has abolished the penalty of death in law or practice.

Like many of its South American neighbors,[27]Brazil, in 1882, abolished the punishment of death for ordinary crimes. The abolition only applies to the death penalty for ordinary crimes, and the sentence of death for crimes in extraordinary times of war still remains in practice. The Brazilian Constitution provides "that there shall be no punishment by death, except in the case of war".

The same Article also "provides that there shall be no life imprisonment, making Brazil one of the few countries in the world where both capital punishment and life imprisonment do not exist. In the twentieth century, in the face of political instability and military rule, Brazil

[27] These include Argentina, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Nicaragua, Paraguay, Venezuela, and Uruguay

Re introduced the death penalty twice: in the years 1939-45 (for politically motivated crimes of violence) and 1969-79 (for political crimes against national security), but no death penalties were imposed on any person during these years."[28]

"The United States is a prominent exception in the Americas in terms of its approach to the penalty of death. In 2014, the United States was the only country in its region to bring out executions. Even within the United State, for a period of time following the case of Furman v. Georgia, there was a de facto suspension on the death penalty for about four years, between 1972 and 1976. While the death penalty has since been re-established, court decisions have narrowed down its scope and introduced safeguards. For example, in **Roper v. Simmons,**[29] the Supreme Court held it was unconstitutional to impose the death penalty for crimes committed when the individual was below 18 years of age. Further, in Atkins v. Virginia, the Supreme Court held that executing persons with intellectual disabilities amounted to cruel and unusual punishment, and was thus unconstitutional. An increasing number of states in the US have been officially or un-officially imposing moratoriums. Nineteen states in the US have abolished it; the most recent among them have been Connecticut in 2012, Maryland in 2013, and Nebraska in 2015. In 2014, 35 people were executed in the US, which was the lowest number since 1995."

Europe

All European countries, except Belarus, has either properly abolished the penalty of death or preserve moratoriums.

The 1950 European Convention for the Protection of Human Rights ai Fundamental Freedoms ("the European Convention") originally stated:

"No one shall be deprived of his life intentionally save in the execution of sentence of a court following his conviction of a crime for which this penalty provided by law.

In 1983, the European Convention regarding the abolition of the death sentence said, "The death penalty shall be abolished. No one shall be condemned t such penalty or executed except in respect of acts committed in time of war or imminent threat of war." Finally, in 2002, the European Convention abolished the death penalty in all circumstances. Forty four countries have acceded to this protocol including all member states of the European Union.

[28] 0Roger Hood, Carolyn Hoyle, The Death Penalty: A Worldwide Perspective 70 -71, (5th ed. 2015)
[29] Roper v. Simmons, 543 U.S. 551 (2005)

The European Court of Human Rights (ECHR) has grown rich jurisprudent for countries that have not yet ratified the two optional protocols. On severa occasions, "the court has held that extradition to a country that does not abolish the penalty of death could violate the right to life and prohibition against torture." In 2010, the European Court of Human Rights distinguished the high number of signatories of the European Convention who had not retained the penalty of death. It said "These figures, together with consistent State practice in observing the moratorium on death penalty, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances." It held that "the words 'inhuman or degrading treatment or punishment' in Article 3 could include the death penalty."

Like the rest of Europe, France abolished the death penalty notwithstanding public opinion to the contrary. The death penalty in France was abolished on 9 October 1981, after the voting in the National Assembly decided in against the retention of the penalty of death. [30] It was the end of two centuries of debate in the National Assembly on the issue, the first motion having been presented as far back as in 1791.

The abolition was incorporated into the French Constitution in 2007, Article 66(1) of which reads that "no one shall be sentenced to death". Public opinion supported the punishment of death for many years after it was abolished; a 2006 poll showed that 52% of the population was against it. Robert Badinter, the minister for Justice in France in 1981, who led the legislative amendment, has suggested that "it usually takes about 10 to 15 years following abolition for the public to stop thinking of it as useful and to realise that it makes no difference to the level of homicide, which forecast has found support in many countries."

The history of the punishment of death in the United Kingdom is also relevant to the Indian context. The abolitionist leaning Labour government that was elected in post-war Britain measured the issue of death penalty at least six times before setting it aside when put on the table its Criminal Justice Bill in 1947, deciding that retaining the penalty of death was not its key priority; and by the 1950s, however, a chain of sick touched cases and executions had ran to the creation of a strong public movement in favour of abolition. The last penalty of death in the United Kingdom took place in 1964. In 1965, the House of Commons in Great Britain

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[30] France and Death Penalty, Abolition in France, Available at www.diplomatie.gouv.fr/en/french - foreignpolicv/human-rights/deathpenaltv/ffanee -and-death-penaltv/ (visited on 20/08/2015) at 04:44PM

voted to impose a moratorium on and suspend the death penalty for murder for a period of 5 years by law. [31]

The penalty of death for murder was formally abolished in 1969, when the UK Parliament decided that the 1965 Act should not expire, despite recent opinion polls showing that about 80% of the population was against the abolition of the penalty of death. After the sentence of death for murder was abolished, the House of Commons held a vote during each parliament (until 1997) to restore the penalty, but the motion was never passed. The capital punishment was finally removed for all crimes in the United Kingdom only in 1999, further to the United Kingdom's sanctions of and obligations under the European Convention on Human Rights and the Second Optional Protocol to the ICCPR.

Despite the penalty no longer being a part of UK law, the UK Privy Council has discussed the punishment of death in various decisions pertaining to cases in the Caribbean countries, where the death penalty remains standing. The most notable of these was the 1993 case of **Pratt & Morgan v. Attorney-General for Jamaica**. In this case, the UK Privy Council held that that "it was unconstitutional in Jamaica to execute a prisoner who had been on death row for 14 years. According to the Privy Council, the Jamaican Constitution prohibits inhuman or degrading punishment, as a result of which excessive delays cannot occur between sentencing and execution of the punishment. Specifically, it held that a delay of more than five years between sentencing and execution was prima facie evidence of inhuman or degrading punishment. In cases of such excessive delay, it said that the death sentence should be commuted to life imprisonment.

The Pratt & Morgan case had a "ripple effect on similar cases from other Caribbean countries, where the sentence for convicts on death row was commuted to life imprisonment. This has led to a separate and long-enduring debate about the appellate powers of the Privy Council on countries other than the UK."[32]

Africa

As on October 2014, seventeen African countries had formally abolished the death penalty, and twenty five others had not directed an execution in over ten years. The countries that

[31] 7 Section 4 ofthe Murder (Abolition of Death Penalty) Act 1 965, Available at www.legislation.gov.uk (visited on 20/08/2015) at 05: 05PM

[32] Owen Bowcott and Maya Wolfe-Robmson, British court to rule on death sentences for two Trinidad murderers, The Guardian, Available at www.theguardian.com (visited on 20/08/2015) at 05:06PM

continue to impose the death penalty are Egypt, Equatorial Guinea, Sudan, and Somalia. Several African countries like Angola, Namibia have abolished the penalty of death through the Constitution, while in other countries, notably South Africa, the courts have taken the prime.

Article 5 (3) of the African Charter on the Rights and Welfare of the Child states, “Death sentence shall not be pronounced for crimes committed by children”. In 2008, in its “Resolution calling on State Parties to observe the moratorium on the death penalty”, the African Commission on Human and Peoples’ Rights urged “State Parties that still retain the death penalty to observe a moratorium on the execution of death sentences with a view to abolishing the death penalty.” “The 2014 Declaration of the Continental Conference on the Abolition of the Death Penalty in Africa recognized the trend towards abolition, and asked countries to support the Additional Protocol to the African Charter on Human and Peoples’ Rights on the Abolition of the Death Penalty in Africa.”

The Kenya retains the penalty of death for many offences, including murder, armed robbery and treason. The last known execution in Kenya, however, took place in 1987, and the country is regarded as abolitionist de facto. In the case of **Mutiso v. Republic (2010),** “the Court of Appeal at Mombasa struck down the mandatory death penalty for murder, holding that the penalty was in violation of the right to life, and amounts to inhuman treatment; and that keeping a person on death row for more than three years would be unconstitutional. It also suggested that its reasoning would apply to other offences having a mandatory death sentence.” However, in the case of Joseph Njuguna Mwaura v. Republic (2013), the Court of Appeal at Nairobi upheld the punishment of death for armed robbery. It said that “the legislature had to decide whether the mandatory death penalty should be retained or not. The conflict between these two decisions is expected to be resolved by the Supreme Court.”

In South Africa, the death penalty was abolished through a decision of the Constitutional Court, shortly after the end of the apartheid regime.399 In an early ruling in 1995, in **State v. Makwanyane,**[33], the South African Constitutional Court held that the death penalty was unconstitutional. In doing so, the Court said:

“The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on

[33] 1995 (6)BCLR665

the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby. "

And that Retribution cannot be accorded the same weight under our Constitution as the rights to life and dignity, which are the most important of all the rights. It has not been shown that the death sentence would be materially more effective to deter or prevent murder than the alternative sentence of life imprisonment would be. Taking these factors into account, as well as the elements of arbitrariness and the possibility of error in enforcing the death penalty, the clear and convincing case that is required to justify the death sentence as a penalty for murder, has not been made out.

At the time of this decision, public opinion in South Africa on the death penalty was very separated, with a huge support for retaining death penalty. Crime was a massive problem, and during the apartheid regime, there had been widespread use of the death penalty. The last execution was just four years before its abolition. In 1997, the South African Parliament repeated the Court's decision through law.

In Nigeria, the death penalty is chiefly a state issue, as the country has a federal system, where criminal laws differ through its 36 states. Each state stipulates crimes and punishments within its territory, and have laws created on both Shariah and common law systems. A mandatory death penalty is agreed for an extensive range of offences in various Nigerian states.[34]

In 2012, the High Court of Lagos State declared that the mandatory death penalty was unconstitutional **in James Ajulu & Others v. Attorney General of Lagos**.[35] The Court held that "the prescription of mandatory death penalty for offences such as armed robbery and murder contravenes the right of the applicants to dignity of human person and their right not to be subjected to inhuman or degrading punishment under S.34 of the constitution of the Federal Republic of Nigeria, 1999." As a result of this ruling, the mandatory imposition of the death penalty is now banned in the state of Lagos, and the death penalty is now the maximum, but not the only, penalty possible. This holding is only enforceable in the state of Lagos.

[34] Country profile: Nigeria, Available at: www.deathpenaltvworldwide.org (visited on 20.08.2015) at 05: 15PM

According to a report by a UN Special Rapporteur, the average in 2006 was already 20 years406 four prisoners were executed in 2013 in Nigeria, which had otherwise not carried out an execution since 2006.407 As of September 2013, tfc number of death row inmates stood at 1,233, with many prisoners having remained o death row for over 10 years.

Asia and the Pacific

About 40% of the countries in the Asia-Pacific are retentionists, and maintain and use the death penalty. China, Iran, Iraq and Saudi Arabia remain amongst the highest executors worldwide, and the past few years have also seen Pakistan and Indonesia breaking their de facto suspensions to return to executions.

A 2015 OHCHR publication examining movements in the death penalty in South East Asia, found that “The Global movement towards abolition of the death penalty has also been reflected in South-East Asia”. At the time of the report, Brunei Darussalam, Indonesia, Laos, Malaysia, Myanmar, Singapore, Thailand and Viet Nam had retain the capital punishment, while Cambodia, Timor-Leste and the Philippines had done so.

Indonesia, for example, “is a retentionist country that practices the death penalty for numerous crimes, including drug-related offences. Earlier in 2015, Indonesia executed eight people by firing squad, including foreign nationals, for drug related offences.” Indonesian president Joko Widodo has defended the death penalty, saying “We want to send a strong message to drug smugglers that Indonesia is firm and serious in tackling the drug problem, and one of the consequences is execution if the court sentences them to death” Indonesia had a brief unofficial Suspension on executions between 2008 and 2012, but has since restarted executions.

China is one of the main executing countries in the world. There is very inadequate information of even how many executions take place in China, as they are all carried out in secret. However, estimations suggest that 90% of the world’s executions happen in Asia, and most of them occur in China, and that China executes more people than all other countries.412 In 2010, 68 crimes were punishable by the death penalty in China. A 2011 amendment reduced this number to 55. Hong Kong and Macau, both Special Administrative Regions of China, have not retained the death penalty.

Similarly, Japan also retains the penalty of death, and conducts executions in secret. At that the families are usually informed after it has taken place.

The Philippines was one of the first countries in Asia to abolish death penalty. Its 1987 Constitution, broadcasted after President Marcos was overthrown, stated: "Article III, Section 19(1): Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetual."

By 1994, the mood in some quarters of the nation had changed, and Republic Act No. 7659, also called "An Act to Impose the Death Penalty on Certain Heinous Crimes", was passed. The preamble of this law said that "the Congress, in the justice, public order and the rule of law, and the need to rationalize and harmonize the penal sanctions for heinous crimes, finds compelling reasons to impose the death penalty for said crimes."

This act reintroduced the penalty of death for a range of offences including for murder, treason, and certain forms of rape. Death sentences were imposed, and executions were recommenced.

The Philippines saw strong public debate on the penalty of death in this period. In 2000 President Estrada announced "a moratorium on executions, which President Arroyo continued." In April 2006, President Arroyo decided "to commute all death sentences and block executions. Later that year, a Bill abolishing the death penalty completely was passed. In 2007, the Philippines ratified the Second Optional Protocol to the ICCPR."

Saudi Arabia also retains the death penalty, using it against foreign nationals and persons convicted for offences that do not meet the international law threshold of most serious crimes. Recently there has been an increase in the rate and number of executions, with over 102 persons being executed in 2015 alone.[36]

Since its formation in 1948, Israel has been abolitionist for ordinary crimes. The death penalty has only been imposed and implemented once, in 1962, when Adolph Eichmann was executed.

[36] 1 BBC News: Middle East, Saudi Arabia executes 175 people in a year - Amnesty, available at http://www.bbc.co.uk/news/world -middle-east-34050853 (last viewed on 20.08.2015); Adam Withnall, Saudi Arabia executes 'a person every two days' as rate of beheadings soars under King Salman, The Indepen dent, 28 August, 2015, Available at www.independent.co.uk/news/world/middle -east/saudi-arabiaexecutionsamnestv-intemational-beheadings-death-sentences-rate-under-king-salman 10470456.html (visited on 20/08/2015 at 06:25PM

Currently, the following crimes can carry a death sentence:

a) genocide;

b) murder of persecuted persons committed during the Nazi regime;

c) Acts of treason under the military law and under the penal law committed in time of hostilities and the illegal use and carrying of arms.

Further, Israeli law requires that the death penalty can only be imposed with judicial consensus, not judicial majority. In 2015, there were attempts to introduce a Bill that would make it easier to impose the death penalty on terrorists, by requiring only a majority and not consensus amongst judges in such cases. The Bill was rejected in its first reading.

South Asia

In South Asia, India, Pakistan, and Bangladesh do not abolish the death penalty. In December 2014, Pakistan lifted its suspension on executions, in response to a terrorist attack on a school in Peshawar. Since then, around 200 people have been executed, and around 8000 people on death row remain at risk of execution.

Maldives and Sri Lanka maintain the penalty in law, but is abolitionist in practice. The last Sri Lankan execution was in 1976; and in the Maldives in the 1950s. Death penalty was introduced in Sri Lanka, during colonial times. Sri Lanka still not abolishes this punishment in law, and sentences people to death. Death row is a controversial phenomenon in Sri Lanka. In 2014 alone, Sri Lankan courts sentenced over 61 people to death, including juveniles. Sri Lanka also retains the death penalty for drug-related crimes, which do not meet the threshold of most serious crimes in international law.

But Sri Lanka has not carried out an execution since 1976, and is considered abolitionist in practice. Death sentences are converted to terms of imprisonment. It is noteworthy that Sri Lanka's moratorium has remained in place despite insurgency and civil war between the 1980s and late 2000s.

Bhutan and Nepal have not retained the death penalty. Bhutan abolished it in 2004, and it is also prohibited in its 2008 Constitution. The last execution in Nepal was in 1979. Nepal officially abolished the death penalty in 1990, with its government saying the punishment was considered inconsistent with its new multiparty political system. Since then, Nepal has

seen a 10 year-long civil war, lasting from 1996 to 2006. Both sides of the civil war committing a range of human rights abuses, and accountability remain a central concern in Nepal today.

This violence and conflict ended with the signing of the 2006 Comprehensive Peace Accord between the Government of Nepal and the Communist Party of Nepal (Maoist). Despite the scale of the violence and atrocities, clause 7.2.1 of the Accord clearly said that, Both sides respect and protect the fundamental right to life of any individual. No individual shall be deprived of this fundamental right and no law that provides capital punishment shall be enacted. Article 12 of Nepal's Interim Constitution, which came into force after the Comprehensive Peace Accord was signed, states:

"Every person shall have the right to live with dignity, and no law shall be made which provides for capital punishment. ''

The prohibition against the penalty of death has also been retained in Nepal's current draft constitution, which is being debated in the Constituent Assembly.

Arguments for and against Capital Punishment

Death penalty has long considerable debate about both its morality and its effect on criminal behaviour. Existing arguments for and against capital punishment fall under three general headings: Moral, Utilitarian, and Practical.

Moral arguments

Those supports the death penalty believe that those who commit murder, because they have taken the life of another, have forfeited their own right to life. Besides, they believe, death penalty is just a form of retribution, expressing and reinforcing the moral resentment not only of the victim's relatives but of law-abiding citizens in general. By distinction, opponents of penalty of death argue that by legitimizing the very behaviour that the law seeks to repress killing capital punishment is counter- productive in the moral message it conveys.

Moreover, they wish, when it is used for lesser crimes, death penalty is immoral because it is wholly unequal to the harm done. Abolitionists also claim that death penalty violates the condemned person's right to life and is fundamentally inhuman and degrading.

Although death was suggested for crimes in many holy religious-documents and historically was adept widely with the provision of religious hierarchies, today there is no agreement among religious faiths, or among denominations or sects within them, on the morality of capital punishment. In the last half of the 20th century, increasing numbers of religious leaders particularly within Judaism and campaigned against it. The penalty of death was abolished by the state for all offenses except treason and crimes against humanity, and Pope John Paul II condemned it as cruel and unnecessary.

Utilitarian arguments

Supporters of capital punishment also claim that it has an exclusively strong deterrent effect on potentially violent offenders for whom the threat of imprisonment is not a sufficient restraint. Opponents, however, point to research that generally has demonstrated that the death penalty is not a more effective deterrent than the alternative sanction of life or long-term imprisonment.

Practical arguments

There also are disputes about whether capital punishment can be administered in a manner consistent with justice. Those who support capital punishment believe that it is possible to fashion laws and procedures that ensure that only those who are really deserving of death are executed. By contrast, opponents maintain that the historical application of capital punishment shows that any attempt to single out certain kinds of crime as deserving of death will inevitably be arbitrary and discriminatory.

They also point to other factors that they think preclude the possibility that capital punishment can be fairly applied, arguing that the poor and ethnic and religious minorities often do not have access to good legal assistance, that racial prejudice motivates predominantly white juries in capital cases to convict black and other nonwhite defendants in disproportionate numbers, and that, because errors are inevitable even in a well-run criminal justice system, some people will be executed for crimes they did not commit. Finally, they argue that, because the appeals process for death sentences is protracted, those condemned to death are often cruelly forced to endure long periods ofuncertainty about their fate.

Argument against the capital punishment

The state clearly has no absolute right to put its subjects to death almost all countries do so in some form or other but not necessarily by some conventional form of death penalty. In most countries, it is by arming their police forces and accepting the fact that people will from time to time be shot as a result and therefore at the state's order.

A bulk of a state's subjects may wish to discuss the right to put certain classes of criminal to death through analysis or voting in state elections for candidates favoring the penalty of death. Majority opinion in some democratic countries, including the U.K., is still in favour of the death penalty.

It is reasonable to undertake that if a majority is in favor of a particular thing in a democracy, their wishes should be seriously measured with equal deliberation given to the downside of their views.

A fact that is suitably overlooked by anti-death penalty activists is that we are all ultimately going to die. In many cases, we will know of this in advance and suffer great pain and emotional torture in the process. This is particularly true of those diagnosed as having terminal cancer. It is apparently acceptable to be "sentenced to death" by one's family doctor without having committed any crime at all but totally unacceptable to be sentenced to death by a judge having been convicted of murder or drug-trafficking the crimes for which the majority of executions worldwide are carried out after a fair and careful trial. There are a number of unquestionable arguments against the death penalty.

The most important one is the simulated certainty that honestly innocent people will be executed and that there is no possible way of compensating them for this miscarriage of justice. There is also another significant but much less realized danger here. The person convicted of the murder may have actually killed the victim and may even admit having done so but does not agree that the killing was murder.

Often the only people who know what really happened are the accused and the deceased. It then comes down to the skill of the prosecution and defence lawyers as to whether there will be a conviction for murder or for manslaughter. It is thus highly probable that people are convicted of murder when they should really have only been convicted of manslaughter.

A second reason, that is often overlooked, is the hell the innocent family and friends of criminals must also go through in the time leading up to and during the execution. It is often very difficult for people to come to terms with the fact that their loved one could be guilty of

a serious crime and no doubt even more difficult to come to terms with their death in this form. One cannot and should not deny the suffering of the victim's family in a murder case but the suffering ofthe murderer's family is surely valid too.

There must always be the concern that the state can administer the death penalty justly, most countries have a very poor record on this. In America, a prisoner can be on death row for many years awaiting the outcome of numerous appeals, some of which are fatuous and filed at the last minute in order to obtain a stay of execution. Although racism is claimed in the administration of the death penalty in America, statistics show that white prisoners are more liable to be sentenced to death on conviction for first degree murder and are also less likely to have their sentences commuted than black defendants.

It must be remembered that criminals are real people too who have life and with it the capacity to feel pain, fear and the loss of their loved ones, and all the other emotions that the rest of us are capable of feeling. It is easier to put this thought on one side when discussing the most awful multiple murderers but less so when discussing, say, an 18 year old girl convicted of drug trafficking. (Singapore hanged two girls for this crime in 1995 who were both only 18 at the time of their offence and China shot an 18 year old girl for the same offence in 1998.)

There is no such thing as a humane method of putting a person to death irrespective of what the state may claim. Every form of execution causes the prison suffering, some methods perhaps cause less than others, but be in no doubt that being executed is a terrifying ordeal for the criminal. What is also often overlooked is the mental suffering that the criminal suffers in the time leading up to the execution. How would you feel knowing that you were going to die tomorrow morning at 8.00 a.m.?

There may be a brutalising effect upon society by carrying out executions - this was apparent in this country during the 17th and 18th centuries when people turned out to enjoy the spectacle of public hanging. They still do today in those countries where executions are carried out in public. It is hard to prove this one way or the other - people stop and look at car crashes but it doesn't make them go and have an accident to see what it is like. It would seem that there is a natural voyeurism in most people.

The death penalty is the bluntest of "blunt instruments," it removes the individual's humanity and with it any chance of rehabilitation and their giving something back to society. In the

case of the worst criminals, this may be acceptable but is more questionable in the case of less lawful crimes.

Garroti Opponents say that there might be a possibility of innocent people getting executed because of unfair and discriminatory application of the death penalty. Studies across the world have shown that in most cases, persons on death row are from economically and socially backward section of the society, indicating the inability to hire good lawyers to contest their cases. In the US, where 15 of the 50 states and the District of Columbia do not have the death penalty, most studies have failed to establish any link between crime rates and death sentences, that is, a death penalty is no deterrent against serious crime.

"Some of the major arguments used by those opposed to the death penalty include:

i. The death penalty is killing. All killing is wrong therefore the death penalty is wrong.
ii. The death penalty is violation of Human Rights.
iii. Torture and cruelty are wrong- Some executions are botched and the executed suffer extended pain. Even those who die instantly suffer mental anguish leading up to the execution.
iv. Criminal proceedings are fallible -Many people facing the death penalty have been exonerated, sometimes only minutes before their scheduled execution. Others, however, have been executed before evidence clearing them is discovered. Whilst criminal trials not involving the death penalty can involve mistakes, there is at least the opportunity for mistakes to be corrected.
v. Since in many cases at least the defendants are financially indigent - therefore end up being represented by court-appointed attorneys whose credentials are often highly questionable, opponents argue that the prosecution has an unfair advantage.
vi. The race of the person to be executed can also affect the likelihood of the sentence they receive. Death penalty advocates counter this by pointing out that most murders where the killer and victim are of the same race tend to be crimes of passion while inter-racial murders are usually felony murders; that is to say, murders which were perpetrated during the commission of some other felony (most commonly either armed robbery or forcible rape), the point being that juries are more likely to impose the death penalty in cases where the offender has killed

a total stranger than in those where some deep-seated, personal revenge motive may be present.

vii. It can encourage police misconduct

viii. It is not a deterrent - anyone that would be deterred by the death penalty would already have been deterred by life in prison, and people that are not deterred by that wouldn't be stopped by any punishment. This argument is typically supported by claims that those states which have implemented the death penalty recently have not had a reduction of violent crime. A stronger variant of this argument suggests that criminals who believe they will face the deal penalty are more likely to use violence or murder to avoid capture, and therefore the death penalty might theoretically even increase the rate of violent crime.

It has also been argued that the death penalty does not deter murders because most murders are either crimes of passion or are planned by people who don' think they'll get caught (however this argument could be used for any penalty).

Some people argue that the death penalty brutalizes society, by sending out the message that killing people is the right thing to do in some circumstances.

It is claimed that the death penalty psychologically harms the executioners, in some cases contributing to Perpetration-Induced Traumatic Stress, and that even when this does not occur, killing a helpless person in a situation in which the executioner is not in danger may harm the executioner in other ways, such as decreasing his or her sense of the value of life. The suggested conclusion is that when capital punishment is not absolutely necessary to defend society, society has no right to ask executioners to risk their own mental health in such a way variously argue that statistics show the death penalty either makes no difference to the number of murders, or actually causes them to increase.

Some other arguments are as follows:

1. Man is supposed to be a rational animal. But can a rational being kill a man for a man? No, because it would be savage & barbarous. Besides, by killing a murderer the dead cannot be brought back to life, nor would he or his family be compensated. So instead we should reform a killer, make him realize his sin &follow a virtuous life.

2. If we kill the murderer his troubles are over. But his family is made suffer for no fault of theirs. We should instead give him other punishment, say, for example, life

imprisonment so that he has to face his own conscience & repent for what he has done. Alongside, he should be given psychological treatment & an opportunity to lead a normal citizen's life.

3. Instances are many where instead of being given capital punishment to even hardened criminals, they were just imprisoned or put in a reformatory with result that they realized & regretted their wrong doings, their term of sentence were reduced as a reward. Such acts enabled them to serve their innocent families & they even turned towards social work. This shows their capital punishment is not only remedy to take care of criminals.

4. We observe today that in spite of capital punishment being very much there on the statue, heinous crimes are not decreasing. It goes to show that capital punishment is not deterrent of criminals. Therefore, we must think of changing the method of punishment. Over 30 countries in the world abolished capital punishment but none has reported any increase in crime. So death punishment is not justified in any sense.

5. The reason capital punishment should be abolished is based on the fact that sometimes judgments go wrong, and, consequently innocent people are hanged. This is because of legalistic juggling of clever lawyers. Even otherwise instances are into rare when current police officials are brought over through money and political power to file patently cooked up charge sheet in courts and magistrate in turns pass doubtful judgment. The only way to preclude the possibility of error is to abolish capital punishment itself. 'Benefit of doubt' is an important point of law & rightly so because law holds that 99 guilty can go unpunished but even one innocent should not be punished. In same spirit our supreme court has held death penalty should be awarded only in 'rarest or the rare case'.

6. We have no right to destroy what we cannot create. It is for god to give or take one's life. Mercy is higher in his life than punishment. It is barbarous to hold the doctrine of “tooth for tooth” and “limb for limb"

Various reasons against the use of death penalty:

There are plenty convincing reasons against the use of death penalty:

1. Denial of basic right - According to Humans Right Association death penalty overrules our most basic human right - the right to life. Human life has fundamental value. The blessedness of human life is denied by the death penalty. Live is precious.

2. The possibility of error - Later investigations revealed many convicted individuals innocent which got death penalty in the past, and have been pardoned. Recent DNA investigation studies have shown the same thing.

3. Unfair Judgment - Generally, "it is observed that Capital punishment is inflicted unduly on the poor and minorities. If you follow the data of these victims, you will find that the mentally ill, poor and people belonging to minorities form a large chunk of the total number. You can also notice a kind of racial discrimination this happens due to varied reasons. Because the poor can offer very low compensation the defense lawyers are often incompetent, resulting in losing the case. Due to prejudice and bias, poor people, and people from minority sections become soft target for such capital punishments, as unrestricted discretion has offered to District attorney. If anyone wants to appeal then it becomes a burdensome process for him often resulting in denial of justice."

4. Lack of Deterrence - The purpose of any punishment should be deterrence from repeating the same act. But, according to the statistics available, the death penalty has not been effective in controlling the homicide rate. The studies have revealed the shocking truth that executions actually increase the murder rate. That means the capital punishment does not deter violent crime. According to a New York Times study, the last 20 years witnessed 48% homicide rate in states with the implementation of capital punishment compared to 23% in the states without capital punishment

5. The prolonged uncertainty - The validity to the deterrence argument is annulled by the delays, endless appeals, retrials, and technicalities that keep persons predestined to capital punishment waiting for execution for years. In fact, we are not competent enough to carry out execution. This uncertainty and incompetence offers another great injustice. It is itself cruel and a form of torture.

6. Justifying circumstances - Sometimes, persons suffering from emotional trauma, abandonment, violence, neglect or destructive social environment commit such heinous crimes. These mitigating situations can have devastating effect on their humanity. So, it is

unfair to hold them fully responsible for their crimes. It is our communal responsibility to show some sympathy to some extent.

7. By giving capital punishment, the family of the victim is permanently traumatized and victimized. They are often punished by their loved ones without their fault, even though they are innocent.

8. Effects on society- Capital Punishment is itself a premeditated murder. This is unacceptable even it is inflicted by state authority as it lowers the value of life. In fact, such act can only brutalize the society. Revenge is essential can become a society attitude. By witnessing such acts, our own mental makeup starts believing that violence is necessary to curb the wrongdoings.

In conclusion, the penalty of death is a moral dishonour. The mockery is that the very civilizations that have no right to impose it, are in particular leading the traditions of death penalty. The economic malfunctions and cultural diseases in those very societies contribute to the violence. So, instead of inflicting death penalty, it's our duty to provide opportunities for all people to accomplish a good life in a rational culture.

Arguments in favour of Death Penalty

Some of the philosophical principles used by societies and courts to carry out any punishment are: retribution (as revenge), deterrence (to prevent others), denunciation (disapproval), incapacitation (to prevent repetition) and rehabilitation (to give a chance for reform). The supporters of death sentence say that except the last all other legal philosophies approve of death sentence. They also cite studies stating that putting someone to death is less expensive than permanent incarceration.

There also are disputes about whether capital punishment can be administered in a manner consistent with justice. Those who support capital punishment believe that it is possible to fashion laws and procedures that ensure that only those who are really deserving of death are executed. Supporters of Capital Punishment also claim that it has a uniquely potent deterrent effect on potentially violent offenders for whom the threat of imprisonment. Furthermore, they believe, Capital Punishment is a just form of retribution, expressing and reinforcing the more indignation not only of the victim's relatives but of law-abiding citizens

Currently, however, there has been a lot of controversy surrounding the death penalty. Imagine a man who commits murder once, is given a fifteen-year jai sentence and is returned to the streets where he kills again. He is imprisoned agaii only to be released. This could happen since almost one in ten death row inmates have been convicted of murder at least once.

That means that "some death row inmates have been given more than one chance to rehabilitate in prison and continue to commit violent crimes. Capital punishment is one of the oldest forms of punishment in the world. Most societies have thought it to be a fair punishment for severe crimes, and it is even mentioned as an appropriate punishment in the Bible. American colonists used capital punishment before the United States was a country, and most states use it today."

Opponents of capital punishment cite its arbitrariness and finality as reasons for their opposition against the death penalty. Because capital punishment can lead to an unequal application of justice, sometimes to the arguments for supporters of the death penalty include:

i. Death penalty prevents a repeat offender to ever return to society and continue to harm and murder innocent people.
ii. People committing the most heinous crimes (usually murder in countries that practice the death penalty) have forfeited the right to life.
iii. Government is not an individual and is given far more powers.
iv. The death penalty shows the greatest respect for the ordinary man's, and especially the victim's, inviolable value.
v. It strikes fewer innocent persons than alternative penalties, as among prisoners and ex-prisoners there are many who relapse into new crimes which strike innocent persons.
vi. It provides peace of mind for many victims of crime and their families.
vii. It recognizes humankind's natural sense of equal justice, in this case, a life for a life
viii. It is the most effective way to protect society (its structures and its individuals) from a felon.
ix. It is less cruel than prolonged sentences of imprisonment, especially under the conditions that would be popularly demanded for heinous criminals.

x. It is explicitly allowed in constitution and other documents of basic law.

Just as the virtuous deserve reward proportionate to their good deeds, so too the vicious deserve punishment proportionate to their bad deeds. One might even hold, with Kant, that respect is shown to the criminal as someone who has chosen a particular path in life by visiting the appropriate punishment on the criminal. (Objection: Not all virtue needs to be rewarded. Likewise, there may be good reason mercy, say to refrain from imposing the full weight of a deserved punishment.)

Criminals may be led to rethink their lives and set their souls in order by the pressing expectation of death.

It upholds the rule of Law, because it discourages vigilantism or self- help on the part ofthe victim's family or friends (in the form of lynching or the retaining of hit men). If not controlled, such self-help can lead to extremely destructive vendettas or . blood feuds.

If capital punishment were used more, there would be fewer inmates on death role. Every time an inmate was executed it would show what happens to people that break the law. If capital punishment were not there in all states, criminals would run wild because they would know that they would not receive any type of capital punishment.

Some other arguments in favour of capital punishment:

1. The time is not yet ripe to abolish capital punishment. There is no letup in crimes. Capital punishment is an effective deterrent for would be offenders or murderers. Those who argued that despite of capital punishment being theme on the statue book crime is on the increase fail to understand that it is because of our faulty justice delivery system where justice delayed is justice denied, and not the other way round.

2. There are certain kind of hardened criminals who are beyond reform. It is futile to teach them sanity, Killing other has become their second nature and they have dozens of murder cases pending on them. It would only be for good of society that they are sent to the gallows thus their career on crime is stopped.

3. If a murderer is not put to death but instead allowed to live on, he is tempted to repeat the crime in future. It is often happens that murderer set at large through police connivance or legal trickery of lawyer indulge in more heinous crime for fun or contract killing until they are caught or killed.

In some countries like Pakistan, Iran, Dubai where laws are rigid and even petty criminals are awarded harsh punishment, crime is rare. Similarly in fascist countries where death penalty is awarded for negligence of duty or other offences, efficiency & honesty is found in abundance. Jawahar Lai Nehru once favoured capital punishment for black marketers as well.

It is believed, primarily by those who swear by death penalty that justice is better served in the form of capital punishment. Moreover, it is a major crime deterrent.

Another argument for the death penalty is that by giving the death penalty, there will be no sympathy shown to criminals. By keeping them alive through prisoners' parole, criminals get a chance to escape and thus go scots free, committing more crimes.

Capital punishment will curb this. Further, if the person has been proved to be guilty of a heinous crime, with the help of forensic science and advanced investigation methods, there would not be any chance of an innocent person being killed. In addition to this, it is believed that killing a criminal is more humane than incapacitating or keeping that person in jail for decades together. Retribution or capital punishment for making the criminal realize what the victim went through is another reason for supporting the death penalty. Thus the answer to should death penalty is allowed? Will undoubtedly be yes from this perspective?

Should death penalty be abolished?

The aim of the judicial system is to reform the individual found guilty of a particular crime, and the death penalty contradicts this very aim. The judicial process is undertaken to judge whether the person has committed the crime or not, and not to judge whether he will reform or not. This is one of the most prominent arguments of the people who believe that death penalty should be abolished. These people also argue that the judicial system can be well-versed with the investigation, but it can't really have an opinion on the whether the convict is ready to reform or not.

Secondly, no legal system in this world can boast of cent percent discipline when it comes to crime investigation. There are chances that lack of proper investigations may land a wrong person in the conviction box, and even send him to gallows. One also has to understand that execution of an individual cannot be rectified ifthe person was found to

be innocent after the execution. On the other hand, a person serving a life term can at least be set free once his innocence has been proved.

Why shouldn't death penalty be abolished?

The number of people in favour of the death penalty is quite decent as well. These people argue that respecting the human rights of a person who himself doesn't have any respect for the rights of others is obviously out of question. Moral grounds are not at all substantial to challenge the fact that the person has committed a heinous crime.

Those in favour of capital punishment also tend to question the fact that why does a citizen of the nation, as a taxpayer, have to take the burden of housing a convict, and providing him with the basic necessities of life. Instead, executing him will save a decent amount of money, which can channelize towards the development of the nation.

More importantly, allowing this person to roam about freely in the society, even if it is after the completion of his term in prison, is indeed a risk. No one can give a guarantee that the person will repent after his prison term, and refrain from doing such things in the future. More importantly, sentencing a person for capital punishment for crimes like murder or rape will also work in dissuading others from committing such crimes.

Realistic alternatives to the Death penalty

Any punishment must be fair, just, adequate and most of all, enforceable. Society still views murder as a particularly heinous crime which should be met with the most severe punishment. Whole life imprisonment could fit the bill for the worst murders with suitable gradations for less awful murders. Some 44 people are currently serving whole life tariffs in the UK.

Imprisonment, whilst expensive and largely pointless, except as means of removing criminals from society for a given period, is at least enforceable upon anyone who commits murder (over the age of 10 years). However, it appears too many people to be a soft option and this perception needs to be corrected.

In modem times, we repeatedly see murderers being able to get off on the grounds of diminished responsibility and their alleged psychiatric disorders or by using devices such as plea bargaining. This tends to remove peoples' faith in justice which is very dangerous.

Are there any other real, socially acceptable, options for dealing with murderers? One possible solution (that would enrage the civil liberties groups) would be to have everyone's DNA profile data-based at birth (not beyond the wit of modem computer systems), thus making detection of many murders and sex crimes much easier.

If this was done and generally accepted as the main plank of evidence against an accused person and a suitable, determinate sentence of imprisonment passed, involving a sensible regime combining both punishment and treatment, it would considerably reduce the incidence of the most serious and most feared crimes.

The reason for this is that for most people, being caught is a far greater deterrent than some possible, probably misunderstood punishment, e.g. life imprisonment. Surely this has to be better than the arbitrary taking of the lives of a tiny minority of offenders (as happens in most countries that retain the death penalty) with all the unwanted side effects that this has on their families and on the rest of society.

It is clear that certainty of being caught is a very good deterrent - just look at how people observe speed limits when they see signs for speed cameras and yet break the speed limit as soon as the risk is passed.

Evaluation

Should the India justice system continue to let violent criminals back on the streets where they are likely to commit murder again? Should Capital Punishment stay in effect in this country? There is an ongoing debate as to whether capital punishment reduces crime rates; ideally, potential murderers (or other criminals) would be too scared ofthe punishment to commit crime.

The counter argument is that it doesn't affect crime rate, because potential criminals think that they won't be caught, so they do not care about punishment until it's too late. There are even studies that have concluded that the death penalty appears to encourage murder.

However, like many questions in the society, actual research data on this question can be interpreted very differently by people with differing predispositions towards the punishment of death. In any event, the actual effectiveness is largely irrelevant to many who feel strongly about the debate, as their views are based on other factors Is it appropriate for the guilty to impose the most extreme kind of punishment?

This question remains unanswered till now also as to whether society has any right to take life or no. If yes then criminal will never be given opportunity to become better person & if no then who will give justice to victim or innocent who are raped, etc.

The debate about sentence of death in India, the specifications for which are grey system in India is in direct need of some serious lubrication in order to find out such solution which will make accuse better person & at same time justice favour to victim also upon whom the atrocious crime is done.

Is Death Penalty cruel and unusual punishment - pro arguments?

Some people believe that purpose of the sentence of death is to send a right message to the society. Such punitive punishment implies that no serious crime will be tolerated and the guilty must be punished for his or her crime. In short, according to this pro death penalty argument, the penalty of death acts as a deterrent for society and prevents further crimes. According to some people murders committed in the rage of anger or in a drunken state can be still excluded from sentence of death.

But people who commit crime in the conscious state of mind have no right to live. If you analyse the last sentences of the criminals you would realize that they all were scared of dying. It proves that death is the terrifying punishment they could be allotted with. And this point makes clear that death is one of the most scary things people fear. So other punishments, be it life imprisonment, etc. are milder for criminal minded people and hence penalty of death is the only way to worsen their criminal motives.

One of the other death penalty pros comes from victims and families of victims who believe that sentence of death is the only justice they could get which is their right and not a privilege. If you think from their point of view, you would come across various emotional issues that would force you think that life for life is the ideal punishment.

Is Death Penalty cruel and unusual punishment - against arguments?

One of the biggest arguments that anti-death penalty people make is that death going to bring back the life of a victim, which is true. Whatever you do with the criminal, the victim has already suffered it all and gone probably. As someone rightly said that to take a life when a life has been lost is revenge, and not justice.

One of the other arguments against the death penalty is that there is no point in punishing a criminal with death penalty as most of the time they knew what they were doing was wrong and they also knew the punishment for it. The very fact that the criminals are aware of the grave consequences of serious crimes, they are probably ready to face death, which is one of the notable death penalty facts.

According to anti-death penalty philosophy, criminals need to be given a second chance to understand their mistake. They should be kept under government surveillance if they are really sorry for what they did. This is one of the strong reasons against death penalty that could be considered in case of juvenile crimes or crimes committed under drug or alcohol influence. Iowa State Supreme Court Justice has put this thought in a simpler manner in 1840. It says, "Crime indicates a diseased mind in the same manner that sickness and pain do a diseased body. And as in one case we provide hospitals for the treatment of severe and contagious diseases, so in the other, prisons and asylums should be provided for similar reasons."

One hundred and forty countries today have abolished the death penalty in law or practice. This trend towards abolition is evident in the developments in international law, which have limited the scope of the death penalty by restricting the nature of crimes for which it can be implemented, limiting the manner in which it can be carried out, and introducing procedural safe guards. Recent political commitments on the international stage, such as growing support for the UN General Assembly resolutions on a moratorium on executions, reaffirm this trend.

It demonstrates that "there is no evidence of a link between fighting insurgency, terror or violent crime, and the need for the death penalty. Several countries have abolished the death penalty, or maintained moratoriums on executions, despite facing civil wars, threats of insurgency or terrorist attacks. For example, Nepal officially abolished the death penalty in 1990 and did not re-introduce it even in the aftermath of the civil war; Sri Lanka, despite a long civil war, has maintained a moratorium on the penalty; and Israel has only executed once since its formation. Most European countries remain abolitionist despite facing terrorism within their national boundaries, e.g., the UK, France, and Spain. In fact, it is relevant to note that the UK abolished the death penalty at a time when the Irish Republican Army, a revolutionary military organization, was particularly active in the country. The same can be seen for fighting crime. The Philippines faces a severe

problem of drug trafficking, but has abolished the death penalty. South Africa abolished the death penalty at a time when crime rates in the country were very high."

A country's decision to abolish or retain the death penalty is not necessarily linked to its socioeconomic or development profile; rather, political will and leadership are keys. Several developing countries do not use the death penalty. Nepal, Rwanda, Senegal, Solomon Islands, Djibouti, Togo, Haiti, and Guinea- Bissau are all examples of countries ranked under Low Human Development in the UNDP Human Development Index (that is, considered less developed than India), which have abolished the death penalty.[37]

State practice regarding the penalty of death also proves that the road to abolition is not always a function of public opinion. Political leadership has been keys to this process. Many states have not retains the penalty of death at a time when public opinion may not have necessarily supported this position. Indeed, public opinion in many countries has only gradually reversed over time, changing with subsequent generations, suggesting that it takes time for populations to stop thinking of the penalty as useful, or realise that it has no linkages with levels of homicide. For example, "in France, public opinion continued to support the death penalty for several years after it was abolished, and it was about two decades after the abolition of the law that opinion began to change." Similarly, In South Africa, a Constitutional Court decision found the death penalty to be unconstitutional at a time when the public supported it, and the decision of the Court was supported by the legislature. The passage of time has proven these to be wise courses of action. These countries remain abolitionist even today, and have not felt the need to doubt or question their decisions. They have relied on different methods to control crime and sanction individuals. In the UK and France, the political parties who abolished the death penalty in the face of contrary public opinion were in fact re-elected.

The situation today can be contrasted with the global status of the death penalty in 1979 - 1980, at the time of the **Supreme Court's decision in Bachan Singh**[38]. The Court had noted that only 18 states had abolished the death penalty for all offences, and 8 more had only retained it for specific offences committed in time of war. The Court cited Saudi Arabia, the United States, Israel, China, Argentina, Belgium, France, Japan, Greece, Turkey, Malaysia, Singapore and the USSR (Russia) as examples. Several of these

[37] 8See Human Development Index and its components, Available at: www.hdr.undD.org/en/content/table -l-human-development-index-and itscomponents) (visited on 20/08/2015) at 2:09 PM

[38] Bachan Singh v. State ofPunjab, (1982) 3 SCC 24 at para 128 and 129.

countries are abolitionist in law or practice today, including Belgium, France, Greece, and Turkey. Others only retain it for exceptional crimes, such as Argentina and Israel."

There is a clear trend towards abolition in international law and state practice across the globe. International legal norms have evolved to restrict the lawful use of capital punishment in a very narrow variety of cases, and a very limited manner. India continues to sentence individuals to death and execute them, and has also opposed all five General Assembly resolutions on a moratorium. In doing so, India keeps company with a minority of countries who retain the death penalty, and an even smaller number who actually carry out executions, a list that includes China, Iran, Iraq and Saudi Arabia.

CHAPTER -5

'CAPITAL PUNISHMENT AS EMBODIED IN THE INDIAN PENAL LAW'

In India, capital punishment may be awarded by the criminal courts under the provisions of the general law of crimes and the special law of crimes. The Indian Penal Code, 1860 is the general law of crimes, and a few other Statutes dealing with certain particular persons, subjects and places together constitute the special law of crimes. These two kinds of laws are the primary sources of law with regard to capital punishment in India.

The Indian Penal Code, 1860 describes the various kinds of offences and the punishments that may be awarded by the criminal courts. It describes the defences that may be pleaded when there is any allegation of the offences mentioned in the Penal Code. It also describes the situations in which Capital Punishment may be awarded. The Penal Code in its nature is a substantive law of crimes. The procedural law however is in the form of the Code of Criminal Procedure, 1973. It also contains the safeguards to the persons accused of crimes.

To everything covered on the subject crimes and punishment in any law of crimes, the fundamental principles of the Constitution are relevant. The significance of the Constitution therefore is that it contains the safeguards which may be pleaded by a person against the process of conviction by a court of criminal jurisdiction.

Apart from the principles embodied in the Code of Criminal Procedure and the Constitution there are the principles of Human Rights Law which represent the urging norms of International Law on the subject of safeguards to the individuals against any punishment by the law enforcement agencies.

The object of this chapter is to discuss the penal provisions embodied in the substantive law as well as the procedure law of our country on the subject of capital punishment. The discussion in this chapter also covers the provisions of the Constitution and those of the Human Rights Law with regard to the safeguards available to persons convicted of capital punishment.

The methodology followed in presenting the discussion in this chapter is to describe first the historical background of the system of punishments in India and then discuss the

nature and scope of Capital Punishment under the provisions of the general and the special law of crimes. The discussion also covers the provisions of the Code of Criminal Procedure and the Constitution of India which are concerned with the safeguards to the individuals such as the right to seek pardon, remission, or commutation etc. of the punishment awarded by the criminal courts.

SYSTEM OF PUNISHMENT IN INDIA

(i) Crime and Punishment in Ancient India - In the Rig-Veda, Sabha, Samiti and Vidatha were defined as the meeting places of the people or the assemblies of the warriors. In such assemblies, the King or the tribal Chief used to be the supreme authority. Such assemblies exercised judicial powers in both civil and criminal matters and they decided the disputes both private and public. However, with the progress of Aryan Civilization, the Sabha usually with the King as its head, came to exercise all judicial functions. Besides the Sabha and Samiti, Yajnavalkya also refers to judicial functionaries, which acted almost like courts. These were the Kings functionaries, the village community, the guilds and the families. The objective of having such functionaries was to make justice available to the people in their own places. The parties and their witnesses were not to travel to far off places to seek justice. Thus justice was not only cheap but also expeditious.

(ii) Crime and Punishment During Mughal Period - In Mughal India, there were three agencies in general charge of judicial administration. The Emperor and his agents like, the provincial Governors, the Faujdars in the Sarkar and Kotwals usually administered the political matters. The Qazi administered Sharia or the sacred law. His jurisdiction was confined only to questions connected with religion. He decided disputes concerning family law and marriage, inheritance of Auqaf and also criminal cases. For the Hindus and the village people there were the courts of the Brahmin Pandits and the caste elders. They administered the common (unwritten) law or the codes of tribal traditions.

In respect of criminal justice, the Sharia had left a wide field to the discretion of the sovereign. The Emperor was the highest authority in the Kingdom and was the fountain of justice

(iii) Crime and Punishment during British Period - The British regime in India started with the establishment of the Government of India succeeding the East India Company, The Britishers had also introduced, on the pattern of their own system of administration, quasi-judicial institutions like the Tribunals vesting them with a part of the normal powers to decide disputes. These experiments had been initiated by way of alternative dispute resolution mechanism. They also encouraged the system of arbitration, mediation and conciliation so that the delay in disposal of cases was minimized. Several committees and commissions were appointed to examine the problems arising from the application of laws and the functioning of the legal institutions. Prominent among them was the Law Commission of India which from 1850's onwards took upon itself the task of suggesting a reform of the judicial system and a revision of the substantive and procedural laws. Based on the recommendations of the Law Commission changes were made in the rules of law and the organization of judicial institutions.

Jeremy Bentham, an ardent supporter of the reform of criminal law and codification in England, took interest in the codification of law in India. In England Bentham was an untiring campaigner for the reform of the antiquated law. The test to which Bentham subjected every institution was the test of Utility. His doctrine of Utilitarianism had a profound influence on the course of legislation in England.

The influence of Bentham could be seen in the process of law reform and codification in India. Governor General Bentick had sympathies with Bentham's teachings. Bentham died in 1832 and-the first steps towards codification of law in India were initiated in 1833 through Charter Act of 1833. In order to achieve the objective of a uniform and codified system of law in India the Charter Act, 1833[39] made provision in three directions (1) it established an omni-competent all-India Legislature having legislative authority throughout the country; (ii) It created a new office of the law-member in the Government of India; and (iii) It provided for the appointment of a Law Commission in India[40].

First Law Commission consisted only of three members; Lord Macaulay, the first Law Member was appointment as Chairman of the Commission. The first project assigned to the Law Commission by the Government was the codification of penal law. The Law Commission had prepared a draft Penal Code and submitted to the Government of India

[39] 3 & 4 Will.IV, c 85.
[40] Supra.

in 1837. It was mainly the handiwork of Lord Macaulay. The Penal Code was finally approved in 1860 and became the first piece of penal legislation.

The Indian Penal code marked the beginning of the period of reforming the criminal law in India. The criminal law which was being applied was not uniform. In Bombay till 1827, the endeavor had been to apply Hindu customary criminal law to the Hindus and the Muslim criminal law to the Muslims.

II. CAPITAL PUNISHMENT UNDER THE PROVISIONS OF THE INDIAN PENAL CODE

Capital Punishment is the highest punishment provided in the Indian Law.

Under the provisions of the Penal Code this punishment may be awarded for the following offences;-

I. Waging or attempting to wage war, or abetting waging of war against the Government of India:

The Penal Code, dealing with the above offence provides for the punishment of death. It says, "Whoever wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death or imprisonment for life and shall also be liable to fine.[41]

2. Abetment of mutiny, if mutiny is committed in consequence thereof:

The Penal Code dealing with this offence provides: "Whoever abets the committing of mutiny by an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Government of India, shall, if mutiny be committed in consequence of that abetment, be punished with death or with imprisonment for life or imprisonment of either description for a term which may extend to ten years and shall also be liable to fine."[42]

3. Giving or fabricating false evidence with intent to procure conviction of capital offence;

[41] Section 121 of the Penal Code.
[42] Section 132 of the Penal Code.

Section 194 of the Penal Code dealing with this offence provides as follows : "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 laws 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 in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described."[43]

4 Murder:

The Penal Code provides the punishment for murder; it says, "Whoever commits murder shall be punished with death or imprisonment for life and shall also be liable to fine."[44]

5. Abetment of suicide of child or insane person :

The Penal Code dealing with this offence provides: "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.[45]

6. Punishment for murder by life convict

Section 303 of the Penal Code dealing with the offence of murder by life convict, provides: "Whoever, being under sentence of imprisonment for life commits murder, shall be punished with death."

7. Dacoity with murder:

The Penal Code provides for the punishment of murder in respect of the accused convicted of dacoity with murder. It says,

"If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with

[43] Section 194 of the Penal Code.
[44] Section 302 of the Penal Code
[45] 8 Section 305 of the Penal Code.

death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

III Capital Punishment under Special Laws: There are a good number of Statutes forming part of the special law of crimes in our country which provide for the punishment of death. Among these statutes the largest number are those which deal with the prevention of terrorism, maintenance of internal security and the control of organized crime. The offences for which capital punishment is provided under the special laws of this category may be discussed as follows:

(i) The Prevention of Terrorism Act, 2002

The background to this legislation is that the country has faced and continues to face multifarious challenges in the management of its internal security. There is an upsurge of terrorist activities, intensification of cross-border terrorist activities and insurgent groups in different parts of the country. Very often, organized crime and terrorist activities are closely inter-linked. Terrorism has now acquired global dimensions and has become a challenge for the entire world. The reach and methods adopted by terrorist groups and organizations take advantage of modem means of communication and technology using high-tech facilities available in the form of communication systems, transport, sophisticated arms and various other means. This has enabled them to strike and create terror among people at will. The existing criminal justice system was not designed to deal with such types of heinous crimes.

In view of the precarious situation that had arisen, it was felt necessary to enact legislation for the prevention of, and for dealing with, terrorist activities.[46]

Punishment for terrorist acts - (1) Whoever,-

(a) With intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injuries to any

[46] R.P. Kataria & S. K. A. Naqvi, "Laws on Prevention of Terrorism and Unlawful Activities", Orient Publishing Company, 2003

person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act:

(b) Is or continues to be a member of an association declared unlawful under the Unlawful Activities (Prevention) Act, 1967 (37 of 1967), or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property, commits a terrorist act.

(c) Explanation.- For the purposes of this sub-section, “a terrorist act” shall include the act of raising funds intended for the purpose of terrorism.

(2) Whoever commits a terrorist act, shall,-

(a) If such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine:

(b) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine;

(3) Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(4) Whoever voluntarily harbours or conceals, or attempts to harbor or conceal any person knowing that such person is a terrorist shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life and shall also be liable to fine:

Provided that this sub-section shall not apply to any case in which the harbor or concealment is by the husband or wife of the offender.

(5) Any person who is a member of a terrorist gang or a terrorist organization, which is involved in terrorist acts, shall be punishable with imprisonment for a term which may extend to imprisonment for life or with fine which may extend to rupees ten lakh or with both.

Explanation.- For the purposes of this sub-section, "terrorist organization" means an organization which is concerned with or involved in terrorism... ,"[47]

(ii) The Explosive Substances Act, 1908.

This Act extends to the whole of India and applies also to citizens of India outside India. In this Act, -

(a) the expression "explosive substance" shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine or implement;

Punishment for causing, explosion likely to endanger life or property- Any person who unlawfully and maliciously causes by;

(a) Any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has been actually caused or not, be punished with imprisonment for life, or with rigorous imprisonment of either description which shall not be less than ten years, and shall also be liable to fine;

(b) Any special category explosive substance, an explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property

[47] Section 3 of the Prevention of Terrorism Act, 2002.

has been actually caused or not, be punished with death, or rigorous imprisonment for life, and shall also be liable to fine.[48]

(iii) The Terrorist and Disruptive Activities (Prevention) Act, 1987

This is an Act enacted in the year 1987 to make special provisions for the prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto. It lays down the following provisions for the punishment and measures for coping with terrorist and disruptive activities:-

Punishment for terrorist acts (1) Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or fire-arms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act.

(2) Whoever commits a terrorist act, shall, (i) if such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine (ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(3) Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

[48] Section 3 of the Explosive Substances Act, 1908.

(4) Whoever harbours or conceals, or attempts to harbor or conceal, any terrorist shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(5) Any person who is a member of a terrorist gang or a terrorists organization, which is involved in terrorist acts, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(6) Whoever holds any property derived or obtained from commission of any terrorist act or has been acquired through the terrorist funds shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.[49]

(iv) The Narcotic Drugs and Psychotropic Substances Act, 1985

This Act was passed by the Union Parliament to consolidate and amend the law relating to Narcotic Drugs, to make stringent provisions for the control and regulation of operations relating to Narcotic Drugs and Psychotropic substances, [to provide for the forfeiture of property derived from, or used in, illicit traffic in Narcotic Drugs and Psychotropic Substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic substances] and for matter connected therewith. The Act has laid down the following punishment for certain offences punishable under the Act :-

31-A. Death penalty for certain offences after previous conviction

(1) 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 19, Section 24, Section 27-A and for offences involving commercial quantity of any narcotic drug or psychotropic substance] is subsequently convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence relating to:

(a) Engaging in the production, manufacture, possession, transportation, import into India, export from India or transshipment, or the narcotic drugs or psychotropic

[49] 4 Section 3 of the Terrorist & Disruptive Activities (Prevention) Act, 1987

substances specified under column (1) of the Table below and involving the quantity which is equal to or more than the quantity indicated against each such drug or substance,.. .”

CAPITAL PUNISHMENT UNDER THE LOCAL LAWS

(i) The Karnataka Control of Organized Crimes Act, 2000

This is an Act passed by the Karnataka State Legislature in the year 2001 to make special provisions for prevention and control of, and for coping with, criminal activity by organized crime syndicate or gang, and for matters connected therewith or incidental thereto.

According to the provisions of this Act an “Organized crime” means continuing unlawful activity by an individual, singly or jointly, either as a member of an organized crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself for any other person or promoting insurgency;

Punishment for organized crime.- (1) Whoever commits an organized crime shall,-

(i) If such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to a fine, which shall not be less than one lakh also be liable to a fine, which shall not be less than one lakh rupees; (ii) In any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall be liable to fine, which shall not be less than five lakh rupees.

(2) Whoever conspires or attempts to commit or advocates, abets or knowingly facilitates the commission of an organized crime or any act preparatory to organized crime, shall be punishable with imprisonment for a term which shall not be les then five years but which may extend to imprisonment for life and shall also be liable to a fine, which shall not be less than five lakh rupees.

(3) Whoever harbours or conceals or attempts to harbor or conceal, any member of an organized crime syndicate shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to a fine, which shall not be less than five lakh rupees.

(4) Any person who is a member of an organized crime syndicate shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine which shall not be less than five lakh rupees.[50]

(ii) The Maharashtra Control of Organized Crimes act, 1999

This is an Act passed in the year 1999 to make special provisions for prevention and control of, and for coping with, criminal activity by organized crime syndicate or gang, and for matters connected therewith or incidental thereto.

Punishment for organized crime (1) whoever commits an offence of organized crime shall,-

(i) If such offence has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees one lac;

(ii) In any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.[51]

(2) Whoever conspires or attempts to commit or advocates, abets or knowingly facilitates the commission of an organized crime or any act preparatory to organized crime, shall be punishable with imprisonment for a term which shall be not less than five years but which may extend to imprisonment for life and 17 chall also be liable to a fine, subject to a minimum fine of rupees five.

(iii) The Rajasthan Dacoity Affected Areas Act, 1986

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[50] 6 Section 3 of the Karnataka Control of Organized Crimes act, 2000.

[51] Section 3 of the Maharashtra Control of Organised Crimes act, 1999

The Government of Rajasthan felt that the menace of organized and unorganized gangs of dacoits is causing concern and needs to be tackled effectively. It is, therefore, necessary to break the chain of vested interests assisting such gangs and to control them. For that purpose, provisions are to be made for specifying certain offences in the dacoity affected areas of Rajasthan in order to curb the commission of scheduled offences and for speedy trial and punishment thereof. Properties acquired through the commission of such offences are also intended to be attached. The Rajasthan Legislative Assembly enacted in the year 1985 the Rajasthan Dacoity Affected Areas Act, which contained the following provisions:

Punishment for offence against public servant.- A scheduled offender who commits the offence of murder of more than one person or a scheduled offence against a public servant or against a member of the family of a public servant, shall,-

(a) If such offence is punishable with death or with imprisonment for life under the Indian penal Code, 1860 (Central Act XKV of 1860) be awarded such punishment as is provided for that offence in the Code; and

(b) In other cases, be punished with imprisonment which may extend to ten years and with fine.

Besides these Statutes on prevention of terrorism and threats to internal security capital punishment is also provided under certain other special laws, the Indian Air Force Act, 195019 the Army Act 195020, the Navy Act etc. which constitute the defence laws of our country. Under Defence Laws death punishment can be awarded for less serious offences if committed during action. The nature and scope of the Defence Laws may be discussed thus:

(iv) Capital Punishment under the Defence Laws:

As a rule the members of the Armed Forces of the Union of India are subject to the provisions of military laws,. But in certain situations an ordinary member of the public renders himself liable to be tried by the Courts Martial for violation of the provisions of the defence laws. Hence he can be sentenced to death without a trial according to accepted principles of Natural Justice which is guaranteed to him under the Code of Criminal Procedure.

According to the Defence laws the Courts-Martial constituted under the Act can pass a sentence of death on a person found guilty under the Act. The abetment of the offences punishable with death is also punishable with death under Sec. 68 if the act abetted is committed. Some of the common offences that are punishable with death by the courts Martial are misconduct in action, delaying the service, disobedience in action, cowardice and sleeping over duty. Spying by the member of the forces or by an ordinary person who is not otherwise subject to the defence laws, is also punishable with death.

V. SAFEGUARDS TO PERSONS CONVICTED OF CAPITAL OFFENCES

(i) Safeguards under the general law of crimes:

The Penal Code contains the safeguards which may be pleaded when an allegation of an offence is made against a person, the important among these safeguards are the safeguards known as General Defences.

(ii) Safeguards under the Procedural Law of Crimes:

The Code of Criminal Procedure, 1973 provides certain safeguards to the persons who are convicted of the capital punishment. The objects of these safeguards is to protect a person from being penalized arbitrarily. The whole sentencing process in capital cases is replete with safeguards for the accused.

(i) Death Penalty now is an Exceptional Punishment Death penalty has become an exceptional punishment22 for all the eight offences which are punishable in the alternative with 'death' because Section 354(3) of the Code of Criminal procedure, 1973, now requires the court to assign "special reasons" for such sentence. Accordingly, death sentence is rarely resorted to only in extremely heinous cases, e.g., pre-planned, calculated cold-blooded murder or a murder diabolically conceived and cruelly executed.[52]

(ii) Accused's right of Pre-Sentencing Hearing Section 235 (2) of the Code of Criminal Procedure, 1973, is a new advancement in penological direction inasmuch as it confers on the accused person a right of pre-sentencing hearing in all cases where death penalty is prescribed as an alternative punishment.

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[52] 2 On the other hand, 'death' was the normal punishment for such offences under the code of 1898 as sec 367(5) required the Court to state reasons for not passing such sentences.

Under this provision, the accused now, in such cases can produce evidence or material before the judge relating to the various factors bearing on the question of sentence or which have a bearing on his (accused) choice of sentence. For example, the accused can make his submission on point of sentence that he is the only breadearner in his family, or he can plead extreme youth on his part for not awarding death sentence.

(iii) Individualization of Sentence

Moreover, Sections 235(2) and 354(3) of the Code of Criminal procedure, 1973, jointly require the court to give due consideration to the circumstances connected with the crime as well as to the circumstances of the criminal, in fixing the degree of punishment or making the choice of sentence for various offences including capital offences. Thus, the question of sentence is completely individualized under our penal system.

(iv) Confirmation of Sentence by High Court

Every provision relating to submission of death sentence for confirmation in the Code of Criminal procedure, 1973 (Sections 366—370) seeks to ensure that the entire evidence material hearing on the innocence or guilt of the accused and the question of sentence must be scrutinized by High Court with utmost care and caution.

Under these provisions, the High Court has complete powers to direct further enquiry to be made or additional evidence to be taken; to confirm the sentence of death or pass any other sentence warranted by law; or to annual or alter the conviction or order a new trial or acquit the accused.

(v) Appeal to Supreme Court

Section 379 of the Code of Criminal procedure, 1973 and Article 136 of the Indian Constitution stand to safeguard the accused by way of appeal to the Supreme Court when he is sentenced to death by way of appeal to the Supreme Court when he is sentenced to death by the High court by reversing his acquittal in appeal or when his sentence of death awarded by the Sessions Judge is confirmed by the High Court.

(vi) Pregnant Woman and Death Sentence

When a woman is sentenced to death many other factors come to fore. The important question amongst them is if she is pregnant at the time of pronouncement of sentence of death, shall it be commuted or just postponed according to the given provision of Cr. P.C.

Art 39(f) of the Constitution provides that the State shall direct its policy towards securing that children are given opportunity and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected from exploitation and against moral and material abandonment. However, the Criminal Procedure Code, 1973 has a provision which goes against the spirit of article 39(f) of the Constitution which imposes a death sentence on pregnant woman. Such a sentence would result in the killing of the foetus also. If the mother is executed, after the child is delivered, it will orphan the child and the child will suffer for no fault of hers. Sec 366 of the Cr. P. C. is the relevant provision which says that "when any person is sentenced to death by a Court of Session, the sentence shall not be executed unless it is confirmed by the High Court. When the sentence is confirmed by the High Court the court of sessions shall issue a warrant to the superintendent of the prison in which the prisoner is confined to cause the sentence to be carried into effect. 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. The word 'May' in Section 416 of the Cr. P. C. 1973 empowers the Court with discretionary powers. The court may execute the death sentence after the woman gave birth to the child or may commute the sentence to imprisonment for life.

(iii) Safeguards under the Constitution and the Statute Law

(a) Pardoning power under the Constitution:

The Rationale of Pardoning Power:

Quite a good number of rules in the sphere of criminal law deal with the exercise ofpardoning power and related matters. Originally, the pardoning power was

The rationale of the pardoning power was felicitously enunciated by Justice Holmes of the United States Supreme Court in the case of Biddle v. Perovich as follows:

"A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination ofthe

ultimate authority that the public welfare will be better served by inflicting less than what the judged fixed.[53]

While in some systems of government the pardoning power is part of the constitutional scheme, in some others it is provided by the statutes, but in certain systems it is part of the traditional power of the Executive called the Prerogative power.

In England, the pardoning power has been exercised from time immemorial, and has always been regarded as a necessary attribute of sovereignty. There are quite a good number of subjects in regard to which the prerogative powers may be exercised by the Executive in matters of criminal justice, such as, the power to grant parole, the power to sanction prosecution or withdraw the prosecution, the power to suspend, postpone or commute the sentence etc. Prerogative powers in England originally were considered to be discretionary powers in regard to which there could hardly be a judicial review. But with the passage of time various discretionary powers have been brought under the scope and ambit of judicial review, so also the pardoning power of the Executive.

In United States of America, at the Federal level the President of United States exercises the power under the Constitution and at the State level the Governors of the States exercise such a power either under the State Constitutions or the relevant Statutes. In some States an administrative agency called the Board of Criminal Justice of which the Governor is always a member may exercise the pardoning power. In some cases, the Governor's power is so limited as to render an arbitrary exercise impossible.

Side by side with the rules relating to pardon, there are certain matters which the courts consider to be relevant in examining the justification or otherwise of the exercise of pardoning power. On various occasions the courts were called upon to pronounce the principles as to the manner in which the Executive could exercise its pardoning power. The statutory provisions sanctioning the pardoning power and the judicial decisions on the subject act as the corpus juris of the pardoning power 01 the Executive in India.

' In India, the Constitution provides for the pardoning powers of the President at the Union level and of the Governors at the State level.

[53] 71 L Ed. 1161 at 1163.

Article 72 of the Constitution dealing with the powers of the President says, "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—

- In all cases where the punishment or sentence is by a court martial;
- !n all cases where the punishment or sentence is for an offence against any law relating to a matter to which the Executive power ofthe Union extends;
- In all cases where the sentence is a sentence of death."

Article 161 of the Constitution dealing with the pardoning powers of the Governors says, "The Governor of a 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.

(ii) Pardoning Power under the Statutes

While the Constitution provides for the powers of the chief executive at the Union and the State levels, the Statutes dealing with the substantive and procedural matters of criminal justice provide for the powers of the Government to exercise the pardoning powers.

According to the Corpus Juris Secundum, "the pardoning power is founded on considerations of public good and is to be exercised on the ground that the public welfare, which is the legitimate object of all punishment will be as well promoted by a suspension as by an executive of the sentence. It may also be used to the end that justice be done by correcting injustice as where after-discovered facts convince the official or board invested with the power that there was no guilt or that other mistakes were made in the operation or enforcement of the criminal law. Executive clemency also exists to afford relief from undue harshness in the operation or enforcement of criminal law."

The American Jurisprudence explaining the philosophy of pardoning power says, "Every civilized country recognizes, and has therefore provided for the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency to be exercised by some department or functionary of a government, a country would be most

imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy."[54]

The Indian Penal Code, 1860, which is a general law of crimes dealing the substantive matters of criminal justice, provides in Sections 54 and 55 of the Indian Penal Code confer power on the appropriate Government to commute sentence of (tenth or sentence of imprisonment for life as provided therein.[55]

The Code of Criminal Procedure which is also a general law dealing with procedural matters of criminal justice, contains the following provisions about commutation of offences by Government:-

1. Sec.432: Power to suspend or remit sentences: (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

2. Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

3. If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

4. The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

[54] 59 American Jurisprudence, page 5.
[55] Sections 54 and 55 of the Indian Penal Code, 1860

5. The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with;

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by other person on his behalf shall be entertained unless the person sentenced is in jail,

Section 433: Power to Commute Sentence: The appropriate Government may without the consent of the person sentenced, commute

(a) a sentence of death, for any other punishment provided by the Indian Penal Code, 1860;

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine."

(iv) Section 433-A: Restrictions on powers of remission or commutation in certain cases: "Notwithstanding anything contained in Section 432 where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment provided by law or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."

Section 434 confers concurrent power on the Central Government in case of death sentence. Section 435 provides that the power of the State Government to remit or commute a sentence where the sentence is in respect of certain offences specified therein will be exercised by the State Government only after consultation with the Central Government."

(a) The situations in which the Executive at the Union or the State level may exercise the powers laid down in the above provisions:

Sections 434 and 435 dealing with the powers of the Executive at the Union and the State level in regard to the powers enshrined in the above provisions of the law provide as follows:

434 Concurrent Power of Central Government in case of death sentences:

The powers conferred by Sections 432 and 433 upon the State Government may, in the case of sentence of death, also be exercised by the Central Government.

435 State Government to act after consultation with the Central Government in certain cases:

1. The powers conferred by Sections 432 and 433 upon the State Government to remit or commute a sentence, in any case where the sentence is for an offence—

2. which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, or

3. which involved the misappropriation or destruction of, or damages to any property belonging to the Central Government, or

4. which was committed by a person in the service of the Central Government, while acting or purporting to act in the discharge of his official duty, a. Shall not be exercised by the State Government except after consultation with the Central Government.

5. No order of suspension, remission or commutation of sentences passed by the State Government in relation to a person, who has been convicted of offences, some of which related to matters to which the executive power of the Union extends, and who has been sentenced to separate term of imprisonment which are to run concurrently, shall have effect unless an order for the suspension, remission or commutation, as the case may be, of such sentence has also been ma Hs by the Central Government in relation to the offences committed by such person with regard to matters to which the executive power of the Union extends.

The President, the Governor, the Central Government and appropriate State Governments have power to grant pardons or to commute the sentence of death, under Articles 72 and 161 of the Constitution and certain relevant provisions of the Code of Criminal procedure, 1973. The President of India is authorized to grant pardon or commute the sentence of death under Article 72 of the constitution. The Governors also have concurrent powers to commute the death sentence under Article 161, similarly,, the appropriate State Governments and the

Central Government have powers to commute the death sentence respectively under Sections 433 and 434 of the Code of Criminal Procedure, 1973.

These executive clemency provisions, in the words of Taft, C.J exist, to afford relief from undue harshness or evident mistake in the operation or enforcement of the Criminal Law because administration of justice by courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt

It may be observed that the sentence of 'death' as it is administered, is inflicted very sparingly with utmost care and caution to minimize mistakes and mitigate harshness in the operation or enforcement of the criminal law in India.

SAFEGUARDS UNDER THE HUMAN RIGHTS LAW

(i) Obligation of States to be Transparent In 1998 the UN Commission on Human Rights called upon all states that retained the death penalty, "to make available to the public information with regard to the imposition of the death penalty".

A similar resolution was also passed in 2003. The UN Economic and Social Council (ECOSOC) too, in 1989, urged member states,

"to publish, for each category of offence for which the death penalty is authorized, and if possible on an annual basis, information about the use of the death penalty, including the number of persons sentenced to death, the number of executions actually carried out, the number of persons under sentence of death the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted"

The UN special reporters on extrajudicial summary or arbitrary executions has also focused on transparency as a key concern at the 2005 Commission of Human Rights in Geneva. The reporters, Philip Alston noted.

In a considerable number of countries information concerning the death penalty is cloaked in secrecy. No statistics are available as to executions, or as to the numbers or identities of those detained on death row, and little, if any information is provided to those who are to be executed or to their families. Such secrecy is incompatible with human rights standards in various respects. It undermines many of the safeguards which might operate to prevent errors or abuses and to ensure fair and just procedures at all stages.

The special rapporters further observed,

Countries that have maintained the death penalty are not prohibited by international law from making that choice, but they have a clear obligation to disclose the details of their application of the penalty. For a government to insist on a principled defence of the death penalty but to refuse to divulge to its own population the extent to which, and the reasons for which, it is being applied is unacceptable. They should, as a matter of priority, insist that every country that uses capital punishment undertake full and accurate reporting of all instances thereof, and should publish a consolidated report prepared on at least an annual basis.

The special rapporteur thus recommended.

Transparency is essential wherever the death penalty is applied. Secrecy as to those executed violates human rights standards. Full and accurate reporting of all executions should be published, and a consolidated version prepared on at least an annual basis.

(i) The International Covenant on Civil and Political rights, 1966 is the first important instrument to which a reference is necessary at this juncture.

Article 6 of this Covenant says,

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the convention on the Prevention of Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court .

The Second Optional protocol to the International covenant on Civil and Political rights aiming at the abolition of death penalty has the following provisions on the subject.

Article 1. 1. No one within the jurisdiction of a State Party to the present Optional Protocol shall be executed.

2. Each State shall take all necessary measures to abolish the death penalty within its jurisdiction.

CHAPTER – 6

‘CONSTITUTIONALITY OF DEATH PENALTY IN INDIA

The legal system of many nations of the world contains a written constitution which guarantees fundamental rights against the excesses and the apathy of the legislature and the executive. Such constitution after recognize the ‘act to life’, equal protection of law and ‘due process of law’. They prohibit ‘cruel and unusual punishment and’ degrading treatment or punishment’. The constitutional validity of capital punishment is an issue which has troubled the constitutional courts of the world. It is a question the answer to which provides a litmus test of the spirit in which a supreme court perform its duties. The cases in which the legality of the death penalty has been impugned raise for judicial review a state practice of dubious moral propriety one impinging on the fundamental right to life of the weakest members of society an issue in which the standards of liberals are in conflict with the standards of conservatives and often with those of the man in the street.

Indian constitution is an amalgam of many constitutions, i.e. the constitution of America, Britain and Japan. It should not surprise anyone, therefore, that the main provisions of the constitution of India guaranteeing the right to life has been lifted from the American and the Japanese constitution. It may be added here that what we have borrowed in the form or style of expression and not the right itself. The right to life is not the something that constitutions create or even confer. The constitution only recognizes this inalienable and indispensable right.

It is an indisputable fact that there is nothing in the constitution of India which expressly holds capital punishment as unconstitutional, though there are provisions that suggest that the constitutional scheme accepts the possibility of capital punishment. However, there are several provisions in the constitution such as the preamble, the Fundamental Rights and directive principle which can be relied upon for challenging the constitutionality of capital punishment. It is clear that only a limited category of serious offender visited with capital punishment. The crux of the whole issue is that each one of us has an inherent right to life and none of us can divest any one from this precious right, and I fhe does so, it has to be at the cost of his own life.

II) WHETHER DEATH PENALTY SERVES ANY PENOLOGICAL PURPOSE : VIEWS OF LEGAL LUMINARIES

The dispute between the proponents of the exclusive deterrent effect of capital punishment and those who deny any such effect is not one in which the judiciary is keen to participate or take sides in the course of constitutional adjudication. Justice Sarkaria has emphasized, for the Indian Supreme Court that:

> The question whether or not death penalty serves any penological purpose, is a difficult complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty. It is not necessary for us to express any categorical, one way, or the other, as to which of these antithetical views, held by the abolitionist and Retentionist, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue is a grounds among other, for rejecting the petitioners arguments that retention of the death penalty in the impugned provisions is totally devoid of reason and purpose.[56]

If the deterrent effect of the death penalty has not been challenged by the courts, the comment of Justice Paliker in the Indian Supreme Court that there is large volume of evidence compiled in the west by kind social reformers and research workers to confound those who want to retain the capital punishment, is unique in appearing to challenge the bonafide of those who have denied such a deterrent effect.

The Hon'ble Mr. Justice Krishna Iyer has challenged the deterrent effect claimed for capital punishment, According to him

'The solution for explosive tension and returns to tranquility (us not the death penalty but) curing the inner man through technology, elimination of social provocation and economic, injustice and of addiction to inebriants which dement the consumer[57]

Among the other Indian judges, only Justice Chinnapa Reddy has expressed any degree of support for Justice Krishna Iyer's approach. He has accepted that

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[56] Bachan Singh Vs. State ofPunjab 1980 2 SCC 685,729.
[57] Dalbir Singh & others Vs State ofPunjab Supra at p 1066

‘The most reasonable conclusion is that there is no positive indication that the death penalty has been deterrent. In other words, the efficacy of the death penalty as a deterrent is unproven. Nor have the vast majority of the judges exercising judicial review been prepared to accept that retribution is for bidden penological objective, or that it is a penal purpose to which capital punishment has nothing unique to contribute[58].

Justice Chinnapa Reddy (with whom Krishna Iyer J agreed) asserted that ‘The retributive theory is incongruous is an era of enlightenment.”The incapacitative function of capital punishment, its indisputably unique ability to ensure that accused does not repeat the capital offence (or any other offence) who has received rather less judicial attention than the rationales of deterrence and retribution.

The Indian Supreme Court has appreciated the difficulty of predicting dangerousness, and the error of assuming that a man convicted a accused of capital crime is prone to future criminal acts. It was for that reason that the court held it unconstitutional under Article 21 of the Indian constitution (and under other Articles) to subject a condemned man to solitary confinement, and to keep in chains a prisoner on remand unless, is either ease, there was strong evidence of violent propensities. ‘The reformation of the individual offender is usually regarded as an important function of punishment. But it can have no application where the death penalty is exacted. In India, Justice Chinnapa Reddy has, consequently, found a ‘ .... “grievous injury” which the death penalty inflicts on the administration of Criminal justice. It rejects reformations and rehabilitation of offenders as among the most important objectives of Criminal justice. For similar reasons Justice Krishna Iyer has argued that ‘death penalty is permissible only where reformation within a reasonable range is impossible.[59]

Because due process of law and the rule of do not express support for any particular penal theory, Supreme Court have denied that the death penalty is per se unconstitutional.

The punishment of a Criminal can be looked upon as a retributive or retaliatory social reaction to the evil he has caused. Capital punishment, wrote Montesquieu, represent is kind of retaliation by which society withdraws protection form a citizen who has sought to destroy another citizen. This punishment is derived from the nature of the crime, drawn from the fund of reason and the Springs of Good and Evil. A citizen deserves death, when he has violated

58 Gregg Vs Georgia, Bachan Singh Vs State ofPunjab
59 Rajindra Prasad Vs State of UP

the security of another and has gone so far as to kill him or attempt to kill him. The death penalty this employed may be described as the medicine for a social malady.

In India, Justice Krishna Iyer has not denied the per se constitutionality of capital punishment. Indeed, he has emphasized that '........... to sublimate Savagely in individual or society is a long experiment in spiritual chemistry where moral values, Socio economic conditions and legislative judgment have a role. Judicial Activism can only be a sign post, a weather vane, no more. But the extent to which Justice Krishna Iyer has restricted the circumstances in which the death penalty can be imposed has led. Justice Sen to complain that Krishna Iyer Justice's opinion have brought about 'a virtual abolition of the death sentence.'[60]

If the death penalty is not per se unconstitutional as a denial of due process of law and the rule of law, it is unlawful as a breach of fundamental rights when it......... makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering.

DISCRETIONARY DEATH SENTENCE:

WHETHER IT IS CONSTITUTIONALLY VALID OR INVALID.

In **MC Gautha Vs California**, Justice Harlon for the majority of the United States Supreme Court held that 'Despite the undeniable surface appeal of proposition, unstructured jury discretion in deciding when to award the death sentence for an offence for which it is a permissible penalty is not a denial of due process of law, 'Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have', he said.

In Furman Vs Georgia, the court impliedly overruled its earlier decision in MC Gautha Vs California. In nine Separate opinions the justices struck down by a majority of 5-4, the death penalty statutes at issue as cruel and unusual and hence as a denial of the due process of law guaranteed by the 14th Amendment. Of the judges in the majority, Justice Marshall and Breman said that the death penalty is per se unconstitutional, Justice Stewart, Douglas and White found that the jury discretion in sentencing authorized by the statutes was instructed arbitrarily, imposed and therefore a denial of fundamental rights.

[60] Dalbir Singh & others Vs State ofPunjab

The decision in Furman Vs Georgia provoked many American States to amend their death penalty laws. Other states attempted to structure judge and jury discretion in awarding the death sentence by specifying aggravating and mitigating factors. The constitutionality of those statutes was considered by Supreme Court in a series of cases in 1976: Gregg Vs Georgian, Profit Vs Florida and Furek Vs Texas. The three statutes at issue invoked different types of legislative guidelines to the sentence. But in all three cases the Court held by a majority of 7-2 that the statutes satisfied the demand of Furman Vs George that in death penalty statutes discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

The expression discretionary death has been used to distinguish it from the cases of mandatory death penalty. In brief, the discretionary death penalty means that if the offence, for which it is prescribed is proved, the court has a discretion to award either death sentence of the lesser sentence which is prescribed by law for that offence. Under the Indian Penal Code, death penalty has generally been prescribed as the maximum limit of full range of punitive measures. The only exception was Section 303 which provides for the mandatory death penalty.[61]

Under the Indian Penal Code, discretionary death penalty is prescribed in two patterns. Under the first pattern very wide discretion is vested in the courts to choose from the death sentence and a wide range of other lesser sentence. This pattern is followed in Section 132, 194,305,307 and 396. Under the Second pattern, only a limited discretion is available to the court to choose from the sentence of death and single alternative like imprisonment. This pattern is followed in Section 121 and 302. However in all cases, where the law provides for discretionary death sentence the courts have to exercise the discretion judiciously after balancing all the aggravating and mitigating circumstances attending a particular case.

All the challenges to the constitutional validity of discretionary death penalty have been made mainly on the basis of the fundamental rights guaranteed by Article 14,19,21 of the constitution.

PRE MANEKA PERIOD

[61] This provision has been struck dawn as unconstitutional by the Supreme Court in Mithu Vs State of Pu njab AIR 1983 SC473

This period may also be described as "Gopalan Period" as the constitutional interpretation of the fundamental rights guaranteed by Article 19, 21 and 22 was governed by A.K. Gopalan Vs State of Madras. This case in beyond the scope of the present discussion. Therefore a brief reference may be made to illustrate its impact. In it, the Supreme Court laid down that Article 19 and 21 were not supplemented to each other but were mutually exclusive. It was also held that the procedure established by the law in Article 21 meant procedures provided by the law of the state that is noted law. It did not include what was known as procedural due process in America, nor were the principle of natural justice included in it. In other words, this decision laid down that the court had no power to examine the reasonableness. If the law depriving a person of his life and personal liberty.

The Gopalan decision is regarded of high precedent value. Question's have been raised regarding the soundness of judicial view expressed in this case. But it was not possible for the court at that time to introduce the doctrine of "procedural due process in Article 21 in the face of its clear cut rejection by the constituent Assembly16. However, the law and order problem could not have escaped the attention of the court. A prosecuting approach was obvious on the part of the Court.

Thus, before Maneka Gandhi, it was not possible to challenge the reasonableness of the procedure provided by the law for deprivation of life or personal liberty with respect to Article 21. Article 21 could be invoked only by arguing that the law of statute in question had no procedure for the deprivation of life or personal liberty. Therefore the constitutional validity of death penalty could be challenge only in this limited way.

And this was done in. **Jagmohan Singh Vs State of UP**[62]. In this case the constitutional validity of death sentence for murder under Sec302 of the Indian Penal Code, was challenged for the first time. It was argued that death penalty for murder was constitutionally invalid, as it violates, among other things fundamental rights guaranteed to the citizen of India. It was further contended that death penalty was violative of the constitutional right of equality guaranteed under Article 14, as in two similar cases one may get death penalty and the other life imprisonment Mr. R.K. Garg, Counsel for the appellant contended in this respect that the discretion given to the judges to impose capital punishment or imprisonment for life, is uncontrolled and unguided. The Supreme Court held that it does not find any merit in this contention. If the law has given to the Judges a wide discretion in the matter of sentence to

[62] **AIR 1973 SC 947 Cr. LJ 370,1973 S.C. Cr.162**

be exercise by him after balancing all aggravating and mitigating circumstances of the crime, it will be impossible to say that there would be at all any discrimination, since facts and circumstance of another.

It has been pointed out by this court in **'Bndhan Chowdhary Vs State of Bihar**[63] that Article 14 can hardly be invoked in matter of judicial discretion. The challenge with respect to Article 19 was that the sentence of death put a final and to all the fundamental freedoms guaranteed in this Article. It was contended that the freedom to live was basic to the enjoyment of all those freedoms even though it was not expressly mentioned in this Article. Therefore, it could not be desired by any law unless such law was reasonable and required in general public interest. The court, just for the sake of this argument, assumed that the freedom to live was basic to the enjoyment of all the fundamental freedoms guaranteed under Article 19 and this proceeded to examine whether Section 302 Indian Penal Code prescribing the sentence of death for murder was reasonable and in the public interest at the outset, the court clearly pointed that the argument advanced against death penalty per se were almost similar to those raised in the American case Furman Vs State of Georgia™. It compared the viability of these arguments in both the countries. India and America. Speaking for the court, Justice Palekar pointed out the absence of the "cruel and unusual punishment clause and the liberal interpretation of the 'due process clauses' of the American constitution in India. He drew attention towards the fact that despite the presence of these favourable factors and abundant evidence and literature in support of the abolition of death sentence, the US Supreme Court could not conclude that death penalty was per se unconstitutional.[64]

POST MANEKA PERIOD

The developments in the procedural law relating to imposition of death penalty and the new dimensions of Article 21 unfolded by Maneka Gandhi case encouraged the lawyers to reagitate the question of constitutionality of death sentence.

This time the constitutional desirability of the death penalty came up for the

consideration of the court in RAJINDRA PRASAD VS STATE OF UP. Actually

this was not the real question before the Court .The Court was invited to consider

[63] **AIR 1951 SC 191 (1965)1 SCR1045**
[64] In furman, out of judges of the Court, only two Judges (Justice Brennan & Justice Marshall) held that death penalty was per se unconstitutional.

question as to the circumstances under which the death penalty could be imposed for

the offence of murder. The question arose out of three special leave Appeals, in which

the leave was limited to the question of sentence. However, JUSTICE VR KRISHNA IYER, who delivered the majority judgment of the Court, discussed a wide range of issues concerning death penalty, he took the help of the history, culture, law, morality and penological justifications of the death penalty, but the most emphasized aspect was its constitutional dimension. Jagmohan Singh was sought to be distinguished on the ground that it had held the sentence imposed after trial in accordance with the procedure established by law to be valid. Therefore, the observation of the court on the sentencing criteria for discretionary power did not constitute ratio of the case. This was realized by Justice Krishna Iyer also as he observed.

MANDATORY DEATH PENALTY

Mandatory death penalty simply means that if any one commits certain offence, he shall be punished with death sentence only. For eg. S. 303 of Penal Code provided "whoever being under sentence of imprisonment for life commits murder shall be punishable with death". Thus this kind of punishment removes all flexibility from the sentencing process. By making the offence or offences punishable with death penalty only, the legislature leaves nothing for the courts. If such an offence is proved, the courts, have no option except to impose the sentence of death. They cannot exercise this judicious discretion in such matters and the exercise of judicial review becomes fully mechanical Mandatory death penalty is criticized for a number of reason. It deprives the judges of the power to exercise their judicial discretion while sentencing the accused. It is said that this may cause injustice to the accused as each case in attended by a different set of aggravating, mitigating and causal factors which must be considered by the Judges in deciding the gravity of the offence and appropriate punishment. Mandatory death penalty proceeds on an irrefutable presumption of certain class of offenders to be more dangerous than others. This is inconsistent with Article 21 in view of Supreme Court's decision in Sunil Batra's case. Further it is pointed out that mandatory death penalty does not stricture discretion in awarding the death penalty which is the main reason behind its enactment. These remain discretionary and unstructured choices in the legal processes at stages prior to and subsequent to sentencing stage. Therefore, it is said that mandatory death penalty merely acts as a disguise for arbitrary and standardless decision. It is not known that whether it serves the retributive or deterrent purpose of punishment more

effectively than the discretionary death sentence. Instead it strikes at the administration of criminal justice.

In this connection, it is stated that experience in various countries like America had shown that some Judges and Juries have an abhorrence of death penalty and they would rather find a guilty person non guilty, and sending even a non guilty person to the gallows. Finally, it is urged that mandatory death penalty is incompatible with evolving standards of decency of a society.

Constitutionality of mandatory Death Penalty in India:

In India the constitutional validity of mandatory death penalty was considered by the Supreme Court in Mithu Vs. State of Punjab. It was contended that section 303 of the Penal Code was unreasonable and arbitrary and violative of Article 14 and 21 of the constitution. The court unanimously held that Section 303 Indian Penal Code providing for mandatory death penalty was unconstitutional as it violated Article 14 and 21.

On behalf of the respondents it was contended that the Supreme Court in Bachan Singh upheld the constitutional validity of death sentence and Section 303 Indian Penal Code only provided for death sentence for a specific category of murders. Therefore, the question regarding the constitutional validity of Section 303 must be regarded as concluded, in view of the decision in that case.

However, this contention was rejected by the Court as it was not in accordance with the decision of Bachan Singh Case. It also did not recognize the fundamental distinction between Section 302 and 303 of Indian Penal Code. Speaking for majority, Chief Justice Chandrachud pointed out that Supreme Court did not lay down any abstract proposition that death sentence was constitutional. In fact it was held that Section 302 of penal code which provided death sentence as one of the two alternative sentence for murder was constitutional.

In questioning the constitutional validity of Section 303 it was contended that the legislature was not justified in classifying a certain class of murderers under Section 303 Indian Penal Code. Such classification offended the fundamental right to equality enshrined in Article 14. It was also argued that Section 303 Indian Penal Code violated Article 21 of the constitution

as the procedure given in that section for deprivation of life was unjust and unfair. On the basis of arguments the court reduced the matter for its consideration into the following issues.

(1) Whether there was any intelligible basis for giving different treatment to the offender under Section 303 Indian Penal Code and whether there was any nexus between such discrimination and object of the impugned provisions, viz, the prescription of mandatory death sentence for murders committed by the life convicts.

(2) Whether a law providing for the sentence of death for the offence of murder, giving no opportunity to the accused to show cause why that sentence should not be imposed was just and fair.

(3) Whether such a law was just and fair and it did not require the court to state the reasons why the extreme sentence of death was called for.

(4) Whether such a law was arbitrary as it required the death sentence to be imposed under all circumstances.

For judging the violation of Art. 14, the court applied the test of reasonable classification. It pointed out that similar motivational forces operated on the minds of the murderer whether the murder was committed by a life convict or any other person.

The murders falling under Section 303 Indian Penal Code deserved same consideration as those falling under Section 302 Indian Penal Code. The circumstances that a person was undergoing a sentence of life imprisonment did not lessen the importance of mitigating factors relevant on the question of sentence. On the contrary, in certain circumstances, such murderer deserved greater sympathy, understanding and consideration. Chief Justice Chandrachud Illustrated this by giving instances of the possible circumstance in which murder may be committed by life convict inside or outside the jail precincts while on bail or parole. This led the court to conclude that there was no rational basis to distinguish between the two classes of murderers namely, the person committing murders while undergoing the sentence of life imprisonment & other person not under such a sentence while committing murders.

The court posed the question whether persons could be classified for mandatory death penalty only on the basis of their being under the sentence of life imprisonment. If a person had served such a sentence and came out and then he committed murder, he was not covered by

this section. Only a person who was under such sentence while committing murder had been selected for the mandatory death sentence, and he was not to get any benefit of judicial discretion in the matter of sentences. Chief Justice Chandrachud said that this classification was based on an irrelevant consideration and had no nexus with the object of the impugned provisions, namely, the imposition of mandatory death penalty.

Further, the court made it clear that unlike other countries, in India there existed no scientific investigation regarding the behavior of life convicts. In the absence of such data the court refused to assume that the incidence of murder committed by life convicts was unduly high. It also refused to accept that life convicts were and dangerous breed of humanity. Thus, it found that there was no reasonable ground for treating such murderers differently.

In the light of this reasoning, Chief Justice Chandrachud concluded that Section 303 of the Penal Code providing for mandatory death sentence did not answer the test of reasonableness and therefore violated Article 14 of the constitution. For the first time the law commission of India considered the question of mandatory death sentence in its 35th Report. It had agreed that divesting the courts of all discretion in the matter of sentence did not conform with the modem trends. The commission has also considered the question of amending Section 303 so as to limit its application to the persons committing murder while undergoing life sentence imposed for a previous murder.

THE U.S.A. EXPERIENCE

The continuance of death sentence in the United states received a set back in Furman Vs. State of Georgia. The Supreme Court by majority held that Death penalty is administered under the impugned statutes constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. It struck down these impugned statues as unconstitutional for giving unstructured discretion to the courts in the matter of sentence. This decision was interpreted to mean that the court had not declared death penalty per se unconstitutional. It had only condemned and struck down its unpredictable and fortuitous use. Consequently, the legislature of 35 states acted to tighten the law under which death sentence was to be inflicted to bring them in conformity with the decision in Furman’s case. Two different approaches were adopted for this purpose.

CONCLUSION AND SUGGESTIONS

In this Chapter, first of all a brief view of all the chapters from chapter first to five has been discussed. The scholar has first discussed about the existence of death penalty provisions in India from the beginning of society when there was no codified law in India till today. Finally on the basis of the aforesaid discussion, some arguments have also been done whether to retain or abolish death penalty provisions in India's legislation.

The researcher would like to recommend the following suggestions on the basis of the research findings which may possibly help in forming an opinion regarding abolition or retention of death penalty in India:

- In present circumstances it would not be desirable to abolish death penalty totally.
  Death Penalty may be used as punishment, considering the nature of offence, security of state, public welfare or anticipated grave potential danger from dangerous criminals.
- Mandatory death sentence be abolished and whenever death penalty is prescribed, it must be associated with imprisonment for life with a disjunctive 'or' so that either of the punishment may be imposed according to the discretion of the Judge.
- Currently the legal proceedings are too complicated and lengthy; the process moves. slowly and conviction rate is low. Hence, quick disposal of cases and immediate appropriate punishment is called for.
- The punishment of death must be proportionate to the nature and gravity of the offence and in the context of legislative judgment world-over, if we alone in India prescribe death penalty; it is likely to be vulnerable as a punishment disproportionate to the nature and gravity of the offence.
- Society has always used punishment to discourage would-be criminals from unlawful action. Since society has the highest interest in preventing murder, it should use the strongest punishment available to deter murder, and that is death penalty. If murderers are sentenced to death and executed, potential murderers will think twice before killing for fear of losing their own life.
- Retribution has its basis in religious values, which have historically maintained that it killing for fear of losing their own life. is proper to take an "eye for an eye" and a life for a life. For the most cruel and heinous crimes, ones for which the death penalty is applied, offenders deserve the worst punishment under our system of law, and that is the

death penalty. Any lesser punishment would undermine the value of society which protects the lives of the people.

- Death punishment is the highest form of punishment known to man. So it has the maximum deterrent effect in general. By implementing this punishment, it becomes as a lesson to the remaining people of the society to deter before committing an offence of such nature.

On the basis of ultimate analysis, it is clear that from the angle of social justice and protection of society from hard-core criminals, death sentence is not unreasonable type of punishment. The death penalty is no doubt unconstitutional if imposed arbitrarily, capriciously, unreasonably, discriminatorily, freakishly or wantonly, but if it is administered rationally, objectively and judiciously, it will enhance people's confidence in criminal justice system. Thus on the basis of the aforesaid discussion in the research thesis, the research scholar has come to the conclusion that in the present circumstances of the country, it is required to retain death penalty in rarest of the rare cases.

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