CAPITAL PUNISHMENT IN INDIA

A DISSERTATION TO BE SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE AWARD OF DEGREE OF MASTER OF LAWS

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PREFACE

Capital Punishment was once accepted as necessary and inevitable by the rulers and the ruled alike. For centuries, nobody questioned either its power to reduce crime or its impact on the society in general and on the persons involved in the process in particular. But, now it has been questioned and challenged by the present day society in the changed context of the social order in the welfare society, where rational and sophisticated thinking, human dignity, liberty and equality are considered more important than ever before. Capital Punishment is used as a tool of political repression. This irrevocable punishment is imposed arbitrarily and capriciously against the poor and minorities.

Article 21 of the Indian Constitution provides that, 'The State shall not deprive a person's right to life and personal liberty except in accordance with the procedure established by law." In other words, the Indian Constitution provides for deprivation of right to life in accordance with the fair, just and reasonable procedure prescribed under a valid law.; The Indian Penal Code which is the substantive criminal law prescribes Capital Punishment and the Criminal Procedure Code provides the procedure for the execution of the Capital Punishment. In the case of Capital Punishment the violation is committed by none other than the State itself. Capital Punishment is premeditated and cold- blooded killing of a human being by the State.

Capital Punishment existed all over the world since times immemorial. With an exception of few countries all the other nations of the world are implementing this barbarous penalty over their citizens by various modes such as gassing, shooting,

hanging, electrocution etc., Organisations like United Nations Organisation, Amnesty International etc ., are striving hard to make this practice obsolete. Article 3 of Universal Declaration of Human Rights envisages that, “Every one has the right to life, liberty and security of person.” Article 6 of the International Covenant on Civil and Political Rights observes that,”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.” As the Human Rights Committee set up under the International Covenant on Civil and Political Rights has recognised “The right to life enunciated in Article 6 of the Covenant is the supreme right from which no derogation is permitted even in times of public emergency which threatens the life of the nation. It is a right which should not be interpreted narrowly.” It is to be noted that, inspite of being the members of this Covenant, the penal laws of the various countries prescribed Capital Punishment for certain offences.

The validity of Capital Punishment is challenged both in developed and developing countries as uniquely cruel, inhuman and degrading punishment. The approach of judiciary in India in respect of Capital Punishment is not clear. A review of judicial decisions on Capital Punishment in India clearly indicates the cleavage of opinion among the judges.

On the global front, the movement for the abolition of Capital Punishment is gaining ground throughout the world. The Human Rights Activists and Organisations are demanding the abolition of Capital Punishment. In the light of these new challenges the present study is undertaken to examine the relevance of Capital Punishment in the light of changed socio - economic conditions and newly emerged human rights jurisprudence.

The scholar has made a modest attempt to trace out the origin of Capital Punishment, its retention in the statutes of various countries and judicial approach towards Capital Punishment. The scholar has highlighted the necessity to abolish Capital Punishment from the statutes of various countries.

ABBREVIATIONS

A.I.R.	All India Reporter
All.E.R.	All England Reporter
Cri.LJ.	Crimianl Law Journal
Del.	Delhi.
Ed.	Edited by
Gau.	Gauhati
Guj.	Gujarat
H.P.	Himachal Pradesh
J.I.L.I.	Journal of Indian Law Institute
J&K	Jammu and Kashmir
Ker	Kerala
Lah.	Lahore
Mad.	Madras
M.L.J.	Madras Law Journal
M.P.	Madhya Pradesh
Ori.	Orissa
Pat.	Patna
P & H.	Punjab and Haryana
P.U.C.L	Peoples Union for Civil Liberties
Ran.	Rangoon
Raj.	Rajasthan
S.C.	Supreme Court

S.C.C	Supreme Court Cases
U.P.	Uttar Pradesh
U.S.	United States

LIST OF CASES

A

Abdul Ghani v. State of Uttar Pradesh: AIR 1973 S.C. 1385.. A.B.Gopalan v. State of Madras: AIR 1950 S.C.27.

Allauddin v. State of Bihar: 1989 Cr. L.J. 1486 (S.C).

Amar Singh and another v. Union of India: AIR 1983 S.C. 1155. Ambaram v. State: AIR 1976 S.C. 2159.

Amir Hussain v. State of Uttar Pradesh: AIR 1975 S.C. 2211. Amrutha v. State of Maharashtra: AIR 1983 S.C. 629.

Ashrafi Lai v. State of Uttar Pradesh: 1987 Cri.L.J. 1885. Atmauddin v. State of Uttar Pradesh: ADR. 1974 S.C. 1901. B

Bachhan Singh v. State of Punjab: AIR 1980 S.C.898. Balak Ram v. State: AIR 1974 S.C.2165.

Balwant Singh v. State: AIR 1976 S.C. 230. Barclay v. Fliorida: 463 U.S. 939

BhagwanBux Singh v. State of Uttar Pradesh: AIR 1978 S.C. 34. Bhagwan Swarup v. State of Uttar Pradesh: AIR 1971 S.C. 429.

Bhoomaiah and Kista Goud v. State of Andhra Pradesh: (1976) 1 SCC 157. Bhudan Chowdhary v. State of Bihar: AIR 1955 S.C. 191.

Bhupendra Singh V. State of Punjab: 1969 Cri.L.J. 6 (S.C).

Bhuvan Mohan Patnaik v. State of Andhra Pradesh: AIR 1974 S.C.2092. Bishnu Deo Shah v. State of West Bengal: AIR 1979 S.C. 964.

Bishnu Singh v. State of Punjab: AIR 1983 S.C. 743. Blystone v. Pennsylvania: 494 U.S. 299 (1990).

Bryan Stuart Lankford v. Idaho: 500 U.S. 114 (1991). C

Carlose John v. State of Kerala: AIR 1974 S.C. 1168.

Catholic Commission for Justice and Peace in Zimbabwe v. The Attorney General and Others: Commonwealth Judicial Journal: v. 10: No.3: 32-33 (June, 1994).

Chawla v. State of Haryana: AIR 1974 S.C. 1039. Clemons v. Mississippi: 494 U.S. 738 (1990).

Crampton v. Ohio: 402 U.S. 183 (1971). D

Darshan Singh v. State of Punjab: AIR 1988 S.C. 727. D.C.Karmakar v. Emperor: AIR 1936 Cal. 193.

Dagdu v. State of Maharashtra: AIR 1977 S.C. 1579. Dalbir Singh v. State of Punjab: AIR 1975 S.C. 1384. Daya Singh v. Union of India: (1991) SCJ 158.

Deena alias Deen Dayal v. Union of India: AIR 1983 S.C. 1155. Dharma Ram Bhangare v. State of Maharashtra: AIR 1973 S.C. 476.

Dilip Kumar Sharma and Other v. State of Madhya Pradesh; AIR 1976 S.C. 133. Dukhi Devi v. State of Orissa: .AIR 1963 Orissa 144.

Duraipandi Thevar v. State of Tamil Nadu: AIR 1973 S.C. 659. E

Ediga Axmamma v. State of Andhra Pradesh: AIR 1974 S.C. 799. Ehrlich Anthony Coker v. State of Georgia: 433 U.S. 584 (1977). Emperor v. Misri: (1909) ILR 31 All 392.

Enmund v. Florida: 458 U.S. 782 (1982)

F

Francis v. State of Kerala: AIR 1974 S.C. 2281. Furman v. Georgia: 408 U.S. 238 (1972).

G

Gajendra Singh v. State of Uttar Pradesh: AIR 1975 S.C.1703. Ghasita v. State of Uttar Pradesh: AIR 1973 S.C.211.

Ghulam Rasul v. Emperor: 1946 Cri.LJ.585. Glass v. Louisiana: 471 U.S. 1081 (1985).

Godfrey v. Georgia: 446 U.S. 420 (1980).

Govinda Swamy K. v. Government of India: AIR 1986 Mad. 204. Gregg v. Georgia: 428 U.S. 153 (1976).

Gurubachan Singh v. State: AIR 1963 S.C. 340.

Gurudas Singh v. State of Rajasthan: AIR 1975 S.C. 1411. Guru Swamy v. State of Tamil Nadu: AIR 1979 S.C.1177. H

Harabans Singh v. State of Uttar Pradesh: AIR 1982 S.C. 849. Harbhajan Singh v. State of Jammu and Kashmir: AIR 1975 S.C.1814. Har Dayal v. State: AIR 1976 S.C. 2055.

Harihar Singh v. State of Uttar Pradesh: AIR 1975 S.C. 1501. Hari Singh v. State of Punjab: AIR 1974 S.C. 1168.

Harnam v. State: AIR 1976 S.C. 207. Harnamum v. Emperor: AIR 1928 Lah. 855. Heera v. State: 1985 Cr.L.J: 1153 (Raj).

Herald Stephen Benson v. State of Madhya Pradesh: (1988) Cri.L.J. 1008. Hazmohidedeen and anothr v. Union of India: AIR 1983 S.C. 1155.

Himachal Pradesh Administration v. Smt. Shiv Devi: 1969 Cri.L.J. 443. Himanshu Pahari v. State: 1986 Cri.LJ.622 (Cal).

Hukam Singh v. State: 1975 Cri.L.J. 902 (P&H).

Hussainara Khatoon v. Home Secretartary: AIR 1979 S.C. 1360. I

Iftikhar Khan v. State: AIR 1973 S.C. 863. J

Jagmohan Singh v. State of Uttar Pradesh: AIR 1973 S.C.947 Jaisingh Babbar v. State: AIR 1991 S.C. 2147.

Janak Singh v. State of Uttar Pradesh: AIR 1972 S.C. 1853.

Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra: AIR 1983 S.C. 473: AIR 1985 S.C.

Javed Ahmed v. State of Maharashtra: AIR 1985 S.C.231. Jumma Khan v. State of Uttar Pradesh: (1991) SCJ 444. Jurek v. State of Texas: 428 U.S. 262(1976). .

K

Kailash Kaur v. State of Punjab: AIR 1987 S.C. 1368. Karan Singh v. State of Uttar Pradesh: AIR 1973 S.C. 1385. Kamail Singh v. State of Punjab: AIR 1983 S.C. 473.

Kartar Singh v. Emperor: AIR 1932 Lah. 259. Kartar Singh v. State: 1977 Cri.L.J. 214. (S.C). Kehar Singh v. State: 1987 Cri. L.J. 291 (Del).

Kehar Singh v. (State) Delhi Administration: AIR 1988 S.C. 1883. Kesavananda Velayudha Panicker v. State of Kerala: AIR 1974 S.C.1918. Keshar Singh v. State of Punjab: AIR 1974 S.C. 985.

In re Kemmler: 136 U.S. 436 (1890).

Keshav Dev v. State of Uttar Pradesh: AIR 1973 S.C. 22.

Keven N. Stanfor v. Kentucky and Heath A. Wilkins v. Missouri: 492 U.S. 361 (1989). Khitari v. Emperor: AIR 1934 Oudh. 405.

Kista Goud and Bhoomaiah v. State of Andhra Pradesh: 1977 Cri.LJ. 700 (S.C.). Kodavandi Moiddeen v. State: AIR 1973 S.C. 467.

Krishna Nair v. State of Kerala : AIR 1994 Cri.L.J. 86 (Ker). Kuljeet Singh v. Lt. General of Delhi: AIR 1982 S.C.774.

Kunju Kunju Janaradhan v. State of Kerala: ADR. 1979 S.C. 916. L

Lajar Masih v. State of Uttar Pradesh: AIR 1976 S.C. 653. Lallav. State of Uttar Pradesh: AIR 1986 S.C.576.

Lalla Singh v. State of Uttar Pradesh: AIR 1978 S.C.368.

Laxman Kumar v. State (Delhi Administration) AIR 1986 S.C. 251. Lichhma Devi v. State of Rajasthan : AIR 1988 S.C. 1785.

Lokpa lv. State of Madhya Pradesh: AIR. 1985 S.C. 891. Louisiana ex rel Francis v. Resweber: 329 U.S. 459 (1947). M

Machhi Singh v. State of Punjab: AIR 1983 S.C. 957. Madho v. Emperor: AIR 1926 Mad. 21.

Madhu Mehta v. Union of India: (1989) 4 SCC 62. Maghar Singh v. State of Punjab: AIR 1975 S.C. 1320.

Mahesh v. State of Madhya Pradesh: AIR 1987 S.C. 1346. Malloy v. South Carolina: 237 U.S. 180 (1915).

Maneka Gandhi v. Union of India: AIR 1978 S.C. 597.

Manepragada Ramachandra Rao v. The Revenue Divisional Officer, Kowur: AIR 1957 A.P.249.

Maru Ram v. Union of India: (1981) SCC 107. Masalti v. State: AIR 1965 S.C. 202.

Ma Shuk v. Emperor: (1923) Ran. 751. Maynard v. Cartwright: 486 U.S. (1988).

Me Clesky v. Kemp: 481 U.S. 279 (1987).

Me Gautha v. California: 402 U.S. 183 (1971).

Mehar Chand v. State of Rajasthan: 1983 SCC (Cri) 57(2). Misa Stree v. State of Orissa: AIR 1938 Mad. 318.

Misa Stree v. State of Orissa: AIR 1954 S.C. 678. Mithu v. State of Punjab: AIR 1983 S.C. 473.

Mohammed Aslam v. State of Uttar Pradesh: AIR 1974 S.C. 678. Mohan Lai v. Emperor: AIR 1931 Lah.

Mohan v. State of Uttar Pradesh: A1R1960 S.C. 659. Mohin Singh v. Delhi Administration: AIR 1973 S.C. 697. Moorthy v. State of Tamil Nadu: AIR 1988 S.C. 1245.

Munawar Harun Shah v. State of Maharashtra: AIR 1983 S.C. 473. Muniappan v. State of Tamil Nadu: AIR 1981 S.C. 1220.

N

Nachhitar Singh v. State of Punjab: (1975) 3 SCC 266. Namu Ram v. State of Assam: AIR 1975 S.C. 762.

Namu Ram Bora v. State of Assam and Nagaland: AIR 1975 S.C. 762. Nanavati v. State of Maharashtra: ADR 1961 S.C. 112.

Nanhey v. State of Uttar Pradesh: AIR 1973 S.C.22.

Narasaiah v. State of Andhra Pradesh: AIR 1959 A.P. 313. Narendra Kumar v. State: AIR 1960 S.C. 430.

Nattan v. State: AIR 1976 S.C. 2197. Nawab v. Emperor: AIR 1932 Lah. 308.

Neel Riley v. Attorney General: 1982 Cri.L.Review: 679.

Neti Sri Ramulu v. State of Andhra Pradesh: AIR 1973 S.C. 255. Nika Ram v. State of Himachal Pradesh: AIR 1972 S.C.2077.

P

Parkasho v. State of Uttar Pradesh: AIR 1962 All. 151. Pandurang v. State of Hyderabad: AIR 1955 S.C. 216. Pashupati Singh v. State of Bihar: AIR 1973 S.C. 2699.

Peter Joseph v. State of Goa, Daman & Diu AIR 1977 S.C. 1812. Piare Dushadh: AIR 1944 P.C.l.

Pope v. United States: 392 U.S. 651 (1968).

Powell v. State of Texas: 392 U.S. 514 (1968).

Prabhakar Panduranga Sanzgiri v. State of Maharashtra: AIR 1966 S.C. 424. Prem Narain v. State of Uttar Pradesh: AIR 1957 All. 177.

Profit v. Florida: 428 U.S. 242(1976). R

Raghomani v. State: AIR 1977 S.C. 703.

Raghubir Singh v. State of Haryana: AIR 1974 S.C. 677. Rajendra Prasad v. State of Uttar Pradesh: AIR 1979 S.C. 916. Rakesh Kaushik v. Delhi Administration: 1986 CRI.L.J. 566 (Del) Rameshwar v. State of Uttar Pradesh: AIR 1973 S.C. 916.

Ram Shankar v. State: AIR 1962 S.C. 1239.

Ram Swarup v. State of Uttar Pradesh: AIR 1974 S.C. 1570. Ranjit Singh v. State of Rajasthan: AIR 1988 S.C. 612.

R.C.Cooper v. Union of India: (Bank Nationalisation Case)AIR 1970 S.C. 564. Roberts v. Louisiana: 428 U.S. 325 (1976).

Robinson v. California: 370 U.S. 660 (1962). S

Sadhu Singh v. State Of Punjab: 1968 Cri.L.J. 183 (P&H). Sadhu Singh v. State of Uttar Pradesh: AIR 1978 S.C. 1506. Sahai v. State of Uttar Pradesh: AIR 1981 S.C. 1442.

Sandra Lockett v. State of Ohio: 438 U.S. 586 (1978). Santa Singh v. State ofPunjab: AIR 1976 S.C. 2386.

Shamim Rahman v. State: 1975 Cri.L.J. 1654 (S.C.). Sheo Shankar Singh v. King Emperor: AIR 1954 Pat. 109.

Sheo Shankar Dubey v. State of Uttar Pradesh: AIR 1979 S.C. 916. Sher Singh v. State ofPunjab: AIR 1983 S.C. 465.

Srirangam v. State of Tamil Nadu: AIR 1978 S.C. 274. Strunk v. United States: (1973) 37L.Ed.2d 56.

Subhash v. State of Uttar Pradesh: 1976 Cri.L.J. 152 (S.C.). Subramaniam v. State of Tamil Nadu: AIR 1975 S.C. 139.

Sukhabas iv. State of Uttar Pradesh: AIR 1985 S.C. 1224. Sundar Singh v. State of Uttar Pradesh: AIR 1956 S.C. 411. Sunil Batra v.Delhi Administration: AIR 1978 S.C. 1675.

Suresh v. State of U.P; AIR 1981 S.C. 764.

Suijit Singh v. Union of India: AIR 1983 S.C.473.

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The Deputy Inspector General of Police, North Range, Waltair and another v. D. Raja Ram and others:AIR 1960 A.P. 259.

Titanchumma v. State: AIR 1941 Mad. 27.

Triveni Ben V. State of Gujarat: 1990 Cri.L.J: 1810 (S.C): (1989) 1 SCC 678.

Trap v. Dullas: 356 U.S. 86 (1958). U

Umi Joyaji: Confirmation cases Nos. 112 & 119 of 1911. 231 Ummilal v. State of Madhya Pradesh: AIR 1981 S.C. 1701.

United States v. Jackson: 390 U.S. 570 (1968). V

Vasanta Laxman More v. State of Maharashtra: AIR 1974 S.C. 1697. Vatheeswaran T.V.v. State of Tamil Nadu: AIR 1983 S.C. 361.

Vijaya Bahadur v. State of Uttar Pradesh: AIR 1974 S.C. 1900. W

Washington v. Louisiana: 428 U.S. 906 (1976).

Weems v. United States: 217 U.S. 349 (1910). Westmuller Robers v. State of Assam: AIR 1985 S.C. 823. Wilkerson v. State of Utah: 99 U.S. 130 (1879).

William Wayne Thompson: 458 U.S. 782 (1982).

Witherspoon v. State of Illinois: 39 U.S. 510 (1968). Woodson v. North Carolina: 428 U.S. (1976).

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INTRODUCTION

CHAPTER I

INTRODUCTION

The history of Capital Punishment is as old as that of humankind. In the Western world the first example seems to be “The Law of Moses”, inflicting death for blasphemy. By 1179 B.C. murder was a capital crime among Egyptians and Greeks. In India, the Indian Epics like, the Mahabharata and the Ramayana also contain references about the offender being punished with vadha-danda which means amputation bit by bit. Fourteen such modes of amputating the criminals to death are known to have existed. This provide that in every country in the world Capital Punishment existed since times immemorial.

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

Among the theories of punishment namely, retributive theory, deterrent theory, preventive theory and reformative theory, the first two theories support Capital Punishment without any reservations. The last theory namely reformative theory does not support Capital Punishment. Those who argue for the retention of Capital Punishment are called retentionists and those who advocate the abolition of Capital Punishment are called abolitionists.1

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

maintain that it is an inhuman punishment arbitrarily imposed on the poor, the minority, theuneducated and the downtrodden. The conflict of opinion between the abolitionists and retentionists over Capital Punishment generated a debate throughout the world

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

Amnesty International surveyed in detail the use of the death penalty in 180 countries around the world. It shows that nearly half of the countries in the world have already abolished the death penalty or discontinued its use. Inspite of this ray of hope, the number of executions world wide are not less in number. In the year 1985 alone, 1,125 executions were carried out in 44 States. This was substantially less than the 1984 figure of 1,153. But, the statistics are not to be believed. The true number of executions may be probably much higher. This is apart from the lock-up deaths and the fake encounters by the police.

Every year the number of executions are increasing inspite of the human rights movement. This fundamental human right which is the basic right to other fundamental human rights such as freedom of speech, freedom of movement etc., is used capriciously, arbitrarily and disproportionately against the poor and minorities. It is the only irrevocable punishment which cannot be corrected in case of miscarriage of justice. Over the past decade, an average of.atieast one country a year has abolished death penalty, affirming respect for human life and dignity. Yet, too many governments still believe that they can solve urgent social or political problems by executing a few hundred of their prisoners. Too many citizens in too many countries are still unaware that the death penalty offers not further protection but further brutalisation.

As far as England is concerned, some 450 years before Christ, the early Britons used to drown their malefactors. In the tenth century Britain, mutilation also appeared on the

scene. Canute's rule which lasted from 1016 to 1035 was blessed with peace and public security without any capital offences. But, his son Rufus reintroduced Capital Punishment. Henry I and Henry II who ascended the throne after him punished the offenders capitally for murder, treason and a few property offences. On 6 July, 1189 Richard I ascendedthe throne. In 1241, "drawing, hanging and quartering" occurred for the first time in England.2

By the end of fifteenth century, eccelesiastical Courts started punishing people spiritually. They could not inflict death penalty. Taking advantage of this, not alone clergymen even the door-keepers of the exorcists also started claiming this privelege.

Because priests were among the few literate people, the test of one's membership of holy order was to read the first verse of the fifty-first psalm. Because it saved people from death, it was known as neck-verse. In practice it amounted to reprieve. By the time Henry VII came to the throne, the whole Europe was experiencing a movement towards severity and brutality of sentence.

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

When Queen Anne died in 1714, there were thirty -two capital offences in England. By the time George came to the throne in 1743 this number increased to one hundred and sixty. In 1799 London averaged one execution every fortnight. By 1819, the number of capital offences on Britain's statute books were two hundred and twenty embracing all kinds of crimes. Even children of seven years and eight years were also executed for stealing spoons, colours, shoes etc.,3

Protests against Capital Punishment can be traced back to Saint Augustine or to the writings of New Testament itself. Some would carry the beginning of the crusade against Capital Punishment to the literature of Old Testament. For the Modem Period, the starting point is the year 1764, with Cesare Beccaria's essay "On Crime and Punishments". Through Jereny Bentham and Samuel Romily, Beccaria's ideas seeped into English thought. From 1810 until his death in 1818, Romily devoted his time in

influencing the Parliament to repeal Capital Punishment for theft. After his death, Sir James Mackintosh took the torch and saw to it that a Select Committee was appointed to study Capital Punishment in 1819. After him, John Bright and William Ewart carried the movement towards abolition of Capital Punishment. In 1837, there were thirty seven capital offences on statute books. Lord John Russel sponsored a Bill for the removal of the death penalty for twenty one offences and to restric: its use in the remaining sixteen offences, and he was successful.

In twentieth century the movement was taken up by Howard League for Penal Reforms. In 1925, a National Council for the abolition of Death Penalty, with Roy Clavery as its first secretary was founded. Thereafter several Select Committees and Royal Commissions were appointed to study Capital Punishment in other countries.

The cases of Rowland, Timothy John Evans and Dereck Bentley rose public emotions and public showed some concern. In 1957, an Act was passed which retained Capital Punishment for certain types of murders, although it eliminated three-fourths of those offences formerly subjected to death penalty.

By 1960, under the New Law, the rate of executions is four per annum. Ultimately, the Murder(Abolition of Death Penalty) . Act, 1965 abolished the death penalty for murder for a five year experimental period. Since the death penalty was abolished for murder, motions to reintroduce it have been defeated in the House of Commons on a number of occasions. A vote on an amendment to the Criminal Justice Bill to reintroduce the death penalty for murder was held in 1988 and was defeated by 341 votes to 218.

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

Benjamin Rush was the father of the movement to abolish Capital Punishment in The United States. He also was inspired by Beccaria's "Crime and Punishments". He was

supported by Franklin and William Broadford. After Rush, it was Edward Livingston (1764-1836) who prepared a revolutionary penal code for Louisiana, insisted on total abolition of Capital Punishment. By 1830, the legislatures in several states were besieged each year with petitions in favour of abolition from their constitutions. In 1845, an American Society for the Abolition of Capital Punishment was organised. With the efforts of many abolitionists in 1846, the Territory of Michigan replaced Capital Punishment with life imprisonment. Taking cue fromMichigan, many states including Rhodes Island and Wisconsin abolished death penalty.

Between the peak of the progressive Era and the year when women got vote, eight states namely, Kansas, Minnesota, Washington, Oregaon, North and South Dakota, Tennessee and Arizona abolished Capital Punishment. Inspite of the efforts of individuals and other social sendee organisations, Capital Punishment is there in the statute books of many American States.

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

In Buddhist texts also, references to death penalty were found. Idu Batuta in his writings, painted the picture of India as it was in the 14th century. Capital Punishment was in vogue for the offences of moral turpitude.4

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

The sources of Muslim Law were Quran, Sunna and Sunnies. The traditional Muslim Criminal Law broadly classified crimes under three heads: (i) Crimes against God, (ii) Crimes against Sovereign and (iii) Crimes against private individuals, and prescribed Capital Punishment for the offences namely, disturbance of public peace, highway robbery, extortion on the pretext of collection of public taxes and needless to say for murder.

The policy of the British being to interfere as little as possible with the Muslim Penal Law, only such modifications were made as were required to remove glaring defects. Motive played a vital role in the capital offences than the manner of committing the offence. The case of Nand Kumar was a glaring example for the miscarriage of justice. For the first time in 1846, the Law Commission under the Chairmanship of Lord Macaulay preparedIndian Penal Code and it was adopted on 6th October, 1860. The Indian Penal Code, 1860 defines the substantive offences and prescribes punishments. After Independence also the same Indian Penal Code has been in operation.

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

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

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

The mode of execution was challenged as ultra vires of the Eighth Amendment guarantee against cruel and unusual punishment. In Wilkerson and Kemmler the mode of execution of death penalty by shooting and electrocution was challenged as “cruel and unusual” punishment. In both the cases, the court negatived the plea and held that the mode is not contrary to Eighth Amendment guarantee.

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

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

It may be noted that the Capital Punishment is not banned in the United States and it has judicial approval also. However, imposition of Capital Punishment is much less and its implementation is very rare, indeed.

As far as Indian Supreme Court is ccncerned, after Independence to the country, several times Bills were introduced in both the Houses to amend the law regarding Capital Punishment. But, every time they were negatived on the ground that the time is not ripe to abolish Capital Punishment in this country.

After the legislative attempts failed in both the Houses of Parliament to abolish death penalty, the abolitionists turned to Indian Supreme Court with the hope that it would declare death penalty as unconstitutional as was done by the United States Supreme Court in the case of Furman.5

But, the Supreme Court in Jagmohan’s case declared that death penalty is constitutionally valid and it is not violative of the fundamental rights guaranteed under Article 14,19 and 21 of the Constitution. In that case the Indian Supreme Court did not agree the decision of the American Supreme Court in Furman. The Supreme Court in Rajendra Prasad’s case while commuting the death penalty into life imprisonment pleaded for the abolition of death penalty. The Court in Rajendra Prasad extensively quoted the observations of the American Supreme Court in Furman and did not refer to its subsequent decisions which had overruled Furman. Rajendra Prasad dictum did not have any impact on the Capital Punishment. Later came Bachhan Singh’s case

before the Supreme Court in which reconsideration of its opinion expressed in Jagmohan on death penalty was pleaded. It was contended that reconsideration of Jagmohan opinion is necessitated because of the new interpretation given by the Court to Article 21 in Maneka Gandhi. Such an interpretation was not available at the time when the Court decided Jagmohan. The majority of the Court in Bachhan Singh approved death penalty, but with a rider. The Court declared in Bachhan Singh that death penalty be awarded only in "rarest of rare cases". It is to be noted that the Court in Bachhan Singh did not explain the scope of the doctrine of "rarest of rare cases". However, the Supreme Court in Machhi Singh elaborately explained the scope of "rarest of rare cases". The Supreme Court in Deena while approving the mode of execution ofdeath penalty as prescribed under the Criminal Procedure Code as valid mode, exhibited its intention for retention of death penalty. However, it was in the case of Mithu that the Supreme Court declared mandatory death penalty as prescribed under Section 303 of Indian Penal Code as unconstitutional on the ground that it offends the test of reasonableness and fairness under Article 14 and 21 of the Constitution.

Inordinate delay in the execution of death penalty became a debatable issue before the Supreme Court in Vatheeswaran, Sher Singh and Javed Ahmed. In Vatheeswaran Court applied the test of fairness during the execution of death penalty and declared that delay exceeding two years in execution of death penalty offends the test of fairness under Article 21. Consequently, the Court on the ground of delay in execution of death penalty converted death penalty into life imprisonment. It is to be noted that three Judge Bench of the Supreme Court in Sher Sing refused to follow Vatheeswaran and did not convert death into life imprisonment merely on the ground that the execution is delayed. Quite surprisingly a two Judge Bench of the Supreme Court in Javed Ahmed did not follow Sher Singh but followed Vatheeswaran in converting death penalty into life imprisonment on the ground of delayed execution. The cleavage of judicial opinion on the question of conversion of death penalty into life imprisonment the ground of delayed execution exhibits the abolitionist and reformist tendency of the Judges of the Apex Court. Triveni Ben resolved the conflict of judicial opinion by disapproving the two years delay rule laid down by Vatheeswaran. Triveni Ben maintained that each

case has to be considered on its merits and no fixed period of delay could be laid down for conversion of death into life imprisonment. It is submitted that recently the Supreme Court of Zimbabwe held in Catholic Commission For Justice and Peace in Zimbabwe that delayed execution of death penalty amounts to torture or inhuman or degrading punishment and offends Article 15(1) of the Zimbabwe Constitution. Consequently the Court converted death penalty of the appellants into life imprisonment.

1.2 OBJECTIVES OF THE STUDY:

The prime objectives of the study are as follows:

1. to discuss various theories of punishment and their relevance and also analyse the arguments of retentionists and abolitionists over Capital Punishment.
2. to study in detail the evolution of Capital Punishment in England, America and also in India and the attempts made towards abolition of Capital Punishment
3. to examine in detail the statutory and Constitutional frame work relating to Capital Punishment, and
4. to evaluate the judicial approach towards Capital Punishment in India and in the United States.

The present study is purely a theoretical study. As such the researcher has adopted case law, libraryand historical methods for the collection of information relevant to the present research problem under study.6

The present study is divided into five chapters. The first chapter deals with the introduction to the study. It explains the problem and the methodology of the study. In the introductory chapter the problem of Capital Punishment is discussed briefly. With the help of the review of the existing literature on the problem, the research gap is identified and the need for the present study is explained. In the second chapter an attempt is made to explain the theories of.punishment, retributive, deterrent, preventive and reformative theories and their relevance to Capital Punishment. The arguments of the retentionists and abolitionists basing on several grounds such as religious, ethical, humanitarian etc., are discussed at length. The third chapter deals with the evolution of Capital Punishment in England, America and India and the attempts made in these

countries to abolish Capital Punishment. Fourth chapter deals with Capital Punishment before and after independence

In the fifth chapter an attempt is made to discuss the approach of CAPITAL PUNISHMENT AS RAREST OF RARE CASE.

1.3 RESEARCH QUESTION:

Why is capital punishment applied only in "rarest of rare" cases? How Capital Punishment was applied before and independence? Comparision of death penalty given in India and other countries?

1.4 HYPOTHESIS:

NULL HYPOTHESIS: Capital punishment is not effectively applied in India. It is being said so as number of death penalty given are more then number of execution of death penalty in India.

ALTERNATIVE HYPOTHESIS: Capital punishment laws in India are effectively implemented in respective cases. In India death penalty is effectively applied as kind of punishment practiced in India highest punishment under it is death penalty which is given for most heinous crimes.

In India many criminals till date have been awarded by death penalty. In comparision crime rate have been reduced in india.

1.5 LITERATURE REVIEW

Bhumika N. (2012). Had written in her article whether death penalty violating under article 19, 14 and 21of the Indian constitution. Krishna Ayer judge express their view in Rajendra Prasad case death penalty is violated of article 14, 19 and 21of the Indian constitution. One more Jagmohan Singh case death penalty could not violated under article 19 of the Indian constitution. I agree with the Hon"ble Krishna Ayer death penalty is violated under article 14, 19 and 21 of the Indian constitution. Death penalty is not rule it is exception I am going through of this judgment today we need to unanimous judgment to secure and protect the people and society.

Shallu B.A. (2010) has written in her article no one shall deprived of his life except to procedure established by law under article 21 of the constitution of India and it is postulates person deprived of his life in procedure reasonable fair and just procedure death penalty a person depriving of his life. Dr. Shallu has explained Rajiv Gandhi in

the year 1991in this case twenty six accused guilty committing crime under the POTA act1987 death sentence them in the year 1998.The supreme court in the 1999. The Rajiv Gandhi‟s killer is waiting their execution. The president has not yet taking decision on mercy petition social economical background of the person. One of the point delays in execution of the death sentence which considered the delay in the mercy petition disposal against the principle of rule of law.

M.B.Biradar (2012) has written in his article about the rights of a man such as social right and cultural right, natural right as well as right to live death sentenced condemns or curtails most of these rights. The human rights organization as improve the quality of life rather than finish life .Death penalty is not necessary no person is never a born criminal and everyman is born good but some circumstances or fanatism compel him to commit crime. In criminal jurisprudence said „Hate the crime and not the criminal‟. There are many reasons in death penalty against the human rights as well as the abolition of the death penalty „every saint has his past and every sinner has his future‟. Offence of death penalty is murder, highway dacoit, robbery, atrocities on women and child gang rape internet obscenity and economical offences or white collar offences. The first sentence will be to award life imprisonment and not death sentence India has retained the capital punishment in certain cases but the basic human right to life is well protected under the constitution

Kannabiran K.G.(2012) had written in his book the death penalty was itself a grave crime some countries had abolished death penalty in all crimes. India could not risk to abolish death penalty because the maintaining social peace will be hard and there would be problems of law and power. Unfortunately the younger generation for various reasons has turned short tempered and less tolerant.

1.6 RESEARCH METHODOLOGY

This research is based on doctrinal type pattern. Doctrinal research is also known as traditional research. Doctrinal research is divided into different types such as analytical and descriptive method. This research is based on information which has been already available and analysed those facts to make a evolution of this research. This research involves secondary data. In this research the researcher mostly used books,articles,journals.,etc.

CHAPTER II
THEORIES OF PUNISHMENT (WITH SPECIAL REFERENCE TO CAPITAL PUNISHMENT)

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In this chapter it is proprosed to analyse various theories of punishment. Austin considered sanction as an essential ingredient of law. It is only through sanction that obedience to law can be secured. Sanction is nothing but inflicting pain or injury upon the wrong doer. This in a way can be called punishment. The immediate consequence of a criminal act is punishment. The term punishment is defined as, "pain, suffering, loss, confinement or other penalty inflicted on a person for an offence' by the authority to which the offender is subjected to." Punishment is a social custom and institutuions are established to award punishment after following criminal justice process, which insists that the offender must be guilty and the institution must have the authority to punish. In this chapter an attempt is made to discuss various theories of punishment and their efficacy and effectiveness in the light of modem penology.

2.1 NATURE OF PUNISHMENT:

The primary operation of punishment consists simply in announcing certain standards of behaviour and attaching penalties for deviation, making it less eligible, and then leaving individuals to choose. This is a method of social control which maximizes individual freedom within the coercive frame work of the law in a number of different ways.

The first moral duty of the community or of the State on its behalf is to reassert the broken moral laws against the offender who has broken it. For this reason, it must affirm his guilt and deal with him in accordance with it. To forgive may be right: to condone is always wrong. A criminal act must not be condoned. It must be punished.

Government prohibits taking life, liberty or property of others and specifies the punishments, threatens those who break the law. The intended effect of all legal threats obviously is to deter people from doing what the law prohibits. The threats must be carried out. Otherwise, the threats are reduced to bluffs, and become incredible and therefore ineffective. Thus, all states punish people whom they identify as criminals. How a punsihment should be is still a question to be answered. Neo-Kantians proposed the concept of proportionality. "Punishment must fit the crime", when we say that the

aim of punihsment is to prevent crime. We must accept that man avoids criminal behaviour if that behaviour elicits swift, severe and certain punishment. Many studies by many sociologists and criminologists such as Gibbs, Chiricos and Waldo and Tittle suggest that the severity and certainty of punishment are additive factors.[1]

But, evidence suggests that the severity and certainty' of punishment are inversely related. Jeffrey states that severity of punishment can be gained only by sacrificing certainty and that "increasing the penalties for crime has had negative effect of making the punishment less certain."

John Bright throughout his life argued that certainty of punishment was more important than severity of punishment in preventing the development of crimes. William C. Bailey, Assistant Professor of Sociology, The Cleavland State University and Ronald W. Smith, Assistant Professor of Sociology, University of Nevada conducted extensive research in finding whether the severity and certainty of punishment really deter the criminals. They concluded that the severity and certainty are not substantially inversely related for the index crimes nor are changes in their level.

Another facet of the punishment is that it cannot be benign to the criminal. But for the society punishment is and should be a benign process. So punishment is necessarily adverse to the interests of the criminal, but to the society it is not necessary. The first duty of the state is to dissociate itself from the acts of its own member. To do this it must act,not only upon but against the member.. While acting so, it must exhibit no antagonism in its will against the will of the offending members. This is necessary for the preservation of its own character,on which the character of its citizens largely depend."

All punishments properly imply moral accountability. Community wants the punishment to reach the criminal's mind as well as his body; it wants him to suffer remorse for his evil deed: to realize that he had against him right as well as might. Unless, the community believes these conditions are attained it is unsatisfied and the object of punishment is not fully realized.

2.2 PURPOSE OF PUNISHMENT:

[1] Study of Capital Punishment in India by A.KRISHNA KUMARI

In primitive times, crimes were mainly attributed to the influence of evil spirits, and the major purposeof punishment was to placate the gods. Later, in the evolution of punishment more stress was laid on social revenge, because crime was considered a wilful act of a free moral agent. Society, outraged at an act of voluntary perversity, indignantly retaliated. Thus, we started punishing primarily for vengeance or to deter or in the interest of a just balances of accounts between "deliberate" evil doer on the one hand and an injured and enraged society on the other.

According to Gouldner, members of the society identify themselves with the victim. Hence, the urge to punish the offender.Take rape as an illustration. Since, the victims of rape are females, we might hypothesise that women would express greater punitiveness towards the rapist than men, and that degrees of hostility would correspond to real or imaginary exposure to rape. Thus, young girls might express more

punitiveness towards rapists than homely women. Among males, we can predict that greater punitiveness would be expressed by those with more reason to identify with the victims. Thus, males having sisters or daughters in the late teens or early twenties might express more punitiveness towards rapists than males lacking vulnerable hostages to fortune. This notion in a broader perspective is well expressed by Sir James
F. Stephen. According to him the purpose of punishment is to gratify the desire for vengeance by making the criminal pay with his body. To quote him "The criminal law stands to passion of revenge in much the same relation as marriage to the sexual appetite." Punishment gratifies the feeling of pleasure experienced by individuals at the thought that the criminal has been brought to justice. That desire ought to be satisfied by inflicting punishment in order to avoid the danger of private vengeance. It is plain that however futile it may be, social revenge is the only honest, straight forward and logical justification for punishing the criminals. To carry out this purpose we need an authority. A criminal has a right to be punished. Because he is treated as a moral agent - a person who chooses between right and wrong- he is capable of choice.

In the words of Jeremy Taylor "A herd of wolves is quiter and more at one than many men, unless all have one reason in them or have one power over them." Hobbes says, "Without a common power to keep them all in awe, it is not possible for

individuals to live in society. Without it justice is unchecked and triumphant and the life of the people is solitary, poor, nasty, brutish and short."

According to Jackson Toby punishing the criminals is necessary a) for preventing crime b) for sustaining the morale of conformists and c) for rehabilitation of offenders.[2]

(a) PUNISHMENT AS A MEANS OF CRIME PREVENTION:

Those who have introjected the moral norms of the society cannot commit crimes because their self determined concept will not permit them to do so. Only unsocialised (and therefore amoral) individual fit the model of classical criminology and is deterred from expressing deviant impulses by a nice calculation of pleasures and punishments. Other things being equal, the anticipation of punishment would seem to have more deterrent value for inadequately socialised members of the group. According to Durkheim minute gradation in punishment would not be necessary if punishments were simply a means of deterring the potential offender. Eventhough punishment is uncertain, especially under contemporary urban conditions the possibility of punishment keeps some conformists law-abiding.[3]

(b) PUNISHMENT AS A MEANS OF SUSTAINING THE MORALE OF CONFORMIST:

Durkheim talks about punishment as a means of repairing "the wounds made upon collective sentiments". According to him, the punishment of offenders promotes the solidarity of conformists. When the conformist sees others defy rules without untoward consequences, he needs some reassurance that his sacrifices (being a law abiding citizen) were made in good cause. If "the good die young and the wicked flourish as the green bay tree", the moral scruples which enable conformists to restrain their own deviant inclinations lack social validation. He feels his sacrifices are not worthwhile. He unconsciously wishes to violate the rules.

(c) PUNISHMENT AS MEANS OF REFORMING THE OFFENDER:

Now, the trend is towards treatment of the offenders. Criminologists all over the world profess that criminals are as good or rather as bad as patients, and they need to be treated, not punished. It would be an error to suppose that punishment is invariably

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[2] Study of Capital Punishment in India by A.KRISHNA KUMARI

[3] https://en.wikipedia.org/wiki/Punishment

experienced as painful by the criminal whereas treatment is always experienced as pleasant by the psycho-pathological offender. On this assumption, punishment may be a necessary preliminary to a rehabilitation programme in as much the same way that shock treatment makes certain types of psychotics accessible to psychotherapy. Those offenders who regard punishment as a deserved deprivation resulting from their own misbehaviour are qualitatively different from offenders who regard punishment as a misfortune bearing no relationship to morality. The former accepts punishmentas legitimate and the other bows before the superior force, because he has no option.

Immanuel Kant, the German philosopher sounds pessimistic when he says: "Judicial punishment can never serve merely as a means to further another good, whether for the offender himself or for society, but must always be inflicted on him for the sole reason that he has committed a crime." The object of punishment must be to substitute justice for injustice. According to Paranjape, the principle which underlies the doctrine concerning the desirability and objectiveness of punishment is to reduce the incidence of criminal behaviour either by deterring the potential offenders or by incapacitating and preventing them from repeating the offence or by reforming them into law abiding citizens. All said and done we do not yet generally punish or treat in the sense that scientific criminology would imply, namely, in order to change antisoical attitudes into social attitudes.

2.3 THEORIES OF PUNISHMENT:

There are five theories of punishment, namely, retributive theory, deterrent theory, preventive theory and reformative theory. Of all the five theories retributive theory is the first and foremost. A child who falls down, kicks the floor inadvertently. Generally, it is believed to be a form of taking revenge and would not serve any penal purpose. Deterrent theory by punishing the offenders deters the wrongdoer specially and deters the general public also by punishing him and refrains them from committing an act which is an offence. Preventive theory incapacitates an offender from repeating the crime, while reformative theory serves the purpose of rehabilitation of the offender. Modem penologists do not believe in purposeless punishment. They believe that a criminal is a patient and he be treated with humanity. All these four theories have their own merits and demerits. They are discussed at length in this chapter.

2.4 PUNISHMENT:

Punishment,[4] according to the dictionary, involves the infliction of pain or forfeiture, it is the infliction of a penalty, chastisement or castigation by the judicial arm of the State. But if the sole purpose of punishment is to cause physical pain to the wrong-doer, it serves little purpose. However, if punishment is such as makes the offender realize the gravity of the offence committed by him, and to repent and atone for it thus neutralizing the effect of his wrongful act), it may be said to have achieved its desired effect[5]

A person is said to be "punished" when some pain or detriment is inflicted on him. This may range from the death penalty to a token fine.

Thus, punishment involves the infliction of pain or forfeiture; it is a judicial visitation with a penalty, chastisement or castigation. In this book entitled "Criminal Behaviour", Walier Reckless describes punishment as "the redress that the commonwealth takes against an offending member." In the words of Westermarck, punishment is "Such suffering as is inflicted upon the offender in a definite way by, or in the name of the society of which he is permanent or temporary member."

The objects of punishment, - The needs of criminal justice are considered to be five, namely:

A. Deterrent

B. Preventive

C. Reformative

D. Retributive

E. Compensation. 12

2.5 THE DETELRRENT THEORY OF PUNISHMENT:

Punishment is primarily deterrent when its object is to show the futility of crime, and thereby teach a lesson to others. Deterrence acts on the motives of the offenders, whether actual or potential.

Offences are committed, in most cases, as a result of a conflict between the socalled interests of the wrong-doer and those of society at large. The object of punishment,

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[4] https://en.wikipedia.org/wiki/Punishment

[5] THE INDIAN PENAL CODE (ACT XLV OF 1860)

according to this theory, is to show that, in the final analysis, crime is never profitable to the offender, and as Locke observed, to make crime "an ill-bargain to the offender." By making it an ill-bargain to the offender, the world at large would learn that crime is a costly way of achieving an end.

The idea behind deterrent punishment is that of preventing crime, by the infliction of an exemplary sentence on the offender. By this, the State seeks to create fear in its members, and thus deter them from committing crime through fear psychology. The rigour of penal discipline is made a terror and a warning to the offender and others.

According to the exponents of this theory, punishment is meant to prevent the person concerned and other persons from committing, similar offences. The advocates for the retention of capital punishment rely on this theory in support of their contention. They argue that capital punishment, by its very nature, cannot have either a reformative value or be a retributive necessity. Its only value, if at all, is by way of deterrence.

However, the theory of deterrent punishment fails to achieve its goal. A hardened criminal becomes accustomed to the severity of the punishment, and deterrence does not always prevent him from committing a crime. On the other hand, it also fails to affect an ordinary criminal, as very often, a crime is committed in a moment of excitement. If the crime is pre-mediated, the offender commits the crime, knowing fully well, the consequences arising from his act and performs the act because he cannot help but do it.[6]

In a case decided by the Supreme Court, Phul Singh Vs State of Haryana, (1980 Cri. L. J. 8), a young philanderer aged 22, overpowered by excess sex stress, raped a twenty-four year old girl next door in broad day-light. The Sessions Court convicted him to four years' rigorous imprisonment, and the High Court confirmed the sentence in appeal. When the matter went in appeal to the Supreme Court, the sentence was reduced to two years' rigorous imprisonment, as the accused was not an habitual offender, and had no vicious antecedents. The Supreme Court observed: "The incriminating company of lifers and others for long may be counter-productive, and in

[6] https://shodhganga.inflibnet.ac.in Crime and theories of punishment

this perspective, we blend deterrence with correction, and reduce the sentence to rigorous imprisonment for two years,"[7]

2.6 THE PREVENTIVE THEORY OF PUNISHMENT:

If the deterrent theory tries to put an end to the crime by causing fear of the punishment in the mind of the possible crime-doer, the preventive theory aims at preventing crime by disabling the criminal, for example, by inflicting the death penalty on the criminal, or by confining him in prison, or by suspending his driving license, as the case may be.

Thus, the extreme penalty, the death sentence, ensures that, once and for all, the offender will be prevented from repeating the heinous act. In the past, maiming was considered an effective method of preventing the wrong-doer from committing the same crime in the future, by dismembering the offending part of the body. Thus, a thief's hand would be cut off, or a sexual off.

In the ultimate analysis, the preventive mode of punishment works in three ways, viz-

a) by inspiring all prospective wrong-doers with the fear of punishment;

b) by disabling the wrong-doer from immediately committing any crime; and

c) by transforming the offender, by a process of reformation and reeducation, so that he could not commit crime again.

In this connection, the following extract from Rule 58 of the International Standard Minimum Rules is illuminative:

"The purpose and justification of a sentence of imprisonment or a similar measure derivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society, the offender is not only willing, but also able, to lead a law – abiding and self-supporting life."

THE RELATION BETWEEN DETERRENT AND PREVENTIVE THEORIES OF PUNISHMENT:

An important difference between the deterrent and the preventive theories of punishment deserves to be carefully noted. The deterrent theory aims at giving a warning to

[7] https://shodhganga.inflibnet.ac.in Crime and theories of punishment

society at large that crime does not pay, whereas the preventive theory aims at disabling the criminal from doing further harm.

As mentioned above, the purpose of the deterrent theory is to set a lesson unto others and show that crime does not pay. This theory of punishment seeks to show to the offender, and the rest of the world, that ultimately punishment will be inflicted on the criminal, and therefore, crimes are to be shunned. But under the preventive theory of punishment, the main object of the punishment is to disable the wrong-doer himself from repeating the crime. This theory does not act so much on the motive of the wrong- doer, but it disables his physical power to commit the offence.

THE REFORMATIVE THEORY OF PUNISHMENT:

According to the reformative theory, a crime is committed as a result of the conflict Between the character and the motive of the criminal. One may commit a crime either because the temptation of the motive is stronger or because the restraint imposed by character is weaker. The deterrent theory, by showing that crime never pays, seeks to act on the motive of the person, while the reformative theory aims at strengthening the character of the main, so that he may not become an easy victim to his own temptation. This theory would consider punishment to be curative or to perform the function of a medicine. According to this theory, crime is like a disease. This theory maintains that "you cannot cure by killing".

The exponents of the reformative theory believe that a wrong-doers stay in prison should serve to re-educate him and to re-shape his personality in a new mould. They believe that though punishment may be severe, it should never be degrading. To the followers of this theory, execution, solitary confinement and maiming are relics of the past and enemies of reformation. Thus, the ultimate aim of the reformists is to try to bring about a change in the personality and character of the offender, so as to make him a useful member of society.

The reformists argue that if criminals are to be sent to prison in order to be transformed into law-abiding citizens, prisons must be turned into comfortable, dwelling houses. This argument is, however, limited in its application, and it must be remembered that in a country like India, where millions live below the poverty line, it may even act as an encouragement to the commission of crimes.

Lamenting on the conditions prevailing in jails in India, Justice Krishna lyer opens his judgment in Rakesh Kaushik Vs Superintendent, Central Jail (1980 Supp. S.C.C. 183) with the following poignant question :
"Is a prison term in Tihar Jail a post-graduate course in crime ?"

In Sunil Batra (II) V. Delhi Administration (1980 3 S.C.C. 488), the Supreme Court regarded a simple letter from a co-prisoner as sufficient to invoke proceedings by way of habeas corpus. The judgment deals at length with the shocking conditions prevailing in Indian prisons and suggests a series of prison reforms. Lamenting on the atrocities prevailing in Delhi's Tihar Jail, Justice Krishna lyer, in the course of his learned judgment, observes a follows.14
"The rule of law meets with its Waterloo when the State's minions become law-breakers, and so the Court as a sentinel of justice and the voice of the Constitution, runs down the violators with its writ, and serves compliance with human rights even behind iron bars and by prison wardens."
True it is, that the reformative element had long been neglected in the past. However, the present tendency to lay heavy stress on this aspect seems to be only a reaction against the older tendency to neglect it altogether, and has therefore, the danger of leaning to the other extreme. Whereas reformation is an important element of punishment, it cannot be made, the sole end in itself. It must not be overlooked, but at the same time, it must not be allowed to assume undue importance. In the case of young offenders and first offenders, the chances of long-lasting reformation are greater than in the case of habitual offenders. Again, some crimes, such as sexual offences, are more amenable to reformative treatment than others. Further, reformative treatment is more likely to succeed in educated and orderly societies than in turbulent or under-developed communities

THE RELATION BETWEEN THE DETRRENT THEORY AND THE REFORMATIVE THEORY:

Though the deterrent and the reformative theories coincide to some extent, there is also some element of conflict between the two. The deterrent theory would impose the punishment of imprisonment, fine, or even whipping and death-penalty, but according to the formative theory, all modes of punishment other than imprisonment are barbaric. Imprisonment and probation are the only instruments available for the purpose of a purely reformative system.

The next question to be answered, in view of this conflict between the deterrent and reformative theories of punishment, is whether it is possible to have a penal system having the reformative element as the sole standard of punishment. Salmond, in his treatise on Jurisprudence, points out that there are in the world, men who are incurably bad. With them, crime is not so much of a bad habit as an ineradicable instinct. The reformative theory might be quite helpless in the case of such persons. Therefore,

14 https://shodhganga.inflibnet.ac.in Crime and theories of punishment

according to him, the perfect system of criminal justice is based neither the reformative, nor the deterrent principle exclusively, but is the result of a compromise between them. In this compromise, it is the deterrent principle which wields the predominant influence.

Salmond further adds that the present-day acceptance of the reformative theory is, in a large measure, a reaction to the conservative approach to the question of punishment. The extreme inclination towards the reformative theory may be as dangerous as the complete acceptance of the old code of punishment. It is true that in the olden days, too much attention was paid to the crime, and very little to the criminal. It is also true that criminals are not generally ordinary human beings. They are often mentally diseased abnormal human beings; but, if all murderers are considered as innocent and given a lenient treatment, is it not possible that even ordinary sane people might be tempted to commit that crime, in view of the lenient attitude of law towards crime? Thus, in course of time, this theory would crumble down. The theory may be effective

in the case of very young and the completely insane offenders, but in other cases, some deterrent element in the punishment must be present.

THE RELTRIBUTIVE THEORY OF PUNISHMENT:

While discussing the history of the administration of justice, it was seen that punishment by the State is a substitute for private vengeance. In all healthy communities, any crime or injustice stirs up the retributive indignation of the people at large. Retribution basically means that the wrongdoer pays for his wrongdoing, since a person who is wronged would like to avenge himself, the State considers it necessary to inflict some pain or injury on the wrongdoer in order to otherwise prevent private vengeance.

Whereas other theories regard punishment as a means to some other end the retributive theory looks on it as an end in itself. It regards it as perfectly legitimate that evil should be returned for evil, and that a man should be dealt with the manner in which he deals with others. An eye for an eye and a tooth for a tooth is deemed to be the rule of natural justice.

Though the system of private revenge has been suppressed, the instincts and emotions that lay at the root of these feelings are yet present in human nature. Therefore, according to this theory, the moral satisfaction that society obtain from punishment cannot be ignored. On the other hand, if the criminal is treated very leniently, or even in the midst of luxury, as the reformative theory would have it. (and as actually happens in some prisons of the world, which are equipped with airconditioning, private toilets, TV sets etc.), the spirit of vengeance would not be satisfied, and it might find its way through private vengeance. Therefore, punishment, instead of preventing a crime, might indirectly promote it.

Unfortunately, the retributive theory ignores the causes of the crime, and it does not strike at the removal of the causes. A mere moral indignation can hardly prevent crime. It is quite possible that the criminal is as much a victim of circumstances as the victim himself might have been.

It is also unfortunate that this theory overlooks the fact that two wrongs do not really make a right. The theory also seems to ignore that if vengeance is the spirit of punishment, violence will be a way of prison life.

RETRIBUTION AS EXPIATION:

There is yet another interpretation of the retributive theory, which considers punishment as a form of expiation. To suffer punishment is to pay a debt due to the law that has been violated. As per this formula, guilt plus punishment is equal to innocence. According to this view of the retributive theory, the penalty is a debt which the offender owes to his victim, and when the punishment has been endured, the debt is paid, and the legal bond forged by the crime is dissolved.

Therefore, the object of true punishment must be to substitute justice for injustice, to compel the wrong-doer to restore to the injured person that which is his own, and by such restoration and repentance, the spirit of vengeance of the victim is to be satisfied.

THE COMPENSATION THEORY OF PUNISHMENT:

According to this theory, the object of punishment must not be merely to prevent further crimes, but also to compensate the victim of the crime. This theory further believes that the main-spring of criminality is great and if the offender is made to return the ill-gotten benefits of the crime, the spring of criminality would be dried up.

Though there is considerable truth is this theory, it must be pointed out that this theory tends to over-simply the motives of a crime. The motive of a crime is not always economic. Offences against the state, against justice, against-religion, against marriage, and even against persons, may not always be actuated by economic motives. There may be other complicated motives involved. In such cases, the theory of compensation may be neither workable nor effective. Quite often, even in the case of offences actuated by such motives, the economic condition of the offender may be such that compensation may not be available. Therefore, this theory can at best, play a subordinate role in the framing of a Penal Code.

By way of conclusion, it may be said that the administration of criminal justice cannot have any of the above purposes as the single or sole standard of punishment. A

perfect penal code must be a judicious combination of these various purposes of punishment.

No theory of punishment is a complete answer by itself. All the above theories of punishment are not mutually exclusive.

If the retributive theory is meant pure vengeance, it cannot be accepted. However, it does not mean that. In its true sense, it involves the working of Nemesis. The real idea behind retribution is to make the offender realize-by a process of reformative detention- the heinousness of his crime, thus preventing him and deterring others at the same time.

As observed by justice Krishna lyer in Rakesh Kaushik Vs Superintendent, Central Jail (referred to above)-

"The fundamental fact of prison reforms-comes from our constitutional recognition that every prisoner is a person, and such person hold the human potential which, if unfolded, makes a rober a Valmiki, and a sinner a saint."

As stated in a British Government's White Paper entitled "People in Prison,"-

"A society that believes in the worth of individual beings can have the quality of its belief judged, at least in part, by the quality of its prison and probation services and of the resources made available to them." In the words of Dr. Sethna, the theories of retribution, reformation, determent and prevention go hand-in-hand, and exist for the preservation of the moral order, the protection of society and the rehabilitation of the offender himself.15

FUTURE OF THE PUNISHMENT:

Punishment must be just. It must be directed to the good of the society. A punishment which prejudices rather than promotes the good order of society is plainly not just, no matter how guilty the offender may be, how well founded the authority which imposed the punishment may be.

Punishment ought to be medicinal rather than retribuitive. In his disclosure to the Catholic Jurists of Italy in December 1954 Pope Pius XII stated that the limction of punishment is “the redeeming of the criminal through repentance” and thus seemed to set the reformation of the offender as the primary end of penal sanction.There is a general belief that has persisted since the late eighteenth century that punishment must

have an aim. Retributivists punish because the criminal is guilty. According to them the crime itself justifies the punishment and punishment has no other purpose than to be imposed as a legal consequence of the guilt.

Punishment is categorically imperative, the guilty criminal must be punished, but moral order demands that the punishment should be proportionate to the gravity of the offence.148 Utilitarians would punish because they seek to prevent crime by

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intimidation, incapacitation or reformation of the criminal and by presenting his fate to the general public so that the like minded may see what the consequences of a criminal act will be. However, history has shown, critics contend, that punishment has never reduced crime to any marked degree. To maintain that punishment is imposed in order to prevent crime is to offer an answer to the question of the aim of penal legislation. To say that punishment is imposed because the criminal has incurred guilt is to offer an answer to the question of the justification for imposing penalties.

To conclude, punishment is the proper immediate consequence of the criminal act, a stage in the criminal justice system. It should be administered in such a way that the criminals reconciliation to the community is not impeded. Perhaps, in future, in imposing the punishments, authorities would take this point into consideration. Our probation laws, parole system, open prisons etc., aimed at this goal only.

ARGUMENTS FOR RETENTION AND ABOLITION OF CAPITAL PUNISHMENT:

Some people advocate abolition of Capital Punishment,16 while some strongly oppose the abolition of Capital Punishment. Those who object the abolition and propagate in favour of retention are called retentionists, and who advocate the abolition of Capital Punishment are known as abolitionists. The specialists of social sciences, criminologists, sociologists, penologists, psychiatrists, doctors and writers on social sciences and criminology are, in their great number abolitionists. The supporters of Capital Punishment, apart from a number of political figures and persons holding high public

office, are generally jurists with a traditional training and judges. Law enforcement and prosecutorial groups tend to be strongly supportive of Capital Punishment.

There are three aspects to the question of Capital Punishment: first the moral-humanitarian, religious; secondly, the popular the views, the prejudices and superstitions of a common man in the street; and lastly, the scientific viz., penological, psychiatric, sociological, in short, the accumulated knowledge and experience of various brands.

However, the controversy between the two groups is as old as the issue of death penalty itself. The debate dates back to Bible in the Western world and Mahabharata in the East. In this section an attempt is made to present the views of both retentionists and abolitionists.

ARGUMENTS FOR RETENTION:

In primitive societies and even in the more developed societies which suceeded them, from the Greece-Roman civilization to the Middle Ages and the Renaissance upto the 17th century, one notices the persistence of the idea of talion uner the form of individual or tribal vengeance. When therespect for life began to be widely admitted one tried to show that the death of the criminal was complement in such a way that it could be said to be both just and necessary.

(a) CAPITAL PUNISHMENT HAS RELIGIOUS SANCTION:

From the religious point of view, the death penalty is in large measure controversial. It is asserted by Catholic authors like Ermecke and Protestant writers like Gloege that the murderer has forfeited his life under the divine order as it is revealed in the scriptures; in consequence, the State, in carrying the death penalty, is only doing something which in any event has been preordained. The death penalty, moreover serves the balance out the disturbance to the moral order.

An incident on par with this argument is found in Mahabharata. Justifying the retention of death penalty King Dyumatsena observed that if the offenders were leniently let off, crimes were bound to multiply and thta they therefore plead that the true ahimsa lay in the execution of unworthy persons. He further argued that the distinction between virtue and vice must not disappear and the evil element must be removed from the society.17

A killer must be killed, though not in the same cruel way as he had dealt with the victim. It is law of nature, arid the Gods too. The Bhagvadgita reckons it as a sacred duty for which the God himself comes down to earth. A judge hanging the offender and the State executing him are exactly in the same position as the surgeon who straightaway removes the offensive limb of his body to save his life. It is a duty which both owe to the society as Brahmagnani Vishwamitra had emphasised when Rama was face to face with Tataka.

(b) CAPITAL PUNISHMENT MARKS THE REPROBATION OF SOCIETY:

Capital punishment marks the society's detestation and abhorrence. Capital Punishment marksthe detestation and abhorrence of the taking of life and its revulsion against the crime of crimes. It is supported not because of a desire for vengeance, but rather as the society's reprobation to the grave crime of murder.

(c) RETRIBUTION SATISFIES THE PUBLIC CONSCIENCE:

All retributionists would agree that if anybody deserves death sentence for his crime it is thekiller for hire.158 The criminal should die because he has committed a terrible crime, and that only his death will satisfy the public and keep it from taking the law into its own hands.

(d) CAPITAL PUNISHMENT IS DETERRENT:

No other punishment deters men so effectually from committing crimes as the punishment of death. True, it cannot be proved by evidence. It is a conclusion that must be drawn from the general impression one gains from experience, from looking around the world, from seeing how things are done and how people feel. Lord Simon expressed he had no doubt that Capital Punishment prevented more murders to an extent that no other punishment could. It was not a matter of statistics but of the judgment and commonsense of every individual. In a speech in the House of Lords in 1948, Lord Jowitt said that "to his mind there was only one possible justification of Capital Punishment - that its potency as a deterrent reduced the number of murders. He belileved it did: he could not prove it: it must be matter of impression and one's own personal opinion. Lord Brideman based his belief in the deterrent force of the penalty "more on what I think is my knowledge of human nature than anything else, and Bishop of Truro thought that on the value of the death penalty as a deterrent his

own feelings were a surer guide than any statistics from other countries and he was sure that the death penalty would be a great deterrent to him if he were contemplating murder.

The death penalty is a deterrent to premeditated murders. The experience of law enforcement officers show that many offenders do not carry weapons because of their fear of death penalty. Statistical studies on the effectiveness of the death penalty have been inconclusive, and are in anycase, unimportant. The public views Capial Punishment as both deterrent and denunciation of those who have committed the most terrible crime.

Retentionists further argue that Capital Punishment is a deterrent. Taking a realistic view, so long as the society does not become more refined, death sentence has to be retained. The security of the society and the security of the individual liberty has to be borne in mind. Capital Punishment is a deterrent because the deterrent force of Capital Punishment affects the conscious thoughts of an individual. Most people will not commit a crime if they know they may be executed as a result: thisis an outgrowth of man's instinct for self-preservation.

(e) LIFE SENTENCE IS NOT AN ALTERNATIVE:

Abolitionists suggest life imprisonment as an alternative to Capital Punishment. But, Capital Punishment is less human than the proposed alternative of life imprisonment. If life sentence is substituted for death penalty, a man who has committed a crime for which he may be sentenced to life imprisonment would be as likely to commit other crimes because he would know that he was already subjected to the maximum penalty. The lifers may feel that they have nothing to loose. Some retentionists argue that lifers would often be released on parole and commit crimes. Thus, the protection of the society is at stake. Keeping the murderers, in the prison greatly complicates the work of prison administration. Life sentence is not an alternative. It is inadequate, because of the practice of early release.

(f) CAPITAL PUNISHMENT IS MORE HUMANE:

Capital Punishment is more humane and painless than life imprisonment. Making a person to spend in jail throughout the remaining part of his life is more barbarous. Capital Punishment does not prolong the agony of the prisoner as imprisonment of life

does. However, if Capital Punishment is to be abolished the life imprisonment should be implemented strictly. Staying behind the bars all alone, away from the family members till the life ends is more miserable than the death penalty.18

(g) STUDIES OF ABOLITIONISTS ARE BIASED:

When Prof. Sellin conducted research in two adjacent states and concluded that both the states have similar rates of crime, Prof. Haag retorted observing that, "the fact that two states, one with Capital Punishment and the other without, have similar rates of crimes does not prove that there is no deterrent effect. Both the studies are based on assumptions. However,this lack of evidence for deterrence is not evidence for the lack of deterrence. It means deterrence has not been demonstrated satisfactorily - not that non-deterrence has."

All human beings fear the loss of their lives, even those, who may be suffering from major mental disturbances. The instinct of self-preservation is fundamental and threat of death, apprehended as such must have a powerful deterring influence on the voluntary direction of human activity. The claim that the death penalty itself decreed for the commission of a major crime, will not exercise a deterring influence on the great majority of potential criminals, contradicts one of the fundamental facts of human psychology.

Threat of the death penalty, plays an important role in forming and maintaining law-abiding self-image. The fear of death is the ultimate deterrent. Although the fear of long term incarceration is also a deterrent, there is a margin of increased deterrence present by the threat of death penalty. Parkash v. State of Uttar Pradesh: AIR 1962 All. 151.[8]

(h) MISCARRIAGE OF JUSTICE IS RULED OUT:

The danger of miscarriage of justice is negligible under a well-oriented administration of criminal law. Mistakes are unlikely, the presence of judge at the trial and impartial review upon appeal provide adequate protection. Abolitionists show one or two instances. In the light of the existing safeguards of appellate review and the possibility of commutation, executing the innocent is unlikely. However, the modem judicial system has become so foolproof that the chances of an innocent person being hanged

[8] Parkash v. State of Uttar Pradesh: AIR 1962 All. 151.

are extremely rare. Supreme Court and Government are there to look after such instances. However, one or two cases do not make history.

(i) PRAIMACY OF SOCIAL DEFENCE:

It is the surest method of eliminating the hopeless elements from the society. It is more dangerous to the society if it supports a criminal whose release means a perpetual peril and subsequent contamination and depredation. Garofalo says the Capital Punishment satisfies the sense of justice and protection and relieves the society of the pernicious effect of those who resolutely and ceaselessly was upon it. Garafalo goes upto the extent of saying that it is the only.means by which absolute elimination of irreparable or typical criminals can be eliminated. Capital Punishment is not only a threat to the offenders, but to those persons who are yet to have committed murder. If the offenders are not punished severely, criminals will think that they can get away with murder. According to Stephen hundreds and thousands abstain from murder, because they disregard Capital Punishment with horror.

The 35th Law Commision of India also expressed the same fear. A particular potent weaponneeded for dealing with the dangerous criminals and individuals not only for protecting the human life and cultural values but even to safeguard certain social property which is placed under the protection of law. Society must be protected from the risk of a second offence.20

(j) ABOLITION OF CAPITAL PUNISHMENT IS A RISK TO THE OFFICERS:

Murderers after they came out of prison, pursue the man who got them convicted. Likewise there are numerous cases of prison inmates who have killed guards and other inmates, knowing that the worst punishment they could get would be continued tenancy in the same institution. Opponents of the death penalty usually resist even life sentence without parole, and the deterrent function of that would be even less effective than Capital Punishment.

(k) CAPITAL PUNISHMENT IS MORE ECONOMICAL:

Capital Punishment is lest expensive. Public funds shall be saved. The death penalty is often defended on the ground that it is less expensive than life imprisonment. The per capital cost of imrprisonment is about ten thousand dollars per year, and the life term

may amount to an average of twenty years, making a total of two hundred thousand dollars.

(l) CAPITAL PUNISHMENT PREVENTS MURDERS:

There is no other surest way to prevent crimes of violence and to reduce the number of professional criminals than implementation of Capital Punishment.

(m) MANY STATES REINTRODUCED CAPITAL PUNISHMENT:

In many countries capital Punishment is re-introduced. For example Brazil had abolished Capital Punishment in the year 1882 but reintroduced it in 1969. Argentina also had abolished Capital Punishment in 1921 and again in 1972 but reintroduced it in 1976.

(n) PUBLIC OPINION IS IN FAVOUR OF RETENTION:

In United Kingdom public opinion was in favour of abolition of Capital Punishment. In India majority of the citizens are for Capital Punishment.

(o) VICTIMS' FEELINGS SHOULD BE GIVEN PREFERENCE:

Knowing that the law would not come to their rescue, or does not respect their feelings, victims may take law into their own hands. Execution avoids popular reactions. Thus, we can avoid lynching.

(p) CAPITAL PUNISHMENT SERVES ATONEMENT:

Capital Punishment is the only just punishment, the only one capable of effacing an unpardonable crime.

(q) RISK TO THE INNOCENTS:

Abolition means risking innocent lives. We must weigh the execution of the convicted murderer against the loss of his victims and of the possible victims of other potential murderers.

ARGUMENTS FOR ABOLITION OF CAPITAL PUNISHMENT:

(a) RELIGIOUS, MORAL AND ETHICAL GROUNDS:

The abolitionists point to the fifth commandment in support of their argument. 'Thou shall not kill" and to Christ's appeal in the Sermon on the Mount. "Do good.to those who hate you." Further, there is the case in the Bible of the murderer Cain, whose life was spared: and Church itself does not provide for the death penalty on its own canonical law.

In Mahabharata also, Satyaketu, Dyumatsena's son was against Capital Punishment. He protested against the mass scale executions ordered by his father and argued that destruction of human life can never be justified on any ground.

The sentiment and reasoning against Capital Punishment is found in Sukra, according to whom, this bad practice violates the vedic injunction against taking any life, and should be replaced by imprisonment for life, if necessary and natural criminal should be transported to an island or fettered and made to repair public roads.

Life is a precious gift of God. God, who gives the life, alone has the right to take it back. This right should not be executed by any agency including judiciary. Taking life of the accused by way of death sentence deprives him from salvation (Nirvana or Moksha). The soul of the person who died unnatural death roams above unsatisfied.

The Father of the Inidan Nation Mahatama Gandhi also reiterated the same long back. "God alone can take life. Because He alone gives it. Destruction of human life can never be an virtuous act."

(b) RIGHT TO LIFE AND THE STATE:

Every individual is entitled to have his rights and each individual has a responsibility to protect those rights for all others. Life is an universal human right. To put off such a right by the State diminishes the basic concept of the dignity of the individual, and this dignity is an inalienable right. While using the death penalty a State was not only exercising a right it was not entitled to possess, but also was engaging in a war against a citizen, whose destruction it believed to be necessary and useful. A similar view was expressed by the French Representative in United Nations Conference on Human Rights. "The Right to Life was the right of individuals. The State conferred no right, it had a duty to protect the life of citizens against anything which endanger it." Professor Conrod reminds the duty of the State in his famous debate with Professor Haag. "Killing demeans the State. Inevitably the State is a teacher, and when it kills it teaches vengeance and hatred. Murderers are not to be loved nor their acts be disregarded. But, in allowing them to live, the State reminds all citizens that no man is always and only a murderer. However, the abolitionists strongly opine that it is morally wrong for the State to take human life. Conrod in his famous debate observes that "I must oppose Capital Punishment because I cannot accept killing as permissible action

for anyone, even a civil servant acting as an agent of the State. Killing demeans the State and a society that insists killing its murderers violates the precepts that it make it possible for us to live together."

(c) CAPITAL PUNISHMENT IS BARBAROUS:

Capital Punishment is a cruelly callous investment by unsure and unkempt society in punitive dehumanisation and cowardly strategy based on the horrendous superstition that cold-blooded human sacrifice by professional hangman engaged by the state will propotiate the Goddess of Justice to bless Mother Earth with crimeless society. Execution brutalises those involved in the process. It brutalises the human intellect.

Capital Punishment is injurious to human values: the act of execution is degrading for the crowd, the executioner, and the criminal, and its appeal is to basic instincts. The gallows is not only a machine of death but a symbol. It is the symbol of terror, cruelty and irreverence for life.

(d) CAPITAL PUNISHMENT IS NOT ETHICAL:

"taking a human life, even with subtle rites and sanctions of law, is retributive barbarity and violent futility, travesty of dignity and violation of divinity, bankruptcy of deterrent dividends, revocation of correctional possibilities, myopically unscientific in that its focus is on the effect not the cause and its basis is macaberely devoid even of moral alibi." [9]

(e) CAPITAL PUNISHMENT IS INHUMAN:

Capital Punishment is inhuman and barbaric. Man is a wonderful creation of God. One cannot destroy it in the name of punishment. The physical pain caused by the action of killing a human being cannot be qualified. Nor can the psychological suffering caused by foreknowledge of death at the hands of the State. Whether a death sentence is carried out six minutes after a summary trial, six weeks after a mass trial or sixteen years after a lengthy legal proceedings, the person executed is subjected to uniquely cruel, inhuman and degrading treatment and punishment. It denies the value of human life.

A great reverence to human life is worth more than a thousand executions in prevention of murder: and is, in fact, the great security of human life. The law of

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[9] Study of Capital Punishment in India by A.KRISHNA KUMARI

Capital Punishment while pretending to support the reverence, does in fact tend to destroy it. It is against the spirit of humanity. It brutalises the human intellect.

There is a phrase in the early book of the Bible that runs something like this. "Ye shall make no slaves: for ye were slaves in Egypt." So, we might say "Ye shall be cruel to no man : for ye are men, and know what cruelty done unto you would mean." "We are not discussing ideas of justice, retributive, retaliatory, or otherwise: we are merely claiming that Capital Punishment is abominably cruel, having taken for granted, I hope with objector's agreement, that abominable cruelty, deliberately inflicted on anyone, is in all circumstances inadmissible."

"Thou shall not kill" must penologically overpower "an eye for an eye". The authentic voice of the divinity and dignity of humanity, echoed in many national constitutions and now underscored in the Universal Declaration, has been that of Buddha and Gandhi and not of Manu and Hammurabi. Beccaria and Bentham, not Bradely and Bosanquet are the torch bearers in this area. The extreme penalty's falsity and ferocity, its humanity and irreversibility, life's sanctity and society's safety and above all, finer criminology transformed by high consciousness, argue for Jesus and against Moses."A deep reverence to human life is worth more than a thousand executions in the prevention of murder."

(f) RETRIBUTION IS NO ANSWER:

Strict "Lex Talionis" was not practical even for the early Romans. Execution is no more than vengeance, and vengeance is not the aim of the justice. Justice no longer lies in retribution. It demands the criminals induction into a new social environment devoid of those circumstances that incited the criminal in him. However, the most conspicuous failure of retribution by death is seen in Capital murders committed by hired killers and their employers, who are rarely brought to the bar of justice. Retribution can hardly protect the society. The Legislative vengeance has adversely failed to cope with the present day biological and social problem. However, we may inflict harm as a means of denouncing violation of the law, but in doing so we have to set careful limitations on the harm we may inflict.

(g) CAPITAL PUNISHMENT IS NOT DETERRENT:

British and Canadian White papers as well as the works undertaken by the European Council, the committee for the Prevention of Crime created by the United Nations and the European Parliament studies came to the conclusion," violent crime follows a curve that is a function of social and economic conditions and the evolution of the moral values of society at a given moment. It is unaffected by the existence or absence of Capital Punishment. In otherwords the death penalty does not reduce crime, nor does its abolition increases it."

A criminal does not expect to be caught, if caught to be convicted, if convicted to be the recipient of the maximum sentence, it is also true that criminals will not be deterred by the most severe sentence that may be imposed on them. Studies do not prove any deterrent effect.

Available information confirms that removal of Capital Punishment has never been followed by a notable rise in the incidence of the crime. In fact, theft, robbery, forgery, counterfeiting currency, infanticide which were punished with death in 19th Century decreased after partial abolition. In Greece, banditry decreased after it ceased to be punishable with death. The same thing with Canada in cases of rape. In England, there has been since 1957 no increase in the crimes which ceased to be capital murders under the Homicide Act of that year. Yugoslavia shares this experience. Arizona, Colorado, Kansas of United States and in Queensland of Australia where Capital Punishment was reintroduced after a period of abolition crime did not decrease. In Argentina Capital Punishment was abolished in 1922. Yet, despite the constant increase in population, the number of murders of the kind previously punishable with death declined steadily in the decade which followed.

The authorities on death penalty like Sellin, Isenberg and do not accept the deterrent theory. "There is no evidence that the abolition of death penalty generally cause an increase in criminal homicides or that its re-introduction is followed by a decline." The presence of death penalty - in law as in practice does not influence homicide death rates the death penalty as we use it exercises no influence on the extent of fluctuating rate of capital crime. It has failed as a deterrent."

(h) CAPITAL PUNISHMENT VIS-A-VIS THE FAMILY OF THE VICTIM:

Killing one offender means killing not only a particular offender, but killing his wife, children and parents also. The loss suffered by the victim's family is a legitimate concern of the State, but it should be dealt with through economic support rather than the perpetrating vengeance. Because, the victim's grief does not command that society should put the offender to death. The march of justice over the centuries has been to overcome private vengeance. How can we do this without first rejecting the law of an eye for an eye.[10]

(i) CAPITAL PUNISHMENT IS DEGRADING AND FUTILE:

Punishment for death is degrading after all. If the current standards of review over imposition of death penalty are insufficient, the death penalty should be banned.

It is futile to attempt to reconcile in one's mind the abstract justification of death penalty jurisprudence with the pain and suffering of a murder victim. Law cheats morality.

Murder and Capital Punishment are not opposites that cancel one another, but similars that breed their kind, when the State itself kills, the mandate "thou shall not kill" looses the force of the absolute. A significant percentage of death-row inmates request the death penalty rather than exhaust their appeals, thereby indicating the desirability of death over imprisonment. The inmates who choose death may simply desire to put an end to the waiting involved. In otherwords, the inmates might prefer the certainty of immediate death rathre than continue to experience anguish through the appeals process while waiting on death row. Most murderers perceive life imprisonment as more severe than the death penalty.

(j) CAPITAL PUNISHMENT AND THE LIKELIHOOD OF UNCERTAINTY:

In a public opinion survey, 60% of death penalty proponents stated that as jurors they would require "much more" or some what more" evidence in order to convict if the penalty would be death. Of those opposed to the death penalty, 40% stated that they would never vote to convict if they knew that the penalty would be death. Consequently, the use of death penalty might result in an increase in the acquittal of murderers and therefore, lead to more lives lost at the hands of those acquitted murderers who kill again.

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(k) LIFE IMPRISONMENT IS A GOOD ALTERNATIVE:

It is far from clear that life imprisonment may, in fact, perform the punishment better than the death penalty. Prisoners convicted for murder are no more likely to commit violent acts while imprisoned, than other types of prisoners.

(l) IRREVERSIBLE ERROR MAY RESULT IN CAPITAL PUNISHMENT:

Although it is impossible to determine the exact percentage of defendants executed wrongfully, one study indicates that a significant number exists. Certainly our criminal justice system is filled with errors. Jurors can err in their findings of fact. Judged can err in their legal determinations and in the exercise of discretion. Witnesses can err in their recall. Lawyers can err in their strategy. These imperfections can alone, without a system of perfect review, serve as the basis of a strong argument against the use of the death penalty.

Joseph Regan's reprieve arrived two minutes too late; Rush Griffin was hanged, but nonetheless, papers requiring a stay of his execution were delivered to the courts three days later; and an order by the governor requiring the stay of the execution of Burton Abbot reached the warden just after the pellets of the gas chamber were dropped. Fortunately for Charles Stielow and William Wellman, their reprieves arrived in time, although they were both already strapped into the electric chair. A wrong fully convicted offender sentenced to life imprisonment can hope, each day of his or her natural life, for justice to be done. Likewise, no wrongful sentence in terms of years matches the injustice of a wrongful sentence of death. The risk of judicial error should suffice to ban the death penalty.

(m) CAPITAL PUNISHMENT AND BIASED JURY:

Inability of jurors to deliver unbiased results is a problem detected by a leading empirical study completed over two decades ago. More recent evidence suggests that at times juries still convict or sentence offenders based on race or social status rather than on the proof of harm and culpability. Biased verdicts do result. In the infamous Chessman's case among twelve jury members eleven were women, whose verdict naturally went against him, because he was charged with the offence of attempted rape. The conviction depends upon the choice of the judges, the respective abilities of the lawyers and prosecutors. Isn't it true that for identical crimes, some criminals may be

punished by death and others escape scot free? When the life of a man is at stake, this judicial lottery is morally intolerable.

Law gives to the judge the sovereign power to decide the fate of another human. Not only must they decide the guilt or innocence with all the risks of the error inherent in such a decision, but they can also decide whether this human is to live or to die. Such absolute power is not acceptable in a democracy.

(n) POWER OF COMMUTATION IN CAPITAL PUNISHMENT CASES:

The same is true of the power to commute. Such a power implies that one person may, according to his whim, halt the execution or allow it to proceed, without answering to anyone. This right of life or death granted to one man is the survival of another age of another political system, a throwback to the period when the right to pardon had its basis in the sacred aura of the monarch. In a democracy, no man, no power, can hold the right of life or death over another person.

(o) REVOCABILITY IS IMPOSSIBLE:

"miscarriage of justice through judicial error, minimal may be, cannot be ruled out." if Capital Punishment eliminates the guilty it also eliminates the chance of correcting judicial errorsimposed on the innocent." Former Home Secretary, Mr Chuter Ede, who in 1950 had refused to reprieve Timothy John Evans frankly admitted that "Evan's Case shows ... that a mistatke was possible, and that, in the form in which the verdict was actually given on a particular case, a mistake was made. I hope no future Home Secretary will ever have to feel that although he did his best he sent a man to the gallows who was not guilty as charged". As long as the death penalty remains such irremediable errors of justice can never be altogether excluded.

(p) DEATH PENALTY IS A LAZY ANSWER:

To fancy comfortably that Capital sentence is a sovereign remedy for the criminal syndrome afflicting the current complex society is a sombre confusion about socical

defence, a guilty ignorance about executioner's impotence and jural farewell to advancing human rights and civilized meanings.

This extreme penalty, an amalgamation of collective vengeance, and deterrence, has scientifically lost its penological purpose particularly in the context of traditional crimes and is functionally non-utilitarian. At global level it has claimed numerous outstanding and socially significant lives and it still continues particularly in the third world countries where the governments are dictatorially hysteric and letharigic. To be precise, if murder by an individual or a group of individuals is undesirable, how could it be justified if committed by the state or body politic.

In any case the test by which rightfulness of Capital Punishment must be judged is not only its immediate success or failure in deterring potential murders, but its long-term influence on the conscience of the community.

(q) CAPITAL PUNISHMENT DOES NOT SERVE THE PURPOSE OF SOCIAL DEFENCE:

Death Penalty, as violation of fundamental human rights, would be wrong even if could be shown that it uniquely met a social need. Anyway, it has never been shown to have any special power to meet any genuine social need. However, there is no indication that people who have committed capital crimes are more likely to commit other crimes. Many who commit repeated capital crimes are adjudged legally insane and are not executed even in Capital Punishment jurisdiction. Surveys reveal that murderers are the best behaved persons.

(r) CAPITAL PUNISHMENT IS DISCRIMINATORY:

Most of the condemned persons are poor men, prefunctorily defended in court by appointed counsel. Many were Blacks, Chicanos or Indians. Death Penalty is imposed more frequently on the poor, the ignorant and the minorities.Even though women commit about one of every seven murders (in the United States) of the 3,298 people executed for murder from 1930 through 1962, only 30 were women. In the same period 446 were executed for rape. Of these 45 were Whites, 399 Negroes and 2 American Indians. If Capital Punishment is not uniformally applied it should be abolished. It is unlikely that any future application of death penalty would be non-discriminatory. It is clear that it has been highly discriminatory in the past. “Do remember that the blow of Capital punishment often falls on the socially, mentally and economically backward, on the brave revolutionaries, and patriotic dissenters, on the

derelicts, and desperates, on the lowliest and lost and on those who have turned delinquent because society, by its continued-maltreatment, cultural perversion and environmental pollution has made them so. The villain of the peace, in the large view, is psychopathic society itself, the victims are so called criminals and the other sufferers of crime. It is disproportionately imposed upon the poor, the Negro and the unpopular. The same view was expressed by Justice Douglas in the case of Furman." It is the poor, the sick, the ignorant, the powerless and the hated who are executed." Krishna Iyer adds to this list the harijan, the woman, the worker or the illeterate. Over the periods the Capital Punishment is imposed on the poor, not on the rich, on pariah, not on the Brahmin, on the black not on white, on the underdog, not on the top dog, the woman not the man, the dissenter not on the conformist. It is class biased and colour biased. Criminal barks at both but bites only the poor. That is why white collar criminals, adulterers, smugglers are not imposed capital Punishment." In country after country it is used disproportionately against the poor or against the racial or ethnic minorities.

It destruets only the sinner not the sin.

(s) CAPITAL PUNISHMENT RULES OUT THE POSSIBILITY OF REFORMATION:

Every saint has a past and every sinner a future. Never write off the man wearing the criminal attire but remove the dangerous degeneracy in him, restore retarded human potential by holistic healing of his fevered, fatigued or frustrated inside and by repairing the repressive, though hidden, injustice of the social order which is vicariously guilty of the criminal behaviour of many innocent convicts. Law must raise with life and jurisprudence respond to humanism.

Human nature is complex and acts not by fear alone but by love, loyalty, greed, lust and many other factors. However, individuals do not think death penalty before they act. Social scientists and public policy makers must search for ways that will reduce the inclination of men and women to commit crimes. However, efficient police officer does more work than an executoner. Criminologists and Penologists now teach that it is less important to strike blindly than to reform thoughtfully.

(t) MANY STATES ABOLISHED CAPITAL PUNISHMENT:

In a large number of countries in the world where the murder rate is higher than in India, the death penalty has been abolished. In most Latin American Countries, in Argentina, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Panama, Peru and Uruguay, Venezula, in European countries, in Australia, Belgium, Denmark, Germany, Italy, Netherlands, Norway, Sweden and Switzerland, in Iceland, in Israel, in many Australian States and in many of the States in the United States of America, death sentence has been abolished.

SUMMARY:

Sanction is an essential ingredient of law. Punishment is a social custom and institutions are established to award punishment, after following criminal justice process. Governments prohibit taking life, liberty or property of others and specifies the punishments, threaten those who break the law. Criminologists hold the view that certainty of punishment is more important than the severity. However, punishment shall prevent crime, it shall sustain the morale of confirmists and it shall reform the offender at the same time.

Of the theories of punishment namely, retributive, deterrent, preventive and reformative, the first two theories, being the philosophies of classical and neo-classical schools advocate the retention of Capital Punishment. While the last viz., reformative theory, the product .of positive school is against the death penalty. Retributionists argue that death will satisfy the public and keep them away from taking the law into their hands. Deterrent theory suggests that punishment is designed not to take revenge but to terrorise the future offenders, thus explaining the necessity of carrying out the execution of the offender. Preventive theory which is known as incapacitative theory also, is a two edged weapon used for arguments of retentionists as well as abolitionists. Reformative theory which used mass methods to reform the criminals in the last century resorted to individual treatment, in the present century. This theory advocates that punishing the offender is as good or as bad as punishing a cancer patient. It serves no good.

The retentionists interpret the retributive and deterrent theories in such a way to suit their arguments. They advocate the retention of Capital Punishment on moral, ethical

and religious grounds. Abolitionists argue on the otherhand in favour of abolition on the same grounds as that of retentionists.

CHAPTER III

EVOLUTION OF CAPITAL PUNISMENT IN ENGLAND, AMERICA AND INDIA

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Capital Punishment was in existence in different countries for a variety of offences. A better understanding of the concept of Capital Punishment requires a brief enquiry into its origin, evolution and abolition in particular in England, America and India. In this chapter a modest attempt is made to trace out the historical background of the Capital Punishment in England, America and India. An attempt is also made to study the efforts in those countries to abolish Capital Punishment.

3.1 ORIGIN OF CAPITAL PUNISHMENT IN ENGLAND:

In England the origin of Capital Punishment can be traced to 450 years before Christ. In the beginning the culprits were drowned and later mutilation was practised. In the early period the methods of execution depended upon other factors like the gender, social status etc., of the criminal.23

There was no unanimity among the rulers over the award of Capital Punishment. Canute who ascended the throne in 1016 did not favour Capital Punishment and in fact abolished the death penalty. Canute's abolition of death penalty did not survive. His own son William Rufus was a passionate hunter, who hunted day and night. It was natural enough for him to order death for those who were caught hunting deer in the Royal forests. Normans and Williams were also against Capital Punsihment. During their tenure no criminal was hanged. But, they allowed other harsh punishments which in turn in some cases resulted in the death of the offender. However, conditions were changed during the regime of Henry I and II. Henry I prescribed death penalty for murder, treason, burglary, arson, robbery and theft. But, Henry II prescribed amputation of right hand and right foot for the offences of robbery, murder and false coinging in the place of death penalty provided by Henry I. After Henry II Richard I who ascended the throne prescribed 'hanging, drawing and quartering' which was inhuman and barbarous.

3.2 INTRODUCTION OF NECK-VERSE :

By the end of fifteenth century the position was changed with the establishment of eccelesiastical courts which started punishing the people spiritually. They could not inflict death penalty. So, any clergyman charged with a crime which carried death or imprisonment made sure he claimed his privelege, which had been so extended as to include even doorkeepers and exorcists. Because priests were among the few literate people, the test of one's membership of holy order was to read the first verse of the fifty-first psalm. It became a simple matter for criminals to memorise the verse. The custom was to ask a convicted person if he had anything to say before sentence was passed and it was at this moment that he could put forward his plea of "benefit of the clergy". By repeating the Neck-Verse, as it became known, he obtained what amounted to reprieves.24

Henry VII ordered that everyone convicted of a clergyable felony had to be branded on the thumb. This stopped persons claiming benefit on more than one occasion. After Henry VII, Henry VIII came to the throne. He was the first and only English King to permit Sunday executions and execution by boiling to death as a legal penalty. The whole Europe was at this time experiencing a movement towards severity and brutality of sentence. It was believed that hard and tough punishment was the natural answer - indeed God's answer to crime. Death of varying degrees of horror must be the deterrence of the serious offenders.

In 1512 murder in Church or on the highway was classified as non-clergyable. Suspects thus became liable to death penalty. A statute of 1532 set the tone for the remainder of the century stipulating that those committing petty treason, wilful murder, highway robbery or who stole from churches or other holy places or from dwelling houses where the owner or members of household were present, and who burned down houses or bams where grain was stored, were, with the exception of high ranking clergymen, to be denied benefit of clergy.

In 1553, Henry VTH had twenty Protestants burned because they would not acknowledge him as head of the Church. In 1536 he extended death penalty to various

offences. Later Acts extended the death pently to those holding diversity of opinion over religion (1540), those indulging in witchcraft or sorcery (1542), servants stealing or embezzling from their masters (1536), horse thieves (1546) and those committing buggery with mankind or animals (1532). In the short reign of Edward VI (1547-53), he repeated the laws permitting burning alive. Mary Tudor's reign (1553-58) was also too short without any marked difference. Elizabeth I who ascended the throne on 17 th November, 1558 was not noted for humanity. The result was more capital offences entered into the statute book, and a number of Henry VETs statutes which had been repealed were virtually re-enacted. Estimated annual executions numbered eight hundred at the beginning and increased steadily. Henry VIII did not distinguish clearly between political and religious offences and Elizabeth executed many Roman Catholics for religious offences which for legal purposes were classified as treason. Witches were burnt at stake, Bible being.quoted as authority.[11]

3.3 TYBURN EXECUTIONS:

During the sixteenth century Tyburn in London became notorious place of execution. The site had been a traditional place for hanging since the twelfth century. The trees there were utilised for hanging purposes. In fact gallows became known as Tyburn tree. The first execution was that of Willima Fitzosbertin 1196, for leading a rebellion.

When Tyburn's sad trade became too brisk, a beam was erected right across Edgware Road to permit multiple executions. Stands were built to accomodate the public who could witness events for small fees, the cost being increased according to the rank or social status of the victim. As hanging became the acceptable British method of execution, drowning became less common.

In 1603, James I came to the throne. He made witchcraft a capital crime. During his reign executions at Tyburn averaged about 140 a year. In this century gibbets were used to suspend the bodies of executed criminals in chains near the site of crime as a

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lesson to those who might copy their deeds. Occasionally living criminals were hung by chains and left to die; sympathetice passers-by would shoot them to put them out of their misery. It is doubtful whether gibbets deterred anyone."

In Charles I's reign Tyburn executions dropped to 90 per year. He was followed to the throne by Charles II who took some interest in penal reforms. Transportation was introduced as a punishment. The last burning of a woman in Scotland was in 1708 and in 1710 the " Maiden" was finally put into retirement. But, in England burning of witches continued for another eighty years.

By 1700 the death penalty was pronounced in England both for high and petty offences. This trend continued and hangings crudely and publicly performed, were frequent - and from this period any statute would specifically state whether an offence was punished without the benefit of clergy. Five years later the system of requesting recital of the "Neck-verse" was abolished bringing to an end the farce of the benefit of clergy plea.

When Queen Anne died in 1714 there were thirty two capital offences in England. By the time George II came to the throne in 1743 this number increased to one hundred and sixty. Such was the incidence of hanging in London that it became known as the City of Gallows. In 1799 London averaged one execution every fortnight. By 1819 the number of capital offences on Britain's statute books were two hundred and twenty embracing all manner of crimes and wrongs such as - damaging the Waterloo bridge, impersonation of a prisoner, associating with gypsies for one month etc., Even children of seven years and eight years were also given death penalty for stealing spoons, colours, shoes etc.,

TOWARDS ABOLITION:

Protests against Capital Punishment can be traced to Saint Augustine or the writings of New Testament itself. Some would carry the beginning of the crusade against Capital Punishment to the literature of Old Testament. For the modem period the logical

starting point is the year 1764, when Cesare Beccaria wrote his essay on "Crime and Punishments". Beccaria maintained that since man was not his own creator he did not have the right to destroy human life either individually or collectively. He claimed that Capital Punishment was justified only in two instances: first, if an execution would prevent a revolution against a popularly established government; and secondly, if an execution was the only way to deter others from committing a crime.

The man who first brought the ideas of Beccaria and Bentham to the British political scene was Sir Samuel Romily. He entered political scene in 1806. In 1808 he succeeded in getting the death penalty repealed for the offence of picking pockets. Quakers supported Romily in his efforts to restrict the death penalty.

In 1812 Romily managed to set aside death penalty for vagrancy by a soldier or seaman. From 1810 until his death in 1818 Romily devoted his time in influencing the Parliament to pass three Bills to repeal the death penalty for theft. In his twelve years tenure in Parliament, Romily succeeded in abrogating the death penalty in only three types of cases: picking pockets, stealing from cloth makers and vagrancy by soldiers and sailors.

Though he was far in advance of the general opinion of his day, he could not agree that the death penalty be abolilshed for all offences. Sir James Mackintosh, entered the Parliament in 1812, where he became one of Romily's most enthusiastic supporters in his attempts to reform the criminal law. In March 1819, his motion for a committee to study Capital Punishment was carried, resulting into the Select Committee of 1819.

With the insistence of the Committee and Mackintosh the three Bills proposed by Romily became law in 1820. In 1823, Mackintosh introduced nine resolutions to abolish death penalty for various offences. Sir Robert Peel, the then Home Secretary promised to look into the matter and between 1823-1827 he was able to pass eight Acts which

moderated and consolidated the criminal law and which repealed more than 250 old statutes.[12]

Although Peel favoured the removal of death penalty wherever practicable, he believed that Capital Punishment must be retained for all documents representing money. Though the penalty was in the statute book no more was it practised.

The movement towards abolition of Capital Punishment was further carried on by John Bright and William Ewart. They were successful in getting repealed death penalty for burglary in 1837 and were responsible for the appointment of five member Royal Commission in 1833 which presented its report in 1836.
In 1837, there were thirty seven Capital Offences on statute books. Lord John Russel sponsored a Bill for the removal of the death penalty for twenty one offences and restrict its use in the remaining sixteen offences, and he was successful.

William Ewart aided by John Bright, further led the movement for complete abolition. Debates in Parliament reached a peak and resulted in the appointment of another Royal Commission in 1864. At that time treason and murder were, in practice the only crimes punished by death in the United Kingdom. The Commission favoured dividing murder into degrees. The Commission further suggested that the judges should have the power to record death sentence without pronouncing it, and suggested that an Act be passed directing that executions should be carried out within prison grounds. With the result in 1868 public executions became a thing of past. Except this, little progress was made during the remainder of the nineteenth century.

In the first and second decades of twentieth century, though two societies - Penal

Reform League and Howard Association made some efforts nothing much was resulted. A small reform was achieved when the statutes in the criminal law relating to children

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were revised and consolidated by the Children's Act, 1908, which prohibited Capital Punishment for any person under sixteen years of age.

In 1921, the amalgamation of the two societies resulted into a new body, known as the Howard League for Penal Reforms. It became a prime force in the abolition movement. The first attempt, in 1921, was an effort designed to prohibit passing the death sentence for persons under twenty one years of age or persons whom a jury had recommended to mercy. In 1922 Infanticide Act was passed. By the terms of the Act, woman charged with the death of her newly bom child would be punished for the commission of manslaughter rather than with murder.

In 1925, a National Council for the Abolition of Death Penalty was founded, with Roy Clavery, as its first secretary. The subscribers of this new body were drawn from the entire nation and were of varied political, social, economic and religious backgrounds. This Council published newspaper accounts, magazine articles, radio broadcasts, books packed with statistics, novels, plays, pamphlets and leaflets advocating abolition of death penalty.

In October 1929, the first full-scale debate in the twentieth century on the abolition of the death penalty culminated in the appointment of a now famous Select Committee on Capital Punishment. This Select Committee, (1930) met thirty one times in all and interviewed a great many witnesses from Britain, Europe and even the United States. Special emphasis was placed on countries which had dispensed with the use of Capital Punishment. In those cases where appearances before the Committee were impracticable, witnesses sent memoranda which the Committee either incorporated in the evidence or placed in the appendices. With the hearing of the last witness on July 30, 1939 the inquiry was completed, and the report consisted of 550 pages with an additional 100 pages in appendices. Ultimately, it recommended that in the then session of Parliament, a Bill abolishing Capital Punishment for an experimental period of five years should be passed.

Although, the Government did not allow a debate on the Report, the work of the Committee was not entirely lost. After a careful investigation, the Committee had condemned death penalty as unnecessary to the safety of the nation. The report now stood as a basic tenet in the crusade against Capital Punishment, and abolitionists turned their attention towards propaganda, which, they hoped would compel parliamentary action on the death penalty. But, unfortunately in 1931 the downfall of the government took place and the chances for action on the Select Committee Report became slim indeed.

After the war ended in 1945, The National Council for- Abolition of the Death Penalty and the Howard League for Penal Reforms rendered their propagandists efforts for the abolition of Capital Punishment. In the Parliament in 1947, Sydney Silverman criticised the Government for not including the abolition of Capital Punishment in the Criminal Justice Bill which was introduced in October,1947.

The new clause inserted by the House of Commons providing for the suspension of Capital Punishment for an experimental period of five years was not considered. The Government proposed to maintain the death penalty for murders committed during: robbery, burglary, or house-breaking, wounding or inflicting grievous bodily harm by three or more persons acting in concert, crimes committed by means of explosives or other destructive substances, rape and indecent assaults on females and sodomy and indecent assaults on males.

Murders committed in the course of resisting or preventing arrest, or escaping from custody, or obstructing a policeman or any person assisting him were capital under the Government proposal. Murder of a prison officer by a prisoner was punishable by death, as was murder committed by the systematic administration of poison. A person ‘convicted of previous murder’ was also to be subjected to the death penalty. In addition a murder must have been committed with “express malice”, which was defined as the “intent to kill or maim” if Capital Punishment” is to be awarded.

Albeit the Home Secretary promised to consider practical means of limiting the scope of death penalty, the Criminal Jusice Act did not provide for the abolition of Capital Punishment.

3.4 THE ROYAL COMMISSION, 1949:

In 1949 another Royal Commission was appointed to study the issue of Capital Punishment. In 1953 the Commission submitted its report. The following are the suggestions made by the Royal Commission:

1. Raising the age limit for imposing the death sentence from eighteen to twenty one.
2. Mercy killings are not to be removed from the category of murder.
3. Death penalty could not rationally be abolished for woman and retained for men.
4. M'c Naughten Rules dating from 1843, should be abrogated and that the jury should be left free "to determine whether at the time of the act, the accused was suffering from disease of the mind or mental deficiency to such a degree that he ought not to be held responsible.

The Commission refused to recommend that the judge be empowered to pronounce a lesser sentence upon a conviction of murder, but did not suggest that it might be possible for the jury to decide in each case if there were extenuating circumstances that would justify the substitution of life imprisonment.

The Committee concluded,"the conclusion would seem to be inescapable that in this country a stage has been reached where little more can be done effectively to limit the liability to suffer the death penalty, and that the issue is now whether Capial Punsihment should be retained or abolished." By this time there was some new propaganda published favouring abolition, but three murder cases probably did more than anything else to call the attention of the public to the problem of Capital Punishment.[13]

Inspite of public opinion and efforts of the abolitionists the Government refused either to abolish or to suspend the Capital Punishment on the ground of three reasons:

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1. In the case of potential offenders, the Capital Punishment was a unique deterrent.
2. Serious difficulties might arise in view of the extraordinary long terms of detention that would be required in the absence of Capital Punishment.
3. Public opinion opposed abolition and it would be wrong to undertake it without public support.

Consequently Sydney Silverman, who had emerged as the leader of the abolitionists in the House of Commons decided to introduce a Bill for the abolition of death penalty in 1955. It was supported in the House of Commons. The vote favouring the abolition was not victory solely for the Labour Party, as forty eight Government supporters had voted for ending the use of death penalty in Great Britain.But, in the House of Lords it was opposed. The commentary of "The New Statesman" and "Nation" in this regard was noteworthy: 'The House of Lords may have delayed the abolition of hanging: but it has hastened its own abolition. From the hills and forests of darkest Britain they came: the halt, the lame, the deaf, the obscure, the senile and the forgotten - the heredity peers of England united in their determination to use their medieval powers to retain a medieval institution."[14]

3.5 THE HOMICIDE ACT, 1957:

The Homicide Bill was a compromising measure, it was hoped to draw support from both moderateabolitionists and moderate retentionists. This Bill was designed to resolve the problem in a manner acceptable to the majority of people in the country and in parliament itself and to maintain law and order by providing Capital Punishment for several categories of murder.

On March 21, 1957 the Bill became law. Thus Capital Punishment was retained for certain types of murder with in Great Britain. Although it would eliminate three - fourths of those formerly subject to execution still the death penally exists in the statutes of Great Britain. Under the new Law, by 1960 seventeen persons were executed. The rate of execution is therefore roughly four per annum, compared with an annual average of thirteen before the Act. Whether it is worthwhile continuing the law

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about Capital murder in order to hang an average four persons each year out of an average total of a hundred or more murderers is debatable.

3.6 THE MURDER (ABOLITION OF DEATH PENALTY) ACT, 1965:

Ultimately, the Murder (Abolition of Death Penalty) Act, 1965 abolished the death penalty for murder for a five year experimental period. A hundred years of relentless crusade against Capital Punishment has been completed. Abolition of death penalty for murder in Great Britain was made permanant by resolutions of both Houses of Parliament on 18 December 1969. The death penalty is retained now only for high treason and for piracy with violence.[15]

Since the death penalty was abolished for murder, motions to reintroduce it have been defeated in the House of Commons on a number of occasions. In the last decade, a vote on an amendment to the Criminal Justice Bill to reintroduce the death penatly for murder was held on June 1988 and it was defeated by 341 to 218.

An ardent abolitionist commenting on the abolition of death penalty observed, “What next? Well, it will still be necessary to expunge the death penalty completely from our laws, and that ought surely to be done without arguments, or fears, that treason and piracy will become rife, or that arsenals and dockyards will be burnt down.

It is submitted that in Great Britain public opinion very much influenced the Legislature and the result is abolition of Capital Punishment. Bentham’s assertions that the Legislature should exercise its power in consonance with the public opinion had its sway in England. The Legislature should assess or gauge public opinion on matters of great public importance and it should accrodingly act. Public opinion should be respected and be given effect.

3.7 CAPITAL PUNISHMENT IN AMERICA:

The American colonies had no uniform criminal law. The range of variation during the seventeenth and eighteenth centuries, so far as Capital Punishment is concerned, was considerable.lt may be gauged from the differences in the Penal Codes of Masachusettes, Pennsylvania and North Carolina. The earliest recorded set of capital statutes on these shores are those of the Masachusettes Bay colony, dating from 1636.

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The early codification, titled "The Capital Lawes of New England", lists in order the following crimes: idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, rape, man-stealing, perjury in a capital trial, and rebellion (including attempts and conspiracies). Each of these crimes was accompanied in the statute with an Old Testment text as its authority.30 During one twelve-month period, there is a record that colonial Masachuesettes put to death twenty witches.

In later decades, this theocratic criminal code gave way in all but a few respects to purely secular needs. Before 1700, arson and treason as well as the third offence of theft of goods valued at over forty shillings, were made capital, despite the absence of any Biblical justification. Several Negro slaves were burnt at the stake in New Jersey as late as in 1785. The Common Wealth of Masachusettes recognized nine capital crimes and they bore only slight resemblance to the thirteen " Capital Lawes" of the Bay Colony viz., treason, piracy, murder, sodomy, buggery, rape, robbery, arson and burglary.[16]

Far milder than the Masachusettes laws were those adopted in South Jersey and Pennsylavania by the original Quaker colonists. The Royal charter for South Jersey in 1646 did not prescribe the death penalty for any crime, and there was no execution in the colony until 1691. In Pennsylvania, William Penn's Great Act of 1682 specifically confined the death penalty to the crimes of treason and murder

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These ambitious efforts to reduce the number of capital crimes were defeated early in the eighteenth centuiy when the colonies were required to adopt, at the direction of the Crown, a far harsher penal code. By the time of the war of Independence, many of the colonies had roughly comparable capital statutes. Murder, treason, piracy, arson, rape, robbery, burglary, sodomy, and, from time to time, counterfeiting, horse-theft, and slave rebellion - all were usually punishable by death. Benefit of clergy was never widely permitted, and hanging was the usual method of inflicting the death penalty.

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Some states, however, preserved a severe code. As late as 1837, North Carolina required death for all the following crimes: murder, rape, arson, castration, burglary, highway robbery, stealing banknotes, slave-stealing, the crime against nature (buggery, sodomy and beastiality), duelling if death ensues, burning a public building, assault with intent to kill, breaking out of jail if under a capital indictment, concealing a slave with intent to free him, taking a free Negro out of the state with intent to sell him into slavery, the second offence of forgery, mayhem, inciting slaves to insurrection, or of circulating seditious literature among slaves: being accessory to murder, robbery, burglary, arson, or mayhem. Highway robbery and bigamy, both capitally punishable, were also clergyable. This harsh code persisted so long in North Carolina partly because the state had no penitentiary and thus had no suitable alternative to the death penalty.

3.8 THE ABOLITION MOVEMENT:

The last part of the eighteenth and early nineteenth centuries, however, saw a steady movement of thought and feeling towards humanitarianism over the Western world, of which America was naturally a part: but men like William Penn were embodiments of a social conscience, centuries ahead of its time.

Penn's famous code adopted in 1682, retained Capital Punishment only for what is nowadays termed "first degree murder". His criminal reform "Bill" was undoubtedly the most important single innovation in centuries for ameliorating the treatment of convicted criminals. But. after his death in1718, the English Penal Code was reinstated in Pennsylvania. This not only restored religious offences, which Penn's Code did not recognise, but imposed the death penlalty for fourteen separate offences. Before Independence, in fact, the English colonies recognised anything from ten to eighteen capital offences: but after Independence, Pennsylvania again took the lead in reducing the number of capital crimes. The English Penal Code was overhauled and the death penlalty for witchcraft was abolished in 1791: and, once more, Capital Punishment was abolished for all offences except the first degree murder in 1794.

After Penn, the noteworthy name in the criminal reforms was that of Dr. Benjamin Rush (1745- 1813). In May 1787, he gave a lecture in Benjamin Franklin's house in Philadelphia to a group of friends, recommending the construction of a House of Reform. After a year, he wrote an essay entitled "Inquiry into the Justice and Policy of Punishing Murder by Death." He argued its impolicy and injustice. This essay, published a few years later, became the first of several memorable pamphlets originating in the country to urge the cause of abolition, and Dr. Rush is naturally credited with being the father of the movement to abolish Capital Punishment in the United States.

Like Romily of England, Rush also depended upon Cesare Beccaria's "On Crimes and Punishment" for his arguments in favour of the abolition of Capital Punishment. The main points of Rush's argument were simple enough: scriptural support for the death penalty was spurious: the threat of hanging does not deter but creates crime: when a government puts one of its citizens to death, it exceeds the powers entrusted to it. In the years immediately following the publication of Rush's essay, several other prominent citizens in Philadelphia, notably Franklin and the Attorney General, William Brandford, gave their support to reform of the capital laws. In 1794, they achieved the repeal of the death penalty for the crime of "first degree murder".

These reforms in Pennsylavania have no immediate influence in other States... In the United States no major public figure emerged as leaders in this movement until several decades later. During the early decades of the nineteenth century, individual efforts were to advance the cause of abolition of Capital Punishment. Edward Livingston (1764- 1886) who prepared a revolutionary penal code for Louisiana, insisted on total abolition. But, he did not live long enough to learn that during the next halfcentury,the leading piece of anti-Capital Punishment propaganda in the United States was a thirty page excerpt from his modem Louisiana Code. Few voices rose in support of him. One New York Quaker hit on the worldy idea that the best "practical cure for murderous impulses" would be to impose an "enormous duty" on all kinds of strong liquor. A pacific clergyman, John Edward, wrote a tract entitled "Serious Thought on the Subjects of "Taking the Lives of Our Fellow Creatures" which enjoyed wide circulation in New York.

Not until 1830 did the literary efforts of Rush and Livingston began to bear fruit. By that time, the Legislature in several States (notably Maine, Masachusettes, Ohio, New Jersey, New York and Pennsylvania) were besieged each year with petitions on behalf of abolition from their constituents. Special Legislative Committees were formed to receive these messages, hold hearings, and submit recommendations.Anti-gallows societies came into being in every State along the eastern, sea board.

The high water mark was reached in 1840s when Horace Greenley, the Editor and founder of the

New York Tribune became one of the nation's leading critics of the death penalty. Another notable figure in the area of abolition of Capital Punishment was Charles Spear, who was the author of Essays "On the Punishment of Death" in 1844. In 1845, he had founded a journal entitled "The Hangman" which afterwards became the "Prisoners' Friend" and continued publication until 1859. About the same period the New York Society for the Abolition of Capital Punishment was sponsored by such prominent citizens as the Reverend William S. Baclch, John Quiney Adams, Williams H. Steward and former United States Vice-President Richard M. Johnson of Kentucky and George M. Dallas of Pennsylvania.

In May 1845, a National Society was formed in Philadelphia, the head quarters of the Pennsylvania, for promoting the Abolition of Death Penalty and within a few years State societies existed in Tennessee, Ohio, Alabama, Louisiana, Indiana and Iowa. The conscience of mankind was so revolted by Capital Punishment that the death penalty could not be enforced in practice. One authority estimated that in the year of 1894, there were 9,800 known murders, but only 132 legal executions, plus 190 illegal ones. Thus, twenty nine out of thirty murderers got off without being punished.

In 1846, the Territory of Michigan voted to abolish hanging and to replace it with life imprisonment for all crimes save treason. This law took effect on March 1,1847 and Michigan became the first English speaking jurisdiction, in the world to abolish death penalty for all practical purposes. In 1852, Rhode Island abolished the gallows for crimes, including treason. The next year Wisconsin did likewise. Maine abolished it in 1876, but reintroduced it in 1833 and abolished it again in 1887. Four other states prohibited it from 1907 to 1911, and seven more between 1913 and 1918, five of

these restored it after an average period of about three years. South Dacota restored it in 1939. But, only one man was executed since then.

Between the peak of the Progressive Era no less than eight states - Kansas, Minnesota, Washington, Oregaon, North and South Dakota, Tennessee and Arizona abolished the death penalty for murder and for most other crimes. However, by 1921, Tennessee, Arizona, Washington, Oregaon and Missouri had reinstated it. Had it not been for persuasive voices of Clarence Darrow, the great “Attorney for the damned”, and for

Lewis E. Dawes, the renowned warden of Sing Sing Prison, and organisation in 1927 of the American League to abolish Capital Punishment, the lawless era of the twenties might have seen the death penalty reintroduced in every State in the Union. By 1918 the death penalty was mandatory for capital crime in few states. By 1930 there remained only five states with a mandatory death law, and in 1951, Vermont and New York were the only States left with such a law. This practice has led to the enhancing the power of the jury or the court, or both, in deciding whether the convicted person should be executed or be given a lesser sentence than death. This is done partly by establishing a different degrees of homicide - a division unkonwn to England till 1957 – and partly making the death sentence permissive instead of mandatory.

3.9 THE PRESENT SITUATION IN AMERICA:

The death penalty is completely abolished in nine of the states and a life sentence is given instead. In twenty other states, the penalty is rarely used. To sum up this record in chronological order, Capital Punishement has so far been abolished in Michigan (1847), Rhode Island(1852), Wisconsin (1853), Maine (1887), Minnesota (1911), North Dakota (1915), Alaska and Hawai (1957) and Delware (1958) though Rhode Island and North Dakota are not perfect examples, as they provide the death penalty for murder committed in prison, by a lifer. In the State of Washington, the jury may decide between death or life sentence and the jury may recommend alternative punishment. A death sentence may similarly be commuted to life imprisonment in vimally all States, and in some (such as Idaho, Illinois, Louisiana, New York, Oklahoma and Texas) atleast it can be directly commuted to less than life sentence.

Alburt Camus, the Nobel Prize winner commenting on a film "I want to live" which surrounds the whole practice of passionless deliberate killing as a punishment, performed in the name of State said: "Here is the reality of our times, and we have no right to be ignorant of it. The day will come when such documents will seem to us to refer to prehistoric times and we shall consider them as unbelievable that in early centuries witches were burnt or thieves had their right hands cut off. Such a period of true civilization is still in the future, in America and in France.
To conclude, "the history of Capital Punishment in America has passed through periods of unarticulated acceptance in the early centuries to a nearly total repudiation in the Furman case to a limited acceptance which is evidenced by the post Furman decision.

3.10 ORIGIN OF CAPITAL PUNISHMENT IN INDIA:

Capital Punishment has been prevalent in India from times immemorial. It is as old as the Hindu Society. There were references about the death penalty in our ancient scriptures and law books. Kane points out "It will be seen from the early sutras like that of Gautama and from Manusmriti that the ancient criminal law in India was very severe and drastic. But from the times of Yajnavalkya, Narada and Brihaspati the rigour of punishment was lessened and softened.[17]

The fundamental basis of'Dandaniti' was deterrence. The concept of reformation was not known to the smriti writers. One more salient feature of ancient Hindu law was that the punishment depended upon the caste of the offender as well as the victim. There was little uniformity between the various scriptures and sastras. The law depended upon the nature and whim of the King, if not in theory, at least in practice. Nevertheless, murder was considered to be the worst of all crimes and hence the punishment was also severe.

Various forms of punishment were mainly traced from the Rig Veda and Atharv Veda. There is a mention in both Rig Veda and Athrva Veda about the death penalty by

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hanging, by shooting, by thunderbolt, by electrocution, or by combination of any of the three punishments out of the above.

The infliction of penalties, including the penalty of death, is a process operating against certain classes in general: and even if a single individual is subjected to any penalty, including the penalty of death, it is because of that individual belonging to the enumerated class of the social degenerates. The hundred and fourth hymn of the seventh part of the Rig Veda and fourth hymn of Eighth part of Atharva Veda have been addressed in common to the deities Indra and Soma. Infliction of punishment on culprits appears to be the common jurisdiction of these two deities. The hymns reflect the instrumentality of Indra in inflicting penalties in consultation with Soma, making thereby the infliction of punishment as a matter of common deliberation of the deities Indra and Soma, as if the two are respectively the executive and the judicial organs, acting in unison, in the cosmic government.

Till the end of the Epic period killing was justified either in war or combat. The eighteen prominent epics, the puranas, are impregnated with the classical theme of the incarceration of godhead on the mission of killing non-Aryan sovereigns. All this depicts the cult of killing as a cultural crusade.[18]

Killing of a demon or evil spirit was supposed to be a very religious act performed with a view to propotiating the deities for safeguarding the welfare of the group. With that object in view, such punishments were usually carried out in the public gatherings, since they had a religious outlook. Such a mode of Capital Punishment seemed to have been in vogue.

The administration of criminal justice as an integral part of the sovereign function of the State did not seem to have emerged in India till the smriti period. The credit goes first to smritis, mainly Manu and secondly to the Artha Sastra of Kautilya, who have eliminated the influx of metaphysical subtleties into the innate conditions of the society' governed by positive law administered by the Royal Courts. The administration of criminal justice in accordance with the tenets of positive law deduced from the

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principles laid down in the smritis, very often alloyed with Royal edicts or ordinances, emerged in the smriti period and continued till the Mughal regime in India until it was replaced by codified penal law in the British regime.

The Manu Smriti has recongnised a juristic distinction between the sentence of death 'dejure' and 'de facto'. It is stated that a death sentence passed on a Brahmin culprit is not to be executed 'de facto', but only 'de jure' by the tonsure of his head. The tonsure to such a Brahmin was as good as his death The death sentence of a Brahmin culprit may be executed 'de jure' by his exile also.

The later smriti writers also concurred with the opinion of Manu. Kautilya's Artha Sastra, Gautama's Dharma Sutras and Yajnavalkya's smriti prescribe that as a general rule'a Brahmin offender was not to be sentenced to death or corporal punishment for any offence deserving a death sentence, but in such cases other punishments should be substituted.

Kautilya who exempted a Brahmin from death sentence, as a general rule prescribed certain extraordinary circumstances where death penalty can be given to a Brahmin also. A Brahmin who aims at the kingdom or who forces entrance into the king's harem or who instigates alien enemies or tribes against the king or who instigages disaffection or rebellion in forts or in the country or in the army should be sentenced to death. Katyayana was against exempting Brahmins from death penalty and stated that even a Brahmin deserved to be killed if he be guilty of causing abortion, or if he be a thief of gold or if he kills a Brahmin woman with a sharp weapon or if he kills a chaste woman. Death Penalty on culprits belonging to a class other than that of the Brahmins has to be executed 'de facto' without any exceptions.

Manu Smriti not only prescribed varied types of punishments depending upon the cast and social status of the offender and victim, but also prescribed various modes of carrying out the execution depending upon the offence committed. The thief of unclaimed property is liable to be crushed to death by an elephant. The punishment for institution of a malicious proceeding may range from fine, corporal pain and death, commensurate with the charge levelled against the accused. A sudra bringing false accusation of theft against a Brahmin is liable to be awarded death penalty.

The punishment on a thief of gold, silver or other metal of the weight of a hundred grams or valuable apparel of another might range from corporal pain, amputation, or death in accordance with the gravity of the offence and with due regard to time and place of offence and the class of offence to which the owner of such property would belong to. A person of noble birth, convicted of theft of gems or precious stones, or of kidnapping a woman, is liable to penalty of death. A culprit guilty of arson, of poisoning, of causing hurt on an unarmed victim, or robbery, and of stealing crops or women, even if he be a preceptor, an old man or child, is liable to be killed instantly. An adultress proud of money or beauty, bringing indignity to her husband by lying with her paramour is liable to be bitten to death by dogs in a public place and the paramour is to be burnt to death by being placed on a red-hot iron cot.

3.11 OFFENCES AGAINST STATE:

After Manu, the total scenario was changed. Offences against God, morality and upper class people took a back seat, and offences against the State were considered to be the gravest. Kautilya's Artha Sastra reflects this change of attitude, which is still prevalent and embedded in all the penal laws of the world till date.

Kautilya considered offences against the State as gravest, and prescribed death penalty for such offences even on the least pretext. There are four broad classes of offences, traceable in Artha Sastra as would entail death penalty, namely, (a) spying against the State, (b) misappropriation from the State exchequer or from personal property of the king, or from the resources of the State, (c) conspiracy by officers of the State, including ministers, and (d) other heinous offences committed by citizens. Death penalty for offences against security of State were awarded, not strictly as a mark of justice but rather as a measure of policy or expediency where no chances could be taken. A liberal view in these matters could geopardise the security of the State.

The offence of breach of secrecy, which is, in otherwords, the same thing as spying against the State is punishable with death. The offence of embezzlement from the State

treasury, if committed by the treasurer entails death penalty. The other offences which carried death penalty are misappropriation or conversion of the personal belongings of the sovereign and involvement of officers of State in the offence of disposing of any jewel extracted from mines or sandal wood forests.

Artha Sastra contained provisions for death penalty on officers of State, when suspected to be conspirators or otherwise guilty of breach of loyalty to the sovereign. Death to such suspects had to be brought about only by diplomatic manoeuvring and rather in a clandestine way. It also prescribed death penalty for clandestine deaths, which resemble our modem day fake encounters by police.

The thugs and cheats in places of pilgrimage would reap death penalty on their fourth offence. Persons guilty of rape, abduction or of keeping others in wrongful confinement, or those who cause grievous hurt to others by the offence of deprivation of members of the body, like nose or ear and those who kill the horses or elephants of the king or steal such chattels or chariots or those who have trespassed on places of public resort, would also meet death penalty. Causing the death of a virgin below the age of menstruation is offence entailing death penalty. Letting out a prisoner from the prison would entail penalty, of confiscation of the property and death also. Assault on a woman by a prisoner and cohabitation committed by a sudra man with a Brahmin lady also carried the death penalty. Death caused in a scuffle called for death penalty with torture, but if death of the victim did not take place immediately and he died within seven days then the penalty would be death without torture.

The Artha Sastra prescribed death penalty for murder even if it occured in a quarrel or duel. Hanging was the penalty for spreading false rumours, house-breaking and stealing the king’s horses and elephants. For offences against the State, for murdering one’s father and mother or committing serious arson Capital Punishment was given in varied forms, namely roasting alive, drowning, trampling by elephants, devouring by dogs, cutting into pieces, impalement etc.,

For rape, threat to kill, abduction and wrongful confinement, death was given by crucifixion. The other offences which carried death penalty by crucifixion were tresspass on places of public resort, causing grievous hurt, stealing king's chattels and chariots etc., For committing arson death penalty was executed by burning. The person guilty of damaging a bridge or obstruction of a water course would be drowned. Causing death by poison was also punished by drowning. Women were not exempted from death penalty. But, if a woman was found to be pregnant, her execution would be postponed till one month after her delivery. This provision was clearer than the provision of Criminal Procedeure Code. The woman guilty of killing her husband, or her offsprings, or committing arson, or causing the death of any person by poisoning would be crushed to death by cows.

It is notable that the Artha Sastra is not a penal code and naturally lacks a coherent schematization of offences and their penalties of death mentioned therein are not to be taken as exhaustive but only illustrative. They are meant to set guidelines for the sovereign having most of the things to be determined by discretion of the sovereign: and the penalty of death attached to so many offences do not at all seem to be imperative.

In Buddhists texts also references to death penatly were found. Even a compassionate king like Emperor Ashoka postulated death penalty for a number of heinous crimes, though General Amnesty existed. Idu Batuta, in his writings painted the picture of India, as it was in the 14th century, pointed out that Capital Punishment was in vogue for the offences of moral turpitude. Even members of the Royal family were dealt with like ordinary men.

3.12 THE MUSLIM PERIOD:

Muslim period marks the beginning of a new era in the legal history of India. The social system of Muslims was based on their religion, Islam, which may be described as a reformist version of seventh century Arabian practice. Muslims after conquering

India imposed their criminal law on Hindus, whom they conquered. Consequenly, before the advent of the British, the Mohammedan Criminal Law was prevailing in India.

3.13 THE ORIGIN AND NATURE OF MOHAMMEDAN CRIMINAL LAW:

The primary basis of Mohammedan criminal law was believed to be of divine origin. But, the laws of Quran were found inadequate to administer justice. When Quran was found inadequate, so to fulfil the want of large and civilised community there was introduced the "Sunna" or rules of conduct deduced from the oral precepts, actions and decisions of the Prophet. These authentic traditions were taken to be the seond authority of Mohammedan law and were regarded as conclusive in cases which were not expressly provided by the Quran. The third source of legal authority received by the "Sunnies" was the concurrence of the companions of Muhammed and failing this they took the aid of analogy asthe fourth source. "Analogy" is a vast scattered mass of material codified after the death of the Prophet,according to the ideas and opinions of four great Muslim Jurists.

The traditional Muslim Criminal Law broadly classified crimes under three heads: (i) Crimes against God, (ii) Crimes against sovereign and (iii) Crimes against private individuals. The first category includes such crimes as apostacy, drinking intoxicating liquors, adultery etc., The second category consists of crimes such as theft, highway robbery and robbery with murder and the like. The third category includes such offences as murder, maiming etc., i.e., offences against human body. Accordingly,the Muslim Criminal Law arranged punishments for various offences into four categories., namely Qisa retaliation, Diya or blood money, Hadd or fixed penalties and Tazir or discretionary punishments.

Before proceeding into the details, it would be convenient to have a clear idea about the conception and classification of Homicide under Muslim Law. Homicide under Muslim Law was classified under the following heads:

1) Homicide in prosecution of war against hostile Muslims for the advancement of Islam. 2) Homicide in support of Mussalman community 3) Homicide of an apostate Muslim 4) Homicide of an insurgent against the rightful Imam 5) Homicide of a person who resists the established government openly 6) Homicide of a condemned

criminal and 7) Homicide of a murderer by a person who was legally entitled to retaliate are lawful and justifiable.

Leaving these instances, the Muhammedan Criminal Law recognised the general legality of putting another person to death, if necessary, for the prevention of evil, and safety of the community. Capital Punishment could be imposed on persons who violently disturb the public peace, highway robberers, persons committing arson, persons who commit extortions under the pretext of collecting public taxes, false informers and generally on all habitual ill-doers who made practice of committing offences injurisous to society. But, this infliction of death upon a criminal by a private individual was only justified if the criminal was in the act of committing the crime: after the completion of the offence, only a competent official was authorised to'punish the offender.

Besides these there were five kinds of homicides under Mohammedan Law.

1. Qatl-i-Amd: It literally means wilful homicide and implies intention to kill followed by a voluntary act. It entitles the aggrieved person to demand Qisa. The right of retaliation being considered as a private right, the possessors of the right were at liberty to remit their claim, and forgive the offender: or to compound,with the consent of the murderer for compensation.

2. Diya or Blood-money: Diya meant blood money. In cases of homicide Qisa could be exchanged for money. The murderer paid some money to the legal heir of the victim, so that the avenger would not retaliate.So, practically, the punishment of Diya was a corollary to the punishment of Qisa. The blood-money was fixed by law, for man it was 3333-5-4 Dinars and for causing the death of a woman it was half the amount. Curiously, there was no difference between the compensation for the death of a Muslim and a non-Muslim.

3. Hadd: In the case of Hadd, the law prescribed and fixed the penalties for certain offences. In otherwords it meant boundary or fixed limit of punishment with reference to the right of God or to Public Justice. In suchoffences the Judge was not free to use either Qisa or Diya or his discretion but he was required to pass asentence according to the provisions of law.

4. Tazir: Tazir means discretionary punishment. Offences for which no punishment was prescribed were left to the discretion of the Judges to give any sort of punishment from imprisonment and banishment to public exposure. The circumstances of each case determined the Tazir. In these cases the king had the right called"Right of Siyasat" to punish the guilty in the interest of public justice.

Akbar's ideas of justice may be gathered from his instructions to the Governor of Gujarat that he should not take away life till after the most mature deliberations. In his times the death sentence was awarded but itwas not accompanied with mutilation or other cruelty except in cases of grave sedition. This sentence was to be confirmed by the Emperor The exemplary justice by the Mughal Emperor Jehangir in India who ruled from 1605 to 1627 was an illustration of the law of "life for life" as an institutional punishment in the 17th Century.

The Emperor applied this principle in his own case, by offering himself to be killed in the hands of a lady who was bereaved of her husband by an arrow at the hands of empress Noor Jahan. This incident is quoted with historical veracity.

A codified system of penal law never appeared even in Mughal period: and death penalty for heinous offences continued to be part of criminal justice, though history from times of Manu to the Mughal has failed to provide any known instance of regularly staged criminal trial. Aurangazeb the last of the five great Mughalrulers is known to have executed death penalty on Tej Bahadur Singh, the ninth percepter of the Sikh religion.Two of he sons of tenth preceptor of the Sikh religion, namely Guru Gobind Singh, were put to death, by plastering them inside a wall, but all the three instances of death penalty were founded on religious and political motives and fail to provide any clue to any settled system of law and procedure providing for trial of offences calling for penalty of death. Otherwise, under the dictates of anger and passion Aurangazeb never issued orders of death.

3.14 BRITISH PERIOD:

Warren Hastings adopted the principle of non-interference with Mohammedan Penal Law as long as it would not affect the authority of the Government and the interests of the

society. It soon appeared however, that some of the provisions of the Mohammedan Penal Law were of such a nature that the East India Company could not allow their continuance on grounds of humanity and justice.

Mohammedan Criminal Law prescribed death penalty and also other cruel punishments."The Mohammedan Criminal Law was open to every kind of objection. It was occasionally cruel. It was frequently technical, and it often mitigated the extravagant harshness of its provisions by rules of evidence which practically excluded the possibility of carrying them into effect." Nevertheless, in some respects, undoubtedly, the Mohammedan Law was superior to the English Criminal Law of that period which was still rude and crude, and far from perfect. English law would hang a man for stealing trivial things, but in Bengal a thief could never be capitally punished. In prescribing the severest punishment for crimes against person, it was far in advance of the English Criminal Law of the eighteenth century which punished offences against property with much greater severity.

It is noteworthy to observe that Hastings who boasted that he intended to preserve the native law and commented upon Mohammedan Penal Law as barbarious and inhuman was the instrument behind the execution of Raja Nand Kumar, who was falsely implicated in a bribery charge for the sin of bringing corruption and bribery charges agains Hastings. The English Act of forgery under which Nand Kumar was convicted had never been formally promulgated in Calcutta and the people could not be expected to know anything about it. The Hindu or the Muslilm law never regarded forgery as a capital offence. To sentence an Indian to death under these circumstances by applying literally an obscure English law, was nothing short of miscarriage of justice.

However, it is Cornwallis who brought substantial changes in the Criminal Law by making the following amendments:

(a) Intention of homicide was to be determined from general circumstances and proper evidence, and not from the nature of the instrument employed.

(b) The discretion left to the next of the kin of a murdered person to remit the penalty of death on the murderer was taken away, and the law was to take its course

upon all persons convicted thereof without any reference to the will of the relatives of the deceased.

The famous Cornwallis Code provided that in cases of murder the following circumstances were not to bar the trial or condemnation of the prisoner.

(i) refusal of the heir to prosecute,

(ii) non-appearance of the heir within a reasonable time and

(iii) legal incompetency, e.g., minority of the heir to prosecute.

In any of these circumstances, the case was to be conducted and sentence was to be passed on the supposition that the deceased had no heir or that the heir had been present at the trial and did prosecute.

In 1797 further changes were brought in the law of homicide. The law officers were directed to give their "fatwas" in all cases of wilful murder on the assumption that Qisa was claimed, even when it was not, and the sentence might extend upto death. In other kinds of homicide, if the Mohammedan Law prescribed the payment of the fine of blood, the judges were directed to commute the punishment to imprisonment which could extend to life imprisonment.

In 1799 the political awareness in Indians caused the making of another Regulation which was the first measure on the offence of treason and which penalised this offence. In the same year justifiable homicides under Mohammedan Law were also regarded as opposed to public justice, and all such cases were declared liable to Capital Punishment. The capital sentence was also prescribed in cases of homicide which were previously exempted from retaliation on some flimsy and superstitious grounds like the prisoner being one of the ancestors of the slain, or being the master of the slave if the deceased was a slave, or on the plea that the deceased desire to be put to death.

The next reform came in 1802 when infanticide - the practice of destroying children by throwing them into water which was practised partly from economic reasons but

also from a belief in its efficacy as a stimulant to the fertility of the mother - and which was not sanctioned by the Hindu Law, nor countenanced by the religious orders or by.the people at large, nor was it at any time authorised by the Hindu or Mohammedan Governments of India - was declared to be wilful murder and on conviction to be liable to the punishment of death, and same punishment was to be inflicted on all the abettors and accomplices, notwithstanding any contrary fatwa of the law officers.

Regulation VI of 1832 marked the end of the Mohammedan Penal Law as a general system of law applicable to all persons in the country, excepting "British subjects". The period of horror of the Mutiny of 1857, being over Act XXVI of 1858 was enacted with a view to discouraging a recurrence. Under this Act, collecting men, arms, ammunition, or otherwise preparing to levy war against the State or instigating, or aiding in the commission of that offence was made laible to the punishment of death, or to the punishment of transportation of life, or of imprisonment with hard labour for a term not exceeding fourteen years.

Ultimately, the Indian Penal Code was passed in 1860. The provision regarding Capital Punishment under this code are discussed separately.

3.15. THE MOVE TO ABOLISH DEATH PENALTY IN INDIA:

After the Indian Penal Code came into force attempts were made both before and after independence for abolition of death penalty. In 1931 Gaya Prasad Singh introduced a Bill and a motion for its circulation was negatived after the reply by the then Prime Minister Sir James Crerar.

The mover in support of his motion, cited the examples of other countries which had abolished the death sentence, pointing out that the abrogation of death penalty had not landed human society into chaos, and argued that Capital Punishment had a demoralising effect on the human mind. The dangers of conviction of innocent persons and misery caused to the wife and children of the condemned mart were also dealt upon.

The Home Minister, however, in his reply supported death penalty on the ground that in many countries death sentence had been restored after abolition: Secondly, he pointed out that in the abolition countries, the enactments abolishing death sentences were made after a very long period of experiment: Thirldy, he argued that in his experience as Home Minister and from the familiarity he had gained with homicides throughout the length and breadth of India, he could recite to the House "Crimes of so dreadful character that one is presented with the very pressing question whether in cases if that kind any punishment other thn Capital punishment could on any theory of crime be regarded as the proper punishment." Fourthly he also stated that the Indian law was more elastic than Englsih law, as it empowered the Courts to pass an alternative sentence. In this connection, he stated "it is my experience, both as an official in Local Government and as an official and a Member of the Government of India, that discretion is very frequently, and I think on the whole, very wisely and judiciously exercised."

In Independent India in 1952 Sri A. Kazmi moved a Bill to amend Section 302 of Indian Penal Code in such a way to abolish death penalty. But, later the Bill was withdrawn without much discussion. Subsequently, Bills and resolutions were introduced in Parliament in 1956, in 1958 and in 1961 for abolition of death penalty. All these attempts failed, but, provided a ground for discussion over death penalty. Sri Raghunath Singh's resolution for the abolition of Capital Punishment was discussed in the Lok Sabha, in 1962 and later it was withdrawn after discussion. However, a decision was taken to refer the matter to the Law Commission. The Government gave an assurance that a copy of the discussion that took place in the House would be forwarded to the Law Commission, which was seized of the question of examining the Code of Criminal Procedure and the Indian Penal Code, with a view to considering as to whether any changes are necessary therein.

Thereafter, in 1963, a question, was put in the Rajya Sabha on the subject In the answers to the supplementaries on the question Government gave an assurance that a

copy of the debates that had taken place in the Rajya Sabha in 1961 on the resolution of Smt. Savitri Devi Nigam would be forwarded to the Law Commission. Government kept its promise by sending copies of Debates in the Lok Sabha as well as in Rajya Sabha to the Law Commission. As to the resolution of Sri Raghunadh Singh, Dr. L.M. Singhvi, had moved an amendment to the effect that the original resolution be substituted by one that the Government should take immediate steps to set up a commission consisting of eminent lawyers, judges and Members of the House of Parliament to consider the desirability of enacting legislation for the abolition of Capital Punishment in India. Sri. H.
C. Mathur moved amendment to the effect that the question regarding the abolition of Capital Punishment be referred to the Law Commission. Sri Bede also moved an amendment to the effect that a committee of eleven members consisting of legal experts and members of Parliameant be appointed to investigate and report under what circumstances the Capital Punishment could be abolished.

The Legislative move having, thus, ended with the resolution, of Sri Raghunath Singh, the matter was taken up during Gandhi Centenary year, when the Government decided to commute the death sentence of condemned prisoners into sentence of life imprisonment. In replay to a question raised, in the Rajya Sabha, on March 12, 1969 by Ganesh Lai Chaudhary, whether Government had ordered to commute the death sentence during the Gandhi Centenary year, the Home Minister, Y.B. Chavan, stated on floor of the House that in connection with the Gandhi Centenary year, it had been decided that in respect of death sentences awarded by Court, the President would exercise his prerogative of mercy in the case of all prisoners against whom the death sentence had been awarded on or before the 12th November, 1968, and commute the death sentence in each case to one of imprisonment for life.

3.16 CONCLUSION:

Capital Punishment existed in England since 450 B.C. In tenth century Britain mutilation also appeared on the scene. Canute’s rule was blessed with peace without any executions. But, Rufus reintroduced Capital Punishment. By the end of fifteenth

century eccelesiastical courts stared punishing people spiritually. Every literate claimed the benefit of clergy. Inspite of this, the number of capital offences in England rose to 220 but in the course of time they were reduced to thirty two in all. The starting point for abolition of Capital Punishment in England was the year 1764, with Cesare Beccaria's essay on Crimes and Punishment. With the efforts of Bentham and Romily the ideas of Beccaria seeped into the English thought. Mackintosh, Ewart and John Russel were instrumental for the abolition move.

Criminal Law was not uniform throughout America. Every Colony had its own law though the variation is slight. Though technically thirty-one crimes carry death penalty only seven crimes have actually been punished with death. Benjamin Rush, influenced by Beccaria's essay started the movement towards the abolition of Capital Punishment. Livingston further carried the movement of abolition. Nine States in America abolished Capital Punishment completely. In other states it still exists.

In India, the Hindu Era and Mughal Regime saw Capital Punishment being imposed quite liberally. After the British stepped in the number of capital offences reduced substantially. In 1860, the Indian Penal Code was enacted. It prescribed death penalty only for eight categories of offences. Prior to Independence and after Independence also several motions were moved in both the houses for the abolition of Capital Punishment, 35th Law Commission was appointed to study the matter in detail. Neither the Legislature not the Law Commision felt that the time is ripened for the abolition.

CHAPTER IV
CAPITAL PUNISHMENT IN INDIA BEFORE AND AFTER INDEPENDENCE IN INDIA

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4.1 CAPITAL PUNISHMENT IN INDIA

Capital punishment is a legal penalty in India. It has been carried out in nine instances since 1995, while a total of thirty executions have taken place in India since 1991, the most recent of which were carried out in 2020.

The Supreme Court in Mithu vs. State of Punjab struck down Section 303 of the Indian Penal Code, which provided for a mandatory death sentence for offenders who committed murder whilst serving a life sentence. The number of people executed in India since the nation achieved Independence in 1947 is a matter of dispute; official government statistics claim that fifty-two people had been executed since Independence. However, research by the People's Union for Civil Liberties indicates that the actual number of executions is in fact much higher, as they located records of 1,422 executions in the decade from 1953 to 1963 alone. Research published by National Law University, Delhi on death row convicts since 2000 had found that of the 1,617 prisoners sentenced to death by trial courts in India, capital punishment was confirmed in only seventy-one cases. NLU Delhi confirmed 755 executions in India since 1947. National Law University, Delhi examined 1,414 prisoners who were executed, in the available list of convicts hanged in post-Independence since 1947. According to a report of the Law Commission of India (1967), the total number of cases in which the death sentence was handed down in India from 1953-63 was 1410.

In December 2007, India voted against a United Nations General Assembly resolution calling for a moratorium on the death penalty. In November 2012, India again upheld its stance on capital punishment by voting against the UN General Assembly draft resolution seeking to end the institution of capital punishment globally. 33

On 31 August 2015, the Law Commission of India submitted a report to the government which recommended the abolition of capital punishment for all crimes in India, excepting the crime of waging war against the nation or for terrorism-related

offences. The report cited several factors to justify abolishing the death penalty, including its abolition by 140 other nations, its arbitrary and flawed application and its lack of any proven deterring effect on criminals.

4.2 HISTORY:

In colonial India, death was prescribed as one of the punishments in the Indian Penal Code, 1860 (IPC), which listed a number of capital crimes. It remained in effect after independence in 1947. The first hanging in Independent India was that of Nathuram Godse and Narayan Apte in the Mahatma Gandhi assassination case on 15 November 1949.34

Under Article 21 of the Constitution of India, no person can be deprived of his life except according to procedure established by law.

Bachan Singh vs. State of Punjab (1980) The Constitution Bench judgment of Supreme Court of India in Bachan Singh vs. State of Punjab (1980) (2 SCC 684) made it very clear that Capital punishment in India can be given only in rarest of rare cases. This judgement was in line with the previous verdicts in Jagmohan Singh vs. State of Uttar Pradesh (1973), and then in Rajendra Prasad vs. State of Uttar Pradesh (1979). The Supreme Court of India ruled that the death penalty should be imposed only in "the rarest of rare cases." While stating that honour killings fall within the "rarest of the rare" category, Court has recommended the death penalty be extended to those found guilty of committing "honour killings", which deserve to be a capital crime. The Supreme Court also recommended death sentences to be imposed on police officials who commit police brutality in the form of encounter killings.

An appeal filed in 2013 by Vikram Singh and another person facing the penalty of the death sentence questioned the constitutional validity of Section 364A of the Indian Penal Code.

4.3 OTHER LEGISLATION:

In addition to the Indian Penal Code, a series of legislation enacted by the Parliament of India have provisions for the death penalty.

Sati is the burning or burying alive of any widow or woman along with the body of her deceased husband or any other relative or with any article, object or thing associated with the husband or such relative. Under The Commission of Sati (Prevention) Act, 1987 Part. II, Section 4(1), if any person commits sati, whoever abets the commission of such sati, either directly or indirectly, shall be punishable with death. Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, 1989 was enacted to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes. Under Section 3(2)(i) of the Act, bearing false witness in a capital case against a member of a scheduled caste or tribe, resulting in that person's conviction and execution, carries the death penalty. In 1989, the Narcotic Drugs and Psychotropic Substances Act, 1985 was passed which applied a mandatory death penalty for a second offence of "large scale narcotics trafficking".

In recent years, the death penalty has been imposed under new anti-terrorism legislation for people convicted of terrorist activities. On 3 February 2013, in response to public outcry over a brutal gang rape in Delhi, the Indian Government passed an ordinance which applied the death penalty in cases of rape that leads to death or leaves the victim in a "persistent vegetative state". The death penalty can also be handed down to repeat rape offenders under the Criminal Law (Amendment) Act, 2013. 35

In January 2014, a three-judge panel headed by Chief Justice of India Palanisamy Sathasivam commuted sentences of 15 death row convicts, ruling that the "inordinate and inexplicable delay is a ground for commuting death penalty to life sentence". Supreme Court of India ruled that delays ranging from seven to 11 years in the disposal of mercy pleas are grounds for clemency. The same panel also passed a set of guidelines for the execution of a death row convict, which includes a 14-day gap from the receipt of communication of the rejection of the mercy petition[33] to the scheduled execution date, after going through the Shatrughan Chauhan vs. Union of India case. Subsequently, in February 2014, Supreme Court commuted death sentence of Rajiv Gandhi's killers on the basis of 11-year delay in deciding on mercy plea. It was subsequently commuted to life imprisonment. In March 2014, Supreme Court of India commuted death sentence of Devinder Pal Singh Bhullar, convicted in a 1993 Delhi bombings case, to life imprisonment, both on the ground of unexplained/inordinate delay

of eight years in disposal of mercy petition and on the ground of insanity/mental illness/schizophrenia.

4.4 CURATIVE PETITION:

The concept of Curative petition was evolved by the Supreme Court of India in the matter of Rupa Ashok Hurra vs. Ashok Hurra and Anr. (2002) where the question was whether an aggrieved person is entitled to any relief against the final judgement/order of the Supreme Court, after dismissal of a review petition. The Supreme Court in the said case held that to prevent abuse of its process and to cure gross miscarriage of justice, it may reconsider its judgements in exercise of its inherent powers.

4.5 CAPITAL OFFENCES

Section under IPC or other law	*Nature of crime*
120B of IPC	*Being a party to a criminal conspiracy to commit acapital offence*
121 of IPC	*Waging war against India*
132 of IPC	*Abetting a mutiny in the armed forces (if a mutinyoccurs as a result), engaging in mutiny*
194 of IPC	*Giving or fabricating false evidence with intent to procure a conviction of a capital offence*
302, 303 of IPC	*Murder*
305 of IPC	*Abetting the suicide of a minor*
Part II Section 4 of The Commission of Sati (Prevention) Act, 1987	*Aiding or abetting an act of Sati*
364A of IPC	*Kidnapping, in the course of which the victim was held for ransom or other coercive purposes.*
31A of the Narcotic Drugs and Psychotropic Substances Act, 1985	*Drug trafficking in cases of repeat offences*
376AB of IPC; 42 of Protection of Children from Sexual Offences Act, 2012 (POCSO) and Criminal Law (Amendment) Act, 2013	*Rape and gang rape of a girl under 12 years of age*
396 of IPC	*Dacoity with murder – in cases where a group of five or more individuals commit dacoity and one of them commits murder in the course of that*

	crime, all members of the group are liable for the death penalty.
376A of IPC and Criminal Law (Amendment) Act, 2013	*Rape if perpetrator inflicts injuries that result in the victim's death or incapacitation in a persistent vegetative state,or is a repeat offender.*
Bombay Prohibition (Gujarat Amendment) Act, 2009	*In Gujarat only – Manufacture and sale of poisoned alcohol which results in death(s).*

4.6 POWER OF THE PRESIDENT

The present day constitutional clemency powers of the President and Governors originate from the Government of India Act 1935 but, unlike the Governor General of India, the President and Governors in independent India do not have any prerogative clemency powers. 36

In V. Sriharan and Murugan v. Union of India, (2014) 4 SCC 242 the Supreme Court reiterated that the clemency procedure under Article 72/161 provides a ray of hope to the condemned prisoners and his family members for commutation of death sentence into life imprisonment and, therefore, the executive should step up and exercise its time honoured tradition of clemency power of guaranteed in the constitution one way or the other within a reasonable time. Profuse deliberation on the nature of power under Article 72/161 of the Constitution has already been said in Shatrughan Chauhan.

4.7 CONSTITUTIONAL POWER

Article 72(1) of the Constitution of India states:

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

(a) in all cases where the punishment or sentence is by a Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death.

4.8 EXECUTION OF DEATH SENTENCE:

The execution of death sentence in India is carried out by hanging by the neck until death.

The Code of Criminal Procedure (1898) called for the method of execution to be hanging. The same method was adopted in the Code of Criminal Procedure (1973). Section 354(5) of the above procedure reads as "When any person is sentenced to death, the sentence shall direct that the person be hanged by the neck till the person is dead." The hanging method is long drop, the method devised by William Marwood in Britain. The person has their neck snapped as they fall through the trapdoor and is left hanging until they are dead.

As of 2011, only two people had been hanged over the previous 15 years and there was no longer a professional hangman to be found. 8 men have been hanged so far in the 21st century, most recently in 2020. The convicts of the Nirbhaya case were hanged till death at 5:30 am IST on 20 March 2020.

SHOOTING

The Army Act, The Navy Act and The Air Force Act also provide for the execution of the death sentence. Section 34 of the Air Force Act, 1950 empowers the court martial to impose the death sentence for the offences mentioned in section 34(a) to (o) of The Air Force Act, 1950. Section 163 of the Act provides for the form of the sentence of death as:-

"In awarding a sentence of death, a court-martial shall, in its discretion, direct that the offender shall suffer death by being hanged by the neck until he be dead or shall suffer death by being shot to death."

This provides for the discretion of the Court Martial to either provide for the execution of the death sentence by hanging or by being shot to death. The Army Act, 1950, and The Navy Act, 1957 also provide for the similar provisions as in The Air Force Act, 1950.[19]

[19] https://en.wikipedia.org/wiki/Capital_punishment_in_India

4.7 DEATH PENALTY IN INDEPENDENT INDIA

At least 100 people in 2007, 40 in 2006, 77 in 2005, 23 in 2002, and 33 in 2001 were sentenced to death (but not executed), according to Amnesty International figures. No official statistics of those sentenced to death have been released.

About 26 mercy petitions are pending before the president, some of them from 1992. These include those of Khalistan Liberation Force terrorist Devinder Pal Singh Bhullar, the cases of slain forest bandit Veerappan's four associates—Simon, Gnanaprakasham, Meesekar Madaiah and Bilvendran—for killing 21 policemen in 1993; and Praveen Kumar for killing four members of his family in Mangalore in 1994.

In June 2012 it became known that Indian president Pratibha Patil, near the end of her five-year term as president, commuted the death sentence of as many as 35 convicts to life imprisonment, including four on the same day (2 June), which created a storm of protest. This caused further embarrassment to the government when it came to light that one of these convicts, Bandu Baburao Tidke—convicted for the rape and murder of a 16-year-old girl—had died five years previously from HIV.

There have been calls for the introduction of the death penalty for rapists and molesters, especially since an infamous 2012 Delhi gang rape case and later crimes.

NOTABLE INDIVIDUALS EXECUTED AND FACING EXECUTION

Seema Gavit and Renuka Shinde are the only two women in India on death row, whose mercy pleas were rejected by the President after the Supreme Court of India confirmed their death sentence.

As of July 2015, President Pranab Mukherjee had rejected 24 mercy pleas including that of Yakub Memon, Ajmal Kasab, Afzal Guru.

On 27 April 1995, Auto Shankar was hanged in Salem Central Jail at Salem, Tamil Nadu. On 14 August 2004, Dhananjoy Chatterjee was hanged for the murder (following a rape) of 14-year-old Hetal Parekh at her apartment residence in Bhowanipore, West Bengal on 5 March 1990. Chatterjee, whose mercy plea was rejected on 4 August 2004, was kept at Alipore Central Jail in Kolkata, West Bengal for nearly 14 years.

In 1997, Mahendra Nath Das was sentenced to death. He was infamous for having surrendered to police while holding a sword and the severed head of his murder victim. In 2013, the Supreme Court commuted his sentence to life in prison.

On 3 May 2010, a Mumbai Special Court convicted Ajmal Kasab of murder, waging war against India, possessing explosives and other charges. On 6 May 2010 the same trial court sentenced him to death on four counts and to a life sentence on five other counts. Kasab was sentenced to death for attacking Mumbai and killing 166 people on 26 November 2008 along with nine other Pakistani terrorists. He was found guilty of 80 offences, including waging war against the nation, which is punishable by death. Kasab's death sentence was upheld by the Bombay High Court on 21 February 2011. and by the Supreme Court on 29 August 2012. His mercy plea was rejected by the president on 5 November and the same was communicated to him on 12 November. On 21 November 2012, Kasab was hanged in the Yerwada Central Jail in Pune, Maharashtra.

Afzal Guru was convicted of conspiracy in connection with the 2001 Indian Parliament attack and was sentenced to death. The Supreme Court of India upheld the sentence, ruling that the attack "shocked the conscience of the society at large." Afzal was scheduled to be executed on 20 October 2006, but the sentence was stayed. He was hanged on 9 February 2013 at Delhi's Tihar Central Jail.

Yakub Memon, convicted of 1993 Bombay bombings, was executed by hanging in Nagpur Central Jail at Nagpur, Maharashtra at around 6:30 am IST on 30 July 2015. On 21 March 2013 the Supreme Court confirmed Memon's conviction and death sentence for conspiracy through financing the attacks. On 30 July 2013 the Supreme Court bench headed by Chief Justice P. Sathasivam, Justice B. S. Chauhan and Justice Prafulla Chandra Pant rejected Memon's application for an oral hearing and dismissed his review petition by circulation. Indian President Pranab Mukherjee rejected Memon's petition for clemency on 11 April 2014. Memon then filed a curative petition to the

Supreme Court, which was rejected on 21 July 2015. He became the first convict in 31 years to be hanged in Nagpur Central Jail and the fourth in India since 2004. On 5 March 2012 a sessions court in Chandigarh ordered the execution of Balwant Singh Rajoana, a convicted terrorist from Babbar Khalsa, for his involvement in the assassination of Chief Minister of Punjab Beant Singh. The sentence was to be carried out on 31 March 2012 in Patiala Central Jail, but the Centre stayed the execution on 28 March due to worldwide protests by Sikhs that the execution was unfair and amounted to a human rights violation.

The four adult perpetrators Akshay Thakur, Vinay Sharma, Pawan Gupta and Mukesh Singh of the infamous 2012 Delhi gang rape who survived to trial were sentenced to death by hanging on 13 September 2013. They were executed at 5:30 a.m. on 20 March 2020, after a lengthy legal battle. [20]

4.8 NCRB AND ACHR STATISTICS

<table>
<tr><th>Year</th><th>Sentences given</th><th>Sentences commuted to life</th><th>Executed</th><th>Convict</th><th>President</th><th>Ruling Party/Alliance</th></tr>
<tr><td>2001</td><td>106</td><td>303</td><td>0</td><td></td><td>K. R. Narayanan</td><td rowspan="3">National Democratic Alliance</td></tr>
<tr><td>2002</td><td>126</td><td>301</td><td>0</td><td></td><td rowspan="4">A. P. J. Abdul Kalam</td></tr>
<tr><td>2003</td><td>142</td><td>142</td><td>0</td><td></td></tr>
<tr><td>2004</td><td>125</td><td>179</td><td>1</td><td>Dhananjoy Chatterjee</td><td rowspan="2">United Progressive Alliance</td></tr>
<tr><td>2005</td><td>164</td><td>1241</td><td>0</td><td></td></tr>
</table>

[20] https://en.wikipedia.org/wiki/Capital_punishment_in_India

2006	129	1020	0			
2007	186	881	0		Pratibha Patil	
2008	126	46	0			
2009	137	104	0			
2010	97	62	0			
2011	117	42	0			

The Death penalty is a process, where the life of a person is taken by the State by following the due procedure of law. Capital punishment is, in all cases, given for the most heinous of crimes. During recent times, there has been a global trend to abolish the capital punishment. However, India has yet not abolished the capital punishment (though the Court awards the capital punishment in rarest of the rare case). What makes the capital punishment a unique form of punishment is the nature of irreversibility attached to it. If any error has been committed to awarding the death penalty, it cannot be undone after the person has been executed. (Many people give this argument for abolishing the capital punishment.)[21]

Although the death penalty has existed from time immemorial, the movement to abolish it has gained a lot of momentum in the recent times. This movement can be traced back to the works Of one of the great criminologist named Cessare Beccaria, who convinced many people that death penalty should be abolished because it is inhuman, useless and technically speaking, a public assassination. In the year 1846, Michigan became the first State to abolish the capital punishment, followed by Portugal and

[21] https://blog.ipleaders.in/capital-punishment-india-overview/

Venezuela in 1867. Abolition of the death penalty was also supported by the United Nations during the drafting of Universal Declaration of Human Rights in the year 1948.

Around the world, 58 countries still practice awarding the capital punishment. 102 countries do not award capital punishment for any crime, i.e. total abolition. According to the reports of Amnesty International China, Iraq, and Iran have awarded highest number of death penalties in the recent years. In Europe, the death sentence has been almost abolished completely, except The Republic of Belarus retaining it.

4.9 POSITION IN INDIA

Article 21 of the Indian Constitution states that no person shall be deprived of his life and liberty except according to the procedure laid down by law. Under Article 21, every person has the Right to Life which has been guaranteed by the Constitution.

The Indian Penal Code, 1860 provides for the provision of a death sentence for various offenses like criminal conspiracy, murder, waging war against the nation, dacoity and murder, etc. Various other legislations like the NDPS ACT and Unlawful Activities Prevention Act also provides for the death penalty.

Under Article 72, the Constitution has created a provision for clemency of capital punishment. Under this Article, the President of India has the power to grant pardon, or commute or remit the death sentence in certain cases. Similarly, Article 161 provides for powers of the Governor of the State to grant clemency. Also, when a Sessions Court awards the capital punishment, it must be confirmed by the High Court of the particular state, and then only the execution can be carried out.

These measures are necessary so as to remove any room for error. These days, awarding life sentence has become the rule, and death penalty an exception, which is awarded only in the rarest of the rare case. The case of Jagmohan Singh v State of U.P Was the first case in which the court had the opportunity to discuss the Constitutionality of capital punishment. The council for the appellant put forth the

argument that capital punishment takes away all the rights guaranteed under Article 19 (1) of the Constitution. The second argument which was given that the discretion of which capital punishment was awarded did not follow any fixed standard or policy. Thirdly it was argued that this unguided and unfettered discretion violated Article 14 of the constitution, which guarantees equality before the law. It was stated that in many cases, the situation arose that where two individuals had committed a murder, one was awarded the capital punishment, and other was awarded life imprisonment. The last argument which was put forward was that the law does not provide any guidelines which considers different factors and circumstances while awarding death penalty or life imprisonment.40

4.10 LAW COMMISSION REPORT

A discussion on death penalty cannot be complete without taking into consideration the 36th Report of the Law Commission of India, which was submitted by the Law Commission in 1967.

The Report stated that the issue of abolition or retention of capital punishment should be decided after balancing the arguments given in favor and in against of death penalty. A single factor cannot decide the question of abolition or retention of death penalty in the country. The Report also vocally stated that the question of protecting the society must be given prime consideration while deciding the issue.

The Commission did consider the strong arguments given for abolition of capital punishment. They also considered the concept of irrevocability attached with the punishment of a death penalty. Nor did they ignore the fact that capital punishment was very severe, and a modern approach was required to deal with criminals. But considering the state of the nation, the Commission stated that, keeping in mind the way of upbringing of the citizen, the disparity level in educational and moral levels of the people, the vastness of the area, the diversity of the nation and the utmost need to preserve law and order, India cannot risk abolishing the capital punishment yet.

In the judicial pronouncement of Ediga Anamma v State of Andhra Pradesh, Justice Krishna Iyer commuted the death sentence of the accused to life imprisonment considering factors like gender, age and socio-economic background of the accused. In

this case, the Court laid out that apart from looking into the circumstances of the crime, the Court should also look into the condition of the accused. This case was followed by some important developments. Section 354 (3) was added to the Code of Criminal Procedure, 1973 which stated that in cases where capital punishment was being awarded, the Court has to give special reasons for it. This made life imprisonment a rule, and death penalty an exception, which was the other way round earlier.

In 1979, India also became a signatory to the International Covenant on Civil and Political rights (ICCPR). In the case of Rajendra Prasad v State of U.P the Apex Court, however, stated that the question whether capital punishment should be abolished or retained was a question for the Legislature and not for the Courts to decide.[22]

The case of Bachchan Singh v State of Punjab again brought up the question of the validity of capital punishment and in this case, the doctrine of "rarest of the rare" was formulated. The five Judge Bench stated that the taking of human life shouldn't be encouraged even in the form of punishment except in "rarest of the rare" cases where no alternative method can be used and is foreclosed.

When the validity of capital punishment was questioned, the bench (majority decision) opined that capital punishment did not violate either Article 19 or Article 21 of the Constitution. They also pointed out to the fact that the makers of the Constitution were fully aware that the capital punishment may be awarded in some cases, and it was proved by the existence of the provision of appeal and provision of pardoning powers of the President and the Governor. It was also laid down that mitigating, and aggravating factors should be considered while deciding the matter.

In the judicial pronouncement of Mithu v. State of Punjab, mandatory death sentence, under Section 303 Of IPC was declared unconstitutional and deleted from the IPC. This section was based on the logic that any criminal who has been convicted for life and has committed a murder while in custody is beyond reformation and do not deserve to live.

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[22] https://blog.ipleaders.in/capital-punishment-india-overview/

The case of Machchi Singh v State of Punjab elaborated the doctrine of “rarest of rare.” The Court gave guidelines regarding the things to be considered when deciding on the issue that whether the case falls under the category of “rarest of rare” or not.

The following are-

1. Manner of Commission of the Crime: The Court stated that if the crime were committed in extremely brutal and diabolic manners so that it arouses the intense indignation of the society, it’d fall under the rarest of the rare case. Some instances were given like when the house of the victim is set to flame with the objective to burn him alive, or the victim is subjected to inhuman cruelty and torture, or when the body of the victim is chopped and mutilated, it’ll be considered as a rarest of rare case.
2. Motive for Commission of the Crime: When the crime is committed in furtherance to betray the nation, or assassins are hired to kill the victim, or any deliberate design is made to kill the victim in a cold-blooded manner, it’ll also fall under the said category of rarest of the rare.
3. Magnitude of the Crime: When the crime is humongous in proportion, for example, killing all the members of the family or a locality is done.
4. Socially Abhorrent Nature of Crime:When the crime is such that it is socially abhorred, such as killing a person belonging to the backward classes of the community, or burning of a bride in case dowry wishes are not met, or murdering a woman to remarry again.42
5. Victim of the Crime: If the victim of the crime is a small child, who couldn’t have provided any reason to the accused to commit the crime, or the crime is committed against a helpless woman, or an old person, and if the victim was mentally challenged, or the victim was a public figure who was loved by the society, the crime will fall under rarest of the rare case.

In the case of Allauddin v State of Bihar, The Court stated that in case the Court was unable to give a special reason for awarding the capital punishment, the Court should go for a lower sentence. In the case of Kehar Singh v Union of India, Assassins of the then Prime Minister, Indira Gandhi, were sentenced to death. Kehar Singh was one

of the conspirators who took part in the planning of the murder but did not commit it. The Court stated that even this fell in the rarest of rare category.

The case of Santosh Kumar Bariyar v State of Maharashtra Can be considered one of the cases where a major step towards abolition of the death sentence was taken. In the following case, the accused along with three other people kidnapped a person and then demanded a ransom of 10 lac rupees. When the demands were not met, the kidnappers killed the victim and chopped his body into pieces and then disposed of the victim's body by throwing, the pieces are various locations. Although the manner in which the crime was committed was extremely brutal, the Court considered the mitigating factors and opined that the case was outside the ambit of "rarest of the rare" category. The reasoning of the Court was that the accused were not professional killers, and they committed the crime with the sole motive of collecting money. The Court opined that in such circumstances, there was a chance that they might be reformed and opted for the lesser punishment of life imprisonment.

In the year 2012, the judicial system had to suffer two major embarrassments. The first instance was when fourteen retired judges asked for thirteen cases of capital punishment to be commuted admitting that the capital punishment was awarded out of ignorance or

error in these cases. The second instance was where, the then President Pratibha Patil commuted the death penalty of a convict to like imprisonment, and it was later known that he had already died five years previously.[23]

After these incidents, the protest against awarding of capital punishment gained more momentum. In 2012, Ajmal Amir Kasab was executed by the State for his involvement in the Mumbai Terror Attack. Then in 2013, Mohd. Afzal, the mastermind of the 2001 Parliament Attack was also executed. The verdict of the Nirbhaya Rape case was also given in 2013 where the accused were awarded death sentence; this decision also reignited the debate regarding the death penalty.

[23] https://blog.ipleaders.in/capital-punishment-india-overview/

CHAPTER V
DOCTRINE OF RAREST OF RARE CASE

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To understand the principle of rarest of rare case is the main body of this research which only will conclude the objective of research. To understand this doctrine researcher had gone through many cases those are as:

In Rooper v. Simmons case Supreme Court prohibited the awarding of death penalty less than 18 year of age and sets minimum age of death penalty.

In Uttecht v. Brown case US Supreme court judgement was proved an exception regarding death penalty. Supreme Court in his judgement ordered for the formation of trial in two phases for death penalty. In its 1st trial the jurist will find whether or not the accused is guilty of crime of murder and in the another trial the jurist will decide whether to penalize guilty with death penalty is appropriate or not only if the accused proved guilty in 1st trial. As to award penalty Supreme Court requires to jury consider aggravating factors and that through the evidence presented in case which include aggravating and mitigating circumstances. It was also held that death penalty must be awarded in "the worst of worst murder case" and not routinely and that to will be judged on criminals violent past acts, if accused had long violent and criminal record or several people killed at the time of accused committed murder or murders. But if an accused is guilty of mitigating factor which are those in which the accused had never been convicted for any crimes in the past and the act that was done by him might not been significant, then he must not be punished with death penalty. Under Lockhart v. Mccree, Supreme Court judgment uphold the constitutionality of state procedure regarding the jurist of death qualified and it was held that the jurist who will sit in any part case related to capital punishment for the determination of guilt or innocence as well as to determine whether death penalty should be awarded or not must not be ideologically or religiously oppose to death penalty and these jurist will find the aggravating and migrating factor in that case and on that basis only death penalty should be awarded.

In landmark judgement on Texas Case of US in which Supreme Court restores the death penalty in 1976, through which 388 accused who had received the death penalty have been executed (Death Penalty When generate Death legally, 2007).

The Above cases were of United States but when we will have a look on Indian Cases we will find that: 44

Section 302 of Indian Penal Code, 1860 prescribe death penalty or life imprisonment as penalty for murder. It is not possible to hold that the provision of death penalty as an alternative punishment for murder is unreasonable and not in public interest. The deprivation of freedom consequence upon an order of conviction and sentence is not a direct and inevitable consequences of law but is merely incidental to the order of conviction and sentence is not a direct and inevitable consequences of the penal law but is merely incidental to the order of conviction and sentence which may or may not come into play, that is to say, which may or may be passed. Thus section 302 of Indian Penal Code does not have to stand the test of Article 19(1) of Constitution of India, 1950.

Supreme Court from Bacchan Singh V. State of Punjab improve the statue by the ruling that death penalty will be awarded only on rarest of rare crimes, where other remedy is unquestionable. Till 1970 constitutional court require to mention the reason behind awarding imprisonment for life rather than death sentence in capital offence.

In Jagmohan Singh v. State of Uttar Pradesh98 Supreme Court by supporting constitutionality of death penalty held it does not only prevent the crime but also it prevent the society. Honourable court also held that India could not take risk by experimenting with the abolition of death penalty but court clear a standard that death penalty will going to be an exception and not the rule in sentence. The circumstances of case will decide the awarding of capital punishment which is only to protect state security, public order and interest.

Therefore when we have a look on bare reading of Section 235 of Code of Criminal Procedure (Cr.PC) and Section 354 of Cr.PC it gave a right to accused for hearing of pre sentence under section 235(2) and compel the court to specify special reason for awarding death penalty rather for awarding death penalty rather than the alternative imprisonment for life section 354(3).45

In 1980 again the constitutionality of death penalty came as a question before court in Bacchan Singh v. State of Punjab Supreme Court emphasized on two question to be considered that:-

- Was there any uncommon about the crime?
- Circumstances of crime show its brutality to such an extent that accused must be penalized with death penalty.

After this emphasis court describes the doctrine of rarest of rare cases which require uncommon crime and brutal circumstances of crime. Also while interpretation of section 354(3) of Cr.PC, under special reason requirement court came on conclusion that:-

Areal and abiding concern for the human life dignity postulates resistance to taking a life through laws instrumentality. That ought not to be done save in rarest of rare case when the alternative option is unquestionably foreclosd. Honourable court more clarify the Doctrine of rarest of rare case from the landmark judgement in Macchi Singh and ors v. State of Punjab, this case reflects the brutality of crime. It is a case of extraordinary brutality where due to family dispute Macchi Singh along with 11 other, killed 17 people in a single night through raid a number of homes for no reason. The court itself in the position of supporting public at large whose response is so shocked that they want the award of death penalty against the accused through the power holder of judiciary irrespective of their personal opinion. Also court in this judgment mention the condition to be fulfilled for awarding of death penalty along with illustration those are:-

a) When the murder was extremely brutal in nature which arouse intense and extreme indication of the community.

b) When the murder is committed for a motive which evinces total depravity and meanness.

c) Dowry deaths or killing due to infatuation with another woman, of a member of a scheduled tribe or scheduled caste on grounds of his caste/tribe; offences to terrorize people to give up property and other benefits in order to reverse past injustices and to restore the social balance.

d) In cases of multiple murders of a members of a particular family, caste, community or locality.

e) Where the victim is an innocent child, helpless woman, aged or infirm person, a public figure whose murder is committed other than for personal reasons.

According to court the five category of murder through which the doctrine of rarest of rare case shall be considered are:

a) Motive

b) Manner of commission

c) The extent of crime

d) Anti social or repugnant nature of crime

e) Personality of victim 46

On the above provided guideline court will decide the punishment.

In Ramnares and ors v. State of Chhattisgarh Supreme Court asked to award death penalty to accused for his brutal act done by gang rape and then murder. The victim has been raped by brother in law and his drunken friends and while gang rape she was been strangulated to death. The court while discussion imposed the principle of rarest of rare case for awarding capital punishment. Supreme Court while awarding death penalty focuses on the nature of (Mahapatro, 2013) offence, its circumstances, extent of brutality, motive concluded that it is essential for the court to examine the cases on their facts in light of announced principles. But apparently when we reflect these principles it says merely because a crime is heinous it may not be a sufficient reason to award capital punishment as the fact of both cases are different. The term rarest of rare focuses to be imposed on exceptional case with special reason. This principle has been divided into 2 parts i.e.:- 47

- Aggravating Circumstances
- Mitigating Circumstances

The above term means (Mahapatro, 2013):

Aggravating Circumstances: - A court may impose death penalty under his discretion only -

- If the murder has been committed after pre planning and involve brutality.

- Murder involve exceptional immorality
- Murder is of member of armed force of union or of police or of any public servant committed which such member was on duty.
- Any consequence done by public servant in discharge of lawful discharge duty under section 43 of Cr.PC, 1973.

Mitigating Circumstances (Mahapatro, 2013): - Court shall take following circumstances:

- Offence committed under mental or emotional disturbance.
- Young age accused shall not be penalized with capital punishment.
- Probability that accused would not commit crime against society.
- Through fact and circumstance it was believe that the accused was morally justified while committing offence.
- Act was done under duress.
- Condition of accuse prove that he was mentally weak.

Supreme Court clarify that in mitigating circumstances the bench shall not provide death penalty under rarest of rarest case.

After balancing both aggravate and mitigating circumstances and by following the principle court came on conclusion that the guilt must be provided life imprisonment. This decision was based on 3 important reasons: -

- Accused were young
- Death caused by strangulation
- Victim was not a lawful married wife but having extra marital affair with accused i.e brother in law

While correlating the two landmark judgment of Bacchan singh v. State of Punjab and Jagmohon Singh v. State of U.P where capital punishment applied on principle of rarest of rare case was to protect the power from arbitrariness. In Jagmohan singh v state of U.P the purpose of death penalty should be established on the principles also mention that exercise of discretion on the principle is the safest possible safeguard for accused. In Bacchan Singh v State of Punjab it was held that in section 354(3) of Cr.PC the special reason is very loose and hence needed an odd and random interpretation. But according to court establishing a standard is a policy matter to be done by legislation. Earlier in Jagmohan Singh v State of Uttar Pradesh it was held

that the awarding of death penalty will be court discretion by following the recognized principles.[24]

The critics on death penalty by the court were found in Bacchan Singh v. State of Punjab case by justice Bhagwati gave a strong prudence on the doctrine given by justice that it may led to rise of greater amount of prejudice in decision making and a person life use to be dependent on the decision of bench which was violation of Article 14 and Article 21 of Constitution of India. Honourable justice raised an essential point by the term brutal , cool blooded etc describing the crime are not clearly specified categories it only express the intensity of judicial reaction to the crime which may not be uniform for all judges. Thus the decision of death penalty by one justice may not be considered by other.

Another case in Alok Nath Dutt v. State of West Bengal victim while sleeping was being murdered by his brother through strike on the head with harder substance over a property dispute. Abundant of cases were cited in which Supreme Court awarded either death penalty for imprisonment for life in similar situation. After a large discussion court finally awarded death penalty to accused specifying the reason that the nature of offence was cruel but the method applied will not be termed as cruel and the act of murder was committed due to bad habit which arises greed of money and the accused though that there was no other option to kill his brother. The decision of death penalty was based on circumstances evidence and not on precedent.

In Macchi Singh v. State of Punjab court while pronouncing the principle of rarest of rare case also mention some illustration which include crime against women . Women and children considered to be the weakest section of society and crime against women are very shameful toward society. In this case the illustration given also include bride burning commit in demand of dowry cold blooded murder where one can trust on murderers where murder is occurred by cruelty , torture or inhuman acts awarded with death penalty. Crime against helpless women and innocent child against women felt in rarest of rare doctrine example rape etc.

In State of U.P v. Satish, court awarded death penalty to accused who raped a 6 year old girl. Court in conclusion after considering Bacchan Singh v. State of Punjab and

[24] CAPITAL PUNISHMENT ON RAREST OF RARE CASE : IS IT JUST AND FAIR? BY Akanksha Madaan

Macchi Singh v. State of Punjab130 held that rape become abnormal and inhuman when it was done with an innocent child where the child does not even know that what is happening even known that what is happening with him/ her and which requires to the lowest level of humanity when followed by heinous murder. Then act it become sinful or cruel when done with child.

On other hand Surrender Pal Shiv Balakal v. State of Gujrat in which another bench refuse death penalty where a teenage girl were raped and then murdered. The circumstantial evidence clearly providing accused did not had previous criminal record and he was a migrant labour from U.P and nothing establish that he will going to become a trouble for society in future and hence its not fall under Doctrine of rarest of rare case.[25]

In Absar Alam v. State of Biharwhere the accused killed his mother by chopping her head. High Court considers it as an inhuman nature of crime and awarded death penalty but Supreme Court set aside the HC decision and held that accused was a cultivator residing in village that is illiterate and had no control over his emotions and situations. In State of U.P v. M.K Anthony where accused killed his wife and both children as he was not able to afford the expenses of his wife's treatment, court held deceased must be awarded with life imprisonment as the accused commit crime due to poverty. In Azmal Kasab Case who was caught in 26/11 Mumbai terror attack case where the accused was awarded death penalty by Supreme Court by observing that the whole crime was planned in Pakistan. To deal with this case court applied the guideline which was established in Bacchan singh v. State of Punjab and Macchi singh v State of Punjab.

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CHAPTER VI

CONCLUSION AND SUGGESTION

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Therefore, it is concluded that in India the death penalty has been applied since ancient times, although the methods of the death penalty have changed from time to time. Capital punishment is ancient sanction there is no Country where death penalty never existed. History is clear that the death penalty has never been declared illegal in India. The awarding of the death penalty to the perpetrator must be regarded as a requirement of justice. The death penalty is the ultimate warning against all crimes. If the criminal knows that the legal system will not stop putting him to death, the system seems more draconian to him. That is why he is less inclined to break and enter. He may not be planning to kill someone who robs them, but is much more anxious about the possibility if he knows he will be executed. So there is a better chance that he will not break in the first place and come in. A system intended to provide justice cannot do this for the surviving victims, unless the murderer himself is killed. If murder is the deliberate deprivation of the victim's right to life, then the deliberate deprivation of the right of the court to have this right - even if it is excessively strict - is a punishment appropriate to the most serious crime that can be committed. Without the death penalty it could be argued that the legal system does not make provision in response to the crime of murder, and therefore does not offer justice for the victim.

- The reformative theory of punishment which is the most humane of all theories are based on the principle of reform of the legal perpetrators through individual treatment. According to reformative theory, the purpose of the punishment is to teach or reform the offender. Such criminals must be adequately punished to justify the authority of the moral law. This theory focuses on their rehabilitation and conforms to the norms of society; in law-abiding member. This theory condemns all kinds of corporal punishment.
- Preventive theory says that "prevention is better than cure". The idea behind the preventive theory of punishment is to keep the perpetrator away from society. This

theory justifies the death penalty as an extreme form of punishment because of its deterrent effect. India follows the preventive theory. A man has taken the life of another man. So he should be deprived of his life.(Rex and Tonry 2012)

- Death Penalty is often imposed on the poor, uneducated, underprivileged and minorities. They win a legal battle in a Court of Law. Legal aid now provided in India is for the poor advocates. While arguing a case where one's life is at stake the lawyer who is engaged by seven years legal standing.
- The Government will pay the fees of an attorney. This would be an interest in the lawyer who is arguing on behalf of the accused.
- Instead of inventing a sophisticated method of execution which is quick, painless and decent, it is better to switch over from death penalty to alternative punishment.
- Life imprisonment is a very good alternative to death penalty. As such it is open to the policy makers that they are not yet reformative in nature but, a very good income to the government. Now, retentionists need not complain that the murderers behind the bars would cost more for the public exchequer.
- Causing death to an individual may be inevitable at times in certain circumstances, such as when a country is locked in either international warfare or civil warfare. Even at times, police personnel may have their lives or other lives. In such cases, strict legal safeguards must be imposed.
- Instead of spending cores or rupees in constructing gas chambers or gallows, the expenditure may be diverted to train efficient law enforcement authorities and correct errors in the judicial system.
- All measures of abolition for the death penalty should be considered as progress in the enjoyment of the right to life.
- Dangerous offenders can be kept away from the public without resorting to executions. Many abolitionist countries are practicing this method of seclusion. It is as good as bad as keeping the mentally insane in an asylum without causing inconvenience to the healthy.
- Till Capital Punishment may be abolished at the end of the year, and may also be avoided with regard to conjugal visits and visits with the family.

BIBLIOGRAPHY

BIBLIOGRAPHY

PRIMARY DATA

- The Code of Criminal Procedure,1973. The Indian Penal Code,1860.
- The Homicide Act, 1957.
- The Murder (Abolition Of Death Penalty) Act, 1965.

SECONDARY DATA:

- Study of Capital Punishment in India by A.KRISHNA KUMARI https://shodhganga.inflibnet.ac.in Crime and theories of punishment https://en.wikipedia.org/wiki/Capital_punishment_in_India https://blog.ipleaders.in/capital-punishment-india-overview/
- CAPITAL PUNISHMENT ON RAREST OF RARE CASE : IS IT JUST AND FAIR? BY
- Akanksha Madaan