CHAPTER VII

INTERNATIONAL CONVENTIONS ON DEATH PENALTY AND CRUEL AND UNUSUAL PUNISHMENT
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AND UNUSUAL PUNISHMENT

Before the United Nations came into existence for
safeguarding human rights it had been largely the concern of
the municipal law, but limited fields had been guaranteed in
the treaties. The charter of the United Nations, however,
goes further by its emphasis on the general obligation of all
the members of the United Nations to encourage respect for
human rights and provide adequate machinery for this purpose.
The significance of the human rights provisions in the charter
of the United Nations may well be described in the words of
Lauterpacht:

"for its goals, the United Nations Programme, is heir
to all the great historic movements for man's freedom
(including the British, American and French revolutions
and the events they set in train) to the enduring ele-
ments in the tradition of natural law and natural rights
and in most of the world's great religions and philoso-
phies, and to the inter relations of simple respect for
human dignity and all other individual and community
values."

1. Under the League of Nations Human Rights were expressly dealt
with in Article 23 of the League covenant. Members of the
League it said, would endeavour to secure and maintain 'fair
and humane labour conditions, undertake to secure just treat-
ment for the native inhabitants of territories under their
control and entrust the league with the supervision of agree-
ments relating to the traffic in women and children'.

2. That is, the various treaty arrangements made concerning the
minorities, slavery and slave trade and humanitarian laws of
warfare.

3. Cited by Myres S. McDougal and Gerhard Babri, "Human Rights in
On Human Rights the very preamble of the United Nations charter which was written by Field Marshall states that— we the people of the United Nations, not merely the member states; reaffirm our "faith in fundamental human rights and in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small..."4 This clearly indicates that the real germs of human rights were present in the U.N. Charter. In 1946, however, the scholars imposed legal obligation on the human rights provisions of the charter of the United Nations.

President Trueman in his valedictory speech to the San Francisco Conference said:

"we have good reason to expect the framing of an international bill of rights,5 acceptable to all the nations involved... The charter 6 is dedicated to the achievement and observance of human rights and fundamental freedoms. Unless we can attain those objectives for all men and women everywhere— without regard to race, language or religion we cannot have permanent peace and security".6

Universal Declaration of Human Rights:

On December 10, 1948 these proposals of the conference on International bill of rights were adopted by the General Assembly of the United Nations in the form of an Universal Declaration of Human Rights. However, it was not conceived as imposing legal

5. The United Nations charter.
obligation on states. This declaration consisting of 30 Articles has been considered as one of the greatest achievements of the United Nations. Mrs Roosevelt, the then chairman of the commission on human rights spoke in General Assembly, that declaration was 'first and foremost a declaration of the basic principles to serve as a common standard for all nations... it might well become the Magna Carta of all mankind.7

In mobilizing the world public opinion against capital punishment, the role played by the United Nations through its organs cannot be lost sight of International conventions. Conferences and Declarations have also contributed in the decline of this penalty.

Articles 3 and 5 of the Declaration are very important in connection with the abolition of capital punishment and unusual penalty from being imposed on any human being. Article 3 of the Universal Declaration of Human Rights lays down that "Every one has the right to life, liberty and security of person". The Article in fact, puts three different freedoms:

(a) right to life;
(b) right to liberty;
(c) right to security of person

All these three freedoms can be joined in one i.e. abolition of capital punishment. Article 5 prohibits cruelty, degrading

7. Robertson, A.H. : op.cit,p.27.
and inhuman torture on mankind.

Death penalty is categorised as a cruel and inhuman punishment. This was held by the U.S. Supreme Court in 1972. Justice Thurgood Marshall cited society's evolving standard of decency as "perhaps the most important principle in analysing the cruel and unusual punishment questions". Justice William Douglas considered it to be unconstitutional because it was applied selectively feeding prejudices against the accused, if he is poor, despised and lacking in political clout or, if he is a member of a suspect or unpopular minority. The five judges thought that, capital punishment was arbitrary, capricious and freakish. Although the punishment was sanctified and restored by the U.S. Supreme Court in 1976, Justice Marshall has in his dissenting opinion that execution is a total denial of human dignity and worth.

Though the Universal Declaration is of prime importance, it is not a treaty and therefore, technically it is weak as an instrument of protection. But its moral force and persuasive character have never been in doubt and it is universally regarded as expounding generally accepted norms. It was chartered for objectives and policy and was drafted in broad and general terms. That was the reason which made it necessary to implement those objectives by more precise and detailed formulation in the form of conventions which would be binding on states parties and hence
the adoption of the two international conventions ICCPR⁸ and ICESCR⁹ were one in the original draft.

**International Covenant on Civil And Political Rights:**

International Covenant on Civil and Political Rights (ICCPR) was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of December 16, 1966. This came into force on March 23, 1976. The very preamble of it speaks agreement with states parties to the present convent that they will recognise the inherent dignity and the equal and inalienable rights of all members of the human family enjoying civil and political freedom from fear and want.

Article 6 of the International Covenant on civil and political rights, as finally adopted by the General Assembly on December 16, 1966 provide as under:

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

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

3. When deprivation of life constitutes the crime of genocide. It is understood that nothing in this Article

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⁸ ICCPR = International Covenant on Civil And Political Rights.  
⁹ ICESCR = International Covenant on Educational Social And Cultural Rights.
shall authorise any state party to the present covenant to derogate in any way from any obligation assumed under the provisions of the convention on the prevention and punishment of the crime of Genocide.

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

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

6. Nothing in this Article shall be invoked to delay or prevent the abolition of capital punishment by any state party to the present covenant.

By providing that no one shall be arbitrarily deprived of his life, Article 6 of the covenant appears to have intended 'arbitrarily' to mean both 'illegally' and 'unjustly'. The covenant addresses itself to unjust laws by its proviso that in any event the law providing for capitaly punishable crimes must not be 'contrary to the provisions of the present covenant'. It is clear, therefore, that where a particular act of government repression amounts to a violation of human rights as defined in the covenant, the use of death penalty in furtherance of the repression is a violation of Article 6 of the covenant. Many of the Articles of the covenant may be suspended in time of public emergency which threatens the life of the nation (Article 4), but this is not true of Article 6.

Article 6(2) also provides that capitaly punishable offence must not be contrary to the convention on the Prevention and Punishment of the Crime of Genocide. Nailing the point down even more firmly, paragraph 3 of the same Article provides:
"When deprivation of life constitutes the crime of genocide, it is understood that nothing in this Article shall authorise any state party to the present covenant to derogate in any way from any obligation assumed under the provisions of the convention on the Prevention and Punishment of the Crime of Genocide. The intention seems to have been avoid any interpretation at all by which the convenants admission of death sentence might be abused to justify executions punishable under the Genocide convention".

International Law does not yet prohibit the death penalty. but it does envisage the goal of abolition. It may be that the convenant contains an implicit obligation analogous to the explicit one contained in the American convention on Human Rights, not to reintroduce the death penalty after it has been abolished, nor to extend it to cover crimes for which it does not at present apply. States are, in any event, expected to restrict the number of offences for which death penalty may be applied. Further, whatever might be the circumstances under which certain offences have been committed, may not be made capitally punishable and certain safeguards (including the right to a fair trial, to appeal and to petition for elements) are to be respected if executions are not automatically amount to arbitrary deprivation of life. Most of these guaranteed rights are contained in Article 6 of the International Covenant on Civil and Political Rights, which deals with the right to life and must be seen as staking a rule of general international law binding on all states whether or not they are parties to the covenant. In particular, no derogation from the right is permitted even in time of grave emergency. Although the right to a fair trial and the right to appeal are not
included expressly in Article 6, they should be understood as being implicitly included. Several categories of people may not be executed in any circumstances: those of 18 years or less when they committed a capitaly punishable offence, pregnant women, and in the Americas, persons over 70 years of age. A recent ECOSOC resolution has extended this protection to 'new mothers' and 'persons who have become insane'. The relevant rules of international human rights law and international humanitarian law tend to be mutually reinforcing.

The U.N. Commission on Human Rights has appointed a Special Rapporteur who cannot only report on the incidence of arbitrary and summary executions (which include death penalties carried out without proper safeguards) but can also intercede to seek to prevent them. This power could well be used effectively in combination with the 'best endeavours' that the General Assembly has asked the Secretary General to deploy. ¹⁰

So far as India is concerned, death penalty was truly alien to the fundamental values of the Indian society. The international conscience as voiced in the U.N. Declaration of Human Rights accords the highest recognition to the basic right to live. A long gap of time is indeed between the ancient period and the modern still a deed of generosity can be recorded if the nations of the world decide to bring death sentence on death sentence.

¹⁰ Nigels Rodley: The Treatment of prisoners under International Law, p.190.
Law men, interpreting the Indian preamble about 'social justice' and 'the dignity of the individual' or the American VIII Amendment about ban of 'cruel and unusual punishment must take the cue from and must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Justice Krishna Iyer delivered a lecture in the International conference on the Abolition of the Death Penalty at Stockholm in Sweden on Human Rights Day 1977. According to him the commandment of life demands a just world order, acquitting may be, the Death law on the alibi that is historical survival after death and establishing surely human justice through human law as a process of cognising the dignity and worth of the human person.

Justice Iyer hoped and concluded his lecture by saying that criminology and consciousness will herald a justice system without the stain of human blood. He appealed to the nations of the world to have faith in Man, to follow the Highways to Rehabilitation away from the blind alley of Retention. Law is for life, let us declare from this whispering gallers, and look beyond death penalty lying buried on the debris of civilization to a Human Tomorrow, fashioned by the new frontiers man's carving cosmos out of chaos. We have before us a challenge to convert on opportunity to reform to enlightenment. Death penalty be not proud. Thy death is drawing near.

Every human has the inherent right to life. This shall be protected by law. No one shall be arbitrarily deprived of his life. This general statement cannot be construed as prohibiting the death penalty, because it is followed by a series of paragraphs stipulating restrictions on the use of the death penalty. The first of these, paragraph 2, which limits the nature of the offences for which the death penalty may be imposed, is introduced by the clause: In countries which have not abolished the death penalty, the various restrictions on the use of the death penalty have been listed in paragraphs 2 to 5, paragraph 6 states:

The formulation in Article 6 led the Human Rights committee (the 18 individual experts elected by the states parties to the covenant to monitor the covenantic implementation) to observe: The article also refers generally to abolition in terms which strongly suggests that abolition is desirable. The committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life...12

The general comments made by the Human Rights committee rejected a narrow interpretation of the right to life as not being restricted simply to the abolition of capital punishment. The committee has interpreted the commitment undertaken by states under this Article to include, for example, a duty to take steps

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to reduce infant mortality, to eliminate malnutrition, to prevent epidemics and to banish weapons of destruction. These issues however, are not easily justiciable. With regard to the death penalty as a form of punishment, there is a resolution of the General Assembly (32/61) proclaiming that the objective is that of "progressively restricting the number of offences for which the death penalty may be imposed" until its eventual abolition. The Committee has observed that, while Article 6(2) and (6) does not require states to abolish capital punishment totally, they are obliged to limit its use and, in particular, to abolish it for other than the most serious crimes.

From the perusal of the Article 2 it is clear that in addition to 'right to life' it includes the prohibition of torture or inhuman or degrading treatment or punishment, prohibition of slavery, servitude or forced or compulsory labour.

To combat problems on region basis U.N. charter provided provisions under which regional agencies are not be evolved. The regional institutions under Article 52 of the United Nations charter have their own existence for dealing with such matters which relate to the maintenance of international peace and security as are reasonable and appropriate for regional action. However, such agencies are not inconsistance with the purpose and principles of the said United Nations charter. The Regional agencies will not deal with a lower standard or human rights than is prescribed by this charter. Regional agencies may function as subordinate piece:
of international machinery, sharing the load, diverting the tensions of international relations from the central world organization, serving as agents of the larger community in handling problems which pertain primarily to their own regional localities.  

The creation and evolution of several regional agencies for dealing with the problems relating to protection of human rights constituted a great significant development in the field of international movement for protection of human rights. The European convention for the protection of Human Rights and Fundamental Freedoms, European Commission of Human Rights and The European Court of Human Rights have served as prototype for the other regional agencies.

**European Convention For Protection of Human Rights And Fundamental Freedoms:**

After the Declaration of Human Rights of 1948 another important convention was that of European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome 4 XI 1950) known in short as E.N.R. The preamble of this convention reaffirms its profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights

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upon which they depend. The text was amended according to the provisions of Protocol No.3 which entered into force on September 21, 1970 and of Protocol No.5 which entered into force on December 20, 1971. This is one of the most important achievements of the Council of Europe.

Article 1 of the Convention provides that "the High Contracting Parties shall secure to every one within their jurisdiction the right and freedoms defined in Section 1 of this convention" Section 1 gives in detail the definition of personal and political rights. These include the "Right to life". Under Article 2:

(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. (2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The African Charter on Human And Peoples' Rights:

The provision for Chronologically abolition of capital punishment are found in the African charter on Human and People's Rights which was prepared within the organization of African Unity in June 1981 at Nairobi. The preamble of this AFR (Short-name) points out the purpose, for which this was resolved, that recalling Decision 115 (XVI) of the Assembly of Heads of State
and Government at its 16th Ordinary Session held in Monrovia, Liberia from 17 to 20 July 1979 on the preparation of "a preliminary draft on an African charter on Human and People's Rights providing center alia for the establishment of bodies to promote and protect human and people's rights relating to freedom, equality justice and legitimate aspirations of the African peoples.

Article 4 of the African Charter on Human And Peoples' Right lays down that Human beings are inviolable. Every human being shall be entitled to respect his life and the integrity of his person. No one may be arbitrarity deprived of this right.

The first international treaty prohibiting the use of the death penalty was opened for signature on 28 April 1983. It is protocol No.6 to the convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty which was adopted by the council of Europe's Committee of Ministers in December 1982. This was the climax of a protracted development towards abolition.

The 'problem of capital punishment in the States of Europe' was on the agenda of the European Committee on Crime Problems as early as 1957 when this body was established. As a result of 1973 initiative, the Parliamentary Assembly adopted in 1980 a resolution in favour of abolishing the death penalty for crimes committed in peacetime and simultaneously recommended that the Committee of Ministers amend Article 2 of the European Convention on Human Rights to bring it into line with the Assembly's peace-
time abolition policy.

Article 2 of the European Convention on Human Rights had exempted from the protection of the right to life the international deprivation of life "in the execution of a sentence by a court following... conviction of a crime for which this penalty is provided by law". The effect of sixth Protocol is to remove the whole exemption for the death penalty is peacetime. Thus, its Article 1 states, with admirable simplicity, "The death penalty shall be abolished. No one shall be condemned to such penalty or executed". The first sentence is aimed at defining the obligation on states parties; the second approaches the issue in terms of the right of the individual. According to the official commentary on the text, the first sentence seems to mean that there is an obligation on a state party to "delete the penalty from its Law". This view is supported by the wording of the second sentence which protects people not only from execution but also from being condemned to death.

However, Article 3 of the Protocol precludes the making of derogations from the terms of the Protocol "in time of war or other public emergency threatening the life of the nation". This preclusion would be redundant if the basic obligation contained in the Protocol (abolition of the death penalty) could be avoided without formal derogation whenever there was an imminent threat, not only of international war but also of civil war. Such redundancy ought not to be presumed".
It is to be hoped that the international legal advance represented by the Protocol will not be confined to the states of Western Europe and that, on the contrary, it may serve as a model for more universal prescription of the death penalty. Perhaps the analogous initiative currently before the U.N. Commission on Human Rights and its sub commission will be stimulated by the pioneering instrument. In 1969 the Inter American Convention on Human Rights San Jose came into existence on the 22nd of November. This text was prepared with the organization of American States. This is also known as the American Convention on Human Rights in short as AMR. The convention reaffirms its intention to consolidate in this hemisphere within the framework of democratic, institutions, a system of personal liberty and social justice based on respect for the essential rights of man including every one's economic, social and cultural rights, as well as his civil and political rights. Article 4 of this AMR lays down.

American Convention on Human Rights:

Article 4 of the Convention emphasises respect to life. The Article speaking on Right to life runs as under:

(1) Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

(2) In countries that have not abolished the death penalty, this may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. Its application shall not be extended to crimes to which it does not presently apply.
(3) The death penalty shall not be re-established in states that have abolished it.
(4) In no case shall capital punishment be inflicted for political offences or related common crimes.
(5) Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years ago or over 70 years of age; nor shall it be applied to pregnant women. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending a decision by the competent authority.

After the Universal declaration of Human Rights United Nations has taken much interest in the abolition of capital punishment. On November 20, 1959 by its resolution 1396 (XIV), it invited the Economic and Social council to conduct a study on the working retaining and abolition of capital punishment and to analyse its impact. Report was prepared by French jurist Marc-Ancel and another committees of experts on prevention of crime and the treatment of offenders in the year 1962 and were presented to the 'economic and social council' which urged member states to keep under review the efficacy of capital punishment as a deterrent to crime in their countries and conduct researches in this matter and removed death penalty from the criminal law for any crime to which its belongs.

On November 26, 1968 this report, after being considered by the Commission on Human Rights, was given the shape of a draft and submitted to the General Assembly of the United Nations. The assembly adopted this draft with certain modifications inviting member states to take adequate measures. The Secretary General
was requested to find the reports from the states about their attitudes restricting the use of death penalty or to its total abolition and submit this report to Economic and Social Council. Accordingly the report was submitted to the Economic and Social Council in 1971. In the report states have restricted the use of capital punishment in number of offences. The report was discussed on December 20, 1971.

"In order to guarantee fully the right to life, provided for in Article 3 of the Universal Declaration of Human Rights, the Indian objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed with a view to the desirability of abolishing this punishment in all countries."

The Secretary General submitted its third report on abolition of capital punishment to the Economic and Social Council in 1973. It was resolved that starting from 1975 the Secretary General bill submit its report at every five years intervals. Accordingly fourth and fifth reports were submitted in 1975 and 1980.

The quest for human rights and human dignity is a phenomenon of contemporary life of Universal dimensions and immense significance. The concept of human rights is a concept of world order. It is a determination for so structuring the world that every individual's human worth is realized, and every individual's human dignity is protected.

Human rights are thus, based on an international consensus. They include the right not to be subjected to torture, to cruelty
inhuman or degrading treatment or punishment, or to arbitrary arrest; imprisonment or execution. Human rights also include the right not to have one's home involved and the right to fair, prompt and public trial. A state is considered to violate international law if it practices, encourages or condones: (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel; inhuman or degrading treatment or punishment; (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) consistent patterns of gross violations of internationally recognized human rights. Human rights are of broad application. They apply not only to countries that have recognized these rights in their legal institutions, but virtually to all countries.¹⁵

Limits on Capital Punishment:

To be compatible with article 6 of the International Covenant on Civil and Political Rights, was the clear intention behind the provision that no one shall be arbitrarily deprived of his life. The American Convention on Human Rights (Article 4) uses the same language and that of the African Charter on Human and Peoples' Rights expressly makes its exception to the right to life, one that is 'in the execution of a sentence of a court following... conviction of a crime, for which this penalty is provided by law' (Article 2). The point need hardly to be laboured unless a punitive

¹⁵. Haleem, Muhammad C.J. of Pakistan.
killing by the authorities is provided for by national law, it will be an extra legal execution.

According to the International Covenant On Civil and Political Rights, sentence of death may be imposed only for the most serious crimes (Article 6(2)). The American convention on Human Rights (Article 4(2)) contains the same limitation. Unfortunately, the term 'the most serious crimes' remains undefined in either instrument. The phrase was adopted in the covenant despite concerns expressed at the time that it lacked precision, since the concept of 'serious crimes' differed from one country to another clearly the concept was expected to evolve.

It is often thought that the death penalty is reserved for crimes involving loss of life, and it is therefore frequently justified on a principle however, retrograde, of retribution *an eye for an eye a life for a life*. In fact, 1979 Amnesty International Report shows that the death penalty is often imposed for offences which not only involve no loss of life, but also involve no use of violence at all. Violence cannot necessarily therefore be used as the sole measure of the crimes which states consider 'serious' enough to warrant the death penalty. The Human Rights Committee's general comment on the phrase 'the most serious crimes' gives little precision. The committee says that the expression must be read restrictively to mean that the death penalty should be a *quite exceptional measure*. 
In a recent resolution adopted by ECOSOC containing safeguards guaranteeing protection of the rights of those facing the death penalty. ECOSOC expresses its understanding that the scope of the term 'most serious crimes' should not go beyond intentional crimes, with lethal or other extremely grave consequences. It is to be hoped that in practice the Human Rights Committee will not interpret the term to authorize the death penalty for crimes not resulting in loss of life, or not likely to result the widespread loss of life.

Adoption of various international conventions has been the manner of international protection of human rights. These international conventions are either concluded under the auspices of the United Nations or through some of its specialised agencies. Even in the practice of Member Nations, the majority of governments continue to hold that the traditional process of preparing adopting and putting into operation multilateral conventions has its place among the endeavours to give effect to the human rights provisions of the charter. As a result, the drafting of covenants on conventions in this field have continued. They form a body of conventional International Law which reflects the human rights work of the United Nations. It is not proposed to discuss here the large number of those conventions in this field but some of the most important are covered.
The Conventions on Crime of Genocide And Other Humanitarian Instruments:

The protection of a special right i.e. the right of an individual to live as a member of a national, ethical, racial or religious group is the purpose of the Genocide convention. The General Assembly in its Resolution 96(1) dated 11, 1946 Stated that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and is condemned by the civilized world. The convention on Genocide was adopted by the General Assembly in its 179th Meeting on December 9, 1948.

Under Article 1 of the Convention, the contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish. Under the Convention, genocide has been defined as acts committed "with intent to destroy in whole or in part a national, ethnical, racial or religious group as such". It is one of the results of the convention that the state parties place it beyond doubt that genocide even if perpetrated by a Government in its own territory against its only citizens, is not a matter essentially within the domestic jurisdiction of states but a matter of international concern.

Regarding the enforcement measures, any contracting party may call upon the competent organs of the United Nations to take such action under the charter of the United Nations as they
consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3.16

Right to life is the most precious human right and it forms the case of all other rights must therefore be interpreted in abroad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. It is no use living a wretched life where human dignity is in abyss. Human worth and dignity need not be lost even in prison setting. Any act which offends or impairs human dignity would constitute deprivation protanto of this right to life unless it is done by reasonable, fair and just procedure established by law.17

However sentence or pattern of sentence which fails to take due account of the gravity of the offence seriously undermine respect for law. It is the duty of the court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment as a measure of social necessity as a means of deterring other potential offenders.

Having similar views in other nations of the world, capital punishment was disliked, rebuked and hated to be imposed on human beings. From the middle of the last century civilized nations tried to discard this ugly heritage and cultural outrage implied in

17. Supra Chap.IV Note 28.
the neck breaking nostrum that homicidal state action will heal
men's murderous habits and must be mercilessly exposed to clear
the way for reaching the correct diagnosis and cure.

"Capital punishment is a cruelly callous investment by
unsure and unkempt society in punitive dehumanization
and cowardly strategy based on the horrendous supersti-
tion that cold blooded human sacrifice by professional
hangmen engaged by the state will propitiate the goldness
of justice to bless Mother Earth with crimeless community". 18

In England as late as 1780, English Law was recognized for
over 200 capital offences, most of which are now considered minor
offences. At that time one could be hanged even "for associating
for a month with gypsies. In 1833, a boy of nine was sentenced to
be hanged in England for pushing a stick through a window and
"raking out a few pieces of children's painting colours, valued at
two pence". 19 It is further reported that capital punishment was
repealed in England for cattle, horse and sheep stealing, larceny
and forgery in 1832; for house breaking in 1833, for stealing
letters in 1835, and for burglary in 1837; although for several
years prior to these abolitions the death penalty had seldom been
used for these offences. 20

The exact number of capital offences during the period
remains obscure, but it is known, for example, that during the
eighteenth century, hangable crimes increased manifold from about

18. Supra Note 11.
fifty in 1700 A.D. to between 220 and 230 in 1800 A.D. Furthermore, as Professor Radzinowic III points out, each statue was so broadly framed that the actual scope of the death penalty was frequently three or four times as extensive as the number of capital provisions would seems to indicate. Included in this so-called Bloody Code were offences such as sleating turnips, consorting with gypsies, damaging a fishpond, writing threatening letter, impersonating out pensioners at Greenwich Hospital, being found armed or disguised in a forest, park or rabbi warren, cutting down a tree, poaching, forging, picking pockets and shoplifting. The early penal reformer Sir Samuel Rohilly spoke truly when he told the House of Commons that "there was no country on the face of earth in which there has been so many different offences according to law to be punished with death as in England."

Prior to the Victorian era the execution of a child was by no means unusual. For example in 1801 a boy aged thirteen was publicly hanged for breaking into a house and stealing a spoon. In 1808 a girl aged seven was hanged at lynon, and in 1831 a boy of nine was hanged at Chimsford for having set fire to a house. Such practices undoubtedly were accepted, perhaps even enjoyed by the English public in general. They found support in the words not only of the sitting judges, but also of oracles of the law such as Coke, Blackstone and Stephen and of church leaders and

influential moralights such as palcy. Such an armory of the status quo was not to be easily penetrated.\textsuperscript{22}

However, when Samuel Romully brought proposals for abolition of death penalty for such offences, there was a hue and cry from lawyers, Judges, parliamentarians and other so-called protectors of social order and they opposed the proposals on the ground that death penalty acted as a deterrent against commission of such offences and if this deterrent was removed, the consequences would be disastrous. Six times the House of Commons passed the Bill to abolish capital punishment for shop lifting and six times the House of Lords threw out the Bill, the majority on one occasion included all the judicial numbers, Arch Bishop and six Bishops. It was firmly believed by these opponents of abolition that death penalty acted as a deterrent and if it was abolished, offences of shop lifting etc., would increase. But is is a matter of common knowledge that this belief was wholly unjustified and the abolition of death penalty did not have any adverse effect on the incidence of such offences. So also it is with death penalty for the offence of murder.

The movement to restrict or abolish the use of capital punishment is just about as old as the modern period of European civilizations. Although most countries of Europe employed the death penalty generously, they had as compared with England, a

\textsuperscript{22} Krishna Iyer, V.R., op.cit., pp. 118-19.
much smaller number of offences that called for its use. And while these countries were gradually restricting the use of the death penalty, England was imposing it more often. In the early fifteenth century it is reported, England cited only 17 capital offences; 400 years later she had over 200 capital crimes. Von Bar cites figures to show the marked decline in the use of capital punishment in Switzerland in the seventeenth century.

Cruel, Inhuman And Unusual Punishment:

The expression "cruel and unusual punishment" is of American origin. The eighth amendment to American Constitution prohibited cruel and unusual punishment, but these open the definition of what is "cruel and unusual". The Supreme Court of America has interpreted this prohibition flexibly, measuring punishments challenged as in violation of it against "evolving standard of decency". The court has refused to outlaw the death penalty as invariably cruel and unusual, but it has applied that constitutional standard to prohibit states from imposing prison sentences upon those found "guilty" of drug addiction. The court has generally indicated that it would apply the amendment to prohibit punishments it found barbaric or disproportionate to the crime punished. Since early in the 20th century, the Supreme Court has weighed the severity of a challenged sentence against the seriousness of the crime punished.

The exact scope of constitutional phrase "cruel and unusual" has not been made clear by the Court, but the basic concept under-

23. Supra Chap.IV Note 30.
lying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.\textsuperscript{24} In 1910 the court in the case of \textit{Weems Vs. United States}\textsuperscript{25} decided that the Eighth Amendment had been violated by a law which allowed a person convicted of falsifying a public record to be assessed a heavy fine, sentenced to fifteen years at hard labour and subjected to several other sanctions.

Generally there have been few cases involving this constitutional provision and they have been divided into two groups. One class of cases takes the approach that an individual may not be subjected to any treatment that is barbaric, cruel, or degrading. In other words, a court can sentence a man but can never strip him of his basic dignity. If a convicted individual was sentenced to be chained to a post and spat upon by other inmates, the sentence would undoubtedly be struck down. Any form of physical torture would likewise be prohibited. Burning at the stake would be forbidden as a form of execution for the same reason.

The second group of cases involves sentences which have been set aside because the appellate court believed that the sentence was disproportionate to such an extent that it shocked the moral sense of the community. In other words, there must be a reasonable correlation between the sentence and the criminal act. Some

\textsuperscript{24} 217 U.S. 349 (1910).
\textsuperscript{25} Ibid.
individuals will admit that they would continue indefinitely in a life of crime, except for the fact that imprisonment is simply to trying a mental experience. Other convicted persons do not seem to be so disturbed by the process.

In an effort to force criminals to conform to the rules of society, a number of states have passed the so-called "habitual criminal statutes". Some of these laws increase the punishment for repeated involvement in any kind of felonies while other statutes make the penalty more severe for two or more convictions for the same specific crime. Some enactments of this type make a criminal repeatedly ineligible for parole. A repeater may be charged both with having committed a specific crime and with being an habitual violation. These are separate felonies, and the accused may be sentenced on both the charges. The procedure usually followed is to have separate pleas from the accused. Since evidence of a prior conviction cannot be presented to the jury hearing the current charge, the habitual criminal charge must be held until after a verdict is reached by the jury on the specific violation. The court will then allow the prior conviction to be raised in connection with the allegation of repeated violations. Some states utilize two separate juries to hear the two matters involved. Other jurisdictions utilize only one jury, allowing evidence of the prior conviction to be presented only after a verdict has been reached on the specific violation.26

Amendment provides: "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted".

If late eighteenth century Americans meant to forbid torture and other barbaric punishments altogether, however, this was apparently not the intention of the Englishman who used the same language in the English Bill of Rights. There is no evidence that this bill meant to forbid atrocious penalties for atrocious crimes, and indeed the infliction of such penalties as drawing and quartering continued into the nineteenth century. The makers of England's Glorious Revolution believed in horrifying punishments just as their predecessors did. In prohibiting both "excessive fines" and "cruel and unusual punishment" the authors of the 1669 bill may have meant simply to incorporate the common law tradition forbidding penalties disproportionate to the offence. Parliament probably had in mind the extraordinary penalties of life imprisonment, huge fines, whippings, pillorying four times a year, and defrocking that were inflicted on Titus Dates for the perjury he committed in connection with the alleged Popish Plot of 1678-1679. No statute or precedent had authorised this unusual sentence, and the House of Commons declared it invalid in 1688. (unlike its American counterpart the English Bill of Rights is not part of a written Constitution. English courts have never had the power to declare an act of Parliament unconstitutional).
The history of the clause provides no conclusive answer to the recurring question of whether its American authors meant only to bar certain barbarous punishments altogether or whether they also meant to bar penalties, not unlawful perse, that are disproportionate to the crime. With the arguable exception of the death penalty, American law has never stipulated on any widespread basis the kind of torturers penalties that the framers of the Bill of Rights may have had in mind. If the clause prohibits only punishment that would be considered "cruel" no matter what the crime may be, its contemporary impact is far less than it would be if it also refers to punishments that are disproportionate to the crime committed. 27

In the preamble of the Universal Declaration of Human Rights the clear wordings are "whereas, disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advert of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."

Article 5 of the Universal Declaration of Human Rights speaks:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

27. Sanford H. Kadish; op. cit., p. 575.
International Covenant On Civil and Political Rights, 1966 effective in 1976 under its Article 7 lays down:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

From the above language of Article 7 it is clear that the Article has been enacted as Article 5 of the Universal Declaration of Human Rights, 1948. The preamble to the covenant has made it clear that in accordance with the Universal Declaration of Human Rights, the ideal of free human being enjoying civil and political freedom from fear and want can only be achieved if conditions are created whereby, everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights. This object cannot be obtained if any torturous inhuman or degrading punishment is imposed on any human being. The second sentence, i.e. "no one shall be subjected without his free consent to medical or scientific experimentation" is specific addition in the Article. Government of India ratified this covenant in 1979. Article 25 of Indian Constitution has been interpreted to include immunity from cruel, inhuman and degrading treatment.

Article 7 which is designed to prevent cruel and inhuman treatment would obviously also has an impact on the kind of offences for which the death penalty may be imposed. The Committee has further observed that the right to life cannot, under Article 4,

29. Idem.
be derogated from even during an emergency. 30

Article 3 of the European Convention For the Protection of Human Rights and Fundamental Freedoms, 1950 (amended by Protocal 3 and 5 on September 20, 1970 and December 20, 1971 respectively) provides that "No one shall be subjected to torture or cruel, to inhuman or degrading treatment or punishment".

The preamble to the convention enshrines the object of the convention reaffirming their profound belief in these fundamental freedoms which are the foundations of justice and peace in the world and best maintained on the one hand by an effective political democracy and on the other hand by a common understanding and observance of the human rights upon which they depend.

According to the African charter on Human and people's Rights, Article 5 every individual shall have the right to the respect or the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruelty, inhuman or degrading punishments and treatment shall be prohibited.

The African charter on Human And People's Rights was formulated under Article 52 of the United Nations charter for protecting human rights on regional basis. This text was prepared by the Division of Press and Information of the Organisation of African

Unity General Secretariat, at Nairobi in 1981. The preamble was written with the stipulation that there would be "freedom, equality, justice and legitimate aspirations of the African people".

The Organisation of American States in 1969 for regional development and protection of human rights prepared the Inder. American convention on Human Right. Under its chapter II dealing with civil and political rights provided freedom from torture under its Article 5 which runs as under:

(1) Every person has the right to have his physical, mental and moral integrity respected.

(2) No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

(3) Punishment shall not be extended to any person other than the criminal.

(4) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subjected to separate treatment appropriate to their status as unconvicted persons.

(5) Minors while subject to criminal proceedings shall be separated from adults and brought before specialised tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

(6) Punishment consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

The code of conduct for Law Enforcement officials under its Article 2 provides that "In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and upheld the human rights of all persons".
This includes that the human rights are identified and protected by national and international law. Article 1 of the Code states that law enforcement officials shall fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts consistent with the high degree of responsibility required by their profession. Thus it is the essential duty of law enforcing machinery to protect the human being from being tortured or to cruelty inhuman or degrading treatment or punishment.

In Furman Vs. Georgia the Supreme Court of America for the first time ruled directly on the constitutionality of capital punishment under the cruel and unusual punishments clause of the eight amendment. The petitioner Furman a black man, had been convicted or murder, and petitioners Jackson and Branch, also black, had been convicted of rape. Each had been sentenced to death, and in each case the decision to impose the death penalty had been left to a jury. The Court held, in a 5-4 per curiam opinion, "that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments".

Justice Douglas argued that the death penalty statutes were therefore "pregnant with discrimination... an ingredient not compatible with the idea of equal protection of the laws that is

31. Supra Chap.IV Note 30.
implicit in the ban on cruel and unusual punishment". He found this mandate of equal treatment by resort to the English history that led to the adoption of the cruel and unusual punishment clause of the English Bill of Rights, the source of the American version. Historically, he argued that the clause was a reaction not only against the barbaric punishments, but also against the selective and irregular imposition of penalties upon persons disfavoured by the British crown. The clause is similarly applicable, the Justice argued, to the selective and irregular imposition of the death penalty upon socially disfavoured persons in America today. 32

Justice Brennan derived from previous Supreme Court decisions under the eighth amendment the general principle that it proscribes punishments which "do not comport with human dignity" and he set forth four tests calculated to guide judicial application of the amendment: (1) "a punishment must not be so severe as to be degrading to the dignity of human beings", (2) "the state must not arbitrarily inflict a severe punishment, (3) "a severe punishment must not be unacceptable to contemporary society", and (4) "a severe punishment must not be excessive", a punishment is "excessive" under this principle if it is unnecessary. He found the death penalty, as then administered, offensive to all four tests and therefore concluded that it was cruel and unusual. Although Justice Brennan placed particular emphasis on the arbit-

32. Ibid. at p. 240.
rariness of the death penalty owing to its infrequent imposition by juries unguided by any standards, nowhere did he indicate that the absence of arbitrariness would have altered his decision. Unlike Justice Douglas, Stewart, and White, he did explicitly limit his opinion to death penalties imposed at the discretion of a judge or jury.

Justice Marshall wrote the opinion which most unequivocally condemned capital punishment. Placing no reliance on the discretionary nature of the sentence, he argued that "a punishment involves" so much physical pain and suffering that civilized people cannot tolerate (it)" (2) if the punishment has previously been unknown for a particular offense; (3) if the punishment "is excessive and serves no valid legislative purpose"; or (4) if popular sentiment abhors the punishment. Assuming that capital punishment did not involve severe physical pain and recognizing that it was not a novel punishment for rape and murder, Justice Marshall found in both the cases that it was excessive and unnecessary and that it offended contemporary moral values.

Two of the argument advanced by the concurring Justices- that the death penalty is unnecessary to further any sufficiently important goal of the criminal justice system and is therefore cruel because excessive, and that capital punishment offends the public morality- are of particular interest because any future per self attack on the death penalty is likely to rely upon them. With respect to the efficacy of capital punishment while the available
evidence is not scientifically conclusive, it is unfortunately in consistent with the intective notion that death is a stronger deterrent than life imprisonment. To be sure, there are other goals of punishment, such as retribution and reinforcement of public morality, which may be furthered by capital punishment. However, courts will find that these goals alone, with deterrence eliminated from the justifying side of the balance, do not suffice to outweigh the unique costs of the death penalty. 33

The sentiment against inflicting capital and barbarous punishment has become fairly widespread as a result of modern social trends and humanitarian agitations. 34 Rather frequently modern jurists in countries where jury trial still lingers, refuse to convict an offender of whose guilt they are assured, because the legally required penalty is too severe. Such instances are an indication that the sentiment for milder, more humane punishment has developed faster and has priority in the consideration of revisions of legal penalties. However, the humanitarian conception of punishment has by no means obtained the support of all classes and levels of modern countries. In many quarters, persons tenaciously believe in the use of severe treatment.

Moved by compassionate sentiment of a human feeling, Baccaria asserted that all capital punishment is wrong in itself and unjust.

He maintained that since man was not his own creator, he did not have the right to destroy human life, either individually or collectively. It is the ultimate cruel, inhuman and degrading punishment, and violates the right to life. Its basic value be affirmed, in its capacitative effect. Baccaria claimed capital punishment was justified in only 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 use of capital punishment has declined in recent times, although it is still permitted by law, as in this country, for various kinds of offences like treason, murder etc. Even where it has been legally retained, capital punishment is now seldom employed except in very grave cases where it is a crime against the society and the brutality of the crime shocks the judicial conscience.

The decline in the infliction of this penalty is because of the fact that the penalty does not conform to the current standards of decency. The standards of human decency with reference to which the proportionality of the punishment to the offence is required to be judged vary from society to society depending on the cultural and spiritual tradition of the society, its history and philosophy and its sense of moral and ethical values. To take an example, if a sentence of cutting off the arm for the offence of theft or a sentence of stoning to death for the offence of adultery were pres-
cried by law, there can be no doubt that such punishment would be condemned as barbaric and cruel in our country, even though it may be regarded as proportionate to the offence and hence reasonable and just in some other countries.

Can there be any higher basic human right than the right to life and can anything be more offensive to human dignity than a violation of that right by the infliction of the death penalty? In order to determine what are the prevailing standards of human decency, one cannot ignore the cultural ethos and spiritual tradition of the country. Justice Krishna Iyer, in Rajendra Prasad, rightly observes:

"The value of a nation and ethos of a generation mould concept of crime and punishment. So viewed, the lodestar of penal policy today, shining through the finer culture of former centuries, strengthens the plea against death penalty."

In India there were many types of punishment particularly those prescribed in the earliest texts. They were vary cruel, inhuman and barbarous. Here is one such rule of Manu: He who raises his hand or stick (for assault) shall have his hand cut off. He who in anger kicks, with his foot shall have his foot cut off. There were several provisions akin to the above in respect of various kinds of offences. Referring to the aforesaid provisions, P.V.Kane remarks that these types of rules prescribing cruel punishments were common to all ancient systems of law and

36. Supra Chap.IV Note 10.
37. Ibid, at p.920.
were not peculiar to Indian legal system alone. He observes:

"Among the ancient law writers of India, comparatively rigorous form of punishments were prescribed by Gautama and Manu. The later smritis like Yaj, Narada and Brahma, lessened the rigour of punishment. Further, not with standing the prescription of cruel corporal punishment, it appears that such penalties were not being imposed in practice and the punishment by way of fines came to be the ordinary mode of punishment for many crimes. Even in manu there is a provision which indicates that extreme cruel penalties should be resorted to only against offenders who were un repentant and recalcitrant, after referring to the four greatest sins (Mahapatakas), which included the murdering of a Brahmana and violating the Guru's bed, for which death penalty was prescribed, provided a qualifying clause. On these four sinners, even if they don't perform a penance, let him (King) inflict corporal punishment and fine in accordance with law. This rule shows that while the act of committing an offence was condemned, the act of accepting the mistake and suffering for it was commended. If, after having committed even the greatest sins, the offender admitted the sin and repented for the offence committed (Paschattapa) and under went penance (Prayaschitta) voluntarily, he was to be exempted from severe penalties".38

Mutilation was very common in ancient times. Sometimes it was followed by death, burning or boiling alive. In ancient India, and even in the Mughal and Maratha periods, mutilation was resorted to. The idea, however, behind this type of punishment was one of deterrence. Flogging prevailed from the earliest times. It was a hard punishment. The punishment of flogging was not inflicted when the offender was found medically unfit to bear it. In times of old and even in the middle ages, whipping was the commonest of punishments. Whipping in public was resorted to. For forcing out confessions from prisoners, they were put to the rack and severely tortured. Many of the prisoners put into chains

and whipped, bled to death, and the whipping went on mercilessly even after the prisoner fainted. Slaves were flogged with three througed whips. TIU 1917, even women were not spared. Lombroso was against flogging, and preferred the substitutes of fasting and hard labour.

In ancient Iran, and in ancient India even in the times of the Mughal rulers and the Maharathas, whipping was much resorted to: it was very severe indeed, and many of the prisoners bled to death as the result of the wounds received through the lashes. In 1838, Dr. Barnes, giving his opinion before the English Prison Commission of 1838, said: "I never know a convict benefited by flagellation. The beaten man becomes a more desperate character".

In the Criminal Sessions of the Bombay High Court, in 1944, four persons involved in a rape case were sentenced to imprisonment ranging from 2 to 3 years and to whipping ranging from 20 to 30 strokes each. One wonders whether such punishment does any good or serves any useful purpose by way of deterrence or reformation. In so far as we are convinced, whipping either breaks and degrades the prisoner or makes him accustomed to pain and hardship, making him more inclined to crime in the future. It is possible, if not quite probable, that whipping may arouse in the person whipped even a sadistic tendency, and thus produce grosser perversity than before. In the case mentioned above the victim was a young girl under 18 years of age, and the crime was committed by threats as also false inducements; the learned judge
desired passing an exemplary sentence. But we should say that whipping was not necessary or desirable, and that imprisonment even for a longer period that is even for five or six years, would have been effective.

Flogging might be resorted to, when the conditions are such that there is no other adequate way left. Veromica King shows how in an American prison, a riot was successfully dealt with by a warden on his own responsibility, flogging the rioters.\textsuperscript{39}

In March, 1944, Mr. M.A. Kazmi introduced in the legislative Assembly a Bill for the abolition of whipping as punishment for offenders. It was however, rejected, on the ground that Government was not in favour of the demand for the total abolition of whipping, but would consider the question of abolition of whipping in the case of certain offences. The State Governments were not in favour of complete abolition of whipping. In 1955, the Union Government of India had their Bill for the abolition of whipping passed in Parliament. The Government of India deserves congratulations for having abolished the punishment of whipping.

We propose the abolition of whipping as a punishment. Whipping should not be inflicted except to control an otherwise uncontrollable offender. Not even in cases of brutal offences should whipping be allowed, for by whipping a man, whom society may call a brute, society is making him either a misanthrope, an

\textsuperscript{39} King, V.: Problems of Modern American Crime, pp.276-78.
enemy, or a coward. Whipping produces the rougher kind of criminal, the more maladjusted being, the braver desperado, or else the broken down man. And whipping in a mild form is ineffective. So either way whipping is of no use. Our conclusion then is that whipping should be abolished, subject, however, to using it only for bringing an otherwise uncontrollable prisoner to check.

It is gratifying to note that, in 1948, England abolished whipping as a punishment. The Indian legislature in 1955, emulated the English Parliament, in this respect,

**Solitary Confinement:**

Originally imprisonment was a mode of custody of undertrial persons. Under trial persons were locked up sometimes for years together before they were put up for trial. As early as 1597, jails were established and then jails were miserable places where prisoners were hurted up together. The inspiring of tear or terror was at the substratum of the old system of social defense and control. It was in the 18th century that due to the agitation set up by prison reformers, prisons were built of the cellular type. But as prisoners could not stand the tortures of solitary confinement, they were put in communal confinement, and thus an important change in the prison system took place.

Regarding solitary confinement. Dr. Havelock Ellis says that this sort of punishment is considered as a national method
of treatment and cellular confinement is a curious monument of human perversity that it should have been established, shows the ignorance of criminal nature which existed at the time; that it should still persist shows the present necessity for a widespread popular knowledge of these matters. It may be possible to learn to ride on a wooden horse, or to swim on a table, but the solitary cells do not provide even a wooden substitute for the harmonising influences of honest society. To suppose that cellular confinement will tend to make the criminal a reasonable human being is rational as to suppose that it will tend to make him a soldier or a sailor, a doctor or a clergyman. The mistake here is the old one that has vitiated so much of human actions where the criminal is concerned with the mistake, that is, of supposing that at all points he is an average human being. Solitary confinement on a refined and cultured human being may produce a deep and lasting impression, a period of solitude, indeed, is for every intellectual person of immense value in helping him to know himself; though even here, if compulsory and unbroken, it can scarcely be without demoralising effect. But the case is quite different when we turn to the vacuous-minded, erratic and animal person who is usually the criminal. 40

Solitude produces in him, no intellectual activity, and no searching of conscience; it serves merely, to deepen his mental vacuity and to deliver him over to unnatural indulgence in the

one animal appetite of which he cannot be deprived. The cell excludes all the bracing influences of struggle; the morality of the cell is submission, punctuality, quietness, politeness to warders. A human life shut up in such a frame has nothing in common with social morality. 41 Beltrani-Scalia, formerly Inspector General of Prisons in Italy, is of the same opinion, and remarks that "the cellular system looks upon man as a brother of 'La Trappe'." 42

Our conclusion in this respect is that the solitary confinement is barbarous, inhuman, cruel and against the notion of a civilized society. Prof. Sethna however opines that it all depends on the type of person confined whether solitary confinement would work well or produce evil results on body or mind. If imposed it should be noted well whether the person would be capable of bearing the same. On the whole it may be said that, except in some suitable cases (certified as such by medical expert), the punishment of solitary confinement should not be imposed. But I may submit it that the punishment which serves no social purpose should be abolished. It is unfortunate that in India we still have the provisions of solitary confinement under Sections 73 and 74 of the Indian Penal Code, 1860. 43

41. Ibid.
42. Sethna, M.L., op. cit., p.263.
43. Indian Penal Code, 1860, Section 73: Whenever any person is convicted of an offence for which under this Code the court has the power to sentence him to rigorous imprisonment, the court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of Contd...
Solitary confinement is now no more in Russia. The prisoner is allowed to associate association with his fellows.\textsuperscript{44} Fetters and dietary punishment are resorted to in our prisons even to day as penalties for breach of prison discipline or rules or for insubordination. Fetters should not be used except to bring an otherwise uncontrollable prisoner to control.

Even execution of any undefined mode of punishment is cruel; inhuman and barbaric. Recently in \textit{Attorney General of India Vs. Lachma Devi and others}\textsuperscript{45} observed that in court would like to make it clear that the execution of death sentence by public hanging would be a barbaric practice clearly violative of Article 21 of the Constitution and we are glad to note that the Jail Manual of no State in the country makes provision for execution of death sentence by public hanging which, no doubt, is a revolting spectacle barking back to earlier centuries.

\textit{Contd...}

the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the scale, that is to say- a time not exceeding one month if the term of imprisonment shall not exceed six months; a time not exceeding two months if the term of imprisonment shall exceed six months and shall not exceed one year; a time not exceeding three months if the term of imprisonment shall exceed one year.

\textsuperscript{44} Ibid, Section 74— In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the period of solitary confinement of not less duration than such periods, and when the imprisonment awarded shall exceed three months, the solitary confinement shall not seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

\textsuperscript{45} \textit{AIR 1986 SC 467}. 
The Court further observed: "The direction for execution of the death sentence by public hanging is to our minds unconstitutional and we may make it clear that if any Jail Manual were to provide public hanging, we would declare it to be violative of Article 21 of the Constitution."

**International Amnesty and Pardon:**

Under the International Amnesty and Pardon Political offenders are protected. Example of amnesty and pardon are as ancient as the records of organized society, and these institutions are recognized in almost every contemporary legal system. This Universality may be seen as a reflection of the desire pertaining to all systems to "temper justice with mercy". More specifically, it signifies the need for any formal system to maintain a residual power to introduce occasional modifications in implementing its formal norms in order to meet the exigencies of unforeseen situations.

The term 'pardon' is first found in early French law and derives from the Late Latin perdonaere "to grant freely" suggesting a gift bestowed by the sovereign. It has thus come to be associated with a some what personal concession by a head of state to the perpetrator of an offence, in mitigation or remission of the full punishment that he has merited. Amnesty, on the other hand derives from the Greek amnestia i.e. "forgetting", and has come to be used to describe measures of a more general nature, directed to
offences whose criminality is considered better forgotten. Yet, it is interesting to note that in ancient Greece, amnesties were in fact called adeia i.e. "security or immunity" and not amnestia. Moreover, the term pardon fell into disuse in French law, to be replaced by the term grace.

An amnesty typically (1) is enacted by legislation instead of being a purely executive act; (2) is applied generally to unnamed persons, that is, to persons who fulfil certain conditions or a description laid down by the law; and (3) is designed to remove past facto the criminality of the acts committed. Amnesties are deemed appropriate after a politically, economically, or military upheaval. A newly installed regime may hold a different perception of conduct penalized by its predecessor, whereas a consolidated one may wish to indicate its self confidence by forgiving its erstwhile opponents. These characteristics differentiate amnesty from pardon, which issues from the head of state rather than the conviction, and is granted on an individuals basis.

Contemporary Functions of Pardon and Amnesty:

The term 'pardon' is often used generically to describe the power vested in the head of state to grant clemency in individual cases. In this sense it includes such subcategories as full pardon, conditional pardon, commutation, remission, and reprieve. Sometimes, however, it refers only to certain categories. Thus, the United States Constitution refers only to pardons and reprieves,
the first term incorporating the remaining sub categories. 46

In recent times, pardons have served three main functions: (i) to remedy a miscarriage of justice, (ii) to remove the stigma of a conviction and (iii) to mitigate a penalty.

The first two objectives are usually achieved by means of a full pardon; the other forms are employed for the purpose of mitigating the sentence. These very different objectives have resulted in some confusion as to the legal effects of a pardon. Thus, a pardon is sometimes held to "blot out guilt"—a necessary outcome where the pardon was brought about by a miscarriage of justice, but an inappropriate result in other cases. A commutation substitutes one recognized form of penalty for another. A conditional pardon is more flexible, the only usual requirement being that the condition attaching to the pardon be reasonable. A remission simply implies cancellation of the penalty wholly or partly.

It will not be out of point to differentiate amnesty from pardon. In law, an amnesty differs from a pardon in that it does not merely operate as a ban to the carrying out of the sentence but actually annuls the sentence itself. Another distinction at least in the traditional doctrine, is that a pardon is an individual measure, whereas an amnesty is in principle general in character. An amnesty measure covers a whole series

of offences which should be forgotten for reasons of higher policy.

Andrei Sakharov in a message to the Stockholm Conference on Abolition of Death Penalty organised by Amnesty International in 1978 expressed himself firmly against death penalty:

"I regard the death penalty as a savage and immoral institution which undermines the moral and legal foundations of a society. A state in the person of its functionaries who like all people are inclined to making superficial conclusions, who like all people are subject to influences, connections, prejudices and egocentric motivations for their behaviour, takes upon itself the right to the most terrible and irreversible act - the deprivation of life. Such a state cannot expect an improvement of the moral atmosphere in its country. I reject the notion that the death penalty has any essential deterrent effect on potential offenders. I am convinced that the contrary is true - that savagery begets only savagery... I am convinced that society has a whole and each of its members individually, not just the persons who come before the courts bears a responsibility for the occurrence of a crime... I believe that the death penalty has no moral or practical justification and represents a survival of barbaric customs of revenge. Blood thirsty and calculated revenge with no temporary insanity on the part of the judges are therefore shameful and disgusting."

Amnesty International is urging all governments to stop execution and take steps to abolish the death penalty in law because the death penalty is a violation of fundamental human rights. It has got Noble Prize in 1977 for humanitarian work.

Infact, abolition is gaining ground over 40% of the countries have abolished the death penalty. Yet too many governments

still believe that they can solve urgent social and political problems by executing prisoners. The death penalty is the premeditated killing of a human being by the state.

There are still some misgivings about the trend towards abolition of capital punishment. It is considered as an extreme sanction for most extreme crimes, a drastic sanction for drastic crime. It is an unfortunate but unavoidable necessity. There is also lack of substitute for capital punishment because life sentence is no better. It is a living death in prison.

**Political Executions**

The death penalty is widely used for political repression. Rulers have executed their rivals and have used executions on consolidate power after coups and attempted coups. The best known political execution of recent times is that of Zulfikar Ali Bhutto in 1979 by General Zia-ul-Haq. Another example is 76 years old leader of Sudan Mahmoud Mohammed Taha in 1985.

Often the courts operate in a highly charged political atmosphere which militates against a fair trial. Indian legal history already knows the judicial murder of Nand Kumar in British days. Now in India out of eight offences under Indian Penal Code, punishable with death penalty, there are only two political offences: waging war etc. and abetment of mutiny
under Section 121\(^{49}\) and 132\(^{50}\) of the Code respectively. After Independence no case has been brought on book in which death penalty has ever been imposed.

When the death penalty is inflicted for other than political reasons, it often becomes a lottery. It depends not only upon the crime but also on factors such as the defendant's ethnic origin and financial circumstances. In South Africa, death sentences are imposed disproportionately on the black population by an almost entirely white judiciary.

In the U.S.A. the quality of legal representation can be crucial in whether or not a death sentence is imposed. Here too, most defendants on capital charges can not afford private defence lawyers and are assigned law paid, court appointed lawyers. On the other hand in Florida, as a result of the efforts of experienced lawyers since 1985, 50% death penalty cases have been reversed. This reveals that death penalty is imposed in an arbitrary way.

It is really very unfortunate that in these days of human rights and advanced civilization, those who are in power make use of this sentence through judicial institution to retain their position.\(^{51}\)

\(^{49}\) Supra Chap. II Note 65.  
\(^{50}\) Supra Chap. II Note 66.  
An amnesty can not as a rule be granted otherwise than by statute or by an equivalent legislative act. The legislature is free to determine and to specify in the amnesty law, the circumstances, conditions and limits of its application. In some countries as in Somalia (nothern) the power of amnesty may be rested in the President of the Republic by Special delegation of the legislative power. In Japan and Greece and amnesty may also be ordered in certain exceptional cases by the emperor or King.\textsuperscript{52}

The power of amnesty is, in some countries limited in scope. For example, an amnesty can only apply to penalties involving deprivation of freedom and to fines. In other countries like Greece and Guatemala an amnesty is possible only in respect of political and similar crimes. And it should be noted that amnesty is an institution unknown to the law of many countries, in particular the United States and the commonwealth countries. If a legislation grants an amnesty in respect of certain offences, he does so as a general rule only for those of medium gravity and in respect of comparatively light sentences. Accordingly, and by reason of what might almost be called consideration of political psychology, amnesty plays practically no role in the matter of capital punishment.\textsuperscript{53}

The arguments for capital punishment are rebutted by asserting that civilization means tolerance. Severity of punish-

\textsuperscript{52} United Nations Department of Economics and Social Affairs: Capital Punishment.

\textsuperscript{53} Ibid, p.28.
ment reflects backwardness and retrogression. Practices and profession paint a contradictory picture about capital punishment. Undoubtedly, there is a trend towards abolition of capital punishment. Presently in the world there are 46 countries whose laws do not provide for death penalty for any crime and 92 countries and territories still retain and use death penalty for ordinary crimes. On the whole, it seems that retentionists or capital punishment are fighting a loosing battle. Abolition of death penalty is the goal towards which all the civilized countries in the world are gradually advancing and it is the inevitable and logical culmination of the modern penological progress.

Abolitionist, For All Crimes
Andorra, Australia, Austria, Cambodia, Cape Verde, Colombia, Costa Rica, Czech and Slovak Federative Republic, Denmark, Dominican Republic, Ecuador, Finland, France, Federal Republic of Germany, Haiti, Honduras, Hungary, Iceland, Ireland, Kiribati, Liechtenstein, Luxembourg, Marshall Islands, Micronesia (Federated States), Monaco, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Norway, Panama, Philippines, Portugal, Romania, San Marino, Sao Tome and Principe, Solomon Islands, Sweden, Tuvalu, Uruguay, Vanuatu, Vatican City State, Venezuela, Nepal, Pakistan.

55. Ibid, Retentionist countries
Afghanistan, Albania, Algeria, Angola, Antigua and Barbuda, Bahamas, Bangladesh, Barbados, Belize, Benin, Botswana, Bulgaria, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Chile, China, Congo, Cuba, Dominica, Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kenya, Korea (Democratic People’s Republic) (North Korea), Korea (Republic) (South Korea), Kuwait, Laos, Liberia, Lesotho, Liberia, Libya, Malawi, Malaysia, Mali, Mauritania, Mauritius, Mongolia, Morocco, Myanmar, Nigeria, Oman, Pakistan, Poland, Qatar, Rwanda, Saint Christopher, And Nevis, Saint Lucia, Saint Vincent And The Grenadines, Saudi Arabia, Sierra Leone, Singapore, Somalia, South Africa, Sudan, Suriname, Swaziland, Syria, Taiwan (Republic of China), Tanzania, Thailand, Tonga, Trinidad and Tobago, Tunisia, Turkey, Uganda, Union of Soviet Socialist Republics, United Arab Emirates, United Kingdom, United States of America, Vietnam, Zambia, Zimbabwe.
On the other hand, some countries which had abolished death penalty earlier have reintroduced death penalty in their codes: Soviet Union had abolished it in 1947 but reintroduced it in 1950 for traitors and spies. France reintroduced it in 1960 in the wake of Algerian war. Brazil and Argentina did the same in 1969 and 1971 respectively due to increasing activities of urban guerillas.

There is also visible change in the attitudes of people in regard to offenders. People seem to have developed a sympathy for ordinary offenders in preference to political offenders. While the number of ordinary crimes entailing death penalty is decreasing, death penalty is being increasingly applied to state crimes like terrorism, drug trafficking, economic offences, corruption and security of state. These is less emphasis on homicide and more emphasis on economic and political crimes.  

Whatever be the ultimate fate of death penalty the accused requires protection against fallibilities and Prejudices of Judiciary, protection against police, protection against public and mass media, protection against political interference and protection against ignorance and poverty. Ultimately there should

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57. Hingurani, R.C., op.cit. seven eight.
also be protection against torturous death penalty.

The time has come to abolish the death penalty worldwide. Now here it has been shown that it has any special power to reduce crime. In country after country it is used disproportionately against the poor or against racial minorities. It is often a tool of political repression. It is an irrevocable punishment, resulting inevitably in the deaths of innocent people. The death penalty is a violation of human rights. 58

According to the Amnesty International appeal, death penalty is cruel, inhuman and degrading punishment. Since the International Conference at Stockholm, held in December 1977, the United Nations has declared death penalty illegal. But a very sorry state can be seen when thirteen soldiers and civilians were shot dead at Kinshasa in Zaire on 18.3.1978 for plotting to kill the country's President Mr. Mobuto Sese Seko. All appeals, based on human rights and considerations were brushed aside by Mr. Mobuto and the sentence awarded by the military tribunal has been carried out. The very next day on 19.3.1978 in Egypt five leaders of a Muslim extremist group called Takfir Waljihira, a society of repentance and fight for sin- including its president were hanged to death on directions of a martial court for kidnapping and killing Dr. Mohammad Hussain Zahabi Ex-minister of Wakfs in Egypt.

Amnesty International made an appeal for commutation of death penalty imposed on Mr. Zulfikar Ali Bhutto, former Prime Minister of Pakistan. Almost all the countries of Asia continent made an appeal for the par.doing of death sentence because Mr. Bhutto was prosecuted in a very tense political atmosphere. There is a risk of miscarriage of justice. But unfortunately Head of the Government of Pakistan did not consider the appeal and lastly Mr. Bhutto was hanged.

This indicates that nations are not prepare to abolish death penalty at present. The world organization can ban death penalty only if majority of its members desire it. To achieve that end, sociologists, jurists and politicians have to create an atmosphere in all countries of the world.