CHAPTER VIII

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Death penalty is an abrogation of the freedom of right to live. Right 'to life and liberty' is our fundamental right enshrined under Article 21 of our Constitution. No doubt, the enjoyment of this right is subjective to the interest of the people. The state may, therefore, encroach on the domain of these rights for the common good or common interest. However, the question whether a fundamental right should be subjected to restrictions for the common good or public interest will depend upon the conditions and circumstances prevailing at a particular time.

It is very much evident that life has been granted to man by God who alone can take back. Man made machinery cannot deprive a man of his life because man is not the maker of life. Death sentence is man's inhuman to man.

In this land of Buddha and Gandhi, where from times immemorial, since over two thousand years ago, every human being is regarded as an embodiment of Brahman and where it is a firm conviction based not only on faith but also on experience that "every saint has a past and every sinner a future". The standards of human decency set by our ancient culture and nourished by our constitutional values and spiritual norms frown upon imposition of death penalty for the offence of murder. It is
indisputable that the Constitution of a nation reflects its culture and ethos and gives expression to its sense of moral and ethical values. It affords the surest indication of the standards of human decency cherished by the people and sets out the socio-cultural objectives and goals towards which the nation aspires to move.

Thus the idea of capital punishment is not suited to the modern welfare state ideals. The state is the protector of all alike. But with regard to capital punishment, it is doubtful whether this statement is true, can the state take life of a man in the name of protecting the other members of the society? Some people find it to be absent that the laws which are an expression of the public will which detect and punish homicide, should themselves commit it and that to deter citizens from murder they order a public one.

In India the question of abolition of death sentence was raised in the old Legislative Assembly in 1931, when Shri Gaya Prasad Singh sought to introduce a Bill to abolish the punishment of death for offences under the Indian Penal Code. The Bill was introduced on the 27th January, 1931, and on the 17th February, 1931, a motion for circulation was made. The motion was negated after the reply of the then Home Minister Sir James Cown.

In support of his motion, examples of other countries were cited 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 demoralizing effect on the human mind. The danger of conviction of innocent persons and the misery caused to the wife and children of the condemned man were also dwelt upon.

Every human judgement is liable to be mingled with error, and the torture of knowing that a man had been hanged through what he believed was a blunder is among the most vivid memories of Lord Carigmyle, the famous Scottish Judge, better known as Lord Shaw of Dunfermline, who became a confirmed opponent of capital punishment. There was a case of Bihar which has been cited in the 35th Law Commission Report that some time back, as many as five persons were condemned to death, and the sixth to be transported for life, by the Sessions Judge of Shahabad, on a charge of murder in a case which was got up by a Sub-Inspector of Police. Subsequently, owing to the attitude taken by the local public whose conscience was shocked, an elaborate official inquiry had to be instituted, which showed that the case which had ended in the conviction of the accused for murder was entirely false. The Local Government was satisfied by evidence which was subsequently discovered that the case was altogether false and concocted and directed the release of the condemned persons. The Sub-Inspector of Police concerned and three other persons, who
were found to be implicated in this remarkable conspiracy, were hauled up before the Patna High Court, and convicted.²

Thereafter, Shri Prithvi Raj Kapur moved a resolution for the abolition of capital punishment in the Rajya Sabha, in 1958.³ The Resolution was withdrawn after debate a Resolution for the abolition of capital punishment was moved in 1961 in the Rajya Sabha,⁴ by Smt. Savitry Devi Negam, but that was negatived after discussion. Thereafter Shri Raghunath Singh's Resolution for the abolition of capital punishment was discussed in the Lok Sabha, in 1962.⁵ The Resolution was withdrawn after discussion. Shri Harish Chandra Mathur had moved an amendment that the matter may be referred 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 raised the question of examining the Code of Criminal Procedure and the Indian Penal Code, with a view to consider as to whether any changes are necessary therein. 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

³. See Rajya Sabha Debates, 25th April, 1958, Cols.431 to 442 and 444 to 528.
⁵. Lok Sabha Debates, 21th April, 1962, Coals.307 to 365, Particularly Cols.354 and 355.
in 1961 on the Resolution of Smt. Savitry Devi Nigam would be forwarded to the Law Commission. 6

The controversy with regard to abolition or retention of capital punishment is so old and familiar that it is doubtful whether there is really any particular issue which has not been discussed threadbare already. So long as capital punishment remains on the statute books the controversy will go on and the same old issues will merely assume a new dimension without any change in their content. The advocates of both the sides are divided so sharply and the issues have been so clearly crystallized and the protogonists remain pitted against each other loaded with the same armoury of arguments. The basic issues in the abolition of capital punishment can be reduced to four. They are: 7

(i) Has society a right to take the life of a citizen?
(ii) Is capital punishment really inhuman and ethically repugnant?
(iii) Is there any element of deterrence in capital punishment or not?
(iv) How is the present system working and is there anything wrong with it?

So far as the first issue is concerned; the right of society to impose capital punishment is except what is created by maudlin sentimentality, the state's right over the individual citizen's

life and property in the overall interest of social stability
and protection cannot be questioned. It is a sovereign right.
Legally, constitutionally, and even philosophically that right
is inherent, in the concept of the state. In what manner this
right to be exercised, what limitations are to be imposed, what
is the extent of care to be taken are matters of details and not
of principles.

The second issue is regarding the element of inhumanity
in capital punishment. The scales appear to be weighted more
in favour of the criminal than the victim. This statement is
not made in a spirit of retribution in our concept of punish-
ment. But there must be at the disposal of the sovereign state
a (menas) of elimination of undesirable elements (however small
their number may be) who poses a threat to the society and whose
presence has a potential for grave peril to it. The abolitionis-
ts also do not object to the removal of such element in principle
but what they object to is the primitive cruelty and barbarity in
taking a man's life.

Now the question is- is life-long imprisonment more human
than capital punishment? To some at least quick extinction of
life is preferable to an interminable incarceration. As regards
the ethical aspects, we have to deal with the problem in the
general context of the attitude of the criminal himself and his
potential for posing a serious threat to other citizens. If a
person attaches no value to the sanctity of human life and proceeds deliberately to destroy it knowing fully well the consequences of his actions, it would perhaps be more unethical to allow such persons a free play for committing more heinous crimes later. Society, in its attachment to mere sentiment cannot forfeit its responsibility towards its large segments.

The last issue is regarding the fact that capital punishment in this country is given only in eight offences under the Indian Penal Code five offences created recently under different legislations. In practice, it is only in respect of murder i.e. Section 302 of Indian Penal Code that it is imposed. I do not think that during the last decade, or even more, capital punishment has been imposed in respect of any other offences. The Law Commission is now engaged in reducing the number of offences still further. Even in cases of murder, it would perhaps recommend capital punishment only in respect of certain types of gross heinousness and diabolical planning. This by itself is a great step forward in the reformation of law. Even in practice, it is only in a very infinitesimal number of cases that capital punishment is imposed and carried out.

The retentionists of capital punishment emphasize that all their arguments have to be considered in the light of conditions in India. Arguments that may be valid in respect of other

8. Ibid.
countries may not necessarily be valid for India. India is a vast country and a large mass of the population is illiterate. The majority of the people live in villages, scattered far and wide and are looked after by a police force which is not uniformly adequate. There are, in some parts of the country, sectional feuds marred by fanaticism.

The extra legal factors that act as a check on murder in western countries such as education, prosperity, homogeneity and awareness of faults, are unfortunately absent in many parts of India, or are overpowered by other and more violent factors.

There had been a detailed discussion concerning the deterrent effect of capital punishment. This deterrent effect is one of the basic arguments of the retentionists, nevertheless they know the problems. Human being is complex and actuated not only by fear, but also by love, loyalty, greed, lust, and by many other factors. In spite of these arguments, the retentionists are convinced of the deterrent effect of capital punishment; they say that this deterrent effect cannot be seen directly, but it acts on the community in the form of moral consciousness.

Further, they argue that the majority of murders in India are committed by the poor and backward classes. Prison conditions are often better than conditions prevailing in their homes, and

10. Ibid, p.112.
for such persons death is the only deterrence. Moreover, life imprisonment is inadequate to replace capital punishment, particularly because of the practice of earlier release. The retentionists also refer to the fact that public opinion is in favour of capital punishment. As in Germany, Kant is quoted who explained that the proper theory of punishment is the theory of retribution. It is also said that capital punishment in a painless and human form is less cruel than imprisonment for life. Further the retentionists do not see a problem in miscarriage of justice, because the accused has the chance of appeal and pardon. But if, we consider the criticism, that is often expressed concerning the apparent susceptibility of the Indian justice system to corruption, one may conclude that this argument would rather tend to support to the abolitionists cause.

Another argument of the retentionists is that a poor land like India is not able to imprison all murderers and feed them for decades, not to mention that the taxpayers should not be called upon to pay for the maintenance of anti social criminals for an indefinite or very long period. Further more, there will be an increased risk to police officers, if murderers are not sentenced to death. Very often, there have been cases when murderers, after they came out of prison, pursue the man who got them convicted.

Capital punishment also has the function of avoiding popular reactions, if the people think that justice has not been done, they take the law into their own hands. But, the main argument of the retentionists is that even if the principle of abolition is accepted, the time is not yet ripe in India. Present day society is not yet ripe for this reform and the community has not yet reached such stage.

Above all the abolitionists mention that Indian ideology is based on non-violence. This is the great ideal, which the fathers of the Indian nation kept before them and if they have any regard for them the death sentence must be immediately removed. Further they say that difficulties of prison administration are no argument for retention. Taking away of life by the State for economic reasons is contrary to the universally accepted religious and moral principles. Capital punishment is irrevocable. In case of an erroneous conviction no compensation can be awarded.

Capital punishment is unjust because persons who cannot afford to engage a good lawyer are unable to fight a case to the last; so the poor Indians have smaller chance of saving themselves. The opponents of capital punishment think that

12. "If a country physically and morally in shambles, as was Germany in 1948, could abolish the death penalty without
atleast we should make an experiment of abolishing the death penalty in India. For them, the argument of public opinion is an irrelevant one. On the one hand public opinion is largely divided on the issue, besides, the members of Parliament are responsible for creating public opinion and for reforming society.

The Law Commission conducted an empirical study and the questionnaires which were despatched by the Law Commission show that the proponents of capital punishment are in the majority.

In favour of retention were almost all the High Courts, Bar Associations, all State Governments and most of the Directors of prisons and police force. But, abolitionists were in the majority as regards the private persons questioned. This leads to the conclusion, that public opinion in India does not totally support the retention of capital punishment.

By comparing this discussion in India with the one in West Germany, it can be said that there are no totally new arguments. The only difference is the difference in weight of certain arguments, e.g., the economic argument or miscarriage of justice. Also the argument of general deterrence might be weighed differently, or perhaps, viewed from a different angle.

For the layman the State was, and still is, the ruler over life and death. A State that voluntarily gives up this

13. Ibid.
position, might be regarded as a weak one, no longer requiring
loyalty. But, are these mere speculations? The weight of
various criminological arguments like gang warfare and a murder
rate amounting to six-times that of England and France, are yet
to be evaluated. There remain a lot of questions, but neverthe-
less, one should try an evaluation. Because of the weight of the
specific Indian arguments capital punishment should be retained
for the moment. But there rests a hope, that there will be a
further restraint and that abolition will follow in the end. 14

The crusade against capital punishment started in England
and in Europe as a result of the works of utilitarian philosophers
like Bentham and Beccaria. They insisted that punishment being
an evil in itself should be just sufficient to curb the menace of
the crime. No excessive punishment, including capital punishment,
ought to be inflicted where some lesser penalty could achieve the
same result. The humanitarian movement resulted first in the
reduction of a number of offences punishable with death which was
about 200 by the end of the 18th century, and then in the ultimate
abolition of capital punishment for all offences except that of
high treason. 15

The position in England can be summarised by saying that
capital punishment has been abolished some twenty years back

15. See, Wani, Abdul Iatif, "Abolition of Capital Punishment",
Cochin University Law Review ( ) p.
except for high treason. However, a private bill was introduced in 1983 in the House of Commons seeking the re-introduction of capital punishment for offences of murder connected with rape, robbery and terrorism. But the motion was defeated. In the United States, Criminal Law being a state subject, the position differs from state to state. Some states have abolished capital punishment while others have retained it. Very recently the question of Constitutionality of death sentence was raised before the American Supreme Court. The Court held that the capital punishment provision was violative of Eighth Amendment of the Constitution in the sense that the punishment was of 'unusual and cruel' nature.

In July 1979, the motion for the restoration of capital punishment in Britain was defeated in the House of Commons by 362 to 243 votes inspite of the overt support to it by Mrs Margaret Thatcher. An American public opinion poll shows that 70% of Americans are in favour of the death penalty and they consider it as a deterrent form of punishment. Standpoints of Retentionists and Abolitionists.

The last decade started a judicial response to the courtroom clash of the Abolitionist and the Retentionists. The humanistic, moralistic standpoint of those opposing the continued

17. Supra Chap.IV Note 30.
exercise of judicial power to take life, witnessed a conscious negation, thus giving the power to deprive life in the name of justice. The Retentionists won the day, but alongside the last bugle in this battle arrived a new mascot "the rarest of rare" case.

The Law Commission has also come to the conclusions that having regard to the conditions in India, we could not risk the experiment of abolishing the capital punishment and it should be retained in the present state of the country. It is rather pertinent to mention the conclusions of the Law Commission-

"It is difficult to rule out the validity of; or the strength behind many of the arguments for abolition. Nor does the commission treat lightly the argument based on the irrevocability of the sentence of death, the need for a modern approach, the severity of the capital punishment, and the strong feeling shown by certain section of public opinion in stressing deeper question of human values.

Having regard, however, the conditions in India to the variety in the social upbringing of the inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment".

The protagonist's stand on this issue is based on several arguments. Firstly, the argument in support of death penalty is that, every punishment is to some extent intended to express the revulsion felt by the society against the wrongdoer and the punishment must, therefore, be commensurate with the crime and

since murder is one of the gravest crimes against society, death penalty is the only punishment which fits such crime and hence it must be held to be reasonable. The denunciatory theory was put forward as an argument in favour of death penalty by Lord Denning before the Royal Commission on Capital Punishment in the following words:

"The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the object of punishment as being deterrent or reformative or preventive and nothing else. The ultimate jurisdiction of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime, and from this point of view there are some murders which in the present state of opinion of all, namely, the death penalty... The truth is that some crimes are so outrageous that is irrespective of whether it is a deterrent or not".

The Royal Commission on Capital Punishment seemed to agree with the above view. The Commission states that the law cannot ignore the public demand for retribution which heinous crimes undoubtedly, provoke; it would be generally agreed that, though reform the criminal law ought, sometimes to give a lead to public opinion, it is dangerous to move too far in advance of it.  

Secondly, death penalty is legally permissible where it is found that a killer is such a monster or beast that he can never be reformed.

20. Supra Chap. IV Note 11, p.642.
Thirdly, the advocates of death penalty argue that though there may be a few murderers whom it may be possible to reform and rehabilitate, there are a large number of killers who cannot be reformed and rehabilitated. So, why should the death penalty be not awarded to them? The Supreme Court adopted the 'rarest of rare' yardstick only in gravest cases of extreme culpability.

Fourthly, why should death penalty be not inflicted on the hardened criminals and notorious dacoits (like Phoolan Devi, Malkhan Singh and on the dacoits in Chambal Valley) who have committed countless murders? Murder is heinous or horrifying and it can be said that death penalty is proportionate to the offence.

Fifthly, the supporters of capital punishment are of the opinion that the murderers must be put to hanging to have a psychological relief to the witnessed society and also to act as a deterrent upon future criminal activities.

On the other hand Justice Douglas rightly said that the tool of capital punishment was used with vengeance against the opposition and those unpopular with the regime (Furman Vs. Georgia).²¹

The spirit of the above observation of Justice Douglas is more relevant in the Indian context in view of our fragile

²¹. Supra Chap.IV Note 30.
democratic institutions to conclude against the legitimacy of capital punishment.

Death penalty is irrevocable and where a person is wrongly convicted and sentenced to death, such execution will be a blot on judicial conscience. The fact that it remains on the statute book amounts to theoretical admission of miscarriage of justice and judicial error in imposition of death is a crime beyond punishment. In Bachan Singh Vs. State of Punjab, majority opinion also admit such possibility but proceeds to say that "their incidence can be infinitesimally reduced by providing adequate safeguards and checks". Curiously this logic essentially means that it is all right so long as only a very less number of innocents are executed and this amounts to the negotiation of well accepted principles of administration of criminal justice which says, "let hundred guilty persons escape but let not one innocent be punished".

Speaking of judicial error, Justice Bhagwati opines that error may result for more than one reason such as improper investigation, perjury and police mistakes etc. The morale of the Indian Police as it stands today raises serious doubts about the reliability of prosecution evidence. Torture of the accused tends to appear to be the only method of investigation that the

22. Supra Chap.IV Note 11.
police usually employ. Professor Upendra Baxi,23 observes that "even with the greatest possible understanding, sympathy and concern for the plight of the Indian police, it should be possible to reach a hypothesis that custodian violence or torture is an integral part of polity operations in India". Professional perjurer are also employed by the police to prove cases and the Supreme Court strongly condemned this systematic collusion of the judicial process and consequent threat to human rights of innocent persons if professional perjurers were kept captive by the policy.

In one case24 the petitioner alleged that he was used by the police as a stock witness in as many as 3,000 cases and a few hundred summons issued against him were also produced in proof of this.

The Statistics provided by some leading newspapers, journals, etc., reveal that there has been a gradual fall in the number of death sentences through out the world. According to Amnesty International the number of death sentences awarded in 1963 was to the tune of 2067, which has fallen to 1513 in 1983. Thus it is evident that death sentence as a punishment is losing ground in various countries, including India with exceptions like Iran and certain other Muslim countries, where the capital punishment

is favoured by the rulers for various reasons.

On the basis of discussions made earlier certain inferences which support the abolishnists view can be drawn-

Firstly, the blow of capital punishment often falls on the lowest strata of the community and on those who have turned delinquent because of society's continued maltreatment, cultural perversion and environmental pollution.

Secondly, the rich and the affluent can afford a good lawyer, and often without corruption the wheels of our police investigation will not accelerate, and the rich only can do or undo this, and in the primary stages of investigation they escape from the eye of law, and possibly the innocent poor are being sent to the gallows.

Thirdly, if a person is sentenced to imprisonment for life and subsequently even if it is found that he was innocent and was wrongly convicted, he can be set free. But that is not possible where a person has been wrongly convicted and sentenced to death. If any mistake is subsequently discovered he cannot be brought back to life and this amounts to negotiation of well accepted principle of administration of Criminal justice which says, let hundred guilty escape but let not one innocent be punished. Miscarriage of justice through judicial error, it seems, cannot be ruled out.
Fourthly, death is an unusually cruel and degrading punishment; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. And if the state machinery adopts the principle of 'life for life' it can be said that the State does not recognise the dignity and divinity of every man.

Fifthly, the most shocking thing of freakishness in imposition of death penalty demonstrates vividly its cruel and stark reality and the infliction of death penalty is influenced by the composition of the bench, for example Bachan Singh's case.  

There is also a lot of inconsistency in considering 'time factor final sentence' by the highest court of India and the more efficient the proceedings, the more certain the death sentence and vice-versa, as per Justice Bhagwati in

Mahatma Gandhi's answer to this is "Destruction of individuals can never be a virtuous act. The evil-doers cannot be done to death. Today there is a movement afoot for the abolition of capital punishment and attempts are being made to convert prisons into hospitals as if they are persons suffering from a disease.

25. Supra Chap. IV Note 11.
Sixthly, were the notorious dacoits of Chambal not transformed by the saintliness of Vinoba Bhave and Jai Prakash Narain? We have also the examples of Nathan Leopold, Paul Crump and Edger Smith who were guilty of the most terrible and gruesome murders but who, having escaped the gallows, became decent and productive human beings, and many other examples clearly show that a murderer can be reformed.

Seventhly, case studies consistently reveal that the murderer seldom considers the possible consequences of his action, and if he does he evidently is not deterred by the death penalty. Statistical findings and case studies converge to disprove the claim that death penalty has any special deterrent value.

Eighthly, in the words of Richard Khudten; "Most arguments against the death penalty followed one of the six lines of reasoning. The religious arguments suggested that the infliction of the death penalty deprives the offender of the time for repentance and of an opportunity for salvation. The medical and psychological position maintained that any person who commits murder is irrational or insane and, consequently, not responsible for his acts.

The social argument maintained that the death penalty is used so infrequently that it consequently does not truly deters others from the commission of crimes. While the moral view point noted that capital punishment makes reformation and
retribution impossible, that cultural argument postulated that man is not responsible for his actions because his culture essentially predetermines how he shall act". 26

Moreover, these arguments against capital punishment have a solid base in India's secular convictions. They express a deep philosophical foundation sustained by spiritual content. The 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 also accords the highest recognition to the basic right to live. There is indeed a long gap of time 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.

In the present era, the abolitionists have a strong support. Recent events in various countries (particularly in the developing countries) have driven many to the conclusion that murder will never cease to be an instrument of politics until the execution even of proved murderers, is regarded as immoral and wrong. In the world of today there are fewer and fewer men condemned to death for murder, and more and more executed for political ends. As long as death remains a permissible instrument of government, those in power will always justify its use. Judgement of courts can always be recalled and reviewed but execution of sentence of death can never be reviewed.

Penalitical goals also do not justify the imposition of death penalty for the offence of murder. The prevailing standards of human decency are also incompatible with death penalty. 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 prescribed 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. So also the standards of human decency vary from time to time even within the same society. In an evolutionary society, the standards of human decency are progressively evolving to higher levels and what was regarded as legitimate and reasonable punishment proportionate to the offence at one time may now according to the evolving standards of human decency, be regarded as barbaric and inhuman punishment wholly disproportionate to the offence.

Punishment is a source of righteousness, it keeps the people in control, it protects them, it remains awake when people are asleep. To what extent capital punishment proves these results has been well explained here. With the rapid
change of civilization the concept of punishment including death penalty has moved towards new dimensions. The question of abolition of capital punishment is a difficult and controversial subject, long and wholly debated. In the existing socio-economic and geographical circumstances, even after a number of attempts to abolish this penalty, it was not successful. But nevertheless, its enforcement has been restricted.

II. The position of imposition of capital punishment on an offender has been studied here in the ancient, medieval and modern period. Under the ancient period its application has been perused during the ages of vedic literature, Ramayana, Mahabharat, Budhist, Dharmashastra, Arthashastra and Smritis. In medieval period its use has been investigated from the very start of 12th century to 17th century. Sources of Muslim Law Muslim Homicidal Law with different forms: Qatl-i-Amd, Ashbah Amd, Qatl-i-Khata, Qatl-i-Qaim and Qatl-ba-Sahub alongwith jurisprudential principles of Diya, Hadd and Tazir have been discussed. For the modern period endeavoure have been made to investigate the existing legal position on capital punishment. Indian Penal Code, 1860; Constitution of India, Criminal Procedure Code 1973 (previously Criminal Procedure Code, 1898) and other recent legislations dealing with capital punishment have been keenly perused with detailed discussions.
III. On the basis of my vast studies, experience and judicial decisions an attempt has been made here to analyse critically but briefly the purposes of punishments in the following five theories: Retribution, deterrent, Incapacitation, Reformation and Rehabilitation and utilitarian.

Retribution generally points out one or the other implications of the followings: vengeance, denunciation, reprobation, atonement, expiation or to desert. Each of these aspects have their justification with Capital Punishment. The deterrent theory of punishment through threat of punishment puts an example before the society that no other person may dare to do the like offence. The both aspects of this theory: punishment "at the normal rate" and excessively severe penalties i.e. "exemplary sentence" have been discussed with justification of capital sentence. Regarding incapacitation theory it has been tried to explain that now a person individually can be restrained from repeating an offence. The purpose of this theory is to protect society from the offender and the like. Under the theory of reformation, my submission has been based on the Gandhian's philosophy that "hate the sin not the sinner". The purpose of the theory has been reformation and rehabilitation of the offender. The theory clearly indicates towards the abolition of the capital punishment. This is founded on the surmise that a crime is not the birth fellow of the criminal as much as the product of its environment. Our endeavour must be
to provide him with an opportunity to let him improve.²⁷ Moreover, if the offender even after opportunities does not leave his old practice, long term imprisonment with hard labour can be awarded.

Though this theory has been criticised on several grounds such as it is not easy to determine how the offender will behave after his release, what should be the maximum term for his imprisonment and how punishment is to be waived in expectation of future carrier. But on the other hand some jurists emphasise that prisons should not be made comfortable hotels which the offender may visit time and again without any fear of hardship or without any shame.

Under utilitarian purpose of punishment it has been submitted that since punishment involves some pain, it can be justified only if it accomplishes enough good consequences to outweigh this harm. Under this head I have discussed its objects such as general deterrence, norm re-enforcement, individual deterrence incapacitation rehabilitation and vengeance. Lastly utilitarian justification for capital punishment has been detailed. There is no reasonability for maintaining a criminal at the cost of the state.

IV. Attempts have been made here to find out whether any death sentence is violative to any provision of our grand norms i.e.
Constitution of India. I have gone through a number of cases decided by higher judiciary i.e. Supreme Court and different High Courts where constitutionality has been discussed in detail. Right to life, right to equality and right to take decision in any case reasonably to the social security of the country have been dealt with sometimes separately and sometimes intermingled in the cases of capital punishment by the courts.

Article 21 of the Constitution expressly challenges that right to life cannot be taken away unless any procedure of law so prescribes. The real challenge before us is how to diffuse the procedure which can prescribe death penalty. Whether any section laid down under Indian Penal Code or any law recently or earlier enacted prescribing death penalty or doing or illegally omitting to do a particular thing is sufficient to grapple or coming within the meaning "procedure established by law". The American phrase "due process of law" is in fact a replate of "Law of the land" used in English Constitution taken since 14th century, of Edward III.

We have neither taken the English Amendment nor the American terms. "Procedure established by law" means the procedure laid down by statute or procedure prescribed by the law of the state. Accordingly, there must be a law justifying the interference with the person's life or liberty. Secondly, the law should be a valid law, thirdly, the procedure laid down by law should have been
strictly followed. The Executive, in the absence of any procedure prescribed by the law sustaining the deprivation of personal life or liberty shall act in volition of Article 21, if it interferes with the life or personal liberty of the individual. This has been supported by a number of cases old and new.

However, the grounds for taking ones life must be reasonable. The test of reasonableness in fact, varies in accordance to circumstances. No abstract standard or general pattern of reasonableness can be established for liking of all. Proper balancing, objective concept and social interests are some basic requirements of reasonableness. The cardinal principle should be not only in substantive law but also in procedural part. It should be seen in restriction not in law. In Rajendra Prasad Vs. State of Uttar Pradesh, the Supreme Court has observed that Article 19 is a lighthouse with seven lamps of liberty throwing luminous indications of which and when only the basic freedom enshrined therein can be utterly extinguished. The judge while deciding to impose death penalty or life imprisonment must ask himself "is it reasonably necessary to extinguish his freedom by putting out the very flame of life"? The exercise of the discretion is a matter of prudence and not of law but an appeal lies by the leave of the court of Criminal Appeal against any sentence.

28. Supra Chap.IV Note 10.
not fixed by law, and if leave is given that can be altered by that court.

If "right to life" is taken away by "a procedure established by law" it should not however, be discriminatory arbitrary. "Equality before law" and equal protection of law" provisions laid down under Article 14 of the Constitution must not be fiddled. Offenders of the same offence should meet the same punishment. Offenders of murder must be sentenced equally. One treated with life imprisonment and the other with death penalty will violate Article 14 of the Constitution.

Equality before law or equal protection of laws means that no person shall be discriminated against unless the discrimination is required to achieve equality. Capital punishment under Article 14 of the Constitution is challenged when either the law itself or procedure prescribed for implementing that law does not deal the offenders equally. The discretion given to the judges for imposing punishment of either imprisonment for life or death penalty does not show any class legislation because the discretion is without any favouratism and discrimination. In death penalty court has to show special reasons.\(^29\)

\(^29\) Supra Chap.IV Note 8

SC 947, Mohinder Singh Vs. Delhi Administration 1972 Cr.L.J. 610, Ramesh Vs. State of Uttar Pradesh 1979 Cr.L.J. 126,
Article 72 and 161 of the Constitutions have empowered the President and the Governor of a State to grant pardon, reprieve, respite or remission of punishment and to commute the sentence of any person convicted of an offence. There is nothing to debar him from reconsidering the relevant circumstances such as the change in the world opinion against capital punishment. This granting of pardon is an executive act and not a judicial act. The exercise of this power will not in any way alter the court judgement. It is an act of grace. It cannot be demanded as a matter of right. Moreover, the power of Governor extends to grant pardon reprieve and respite in all cases where the sentence is not a sentence of death. It is vested only with the President.

Article 72 can be reconciled with Article 161 by limiting the power of the Governor to grant pardon to cases not covered by Article 72. If so read the President alone has the exclusive power to grant pardons, reprieves and respite in all cases where the sentence is a sentence of death and both the President and Governor have concurrent powers in respect of suspension, remission and commutation of sentence of death. But during the pendency of an appeal in the Supreme Court the Governor will have no right to suspend the sentence. Under Article 161 of the Constitution. Moreover Article 137 of the Constitution the Supreme Court has the right to review its judgements.
V. The nature of offences falling under capital punishment belong to different categories Sections 121 and 132 of the Indian Penal Code deals with the waging war or attempt to wage war or abetment of waging of such war and abetment of mutiny if mutiny is committed. Section 194 of the Indian Penal Code deals with the giving or fabricating false evidence with intent to procure conviction of capital offence and Section 3(2)(i) of the Scheduled Caste and Scheduled Tribes Atrocities (Prevention) Act, 1989 provides capital punishment to the accused who (does not belong to SC/ST) gives or makes a false evidence to prosecute any member of scheduled caste or scheduled tribe and that person is hanged, the offender shall be punished with death penalty.

Section 302, 303 and Section 396 of the Code of Section 3(2) of Terrorist (Prevention and Disruptive) Activities Act, 1987 and Section 27 of Arms Act, 1988 deal with murders in different positions. Section 307 part 2nd deal with life convict who attempts to murder any person and causes hurt. Death penalty under other Special Acts has also been discussed in detail. Constructive liability of the offenders in case of capital offences has been held same as discussed in accordance with the rule of evidence under Section 34 of the Indian Penal Code.

Mandate of Section 235(2) of the Criminal Procedure Code, 1973 is to be obeyed strictly. Recommendations of Law Commission in 35th Report on Capital Punishment have been rightly incorpora-
ted where it says that a provision be inserted in the Criminal Procedure Code requiring the court to record reasons for sentence in capital offences as Section 354(3) of the Criminal Procedure Code, 1973.

After passing the Capital Punishment the Session Court under Section 366 of the Criminal Procedure Code, 1973 shall submit the proceedings to the High Court which under Section 368 is empowered to confirm or annul the sentence. Section 416 of the Code further empowers the High Court to commute the capital punishment awarded to a pregnant lady into life imprisonment. Supreme Court is also empowered in cases of criminal appeals under Articles 132 and 134 of the Constitution to postpone the capital punishment.

Under Section 432 of the Criminal Procedure Code appropriate Government is empowered to suspend or remit or commute sentence and Section 433 empowers the appropriate without consent of the person sentenced to commute a sentence of death, for any other punishment provided by the Indian Penal Code.

Section 54 of the Indian Penal Code further empowers the appropriate Government to commute the sentence of death for any punishment provided in this code. Section 433 of the Criminal Procedure Code, 1973 also provides that the appropriate Government may commute without the consent of the convicted person of
death, for any other punishment provided under the Indian Penal Code. Regarding suspension or postponement of death sentence, Section 367, 415 and 416 of the Criminal Procedure Code, 1973 have empowered the High Court in particular circumstances. Again Articles 132 and 134 provide an appellate jurisdiction of Supreme Court in cases of appeals from High Courts during which death penalty will remain suspended or postponed till final decision of the Supreme Court.

The penal provisions in Special Acts regarding death penalty have also been discussed in detail. Section 3(2) of the Terrorist and Disruptive Activities (Prevention) Act, 1987; and Section 27 of the Arms (Amendment) Act, 1988 provide death penalty for those who cause terrorist activities causing death and using prohibited arms or ammunition causing death. Section 31A(1) of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1988 provides death sentence to the offender guilty under any of the Sections: from 15 to 25 of the Principal Act.

Section 3(2) of the commission of Sati (Prevention) Act, 1987 has been critically examined in view of the capital punishment to be imposed on the person convicted for abetment for doing such act. The latest social legislation, the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, through its Section 3(1)(c) has provided death penalty to the person who not being a member of scheduled caste and scheduled tribe falsely
evidences upon which a scheduled caste or, scheduled tribe person is punished with death. These punishments have been critically examined.

VI. Maintenance of Law and order has been the main function of the State but now the maintenance of law and order is the function of the judiciary. It is to protect the interest of the individual as well as of the society. No law violater should go unpunished. The courts are not aimed to extinguish the criminal but simultaneously courts cannot allow any person to interfere in others rights. Prevention and Control of Criminality in society is an essential function of the judiciary.

The judiciary, however, hesitates to lay down any sentencing guide. Because no fixed criteria is feasible as circumstances always remain changing. No hard and fast rule can be laid down in order to meet the exigencies of each case. Whenever any problem regarding inadequate sentencing arises before superior courts they direct the subordinate courts to use their discretion alongwith a judicial line.

The court is not bound to be influenced by public opinion. Court's duty is to administer the law. Public feeling is not an admissible reason from refraining for passing the sentence of death. 30

In India too like western countries efforts have been made regarding abolition of the capital punishment. Although even our Law Commission in its 35th Report has not recommended abolition of capital punishment. Moreover, by inserting Section 354(3) in the Criminal Procedure Code, 1973 the Legislature has shown its internal spirit that no person can be deprived of his life by imposing death penalty without showing special reasons for such punishment. Later on towards restricting capital punishment a further formulae was suggested by the Supreme Court by laying down the "rarest of the rare" doctrine.

Later on the Supreme Court also thought it necessary to restrict the imposition of capital punishment to a very limited use. In Bachan Singh Vs. State of Punjab, the Supreme Court innovated and suggested a new doctrine "rarest of the rare" case where death sentence can be used. However, unfortunately the court did not explain those circumstances which may be presumed to be rarest of the rare. The court left it to the judiciary to use its discretion in cases of imposition of death penalty when they find no other alternative. Supreme Court in a number of cases laid down guide lines through which mitigating or aggravating

31. Supra Chap.IV Note 11.
circumstances can be assessed for reducing or enhancing punishment. Capital punishment should be awarded only in most aggravated circumstances.

The Supreme Court after taking an overall view of the antecedental family backgrounds of the accused and circumstances in which the crime was committed reduced the sentence and maximum penalty was awarded in worst cases. Keeping in view of the Declaration of Human Rights and other regional conventions Indian Government has changed its outlook from removal to reformation. Since Rajendra Prasad's case efforts by the Supreme Court have been towards abolition of the Capital Punishment. Insertion of Section 354(3) of the Criminal Procedure Code indicates that in awarding death penalty the Court has to mention "special reasons" for doing so. In Bachan Singh's case death penalty was again reduced to "rarest of the rare" cases. In Machhi Singh's case court has attempted to define the phrase "rarest of the rare". Our judiciary has learned now towards abolishing cruel, inhuman and barbarous punishments which are in no case lesser than death penalty. Efforts have been made at national and international level to stop such brutal punishment in a civilised society of today. (Solitary confinement and fettering should be no more in operation.)
In modern period modifications in criminal provisions were mainly made of Regulations. Since the grant of Dewani in 1765 to the East India Company of Bengal, Bihar and Crissa, the company interfered even in criminal matters. From January 1, 1862 the substantive Criminal Law of India in the name of the Indian Penal Code, 1860 had come into force. The Code consisted of only eight sections of capital offences for which an offender could be punished with death penalty.

The changing trends of socio-economic, socio-political and socio-legal environment of the independent India has given birth to new legislations. Capital punishment to the violaters of some of the provisions of these legislations has still been thought fit for the security of the society. Commission of Sati (Prevention) Act, 1987; Terrorist And Disruptive Activities (Prevention) Act, 1987; Narcotic Drugs And Psychotropic Substances Act (Amendment) Act, 1988, the Arms (Amendment) Act, 1988, and Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 are such legislations which have been enacted very recently when world view is forelooking for maintaining the human rights, dignity of human life and abolition of death penalty, cruel, inhuman and barbaric treatment or punishment.

VII. I have discussed in detail the International efforts regarding prevention and control of capital punishment along-with the cruel inhuman and unusual treatment or punishment to the offenders. Questions have been raised whether any such restriction on the international level can have any binding force or a mere persuasive character. In the modern context when the world population is accelerating day by day no country can be said to be independent in all respects like educational, social, economic, cultural, scientific and technological fields. That is why every country, some how or other is trying to make its place at international level. Naturally mutual understanding is rapidly increasing. Accordingly communication gap between nations is being eliminated.

In this part I have tried to reveal the facts how international negotiations on educational and cultural impact resulted in municipal laws. How before the United Nations the human rights were safeguarded by mutual treaties? The United Nations charter emphasised on the general obligations of the member states to provide and encourage for protecting and maintaining the human right with dignity and respect.

The Universal Declaration of Human Rights is silent on the specific issue of the death penalty although it was discussed in the context of consideration of the right to life under its Article 3. Article 5 provides for protection from torture or
cruel, inhuman or degrading punishment.

Several other International Covenants on Human Rights under United Nation and Regional development on Human Rights have also been focused on right to life, abolition of Capital Punishment and regarding ban on cruel, unusual and inhuman treatment or punishment have been discussed in Articles 6, 7 and 10 of International Covenant on Civil and Political Rights; Articles 2 and 3 of the European Convention for the Protection of Human Rights And Fundamental Freedoms Article 4, 5(2) to (6) of the American Convention on Human Rights and Article 4 and 5 of the African Charter on Human And People Rights. All these Articles alongwith other covenants have been discussed in detail in chapter VII of the present thesis.

Though the Universal Declaration is of prime importance, it is not a treaty. 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 is a charter 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 covenants- ICCPR and ICESCR.
International Covenant on Civil And Political Rights of 1966 after coming into force in 1976 through its Article 6 expressed that capital punishment offences must not be contrary to the convention. Every person has the inherent right to life. No one shall be arbitrarily deprived of his life. However, African Charter on Human Rights through its Article 4 provided that every human being shall be entitled to respect for his life and the integrity of his person.

International limitations on the use of torture, cruel and inhuman punishment from 1948 to 1990 have also been discussed in detail. Efforts have been made to explain these forms of punishment under international terms. In America the expression "Cruel and unusual punishment" was used in Eighth Amendment of the American Constitution. The Supreme Court of America interpreted this term in measuring punishments challenged as in violation of it against evolving standard of decency. The court had also refused to outlaw the death penalty as invariably criminal and unusual. The great revolutionists of England believed in horrifying punishment. In 1689 a Bill emphasised to forbid excessive and disproportionate penalties, huge fines, whippings, pillorying etc. Article 5 of the Declaration of Human Rights speaks that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 has also adopted the same language after amendment
on December 20, 1971 by Protocol 5. Walter C. Reckless has tried to put the feelings of general public that sentiments inflicting capital and barbarous punishment have become irrelevant in the modern social trends.

Mutiliation, burning or boiling alive have now come to an end. However, flogging and other inhuman punishments are still in operation in several countries.

Regarding the imposition of the solitary confinement Madras High Court in Munuswami Vs. Emperor\(^{35}\) has held that the imposition of the sentence of solitary confinement although it is legal, should be very rarely exercised by a criminal court. It should be administered if ever, in most exceptional cases of unparalleled atrocity or brutality.

Solitary confinement if continued for a longer time is sure to produce mental derangement. That is why section 74 of the Indian Penal Code limits the solitary confinement, when the substantive sentence exceeds three months, to seven days in any one month. Solitary confinement must be imposed at intervals. A sentence inflicting solitary confinement for the whole imprisonment is illegal, though not more than fourteen days is awarded.\(^{36}\)

35. Supra Chap. Note
36. Nyan Suk Mether V.R.
It is experienced that solitary confinement produces evil results on body and mind. Except in certain cases if certified by medical or psychological expert solitary confinement should not be imposed. But it is submitted that this serves no social purpose hence needs abolition.

International Amnesty and Pardon provisions have also been raised for the protection of political offenders, Amnesty International is urging all governments to stop execution and take steps to abolish the death penalty in law because death penalty is a violation of fundamental human right to live. For its extraordinary services it was awarded with Noble Prize for humanitarian work. But still after thousand of efforts Nations do not seem to be prepared to abolish death penalty at present.

In the end after a lot of earlier discussions on aggravating and mitigating factors recognised judicially have been concluded. Age of victim, sex of victim, public servant on duty, brutality and barbarism, Accused-victim relationship, social disapprobation, Hired assasings, political murders, dowry deaths, pre-medilation, modus operandi of the accused and motive of murder have been considered fit for consideration in cases for imposing death penalty. Personality, age, poverty first offender, state of mind, role of diseased, sudden fight, and provocation delay, absence of pre-meditation etc. are the factors for which court does not impose death penalty on the accused. These aggravating and mitigating
factors provide mechanism for judicial discretion to award
dead penalty or its alternate, imprisonment for life. In this
regard there should be a general adherence of the judges to the
efficacy of capital punishment so long as it is statuta-
permitted.

In the coming paragraphs I have tried to submit certain
very useful suggestions for avoiding death sentence to the
accused. It is surprising to evaluate that no court should exe-
cute any person to death but how our individual who commits a
number of offences similar or different should be reformed?
Long term imprisonment with hard labour, to a great extent can
be proved an alternate to the capital punishment.

The main purposes of imprisonment are those of (a) disab-
ling the offender from being a danger to society, by locking
him up, (b) preventing prospective offenders by the threat of
long term lock-up, and (c) reforming the offender under healthy
and transforming conditions (provided of course, the prison is
an ideal one).

Imprisonment, in order to be an effective reformative
method of dealing with offenders must be a long term one or
imprisonment for at least a sufficient time, so as to give the
prison officials sufficient opportunities of successfully dealing
with the offender for his re-education and rehabilitation.
Imprisonment, no doubt is a good substitute for the death sentence. At present, in India, the alternative for capital punishment is imprisonment for life which really means imprisonment for 14 years. Whereas capital punishment has neither a deterrent nor a reformative value, imprisonment has reformative value, if the system of imprisonment is a healthy system. It is therefore, suggested that capital punishment should be submitted by "imprisonment till death in Jail" and efforts must be continued for his reformations. If jail authorities find the offender fit for rehabilitation they may recommend the authority to grant parole.

Further, during imprisonment period the convicted offenders should be asked for earning and out of this earning a considerable amount should be sent to the believed family. The offender's property may also be reasonably divided so as to import a portion of it to the believed family.

The executive power of the President and Governor to commute the death sentence should not only be exercised liberally but should also be arrived at independent of the factors already deliberated upon by the courts. This would mean rationalisation of mercy powers with a view to make it really effective in the administration of criminal justice.
"Special reasons" as mandatory under Section 354(3) of the Criminal Procedure Code, 1973 very clearly helps the judiciary in determining the alternate punishment to death penalty. These "special reasons" emphasise that death penalty will be given only when it is a must. "Special reasons" for sentence of death implies that normal sentence of murder cases is life imprisonment, while the sentence of death is an exception. The award of the death penalty requires an extra-ordinary and exceptional circumstance attending the case.

'Rarest of rare' doctrine also moves to the very direction that it may be imposed when there is no other alternate. By this doctrine, the object is to award the sentence of death only in the "rarest of the rare" cases. Therefore, the court sought to narrow down the occasions when the extreme penalty would be called for. This is a necessary fall out of the later legislative emphasis requiring the stating of the special reason where the court considers sentence of death as necessary.

Right to life is the most precious of all rights and it will be a denial of this right if the decision as to a matter of life and death is arrived at on the mere material findings of the ratio of two is to one. No doubt, judges also have their own philosophy. Some have faith in retention the other in abolition. The bench sometimes gets devided into two antagonistic
views—those favouring death penalty and those against its imposition. The effect of such bench is that where the ratio of judges of retentionist is higher than the ratio of abolitionist the offender gets death sentence confirmed with little or no consideration of the judicially evolved mitigating factors. On the other side, the higher ratio of the presence of abolitionist judges on a particular bench proves a godsend for the accused as he can have further chances for enjoying his remaining life.

Lastly, in the present circumstances when there is allround chaos in the whole of the country I do not think of complete abolition of capital punishment from this country. In cases like terrorism, separatism and disintegratism I would never find any national interest in abolishing death penalty from criminal law. In pre-planned brutal murders, professional killers, family murders and innocent killings I never find any rationality in abolishing capital punishment. If death penalty is essential in preservation of law and order, public peace and tranquility in making communal harmony and in cases where it will evidently prove as an effective deterrence, I do not find any ground to declaim its imposition.