CHAPTER- II

EVOLUTION AND HISTORICAL BACKGROUND OF CAPITAL PUNISHMENT
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"I cannot in all conscience agree to anyone being sent to the gallows. God alone can take life because he alone gives it".

-Mahatma Gandhi

2.1 Introduction

Crime is as old as human civilization. Since time immemorial crime has been with us in different degrees. Every society has a pattern of suitable conduct and some human being in every society fallen outside this configuration. It is the reality which we can accept that crime cannot be abolished. Various reasons of the crime are weakness, greed, jealousness, anger etc. These are the base of crime and present everywhere.

Crime is a legal concept and has a sanction of law. As the social evolution of human being the concept of crime also change all over the world. It shows in different lights at different times. As we show from various studies a crime at one time may not be crime at some another time similarly a crime in one country may not be in another country. The catalogue of crime is changed by adding new and by modify, altering and also repealed the old one according to the societal change.

It is impossible to define crime accurately. But many jurists gave their opinion about the crime and attempted to define the crime in their own way. Let us put a light on some important definitions of crime:

*Oxford English Dictionary* defines “Crime is an act punishable by law as forbidden by statute or injurious to the public welfare.”

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Cress and Jones define “Crime as a legal wrong the remedy for which is punishment of the offender at the instance of the state.”

Blackstone in his commentaries on the law of England has defined “crime as an act committed or omitted in violation of a public law either forbidding or commanding it.”

For all the countries, a suitable definition of crime is not suggested at one time. So the crime would be easy to know through its attributes. Some of the attributes are:

First, it is injury by some antisocial act of human being.

Second, Preventive actions taken by sovereign in the forms of punishments.

Third, the legal proceedings against the accused govern by special rules of evidence.

The punishment to which offenders are sentenced under the provision of Indian penal Code:

a) Capital punishment
b) Life Imprisonment
c) Imprisonment (rigorous and simple)
d) Forfeiture of property
e) Fine.

Capital punishment is one of the abrasive punishments which are provided under the IPC which involve taking of life of accused for his wrongful act. The risk of penalty is the cost of crime or wrongful act which the offender has to pay; when this suffering is high as compared to benefit which the crime is expected to yield, it will be useful to deter a considerable number of people. Here the question arises whether a State has right to take a life of a person, however he cross the any limit of

41 Fazale Kareem, Crime in Capital Society (Federal Government Urdu Law College Karachi, 2001)
42 Protection of human rights vis-à-vis role of police in maintenance of Law P.61
43 Section 53, Indian Penal code, 1860
barbarousness. The people distributed in two group about this question First is Moralists who feel that this penalty is necessary to deter the other like-minded person; Second is Progressive, who argue that this is only a judicial taking of life which court mandated.

An analysis of Criminal jurisprudence, would explore that the penalty of Death is given only in extreme or "Rarest of rare cases" in which a high degree of guilt is involved, which threat the society highly. Not only culpability of dangerousness of the act is taken into consideration to decide whether or not he deserve this penalty of death but also his personal attributes and circumstances and gravity of offence has also to be taken into deliberation. So the penalty should depend upon the gravity of offender’s act and societal reaction on it.

In the beginning, the penalty of death was based on the efforts to pacify the God. The accused persons totally mark out from the group for a particular type of anti-social activity. After the changing of time, metaphysical theory of human conduct arises, here the individual come to be looked upon as a moral agent capable of free choice in every aspect of his conduct, irrespective of biological activity or social environment. If any individual wilfully do some act wrongful or brought a serious loss to any other, his life deserve to be forfeited.44

2.2 Meaning of Capital Punishment

The term Capital Punishment stands for most severe form of punishment. It is the penalty which is to be given for the most terrible and serious crime. The word Capital refers to the 'head or top of the column'. Thus Capital punishment has reference to the head and is also topmost among the grade of punishment. It is one of the most severe types because nothing can be more painful to an individual than being deprived of the very life and existence. Meaning of Capital Punishment is the practice of deliberately putting offender to death as a measure of social policy imposed by

governing authority of community. By common usage in jurisprudence criminology and penology capital punishment means a sentence of death.

Capital is a word derived from the adjective form 'Capitlis' means Principal or Chief. Capital Punishment is the practice of deliberately putting to death an offender as a measure of social policy imposed by the governing authority of the community. Capital Punishment for homicide and other secular offences may be said to have come in with the modern state and its growing recognition of the obligation to maintain peace and order within its boundaries.

On this debatable topic of death penalty society divided into two parts one favour the punishment of death and other against this punishment. Death penalty may be defined as:

"The judicial execution of a prisoner as a punishment for a serious offence called as capital offence capital punishment or death penalty".

Historically and still today under certain systems of law the death penalty was applied to a wider range of offenses, including rape, terror, robbery or theft. It has also been frequently used by the military for looting, insubordination, mutiny, etc.

The dilemma of kill or be killed, which confronts civilized society daily and inexorably, is bedeviled by the jumble of panic, superstition, and angry resentment we call punishment, expiation, propitiatory blood sacrifice, justice, and many other imposing names. The dilemma is a hard fact which must be faced and organized.

In today's world, terrible crimes are being committed daily. Many believe that these criminals deserve one fate i.e. Death. Capital punishment is the maximum penalty used in punishing people who kill another human being and is a very controversial method of punishment. Criminals guilty of murder receive a verdict of capital punishment. Murder is the unlawful killing of another human being with an intentional or criminal intent. First-degree murder is usually premeditated or by
deliberate design. In most states, a person convicted of first-degree murder can be sentenced to the death penalty.

2.3 Aim and objective of death penalty

The objectives of death penalty are found in making the evil doer an example and deter other likeminded people. Out of the various theory of punishment the two i.e. the retributive and the deterrent provides justification for death penalty. Retributive theory emphasizes retention of death punishment for horrendous crimes. This theory is based on principle “An eye for an eye”, “a tooth for a tooth”. It consists not in simple but in proportionate retaliation, that is in receiving in return for a wrongful act not the same thing but its equivalent. Deterrent theory set an example for the wrong doer. This theory operates on two counts:

Firstly, when the offender is punished by infliction of death; the society gets rid of him;

Secondly, it impresses the consciousness of people at large and thus serves the purpose of preventing others from committing crimes.

This is the theory also emphasise the need of death penalty as a token of emphatic disapproval of the society for murderous crime.

The aims of punishments are now considered to be retribution, justice, deterrence, information and protection and modern sentencing policy reflects combination of several or all these aims. The retributive element is intended to show public repulsion to the offence and to punish the offender for his wrong conduct. In the concept of justice as an aim of punishment growing emphasis is laid upon it by much modern legislation but judicial opinion towards this particular aim is varied an rehabilitation will not usually be accorded precedence over deterrence means both the

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punishment should fit the offence and also that like offences should receive similar punishment. Death penalty may serve some of the following purpose:-

1. It may instil a deep feeling of peculiar abhorrence in the society towards deadened crimes\(^{47}\).

2. In an era, marked with increase in criminals and criminality with a substantial increase in armed robberies\(^{48}\) and other shockingly offensive murder, death penalty may be of great help in minimizing the horrendous of offences.

3. Capital Punishment effectively prevents the criminal from indulging in the criminal activities once again by eliminating him.

4. In the light of Indian legal and constitutional history, the penalty of death is neither unreasonable nor unusual nor cruel punishment.

5. Thirty fifth report of the Law Commission of India has expressed its opinion in favour of the reasonableness and expediency of capital punishment and recommended its retention.

6. In case of politically motivated gangsters and terrorism, it may prove of much help.

7. In case of crime of primitive horror e.g. where a blood coagulating of one’s own much-loved son is committed to propitiate some blood thirsty deity.

8. Abolition of death penalty will faster a sense of private revenge in the society and will promote lynching.

9. Death penalty is a necessary measure of social security which must be retained to protect the society from the repeated crimes by incorrigible criminals.

10. It is impossible to replace death penalty by any effective substitute. Even life imprisonment is not adequate because of the practice of earlier release.

11. In case of murder of horrendous nature which are diabolically conceived and cruelly executed.

\(^{47}\) Law Commission of India, Thirty fifth Report, Report on Death Penalty (1967)

12. The economic conditions of the country do not permit the abolition of death sentence. Abolition of death penalty will increase the financial burden on the tax payers and will greatly complicate the work of prison administration.

2.4 Historical Background of Capital Punishment

2.4.1 Vedic Period:

Before we deal in detail with the position of punishment at any stage of the Hindu period, it would be convenient to emphasize, by way of rapid survey, the fact that Capital punishment was in vogue. The emphasis on "danda" (coercive authority of the king) is noteworthy here. During the Vedic Period\(^{49}\) originated the doctrine of the Divine affinity of the temporal ruler. The authority of king was coupled with his obligation toward his subjects, and the coercive authority (danda) of the ruler was recognized as the cause of Dharama. The earliest Aittaraya Brahman of the Vedas or more explicit on personified warfare between the gods or devas and the demons.

In the Pre- Maurya Period\(^{50}\) the concept of obligation of the king to protect his subject was developed. In one of the earliest Smritis, the list of offenders punishable with death includes those who caused injury to the seven constituents of the state and those who forged royal edicts, etc. a king who fails to inflict punishment on a guilty man, or who punished an innocent man, was required to undergo a fasting. Some of the Pali texts of that period, while emphasizing the importance of righteousness also emphasized the duty of the king to protect his people.

From the study of Vedic literature it is concluded that the infliction of penalties, including the penalty of death, is a process operating against certain classes in general; and even if a single individual is subjected to any penalty, including the penalty of death, it is because of that individual's belonging to the enumerated class of social degenerates. The hundred fourth hymn of the seventh part of the Rig Veda and the fourth hymn of the Eighth Part of the Atharva Veda have been addressed in

\(^{49}\) 1500BC to 600BC
\(^{50}\) 600BC to 325BC
common to the deities of Indra and Soma. Infliction of punishment on culprits appears to be the common jurisdiction of these two deities. The following hymns appearing both in the Rig and Atharva Vedas reflect the instrumentality of the Indra in inflicting penalties in consultation with Soma, making thereby the infliction of punishments as a matter of common deliberation of the deities of Indra and the Soma, as if the two are respectively the executives and the judicial organs in unity, in the interplanetary government.

The later Upanishads, particularly, the Chhandogya and the Brihadaranyak Upanishads, do bear references to particular kings, like Janak, which indicate, by that time, the establishment of the royal governments, yet the kings as well as the common folk, are described as concerned more with the knowledge of metaphysical truths. Killing was justified either in war or in combat. There is no reference to the king administrating criminal justice by inflicting penalty of death.

In Vedas, classes of offenders have been referred. It was the belief of the time that crime was an act of demon or evil spirit, and as such a person perpetrating a crime must either be killed or atleast, vanished. This kind of act was believed to be religious act for safeguarding the welfare of the Aryans. So religion was the law of that time. John Gillin J. L. in this regard records that infliction of punishment was a sort of religious ceremony.

Dr. Chatuvedi has quoted Ved Martand, Acharya, Priyavart, Ved Vachaspati for various punishment in the seventh and Tenth part of Rig Veda and Eighth Part of the Atharva Veda through slokas has referred to the penalty of death by hanging\textsuperscript{51}, shooting\textsuperscript{52} and thunderbolt\textsuperscript{53} and electrocution.

\textsuperscript{51} Rigveda 7/104/9; Atharva veda 8/4/9
\textsuperscript{52} Atharveda 1/16/4
\textsuperscript{53} Atharveda 1/7/7
2.4.2 Ramayana Period:

Till the Ramayana period indiscriminate of the demonic race was, thus, a mode punishment inflicted by the Aryan warriors on the demonic aborigines of India. The existence of demon was a constant panic to the Aryans and the death, without any staged trial, was the only punishment deserved by the demons. Staged trial had been unknown till the Ramayana period for the simple reason that the Aryans were a peaceful people. The Asuras or the demons were the only culprits who are punished with death without need of any formal trial.

For the protection of Devas against the Demons, Indra killed Vritasur, Vishnu killed Bhamasu, Madhu, Kaitabha and Narsimha killed Hiranyakasyap. These illustrations of Vedic period show how the Devas maintained as order full society.

In the Ramayana period Lord Rama’s victory over Ravana again illustrates maintaining of peace in the society. In this period stray instances of offences are found in which death penalty was given but on individual level without intervention of the Crown Parasuram out throat of his mother by the order of his father. Lord Rama had shot bales dead on the smug extenuation that the latter has established an adulterous relation with the wife of his younger brother, Sugreeva.

2.4.3 Mahabharata Period:

Danda has always been conceived of security of person and property as well as the stability of the social order. It compels individuals for obedience for authority. The King (state) uses danda without any discrimination and partiality. Pitamah bhisma once asked King Yudhidtera to say without hesitation a person acting interest of his kingdom whoever he may be\textsuperscript{54}. This reference indicates that, it was done for the protection of the society and maintaining peace in the kingdom. Bhishma states that danda is the means placed in the hands of the king for the smooth running of all human affairs on the path of Dharma.

\textsuperscript{54} Mahabharata XII, 57/5-7
In Mahabharata period political powers were at the top, but even in this epic, no reference is found to any king holding a session of his court to pass capital sentence to an offender, illustrations of killings are either in war or combat. Killing of Shishupal, Putana, Kansa, Jarasandh are the example of slay killing either in war or combat.

2.4.4 Buddhist Period:

During Buddhist monarchy when Ahimsa was the rule of conduct, there was an all-round protest against the taking of life of human beings, yet it cannot be said that doctrine of Ahimsa was extended to penology for making capital sentence itself a royal crime. In Buddhist sanskriti and late Pali text reference relating to death sentence can be found. There is a reference that the king is one who rules and guides the world. He censures fines and executes a man who transgresses his command. Ashvoghosha at one place states that Sudhodhana while not executing criminals kept them under mild restraint, as their release would not have been a good policy55. On the one hand the pillar edicts of king Ashoka point to the fact that capital sentence was taken for granted. Pillar edict IV, for instance reads:

“For as much as it is desirable that there should be uniformity in judicial procedure and uniformity in penalties. From this time onward my rule in this- To condemn over lying in prison under sentence of death a respite of three days is granted by me.”56

During this interval his friends and relations or any one may take any necessary steps for taking the sentence of death annulled, on the other hand, the king Gautamiputra Satkarni of Satvahana dynasty refrained from hurting the life even of an enemy.57

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56 Ashoka pillar edict IV
57 D.R.Bhandarkar, *Ashoka (Carmelii) lectures* 1923 p.342
2.4.5 Dharmashastra Period:

Dharamshastra has sanctified the power vested in the King to punish a person found guilty of an offence. Punishment is said to be a great boon to human beings. The fear of punishment prevents the offender from repeating his offence together with a general feeling of fear on other members of society by deterring them and checking their subversive movements thus society becomes fearless and feels security and safety to life and property.

2.4.6 Arthasastra Period:

Kautilya in his Arthasastra emphasizes that Danda is the surest and the most universal means of ensuring public security\(^{58}\). However, he advocated death penalty only in specified cases\(^{59}\). Moreover, he explains that a king who gives out just punishment does not destroy righteousness. During this period law of treason was developed and attracted the death penalty.

Kautilya categorised offences in to four classes which would entail death penalty, namely, spying against the state, misappropriation from the state exchequer, personal property of the king or resources of the state; conspiracy by officers of the State including ministers and other heinous offences committed by citizens.

2.4.7 Smrities Period:

On a perusal of the literature it becomes clear that he upheld theory of staged trials conducted on the basis of evidence and by adherence to the principles of hearing the parties without any departure from what is enunciated in the Manusmriti.

When the world was in distress and people ran helter out of fear, for protection, the Lord created kingship with the object to protect them. Punishment is in reality the king and the manager of affairs and the ruler and that is the guarantor for


\(^{59}\)Bhaskar Anand Saletore, *Ancient Indian Political Thought and Institutions*570 (Asia Publishing House Bombay, 1963)
the four orders to act in accordance with law. 'Punishment alone governs all created beings. It protects them it watches over them while they are asleep.'

According to M.B. Shanti and Manu it is difficult to find a man in this world who is always pure in all respects. It is only on account of the fear of punishment that an individual behaves properly and is kept within bounds.

These above versions declare an all-time truth about the real human nature, that an individual behaves properly only on account of fear of punishment. The above versions of Manu and M.B. Shanti therefore eulogies the power to punish the offender through the instrumentality of kingship and also explain the necessity of the eternal vigilance on the part of the king to protect his subjects day and night by inflicting appropriate punishment on the wrongdoer. It is however impressed that the power to impose penalty must be exercised judiciously, by stating that punishment properly inflicted keeps the people happy and if inflicted arbitrarily it destroys an orderly society. According to Law, it was the prerogative of the King to impose penalty on individuals for committing offence, or to give relief in respect of a civil injury, and no person could take law into his own hands. Manu has emphatically brought about the principle that no one is above law, not even the king. This is in conformity with the definition in Upanishad according to which law is the king of kings, which means that law is supreme and not the king.

'Punishment' in the Code of Manu is personified as a god with a black hue and red eyes, created by the lord of the world as his son and as an incarnation of Law, formed of Brahmin's glory.

Main source of Hindu Law is smriti literature. The five sources of Hindu law have been laid down in Manu smriti and Yajnavalkya smriti which are ascribed to Vedas. But in fact in Vedas there are no fixed data which can constitute the substance

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60 Manu VII/18, Available at www.sacred-text.com/hin/manu/manu07.htm visited on 4/2/16 at 05:00 PM
61 Jois, Rama, Ancient Indian Law, Eternal values in Manu Smriti 326 (Universal Law Publishing Co. Pvt. Ltd., Delhi, 2010)
62 Manu VII/ 1455
of a politically administered law in the modern significance of the term. The Smiritis had undertaken to fill up this lacuna and make up the concretized Code of social conduct. The law primarily has been derived from the Smiriti and latter from those commentaries, expositions or revisions effected upon the original Smiritis by the renowned scholars, in addition to Manu, yajnavalkya, Katyana, Vashishtha and Vrashapati are the other Smiritis in which Vyavahar and danda have been discussed.

In Manu Smiritis punishment has been conceived as a means "to keep the whole world in order, since without it the stronger would oppress the weaker and roast them, like fish on a spit and all barriers would be broken through".63

From the Manu Smiriti several references can be drawn for various kinds of punishment including death penalty. In 8/34 it has been laid down that if stolen property is recovered with thieves, the property may be saved by keeping them in exchequer and the offender be roasted by elephant. In 8/93 where any person receives other's property by deceit the king should kill that offender before the public after giving many torture. In 8/321 and 8/323 provisions are laid down for death punishment to the offenders for stealing gold, silver and costly ornaments of ladies. Pt. Janardan Jha, in his commentaries on Manu Smiriti has tried to mention several references, in which the king could administer, death penalty, on the accused for various offences, namely, Act of subverting the state, Mahapatakas (killing a Brahman, drinking the liquor called 'sura' by a twice born (Dwija), adultery with guru's wife and abetment of these offences. Incendiarism, murder, robbery, poisoning, adultery, abetment of theft by giving subsistence, instruments for house breaking or asylum, causing breach of embankment, attempt to murder, causing abortion, prescribed death penalty for a Brahman if he has committed theft of gold, caused abortion or killed a woman (Strihatya). There were several modes of inflicting death sentence referred to in ancient law texts, such as by administering poison, by getting the person trampled under the feet of an elephant, by an implement, by burning or by getting him killed through wild animals.

Thus from the Manu Smriti it appears that capital punishment was awarded even for theft of more than ten “Kumbhans”. However Brahmans were not subject to the death penalty.

In Yajanvalkya smiriti there were various forms of punishments such as saying ‘fie’ using harsh words, giving corporal punishment or death sentence.

In Narad Smiriti it is provided that taking of human life through poison, weapon or other means was sahasa of the highest degree and should be punished accordingly. Brahspani Smiriti refers death sentence for murders. Both notorious murderers and secret assassins should be put to death by various modes of execution after confiscating their property.

After the death of Kautilya the Magdh Regime tended to disintegrate, giving rise to small principalities. The rulers or their deputies carried the principles of criminal justice on the basis of customary and scriptural rules without any codified enactments. A codified system of penal law never appeared even in Mughal period and death penalty for heinous offences continued to be a part of criminal justice, though the history from times of Manu to Mughal has failed to provide any known instance of a regular stage criminal trial. During seventh century A.D. King Harsvardana used to inflict capital punishments on all the offenders who ventured to slay any living creatures. After Harsa, foreign invasions took place and local rulers maintained administration of criminal justice on the basis of old pattern.

2.4.8 Medieval Period:

Though Muslim period starts from 12th century A.D. yet its administration of justice, in real sense, in the country starts from 16th century when Babar tried to establish his empire in India. During Mughal times the main system of criminal law administered in the country was an Islamic one. The system had organized and grown outside India. Its main sources were the Quran, Hadith, Ijma, and Qiyas. All these four sources were trans-Indian.
The King Akbar's idea of justice may be gathered from his instruction that he should not take away life till after the most mature deliberations\textsuperscript{64}. The emperor himself was the final Court of Appeal. Akbar was keen to lie down that capital punishment was not to be accompanied with mutilation or other cruelty, and that except in cases of dangerous citizens. The Governor should not inflict capital punishment until the proceedings were sent to the emperor and confirmed by him. During Jahangir's time no sentence of death could be carried but without the confirmation of the emperor\textsuperscript{65}. Capital punishment was almost totally unknown under the regime of King Aurangzeb.

Aurangzeb executed death penalty on Teg Bahadur Singh, the 9\textsuperscript{th} preceptor of the Sikhs. Guru Govind Singh's two sons were put to death by plastering them inside a wall but all these three illustrations of death penalty were based on religious and political vendatages. But there was no settled law and procedure providing for trial of offences calling for the penalty of death. Aurangzeb, under the dictate of anger and passion, never issued any order of death.

Before the Indian Penal Code, a Uniform Criminal law for the whole of India was enacted, Muslim law was undoubtedly the basis of the Criminal Law as late as in 1852, Sir George Campbell wrote-

"The foundation of our criminal system is still the Mohammadan Code; but so altered and edit to by our regulations, that it is hardly to be recognized still the hidden substructure on which the whole building rests is thus Mohammadan Law."

2.4.9 Modern Period:

Modifications in criminal provisions were primarily made of regulations. Warren Hastings, who was transferred from Madras to Bengal as a Governor to improve the deteriated political as well as socio- economic conditions of the three

\textsuperscript{64} Wahid Hussain, \textit{Administration of Justice During the Muslim Rule in India} (University of Calcutta Press, Calcutta, 1934)

\textsuperscript{65} Sir George Claus Rankin, \textit{Background to Indian Law} (Cambridge University Press, New York, 1946)
province Bengal, Bihar and Orissa. Warren Hastings was of the opinion that Indians were very much accustomed to their traditions and customs, even the most injudicious or most fanciful customs which were either ignorance or superstition could be substituted and he was convinced that any attempt to free them from such laws would be a 'severe hardship'.

The policy of Britishers therefore was to interfere with the Mohammedan criminal law. Nevertheless this principle of non-interference with the Mohammedan Penal law was conditioned by one big 'if' - if it shall be found to contain nothing hurtful to the authority of Government or to the interests of society.66

Some Muslim Penal provisions were of such a nature that the Company could not allow their continuance on grounds of humanity and justice.67 Even then only the most glaring defects were gradually removed by Regulations and a 'patched up' and modified law was put in its place.68

In 1772, the existing provision for dacoity was changed and to suppress the ruthless and wanton deprivation of the robbers it was provided that dacoits were to be executed in their villages.69

The Supreme Court established in Calcutta under the 1774 letters patent enforced the British law that is Forgery Act 1729, by imposing death penalty on Nand Kumar in 1775.

From 1772-1790 there were no other changes in the penal law of country. In 1790 the then Governor General in Council, Lord Cornwallis in Bengal with his strong mind and superior authority made some remarkable changes in government attitudes. In his minute of December 3, 1790 he pointed out the gross defects in the Mohammedan law and he suggested reforms on several points. The court of Directors

68 T.K.Banejee, Background to Indian Criminal Law 68 (R. Lambray, Calcutta, 1990)
69 Article 35, Plan for the Administration of Justice in Bengal, framed by the committee of circuit, Aug. 15, 1772
were of the opinion that no other reform should be attempted in Penal law excepting the abolition of the barbarous punishments which Mohammedan law prescribed. In December 3, 1790, regulation suit from Bengal government contained that the discretion left to the next of kin of a murdered person to remit the penalty of death on the murderer would be taken away and the law was to take its course upon all person convicted thereof without any reference to the will of the relatives of deceased.

In 1791, the punishment of mutilation was abolished. On May 1, 1793 the Cornwallis code was enacted. In cases of murder it was declared that the following circumstances were not to bar the trial or condemnation of the prisoner: (i) refusal of the heir to prosecute; (ii) non-appearance of the heir within a reasonable time and; (iii) legal incompetency e.g. minority of the heir to prosecute.

A Bengal Regulation of 1797 provided that in cases of willful murder, judgment was to be given on the assumption that ‘retaliation’ had been claimed. The sentence could extend to death if that was the prescribed sentence under Mohammedan Law. As regard to the “fine of blood”, the judges were directed to commute the punishment to imprisonment which could extend to life imprisonment. By the same regulation of 1797, offenders guilty of putting death “any person” on the ground of his or her being versed in and practicing sorcery or any other ground such person or persons were declared to be guilty of murder on being convicted of the crimes and were punished accordingly.

By sections 1 to 5, Bengal Regulation 4 of 1799 elaborated provisions were made for the trial of persons charged with treason and other crimes against the state.

Certain homicide which were regarded justifiable homicide under the Muslim law, were considered as opposed to public justice, and by Bengal regulation 8 of 1799, such cases were declared liable to capital punishment. These included such cases as the prisoners being one of the ancestors of the slain or being the master of the deceased, or the consent of the deceased. Death sentence could be passed provided if

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the court saw no circumstances which may render the prisoner a proper object to mercy.

By the same regulation section 5, it was made clear, that wilful homicide by poisoning or by drowning when the intention of drowning, was evident, was included in the rule that it is the intention which is material and not the manner and instrument of perpetration.

Death sentence was prescribed by Bengal Regulation VIII of 1801 for accidental homicide (as known to Muslim law) accruing in the prosecution of unlawful murderous intention that is shooting with intention to kill and by accident killing.\(^{71}\)

By Bengal killing regulation VI of 1802, the whole practice of infanticide by drowning was declared to be wilful murder punishable with death. It was stated that the practice of killing female children had been widely prevalent in India and the object was to stop that practice. The regulation, however punished the throwing into sea, river etc. of "any infant or person not arrived at the age of maturity".

Regarding robbery, by Bengal regulation 53 of 1803, death sentence was provided for all cases of murder committed in the process of robbery, or aiding, or abetting the same etc. The Nizamat Adalat was empowered to inflict the capital sentence on habitual and notorious robbers.

Regarding escape by convicts, by Bengal regulation 53 of 1803, convicts escaping from their places of transportation, if apprehended, were directed to be tried and on conviction, were to be sentenced to death, "if no circumstances appear to the court to render such convict an object of mercy". Regarding hostility to government, open hostility to the British Government or actual commission of any overt act of rebellion against the authority of the same, or the act of openly aiding and abetting the enemies of the British Government were in 1804 declared to be liable to the

\(^{71}\) Ibid
immediate punishment of death and to the forfeiture of the property, etc. of the convict. The regulation provided for trial by courts martial and was applicable during times of war or open rebellion, but did not preclude the government from causing the persons to be charged under regulation 4 of 1799 and 20 of 180372.

Regarding robbery, Bengal regulation 3 of 1805 made special provisions. It had been brought to light that many village watchmen and some police officers were concerned in the preparation of robbery or connived at the commission of robbery.

Hence the regulation laid down that any police officer convicted of robbery by open violence or of murder, wounding, maiming or any other aggravating act in the prosecution of robbery or an attempt to rob was to be sentenced to death. Any direct or indirect connivance at any of these crimes in the part of any police officer was to be considered as its actual commission and punishable accordingly.

By Bengal Regulation XVII of 1817, persons convicted of murder in prosecution of robbery, burglary or theft was made liable to the sentence of death. By section 15 of the same regulation, exemption of Brahmins of Banaras from capital punishment was abolished.

Regarding waging war, in the year of the Indian Mutiny, waging war and other offences against the State of instigation of the same was made sentenced with the penalty of death or transportation for life or rigorous imprisonment up to 14 years in addition to forfeiture of property.

In 1857, the offence of intentionally seducing or endeavouring to seduce any officer or soldier from his allegiance to British Government on duty to East India Company, exciting or causing others to excite mutiny or sedition in the army was made liable to the punishment of death or transportation for life or imprisonment with hard labour up to 14 years, besides forfeiture etc.

72Ibid
Later, in 1858 an Act was passed to deal with persons who had escaped from jails during the mutiny. The punishment was transportation for life for such offence.

The Common Law of England was never made applicable to India by any Act of Parliament or by any representation of the Indian Legislature. The history of the codified penal law, as outlined in Nelson’s Commentaries on the Indian Penal Code, exposes that it were only the charters, granted to the East India Company that commanded upon the Company and its servants, due obedience to the Common and statute Law of England. The Mohammaden Law, with regard to the offences was administered by the Company’s Courts. From 1802 onwards, the various regulations\(^{73}\) were passed with regard to the trial of offences and trial of civil suits. It was the law, declared in these Regulations that governed the trial and punishment for offences before the commencement of the IPC, 1860.

Section 53, IPC, 1860 recognizes death as the utmost form of punishment. The Code, however, prescribes only some offences for which offender may be punished with the penalty of death. The murder committed by a life convict is punished by the least punishment of death under section 303 of the Indian Penal Code which has recently been declared unconstitutional. However, the section still is adhered with the Indian Penal Code, 1860

Execution of criminals and political rivals has been used by nearly all societies both to punish crime and to suppress political dissent. In most countries that practice death penalty it is reserved for murder, espionage, treason or as part of military justice. In some countries sexual crimes, such as rape, adultery, incest and sodomy, carry the death penalty, as do religious crimes such as apostasy in Islamic nations (the formal renunciation of the state religion). In many countries that use the death penalty, drug trafficking is also a capital offense. In China, human trafficking and serious cases of corruption are punished by the death penalty. In militaries around

\(^{73}\) Regulation II of 1802; Regulation III of 1808, Regulation XVII of 1825; Bengal Regulation XVII of 1817; Regulation XII of 1818; Bengal Regulation XIV of 1827; Bengal Regulation XVIII of 1827; regulation XVI of 1832
the world court-martial has imposed death sentences for offenses such as cowardice, desertion, insubordination and mutiny.74

The use of formal execution extends to the beginning of recorded history. Most historical records and various primitive tribal practices indicate that the death penalty was a part of their justice system. Communal punishment for wrongdoing generally included compensation by the wrongdoer, corporal punishment, shunning, banishment and execution. Usually, compensation and shunning were enough as a form of justice. The response to crime committed by neighbouring tribes or communities included formal apology, compensation or blood feuds.75

A blood feud or vendetta occurs when arbitration between families or tribes fails or an arbitration system is non-existent. This form of justice was common before the emergence of an arbitration system based on state or organized religion. It may result from crime, land disputes or a code of honour. “Acts of retaliation underscore the ability of the social collective to defend it and demonstrate to enemies (as well as potential allies) that injury to property, rights, or the person will not go unpunished. However, in practice, it is often difficult to distinguish between a war of vendetta and one of conquest.”76

Severe historical penalties include breaking wheel, boiling to death, flaying, slow slicing, disembowelment, crucifixion, impalement, crushing (including crushing by elephant), stoning, and execution by burning, dismemberment, sawing, decapitation, neck lacing or blowing from a gun.77

The last several centuries have seen the emergence of modern nation-states. Almost fundamental to the concept of nation state is the idea of citizenship. This caused justice to be increasingly associated with equality and universality, which in

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75 Joachin Schiesinger, Torture and other Amenities in Asia (White Elephant Press, Bangkok, 2014)
76 Ryan Mulligan, The Death Penalty and The Roman Catholic Church (2011)
77 Ibid
Europe saw an emergence of the concept of natural rights. Another important aspect is that emergence of standing police forces and permanent penitential institutions. The argument that deterrence, rather than retribution, is the main justification for punishment is a hallmark of the rational choice theory and can be traced to Cesare Beccaria whose well-known treatise *On Crimes and Punishments*\(^7\), condemned torture and the death penalty and Jeremy Bentham who twice critiqued the death penalty. Moving executions there inside prisons and away from public view was prompted by official recognition of the phenomenon reported first by Beccaria in Italy and later by Charles Dickens and Karl Marx of increased violent criminality at the times and places of executions.

By 1820 in Britain, there were 160 crimes that were punishable by death, including crimes such as shoplifting, petty theft, stealing cattle, or cutting down trees in public place. The severity of the so-called Bloody code, however, was often tempered by juries who refused to convict, or judges, in the case of petty theft, who arbitrarily set the value stolen at below the statutory level for a capital crime.

The 20th century was a violent period. Millions were killed in wars between nation-states as well as genocide perpetrated by nation states against political opponents (both perceived and actual), ethnic and religious minorities; the Turkish assault on the Armenians, Hitler’s attempt to exterminate the European Jews, Hitler’s, the Khmer Rouge decimation of Cambodia, the massacre of the Tutsis in Rwanda, to cite four of the most notorious examples. A large part of execution was summary execution of enemy combatants. In Nazi Germany there were three types of capital punishment; hanging, decapitation and death by shooting\(^9\). Also, modern military organizations employed capital punishment as a means of maintaining military discipline. The Soviets, for example, executed 158,000 soldiers for desertion during World War II. In the past, cowardice, absence without leave, desertion,

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insubordination, looting, shirking under enemy fire and disobeying orders were often crimes punishable by death. One method of execution since firearms came into common use has almost invariably been firing squad.

Various authoritarian states for example those with fascist or communist governments employed the death penalty as a potent means of political oppression. According to Robert Conquest, the leading expert on Stalin's purges, more than 1 million Soviet citizens were executed during the great terror of 1937–38, almost all by a bullet to the back of the head. Mao Zedong publicly stated that "800,000" people had been executed after the Communist Party's victory in 1949. Partly as a response to such excesses, civil rights organizations have started to place increasing emphasis on the concept of human rights and abolition of the death penalty.

Among countries around the world, almost all European and many Pacific Area states including Australia, New Zealand and Timor Leste, and Canada have abolished capital punishment. In Latin America, most states have completely abolished the use of capital punishment, while some countries, such as Brazil, allow for capital punishment only in exceptional situations, such as treason committed during wartime. The United States i.e. the federal government and 32 of the states, Guatemala, most of the Caribbean and the majority of democracies in Asia for example, Japan and India and Africa for example, Botswana and Zambia retain it. South Africa's Constitutional Court in judgment of the case of State v. Makwanyane and Another\(^{80}\) unanimously abolished the death penalty on 6 June 1995 \(^{81}\).

Abolition was often adopted due to political change, as when countries shifted from authoritarianism to democracy, or when it became an entry condition for the European Union. The United States is a notable exception: some states have had bans on capital punishment for decades (the earliest is Michigan, where it was

\(^{80}\) 1995 (6) BCLR 665
\(^{81}\) French Howard, South Africa's Supreme Court abolishes Death Penalty, (The New York Times, 1995)
abolished in 1846), while others actively use it today. The death penalty there remains a contentious issue which is hotly debated.

In abolitionist countries, debate is sometimes revived by particularly brutal murders, though few countries have brought it back after abolishing it. However, a spike in serious, violent crimes, such as murders or terrorist attacks, has prompted some countries (such as Sri Lanka and Jamaica) to effectively end the moratorium on the death penalty. In retentionist countries, the debate is sometimes revived when a miscarriage of justice has occurred, though this tends to cause legislative efforts to improve the judicial process rather than to abolish the death penalty.

2.5 Phase wise change in judicial mind in awarding death sentences

The attitude of the Supreme Court of India towards death penalty has been considerably changed to one of observing more lenience to the offender when his life is at peril. The court has to overcome many fetters imposed by statutes. Thus, in *Joseph v. State of Goa, Daman* 82 Justice V.C. Krishna Iyer stated that judges are bound by the statutes by the oath of their office. This helplessness is implicit in many decisions and in some cases the Supreme Court has gone to the extent of mentioning it. 83 In order to understand the judicial attitude towards death penalty in the last five decades, this period can be divided in five phases depicting the judicial response to the legislative changes made in this direction in IPC's as well as Criminal Procedure Codes' old codes. The five phases may be:

Phase I: When Death Penalty was a rule (1950-55)

Phase II: Age of Judicial Discretion (1955-73)

Phase III: When Life Imprisonment was a Rule (1973-80)

Phase IV: Birth of the Doctrine: "Rarest of Rare Case"(1980-83)

82 AIR1977 S.C. 1812
83 Shiv Mohan Singh v. State of Delhi, AIR 1977SC 979
Phase V: Post Bachan Singh's Case Era (1980-nwards)

The cases divided in these phases clearly indicate the trend of judicial mind during the last 50 years.

2.5.1 Phase I - When Death Penalty was a Rule (1950-55)

In our country under the Code of Criminal Procedure, 1898 death sentence was a rule and life imprisonment an exception in capital offences and whenever the court preferred to award a lesser sentence than death in such offences it was required under section 367(5) of Cr. PC., 1898 to record its reasons in writing. Thus, in *Kirpal & others v. State of U.P.*[^84^], the Supreme Court held that the appellant's act may probably be said not to be premeditated in the sense that he pre-planned or lay in wait to get an opportunity to kill the deceased Jairaj. But it is obvious that when he found him in a fallen and helpless position lying on the ground, he must have been actuated by the pre-existing enmity to finish the man. The nature of his stab was brutal and fatal and this throws light on his deliberate intention. In such case, we have no doubt to agree with the High Court, in awarding him the sentence of death. Moreover, In *Sunderlal v. State of M.P.*[^85^] Where both the deceased and the accused went to a goldsmith with some ornaments. The Court found that the ornaments were established to be of deceased and the accused could not give any satisfactory explanation as to how he came in possession of the same. The Court held that "the circumstantial evidence, therefore, was sufficient to hold the accused responsible for murder of the deceased and the accused was rightly convicted of the offence under sec. 302 IPC and sentenced to death."[^86^] However, the Court, in order to award lesser punishment, had to state reasons, thus, in *Dilip Singh v. State of Punjab*[^87^] the Supreme Court held:

"This is a case in which no one has been convicted for his own act but is being held vicariously responsible for the act of others. When there are no means of

[^85^] AIR 1954 SC 28
[^87^] AIR 1953 SC 364
determining, who inflicted the fatal blow and who took in a lesser part, a judicial mind can legitimately decide to award the lesser penalty."

2.5.2 Phase II - Age of Judicial Discretion (1955-73)

Later on by an amendment in the year of 1955 section 367(5) of the Cr.P.C. 1898 was omitted and thus, thereafter the courts became free to award either death sentence or life imprisonment. The perusal of following cases indicates the judicial mind to deal with the death sentences. Thus, in *Jagbir Singh v. State of Punjab*\(^{88}\) where a person is murdered in a cruel fashion; the dead body is taken in a procession on a mare by the accused persons for a distance of one mile. At the end of this horrid procession they chop away the head of the deceased. The Supreme Court deprecated such a dastardly act and observed: “The murder was ruthless and cold-blooded. There are no extenuating circumstances and Supreme Court found it just and proper to inflict death penalty”\(^{89}\). But, in *Mohan Singh v. State of Punjab*\(^{90}\), the Supreme Court observed that Session's Judge sentencing accused, who were vicariously liable but who did not give fatal blow, to imprisonment for life, while sentencing Mohan (appellant), who was believed to have given fatal blow, to death penalty. Supreme Court, however, held if the test applied by the session's judge was correct, then Mohan too should have given the benefit of that test and the circumstances, so *imprisonment for life* would more appropriate for him than death penalty\(^{91}\). “The Supreme Court inspired by an expert study, was of the opinion in *Om Prakash v. State of Haryana*\(^{92}\), that imposition of death sentence on accused, a boy of 19 years, was excessive when co-accused who were alleged to instigate the accused to fire the deceased, were given benefit of doubt. Again *Hazara Singh v. State of Punjab*\(^{93}\), The Supreme Court held that where there was no pre-meditation and when the contending

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\(^{88}\) AIR 1968 SC 43
\(^{90}\) AIR 1971 SC 2519
\(^{91}\) *Brahma Singh v. State of U.P.*, AIR 1972 SC 1229
\(^{92}\) AIR 1971 SC 1388
\(^{93}\) AIR 1957 SC 469
parties met accidentally and attacked each other, the conflict resulted in a sudden quarrel. The Court set aside conviction of death penalty under Sec. 302 IPC, but sentenced each one of them to imprisonment for ten years. Similarly, weighing the facts and circumstances of the case, in *Sultan v. State of Haryana*94, Supreme Court observed that if death is caused by firing gun shots by two persons and it is found that the shots fired by one person were separately sufficient in the ordinary course of nature to cause death but the shot which the other accused hit was not sufficient to cause death, he can be awarded the extreme penalty of death even if he had fired the gun with the intention to kill95. But, in *Hukum Singh v. State of U.P.*96 when the appellant was forcibly taking his cart through the crops, he was causing a struggle out of which the deceased lost his life. On appeal the Supreme Court held: "When several persons are armed with lathis and one of them is armed with hatchets and are agreed to use these weapons in case they are thwarted in the achievement of their object, it is by no means incorrect to conclude that they are prepared to use violence in prosecution of their common object and that they knew that in the prosecution of such common object it was likely that someone may be so injured as to die as a result of these injuries."97 And also in *Maghar Singh v. State of Punjab*98, the deceased was murdered by his second wife, his son and his wife's paramour. On appeal the Supreme Court held: It was a pre-planned, cold-blooded and dastardly murders in which as many as seventeen injuries were caused on the deceased, most of which were on vital parts of his body. There are no extenuating circumstances to justify the giving of any lesser sentence by this court.99 In certain clear cases where the offence is proved by circumstantial evidence, the Supreme Court had inflicted death penalty. As in *Mohan*
Singh v. State of UP\textsuperscript{100} the Supreme Court on the basis of evidence that shows that the accused gave the deceased three 'paras' and within half an hour he became ill and died within two hours, that the food which the deceased had taken did not contain any poison & that the chemical examination shows that he had died of arsenic poisoning, held the accused guilty of murder of deceased & confirmed the death punishment.

2.5.3 Phase III - Life Imprisonment as a Substitute of Death Sentence (1973-80)

Now the Code of Criminal Procedure 1973 in its Section 354 (3) provides that in case of death sentence special reasons are to be stated. Now imprisonment for life was the rule and capital sentence was an exception, thus, in Asgar v. State of U.P\textsuperscript{101}. Where Appellant Asgar have been convicted under Section 302 of IPC for intentionally causing the murder of one Ramswaroop Singh on account of an alleged dispute concurring the repayment of debt; on appeal Supreme Court held Justice Unitwalla: "The High Court while confirming the death sentence does not seem to have clearly kept in view the change of law which was brought about by the 1955 amendment of the old code, when the High Court held": "The murder was premeditated and we hardly find any extenuating circumstance in this case. He must, therefore, pay the extreme penalty of death". But for giving extreme penalty some case ought to have been made out by the High Court as after the amendment, under the new code mere absence of extenuating circumstance in favour of accused is not enough for awarding extreme penalty. Perhaps the social, economic and psychic conditions of the accused are one of the most conspicuous elements that persuade the Supreme Court for taking a lenient view of the criminals condemned to death \textit{Ediga Anamma v. State of Andhra Pradesh}\textsuperscript{102}, is a striking example. A woman and her child were murdered. The tragedy happened out of the jealousy of the appellant, a woman, beaten away by her husband and in-laws but finding support in a middle-aged


shepherd who had affectionate underground relationship with both the deceased and
the appellant. Reducing the death penalty on the appellant, the Supreme Court took
account of the physical and psychic breakdown of the hopeless appellant in the
following words: "Here the criminal's social and personal factors are less harsh, her
femininity and youth, her imbalanced sex and expulsion from the conjugal home and
being the mother of a young boy these individually inconclusive and
communicatively marginal facts and circumstances tend towards award of life
imprisonment. We realize the speculative nature of the correlation between crime and
punishment in this case as in many others, and conscious of fallibility, and the death
penalty. Some judgments also went for personalization of punishment taking into
consideration both physical and mental state of accused in reducing the extreme
penalty. Thus, in *Thanglah v. State of Tamil Nadu*\(^{103}\) the appellant was sentenced
to death on the charge of committing the murder of his wife, kothaiyaki. Justice
Chandrachudh, for Supreme Court, held that it is clear from the various facts and
circumstances of the case that he had committed the murder under the grave stress of
acute poverty for which he was taunted from time to time by his wife and other
relatives. Considering that the appellant had led a happy married life with the
deceased for ten years and the fact that the couple has three small children, the
sentence may with some justification be reduced to life imprisonment. However, in

*Suresh v. State of Maharashtra*\(^{104}\) where the accused was charged with murder of
the deceased Manibai; the Supreme Court found. "That the evidence adduced by
prosecution, that it was the appellant alone who inflicted the stabs and thereby caused
the death of the deceased. The deceased was unarmed when the appellant came to the
room with the intention to kill her, although she tried to run away when she received
the first stab, the appellant pursued her and inflicted several stabs on the vital parts of
the body. There were as many as 13 injuries on her body and seven among them were
fatal. Thus, we see no mitigating factors and therefore, we confirm the sentence. And

\(^{103}\) AIR 1977 SC 1777

\(^{104}\) AIR 1975 SC 783
to conclude, in *Rajendra Prasad v. State of U.P*\(^{105}\), the Supreme Court has observed that capital sentence may be awarded where survival of the society is in danger. The Court has expressed its fear that judicial discretion in awarding death sentence may turn out in judicial tyranny and thus, violate Article 14 of the Constitution. In its opinion, section 302 IPC and Section 354(3) Criminal Procedure Code, 1973 have to be read in the humane light of part III and Part IV of the Constitution, further illuminated by the Preamble of the Constitution. Death sentence may be awarded in the case of planned motivation, white collar criminals, and persons guilty of adulteration etc., hardened murderer beyond rehabilitation or where officers of law are killed by designers of murder. Further, special reasons stated by the Court in awarding death penalty must relate to criminal as well and not to crime alone.

2.5.4 Phase IV: Birth of the Doctrine "Rarest of Rare Case" (1980-83)

From 1973 to 1980, the legislative dictate has changed from death sentence being the norm to becoming an exception, and necessarily to be accompanied by reasons. *Bachan Singh v. State of Punjab*\(^{106}\), was a landmark in the escalating debate on the question of the compatibility of the death sentence with Art.21 of the Constitution. The Supreme Court while holding the validity of the death penalty expressed the opinion that a real and abiding concern for the dignity of human life postulates resistance for taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases, when the alternative option is unquestionably foreclosed. However, the Court declined to formulate any aggravating or mitigating factors as it would fetter judicial discretion, but held that a murder "diabolically conceived and cruelly executed" may attract extreme penalty. It is not possible, the court opined, to feed numerous imponderable circumstances in an imperfect and undulating society. But what are those rarest of rare occasions is the dilemma. What appears as brutal and gruesome, to one judge may not appear to be so to another. For example, in one case the murder of wife and two children with the motive of leading.

\(^{105}\) AIR 1979 Cr. LJ. 792

\(^{106}\) AIR 1980 SC 898
life with the paramour could not convince Krishna Iyer, J. for death penalty, while 'Sen, J. wondered what else could be a fit case for death penalty than the one at hand. It is submitted that if the difference in perception is so glaring among two judges of the highest court in the country what is relative position among very large number of session's judges in the country. It was, however, in *Machi Singh v. State of Punjab*107, where four men were awarded death sentence by the Sessions Court and the High Court for shooting down seventeen persons including men, women and children within their homes at night, in five incidents. The motive was a family feud. The Supreme Court upheld the death sentence of the three of the four persons. Justice Thakkar, speaking for the court, was impelled to attempt a definition of the 'rarest of rare' case, thus:

1. When the murder is committed in any extremely brutal manner.

2. When the murder is committed for a motive which shows total depravity and meanness.

3. Antisocial or socially abhorrent nature of the crime.


5. Personality of victim of murders e.g. an innocent child or a helpless woman.

However, these are apparently the judicially evolved guidelines which are to assist the courts in determining sentence.

2.5.5 Phase V: Post Bachan Singh's Case Era (1983-onwards)

A trial period to observe the post-effects of the doctrine- Damage rejected legislative prescription of existing guidelines, and has drawn up some frame work of reference for itself. Has the judicial hierarchy adhered to its own dicta? A perusal of the Supreme Court's decisions during the decade should, therefore, serve as pointers in

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107 (1983) 3 SCC 470
understanding the judicial mind. Inconsistency in *Ujagar Singh v. Union of India*\(^{108}\) where the accused was of 17 years old when the offence was committed; taking into consideration the extreme young age of the petitioner, the Supreme Court set aside the sentence of death. On the other hand, it may not be a relevant factor where the accused, clearly shared the common intention of murder, the fact that he was between 18 and 20 years could not be an extenuating circumstance\(^{109}\). Similarly Quenching for dowry, may be an offence worthy only of the death penalty in *Kailash Kaur v. State of Punjab*\(^{110}\) or there may be factors external to the offence and the offender, like wrongful acquittal by the High Court, which may be forceful mitigating circumstance, even where it is a brutal bearing of a pregnant young wife in *Delhi Administration v. Laxman Kumar*\(^{111}\) Properly reasoned decisions are imperative, so that there is no mistake in understanding the judicial mind of all the powers of the courts. This power to deprive life naturally demands the most explicit exercise. A term such as "terrific" murder has been considered too adjectival to fulfil the requirements of perceptible justice, for what murder is not terrific? *Muniappan v. State of Tamil Nadu*\(^{112}\) while the Session Court and the High Court had given "special reasons", the Supreme Court was not able to agree that this was a proper case for death sentence. Till recently, it is very difficult to ascertain that what are exactly the rarest of rare cases and this criterion is still solely on the sweet will of the Judges.

As in *S.K. Ishaque v. State of Bihar*\(^{113}\), murder of three persons by burning them with the help of kerosene inside a shop, absence of material on record showing which of the appellants actually sprinkled the kerosene and set the shop on fire or that they knew that there were three persons in the shop though appellants were armed with bombs and firearms but they did not use the same against the victims, the Supreme Court held that in such circumstances, death sentence is not justified. Or, in

\(^{108}\) 1981 Supp. SCC 5
\(^{110}\) (1987) 2 SCC 631
\(^{111}\) (1985) 4 SCC 470
\(^{112}\) (1981)3 SCC 11
\(^{113}\) (1995) 3 SCC 392
Dharampal Singh v. State of Rajasthan\textsuperscript{14}, where accused intentionally causing injuries on chest of deceased by firearms, civil, criminal and revenue cases pending between complainant party & the accused party prior to incident, it was held not a rarest of rare case. Also in State of M.P. v. Manohar Singh\textsuperscript{15}, the accused, simply to gratify his greed, caused death of an old man and attempted to murder another old and helpless person, was not held as a rarest of rare case. But in Panchi v. State of U.P\textsuperscript{16}, accused persons armed with sharp edged weapons, entering house of deceased persons & butchering four persons to death including a five years old child and an old lady mercilessly, the Supreme Court held that the appellants deserve nothing less than death sentence. In an another case of Duraiswamy Gounder v. State\textsuperscript{17}, in which accused attacking his wife and daughter with sickle in spur of moment without any premeditation, subsequent conduct of accused in cutting himself by same weapon indicating his repentance for what he did, the court held that the circumstances are not one of the "rarest of rare cases" & thus imposing death penalty would deprive the accused of opportunity to reform himself & consequently taking care of his minor children.

But in Suresh Chand Bahri v. State of Bihar\textsuperscript{18}, Conspiracy hatched by the husband with his two associates to kill his wife & two children simply to gain control over the property, murder of wife committed in an extremely brutal, gruesome, diabolical, revolting & dastardly manner as victim's body truncated into two parts in a most devilish style, the Court held such case as rarest of rare case & justified the High Court in confirming the death penalty. Similarly in Kanta Tiwari v. State of M.P.\textsuperscript{19}, the deceased was an innocent, helpless girl of 7 years of age, was kidnapped by the appellant, to whom she called her uncle. She was raped, strangled to death and the dead body was thrown into a well. Holding the facts & circumstances, rarest of rare,

\textsuperscript{14} (1998) Cr.L.J, 3372
\textsuperscript{15} (1998) Cr.LJ. 3630
\textsuperscript{16} (1998) Cr.LJ. 3305 See also in Govind Swami v. State of Tamil Nadu (1998) Cr.LJ. 2913
\textsuperscript{17} (1998) Cr.LJ. 1470 (Madras High Court)
\textsuperscript{18} AIR(1995)SC2420
\textsuperscript{19} AIR(1996) SC2800
the Supreme Court held that death sentence is eminently desirable not only to deter others from committing such atrocious crime but also to give emphatic expression to society's abhorrence of such crime.\textsuperscript{120} More Dimensions In these years the Supreme Court has had to decide on other death sentence related issues too. With regard to the time factor in execution the attitude of the court is more than inconsistent.

In \textit{Ediga Annamma}\textsuperscript{121} Krishan Iyer, J. held that the prolonged agony has ameliorative impact according to the ruling of this court and in this case a delay of two years and two months was taken into account for commuting death sentence to life imprisonment. Similarly, in \textit{Chawla v. State of Haryana}\textsuperscript{122} (1 year to 10 months), in \textit{Bhagwan Bux Singh v. State of U.P.}\textsuperscript{123} (3 years & 7 months) were considered by the court for commuting the sentence of death to life imprisonment. In \textit{T.V. Vatheswaran v. State of Tamil Nadu}\textsuperscript{124}, the accused who was the architect of sensational, diabolical murders in Madras was sentenced to death in 1975 & was kept in solitary condemned cell for over 8 years waiting to be executed. Justice Chiannappa Reddy frowned at this inhuman way of taking away life and quashed the sentence of death. The Court held that two years is the reasonable period and further delay is unconstitutional and violative of Art. 21. This laudable decision of the court was, however, immediately overruled in \textit{Sher Singh & Others v. State of Punjab}\textsuperscript{125}, and finally in \textit{Triveniben v. State of Gujrat}\textsuperscript{126}, the court held that there can be no right for predetermined period for concluding that the delay in the execution of the death sentence is unconscionable and ought to be commuted to life imprisonment, the court retain the discretion to decide, thus there is a lot of inconsistency in deciding the time factor as a mitigating circumstance. In 1983, a three Judge Bench heard a challenge to execution of death sentence by hanging in \textit{Deena alias Deen Dayal v.}

\textsuperscript{120} See also \textit{Mohd. Chaman v. The State}, (1998) Cr.LJ. 3739
\textsuperscript{121} AIR 1974SCC443
\textsuperscript{122} AIR 1974 SC. 1039
\textsuperscript{123} AIR 1978 SC. 34
\textsuperscript{124} (1983)2SCR348
\textsuperscript{125} AIR 1983 SC 365
\textsuperscript{126} (1989)1 SCC 678
The court, however, held that hanging is not unconstitutional. But in *Lachhmidevi v. State of Rajasthan*, where a mother-in-law burnt her daughter-in-law for dowry, the Rajasthan High Court found her guilty and in anger passed an order for execution of death sentence by public hanging. The case naturally caused uproar. The Supreme Court roundly condemned public hanging as a barbaric practice and a revolting spectacle, harking back to earlier centuries.

### 2.6 Modes of Execution of Death Sentence

In different societies various methods of death sentence are practiced. From ancient times death sentence was inflicted for large number of crimes like murder, sedition, kidnapping etc. There are some ways to execute death penalty i.e. burning at the stake, breaking on the wheel, slow strangulation, crushing under elephant’s feet, throwing from a cliff, boiling in the oil, stoning to death etc. Severe death punishments involving torture began to die out in the 18th century, due to the growth of human rights movement. The number of offences punishable by death was also reduced in all leading countries. Some of the important methods of death penalty are as follows:-

#### a. Burning at the stake

Burning at the stake was a famous death sentence from Christian era which was used mostly for heretics, witches, and suspicious women. In the year 643 AD, it is declared by Pope illegal to burn witches. However, the number of persecution of witches increased throughout the centuries and millions of women being burned at the stake. The first major witch-hunt occurred in Switzerland in the year 1427 AD. In 16th and 17th Centuries, trial of witches became common throughout Germany, Austria, Switzerland, England, Scotland, and Spain during the Inquisition.
sometime witch trials began to decline in various parts of Europe and in England and 
the punishment burning at stake. In 1834, the last legal execution by burning at the 
stake took place at end of the Spanish inquisition.

b. **Crucifixion**

Crucifixion was one of the painful ancient execution methods. It was practiced 
about 6BC-4BC. In this method, victim’s hands or arms and feet were nailed to a 
wooden cross and hung to suffer a slow, painful death. Due to this the victim would 
die by suffocating, from heart failure, shock, or by bleeding, hunger, thirst etc. 
Crucifixion is famous in the history of Christianity, but the crucifix was an ancient 
form of execution used throughout antiquity well before the time of Jesus.

c. **Wheeling**

In this method of execution person could be attached to the outer rim of the 
wheel and then rolled over sharp spikes, or down a hill or the wheel could be laid on 
its side, like a turntable, with the person tied to it. The wheel would turn, and people 
beating the victim with iron bars to breaking his bones to his death. This method was 
used during the middle ages especially in Europe. The wheel as a method of torture 
and execution could be used in a number of ways.

d. **Guillotine**

This is a popular form of execution in France. In 1789, Dr. Joseph Guillotine 
proposed that all criminals be executed by the same method of guillotine so that 
torture should be kept to a minimum. At that time it was thought that it is least painful 
and most humane method of execution. With the suggestions of Guillotine 
decapitation machine was built. The machine was first tested on sheep and calves, 
and then on human corpses, and the first execution by guillotine took place in the year 
1792. During the French Revolution, it was widely used outside the prison of 
Versailles. King Charles I was also executed in the same way in England. The last

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131 Execution methods *Available at*: www.indianhorizon.wordpress.com/2013/04/12/methods-of-execution-through-ages (visited on 4/2/16) at 10:10 AM

132 Ibid.
public execution by guillotine was held in France, in June 1939 and last use of the
guillotine came in 1977 after that the device has not officially been used. After France
was admitted to the European Union, death sentences itself has since been abolished
in France.

e. **Hanging and the Garotte**

Hanging is one of the oldest methods of execution and today it is used in some
countries as a form of execution. Hanging was a very common method adopted for
execution among the various methods available. The prisoner could simply be hanged
with a noose, which could lead to death by fracturing the neck. However, if torture
was also intended, there could be methods other than hanging with a noose.

In medieval times, if torture was intended, a person would be drawn and
quartered before being hanged. Hanging was not considered enough for serious crime
like high treason so a prisoner would be carved into pieces while still alive before
being hanged. The Garotte was also a popular method of execution and similar to
hanging. A mechanical device would be tightened around the neck, causing slow
strangulation, stretching, and obstruction of blood vessels. A device could also be
placed in a prisoner's mouth and kept in place by tying and locking a chain around his
neck. Since 1976, three prisoners have been hanged in the United States. Prior to the
execution the prisoner must be weighed. The "drop" must be based on the prisoner's
weight, to deliver 1260 foot-pounds of force to the neck. The noose is then placed
around the convict's neck, behind his or her left ear, which will cause the neck to
snap. The trap door then opens, and the convict drops, if properly done, death is
caused by dislocation of the third and fourth cervical vertebrae, or by asphyxiation.
This process is to assure almost instant death and a minimum of bruising. If careful
measuring and planning is not done, strangulation, obstructed blood flow, or
beheading often result.

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133 *Ibid*
f. **Headman’s axe**¹³⁴

This form of execution was quite popular in Germany and England during the 16th and 17th centuries, where decapitation was thought to be the most humane form of capital punishment. An executioner would chop off the person's head with an axe or sword. The last beheading took place in 1747 in United Kingdom. Lethal injection and electrocution have become the preferred methods of execution in many countries mostly because these methods appeared to be less offensive to the public and more humane for the prisoner.

g. **Firing squad**¹³⁵

Usually in this method the convict tied to the pole or to a chair, with hands and is blind folded. There is no fixed procedure for this execution. In most cases, a team of five executioners is used to aim at the convict's heart with rifles. The prisoner died as a result of heart rupture or by tearing of lungs due to blood loses. If shooters miss the heart, the prisoners bleed to death slowly. Several countries like the Russia, eastern European countries like China, Thailand use this method. It is significant to note that shooting by firing squad is also permitted in India when a death sentence is given by court martial. On March 23, 2015, firing squad was reauthorized in Utah as a viable method of execution. Prior to this reauthorization, firing squad was only a method of execution in Utah if chosen by an inmate before lethal injection became the sole means of execution.

h. **Gas chamber**¹³⁶

In this method of execution the prisoner is restrained and sealed in an airtight chamber and dropped hydrochloric acid potassium cyanide or sodium cyanide crystals which producing hydrocyanic gas. This gas destroys the body's ability to process blood hemoglobin, and unconsciousness can occur within a few seconds if the prisoner takes a deep breath. Death usually occurs within six to 18 minutes. After the death of the prisoner, the body is disposed of.
pronouncement of death the chamber is evacuated through carbon and neutralizing filters. Crews wearing gas masks decontaminate the body with bleach solution, and it is out gassed before being released. If this process was not done, the undertaker or anyone handling the body would be killed.

Nevada was the first state to sanction the use of the gas chamber, and the first execution by lethal gas took place in February, 1924. Since then it has been a means of carrying out the death sentence 31 times. Arizona, California, Maryland, Missouri, and Wyoming authorize the use of the gas chamber as an alternative to lethal injection. Eleven people have been executed by lethal gas in the United States since 1976. This method however is expensive and cumbersome. It is also a reminder of hundreds of thousands of Jews who were killed in gas chamber by the Nazi Germany.

i. Electrocution

In this type of execution, a prisoner is strapped to a specially built chair, their head and body shaved to provide better contact with the moistened copper electrodes that the executioner attaches. Usually three or more executioners push buttons, but only one is connected to the actual electrical source so the real executioner is not known. In Georgia, executioners apply 2,000 volts for four seconds, 1,000 volts for the next seven seconds and then 208 volts for two minutes. Electrocution produces visibly destructive effects on the body, as the internal organs are burned. The body changes color, swells, and may even catch fire. The prisoner may also defecate, urinate, and vomit blood. The first electric chair designed for an execution was created by George Westinghouse at the turn of the century. Westinghouse told the correctional institution that the chair's power source was so deadly it would only take five seconds of 1,000 volts to cause death. However, the first man executed did not die after five seconds, but instead took four minutes of a steady stream of power to finally be pronounced dead. Today the electric chair is modernized and is used in eleven States of U.S.A. Arkansas, Kentucky, Ohio, Oklahoma, South Carolina,

137 Ibid
Tennessee, and Virginia States of U.S.A. authorize both lethal injection and
electrocution, allowing some inmates to choose the method. Alabama, Florida,
Georgia, and Nebraska, however, use electrocution as their sole means of execution.
Since 1976, 144 people have been executed by electric chair.

j. Lethal injection

Death by lethal injection involves the continuous intravenous injection of a
lethal quantity of three different drugs. The prisoner is secured on a gurney with lined
ankle and wrist restraints. A cardiac monitor and a stethoscope are attached, and two
saline intravenous lines are started, one in each arm. The inmate is then covered with
a sheet. The saline intravenous lines are turned off, and Sodium Thiopental is
injected, causing the inmate to fall into a deep sleep. The second chemical agent,
Pancuronium Bromide, a muscle relaxer, follows. This causes the inmate to stop
breathing due to paralyses of the diaphragm and lungs. Finally, Potassium Chloride is
injected, stopping the heart.

Since 1976, many prisoners have been executed by lethal injection in the
United States. Lethal injection is now the most common method of execution in the
United States with all of the 66 executions carried out during 2001 being by this
method. Of the 749 executions in America up to 2000, 586 have been carried out by
lethal injection, including those of seven women. China also reported 8 executions by
injection during 2000. Lethal injection was first considered as a means of execution in
1888 when New York's J. Mount Bleyer MD put it forward in an article in the
Medico-Legal Journal suggesting that the intra-venous injection of six grains of
Morphine should be used for execution of death sentence. The idea did not catch on
and New York introduced the electric chair instead (Based on the findings of the New
York Commission of Inquiry 1888). It was again put forward in 1977 by Dr. Stanley
Deutsch, who at the time chaired the Anesthesiology Department of Oklahoma
University Medical School, in response to a call by an Oklahoma State senator Bill
Dawson for a cheaper alternative to repairing the State's derelict electric chair.

138 Ibid
Deutsch described a way to administer drugs through an intravenous drip so as to cause death rapidly and without pain. And Oklahoma thus became the first State in the U.S.A. to legislate for it in 1977. Texas introduced similar legislation later in the same year to replace its electric chair and carried out the first execution by the method of lethal injection on December 7th 1982 when Charles Brooks was put to death for the murder. It will be relevant here to mention the observation of this execution procedure. 36 American States now use lethal injection either as their sole method or as an option to one of the traditional methods.


The Philippines has also decided to use lethal injection for future executions to replace the electric chair and carried out its first execution since 1976 when Leo Echegaray was put to death for child rape on February 4, 1999 and 6 more men have been executed by this method by the end of 2000. Guatemala has also switched to lethal injection after a botched firing squad execution in 1996 and carried out three executions since then. China also has been experimenting with lethal injection although most executions continue to be by shooting. The present trend seems to be that of favoring execution by lethal injection.

States of America and has been substituted by electrocution or lethal injection and in thirty four States the execution is carried by lethal injection. These methods being more civilized have been adopted and hanging has been abolished by most of these states in the U.S.A. There is also significant increase in the number of countries those who have adopted the method of execution by lethal injection and today thirty five States use this method.
k. Flaying\textsuperscript{139}

In this method, skin removed from the body of a still living prisoner and
thrown to bleed to death. Flaying is one of the most brutal and uncivilized method of
torture and punishment practiced during the middle ages. This was a public method of
execution, inflicted on criminals, captured soldiers and ‘witches’ around a thousand
years ago in places such as the Middle East and Africa.

l. Disembowelment

Disembowelment may result from an accident but has also been used as a
method of torture and execution. It was among the most severe forms of punishments
ever heard. This method was used to punish thieves and those accused of adultery.
Some or all the vital organs were removed one by one from the body, mainly from the
abdomen. Sources say it was practiced in England, the Netherlands, and Belgium and
in Japan.

m. Impalement\textsuperscript{140}

Impalement is one of the most horrifying methods of execution. The victim
was pierced through the rectum, through the vagina, through the side or even through
the mouth, causing deep bleeding and painful wounds. They were then dropped into
their own grave. The victim endured a long period of continued suffering before their
death. Though it was rarely practiced, but was truly horrifying. It was a favourite of
the Romans, Chinese, Greeks and the Turks. It was also practiced in Asia and in
Europe during the middle ages.

n. Crushing\textsuperscript{141}

Several methods are used for crushing to death. One of them is crushing by
elephant. The head was crushed by a highly trained elephant that would slowly exert

\textsuperscript{139} Available at: www.allday.com/post/287-execution-methods-throughout-history/ (visited on 4/2/16) at
11:00 AM

\textsuperscript{140} Ibid

\textsuperscript{141} Ibid
pressure on the head. The one another method is the victim was pressed with a large stone laid upon their chest, causing suffocation till death.

2.7 Religious views about capital punishment

Various religions have different views about the death penalty whether it is abolished or retained and also give various reasons about the delay in the execution of death penalty.

2.7.1 Hindu views of the death penalty

There are both the views sought in the Hindu teaching i.e. abolition and retention of death penalty. Hinduism, on one side preaches Ahinsa or non-violence and on other side teaches about soul that soul cannot die but only change the body like changing the clothes. The crime and punishment defined in Dharmasastras and Arthasastra. Dharmasastras explain various crime and punishment and in several offences also put the death penalty that depends on the gravity of the crime i.e. in murder cases or in warfare.

2.7.2 Christian view of the death penalty

The primary symbol of Christianity is cross with or without the body of the Jesus. The Christian believes that the death of Jesus was the punishment for the offences of the world. But due to the change in time Christian are also dividing on the views regarding death penalty i.e. liberal group and conservative group. Liberal group oppose the death penalty but conservative support this punishment. But the two conservative groups Amish and Mennonites groups also knew for opposition of death penalty.

Jesus himself oppose death penalty, once a woman caught I the act of adultery and put to death by stoning then Jesus come forward and save his life by told to

142 Available at: www.indologica.com/volume/vol 17-18/artSASSARMA.pdf (visited on 25/12/15) at 09:00AM
public that the first stone thrown by the person who didn’t do any sin in his life and everybody goes back. He later tells to woman to go for a new life and never do any other sin.

So there is no clear concept among Christian regarding death penalty. Mostly the churches outside the United States officially opposed to death penalty i.e. Australia, Western Europe but within the United State there is strong support to death penalty especially in southern state.

2.7.3 Muslim view of the death penalty

There is variation in views regarding capital punishment within Islamic nations like Saudi Arabia retain capital punishment but other Muslim nations against death penalty. Apostasy in Islam and stoning to death are controversial topics. In the holy book of Quran expression is condoned. Under Muslim law, murder is treated as civil crime which is covered by law of retaliation where relative of victim decide the way to death to the accused.

A Muslim may be sentenced to death under Shariah, Islamic law. Some of the offences are apostasy, adultery if there are four witnesses, a third conviction of alcohol and fifth conviction for theft and a Non-Muslim who is living in an Islamic state, can be executed if he found offender of sexual relation with a Muslim woman and persecution of Islam i.e. blasphemy against Allah or convert Muslim from his religion.

The main aim of Islamic fundamentalist is to re-introduce Shariah because Shariah is not enforced in various countries with a Muslim majority.

2.7.4 Jewish view of the death penalty

Bible, the religious book of Jews prescribed all the laws that are followed by the Jewish community. In Jew community the death penalty is based on the reading of bible and also on the oral laws that are seen through Judaism’s corpus of oral law.

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143 Capital Punishment (Law), Britannica Online Encyclopedia (Britannica.com) (1967)
These oral laws were amended into phases firstly around 200CE in the Mishnah and later around 550CE in the Talmud.

Study of these shows that the death penalty was only used in extremely rare cases. According to rabbinic law, the essence for the death penalty was the presence of two eye witnesses to the crime. No one should be testifying against himself. Effectively death penalty is out of existence. Today, only one country of Jewish community uses death penalty i.e. Israel.

In Conservative Judaism the rabbis declared that the death penalty is repugnant to their society. The reason for the abolition of the death penalty the argued is that if the person who convicted of crimes and later on some new facts come to their innocence comes into knowledge then the door of the jails can be opened but the dead body cannot be brought back to life again. So they regard all the forms of capital punishment as barbaric and cruel.

### 2.7.5 Buddhist view of the death penalty

There is no any agreement about the retention or abolition of death penalty among Buddhist. According to Buddhist view the first among the five percepts is to abstain from destruction of life.

As we show from the history various state where Buddhism is official religion and imposed capital punishment for some offence. There is an exception where the death penalty is officially abolished as by Emperor Saga of Japan in 818 but Japan still imposes death penalty although some recent justice minister refused to sign death warrants. Other Buddhist country are also have varied view about death penalty like Bhutan abolish death penalty but Thailand still retain it although both are Buddhist country in official religion.

According to the Buddhist, obviously Death Penalty fulfills preventative functions but it is also a form of revenge. Due to the execution of person, he i
deprived of opportunity of change and to compensate. The 14th Dalai Lama indicative of thought of Buddhist told that I believe that everyone has potential to improve and it remains possible to deter criminal activity without having resort to death penalty.

But without one official teaching on the death penalty, that monks are typically divided on issue with some favoring abolition of death penalty while other see it as bad karma stemming from bad action in the past.

However most of the nations that have historically been Buddhist including China, Japan, North Korea, South Korea, Taiwan, Thailand retains Death Penalty.

2.8 Rationality of Death Penalty

The term punishment has nowhere been defined in the Indian Penal Code. However, according to the Concise Oxford Dictionary it means "to make an offender suffer for his offence". The punishment is inflicted on the alleged offender in order to teach him a lesson so that he may not commit the crime again.

Besides this, the second aim of the punishment is to open the eyes of criminals who plan to indulge themselves in criminal activities. The infliction of the punishment also serves as an cream on the wounded feelings of the society because whenever a crime is committed, it is not only the victim who suffers on that score, but the conscience of the entire society and the nation at large is shaken to its very foundation and often there is a hue and cry that the offender should be brought to book. It is at the Stage that the state applies a relaxing balm on the wounds of the society by punishing the offender.144

Death as a mode of sentence is different from the killing which rested on the instinct of primitive man. Death Penalty is the infliction of highest and extreme penalty. The punishment is supreme because if affects the very existence of human life. In the form of a legalized and justifiable homicide, the capital punishment seems to have originated with the concept of an orderly society only to deal with such

144 Mohd. Shamim, Capital Punishment, 1989 (May), 95 Cr.L.J., pp. 52-53
extreme cases of disorderly depredation of anti-social elements with the social needs and exigencies.

Capital punishment has been justified from the earliest times, with reference to retributive and deterrent concepts - "An eye for an eye, and a tooth for a tooth", a sort of vengeance which has been attributed to man from the early days when society had not developed into a body of responsible citizens. Capital punishment for murder and other serious offences may be said to have come into existence with the emergence of modern State and its growing recognition of the obligation to maintain peace and order at any cost. Capital punishment is thus, the only instrument in the armory of the civilized world. The only purpose and object, therefore, for which this sentence has been prescribed, is to protect humanity from such elements who are incompatible with the normal course of human life, and who act against the rudimentary principle of Live and Let Live.\textsuperscript{145}

\subsection*{2.8.1 Death Penalty and Its Justification}

It is said that life is scared and priceless and no decision is more momentous than the decision to take a person’s life, no matter what the provocation or the circumstances are while allege that there are occasions when homicide is justifiable. Some say that no war is ever justified and that the taking of human life in war is always morally wrong. Others maintain that in a struggle for national survival or even for national honour, it is permissible and perhaps even noble, to take lives of enemies.

Some say that police have a right and perhaps even a duty to take the life of a felon who is fleeing or resisting arrest and that any citizen has the right to take the life of another who is threatening him with a deadly weapon; others deny that anyone ever has a right to take the life of another human being, even under such extreme circumstances.

Some say that there are some offences for which the death penalty is appropriate. Others argue that for the state, to take the life of any of its citizens, even

of those who have been convicted of the worst offences against their fellow citizens and against society (such as rape, kidnapping, treason, murder) is uncivilized and unjustifiable.

Death sentence is sought to be justified mainly on two theoretical assumptions, namely 'retribution' and 'deterrence'. The former conceives punishment as an end in itself while the latter emphasizes the utilitarian purpose. It is intended here to examine the 'retributive and deterrent aspect of capital punishment'.

2.8.1.1 Death Penalty justified on the ground of Retribution

Retribution in punishment is an expression of society's displeasure against the offender's criminal act. According to Lord Denning, punishment is "emphatic denunciation" of a crime by the society. Retribution is essentially based on the idea of vengeance. According to Edvin Ropper, "Vengeance is part of the nature of a man and the instinct of revenge which every man possesses"146

Whenever a crime is committed against any person, the first instinct of the victim is to take revenge and sometimes the crime is so heinous and ghastly that this feeling no more remains confined to the victim alone, but its limbs spread to every corner of the society, as a corollary, there is an upsurge for revenge. Public demonstration and large hue & cry against alleged culprits in Anjana Mishra rape case in Orissa or rape and brutal molestation of nuns in Gujarat, are the glaring examples of manifestation of public revolt and demand for capital punishment for them. Can any organ of the Government entrusted with the task of administering justice afford to ignore it? The answer is an emphatic no. If it does so, I feel it fails in its primary duty which is to cater to those instincts; as the feelings of vengeance have primitive unconscious roots.

Arthers Koestler once remarked: "The desire for vengeance had deep unconscious roots and is raised when we feel deep indignation or revulsion ... whether the reasoning mind approves it or not."

146 Cr.L.J., April 2000, p. 56.
The above view was again endorsed by "Lord Denning before the Royal Commission: The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. There are some murders which in the present state of public opinion demand the most emphatic denunciation of all, namely the death penalty."

2.8.1.2 Retributive Aspects in Capital Punishment

Basically capital punishment probably survives because many believe strongly that it possesses a certain moral fitness, that it is the only just penalty for murder especially when murder is particularly brutal. In such cases it is maintained that simple justice demands a life for life. It is claimed that murderer has forfeited the right to live. The law of retaliation is pressed into action to support a publicly regulated substitute for private vengeance.

In his opinion for the majority on *Gregg v. Georgia*¹⁴⁷ upholding the death penalty as constitutionally permissible; Justice Stewart observed that capital punishment "an expression of society's moral outrage at particularly offensive conduct". It is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs. Without orderly means of imposing penalties upon offenders, proportionate to what the aggrieved parties feel is deserved; society runs the risk of anarchy and lynch law.¹⁴⁸ Lord Justice Denning told the British Royal Commission on capital punishment, some crimes are so outrageous that society insists on adequate punishment, because the wrong doers deserve it, irrespective of whether it is deterrent or not."

The theory of retribution emphasis retention of death penalty for heinous crimes on three counts viz. (I) vengeance (ii) punitive and (iii) reprobation.¹⁴⁹

Its value as a motive of death penalty is well explained by a New York Psychologist in the following words:

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¹⁴⁷ 428 U.S. 153 (1976)
¹⁴⁹ S.K. Kumbhaj, *Death Penalty: Indian Penological Retrospect*, 311 (Deep and Deep Publication, Delhi, 2005)
"The motives for the death penalty may indeed include vengeance. Legal vengeance solidifies social solidarity against law-breakers and probably is the only alternative to the disruptive private revenge of those who feel harmed.\textsuperscript{150}

Thus, Retribution was, is and will continue to be the most important aspect of the criminal administration of Justice. In fact there can't be any administration of justice, if we become oblivious of this aspect of the theory of punishment. To ignore it is tantamount of ignoring the basic nature of man.

2.8.1.3 Death Penalty justified on the ground of Deterrence

Deterrence is the foremost principal policy which every penal system advocates. It is applied on the offenders in order to deter people from committing crimes. It underlines the principle that inducement to promote one's selfish interests is at the bottom of every criminal act and by providing adequate penalty and exemplary punishment, it seeks to create a sort of fear in the minds of others and thus, serves to deter them from committing criminal acts. The harshness of penal discipline is a terror and warning to the offender himself and others as well.

According to Bentham, "we consider that an unpunished crime leaves the path open not only to the same delinquent, but also to those who may have the same motives and opportunities for entering upon it. We thus perceive that the punishment inflicted on the individual becomes a source of security to all." Punishment, as deterrent, in general seeks to control future events in "three ways". It seeks -

(a) To stop the offender from offending again (particular deterrence).
(b) To deter other potential offenders (general deterrence), and
(c) To protect the society from the persistent offenders (protection).

It is remarkable that people can seriously argue that the fear of death is never sufficient to deter would be murderers or kidnappers. Everyone has experienced the temptation to commit some offence or other, and everyone has to sometime overcome that temptation. Although many factors enter into that decision, one of the crucial

\textsuperscript{150} K.D. Gaur, Criminal Law and Criminology, (Deep and Deep Publication, Delhi, 2002)
ones is frequently the fear of some penalty. The harsher the penalty is, the greater is the fear and the more effective its deterrent effect would be. The fear of death has been powerful enough to dissuade thousands of persons from flying. It has helped to deter thousands more (though not everyone) from smoking, despite the pleasure they derive from tobacco. The fear of cancer or heart attacks has deterred millions of persons from eating sweets and fear of getting HIV-positive, which till date is incurable, deters many to go for sex. So if people act on the long term fear of death, when death is only a remote possibility. Why is it unreasonable to suppose that some of them might be impelled to take appropriate precautions against the possibility of being executed - one of which might be refraining from committing capital crimes? Thus if even one out of a hundred murderers could be deterred by the execution of those who are guilty of murder, not only the potential victims would be saved, but also the potential murderers. If 1% of the homicides committed in the U.S. in 1975 could have deterred, 205 people would have been spared, such figures can't be ignored. Moreover, there are certain major crimes which cannot possibly be deterred by any other penalty. The revolutionary who contemplates blowing up a school bus as a means of terrorizing the population is not likely to be deterred by the threat of life imprisonment, for he believes that even if he is caught, he will be released and be given a hero's welcome by his fellow revolutionaries when the revolution succeeds.

The same must be true of criminals who are already serving life sentences in prison. The threat of yet another lengthy sentence is meaningless and can therefore, have no effect at all upon them. Thus, if anything at all will deter such men from the crimes they are contemplating it is nothing less than the death penalty.

According to Islamic law, too, the punishment should be deterrent. An accused, once found guilty should be punished at a public place in order to open the eyes of a potential criminal. Islam has prescribed death penalty for a premeditated murder.

2.8.1.4 The Deterrent Effect of Capital Punishment: An Analysis

The question whether the death penalty has really and truly a deterrent effect is an important issue which has received careful attention over the last fifty years in several countries. 152

Here are some opinions of various legal experts regarding the deterrent effect of capital punishment:

(i) Sri James Stephen, "the great jurist who was associated with the drafting of Indian Penal Code also was strong exponent of the view that capital punishment has great value as deterrent for murder and other serious offences."

(ii) In Furman v. Georgia, J. Stewart took the view that death penalty serves a deterrent as well as retributive purpose.

(iii) The eminent social scientist Professor Ehrlich is also of the opinion that death sentence has made intensive deterrent effect on progressive society. The American Economic Review in June 1975 includes a specific test for presence of deterrent effect of capital punishment.

(iv) J.J. Maclean, a parliamentarian of Canadian House of Commons in the March-April debates 1966 emphasized the deterrent effect of capital punishment.

(v) The British Royal Commission after making an exhaustive study of issue of capital punishment & its deterrent value in its report (1949-53) has concluded that 'Prima facie the penalty of death is likely to have a stringent affect as deterrent to normal human beings than any other form of punishment.

(vi) Why a man is so much afraid of capital punishment & why it should act as deterrent can be best described in the words of 'Dostoyevsky' a famous Russian Novelist. He has put the following words in the mouth of one of his characters in his illustrious novel 'IDIOT' while describing the horrors of death penalty. "Yes perhaps the main and the most racking pain comes not from your wounds but from the certain knowledge that in an hour, then in 10 minutes, then in half a minute and then right

152 R.P. Updhaya, Death Penalty in India, CIL Q(J), 1992, p. 48
away at this very instant, your soul will leave your body and you will no longer be
man and this is for certain and the main thing is that it is for certain. Lead a soldier to
the battlefield, place him opposite the very cannon and fire at him and he will still feel
hope, but read out the inescapable sentence of death to that very soldier and he will
go out of his mind and bursts into tears."\(^{153}\)

The most reasonable conclusion is that we can hardly find a man who is not
afraid of death. A person will go to any extent to save his life and that of his family
members. It is because life is the most precious thing. It is, thus, natural that death
penalty acts as a great deterrent for potential criminals. If we keep all the objects
aside, even then the deterrent object, would, by itself, furnish a rational basis for its
retention.

2.8.1.5 Sociological Justification

Apart from the theories of punishment the Supreme Court has emerged with
the principle of 'Social Necessity' in justifying imposition of death sentence\(^{154}\). "A
sentence or pattern of sentence which fails to take due account of the gravity of the
offence can seriously undermine the respect for law". It is rightly said, "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 is a
means of deterring other potential offenders." Failure to levy a death sentence in such
serious cases where it is a crime against the society particularly in cases of murders
committed with extreme harshness will bring to naught the sentence of death provided
by Sec. 302 IPC.\(^{155}\)

Perhaps it was this line of rationality which prompted the court to suggest that
"the survival of an orderly society demands the extinction of lives of persons like
Birla and Ranga who are a menace to social order and security."\(^{156}\)

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\(^{153}\) Cr. L.J. April 2000, p. 56
\(^{154}\) State of Rajasthan v. Tejaram (1985) 5 SCC 210
\(^{155}\) Rajendra Prasad v. State of UP AIR1979 SC 916
\(^{156}\) Kuljeet Singh Ranga v. Union of India, (1981) 3 SCC 324
The credibility of the judicial process and public belief in the efficacy of the judicial system springs into sight as a further justification. "Faced with such evidence and such acts to give the lesser punishment, therefore, would be to render the judicial system of this country, suspect. The common man will lose faith in the courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon."\(^{157}\)

The court should approach the question of sentence "from a broader sociological point of view" in which "not merely the accused but the whole society has a stake."\(^{158}\) Thus, "Any leniency shown in the matter of sentence", the court threatened "would not only be misplaced but will certainly give rise to foster a feeling of private revenge among the people leading to destabilization of the society."\(^{159}\)

Moreover, it has been observed that in countries where the punishment is severe, deterrent & capital punishment is in operation, crime ratio is lower in comparison to the countries where it is not so. \textbf{William Rogers, an American Minister of Foreign Affairs while visiting Saudi Arabia admitted that he had such a feeling of security over there, which he had not felt anywhere and there was no need of any guard.}\(^{160}\)

According to the report of Amnesty International (1979) only 18 states have so far done away with capital punishment. It implies thereby that most of the states have retained it on account of its efficacy. So why we cannot; and why we should not? This happens to be the moot issue.

\(^{159}\) (1983) 3 SCC 354
\(^{160}\) Conference of jurists at Riyad on 23.03.1972 \textit{Cr. L. J.} April 2000, p. 59