CHAPTER VII

APPRAISAL, FINDINGS AND SUGGESTIONS

I. An Appraisal

II. Findings

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CHAPTER VII

CONCLUDING OBSERVATIONS

I. INTRODUCTION

Blessed is that country where the incidence of crime is the least. Indeed every nation in the world strives to achieve this ideal but the statistic change from country to country, and from time to time in the same country. Emile Durkheim in his treatise 'crime as a normal phenomenon' says,

a society composed of persons with angelic qualities would not be free from violations of the norms of that society. In fact crime is a constant phenomenon changing with the social change.

As life became more and more complex opportunities for crime also increased with wants increasing day by day, the need also arose to satisfy them by any means fair or foul. In the attempt to acquire what they did not possess, desire was bred. Desire created anger and angry men never know how to discriminate between right and wrong, between good and evil, and what ought to be done and what ought not to be done. Thus crime bread and come to stay. Wherever people organized themselves into group or associations the need or some sort of rules to regulate the behaviour of the members of that group inter se has been felt, and where there were rules of the society, its infraction was inevitable. And there lies the necessity of devising some ways and means to curb such tendencies in the society that lead to violation of its rules. In every organized society certain acts are forbidden on the pain of punishment. Therefore, ancients evolved the philosophy of punishment and asserted that it was very necessary to maintain order in the society.

‘Danda’ was so called because it controlled those that do not control themselves.1 Dandniti is the code by which the king is led2 and he in his turn leads it.

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1 Santiparva Ch. 15 Verse 8.
2 Kamandakiya Ch. J. M. S. VII 27 M. S. VII, 19.
The king however must utilize Danda according to a well laid plan, only then it succeed. Our maker has created this Danda for the happy organization of society, for the peaceful pursuit of a good political order, and for the protection of Dharma & Artha. The concept of crime or punishment is a relative one. Consequently punishment for our ancients did not simply means perpetrating cruelty on one who had harrased the king’s subjects. The king had to look to his subjects as a father, mother, teacher, brother and Kubera and Yama. This means that a mother punishes her own child for being unjust and cruel to another of her own children with the intent of correcting it and not with the intent of harming it, so should the king’s punishment be. Thus punishment is that which leads to the giving up of bad practices which are restrained by penalty by which beings are kept in check.3

During the long complex history of punishment offenders have been subjected to torture, punishments, transportation, imprisonment, may be for life or otherwise, may be simple or rigorous or it may be solitary confinement and punishment for death, which is extreme penalty of law imposable by courts under the sanction of law. Originally in general punishment was retributive and deterrent.

It is accepted that cruel and degrading punishment does not help in curbing the increasing crime rates. It is also believed that historical demands for harsh punishment will never stop crime because the roots of the crime lie deep in our social structure.

In the first chapter of this study, I have discussed the CONCEPT OF ‘CRIME AND PUNISHMENT’ in detail. It is true that both crime and criminal are looked upon with greater hatred by all sections of the people in society, but it is also true that the study and research of law of crime has always been one of the most attractive branches of jurisprudence since the early years of human civilization. It is very difficult to define crime because of the varying nature of the content of crime. We can define crime as an act punishable by law as forbidden by statute or injurious to the public welfare. According to Blackstone crime is an act done in violation of public rights and duties. According to Paton, ‘the normal marks of a crime are that the state has power to control the procedure, to remit the penalty or to inflict the

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3 Sukraniti IV 40.
punishment. Thus we find that it is very difficult to suggest a definition of crime suitable to all countries for all the time.

As far as ‘punishment’ is concerned, then it is the suffering in person or property inflicted by the society on the offender who is adjudged guilty of crime under the law. The administration of punishment involves the intention to produce some kind of pain which may be partly physical and partly mental. The amount of pain actually experienced by the offender will vary from case to case depending on the circumstances and personality of the offender. Plato regarded it as having instrumental value as a necessary cure, no more evil than the bitter medicine which a physician might administer.4

Punishment is good since it is corrective, deterrent and necessary for the public welfare. In sum punishment is a coercive deprivation intimately applied to an offender because of his voluntary commission of a harm forbidden by penal law and implying his moral culpability. Various theories are advocated to explain the purposes of punishment namely (i) retributive (ii) deterrent (iii) Preventive (iv) Expiatory and (v) reformative. These theories are not mutually exclusive and plays an important role in dealing with potential offenders.

Of all the forms of punishment, Death penalty is the harshest form of punishment provided in the Indian Penal Code and perhaps the most debated subject among the modern penologists which involves the judicial killing or taking the life of accused as form of punishment. Capital punishment has been prevalent in India from times immemorial. It was in existence from the time of Manu; even Narada Brahspati prescribed the death sentence for murders. In the Buddhist Sanskrit and late Pali text, one finds reference relating to death sentence. Hindu law gives justified death penalty in the cases which contains serious offences, against the individual and the states. Under Muslim law the punishment of death is considered as Haqq Allah and it is inflicted, after the offence has been legally proved. The Mughal rules in India also made use of death penalty to eliminate unwanted criminals. However, certain statutory modification were done in British rule.

4 Quoted in Hall, Jerome: General Principles of Cr. Law 92nd ed) p. 311.
There are certain statutory provisions and procedural safeguards provided in the context of death sentence mentioned in Chapter II STATUTORY PROVISION RELATING TO DEATH PENALTY. The study of these statutory provisions with regard to death penalty clearly establishes that maximum care has been taken for its actual operation. The Indian Penal Code enacted by the British in 1860 still regulates the penal law in India. In the objects and reasons of this code, the framers observed that the death penalty should be sparingly inflicted. This code provides death penalty for seven types of offences: for the offence of waging war against the Govt. of India (Section 121); for abetment of mutiny by a member of the Armed Forces (Section 132); for giving false evidence leading to conviction of an innocent person and his execution Section 194; for murder punishable with death (Section 302) and 303; for abetment of suicide of a person under eighteen years of age or of an insane or delirious or idiot or intoxicated person Section 305, for an attempt to murder by a life convict (Section 307 part II) for dacoity accompanied by murder Section 396.

In criminal procedure code, certain procedural safeguards are provided by which death sentence is awarded only in exceptional circumstances. There has been a significant change in the legislative policy towards the death penalty and the parliament is clearly in favour of the retention of death penalty. Under the old Criminal Procedure Code. 1898, Section 367 (5) required the sentencing courts to record reasons for not imposing the death sentence in capital cases. It means death was the rule and imprisonment was an exception in capital cases. In 1955, the code was amended and this provision was deleted. The result was that court become free to award either death sentence or the lesser sentence. However in 1973, the original policy has been completely reversed as Section 354(3) requires the court to record ‘special reason’ for the award of death sentence. The emerging conclusion is that imprisonment for a term of year has become normal punishment and death penalty has become an exception.

In our constitution also, a number of provisions are there which deals with the rights and duties of both the citizens and the non citizens. Right to life has been discussed in detail under Article 21 of our constitution, but there is not even a single

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provision in the constitution which talk about the constitutionality of death penalty in India. But under Article 72 and 161 of the constitution, power to grant pardon, suspend, remit or commute the sentences in certain cases are given to the President and Governor. **Article 72** says that the President shall have the power to grant pardon reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence (a) in all cases where the punishment or sentence is by a court martial (b) in all cases where the punishment or sentence is for an offence against any law, relating to a matter to which the executive power of the union extends (c) in all cases where the sentence is a sentence of death. Article 161 says that the Governor of a state shall have the power to grant pardon, reprieve, respite or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the state extends.

According to the Supreme Court, petition filed under Article 72 and 161 of the constitution or under Section 432 and 433 Criminal Procedure Code. must be disposed of expeditiously. A self imposed rule should be followed by the executive authorities rigorously, that every such petition shall be disposed of within a period of three months from the date on which it is received.

Besides the Indian Penal code and criminal procedure code there are certain other statutes where death sentence is imposed upon the offender. These are Indian Railway Act 1980, the Indian Navy Act, 1957, Narcotics Drugs and Psychotropic Substance Act 1988, Terrorist and Disruptive Activities Act and Prevention of Terrorism Act 2002 (TADA). POTA has been a controversial piece of legislation. The present government at the centre has decided to repeal POTA as cabinet ha already approved its repeal not only POTA, but government should ensure that existing laws are not being misused.

The **third chapter** of this research deals with the "**CONSTITUTIONAL VALIDITY OF DEATH SENTENCE**". Indian constitution is an amalgam of many constitution like constitution of America, Britain and Japan. Infact the main provisions of Indian constitution guaranteeing the right to life has been lifted from the American and Japanese constitution. The right to life is not the something that
constitutions create or even confer. The constitution only recognizes this in alienable and indispensable right. The constitution provision is therefore, only evidentiary value.

There are several provisions in the constitution such as the Preamble, the Fundamental Rights and Directive Principles which can be relied upon for challenging the constitutionality of capital punishment. We can divide the discussion into two parts i.e. validity of discretionary death sentence and validity of mandatory death sentence.

In *Jagmohan Singh* the question of its constitutional validity of discretionary death sentence was raised for the first time. It was argued that it is violative of Article 14, 19 and 21 so unconstitutional in nature. Justice Palekar after careful examinations of the contentions gave his opinion that he does not find any merit in this contention that the discretion given to judges to impose capital punishment or imprisonment for life is uncontrolled and unguided.

In *Rajendra Prasad case*; a further challenge was there against the validity of death penalty. Justice *Krishna Iyer* while delivering his judgement discarded the award of death penalty from the constitutional standpoint also. He emphatically stressed that death sentence is violative of 14, 19 and 21 of the constitution of India. To quote his own words:

“Corporeal death is alien to fundamental rights. Restriction on fundamental rights are permissible if they are reasonable. Such restriction may reach the extreme state of extinction only if it is so completely desirable to prohibit totally. While sentencing, you can not be arbitrary since what is arbitrary is per se inequal”

The learned Judge was of the opinion that death sentence should be restored to only where reformation to a reasonable limit is impossible

But Justice Sen dissenting remarks are as follows:

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7 Ibid at page 935.
The humanistic approach should not obscure our sense of realities when a man commits a crime against the society, by committing a diabolical cold blooded, preplanned, murder of an innocent person, the brutality of which shocks the conscience of the court, he must face the consequences of his act. Such a person forfeits his right to life.\(^8\)

In sum, the Supreme Court concluded that commutation of death penalty to imprisonment for life is justified in the instant case keeping in view of ideological, constitutional, criminological and cultural trends in India and abroad.

In *Bachan Singh Case*\(^9\), supreme court was once again called upon to settle the issue regarding the constitutional validity of death sentence. This time Supreme Court overruled its earlier decision in Rajendra Prasad and Mr. Justice Y. V. Chandrachud expressed a view that death sentence as an alternative punishment for murder is not unreasonable and hence not violative of 14, 19 and 21 of the constitution\(^10\), because the 'public order' contemplated by clauses (2) to (4) of Article 19 is different from law and order. Justifying retention of death penalty as an alternative punishment in reference to Section 354(3) of Criminal Procedure Code. 1973, the court inter-alia observed:

"The question whether or not death penalty serves any penological purpose is a different complex and intractable issue. It has evoked strong divergent views... not withstanding the view of the Abolitionists to the contrary a very large segment of people, the world over including sociologist, jurist, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society'.

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\(^8\) Ibid page 945.
\(^9\) AIR 1980 SC 898.
As far as mandatory death sentence is concerned, its validity was challenged in *Mithu Vs. State of Punjab*\(^{11}\). The Decision of Supreme Court delivered on 7\(^{th}\) April 1983, while disposing of writ petition filed by Mithu in which he has challenged the constitutional validity of section 303 on the ground that it violated Article 14 and 21 of the constitution, held that Section 303 Indian Penal Code is unconstitutional. Justice Y. V. Chandrachud observed

that there shall be no mandatory sentence of death for the offence of murder by lifer. In other words, hereinafter all murder cases would fall under section 302 which provides punishment for murder.

So the supreme Court finally held that a real and abiding concern for the dignity of human life postulates resistances to taking a life through laws' instrumentality.

**In my fourth chapter**, I have discussed the **MODE OF EXECUTION OF DEATH PENALTY** in ancient time and in the prevalent era. An appraisal of the administration of criminal justice of ancient time reveals that death penalty was commonly used in cases of heinous crimes. However, there was great divergence as to the mode of its execution. The common modes of inflicting death sentence on the offender were crucification, drowning burning, boiling, strangling amputation, shooting by gun or starving him to death. Hanging the offender till death in public places has been a common mode of putting to an end the life of an offender. These draconic and barbarous method of punishing criminals to death were justified on the ground that they were the quickest and easiest modes of punishment and at the same time carried with them an element of deterrence and retribution.

A survey of available case law on death sentence would reveal that the attention of the Supreme Court was focused on the question whether in ordinate delay in the execution of death penalty can be considered to entire the convict to claim commutation of the sentence to that of life imprisonment. The Supreme Court in *T. V. Vathee Swaran Vs. State of TN*\(^{12}\) held about the dehumanizing effect of prolonged

\(^{11}\) AIR 1983 SC 473.

\(^{12}\) AIR 1983 Sc 361.
delay after the sentence of death and it went further by holding that cause of delay is immaterial when sentence as death, became it would not alter the dihumanising character of the delay.

The Supreme Court in its decision once again ruled that prolonged delay in execution exceeding two year will be a sufficient ground to quash death sentence since it is unjust unfair and unreasonable procedure and the only way to undo the wrong is to quash the death sentence.

In Sher Singh Vs. State of Punjab\textsuperscript{13}. The Supreme Court overruled its earlier ruling in above case and observed that death penalty should only be imposed in rare and exceptional cases and no hard and fast rule can be laid down as far as question of delay was concerned. In a recent decision in Triveniben Vs. State of Gujrat\textsuperscript{14}, the Supreme Court overruled Vatheeswam to the extent they purported to lay down the 'two years delay rule and held that no fixed period of delay could be held to make the sentence of death inexecutable. In Madhu Mehta Vs. Union of India\textsuperscript{15}, SC held that delay of 8 years in disposal of mercy petition would be sufficient to justify commutation of death sentence to life imprisonment since right to speedy trial is implicit in Article 21 of the constitution which operated through all the stages of sentencing including mercy petition to the president. In State of UP Vs. Ramesh Prasad Misra\textsuperscript{16}, the SC reduced the death sentence of the accused to one of imprisonment for life in view of long lapse of time from the date of commission of crime.

As far as constitutional validity of the mode of execution of death sentence is concerned, it was challenged in Dina Vs. Union of India\textsuperscript{17} on the ground that it was violative of Article 21 of the constitution being barbarous and inhuman in nature. The Supreme Court however rejected the contention and held that hanging the condemned person by neck till he is dead was perhaps the only convenient and relatively less painful mode of executing the death sentence. The issue was once again raised in

\textsuperscript{13} AIR 1983 SC 465
\textsuperscript{14} AIR 1989 SC 1335.
\textsuperscript{15} 1989 Cr. L. J. 2321.
\textsuperscript{16} AIR 1997 SC 2766.
\textsuperscript{17} AIR 1983 SC 1155.

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The Fifth chapter of my study is related with the DEBATE FOR THE ABOLITION OR RETENTION OF DEATH PENALTY. Penologists in India have reacted to capital punishment differently. Some of them have supported the retention of this sentence while others have advocated its abolition on humanitarian grounds. The retentionists support capital punishment on the ground that it has a great deterrent value and commands obedience for law in general public. The persons who support capital punishment feel that death of the killer is a requirement of justice. They believe that death of victim must be balanced by the death of the guilty party, otherwise, the victim will not be avenged and the anguish and passions aroused by the crime in society will not be allayed.

The abolitionists, on the other hand, argue that enormous increase in homicide crime rate reflect upon the futility of death sentence. Another argument generally put forth by abolitionists is that hardened criminals commit most cold blooded murders in a masterly manner. They proceed with their criminal activity in such a way that even if they are caught, they are sure to escape punishment due to one or the other procedural flow in the existing criminal law.

Arguments both in favour and against the death sentence are discussed at par. Even the Law Commission of India in its thirty fifth (35th) Report was sharply against the abolitionist view which was as follow:

Having regard to the condition of India to the variety of the social upbringing of its inhabitants to the disparity of the level of morality and education in the country to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India can not take risk of abolition of capital punishment. Arguments which would

be valid in respect of one area of the world, may not hold good in respect of another area in the context.\textsuperscript{19}

The Supreme Court in Bachan Singh Vs. State of Punjab supported the law commission's view.

**Parliamentary efforts towards reformation in the field of criminal justice**

The current wave of reformation in the field of criminal justice system has inspired Parliamentarians in India to launch a crusade against death penalty. They have been constantly struggling to repeal the provisions relating to death penalty from the Penal Code for the past several years. The first proposal was tabled in Lok Sabha in 1949 but was withdrawn by the then Home Minister Sardar Vallabhai Pater. The matter came up again in Rajya Sabha in 1958 but again met the same fate. Then in 1962 this subject was accepted for discussion in Rajya Sabha but the general opinion of the House favoured its retention, realizing that the time has not yet come, when its repeal from the Statute book could be justified. The law commission was of the opinion even in 1967 that the country should not take the risk of experimenting with the abolition of death penalty.

Even the *Report of convention* of International Congress of criminal law\textsuperscript{20} which was held on 8\textsuperscript{th}, 9\textsuperscript{th} and 10\textsuperscript{th} Feb. 1982 concluded that death penalty should be retained though its use may be restricted to “rarest of rare cases”. Despite strong plea for abolition by Justice Krishna Iyer, the convention justified its retention though to be used sparingly.

As regards the question of exempting certain categories of person from death sentence, the *Law commission in its 42\textsuperscript{nd} Report* published in June 1971 suggested that

1. Children below 18 years of age should not be sentenced to death.
2. It is not necessary to exempt women generally from the death penalty.
3. It is unnecessary to insert a statutory provisions relating to “diminished responsibility” in the statute book.

\textsuperscript{19} 35\textsuperscript{th} Report Law Commission of India (Govt. of India) 1967 page 354.
\textsuperscript{20} The seminar was held in Oct 1969 in Delhi “Capital Punishment in India”
4. An attempt to commit suicide should cease to be an offence in India. The present law in this regard is ‘harsh and unjustifiable’ and it should be replaced.

Thus the law commission felt that capital punishment thus acts as an effective deterrent “which is the most important object and even if all object were to kept aside, this object would itself furnish a rational basis for its retention.21

The pertinent issue which emerges from the foregoing discussion is, how for the present law relating to capital punishment answers the need of the time and whether its scope needs to be extended, curtailed or it should be abolished altogether. The proper approach to the problem perhaps will be that capital punishment must be retained for incorrigible and hardened criminals but its use should be limited to rarest of rare cases.

Judiciary being the second source of law has always acted as guidance for our legal system as discussed in detail in Chapter VI DEATH PENALTY: ROLE OF JUDICIARY in dealing with its different dimension Judiciary in an important tool or remedy which helps in solving or giving new solutions to the every increasing social evil. Thus called Panacea to all social evils. It has tried to punish as well as reform the criminals by means of penal sanctions such as fine, imprisonment, probation and sometimes the extreme punishment of death. A progressive trend in the area of sentencing is discernible in the Indian criminal justice system. Thanks to the substantial amendments that are being brought about in the code of criminal procedure 1973 which in particular incorporates clause (2) in Section 23522 makes it mandatory on the part of the sentencing judge to hear the accused on the question of sentence, when he is found guilty. The Indian Judiciary hesitates to ‘lay down any’ sentencing guide as no hard and fast rule can be laid down in order to meet the exigencies of each case. The superior courts, when faced with the problems of unjust and inadequate sentences, direct the lower. Courts to exercise their discretion along

21 Prof. P. N. Pranjape: Guminology and Penology, Give year of publication, p. 250.
22 Section 235 (2) Criminal Procedure Code. – If the accused in convicted the Judge shall, unless he proceeds in accordance with provision of S. 360, hear the accused on question of sentence, and then pass sentence on him according to law.
with judicial line. They hold that discretion must be exercised according to the principle and not according to the humour of judge, arbitrary or fanciful.

Section 302 of Indian Penal Code provides two categories of punishment for murder, namely death and imprisonment for life. The criminal can not be given lesser punishment. For the convenient study of death penalty, judicial pronouncement since independence may be divided into those phases – Pre Bachan Era and Post Bachan Era.

Before 1955, normal punishment for murder was death and imprisonment for life was to be awarded for reasons to be recorded by judge. After 1955, as reasons were not to be given for not awarding the death sentence in Capital offences, matter of choosing between the alternatives was lift to the discretion of the Court. This position continued till 1974, when new Criminal Procedure Code. 1973 came into force. Thus under new provision, namely section 354(2) Criminal Procedure Code. 1973 normal punishment for murder in imprisonment for life and death sentence is to be awarded for “special reasons” to be recorded by the judge.

In Kunju Kunju Janardhanan Vs. State of AP although the majority of judges by 2:1 commuted death sentence to imprisonment for life, in his dissenting judgement disagreed with the majority.

In Rajdenra Prasad Vs. State of UP Mr. Justice Krishna Iyer of the Supreme Court made clear that where the murder is deliberate, pre-mediated, cold blooded and gureson, the offender must be sentenced to death as a measure of social defence. A year later the Supreme Court was once again called regarding the controversy over death penalty in Bachan Case, in which it overruled the decision given in Rajendra Prasad and laid down that death sentence should be saved in the & rarest of rare cases’ and must be retained as an exception for the offence of murder under S. 302 Indian Penal Code to be used sparingly. Following the ruling, Supreme
Court upheld the death sentence of accused in *Machhi Singh & others Vs. State* calling it as the ‘rarest of rare case’. The death sentence was again approved in *chopra children Murder case*, *Dhananjay Chatterjee Case* keeping in mind the rule laid down to determine as to what cases may be covered under the ‘rarest of the rare’ doctrine.

Recently in *Parliament Attack case* the Supreme Court has confirmed death sentence for Mohammed Afzal. But his mercy petition is still to be decided by our President. Even in Priyadarshini Mattoo case the High Court has ordered the death penalty for Santosh Kumar.

In the Last Chapter all the Chapters have been summarized and have reached to a CONCLUSION that Death Penalty must be retained in the statute Book as it do act as an effective deterrent for the habitual and hardened criminal in the society. Thus Bentham’s pleasure and pain theory acts as a best solution to heinous crimes. Even Italian criminologist Garafalo while disapproving the abolition of death sentences from the statute Book commented, ‘When State abolishes the sentences of death, it authorizes murderer and says to the criminal ‘the risk you run in killing a human being is a change of abode, the necessity of spending your days in my house (i.e. prison) instead of your own.

It may be reiterated that capital punishment is undoubtedly against the notions of modern rehabilitative processes of treating the offender to reform himself. That apart, on account of its irreversible nature many innocent persons may suffer irredeemable harm if they are wrongly hanged. As a matter of policy the act of taking another’s life should never be justified by the State except in extreme cases of dire necessity and self preservation in war.

Therefore, it may be concluded that though capital punishment is devoid of any practical utility yet its retention in the penal law seems expedient keeping in view the present circumstances when the incidence of crime is on a constant increase.

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28 AIR 1983 SC 957  
29 AIR 1981 SC 1572  
32 Prof. N. V. Pranjpay  
is not yet ripe when complete abolition or capital punishment can be strongly supported without endangering the social security. It is no exaggeration to say that in the present time the retention of capital punishment seems to be morally and legally justified.

II) SUGGESTIONS

In the light of the findings of the present study and the foregoing discussion regarding the punishment of death, the following submissions are as follows:

Need for Judicial Precedents

1. When it has been settled in our Country that death punishment should be allowed, the only issue to be decided is that are the guidelines for the award of death sentence; because the different provisions of the Penal Code which make provision for death punishment do not lay down any criteria for the award of death sentence. In particular, Section 302 is also silent and this reticence of the section has resulted into a number of problems and controversies necessitating judicial precedents and interpretations.

Such stark brevity leaves deadly discretion but beams little legislative light on when the Court shall hang the sentence or why the lesser penalty shall be preferred. This facultative fluidity of the provisions repose a trust in the Court to select. And ‘discretionary’ navigation in an unchartered sea is a hazardous undertaking unless recognized and recognizable principles, rational and constitutional are crystallized as ‘interstitial legislation’ by the highest Court. The flame of life cannot flicker uncertain; and so Section 302 I.P.C. must be invested with pragmatic concreteness that inhibits adhominem responses of individual judges and in penal conformance with constitutional

35 Sections 121, 132, 194, 302, 307 and 396 make provision for death sentence.
36 Section 302 punishment for murder-whoever commits murder shall be punished with death or imprisonment for life and shall also be liable to fine.
norms and world conscience within the dichotomous frame work of Section 302 I.P.C.37

2. Need for Certainty and Flexibility in Judicial System

Judicial precedent in this realm would also corroborate the existence of a sort of custom in the sense that it shows respect for the opinion of judges. It is based on the obvious principles that convenience and prudence demands that a question once decided should not be vexed twice. It will also introduce certainly and flexibility in judicial system and would create more public confidence and respect towards it. Since a very flexible system can hardly be certain as no one knows when and where development will take place. It is the eternal difficulty of law to reconcile rule and discretion.38

3. Need for Searching out a viable alternative to deterrence

The criminal jurisprudence provides protective devices through punitive sanctions, and it also aims at securing better social order by insulating against the unwarranted acts emanating from the individual. So it is with this backdrop that the desirability or otherwise of capital punishment has to be judged. Therefore, there is need for searching out a viable alternative to deterrence, which has a vital protective function in society.

4. Adoption of legal logical and Criminological method

The court should also adopt a legal, logical and criminological method and must make an in-depth study of the causes and motivation of the crime and the inner and outer conditions prevailing in and around the accused, which have led to the upsurge of crime. The weapon used, the manner in which murder is carried out, the injuries inflicted upon the accused must impress the mind of the judge while awarding sentence.

History reveals that as the various disciplines began to grow, particularly biology, anthropology, sociology, psychiatry, psychology, and

statistics etc., the explanations soon shifted from rationalism to causes which exist in the hereditary, constitutional, and psychological make up of individuals as well as the causes which exist in the psychological make up of individuals as well as the causes which exist in the physical and social environment of man.\textsuperscript{39} The attempt to identify causes of crime in forces beyond man’s control, external as well as internal, that undermine his capacity to choose between right and wrong, represents the thinking of the so-called school of positivism. The positivist theory maintains that environmental and psychological forces determine all of human behavior, and that an understanding of these forces will provide an understanding of all of human behavior, positivism denies that free will can change the course of events, determined as they are by forces beyond man’s control.

5. Training of Judges, Lawyer and Prosecution

In order to ensure uniformity in the sentencing patterns, the sentencing judges, lawyer and prosecution should be given the training for the determination of the proper sentence. Sentencing guide based on ruling may be prepared.

6. Need for reorganization of Judicial Structure

The wide ranging penalties should be made available to the sentencing courts. To some extent Judiciary can help in rationalize capital punishment that would require identifying the extreme cases and reorganizing the judicial role in the matters of capital punishment in this context.

\textsuperscript{39} At one point in early nineteenth century, geographers became impressed with the variation of crime according to climatic conditions. Such a theory became known as the ‘thermal theory’, according to which crimes against the persons were considered to be introduced by hotter climates and crimes against property, by cooler climates. Beginning about 1830, when statistical reporting on crime became a part of governmental function, several statisticians became impressed with the variation in crime rates by various sections or provinces of European Countries and called attention to the variations in socio-economic conditions which seemed to cause high or low crime rates. Towards the end of the nineteenth century, statistically oriented researchers related the yearly fluctuations in the volume of crime with the early fluctuations in the price of grain when grain was high, there was a high volume of crime; when low, a low volume of crime........ Reckless, Walter C., “The Crime Problem” Vakils Feffer and Simons Private Ltd., Hague Building, 9 Sprott Road, Ballard, Lownbay, 1970 pp. 377-378.
7. **Judicial Discretion must not be arbitrary one**

The law gives the Sessions Judge the option of sentencing a person convicted of murder either to death or to imprisonment for life. The discretion to be exercised by the court must be a judicial discretion and not arbitrary or fanciful. In the illustrious case of Rajendra\(^40\) which is a landmark in the aura of issuing guidelines to the Court for the award of death sentence, as many as seventy cases involving discretion between life and death where selected and certain guidelines issued. The vexed question of legal threat to life by way of death sentence would necessarily require some great caution and criteria. Cases have revealed that murder is usually visited by life imprisonment and rarely by death sentence. (Now the rarest of rare criteria). Before the decision of the Jagmohna’s case\(^41\) there used to vest a broad discretion among the judges but now the same has been restricted to a great length.

While exercising discretion resort must also be taken from Section 354(3)\(^42\) of the Code of Criminal Procedure 1973. There always remains an element of flexibility and choice in the process of sentencing and there is no hard and fast rule created for it. It is a sort of individualization of law and permits justice at times to be hand-made instead of mass-produced. But it should always be noted that every variability is not arbitrary. On the contrary, it promotes rationality and humanity. Article 19 is a lighthouse with seven lamps of liberty throwing luminous indications of when and when only the basic freedoms enshrined therein can be utterly extinguished. The judge who sits to decide between death penalty and life sentence must ask himself: Is it ‘reasonably’ necessary to extinguish his freedom of speech, of assembly and association, for free movement, by putting out finally the very flame of life? It is constitutionally permissible to swing a criminal out of corporeal existence only if the security of state and society, public order and the interests of the general public compel that course as provided in Art. 19(2) to (6). They are the


\(^41\) AIR 1973 SC 947.

\(^42\) Section 354(3) “When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgement shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons for such sentence.”
special reasons which Section 354 (3) speaks of. Reasonableness as envisaged in Art. 19 has a relative connotation dependent on a variety of variables cultural, social, economic and otherwise.

8. **No pre trial detention**

The pre trial detention should be avoided. The convicted prisoner should not be chained, should not be put to bear fetters unless there is information.

9. **Supreme Court and High Court should be at unanimous conclusion**

It may be suggested that both at the stage of confirmation at the High Court and final appeal at the Supreme Court, every capital punishment case should be finally decided by a full bench which should come to a unanimous conclusion about the award of death sentence.

10. **Where life Imprisonment should be awarded?**

It should be also borne in mind that if the judge is satisfied that rehabilitation is possible by long treatment in jail or that the purpose of deterrence is served by life-long prison terms, or where the conviction is based on purely circumstantial evidence or where co-accused is not recognized or the cause of dispute is not known or where there was enmity between the parties or where there was difference of opinion between the judges, or the accused being a youth, or quite old, or the spectre of death hovering over the accused for a long time, or discrepancy exists between medical witness and eye-witness, or if it is a case of murder on instigation, or if the offence is committed in abnormal frame of mind or where the intention is lacking, capital sentence may not be warranted.

11. **Time limit for the trial**

The trial should be made time bound; there should be a speedy trial in practice and not only in therapy.

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12. Importance for judge made law

The judge made law should be given more importance, as they deal daily with new cases of facts and almost new circumstances, the legislature which has once framed a statute can not for see all the circumstances which could arise with the passage of time.

13. Need for exercise of Free Legal Aid Service

The existing rule of Free legal Aid scheme also need a thorough examination. The Govt. provided counsel should be equally good as that of the prosecution. Further it is suggested that the Bar council of India, should provide uniform standards for legal service sin the country and should centralize the scheme with unit in each district.

14. Mitigation of sentence – when permissible?

The principle of mitigation of sentence is founded on consideration of justifiable punishment and involves certain human considerations as well as certain other practical requirements of sound policy. Disregard of the principle is therefore morally wrong and may also turn out to be imprudent administration of a system of criminal justice.44

When a person who has been sentenced to death is quite young45 or too old or has committed the murder under excitement or in flaring up of sudden quarrel or exceeds the right of defence, or a sufficient time has elapsed since the crime was committed, or since the fear of death was hovering over his head or where the governmental policy of reformation is paramount extenuation of the sentence may be permissible.

45 But youth alone is not an extenuating circumstance. It may be one of the factors to be taken into account while awarding death punishment. Cases have revealed that even youth were sentenced to death either because the act of murder was heinous brutal, cold-blooded or premeditated or it otherwise warranted extreme penalty. Attention may be invited to the following cases: Moti Ram Bhoja Ram V. Emperor, AIR 1933 Lah. 939 (941); Saddiq Ali V. Emperor, AIR 1943 Lah. 104 (1060); Jangli V. Emperor, 1934 Qudh 19 (21); Tiri V. Emperor, AIR 1931 Rang 171; AIR 1955 Andh. 24 (26); AIR 1956 Mad. 536 (540).
15. **Revision of existing statues**

The existing penal institutions should be emetic and the state should revive their jail Manuals, on the basis of modern correctional philosophy.

16. **Training for Police Officers**

Police Officer should be appraised with modern concept of penology. They should not be allowed to resort to extra legal method. Their worth should not be assessed by the number of convictions they secure but by their role in the prevention of the crime and reformation of the offender.

17. **When Death punishment should be awarded**

Though no doubt judges are entitled to project their own views in the decisions but it is the bounden-duty of the Court to impose a proper punishment depending upon the degree of culpability and the desirability to impose such punishment. It is only in very grave cases where it is a crime against the society and the brutality of the crime shocks the judicial conscience that the Court has the power, as well as duty to impose death sentence. Where the crime is cruel and inhuman a death sentence may be called for. Death punishment may also be awarded in cases where the murderous operation of a diehard criminal jeopardizes social security in a persistent, planned and perilous fashion, then his enjoyment of fundamental rights may be rightly annihilated.

18. **Test for execution of death sentence**

Regarding execution of death sentence a fourfold test was suggested:

a) The act of execution should be quick and as simple as possible.

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b) The act of execution should produce immediate unconsciousness passing quickly to death.

c) it should be decent

d) it should involve mutilation

19. **Imposition of death sentence only on heinous offences**

Death penalty should be imposed in the crimes of heinous character eg, bride burning, minor rape cases and should be imposed on hardened criminal eg. Ranga & Bella, Dhananjay Chatterjee.

20. **Restriction on Executive powers**

The executive power of clemency and reprieve should not only be exercised liberally for commuting death sentence but should be exercised independent of the factors already deliberated upon by the courts. This would mean nationalization of mercy power with a view to make it really effective in the administration of criminal justice.

To conclude we can say that the day we are able to reform our police force, crime control division, criminal justice system and elevate our society as well as the administrative system to our civilized status and minimize the rate of crime we can not afford to eliminate death penalty from our statute book completely. It should not be completely abolished, because we have noticed that the countries which have once abolished it has again retained this penalty.

It would not be out of place to mention that since law alone is a clumsy tool for regulating human conduct the problem has to be tackled from Physiological, Psychological, Sociological, Criminological, Penalogical and other perspectives. Unless a man is made to realize his innerself, he should not be held guilty for any crime and particularly for cases like murder. There are many factors for the upsurge of a crime. Crime can be minimized if the society is a little alert. This is possible only when some concrete and positive steps are taken by the Government. There seems to be an upsurging need for transforming criminology into the study of justice and
spontaneous fulfillment of law. Transcendental Meditation (T.M.) Sidhi programme should be made compulsory in educational institutions, jails, hospitals and at any other place it is possible. It is only when the “Why” aspect of a crime is studied that one may minimize its recurrence in the society and not merely by studying its “What”? aspect.