PREFACE

All authorities that is not approved by true reason seems weak. But true reason, since it rests on its own strength, needs no reinforcement by any authority.

Johannes Scotus Erigena
AD 867

All through the ages, the society has always reacted to the crimes. The reaction have been different at different stages of human civilization and have also varied from society to society. Punishment is a designed social reaction to crime. It involves deliberate infliction of suffering on the wrongdoer. The attitude of the society towards the criminal has been governed by the emotions and traditions prevalent in a given society. The risk of the penalty is the cost of crime which the offender expects for committing the crime when this cost is more as compared to the benefits of the crime, a person would not like to commit the crime. Therefore, death penalty is prescribed for the most serious or heinous offences such as treason, murder etc. Obviously, the idea is that one would not commit such offences because of the heavy penalty or consequences.

There is no doubt, that in welfare state law is an important instrument of planned social change. But, at the same time law is also an important means of social control. These two functions of law should not be in conflict with each other. There is no doubt that judiciary should protect human rights of the accused or the suspect, but equally important task of judiciary should protect the fundamental interest of the society. Therefore, its attempt should be to strike a nice balance between them. If this is not done, the society may face the danger of disintegration.

The death penalty has antiquarian past in the history of penal thought. When neither imprisonment had come into existence, nor the value of expiration had been recognized or criminal and his criminality were not looked upon separately. The death sentence was surer and certain method for getting riddance of the offender and his offensiveness.
The present study examines the different aspects of death penalty and the efficacy of law, in the existing legal system, to deal with the problem of its constitutionality vis a vis, the significance of the factor of deterrence in the light of recent trends to justify its necessity or otherwise in dealing with crime situation.

Penological purposes served by death penalty also assume importance for the constitutional retention of death penalty. With the increasing pressures for the abolition of death penalty, the clash between the two competing approaches namely, deterrent and reformative should also be examined. Retribution in the sense of reprobation also becomes important for the retention of death penalty. The abolitionists argue that death penalty does not serve any penological purpose.

But, whatever may be one’s view regarding the desirability of this penalty, its importance in a civilized society in difficult to reject. Death sentence has been inflict on the offenders for various crimes depending upon the social set up in the society. The common mode of execution of this penalty are electrocution, guillotine, shooting as chamber, hanging and lethal injection. In India only hanging is used for the administration of death penalty. An important question in this connection as whether any other method has any distinct advantage over the method of hanging. It is also important to know whether in addition to hanging, other methods can also be allowed or not.

The crusade against death penalty started in England and Europe as the result of the works of scholar like Montes given Voltaire, Bentham and Beccaria. These scholars insisted that the punishment being an evil in itself should be just sufficient to curb the menace of the crime and no excessive punishment, including capital punishment, ought to be inflicted where some lesser penalty could achieve the same result. The growing strength of the industrial working class and the humanitarian movement also played important role in this connection. These factors led to a drastic change in the fundamental concept of the death penalty all over the world. There was a progressive decrease in the number of offences punishable with death penalty. Penalties involving torture disappeared and the principle that the punishment should aim solely at the swift deprivation of life was firmly established. Where formerly the death penalty was generally mandatory upon conviction, a trend began to develop.
towards providing it as an alternative punishment. Moreover, the public execution disappeared in favour of the executions within a prison and they could be attended only by certain officials and the witnesses required by law.

Thus, the question of retention of death penalty has been a subject to recurrent controversy. It was highlighted by the humanitarian movement which gained momentum after the second world war. Consequently, death penalty was abolished in some of countries, but, it continues to be most sensitive issue in most of the countries.

The Law commission of India\(^1\) has considered the issue of death penalty in Indian circumstance. After examining this issue in detail, it recommended that the death penalty should not be abolished in view of the conditions prevalent her. On the consideration of all the issues involved, the commission is of the opinion, that capital punishment, should be retained in the present state of country.

The issue of constitutionality of death penalty was raised in \textit{Jagmohan Singh \textit{Vs. State of UP}}\(^2\). It was challenged on the ground that it is violative of Art 14, 19 & 21. The Five judges bench unanimously rejected all the argument and upheld the constitutional validity of death penalty. After this decision, the issue was not open to doubt.

But the liberal interpretation of Article 21 and the expounding of the doctrine of fair just and reasonable procedure by the SC in \textit{Maneka Gandhi Case}\(^3\) gave fresh impetus to the abolitionist to reopen the question of constitutional validity of capital sentence. So in \textit{Rajendra Prasad case}\(^4\) Justice Krishna Iyer held that death Penalty was constitutionally valid only in the extreme cases where if otherwise public interest social defense and public order would be remarked irretrievably.

Due to difference in the ratio of \textit{Jagmohan Singh} and \textit{Rajendra Prasad} case, death sentence was again challenged in \textit{Bachan Singh} case. Court once again upheld the constitutional validity of 302 IPC providing death penalty for the offence of murder. However, it should be imposed only in the rarest of rare case. The stand as

\(^2\) AIR 1973 SC 947.
\(^3\) AIR 1978 SC 2147
\(^4\) AIR 1979 SC 1384.
reiterated by the Supreme Court in *Macchi Singh Vs. State of Punjab*\(^5\). The court stressed that death penalty need not be inflicted except in the gravest cases of extreme culpability where life imprisonment would be altogether inadequate. In this case, the court also formulated broad guidelines for determining the rarest of rare cases. Because of the liberal judicial approach in the area of death penalty, the constitutional validity of mandatory death penalty was questioned in *Mithu Vs. State of Punjab*\(^6\). In this case the Supreme Court struck down Section 303 IPC, providing for mandatory death penalty as violative of Article 14 and 21 of the constitution.

The powerful dissenting opening of Justice Bhagwati in *Bachan Singh case*\(^7\) provided encouragement to abolitionists to make more of attempt one way or the other to make the death penalty practically honest. Therefore, all conceivable arguments, were pressed into service to challenge the constitutional validity of the various practical aspects of death penalty. Delay in the execution of death sentence and the mode of execution of death sentence are two such aspect.

The constitutionality of inordinate delayed execution of death sentence was examined by the Supreme Court in *T.V. Vatheeswaran Vs. State of Tamil Nadu*\(^8\). The court held that delay exceeding two years in the execution of death sentence was sufficient to entitle the accused to invoke Article 21 and demand the quashing of sentence. But in *Sher Singh Vs. State of Punjab*\(^9\), the Supreme Court reconsidered this matter overruled Vatheeswaran. It was agreed that a condemned person had a right to invoke the jurisdiction of the court for reducing the death sentence to life imprisonment in view of the mental torture and agony undergone by him because of the delay. But it refused to accept that the delay exceeding, two years would be sufficient to quash the death sentence. It ruled that no hard and fast rule could be laid down regarding the decisive delay as several factors were to be taken into considerations. The Supreme Court by passed Sher Singh in the next case, *Javed Vs. State of Maharashtra*\(^10\). In this case it was held that overall circumstances entitled the

\(^5\) 1983 Cr.LJ 1457
\(^6\) AIR 1983 SC 473
\(^7\) AIR 1980 SC 898.
\(^8\) 1983 Cr.L.J. 481.
\(^9\) AIR 1983 SC 465.
\(^10\) AIR 1983 SC 594.
condemned person to invoke Art 21. The court regarded the delay of two years and 9 month sufficient for reducing the death sentence to life imprisonment. The controversy arising out of the conflicting and divergent judicial views held in the above three case, as finally resolved in *Triveni Ben Vs. State of Gujrat*\(^\text{11}\). A five judge constitution Bench held that the inordinate delay in the execution of death penalty would entitle the condemned person to approach the court under Article 32 and the court would decide the matter having regard to the nature of delay caused and circumstances subsequent to the final determination of death sentence by the judicial process. Thus, only the delay in the disposal of mercy petition by the executive would be relevant in determining the fate of death sentence. It was also added that no fixed period of delay would be held to make the death sentence in executable.

The constitutional validity of the mode of execution of death sentence was examined by the Supreme Court in *Deena Vs. Union of India*. It was contended that the method for execution of death sentence i.e. hanging by rope, prescribed in Section 354 (S) CrPC 1973 was barbaric, inhuman and degrading and therefore violative of Article 21. The Court Unanimously held that Section 354 (S) was unconstitutional and was not hit by Article 21. It ruled that hanging by rope was the best and the least painful method of carrying out the sentence of death. The movement to abolish death penalty has met with success in some parts of the world. Because of frequent challenges death penalty has received a set back in India too. This is largely because of the increasing acceptance of the liberal and humanistic philosophies in today’s society. However, it is still widely believed that India should not blindly follow the foreign example and completely abolish death sentence. The warning sounded by Justice Palekar in *Jagmohana Singh*\(^\text{12}\) case deserves to be notice here. The leaned Justice stated:

> "We have grave doubts about the expediency of transplanting western experience in our country. Social conditions are different and so also the general intellectual level. In context of our criminal law which punishes

\(^\text{11}\) AIR 1989 SC 1335.
\(^\text{12}\) AIR 1973 SC 947.
murder one can not ignore the fact that life imprisonment works out in most cases to a dozen years of imprisonment and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty.

Precisely because of this, our political leaders have rejected complete abolition of death penalty. The late Prime Minister of India, Pandit Jawahar Lal Nehru observed:

"At one time I was strongly opposed to death penalty and in theory my opposition to death penalty still continues. And yet with all my repugnance for executions. I feel that some method of eliminating utterly undesirable human being will have to be adopted and used with discretion."

Similar view was expressed by Smt. Indira Gandhi also. She said:

I am personally in favour of abolition of capital punishment. But certain crimes are heinous in nature and deserve severe punishment.

It may be noted that even the countries which have abolished the death penalty, have either retained it for certain specific offences which they regard as serious threat to the security of the States or reintroduced it in wake of peculiar circumstances which ensured later on. For example, death penalty as abolished in ceylon in 1956, but it was reintroduced for the offence of murder because of the assassination of Prime Minister Bhandarnaike in 1959, Similarly in England, it is a valid sanction for high treason.

The chief object of this work is to scientifically study the constitutional aspect of death penalty and emerging judicial trends in this respect. An attempt has also been made to see how the doctrine of the 'rarest of rare cases' has been applied by the Supreme Court. In order to study the subject in proper perspective, some general aspects of death penalty have also been examined. An attempt has also been made to
study the possible implications of the new judicial policy and the factors which have been responsible for the approach. The very nature of the subject is such that it should be investigated and reviewed periodically in the light of new development taking place in the society. The judicial interpretation of fundamental rights, the international obligation sunder treaties and agreements, and sociological and legal studies of the subject justify the periodical study of death penalty.

The basic data of the study have been drawn from the cases decided by the Supreme Court. As the scope of the subject is vast and ever expanding with the regular output of the decisional material from the Courts, a representative selection of Indian cases has been made so as to cover all important aspects of the chosen problem. The existing legal and extra legal literature available in the form of books, monographs, articles, research papers and reports etc. were first collected, assembled and scientifically analyzed to infer and support the legal findings.

CHAPTER SCHEME

Chapter I  ‘Introductory’ part of crime and punishment is given in this chapter. It also briefly describes the various theories of punishment which forms the basis of judicial decisions. Meaning and history of death sentence is also discussed in this chapter.

Chapter II  ‘Statutory Provisions of death Sentence’. In this chapter various provisions relating to death sentence are given.

Chapter III  ‘Constitutional validity of Death Sentence’ discusses the judicial approach on this issue.

Chapter IV  ‘Mode of execution of death sentence’. This chapter deals with different modes of execution of death penalty. It also discusses the role of delay in its execution.

Chapter V  ‘Abolition or Retention of Death Penalty : A debate’. This chapter deal with the various arguments for the abolition and retention of death penalty.

vii
Chapter VI  Death Penalty: role of judiciary in dealing with its different dimension. This chapter describes the judicial outlook towards death penalty.

Chapter VII  Concluding observation and suggestion: Concluding remarks and some suggestions in the implementation of death penalty are given in this chapter.