A detailed study was made of the law on the ‘Constitutionality of Capital Punishment’, in the foregoing chapters of this researcher work. The national and international perspectives of the law and the arguments with regard to the abolition and retention of the punishment were also presented. The conclusions arrived at are presented in this chapter. First a summary is given of this research work, then the findings of the researcher are given and then his suggestions are given.

I. Summary of the Research work:

Capital punishment has a long and chequered history. It has been adopted by most of the legal systems of the world as a deterrent to the offenders. Even in India, such a punishment existed for certain crimes under the native laws. But when the codification of criminal law was done in colonial India during the period of the British rulers the Penal Code enacted in 1860 emerged as the first step in codifying the criminal law and it served the purpose of a general law of crimes. The framers of the Code adopted the Deterrent Theory of Punishment and prescribed the punishment of death for a few specific offences punishable under the Penal Code. In respect of the
other offences covered by the Code the framers adopted the other theories of punishment that were existing at that time.

In the Western countries, there was a trend of reform noticed in legal thought during the eighteenth century, the leading figures of which movement were Sir Romilly, Jeremey Bentham and Beccaria. There have been a series of writers commenting on the existing system of punishments and urging upon the States to mould the system of punishments. In place of deterrent theory of the ancient days, a good number of new theories came up urging upon the States to reform the penal policy and protect the individual from being exterminated.

Such a change in legal theory did have its impact in some form or the other on the idea of reforming the penal laws. Though this new trend did not have its immediate impact on the Penal Law of India, the Penal Code of 1860 continued to be in force during the colonial period of the Britishers. But the echo of reform continued to have its impact on the ideas of people as far as the system of criminal justice was concerned. The talk of reforming the penal law did have its effect on the penal laws of the civilized countries.

When India attained Independence in August 1947 the Penal Code of 1860 was adopted by the new Republic to be continued in the country in the same form. However, the Constitution contained certain principles by way of the Fundamental Rights of the citizens, the Directive Principles of State Policy, the federal theory etc. which could hardly be ignored in interpreting the penal provisions of the Code in the
light of the new legal order. These principles were of fundamental importance in the
governance of the country; so much so that all laws including the law as contained in
the Penal Code of 1860 had to be interpreted in the light of what was written in the
Constitution.

One important thing which needs to be highlighted at this stage is that the
Constitution did not banish the system of capital punishment, with the result that such
the system of capital punishment could be prescribed for any new offence whether
introduced in the general law of crimes or the special law of crimes. The result of
such a benign policy was that a few special laws enacted in the country in the post-
Independence period capital punishment sanction for dealing with certain serious
offences. The punishment of death as prescribed in the general law of crimes, namely,
the Penal Code of 1860 and the punishment of death as prescribed in the special law
of the country constituted the system of capital punishment. But this was subject to
what was laid down in the constitution.

Yet another development of far reaching significance was that after the
Second World War the formation of United Nations Organization gave a new mould
to the international legal order; in a large number of matters the United Nations and
its allied agencies formulated their principles. The step taken by the United Nations
on the subject of Human Rights opened a new chapter with regard to the rights of the
individuals and the safeguards which they can avail in matters of criminal justice.
The Human Rights Law in the form of International Covenants opened up new vistas
for protecting the dignity of the individuals and for protecting the life and personal
These Covenants had a persuasive effect on the national laws; the law enforcement agencies had to so enforce the penal laws that there was conformity to the international regulations.

A provision of the greatest importance in these instruments was the provision calling upon the States to abolish the system of capital punishment. States which had capital punishment in their Statute books had to take steps to abolish the rule of capital punishment and incorporate instead a reformatory principle.

This being the development in the area of the rights of individuals, the law on capital punishment had to be interpreted by the courts keeping in view the Human Rights instruments. Hence, apart from the national charter which India had adopted after attaining its independence the other instrument of far reaching significance was the Human Rights law. The directive with regard to which notice had to be taken by the Government of India and the States of the Republic was the provision of abolishing the punishment of death. But neither the Central Government nor any State Government took the step of abolishing the punishment of death from any of the Statutes which they had already enacted.

The cause of Human Rights Law and the rule of abolishing the system of punishment were taken up at the international level by the Amnesty International, and at the national level by the Peoples Union for Civil Liberties, both of which were non-governmental organizations.
Whenever there was a case of capital punishment awarded by any court the Peoples Union for Civil Liberties and the Amnesty International has taken up the cause and raised a hue and cry against the punishment given by the courts. Even in the worst type of crime in which innocent individuals were killed by the offenders, the Amnesty International and the Peoples' Union for Civil Liberties has taken up the cause; a good number of cases had been filed before the courts raising the question of legality and constitutionality of the death sentence given by the courts.

This research work studied all the important cases in which the courts had examined the question of legality and constitutionality of capital punishment. The first chapter as an Introduction of this research work described the reasons which impelled the researcher to go into the question of capital punishment by taking note of the developments at the national and international levels. The second chapter covered the conceptual background of capital punishment, explaining therein the theories relevant to the rule of capital. The next step was that of studying the developments at the international level as a result of which there have arisen a good number of international covenants suggesting the total abolition of capital punishment or introducing in whatever way it is possible the rule of protecting the rights of the individuals. The fourth chapter of this research work focussed on the situations to which the theory of capital punishment was applicable in India under the provisions of the general law of crimes and the provisions of the special law of crimes. The next chapter, i.e., Chapter V which constituted the body of the thesis addressed the question how the courts examined the constitutionality of capital punishment. It covered all those situations in which the principles of constitutional law were
considered to be relevant to decide upon the legality or otherwise of capital punishment. The next chapter, i.e., Chapter VI dealt with the movement for the abolition of capital punishment which movement at the international level has the blessings of the United Nations and at the national level the grace of the Peoples' Union for Civil Liberties. This movement is of the greatest importance in view of the fact that the champions of Civil Liberties have taken up the cause of urging upon the authorities of the State to spare the lives of even those who were punished recently in the wake of terrorist offences. This is one of the most serious matters calling for an urgent decision to be taken about the system of capital punishment. What has been noticed by the researcher in this study of his about capital punishment is that both the groups of persons standing for the abolition of capital punishment and the retention of such a punishment are putting forward strong reasons in support of their argument; the arguments of both the parties are equally strong and the time alone will decide which course of action the Government will consider to be right to do.

The study was based on judgments of the Supreme Court of India and other High Courts of our country given between 1950 (when the Indian Constitution came into effect) and the year 2009 in which cases the Courts considered the principles of law governing the legality and constitutionality of capital punishment. The study was designed covering the cases punishable under the general law of crimes as well as the special law of crimes. In respect of various matters of capital punishment the relevance of the fundamental principles of our legal system was considered.
This research work being in the area of Public Law, the two important fields in which the research was done was the Constitutional Law of India and the International Law of Human Rights. These two aspects of the major units of Public Law have been covered focusing on the safeguards provided to the individuals. The details of what the researcher observed in these two areas of his study may be reported as follows:-

II. Findings of the Researcher:

Taking the theoretical aspects of the study first the findings may be reported as follows:

The purpose of criminal justice is to punish the wrong-doer. He is punished by the State. The question arises, what is the purpose of punishment or in other words, what is the end of criminal justice. From very ancient times, a number of theories have been given concerning the purpose of punishment.

The deterrent theory was the basis of punishment in England in medieaval times and continued to be so till the beginning of the 19th century. The result was that severe and inhuman punishments were inflicted even for minor offences in England. In India also, the penalty of death or mutilation of limbs was imposed even for petty offences.
There is lot of criticism of the deterrent theory of punishment in modern times. It is contended that the deterrent theory has proved ineffective in checking crime. Even when there is a provision for very severe punishments in the penal law of the country, people continue to commit crimes. In the time of Queen Elizabeth, the punishment for pickpocketing was death but in spite of that pick-pockets were seen busy in their work among the crowds which gathered to watch the execution of the condemned pickpockets. It is pointed out that with the increase in the severity of punishments, crimes have also increased. Excessive harshness of punishment tends to defeat its own purpose by arousing the sympathy of the public towards those who are given cruel punishments. Deterrent punishment is likely to harden the criminal instead of creating in him the fear of law. Hardened criminals are not afraid of punishment. Punishment loses its horror once the criminal in punished.

So, from the theoretical point of view the capital punishment stands out in need of reform. But taking into consideration the situation existing at present it is necessary to have such a punishment in our system of punishments because it may deter the people from committing such crimes against the other fellow citizens.

Taking the specific areas of study the findings may be reported as follows. The first area was concerned with the principles embodied in the Constitutional Law of our country. The most important question covered in this study was related to the question of constitutionality of punishment. This question involved the consideration of the question whether the courts had at any time held that the punishment of death cannot be imposed in view of what is stated in Part III of the Constitution. The study
has shown that the courts have all along stuck to their principle of upholding the legality of the penal provisions and declining to review their constitutionality on the basis of Articles 14, 19 or 21 which were very often raised before the Courts.

The courts have observed the principle that the rights mentioned in Part III of the Constitution are in respect of innocent and decent persons which cannot be invoked by persons of criminal record. The Courts have also upheld the legality of penal provisions notwithstanding the rule which was laid down in the international covenants for the abolition of capital punishment.

The Indian judiciary has ruled that the death penalty for murder must be restricted to the "rarest of rare" cases, but this instruction has been contradicted by the legislature increasing the number of offences punishable by death.

The courts have observed for several decades the following two practices in capital cases. The first practice was not to impose a death sentence where the judges hearing the case had not reached unanimity on the question of sentence or of guilt. The second was not to impose a death sentence on a person who had previously been acquitted by a lower court.

However, the courts have observed that there was long delay on the part of law enforcement agencies in completing the process of investigation on account of which the convicts had to languish in jail for quite a long time.
It was observed by the researcher that there was delay on the part of the law enforcement officers in completing their part of the work. The Courts are also taking their own time to dispose of the case. Such a delay has its adverse effect upon other steps which the authorities of the State have to take. Sometimes it defeats the purpose of what all was done by the police and the courts in determining the guilt of the offender and giving their decision. Hard core criminals like terrorists; gangsters etc., when kept under custody throw a challenge to the safety and security of the country. As it was witnessed on December 24, 1999 in Maulana Masood Azhar’s case, the accused’s supporters hijacked an aeroplane, killed a passenger and demanded the release of the terrorist in Kandahar. This is probably one of the serious implications of imprisoning the deadly criminals for a long time in jails.

It was also observed that in some cases there was breach of certain safeguards guaranteed to the convicts. Further, apart from the breach of safeguards of the convicts under the national and international laws, cases have occurred in which no uniformity was observed in granting remission, commutation or pardon to the convicts. A few examples may be given as under:

In August 2004, Dhananjoy Chatterjee was executed for the 1990 rape and murder of a girl in the apartment building where he worked as a guard. He was the first person to be hanged in India for over six years, ending a de facto moratorium on executions.
Three days after the execution, a similar case of rape and murder of a child was heard on appeal by the Supreme Court in Rahul alias Raosaheb v. State of Maharashtra\(^1\). The victim in the former case was 13 years old; in the latter she was four-and-a-half. Neither of the accused had a previous criminal record, and in neither case was any report of misconduct while in prison. Yet the Supreme Court deemed Dhanajoy Chatterjee a menace to society and not only was his sentence upheld by the Court in Dhananjoy Chatterjee alias Dhana v. State of West Bengal\(^2\) but he was subsequently hanged. In Rahul's case, he was not deemed a menace, and his sentence was commuted to life imprisonment.

There is inconsistency noticed in the approach of the Courts also to the problem of commutation or remission on account of inordinate delay though the practice has been to give benefit to the accused if there is inordinate delay in the disposal of case and there is no fault on the part of the accused in any manner.

For example, the convict Dhananjoy Chatterjee had completed over 14 years in prison, most of them under sentence of death and in solitary confinement, before he was executed in August 2004. No action had been taken on his case for nine years because the West Bengal state officials had failed to inform the High Court of the rejection of his mercy petition by the state governor. These facts were not considered a ground for commutation by the Supreme Court, which refused to be drawn on the issue of delay in dismissing appeals on his behalf in 2004.

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\(^1\) (2005) 10 SCC 322
\(^2\) (1994) 2 SCC 220
In the case of Gurmeet Singh v. State of Uttar Pradesh the Supreme Court similarly refused to take into account a delay of a number of years, caused in this case by the negligence of staff of the High Court of Allahabad. In March 1996 Gurmeet Singh had sought special leave from the High Court to appeal to the Supreme Court after the High Court had confirmed his death sentence. Despite several reminders sent by the jail authorities, there was no response from the High Court. Finally, after a petition had been filed in the Supreme Court, an inquiry was ordered which found that officials of the High Court had been negligent in failing to respond, and action was initiated against the officers responsible. Nonetheless, the Supreme Court refused to commute the sentence on the ground of delay, relying on the position that only delays in mercy petitions would be material for consideration.

There is dissent expressed by certain Judges as regards the approach of the Court to the matter of using the power of commutation in the exercise of its judicial power under certain other heads. Justice Sen of the Supreme Court, has for example, said,

“(a) It is constitutionally and legally impermissible for the Supreme Court while hearing an appeal by special leave under Art. 136 of the Constitution, on a question of sentence, to restructure s. 302 of the Indian Penal Code, 1860 or s. 354, sub-s. (3) of the Code of Criminal Procedure 1973, so as to limit the scope of the sentence of death provided for the offence of murder under s. 302.

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(b) The question whether the scope of the death sentence should be curtailed or not, is one for the Parliament to decide. The matter is essentially of political expediency and, as such, it is the concern of statesmen and, therefore, properly the domain of the legislature, not the judiciary.

(c) In an appeal confined to sentence under Article 136 of the Constitution, Supreme Court has not only the power but as well as the duty to interfere if it considers that the appellant should be sentenced 'differently', that is, to set aside the sentence of death and substitute in its place the sentence of imprisonment for life, where it considers, taking the case as a whole, the sentence of death to be erroneous, excessive or indicative of an improper exercise of discretion; but at the same time, the Court must impose some limitations on itself in the exercise of this broad power. In dealing with a sentence which has been made the subject of an appeal, the Court will interfere with a sentence only where it is 'erroneous in principle'. The question, therefore, in each case is whether there is an 'error of principle' involved.

(d) The Court has the duty to see that on the particular facts and circumstances of each case the punishment fits the crime. Mere compassionate sentiments of a humane feelings cannot be a sufficient reason for not confirming a sentence of death but altering it into a sentence of imprisonment for life. In awarding sentence, the Court must, as it should, concern itself with justice, that is, with unswerving obedience to established law. It is, and must be, also concerned with the probable effect of its sentence both on the general public and the culprit. Judges are not concerned with the moral or ethics of a punishment. It
is but their duty to administer the law as it is and not to say what it should be.
It is not the intention of the Supreme Court to curtail the scope of the death sentence under s. 302 by a process of judicial construction inspired by the personal views.

(e) It is also-not legally permissible for this Court while hearing an appeal in a particular case where a capital sentence is imposed, to define the expression "Special reasons" occurring in sub-s. (3) of s. 354 of the Code. ..."

In the context of taking note of the nature and scope of International Human Rights Law on various aspects of the system of capital punishment it is necessary to note the impact which the International Human Rights Law has had on the Indian Law and to what extent there is no impact noticed in the penal laws of our country. The first thing that needs to be mentioned here is that not only is the application of the death penalty in India is outside the purview of the principles of constitutional law, it is also at variance with international human rights standards and the strictures of UN bodies and experts. In 1979 India acceded to one of the main international human rights treaties, the International Covenant on Civil and Political Rights (ICCPR). As a party to the treaty, India is bound under international law to respect its provisions.

Article 6(2) of the ICCPR states: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes..."

Further precisions is provided in Safeguard 1 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN
Economic and Social Council in 1984, which states that capital punishment may be imposed 'only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences'.

In 1993, India introduced the death penalty for kidnapping for ransom (Section 364A, Indian Penal Code). The UN Human Rights Committee — the body charged with monitoring the compliance of states parties with the provisions of the ICCPR — has stated that abduction not resulting in death cannot be characterized as a "most serious crime" under Article 6(2) of the ICCPR and that the imposition of the death penalty for such an offence therefore violates the ICCPR.

The provision of the death penalty under the Narcotics Drugs and Psychotropic Substances (Prevention) Act, 1995, is similarly flawed. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that "the death penalty should be eliminated for crimes such as ... drug-related offences."

The UN General Assembly had once affirmed that "the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed, with a view to the desirability of abolishing this punishment". In a similar vein, the UN Human Rights Committee stated in 1982 that "the death penalty should be a quite exceptional measure" and that under the terms of Article 6 of the ICCPR, "all measures of abolition [of the death penalty] should be considered as progress in the enjoyment of

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4 Resolution 32/61, adopted by consensus on 8 December 1977,
the right to life". But far from reducing the number of capital offences in line with these strictures, India has expanded the scope of the death penalty under a number of special laws adopted after India's accession to the ICCPR in 1979.

The UN Human Rights Committee has stated that "the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life in violation of Article 6, paragraph 1, of the International Covenant [on Civil and Political Rights], in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence." The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that "the death penalty should under no circumstances be mandatory by law, regardless of the charges involved" and that "the mandatory death penalty which precludes the possibility of a lesser sentence being imposed regardless of the circumstances, is inconsistent with the prohibition of cruel, inhuman or degrading treatment or punishment".

Mandatory death sentences are currently prescribed in India in three 'special' laws: the Arms Act 1959; the Narcotic Drugs and Psychotropic Substances Act 1985; and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989. Article 6(5) of the ICCPR prohibits the use of the death penalty against people who were under 18 years old at the time of the crime, as does Article 37(a) of the Convention on the Rights of the Child, another international human rights treaty to which India acceded in 1992. Indian law came into conformity with this prohibition in 2000 with the passage of the Juvenile Justice (Care and Protection of Children) Act
2000. Before that, it was lawful for a boy of 16 to be sentenced to death, but prior to 1986 there was no minimum age prohibition, contrary to India's obligations as a party to the ICCPR.

III. Suggestions

Based on the findings of the researcher the following suggestions are offered for changes in the legal system and the method for the enforcement of the law:

1. Since ours is a country governed by Rule of Law, the first thing that is suggested here is that the law enforcement agencies and everyone charged with the responsibility of formulating a law or enforcing the law must abide by the norms of the legal system in whatever form they exist. In this sense, the principle of constitutional law and the principles of human rights law with reference to which this study was done need to observed in order to uphold the Rule of Law.

2. There is need to inform the general public as to what is happening to the cases of capital offences. As things stand now there is only one agency which publishes the crime records once in a year, that is the National crime Records Bureau; this agency publishes figures of cases by which persons are held liable under various provisions of penal law; but there is no record published in respect of the various stages of the legal process; there is need to publicise the progress of cases, starting from the time a person is arrested up to the time the
case is closed including the matter of pardoning, commuting or remitting the case. If the Crimes Record Bureau cannot publish the details of the capital cases then a method should be devised of bringing out a special publications; such a publication will help all those who study the status of law and examine the way it is enforced in the country.

3. The matter of pardoning, commuting or remitting a punishment is dealt with under political considerations. In a country governed by Rule of Law, the object of Executive Clemency is lost if it is done completely under political considerations. Even though the power vests in the Governor or President they have to follow the advice of the cabinet. The elected Government has its own interests. The study has shown that the pardoning power is being misused. Government doesn’t show any records about the number of offenders released.

To restrict this political activity and bring the executive clemency to the tune of the noble objective of the legal provisions enshrined in the Constitution of India, the Code of Criminal Procedure, and the Indian Penal Code, certain guidelines need to be adopted. These guidelines must be made mandatory.

4. The Human Rights Commission has prepared some guidelines which are relevant to this particular subject. It is suggested that those guidelines may be implemented to achieve the objective of establishing Rule of Law in our country.
5. It is necessary to bring the law on capital punishment in tune with the norms laid down in the Constitution and the International Human Rights Law.

6. As far as international law it may be pointed out that the international laws and standards pertaining to the death penalty are clear on this issue and state the death penalty can only be imposed after exacting legal standards. For example, Safeguard 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council in 1984, states: "Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings."

Any judicial system that carries out executions runs the ever present risk of executing those innocent of the crime for which they were condemned. Such risks are compounded when the judicial system lacks fairness and adequate safeguards.

With a view to make the system fair and reasonable it is necessary to adopt the safeguards guaranteed in the international standards set out by the United Nations.
7. The worst aspect of the breach of safeguards of the convicts was in relation to the investigation and evidence of the convicts in matters of capital punishment. There is lot of discontent among the general public about the way in which the persons charged with terrorist offences are being dealt with. These cases illustrate how persons have been sentenced to death on the basis of false and fabricated evidence, often used in manipulated investigations and prosecutions, with investigating and prosecuting agencies acting in collusion. The object is often to protect influential offenders. The study shows a number of capital cases in which confessions appear to have been procured forcibly. The Supreme Court's acceptance of evidence that might not have been given voluntarily in a number of cases tried under the Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA) is a matter of particular concern. The observation of a few Judges in such cases as pointed out in this study are of considerable importance, and the authorities should formulate a method of avoiding the repetition of such things.

8. The most important message conveyed by the Supreme Court is that a real and abiding concern for the dignity of human life postulates resistance to 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.' The message conveyed by the Supreme Court is to uphold the principle of Rule of Law. The phrase 'rarest of rare' cases carries the message of 'special reasons' in very clear and unambiguous terms. It is necessary for the Courts to pay due
respect to this theory and apply the rule of punishment only when the case fulfils the requirement of 'rarest of rare' case.

9. Article 6(2) of the ICCPR states: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes..." Further precisions is provided in Safeguard 1 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council in 1984, which states that capital punishment may be imposed 'only for the most serious crimes, Such an approach will be in accordance with the principles enshrined in the international instrument of human rights.

10. It is necessary to prescribe the rule of 'legal representation' as a mandatory requirement in all cases of capital offences; the matter should not be left to the discretion of the presiding judge. As inadequate legal representation has sometimes resulted in denial of justice to the convict; therefore in order to make the process of law. The right of legal representation should be recognized in respect of all matters of criminal justice starting with the arrest of an alleged offender and continue to the last phase of the system i.e., the execution of the punishment.

11. The sentencing process should be in accordance with the established principles of justice and should not be left to the arbitrary decision of the law
enforcement officers. All factors with regard to mitigation of punishment and enhancement of punishment must be given due regard.

12. By a resolution 32/61, adopted by consensus on 8 December 1977, the General Assembly of United Nations had affirmed that "the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed, with a view to the desirability of abolishing this punishment". In a similar vein, the UN Human Rights Committee stated in 1982 that "the death penalty should be a quite exceptional measure" and that under the terms of Article 6 of the ICCPR, "all measures of abolition [of the death penalty] should be considered as progress in the enjoyment of the right to life. But instead of reducing the number of capital offences in line with these strictures, India has expanded the scope of the death penalty under a number of special laws adopted after India's accession to the ICCPR in 1979. This particular matters needs to be examined by the authorities of State to reform the state of the law.