CHAPTER - I
INTRODUCTION

“To the great majority of mankind nothing is so dear as life”.

“Capital punishment is the last vestige of law of retaliation and retaliation perse is a never ending change....”.

“Capital punishment is the stark reflection of our predatory and inhumane attitude”.

“La ley favours la vie d’ien home” - The law favours human life”.

“The punishment awarded must always be just, neither too lenient nor too harsh”.

Acharya Vishnugupta
(Chanakya)¹

Law is not and cannot be stagnant. It must change in accordance with the needs of the society. In the era of liberalization of economic policies, the public interest is the ultimate goal of every Government. But at the same time, this public interest is to be taken in consonance with individual interest. The Criminal Justice System is the integral part of every civilized legal system. Crime is a deliberate raid on the peace and order of the society in general and the victim in particular. The purpose and justification of the criminal law is to protect society, by maintaining social order, by methods of social control that maximize individual freedom within the coercive framework of law.

Crime is what has been dubbed as such by each country in accordance with its cultural and social heritage. Thus, each country has its own code of criminal law but even then there are certain common feature in all the countries. One common feature is universality of the punishment. The term punishment has no where been defined in the Indian Penal Code. Punishment is an art which involves the balancing of retribution, deterrence, prevention and reformation in terms not only of the court and offender but also of the

values in which it takes place. A sentence of pattern which fails to take due account of the gravity of the offence can seriously undermine the respect for law.²

The punishment is inflicted upon an offender, first in order to teach him a lesson so that he may not commit a crime again. The second aim of punishment is to open eyes of would be criminals that they too would be dealt like wise, in case they indulge in criminal activities. The infliction of punishment also serves as an ointment on the wounded feeling of the society because whenever, crime is committed it is not only the victims who suffers on that score, but the conscience of entire nation is shaken to its very foundation. It is at this stage that the state applies soothing balm on wounds of the society by punishing the offender.³ Indeed, punishment implies certain well-defined or ill-defined obligations which demand obedience and the disobedience of which may expose the delinquent to the hostility of the society.

Of all the punishment known to law, death penalty is the extreme penalty and is the most dreaded one since the dawn of civilization. It brings the end of the person. God made man ruled over the world, through the administration of man. Man, by nature, is conscious of vice and virtue, of justice and injustice. Nothing is so dear to man than life. Since beginning man has desired for the protection of his life and that if anybody takes his life he should also face the similar consequences. The quantum of punishment should be fixed keeping in mind the gravity of the crime committed. But a controversy is going on over the question whether heinous crime like murder should be met with the punishment of equal gravity i.e. death sentence. This controversy is as old as human history and the battles has been waged on and of, on a political level for almost centuries. It is said that the life is sacred and no decision is more momentous than the decision to takes man's life. Some people insists that no man ever has a right to take other man's life,

whatever, be the provocation or the circumstances. Other alleges that there are occasions when homicide is justifiable.\textsuperscript{4}

In the ancient time, the death sentence was the certain method for getting rid of crime and criminal. Different approaches towards capital punishment develop with the passage of time. Retentionists wanted to retain it on the ground that it has retributive and deterrent effect. But the Abolitionists desire to abolish it due to fact that retribution and deterrence do not give place to reformative measures and rehabilitation of the criminal, who is human being first and criminal afterwards. The apex court has also many a time made an effort to avoid death penalty in order to bring out the humanity hidden in every offender following the humanistic and reformistic approach.

The Supreme Court has tested this irrevocable punishment on the touchstone of "reasonableness, fairness and justice" enshrined in Article 21 of the Indian Constitution and a lot of fluctuation and twist of approaches has been there but the maximum tilt is towards abolishing it, but at the same time, keeping a reservation for awarding it in the "rarest of rare cases". It is very difficult to define what is "rarest of rare case". But one clear implication is that, in maximum cases, it would not be awarded. By declaring section 303 of Indian Penal Code\textsuperscript{5} which prescribes death sentence as mandatory punishment, as unconstitutional, the judiciary has also played the role of abolitionists.

1.1 Problem Profile

In the criminal justice system, when the guilt of the accused is proved, beyond all reasonable doubts, the judge comes under an obligation to pass appropriate sentence on the convict, according to law. The judges, in offences punishable with life imprisonment and alternatively with death sentence, therefore, have to make a critical choice between the two permissible punitive alternatives i.e. death sentence and imprisonment for life. Such stark brevity

\textsuperscript{4} Burton M. Leiser, Liberty, Justice and Morals, (1979), p.236
\textsuperscript{5} Mithu v. State of Punjab \textit{AIR} 1983 SC 473
leaves a deadly discretion but beams little legislative light on when the court shall hang the sentence or why the lesser penalty shall be preferred.6

Merely to say that the discretion is guided by a well "recognised principle" raises the issue to what those recognised principles are? Moreover, the need for well recognised principles to govern the deadly discretion is so interlaced with fair procedure, that unregulated power is violative of Article 21 of the Indian Constitution. What is important to remember is that while rigid prescriptions and random prescriptions which imprison judicial discretion may play tricks with justice, the absence, all together, of any defined principles except a variorum of ruling may stultify sentencing law and denude it of decisional precision. 'Well recognised principles' is an elegant phrase. But what are they when mind differs on the basics?7

Section 354(3) of the Code of Criminal Procedure 1973, mandates the judge called upon to exercise his choice between the alternative sentence of death and imprisonment for life to state "special reasons" for the death sentence awarded. But it is nowhere indicated in either the Criminal Procedure Code or any other statutory instrument as to what constitutes the so-called "special reasons" justifying imposition of sentence of death. This is, again, entirely left to the discretion of the court.8

Nevertheless, Criminal Procedure Code with a view to obviating errors in the exercise of judicial discretion in the matter of imposition of death sentence, provides a set of safeguards. But the question that arises again is whether the safe guards are followed properly i.e. investigations are done honestly and unhindered, evidence tendered fearlessly by the witnesses. A diluted first information report, an incompetent or deliberately fouled up investigation, the purchase or threatening of witnesses raised a question mark on the fair procedure so violative of Article 21 of the Indian Constitution.

7 Ibid, p. 657
8 The Supreme Court has opined that it is neither necessary nor possible to specify the "Speical reasons" which justify death sentence. See Balwant Singh v. State of Punjab, AIR 1976 S.C. 230; Amberam v. State of Madhya Pradesh, AIR 1976 SC 2196; Saroeshwar Prasad v. State of Madhya Pradesh AIR 1977 SC 2423.
The Supreme Court in *Jagmohan Singh v. State of U.P.*\(^9\), interalia, was invited to dwell upon the constitutional validity of such a wide discretion. It was forcefully argued before the five Judges Bench that such discretion results in discrimination and involves arbitrariness, violating of Article 14 and 21 of the Indian Constitution. The court rejected the argument and justified this wide discretion owing to the impossibility of laying down sentencing norms, as facts of no two cases are similar and wrong discretion in the matter of sentence is liable to be corrected by superior courts.

The Supreme Court in Bachan Singh's case\(^10\) upheld the punishment of death sentence but narrowed down and limited the situations in which it may be awarded by involving the principle of 'rarest of rare'. The judgement does not provide a clue as to what constitutes the rarest of the rare. The rareness is supposed to be referred to the cruelty and inhumanity in intent in planning an execution of the crime, while there is no doubt, an objective dimension to this notion of rareness. The labels used for describing the nature of the murder such as brutal, cold blooded, gruesome etc. do not indicate any clear-cut well-defined categories, but are merely expressive of the intensity of judicial reaction to the murder, which may not be uniform for all the judges and even if the murder falls within one of these categories, these factor has been regarded by some judges as relevant and by others as irrelevant, so, not uniformly applied to imposed death penalty. Even the position as regards to mitigating factors also show the same type of incoherence in sentencing capital cases.

However, careful may be the procedural safeguards, enacted by the law before death penalty can be imposed, it is impossible to eliminate the chance of judicial error. It is bound to vary from judge to judge, what may appear as special reasons to one judge may not so appear to another and the decision in a given case whether to impose the death sentence or to let off convict only with the life imprisonment would, to large extent, depend upon the judge who is called upon to make a decision.

\(^9\) AIR 1973 SC 947
\(^10\) AIR 1980 SC 898
Death penalty in its actual operation is discriminatory for its strikes mostly against the poor and deprived section of the community as poor people could not be able to engage a good lawyer to present their case, on the other hand the rich and the affluent usually escape from its clutches by presenting the most fertile brains in black gowns to argue their case. These circumstances also adds to the arbitrary and capricious nature of the death penalty and take it to the stage of being unconstitutional as being violative of Article 14 and 21.

It is needless to mention that ‘unguided’ ‘uncontrolled’ and ‘wide judicial discretion’ ranging from infliction of death sentence to its substitution by life imprisonment not only makes the judicial choice between death and life of a condemned prisoner difficult but also uncertain. It is this disparity which has lead to the present research. The arguments put forward by legal luminaries from time to time against capital punishment taking a the broader view of Article21 further support the topic of this research.

1.2 Research Hypothesis

The statutory provisions do not provide any guidelines as to when the judges should imposed capital punishment in preference to imprisonment for life. So it raises a question mark upon the constitutional validity of such a wide, unguided and uncontrolled judicial discretion to make a choice between ‘death’ and ‘life’ of convict. How this power is exercised? If it is to be left on the whimsical discretion of the judicial officer, then certainly there are chances of arbitrariness and violation of Article 21. This also raises a vital issue, whether in view of arbitrariness, death penalty itself should be there or not?

1.3 Object of Study

The discretion is so wide as it enables the judges to pass the sentence against the accused as to take the life of the accused or to allow how to live the life given by God. The objective is to study this discretion of the judges in awarding capital punishment.
1.4 **Research Methodology**

The research work is purely analytical. It is proposed to critically examine some of the judicial pronouncements and the sentences awarded by the Hon'ble Judges pronouncing their verdict. An attempt has been made to study the case law from 1995 – 2006 where capital punishment has been awarded either by trial or by higher courts. The study has been bifurcated under different heads depending upon the motive of crime i.e. rape, multiple murders, robbery, superstition, terrorism etc. Further the discretion used by the different courts has been analysed from case to case.

1.5 **Analysis of Literature**

The literature resource for analysis is available in the form of number of books, newspaper, magazines, internet sites, journals, articles and conventions. The literature relating to the capital punishment, various traditions and custom, various support like constitutional, legislative, governmental programmes and policies and also the international conventions and conferences affecting the national scenario have been studied. All sources of the information, digital or otherwise, have been cited in foot notes to the main text and these may serve as useful tools to guide those desiring to undertake in depth research in any of the areas that this work contains.

1.6 **Plan of Study**

The research has been presented systematically by dividing into eight chapters as under:

Chapter-I gives the introduction of the topic, its problem profile, object of the study, research hypothesis and analysis of literature. The concept of crime, origin of crime, functions of criminal law, purpose and goals of criminal law, causes, purpose and theories of punishment has been examined in chapter-II.

The central theme of the chapter-III is to analyse an evolution, concept, meaning, jurisprudential foundation, legislative history of right to life and challenges witnessed by the right and then to undertake the judicial
responses which have made the right to life as the most sacred and essential fundamental right.

Chapter – IV deals with history of capital punishment, existing legal frame work of capital punishment, limitations on the award of capital punishment, abolition movements, views of retentionist and abolitionist regarding the justification of capital punishment and various studies on the deterrent effect of capital punishment, the reason for which retentionist wants to keep this punishment in statute books. Chapter – V deals with sentencing policy in murder cases, sentencing guidelines and disparity in sentencing on the point of quantum and how it can be minimized or regulated.

Chapter – VI explain various modes of execution of death sentence in ancient time, in India and procedural requirements and comparative analysis of various mode of execution of death sentence by Law Commission. Chapter-VII deals with discretion in awarding capital punishment, philosophy of judges and comparative analysis of the cases and punishments falling under section 302 of Indian Penal Code from 1995 – 2006.

Finally based on the research, the conclusions has been drawn and few suggestions have been given for channelizing the judicial discretion in capital cases in Chapter VIII.