CHAPTER VI
CONCLUSIONS AND SUGGESTIONS

Capital Punishment is as old as that of man-kind. It existed all over the world since times imme-
morial, though in various forms. The method of execution may be different- but the punishment is the
same - taking away the human life by the State. Many reformations took place in other areas of
criminology and penology. But, as far as this cruel punishment is concerned no change had taken
place. Though it is proved time and again that execution only brutalises the persons involved in the
process, but does not reform either the accused or the potential offender- most of the countries are
suffering from the notion that execution is the only answer either for oppression of political rivalry or
for prevention of crime in the society.

No researcher till date could prove any special power of Capital Punishment as a deterrent. Over
the past decade many countries abolished Capital Punishment - thus expressing their respect for hu-
man dignity and life. According to the Report of Amnesty International the Capital Punishment is the
premeditated and cold-blooded killing by the State. A time has come to abolish Capital Punishment
from our Penal Statutes.

6.1. HISTORICAL BACKGROUND OF THE PROBLEM OF CAPITAL PUNISHMENT:

The history of Capital Punishment is as old as that of mankind. In the Western world the first
instance seems to be "The Law of Moses", inflicting Capital Punishment for blasphemy. By B.C.1179,
murder was capital crime among Egyptians and Greeks. In India, the Indian Epics namely the
Mahabharata and the Ramayana also contain references about the offender being punished with
vadha-danda which means amputation bit by bit. Fourteen such modes of amputating the criminal to
death are known to have existed. This illustrates that in every country in the world Capital Punishment
existed since times immemorial.

In the beginning offences against religion and morality attracted Capital Punishment. The primit-
tive societies soon grew into kingdoms and consequently criminal law also changed quickly. Whether
it was West or East offences against king were considered as more serious. Thus, the political of-
fences were also added to the religious and moral offences and Capital Punishment was prescribed for such offences also. With the advent of industrialisation and advancement of civilisation Capital Punishment was prescribed for offences against the property and human body. Now, in the modern world drug-trafficking, hijacking of aeroplanes, bribery are also included in the list of Capital Offences. Some Islamic countries like Saudi Arabia even went to the extent of adding “artificial insemination” also to the list of capital offences.

The debate between the retentionists of Capital Punishment and the abolitionists of Capital Punishment is also as old as the problem itself. The former argue that Capital Punishment is necessary to maintain peace in the world since it acts as a deterrent to potential offenders. In the beginning public opinion was also in favour of Capital Punishment in preference to life imprisonment. On the other hand abolitionists argue that Capital Punishment failed as a deterrent and no major work of any researcher ever proved its efficacy. Further, they maintain that it is an inhuman punishment arbitrarily imposed on the poor, the minority, the uneducated and the downtrodden. The conflict of opinion between the retentionists and abolitionists over Capital Punishment generated a debate throughout the world about the utility of Capital Punishment in the modern world, where great importance is attached to basic human freedoms. At the International level every instrument dealing with human rights such as Universal Declaration of Human Rights, International Covenants on Civil and Political Rights etc., were very critical about Capital Punishment and suggest an alternative punishment to death penalty. The divergent opinions on Capital Punishment prompted the researcher to undertake an indepth study on Capital Punishment.

6.2. THE PROBLEM:

Inspite of the efforts of the abolitionists to dilute the rigour of Capital Punishment, many countries such as Afghanistan, Burma, China, India, United States etc., have retained Capital Punishment in their statutes. Though Amnesty International expresses hope that the world is going to be without executions, some countries which had abolished Capital Punishment reintroduced it. Some countries are trying to do that. In United Kingdom since the death penalty was abolished for murder, motions to reintroduce it have been defeated in the House of Commons on a number of occasions. Most recently a
vote on an amendment to the Criminal Justice Bill to reintroduced the death penalty for murder was held in 1988. The proposal was defeated by 341 votes to 218.

In United States after Furman’s case many states revised their laws regarding major offences, so that they will not be declared unconstitutional by United States Supreme Court. If we consider the case of India, the Indian Supreme Court struck down Section 303 of Indian Penal Code which provided a mandatory death sentence on a life convict who commits murder. But, the Legislature introduced a Bill to award death penalty to the rape offenders in certain cases. China started killing its officers for accepting bribes. As recently as in 1995 Pakistan Court awarded death sentence on a minor Christian boy (14 years) and his uncle (40 years) for blasphemy. International Organisations like Amnesty International had to interfere and ultimately the two lives were spared.

The worst part of the Capital Punishment is that it has become a weapon in the hands of the State authorities to suppress their political rivals. The executions of Zulfikar Ali Bhutto, Rosenberg couple in America, Nigerian writer and Environmental Activist Ken Saro-Wiwa along with eight other leaders of the Movement for the survival of Ogoni people, Kista Goud and Bhoomaiah of Andhra Pradesh in South-India, Kehar Singh in the murder case of Late Prime Minister Indira Gandhi and the recent sudden trial and execution of Najeebullah in Afghanistan are all politically motivated executions.

Half of the countries in the world have abolished Capital Punishment. Some countries, though they do have this penalty in their Statute books seldom resort to it. Inspite of this ray of hope, the number of executions world wide are not less in number. In the year 1985 alone, 1,125 executions were carried out in 44 States. This was substantially less than 1984 figure of 1,153. But, the statistics are not to be believed. The true number of executions may be probably much higher. This is apart from the lock-up deaths and the fake encounters by the police.

Capital Punishment is used capriciously, arbitrarily and disproportionately against the poor and minorities. It is the only irrevocable punishment which cannot be corrected in case of miscarriage of justice. Capital Punishment offers not further protection, but further brutalisation.

Legal researchers may feel that the area of Capital Punishment is a much beaten track, a highly explored area. True, much discussion had been held, major research works were done, sociologists,
criminologists, social workers, academicians, judges, unions for civil liberties world over expressed their opinions, published articles, written books and in several ways expressed thier anguish over the continuance of this horrendous punishment in the modern, civilised world.

But, in recent times many changes good and bad are brought forth in the area of Capital Punishment. Though no major changes took place in Penal Laws of England, Indian Penal Laws, especially the Procedural Law underwent major changes. Two sections which were included in Criminal Procedural Code in 1973 are noteworthy in this context.

The Constitutional validity of Capital Punishment was challenged in United States Supreme Court as well as in the Indian Supreme Court. Judiciary had to play a major role in this changing scenario. Further, the Indian and Zimbabwe Supreme Courts converted many death sentences into life imprisonments owing to the delay in their execution. Human rights movement is gaining ground. In view of the recent developments in human rights jurisprudence, the present study is undertaken for a deeper theoretical analysis.

6.3. OBJECTIVES OF THE STUDY:

(i) to discuss various theories of punishment and their relevance and also analyse the arguments of retentionists and abolitionists over Capital Punishment.

(ii) to study in detail the evolution of Capital Punishment in England, America and India and also examine the attempts made towards abolition of Capital Punishment:

(iii) to examine in detail the Statutory and Constitutional framework relating to the Capital Punishment and

(iv) to evaluate the judicial approach towards Capital Punishment in India and United States.

6.4. METHODOLOGY:

The present study is purely a theoretical one. As such, the researcher had adopted case law, library and historical methods for the collection of information relevant to the present research problem under study.

In the present study the Capital Punishment in United Kingdom, India and United States of America
are studied at length.

6.5. CAPITAL PUNISHMENT IN ENGLAND:

As far as England is concerned, some 450 years before Christ, the early Britons used to drown their malefactors. Till Canute ascended the throne in 1016, death with torture was a common penalty. But, he abolished death penalty. After his death in 1035, his own son Rufus reintroduced Capital Punishment. Henry I and Henry II, who ascended the throne after him, punished the offender capitaly for murder, treason and for some property offences. On 6 July, 1189 Richard I ascended the throne. In 1241, “drawing, hanging and quartering” occurred for the first time in England.

By the end of fifteenth century ecclesiastical courts started punishing people spiritually. They could not inflict death penalty. Taking advantage of this, not only clergymen, even the door keepers of the exorcists also started claiming the privilege. For, as priests were among the few literate people, the test of one’s membership of holy order was to read the first verse of the fifty-first psalm. As it saved people from death, it was known as neck-verse. In practice it amounted to reprieve. By the time Henry VIII came to the throne, the whole Europe was experiencing a movement towards severity and brutality of sentence.

During the sixteenth century, Tyburn in London became notorious place of execution. Infact, the execution rose to such an alarming stage that a beam had to be erected for carrying hundreds of executions. But, in Charles I’s reign Tyburn executions dropped to ninety per year.

6.6. TOWARDS ABOLITION:

The protest against Capital Punishment can be traced to Saint Augustine or to the New Testament itself. Some would carry the beginning of the crusade against Capital Punishment to the Literature of Old Testament. For the modern period the starting point is the year 1764, with Cesare Beccaria’s essay “On Crime and Punishment”. Through Jeremy Bentham and Samuel Romily, Beccaria’s ideas seeped into English thought. From 1810 until his death in 1818 Romily devoted his time in influencing the Parliament to repeal Capital Punishment for theft. After his death Sir James Mackintosh took the torch and saw to it that a Select Committee was appointed to study Capital Punishment in 1819. After him John Bright and William Ewart carried the movement towards the abolition of capital offences on
statute books. Lord John Russel sponsored a Bill for the removal of the death penalty for twenty one offences and to restrict its use in the remaining sixteen offences, and in this he was successful.

In the twentieth century the movement was taken up by Howard League for Penal Reforms. In 1925, a National Council for the abolition of Death Penalty, with Roy Clavery as its first secretary was founded. Thereafter, several Select Committees and Royal Commissions were appointed to study capital offences in other countries.

The case of Rowland, Timothy John Evans and Dereck Bentley rose public emotions and the public showed some concern. In 1957, an Act was passed which retained Capital Punishment for certain types of murders, although it eliminated three-fourths of the offences of those formerly subjected to the death penalty.

By 1960, under the New Law, the rate of executions is four per annum. Ultimately, the Murder (Abolition of Death Penalty) Act, 1965 abolished the death penalty for murder for a five year experimental period. Since the death penalty was abolished for murder, motions to reintroduce it have been defeated in the House of Commons on a number of occasions.

6.7.CAPITAL PUNISHMENT IN AMERICA:

American Criminal Law took its shape directly from the English Criminal Law of the sixteenth and seventeenth centuries. But, Criminal Law in America was not uniform. Masachusetts, Pennsylvania, North Carolina - every colony had its own criminal law though the variation was very slight. Though, technically, thirty-one separate offences carry death penalty only seven crimes, namely, murder, kidnapping, rape, armed robbery, burglary, aggravated assault and espionage have actually been punished with death.

Benjamin Rush was the father of the movement to abolish Capital Punishment in United States. He was also inspired by Beccaria’s “Crime and Punishments”. He was supported by Franklin and William Broadford. After Rush, it was Edward Livingston (1764-1836) who prepared a revolutionary Penal Code for Louisiana and insisted total abolition of Capital Punishment. By 1830 the legislatures in several states were besieged each year with petitions on behalf of the abolitionists demanding abolition of death penalty. In 1845 an American Society for the Abolition of Capital Punishment was
established. The mounting pressure of the abolitionists made the Territory of Michigan to replace Capital Punishment with life imprisonment in 1846. Taking inspiration from Michigan many States including Rhodes Island and Wisconsin abolished death penalty.

In spite of the efforts of individuals and other social service organisations demanding abolition of death penalty, it exists very much in the statute books of many American States.

6.8. CAPITAL PUNISHMENT IN INDIA:

Capital Punishment is accepted in India from times immemorial. It is as old as the Hindu Society. The administration of criminal justice as an integral part of the sovereign function of the State did not seem to have emerged in India till the smriti period. The credit goes to smritis, mainly Manu, secondly to the Artha Sastra of Kautilya in making administration of criminal justice as part of the sovereign function of the State. However, Artha Sastra was not a Penal Code. So, it lacks a coherent schematisation. In the Buddhist texts also, references to death penalty were found. Capital Punishment was in vogue for the offences of moral turpitude. Muslim period marks the beginning of a new era in the legal history of India. The social system of the Muslims was based on their religion. Muslims after conquering India imposed their criminal law on Hindus whom they conquered. The sources of Muslim Law were Qoran, Sunna and Sunnies. The traditional Muslim Criminal Law broadly classified crimes under three heads: (i) Crimes against God (ii) Crimes against the sovereign and (iii) crimes against private individuals and prescribed Capital Punishment for certain offences.

The policy of the British being to interfere as little as possible with the Muslim Penal Law, only such modifications were made as were required to remove glaring defects. Motive for the commission of the offences played vital role in the capital offences than the manner of committing the offence. The trial of Nand Kumar was considered as a glaring example for the miscarriage of justice in the British India.

For the first time in 1846, the Law Commission under the Chairmanship of Lord Macaulay prepared the Indian Penal Code and it was adopted on 6th October, 1860. The Indian Penal Code, 1860 defines the substantive offences and prescribes punishments. Even after, Independence, the same In-
6.9. CAPITAL PUNISHMENT UNDER THE INDIAN PENAL CODE:

At the outset, the Indian Penal Code prescribes Capital Punishment for eight categories of offences, namely waging war, abetting mutiny by a member of armed forces, fabricating false evidence which results in the death of an innocent person, murder, murder committed by a life convict, abetting suicide of a child or insane, attempt of murder by a life convict which causes hurt, and dacoity with murder. Criminal Procedure Code provides the procedure to be followed while awarding and executing death penalty.

The administration of justice through courts of law, is part of the constitutional scheme, under which it is for the judge to pronounce judgment and sentence and it is for the executive to enforce it. Articles 72 and 161 of the Indian Constitution empowers the President or the Governor, as the case may be, to grant pardons and also suspend, remit or commute sentences, in certain cases. In Nanavati's case the Supreme Court held that the power of pardon and lesser powers of reprieve, suspension etc., could be exercised by the executive heads before, during or after the trial.

6.10. AMERICAN SUPREME COURT AND CAPITAL PUNISHMENT:

The mode of execution of Capital Punishment was challenged as ultra vires of the Eighth Amendment guarantee against cruel and unusual punishment. In Wilkerson and Kemmler the mode of execution of death penalty by shooting or electrocution was challenged as "cruel and unusual punishment". In both the cases the court negatived the plea and held that the mode is not contrary to Eighth Amendment guarantees.

Furman came before the Supreme Court with a direct attack on the Capital Punishment basing on the Eighth Amendment guarantee against cruel and unusual punishment. The American Supreme Court which initially was inclined not to interfere with the mode of execution of death penalty heavily came down against Capital Punishment and declared it as violative of Eighth Amendment guarantee against cruel and unusual punishment. Furman divided the judges of the American Supreme Court clearly as abolitionists and retentionist judges and the abolitionist judges utilised Furman to bury the Capital Punishment in America. But, the wisdom of Furman was shortlived when the retentionist judges gained
the score in Gregg’s case which had overruled Furman and these decisions revalidated Capital Punishment.

It may be noted that the Capital Punishment is not banned in the United States and it has judicial approval also. However, imposition of Capital Punishment is much less and its implementation is very rare, indeed.

6.11. INDIAN SUPREME COURT AND CAPITAL PUNISHMENT:

After the Legislative attempts failed in both the Houses of Parliament to abolish death penalty, the abolitionists turned to the Indian Supreme Court with the hope that it would declare death penalty as unconstitutional as was done by the United States Supreme Court.

But, the Supreme Court in Jagmohan declared that death penalty is constitutionally valid and it is not violative of the fundamental rights guaranteed under Articles 14, 19 and 21 of the Indian Constitution. In the instant case the Indian Supreme Court did not follow the decision of the American Supreme Court in Furman. The Supreme Court in Rajendra Prasad while commuting death penalty into life pleaded for the abolition of death penalty. The Court in Rajendra Prasad extensively quoted the observations of the American Supreme Court in Furman and did not refer to its subsequent decisions which had overruled Furman. Rajendra Prasad dictum did not have any impact on Capital Punishment in India. Later came Bachhan Singh before the Supreme Court of India and the counsel for the accused pleaded for reconsideration of Court’s opinion on death penalty in Jagmohan’s case.

In Bacchan Singh, it was contended that the reconsideration of Jagmohan opinion is necessitated because of the new interpretation given by the Court to Article 21 in Maneka Gandhi. Such an interpretation was not available at the time when the Court decided Jagmohan. The majority of the Court in Bachhan Singh approved death penalty but with a rider. The Court declared in Bachhan Singh that death penalty shall be awarded only in rarest of the rare cases. It is to be noted that the court in Bachhan Singh did not explain the scope of the doctrine of “rarest of the rare cases”. However, the Supreme Court in Machhi Singh explained the Bachhan Singh’s ruling. The Supreme Court in Deena while approving the mode of execution of death penalty as prescribed under the Criminal Procedure Code as valid, made explicit its intention for retaining the death penalty. However, it is in Mithu that
the Supreme Court declared mandatory death penalty as prescribed under Section 303 of Indian Penal Code as unconstitutional on the ground that it offends the test of reasonableness and fairness under Articles 14 and 21 of the Constitution.

6.12 DELAYED EXECUTIONS:

Inordinate delay in the execution of death penalty became a debatable issue before the Supreme Court in Vatheeswaran, Sher Singh and Javed Ahmed. In Vatheeswaran the Court applied the test of fairness during the execution of death penalty and declared that delay exceeding two years in execution of death penalty offends the test of fairness under Article 21. Consequently, the Court on the ground of delay in execution of death penalty converted death penalty into life imprisonment. It is to be noted that a three Judge Bench of the Supreme Court in Sher Singh refused to follow Vatheeswaran and did not convert death into life imprisonment merely on the ground that the execution is delayed. Quite surprisingly a two Judge Bench of the Supreme Court in Javed Ahmed did not follow Sher Singh but followed Vatheeswaran in converting death penalty into life imprisonment on the ground of delayed execution. The cleavage of judicial opinion on the question of conversion of death penalty into life imprisonment on the ground of delayed execution exhibits the abolitionist and retentionist tendency of the judges of the Apex Court. Triveni Ben resolved the conflict of judicial opinion by disapproving the two year delay rule laid down by Vatheeswaran. Triveni Ben maintained that each case has to be considered on its merits and no fixed period of delay could be laid down for the conversion of death into life imprisonment. It is submitted that recently, the Supreme Court of Zimbabwe in Catholic Commission for Justice and Peace in Zimbabwe held that delayed executions of death penalty amounts to torture or inhuman or degrading punishment and offends Article 15 (i) of the Zimbabwe Constitution. Consequently, the Court converted death penalty into life imprisonment.

6.13 SUGGESTIONS:

1. Death Penalty is often imposed on the poor, uneducated, underprivileged and minorities. They seldom win a legal battle in a Court of Law. Legal aid now provided in India is for the poor advocates who cannot have earnings on par with senior advocates. While arguing a case where one’s life is at stake the advocate who is engaged by the state for the accused should be an advocate with at least seven
years legal standing.

2. The Government shall pay the fees of an advocate thus engaged substantially according to his regular charges but not a statutory fee. This would create an interest in the case to the advocate who is arguing on behalf of the accused.

3. Instead of inventing a sophisticated method of execution which is quick, painless and decent, it is better to switch over from death penalty to an alternative punishment which will not put an end to “right to life” itself.

4. Life imprisonment is a very good alternative to death penalty. As such it is submitted to the policy makers that open prisons which are a twentieth century invention in the jurisprudence of Criminology and Penology, where life convicts are expected to serve the remaining period of their sentence are not only reformative in nature but, a very good income to the government. Now, retentionists need not complain that keeping the murderers behind the bars would cost more for the public exchequer.

5. Causing death to an individual may become inevitable at times in certain circumstances such as when a country is locked in either international warfare or civil warfare. Even at times, police personnel may have to cause death to protect their lives or the lives of other individuals. In such cases strict legal safeguards must be prescribed to avoid abuse of such powers by enforcement officials.

6. Instead of spending crores of rupees in constructing gas chambers or gallows, the expenditure may be diverted to train efficient law enforcement authorities and to correct errors in the judicial system.

7. All measures of abolition for the death penalty should be considered as progress in the enjoyment of the right to life.

8. Dangerous offenders can be kept away from the public without resorting to executions. Many abolitionist countries are practising this method of seclusion. It is as good or as bad as keeping the mentally insane in an asylum without causing inconvenience to the healthy.

9. Till Capital Punishment is abolished the offenders may be provided atleast with B class facilities, labour may be avoided for them, they be provided with conjugal visits and visits with the family.
10. The offender's legal battle and the mercy and pardon petitions should be moved quickly so as to avoid delay and thus prolonging his misery. Secretaries to the Governor and President be trained in this regard to move the condemned prisoners' file quickly.

11. Condemned prisoners should be provided with library and some other recreation facilities. Arrangements for their prayers should also be arranged.

12. The prime object of any State should be towards prevention of crime and reformation of its citizens but not to put an end to the life of the offender.

13. It is submitted that the Supreme Court of India should extend its recent order of releasing the undertrials in case of delay in trial to the condemned prisoners in case of delay in their executions as was done by the Supreme Court of Zimbabwe.

NOTES AND REFERENCES