CHAPTER I
INTRODUCTION

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 death for blasphemy. By 1179 B.C. murder was a 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 criminals 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. However, the primitive societies soon grew up into kingdoms and consequently criminal law also changed quickly. Whether it was West or East, offences against the King were considered as more serious. Thus, the political offences 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, capital offences further covered drug-trafficking, hijacking the aeroplanes, bribery etc., Some Muslim countries like Saudi Arabia even want to add “artificial insemination” also to the list of capital offences.

Among the theories of punishment namely, retributive theory, deterrent theory, preventive theory and reformative theory, the first two theories support Capital Punishment without any reservations. The last theory namely reformative theory does not support Capital Punishment. Those who argue for the retention of Capital Punishment are called retentionists and those who advocate the abolition of Capital Punishment are called abolitionists.

Retentionists of Capital Punishment 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 abolitionists and retentionists 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 the 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.

Amnesty International surveyed in detail the use of the death penalty in 180 countries around the world. It shows that nearly half of the countries in the world have already abolished the death penalty or discontinued its use. 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 the 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.

Every year the number of executions are increasing inspite of the human rights movement. This fundamental human right which is the basic right to other fundamental human rights such as freedom of speech, freedom of movement etc., 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.

Over the past decade, an average of at least one country a year has abolished death penalty, affirming respect for human life and dignity. Yet, too many governments still believe that they can solve urgent social or political problems by executing a few hundred of their prisoners. Too many citizens in too many countries are still unaware that the death penalty offers not further protection but further brutalisation.

As far as England is concerned, some 450 years before Christ, the early Britons used to drown their malefactors. In the tenth century Britain, mutilation also appeared on the scene. Canute’s rule which lasted from 1016 to 1035 was blessed with peace and public security without any capital offences. But, his son Rufus reintroduced Capital Punishment. Henry I and Henry II who ascended the throne after him punished the offenders capitally for murder, treason and a few 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, eccelesiastical Courts started punishing people spiritually. They could not inflict death penalty. Taking advantage of this, not alone clergymen even the door-keepers of the exorcists also started claiming this privilege. Because 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. Because it saved people from death, it was known as neck-verse. In practice it amounted to reprieve. By the time Henry VII came to the throne, the whole Europe was experiencing a movement towards severity and brutality of sentence.

During the sixteenth century, Tyburn became a notorious place of execution. In fact, the executions rose to such an alarming stage that a beam had to be erected for carrying hundreds of executions. But, in Charles I reign Tyburn executions dropped to ninety per year. His successor to the throne, Charles II took some interest in penal reforms.

When Queen Anne died in 1714, there were thirty-two capital offences in England. By the time George came to the throne in 1743 this number increased to one hundred and sixty. In 1799 London averaged one execution every fortnight. By 1819, the number of capital offences on Britain’s statute books were two hundred and twenty embracing all kinds of crimes. Even children of seven years and eight years were also executed for stealing spoons, colours, shoes etc.,

Protests against Capital Punishment can be traced back to Saint Augustine or to the writings of 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 Punishments”. 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 abolition of Capital Punishment. In 1837, there were thirty-seven 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 he was success-
In 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 Punishment in other countries.

The cases of Rowland, Timothy John Evans and Dereck Bentley rose public emotions and 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 those offences formerly subjected to 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. A vote on an amendment to the Criminal Justice Bill to reintroduce the death penalty for murder was held in 1988 and was defeated by 341 votes to 218.

American Criminal Law took its shape directly from English Criminal Law of the sixteenth and seventeenth centuries. But unlike England, Criminal Law was not uniform throughout America. Massachussettes, Pennsylvania, North Carolina - every colony had its own criminal law though the variation is 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 The United States. He also was 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, insisted on total abolition of Capital Punishment. By 1830, the legislatures in several states were besieged each year with petitions in favour of abolition from their constitutions. In 1845, an American Society for the Abolition of Capital Punishment was organised. With the efforts of many abolitionists in 1846, the Territory of Michigan replaced Capital Punishment with life imprisonment. Taking cue from
Michigan, many states including Rhode Island and Wisconsin abolished death penalty.

Between the peak of the progressive Era and the year when women got vote, eight states namely, Kansas, Minnesota, Washington, Oregon, North and South Dakota, Tennessee and Arizona abolished Capital Punishment. Inspite of the efforts of individuals and other social service organisations, Capital Punishment is there in the statute books of many American States.

Capital Punishment has been prevalent 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. However, Artha Sastra was not a penal code; hence it lacks a coherent schematisation.

In Buddhist texts also, references to death penalty were found. Idu Batuta in his writings, painted the picture of India as it was in the 14th century. 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 Muslims was based on their religion. Muslirns, after conquering India, imposed their criminal law on Hindus whom they had 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 Sovereign and (iii) Crimes against private individuals, and prescribed Capital Punishment for the offences namely, disturbance of public peace, highway robbery, extortion on the pretext of collection of public taxes and needless to say for murder.

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 played a vital role in the capital offences than the manner of committing the offence. The case of Nand Kumar was a glaring example for the miscarriage of justice.

For the first time in 1846, the Law Commission under the Chairmanship of Lord Macaulay prepared
Indian Penal Code and it was adopted on 6th October, 1860. The Indian Penal Code, 1860 defines the substantive offences and prescribes punishments. After Independence also the same Indian Penal Code has been in operation.

At the outset, the Indian Penal Code prescribes Capital Punishment for eight categories of offences namely, waging war against the Government of India (Section 121), abetting mutiny by a member of the armed forces (Section 132), fabrication of false evidence with intent to procure conviction of a capital offence, with the death penalty applicable only if an innocent person is in fact executed as a result (Section 194), murder (Section 302), murder committed by a life convict (Section 303), abetting suicide of a child or insane person (Section 305), attempted murder actually causing hurt, when committed by a person already under sentence of life imprisonment (Section 307) and dacoity with murder (Section 396), while 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 and under that scheme it is for the judge to pronounce judgment and sentence and it is for the executive to enforce them. Article 72 and 161 of the Indian Constitution empowers the President or the Governor as the case may be to grant pardon and also to suspend, remit or commute sentence in certain cases. This power can be exercised by the executive heads, before, during or after the trial.

The mode of execution was challenged as ultra vires of the Eighth Amendment guarantee against cruel and unusual punishment. In Wilkerson 1 and Kemmler2 the mode of execution of death penalty by shooting and 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 guarantee.

Furman3 came before the Supreme Court of America 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 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 abolitionist 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 score in Profitt, Jurek and Gregg 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.

As far as Indian Supreme Court is concerned, after Independence to the country, several times Bills were introduced in both the Houses to amend the law regarding Capital Punishment. But, every time they were negatived on the ground that the time is not ripe to abolish Capital Punishment in this country.

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

But, the Supreme Court in Jagmohan’s case declared that death penalty is constitutionally valid and it is not violative of the fundamental rights guaranteed under Article 14, 19 and 21 of the Constitution. In that case the Indian Supreme Court did not agree the decision of the American Supreme Court in Furman. The Supreme Court in Rajendra Prasad’s case while commuting the death penalty into life imprisonment 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 the Capital Punishment. Later came Bachhan Singh’s case before the Supreme Court in which reconsideration of its opinion expressed in Jagmohan on death penalty was pleaded. It was contended that 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 be awarded only in “rarest of rare cases”. It is to be noted that the Court in Bachhan Singh did not explain the scope of the doctrine of “rarest of rare cases”. However, the Supreme Court in Machhi Singh elaborately explained the scope of “rarest of rare cases”. The Supreme Court in Deena while approving the mode of execution of
death penalty as prescribed under the Criminal Procedure Code as valid mode, exhibited its intention for retention of death penalty. However, it was in the case of 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 Article 14 and 21 of the Constitution.

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 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 three Judge Bench of the Supreme Court in Sher Sing 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 reformist tendency of the Judges of the Apex Court. Triveni Ben resolved the conflict of judicial opinion by disapproving the two years 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 conversion of death into life imprisonment. It is submitted that recently the Supreme Court of Zimbabwe held in Catholic Commission For Justice and Peace in Zimbabwe that delayed execution of death penalty amounts to torture or inhuman or degrading punishment and offends Article 15(1) of the Zimbabwe Constitution. Consequently the Court converted death penalty of the appellants into life imprisonment.

**OBJECTIVES OF THE STUDY:** The prime objectives of the study are as follows:

(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 also in India and
the attempts made towards abolition of Capital Punishment:

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

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

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

The present study is divided into six chapters. The first chapter deals with the introduction to the study. It explains the problem and the methodology of the study. In the introductory chapter the problem of Capital Punishment is discussed briefly. With the help of the review of the existing literature on the problem, the research gap is identified and the need for the present study is explained. In the second chapter an attempt is made to explain the theories of punishment, retributive, deterrent, preventive and reformative theories and their relevance to Capital Punishment. The arguments of the retentionists and abolitionists basing on several grounds such as religious, ethical, humanitarian etc., are discussed at length. The third chapter deals with the evolution of Capital Punishment in England, America and India and the attempts made in these countries to abolish Capital Punishment. Fourth chapter deals with the statutory framework which deals with the capital offences under Indian Penal Code, the procedure applied in carrying out a death penalty and the powers of the executive regarding pardon, commutation and remission etc., under the Criminal Procedure Code and under Indian Constitution.

In the fifth chapter an attempt is made to discuss the approach of the Supreme Courts of America and India at length.

NOTES AND REFERENCES

2. In re Kemmler: 136 U.S. 436 (1890)
8. Supra note 5.