Chapter - III

DEATH SENTENCE: AN OVERVIEW

(1) HISTORICAL BACKGROUND

In all parts of the world death penalty was in existence from the most ancient times. In primitive conditions of society death by violence was an ordinary phenomena. Tribal or group warfare were often the very conditions of existence. In such a state life was very cheap/ personal vengeance dominated the theme of punishment. Death and exile were two principal devices to eliminate dangerous elements from the group. Hence death sentence in those days was the quickest mode of retribution as well as deterrence.¹

Robertson Smith has said, "in an early society, we may safely affirm that every offence to which death is attached was viewed primarily as a breach of Holiness, for example, marrying within the kin and incest, are branches of the holiness of the tribal blood which would be supernaturally avenged, if men overlooked them."²

Death penalty is the strictest penalty. Punishability, as a rule, by and large, depends on the degree of culpability of criminal act and the danger posed by it to the society and also the depravity of the offender. The risk of penalty is the cost of crime which the offender expects. When this cost (sufferings) is high enough, relative to the benefit which the crime is expected to yield, it will deter a considerable number of people. This is also true in respect of crimes punishable with death. This fact is also undoubtedly admitted that death penalty is justified only in extreme cases in which a high degree of culpability is involved causing grave danger to society.

In primitive society the feelings of retaliation used to be very high
and to pay in the same coin by the kith and kin of the victim was regarded as an honourable act and the respect for life was not up to the mark and the society was not developed into a body of responsible citizens, but ever since the societies have come under the organization of State and the State has assumed the role of the guardian of people, it has to answer and satisfy the wounded feelings of the family members of the victim or murdered by punishing appropriately the murderer who had no regard for the life of the victim. Further, the State has to and can ensure security to people only by punishing the guilty appropriately. It is true that “eye for an eye” cannot be the vision of modern penology but at the same time modern penology should take note of the point that those who have taken the mission of committing murders for gain (Political or pecuniary) and bodily lust (rape resulting in death) and thereby endanger the lives of others cannot expect to enjoy life and smile in jail.

It is true that death penalty cannot be the penalty for all murders, for all murders cannot be grouped under one class. Murders in group clashes, family feuds, sudden provocations stand separately, and that is why, the Indian Judiciary has adopted the principle of rarest of rare cases for imposing death penalty. Death penalty is a social condemnation of a person to death who had taken away the life of another person in premeditated and gruesome manner without any regard for the life of the victim and without any sense of being shameful or mindful of the consequences of his act. Therefore, the question of punishment to such a person must not be decided lightly. Any lenience in punishment would be unsound and unwise and may prove costly to the society as a whole.

Death Penalty for murder and other serious offences may be said to have come into existence with the modern state and its growing recognition of the obligation to maintain peace and order at any cost. A
murder primarily injures a particular victim, but its blatant disregard of human life puts it beyond a matter of compensation between the murderer and the victim's family. Those who commit such act are punished by the state if they are found guilty.

Today it is the State who incurs the responsibility to guard the society from criminal elements, therefore, it is also for the state to punish the offenders. Punishment is, thus, used as a method of reducing incidents of crime, either by detering the potential offenders or by preventing the actual offenders, from committing further crimes. Death penalty is also based on this postulate.

Criminal Law, as an instrument of social control, employs strategies of coercion to attain certain goals, and the coercive strategies rely on punishment which includes deprivation of liberty and even of life. Thus, coercion of death penalty creates some sort of fear in the minds of offenders and checks them from taking any wrong step. This coercion of death assists in the protection and preservation of society.

The prime object not only of capital punishment, but of all punishments, is deterrent which can be named as "general prevention" too. Life is dearest to all and no one wants to lose it. It is on this basic premise that the theory of deterrent value of death penalty rests. According to Salmond, "Punishment is before all things deterrent and the chief end of the criminal law is to make the evil doer an example and a warning to all that are like minded with him". Thus, by punishment the wrong doer is made an example. Thus, we can say that a victim of capital punishment spares the lives of others by sacrificing his life. In this sense it would not be hyperbolic to comment that death sentence does not snatch life but spares it. Moreover, if an offence, however blatant and brutal it may be, is an isolated act and would never occur again then
undoubtedly forgiveness would be better than punishment but if the offence works as a guidance to other like minds and paves a criminal path to them, punishment (and death penalty too, according to the gravity of the offence) becomes necessary because common-safety is more important than an individual's life.

The purpose of punishment changes according to the beliefs of the people from time to time. In the olden days, punishment was inflicted to satisfy human desire to take vengeance. Presently, it has become reformation of the criminal. As death penalty admits no reformation, the abolitionists want that it should be removed from the statute books. However, so far we have not abolished it completely though it has been confined to rarest of rare cases. Thus we have forwarded a step in the direction of humanizing our penal law.

(2) DEATH SENTENCE

(a) Death Sentences under the Hindu Law

Death sentence in India, it is as old as the Hindu society. It has been prevalent in India form times immemorial. We find references to the penalty of death in our ancient scriptures and law books. Hindu law givers did not find anything abhorrent in it, they justified it in the cases of certain serious offences against the individuals and the state. Generally, the death penalty was accompanied with the infliction of torture and was applied indiscriminately. Though, the ancient Indian civilization knew of death sentence its desire at some point of time in history has been effected because:-

"The people were most truthful, soft hearted and benevolent and to them vocal remonstrance sufficed. But in the event of
failure of these measures corporal punishment and death sentence were involved to protect the society from violent criminals."

Even in Buddhist age when Ahimsa was the rule of conduct, that principle was not applied in the realm of penology. King Ashoka did not have capital punishment disallowed. As far as back as the 4th century B.C., the science of penology was fully developed subject of study and statecraft in India. Kalidasa has beautifully narrated the need of punishment of those who deserve it as necessary for preservation. This idea is also reflected in the Mahabharata which state that "if by destroying an individual or a whole family, the kingdom become safe and danger-proof it ought to be done (in the interest of Society) “According to Narada wicked people should be punished by the king. As fire is not polluted by burning, so a king is not polluted by inflicting punishment on deserving criminals. Katyayana holds the view that the king is the protector and thus it is his duty to protect the people from the evil doers and to restrain the delinquent by inflicting punishment commensurate with the wrong done. Brahaspati clearly pointed out that when the safety of many could be ensured by destroying a single offender, his execution was productive of religious merit.

In the pre-Buddhist and post Buddhist period, the death sentence was carried in the most terrible manner. Capital punishment references are available in ancient Indian epics, viz., Mahabharata and Ramayana. In the spacious days of Buddhist's monarchs, when Ahimsa was the rule of conduct, there was an all round protest against taking of life of any sentiment being. Yet it cannot be said that, Doctrine of Ahimsa, was extended to penology for making capital sentence, itself a royal crime. On the other hand pillar edicts of king Ashoka point out to fact, that capital
sentence was taken for granted.

Dandaniti is, therefore, not of recent growth in India. The fundamental basis of Dandaniti is deterrence and mental rehabilitation. It does not savor of retribution and vengeance. Great caution should be observed in interpreting any act in the true spirit of the penal literature there is a clear appreciation of juristic wrong as distinguished from breaches of moral or religious laws. Karma was one of the accepted methods of rehabilitating the offender. Thus, a most interesting phenomenon follows. In the western system of penology, social protection and well-being is the end while the concept of social defence clearly and unmistakably appears very early in the Hindu system.

Manu has taken account not only of the objective circumstances of an offence but also the subjective limitation of the offender. In this respect the penal science of Hindus India ranks on the same level as the most advanced systems of today. "The king shall ordain punishment to law-breakers according to the merit of each case, having carefully examined it with special reference to the place and time of breach and the capacity and knowledge (of the law breaker)." The modem concept-of taking into account both the offender and offence, the individual and the environment was given due consideration in the old days.

Of various acts of Sahasa or violence, man slaughter was considered the worst and punishment was also severe. Narada declared that taking human life through poison, weapon or other means was Sahasa of the higher degree and should be punished accordingly. Brhaspati prescribed death sentence for murderers. Both notorious murderers and secret assassins should be put to death by various modes of execution after confiscating their property. Murderers were never
tolerated in the society. Even in the work of Kautilya, we find mention of sentence of death by various means for murder. The same attitude continued later on. From Kalidasa it is gathered that murder was legally punishable by death. When a murder was committed by conspiracy, no one was spared from the rod of the king. Katyayana also pointed out that the associates and inciters who helped the actual miscreant in different ways were also to be considered perpetrators of the crimes and should be punished according to the gravity of their guilty, Yajnavalkya prescribed special punishment for inciters and helpers.

In one of the earliest Smritis the list of the offenders punishable with death included those who caused injury to the seven constituents of the state, and those who forged Royal edicts etc. Kautilya emphasised that Danda is the surest and most universal means of ensuring public security. In the Buddhist, Sanskrit and late Pali texts, one finds reference relating to death sentence.

The different kinds of punishment prescribed by the Hindu law, and some of the principles on which they were directed to be administered, have been thus described by Dr. P.N. Sen

Yajnavalkya speaks of four class of punishment, viz., censure, rebuke, pecuniaiy punishment and corporal punishment, and says mat these should be used either separately or jointly according to the nature of the crime. The corporal punishment included imprisonment, banishment, branding, cutting of offending limbs, and lastly death sentence, it goes without saying that the measure of punishment depended chiefly on the gravity of the offence."

Law givers specifically exempted the Brahmins from death sentence and advocated banishment as a substitute. However, death
sentence for the Brahmins on murder charge was not totally unknown. The *Mrechakatika* records that *Charudatta*, a Brahmana convicted of murder of *Vasanta sena*, a courtesan, was sentenced to death. Even *Katyayaha*, thought he, in general, that the Brahmins held that the Brahmins were not to be given death sentence, clearly declared guilty of causing abortion, killing a Brahmin's woman with a sharp weapon or murder of a chaste lady, should be condemned to death. The Matsya Purana prescribed banishment and branding for Brahmin's guilty of serious offences. Sumantu quoted by *Vijnansvara* prohibited slaying of a Brahmin's assailant or Atatayin. *Alberuni* noticed that the Brahmins were immune to death sentence. They could only be banished and their property confiscated and those guilty of stealing precious and costly articles, were either blinded or had their right hand and left foot cut off. It was also a general rule to exempt female criminals from death sentence. *Katyayana* stated that in cases of all offences women were to suffer half of the fine in money which were prescribed for male offenders, and when capital punishment was inflicted on a male, amputation of a limb would be the corresponding punishment for a female. For murder, however, female criminal were equally severely punished.

Political crimes were suppressed ruthlessly. The King was expected to be obeyed whether he was capable or not. According to *Narada* disobedience would bring on death. *Kautilya* had enjoined that any person who aimed at the kingdom, who forced entrance into the Royal harem, who instigated wild tribes and enemies against the State, created disaffection in fort, states or in the army should be put to death even if he was a Brahmin. *Kamandaka*, following the ideas of *Kautifya*, pointed out that the sentence of death might be awarded even for the grave offences, but for treason there was no other alternative than death.
People who proved harmful to the Kingdom should be killed without any delay. It appears that death penalty was some time commuted to banishment even for political crimes.

Thus the old practices were faithfully adhered to. Capital and corporal punishments were regarded as the two effective measures for ensuring law and order in society.

(b) **Death Sentence under The Muslim Law**

The concept of crime and punishment is ancient and goes back to unwritten history, though much of it has reached us through the revealed sacred books and the written laws over a period of 35 centuries or more. According to Islamic law, the punishment should be deterrent. An accused, once found guilty should be punished at a public place in order to open the eyes of a potential criminal. Islam has prescribed death sentence for a premeditated murder. This point is illustrated through verse 179 Sura II from the Holy Quran.

"On wise person (here is safety for your lives in death penalty and we hope that you would never violate and would always abide by this law of tranquility."

Punishment is a natural reaction directly following a physical injury to any living creatures as a natural defence or resistance to the wound and pain. Aggression against a human being (murder or bodily injuries), the crime of adultery, rape and defamation, the crimes of aggression against property (robbery; highway robbery), are crimes specified in both the revealed doctrines and the manmade laws, both of which are oriented towards the -welfare of mankind, and the social system and implementation of right and justice. This is clear from the verses of the Holy Quran:
"So establish weight with justice.... "

"We send the not but as a Mercy for all creatures ".

"A guide and a Mercy to the doers of good".13

Punishment, under Islam, in its application and even in its purpose, relates to the commission or the omission of prescribed acts and duties as commanded by Allah and is oriented towards an extended welfare, with which Islamic doctrine is concerned for the good of humanity and to protect and defend it from evil deeds by specification of the acts which require application of penalties against the offenders.

Islamic doctrine has distinguished three types of criminality: had crimes; ta'zir crimes ; and qisas crimes; for each of these, there is a definite prescribed punishment or preventive procedure, and subsequent sanctions may differ in type and amount as they also differ in aim and purpose. This can be explained as follows:

The Shanah divides crimes into two categories:

First Category: Crimes with an impact on social lifes.

Under this category fall all those crimes that badly affect the society. These are further sub-divided into two kinds, whereof each is subject to a distinct injunction. First Kind of Crime

Crimes affecting social existence comprise offences liable to hudood (punishments ordained by Allah). They are seven in number:

(1) Adultery or Fornication
(2) Imputation of Adultery
(3) Larceny
(4) Drinking of Wine
(5) Shedding of Blood
(6) Apostasy and
(7) Rebellion.

Punishments for the seven foregoing crimes have been unequivocally prescribed by the Shanah and the court is not empowered to make any changes in them. Hence whoever is guilty of any one of these crimes shall be punished with the corresponding 'had' regardless of the victim's (aggrieved party's) opinion and personality of the offender. The judge or the person in authority shall have no power to forgive the crime or remit the punishment thereof.

In other words, as to hudood offences the Shariah focuses its attention on safeguarding the society against crime in total disregard of the offender's person. Accordingly the Shariah is strict about these punishments which it prescribes rigidly and allows no powers to the person in authority or the court in respect thereof.

The reason for laying down inexorable punishments for such offences is that they are immensely grave and dangerous and any laxity in dealing with them would lead to decadence, disorder and discontent in the society. Any social set-up falling prey to these evils will disintegrate and be disgraced. The object of the Shariah by adopting a rigorous attitude towards the above offences is to ensure that the moral fabric of the society, the social order and peace and collective security is not jeopardized. In other words, prescribing harsh punishments for the hudood offences public good has been kept above the individual interest, and this is not something surprising. Just the contrary would have been queer indeed. Second Kind of Crime

The other kind of crimes affecting social life consists of offences involving qisas (retaliation) and diyat (blood money or compensatory mulct). Such offences constitute cases of homicide and infliction of wound whether willful or unintentional. They are as under:
(1) Intentional or felonious homicide.
(2) Suspected willful homicide.
(3) Unintentional homicide.
(4) Wounding intentionally.
(5) Wounding unintentionally.

The *Shariah* prescribes two punishments for these offences: *Qisas* or retaliation and *diyat* or blood money. If committed intentionally, the punishment will be *qisas* and *diyat* and if committed unintentionally, the punishment will be only *diyat*. The person is authority or the court does not have the power to reduce or increase and make any other change in punishment laid down. Thus whoever is guilty of any offence as specified above will be awarded the prescribed punishment regardless of the offender's personality and circumstances.

Although the power to forgive is not conferred by the *Shariah* on the person in authority, yet the victim or his lawful heir/guardian has been authorized to forgive. Hence if the latter pardons a willful offence, *qisas* stands annulled and *diyat* replaces it provided that it is pardoned in lieu of *diyat*. But if such an offence is forgiven without any compensation then *diyat*, too, will become void. The result of the nullification of *Qisas* for a willful offence and of *diyat* for an unintentional one, will be that the offender may be awarded penal punishment taking into account the circumstances of the victim.

From what has been stated above we learn that the *Shariah* focuses its attention on the safeguard of the community to the exclusion of the crime and the criminal, giving no importance to the person of the criminal act except that the victim or his lawful guardian is competent to pardon him. In this category of crimes, the *Shariah* authorizes the victim or his lawful guardian to forgive the offender because although the crime affects
the community but it has greater impact on the victim. In fact it affects the community only through the victim. Hence, if the victim or his lawful guardian forgives the offender the legal requirement to disregard the latter's personality and to inflict punishment on him ceases to have any validity, for the danger posed by the offence is no longer there and the offence is rendered harmless to the community. As a matter of fact the victim and his lawful guardian forgive the offender when they either mean to condone him or to gain something material in the form of blood money or compensation and the Shariah gives their right to do so, the reason being that condonation means doing away with the feuds and putting an end to animosities. Preference of material gains to corporal punishment also aims at sondonation and assuaging the virulence of animosity. There should be np doubt whatsoever that the victim or his lawful guardian should have the benefit of offence as far as possible inasmuch as it is he who bears the brunt of the offence.

**Second Category: Other Crimes**

This category comprises offenses that do not fall under the first category or rather consist of crimes whereto the Shariah applies unprescribed penalties. Hence they include all those offences for which 'tazeers", or the penal punishments, are awarded. These may be further subdivided into the following offences:

(a) Any crime which does not come under the category of hudood offences as well as those involving retaliation (qisas) and blood price (diyat).

(b) Hudood offences for which sentence is not passed i.e. hudood offences not completely committed as well as those in respect whereof the had stands invalidated.

(c) The qisas and diyat offences for which no sentence is passed and
which are not liable to *qisas* or payment of blood price.

The crimes classified under second category are not as dangerous as those falling under the first category and therefore, the injunction relating to them is different from the one applicable to the latter. In the case of first category, it is binding upon the court to pass prescribed sentences and it is not empowered to change, increase or decrease the punishment. As regards the second category, on the contrary, powers have been conferred on the court to choose any penalty out of the collection of punishments as it may deem fit. It also has the power to assess the quantum of punishments as it may deem fit. It also has the power to assess the quantum of punishment as well as the circumstances of the offender and the causes of offence do not warrant any curtailment in punishment, the court should award him punishment he deserves. But in case if the circumstances of the offender require remitted punishment, he is to be awarded lighter punishment in keeping with his personality, character and behavior. In case if the circumstances in which a crime is committed demand rigorous punishment, but the circumstances of the offender require remission, he is to be awarded moderate punishment which should neither be too harsh nor too light.

In this category the *Shariah* applies the principles constituting the doctrine of punishment keeping in view both the individual and the collective aspects thereof. Thus if the circumstances of the offender do not warrant any curtailment of punishment, the Shariah takes into consideration the safeguard of the community in the choice of the quantum and the kind of punishment in total disregard of any other aspect. But if the circumstances of the offender demand remitted punishment, they will be kept in view in determining of the punishment to be awarded. However, should the circumstances of the offence require
rigorous punishment while those of the offender warrant leniency, then both collective security and the personality of the offender will be given due consideration in determining the quantity and quality of punishment.

In this category of crimes the position of the victim cannot be relied upon and because of his pardoning the offender, punishment will not become void. But pardoning of the offender by him does provide a judicial criterion of mitigating punishment. Thus if the victim is reconciled with the offender or forgive him, the court will treat the reconciliation or forgiving as a mitigating circumstances in favour of the offender.

The penal punishment, however, does not stand invalidated as the result of the pardoning of the offender by the victim because every punishment involves two rights. The one belongs to the victim and the other to the community. If the victim forgoes his right, the community's right to punish him is not prejudiced whereas so is not the case with *qisas* and *diyat* punishments. These constitute the exclusive right of the victim and his lawful guardian. Hence if they forgive the offender the punishment in such a case would become void and be replaced by *tazeer* or penal punishment, for *tazeer* is the right of community. That is why the result of pardoning the *tazeer* punishments does not manifest itself in the same way as it does in the case of *qisas* and *diyat*, the reason being that *tazeer* involves the right of both the victim and the community. If the victim's right becomes void the right of community remains intact. *Qisas* and *diyat* on the contrary, are the exclusive right of the victim. If he forgoes them, both the punishments will stand invalidated.

**The Reason for Treating the First Category of Crimes as Having Bearing on the Society.**

It has already been stated that the *Shariah* treats with harshness
crimes falling under the first category and focuses its attention on the protection of the community against such crimes in total disregard of the offender's personality except that in the case of qisas and diyat offences, the victim may forgive the offender. It has also been mentioned that both the kinds of offences placed in the first category badly affect the community. That is why the Shariah fixes its glance in their case on the safeguard of the community.

All the social structures of the world have been raised on the following foundations and will always stand upon them:

(1) The formation of family.

Only by corporal punishment and imprisonment. Thus if several people guilty of the same offence are given different punishments in consideration of their circumstances that make them desist from committing the offence, then equality is established.

Punishment May Be Classified into Four Kinds on the Basis of Their Correlation:

(1) The Primary Punishment:

These are penalties originally prescribed for an offence. For example, prescribed punishments for homicide, for fornication and theft are retaliation, stoning to death and amputation of hand respectively.

(2) Substitutionary Punishments:

If there is something inhibiting primary punishment, then some other punishment would be awarded instead of it. Such a punishment would be called substitutionary punishment. For instance, in case of invalidation of qisas, diyat would be substituted. If had and qisas become null and void, tazeer would take their place.

These alternate punishments are themselves primary punishments before they are awarded as substitutes. They are latter cannot be applied.
For instance, in case of quasi-homicide, *diyat* is the prescribed original punishment and in case of ta'zeer offences, ta'zeers are the original or primary penalties. But if on grounds of *Shariah* injunctions a *had* or *qisas* punishment cannot be awarded and instead of it *diyat* and ta'zeer are awarded, then these punishments would be substitutionary.

(3) **Subsidiary Punishment:**

Subsidiary punishments are those which the offender has to undergo as the result of primary punishments and for which no separate order is needed; for example, for a killer deprivation of inheritance, since disinheritance is a consequence of homicide committed by him and as such it needs no separate order. Or take another example; a slanderer is disqualified from giving evidence. Here too disqualification does not require a separate sentence, inasmuch as the person who is awarded punishment for slander is automatically disqualified from giving evidence.

(4) **Complementary Punishments:**

Complementary punishments are the penalties awarded on the basis of the order regarding primary punishments and for which a separate sentence is also passed.

The complementary punishments bear affinity to subsidiary punishment inasmuch as both the punishments owe themselves to the sentence of primary punishments. The difference, however, is that no separate sentence is needed for the subsidiary punishments, while separate sentence must be passed for complementary punishments. An example of complementary punishment is that the amputated hand of a thief is to be hung from his neck till he is set free. The hanging hand owes itself to the punishment of cutting it off, but it is warrantable only when separate order is passed for it to be operative.
Punishments Are Classified into the Following Kinds in Relation to Judicial Power as to the Determination of Quantum thereof.

(1) **Punishment with a single limit:**

As regards such punishments the court has no power to enhance or mitigate the quantum thereof, although they may naturally admit of mitigation or enhancement, such as rebuke, exhortation or flogging.

(2) **Punishment with two limits:**

These punishments involve two limits; minimum and maximum. The court has the power to choose any penalty between them as it may deem fit; imprisonment and flogging as *Ta'zeer*.

Punishments are classified into the Following Kinds in Accordance with Obligator Injunction:

(1) **Determined Punishment:**

Punishments whose nature and quantum have been determined by the lawgiver and has placed the court under the obligation to apply them unchanged without enhancement or mitigation. Such punishments are known as Obligatory Punishments, because the person in authority is not competent to nullify or remit them.

(2) **Non-determined Punishments:**

Punishments in respect whereof the court is empowered to determine the quality and quantity of punishment as it deems fit, in consideration of the offender's circumstance. These are known as 'Optional Punishments', since the court has the option to award any of the given penalties.

Punishments are classified into the Following Kinds in Relation to the Object thereof:

1). **Corporal Punishment**, viz: punishments inflicted on the human body such as execution, whipping, imprisonment, etc.
2). **Physical Punishments:** Punishments whose object is the offender's mind rather than body, such as exhortation, intimidation and threatening.

3). **Pecuniary Punishment:** Punishments whose object is the material possessions of a person, such as diyat, mulct and confiscation.

Punishments are classified into the Following Kinds in Accordance with Offences:

1). **Punishments of Hudood,** i.e. prescribed punishments for hudood offences.

2). **Punishments of Qisas and Diyat,** i.e. punishments prescribed for offences entailing retaliation and blood money.

3). **Punishment of Expiation:** Prescribed punishments for certain qisas and diyat offences as well as certain ta'zeer offense.

4). ** Penal Punishments,** viz: Punishments prescribed for ta'zeer offences.

This is the most important classification of punishments. We proceed to dwell on each kind separately. The sequel show in two sections. The extent to which the Shariah punishments are efficacious as well as the degree to which the Egyptian law is efficacious respectively.

(c) **Death Sentence under The Mughal Empire**

During the medieval period, when Mughal rules over Indian, the main system of criminal law administered was Quranic one. The judges thought it fit and best to follow Quranic precepts...punishment was discretionary with the officer who tried the case, and might assume any form. The system had originated and grown outside India. Its main sources were the Holy Quran as supplemented and interpreted by case law and opinions of jurists. Since all the three sources were "trans-Indian" it became necessary for the Indian Qazis to have digest of
Islamic Law. The last such digest was *Fatwa-i-Alamgiri* compiled by a syndicate of theologians under the orders of Aurangzeb.

*Akbar's* idea of justice may be gathered from his instruction to the Governor of Gujarat that he should not take away life till after the most mature deliberations. Superior executive officers had the authority to try criminal cases. *Akhar* was keen to lay down, that death sentence was not to be accompanied with mutilation or other cruelty, and that, except in cases of dangerous sedition, the Governor should not inflict death sentence until the proceedings were sent to the Emperor and confirm by him. In the time of *Jahangir*, no sentence of death could be carried out without the confirmation of the Emperor. Death sentence, it is stated was almost totally unknown under *Aurangzeb* under the dictates of anger and passion he never issued orders to death. The death sentence, *qatl* under the Muslim Law is inflicted, after the offence has been legally proved, in the following cases:

(i) when the next-of-kin of a murdered person demands the life to the murderer (qisas) and refuses to accept the alternative of money compensation (diya of price of blood);

(ii) in certain case of immorality; the woman owner is stoned to death by the public;

(iii) on highway robbers.

During the Mughal period the offender was made to dress in the tight robe prepared out of freshly slain buffed skin and thrown in the scorching sun. The shrinking of the raw-hide eventually caused death of the offender in agony, pain and suffering. Another mode of inflicting death penalty was by mailing the body of the offender on walls. These modes were, however, abolished under the British system of criminal
justice administration during the early decades of 19th century when death by hanging became the only legalized mode of inflicting death penalty.

**Death Sentence under The Earlier British Rule in India**

We may now consider the statutory modifications made in the Muslim Criminal Law during British times, in the period before the commencement of Indian Penal Code. 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. Regarding homicide only following changes were made by a Bengal Resolution of 1773 (Sections 50,52,55 and 76, substituted by Regulation 4, 1797).

(a) nature of the instrument as signifying the intention was made immaterial in homicide: the intention was to be gathered from the general circumstances arid the evidence ; and

(b) the direction left to the next-of-kin of the murdered person to remit to penalty of death was taken away.

Thus, the motive, not the method should determine the sentence. In 1791, the punishment of mutilation was abolished. All criminals adjudged in accordance with the Native of Law Officers to loss two limbs were to suffer instead of it, imprisonment of life with hard labour for 7 years.

A Bengal Resolution of 1797 provided that in cases of willful murder, judgment was to be given in the assumption that "retaliation" had been claimed. The sentence could extend to death if that was the prescribed sentence under Muslim Law. As regards "fine of blood", the judges were directed to commute the punishment to imprisonment which could extend to life imprisonment.

Section XXVI, Clauses 1st, 2nd, 3rd and 4th of the List of Capital
Offences under Bombay Regulation XIV of 1827, dealt with murder as follows:

Clause 1st" Any person who shall purposely and without justifiable or extenuating cause deprive a human being of life, or who shall commit or assist in any unlawful act, the perpetration of which is accompanied with the death of human being, shall be liable to punishment of murder, provided always, that death takes place within six months after the act was committed1.

Clause 4th- "The punishment of murder shall be death, transportation, imprisonment of life or solitary imprisonment with flogging."

Regarding the power of communication it was observed that it was evidently fit that the Government should be empowered to commute the sentence of death (without consent of the offender) for any other punishment.

The Law Commissioners in 1846 dealt with the subject of death punishment and came to the conclusion that if death is certainly caused by words, deliberately used by a person with intention to cause that result, or with the knowledge that in the condition of the party to whom the words are spoken it is likely that the words will make such an impression on him as to cause death, and without any such excuse as is admissible under "General Exception", such person should suffer the penalty of culpable homicide.

On 30th May, 1851, the revised edition of the Code was circulated to judges for comments. Later, in 1854, a Committee consisting of Barnes, Peacock, Sir James Colvills, Grant, Elliot, etc...was asked to consider the revised Code. That Committee did not recommend any
substantial alteration in the original court. The Code was read for the first
time on 28\textsuperscript{th} December, 1857, and referred to Select Committee. It was
then passed by the Legislative Council of India. It received the assent of
the Governor-General on 6\textsuperscript{th} October, 1860.

Thus, it was left to the Britishers to give the country a systematized
penal code which strictly limited the number of capital offences and laid
down the procedure for criminal trials. In a sense, the Britishers were
responsible for partial abolition of death sentence.

The punishment of death sentence had declined in recent times,
although it is still permitted by law, as in India, for various kinds of
offences like treason, murder etc. Even where it has been legally retained,
death sentence is now seldom employed except in very grave cases where
it is a crime against the society and the brutality of crime shocks the
judicial conscience.

The decline in the infliction of this penalty is because of the fact
that the penalty does not confirm to the current standard of decency. The
standards of human decency with reference to which the proportionality
of the punishment to the offence is required to be judged very from
society to society depending on the cultural and spiritual tradition of the
society, its history and philosophy and its sense of moral and ethical
values. To take an example, if a sentence of cutting off the arm for the
offence of theft or a sentence of stoning to death for the offence of
adultery were prescribed by law, there can be no doubt that such
punishment would be condemned as barbaric and cruel in our country,
even though it may be regarded as proportionate to the offence and hence
reasonable and just in some other countries.

There was a time when in the United Kingdom a sentence of death
for the offence of theft or shoplifting was regarded as proportionate to the offence and therefore quite legitimate and reasonable according to the standards of punishment would be regarded as totally disproportionate to the offence and hence arbitrary and unreasonable.

Can there be any higher basic human right than the right to life and can anything be more offensive to human dignity than a violation of that right by the infliction of the death penalty.

(3) CAPITAL PUNISHMENT

(a) IN INDIA

Relevant Provisions under Indian Penal Code

A Draft Penal Code was prepared and submitted in 1837 by the First Indian Law Commission presided over by Lord Macaulay. Death penalty was prescribed for offences like waging war against the state, giving false evidence of a capital offence, murder, perjury etc. On 30th May 1851 the revised edition of the Code was circulated among Judges for comments. The draft code received the assent of the Governor General on 6th October, 1860. At present the Indian Penal Code provides death penalty only for the following: -

(i) Waging or attempting to wage war or abetting the waging of war against the Govt. of India (S. 120)
(ii) Abetment of mutiny actually committed. (S. 132)
(iii) Giving or fabricating false evidence upon which an innocent person suffers death (S. 194)
(iv) Murder (S. 302)
(v) Murder by a life convict (S. 303)
(vi) Abetment of suicide of a child, an insane or intoxicated person (S.305)
(vii) Attempt to murder by a person under sentence of imprisonment for life if hurt is caused (S. 307)

(viii) Dacoity with murder (S. 396)

Moreover, there are some other categories of cases of constructive liability for death penalty.

(a) Where an act which constitutes an offence punishable with death is done by several persons in furtherance of common intention of all, each of such persons is liable to be sentenced to death (S. 34)

(b) If five or more persons conjointly commit dacoity and any one of them commits murder in so committing the dacoity, everyone of those persons is punishable with death. (S. 396)

(c) In certain circumstances, abetment of offence punishable with death is also punishable with death. (SS. 109 to 119)

In case of above noted provisions of IPC, two options are available to the courts: either to sentence the accused to death or to impose on him a sentence of imprisonment for life.

Now the law vests in the judge a wide discretion in the matter of passing sentence, and as such the award of death penalty is left to the discretion of the court.

1. Treason:

Section 121 of the I.P.C. deals with Treason. It says:

Whoever wages war against the Government of India, attempts, to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life, and shall also be liable to fine.

Illustration

(a) A joins an insurrection against the Government of India. A has committed the offence defined in this section.
This section embraces every description of war, whether by insurrection or invasion. It punishes equally the waging of war against the Government of India, or attempting to wage such war, or abetting the waging of such war. The offence of engagement in a conspiracy to wage war, and that of abetting the waging of war against the Government under this section, are offences under the Penal Code only, and are not treason or misprison of treason.\textsuperscript{18}

Neither the number of persons nor the manner in which they are assembled or armed is material to constitute an offence under this section. The true criterion is the purpose or intention with which the gathering assembled. The object of the gathering must be to attain by force and violence and object of a general public nature thereby striking directly against the Government's authority.\textsuperscript{19}

2. Abetment of Mutiny :

Section 132 of I.P.C. deals with Abetment of mutiny, which says :

Whoever abets the committing of mutiny by an officer, soldier, sailor, in the Army, Navy or Air Force of the Government of India, shall, if mutiny be committed in a consequence of that abetment, be punished with death or with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

3. Fabrication of false evidence leading to one’s conviction (S. 194 I.P.C.) :

"Whoever gives fabricates evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital by the law for the time being in force in India, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and
shall also be liable to fine; and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment, hereinbefore described”.

To constitute an offence under this section the accused must give false evidence intending thereby to cause some person to be convicted of a capital offence. A person who brings before a court a witness do whom he has tutored to tell a false story concerning a murder case before it, commits an offence under this section.20

Where the investigating Inspector concocted false evidence with the help of two sarpanchas and villagers to rope in an innocent man its a false murder case which led to his conviction by the sessions court and during the course of the hearing of the appeal in the High court the so-called murdered man appeared in person before the High Court, it was held that the Inspector, the sarpanchas and the other witnesses were liable to be prosecuted under 3. 194, I.P.C., read with S. 340, Cr.P.C.21

4. Murder (S. 302 I.P.C.)

"Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine". This section provides punishment for murder; Section 304, for culpable homicide not amounting to murder. Except in cases where there were extenuating circumstances, the normal punishment under this section was death22. But under section 354(3) of the Cr.P.C., 1973 a new provision has been introduced to say that when the conviction is for an offence punishable with death or in the alternative with imprisonment for life, or imprisonment for a term of years, the judgement shall state the reason for the sentence awarded and in the case of sentence of death, the special reasons for such sentence. Thus it seems that normal sentence for
murder is no longer a sentence of death but imprisonment for life and only for special reasons to be recorded in the judgement a sentence of death can be awarded in "rarest of the rare" cases. Where the two members of an unlawful assembly went forward to deal with their target by disposing him of and, on being not able to get him, gunned down his two young girls whom they chanced to spot on way back, the supreme court held that it was not one of these "rarest of rare" cases in which death penalty would be warranted.

Where 31 persons were prosecuted for killing 9 Harijans, some of them being acquitted, some of them sentenced to life imprisonment and 3 of them to death, it was held by the supreme court that there was no ground to sort out those three so as to put them in the "rarest of rare" category, and converted their sentence into life imprisonment. Where a bank clerk in his lure to rob the contents of the strong-room of his bank killed an officer finding no other weapon on the spot than the stitcher lying there, the Supreme Court came to the conclusion that the nature of the weapon showed that the accused acted under a momentary impulse and not in a preplanned manner and that the death sentence awarded to him ought to be reduced to life imprisonment. The court confirmed the conviction under the section though the evidence was wholly circumstantial. His knowledge of the method of operating the strong-room, his being seen alone leaving the premises at night with a suit-case and a bag earlier purchased by him, staying in expensive hotels thereafter and recovery of the robbed money from him and his father, these circumstances were regarded by the Supreme Court to be strong enough evidence of his involvement in the murder so as to justify conviction under the section. In another case involving the murder of a woman, and that of her 12 year old son and serious injury to her daughter, the
Supreme Court converted death sentence into life imprisonment. The husband of the deceased woman lived apart from her. The assailant came to occupy the vacuum treated by the husband. The grown-up children protested and the mother had to say "No" to the lover. He was badly disappointed and having witnessed a film showing murder of four women, pounced upon the women and in the process killed her with her son, seriously injuring the daughter. On being challenged by a police officer, he immediately stopped his assaults, came out and surrendered. These factors enabled the supreme court to pull out the case from the category of "rarest of rare". On the other hand, the matter of Kehar Singh was considered by the Supreme Court as one belonging to the "rarest of rare" category. It was not simply a murder of a human being. It was the crime of assassination of the duly elected Prime Minister of the country. There was no personal motivation, the aggrievements was as to an action taken by the Government in the exercise of Constitutional powers and duties. The security guards who were duty bound to protect the person of the Prime Minister themselves assumed the role of assassins. It was a betrayal of the worst sort. It was a murder most foul and senseless. Those who executed the plot and those who conspired with them would, therefore all fall in the "rarest of rare" category. Death penalty is not awarded in cases where the origin of the transaction is not clear and because of involvement of a number of persons it is not possible to attribute a particular act to a particular accused.

5. Murder by a person undergoing a term of life imprisonment

(Section 303 I.P.-C.)

Section 303 says that:

"Whoever/ being under sentence of imprisonment for life, commits murder, shall be punished with death".
This section has been struck down by the Supreme Court as void and unconstitutional being violative of both Articles 14 and 21 of the Constitution. It regards life convict to be a dangerous class without any scientific basis and thus violates Article 14 and similarly by completely cutting out judicial discretion it becomes a law which is not just, fair and reasonable within the meaning of Article 21. So all murders are now punishable under Section 302 I.P.C.

6. **Abetment of suicide by a child or woman (Section 305 I.P.C.):**

"If any person under eighteen years of age, any in sane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the commission of such suicide, shall be punished with death or imprisonment for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine".

This section have been inserted because the ordinary law of abetment is inapplicable. They apply when suicide is in fact committed.

7. ** Attempt to murder (307 I.P.C.):**

"Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned”.

When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused be punished with death.

**Illustrations:**

(a) A shoots at Z with intention to kill him, under such circumstances, that, if death caused, A would be guilty of
murder. A is liable to punishment under this section.

(b) A with the intention of causing the death of a child of tender years exposes it in a desert place. A has committed the offence defined by this section. Though the death of the child does not ensue.

(c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence defined in this section, and if by such firing he wounds Z he is liable to the punishment provided by the latter part of the first paragraph of this section.

(d) A, intending to murder Z, by poison, purchases poison and mixes the same with food which remains in A's keeping: A has not yet committed the offence defined in this section. A places the food on Z's table or delivers it to Z's servant to place it on Z's table. A has committed the offence defined in this section.

This section seem to apply to attempts to murder, in which there has been not merely a commencement of an execution of the purpose, but something little short of a complete execution, the consummation being hindered by circumstances independent of the will of the author. The act or omission, although it does not cause death, is carrying it to that length, the offender considers sufficient to cause death. It is sufficient if the act was one capable of causing death and there was an intention to cause death. Even so in a case the supreme court held that where four or five persons attacked a man with deadly weapons like Farsha, etc., it could be presumed that they had intention to cause death but as the sharp edge of the Farsha was not used in causing the injuries, the accused were liable to be punished under Ss. 326 and 324 on the nature of the injury caused by each and not under S. 307, I.P.C. The administration of powdered glass
in food is an offence under this section.\textsuperscript{32}

The High Court of Orissa has, however, held that causing injuries, though with the intention of causing death but which do not result in death does not fall under this section.\textsuperscript{33}

\textbf{8. Dacoity with murder (Section 396 I.P.C.)}

If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of these person shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Under this section extreme penalty of death may be inflicted on a person convicted of taking part in a dacoity in the course of which a murder is committed, even though there is nothing to show that he himself committed the murder or that he abetted it. The section declares the liability of other persons as co-extensive with the one who has actually committed murder. Where in the course of a dacoity one man was shot dead, and the accused who was tried had a gun and others of the dacoits also had guns, and there was no evidence that the accused was the man who fired the fatal shot, the sentence was altered from one of death to one of transportation for life.\textsuperscript{34}

The section says that if "any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity" then every one of those persons shall be liable to the penalty prescribed in the section. It is not necessary that murder should be committed in the presence of all. When in the commission of a dacoity a murder is committed. It matters not whether the particular dacoit was inside the house where the dacoity is committed, or outside the house, or whether the murder was committed inside or outside the house, so long
only as the murder was committed in the commission of that dacoity.\(^{35}\)

The essence of an offence under this section is murder committed in commission of dacoity. It does not matter whether murder is committed in the immediate presence of a particular person or persons. It is not even necessary that murder should have been within the previous contemplation of the perpetrators of the crime.\(^{36}\) The house of a person was raided by a gang of five dacoits, one of whom was armed with gun. The dacoits ransacked the house and made good their escape with their booty. A number of villagers had assembled outside the house and in fighting their way through the crowd one of the dacoits shot one man dead and inflicted fatal wounds upon another who died shortly afterwards. It was held that murder committed by dacoits while carrying away the stolen property was "murder committed in the commission of dacoity", and every offender was therefore liable for the murder committed by one of them.\(^{37}\) But if in this very case the dacoits were forced to retreat without collecting any booty, the offence of dacoity would be completed as soon as they left the house of occurrence and took to their heels. And if a murder was committed by any one of the dacoits in course of such a retreated without any booty, then only the actual murderer will be liable under S. 302 I.P.C., and conjoint responsibility under S- 396 I.P.C., could not be fixed on others though all of them could be convicted under S. 395 I.P.C- as attempt to commit dacoity.\(^{38}\) Where an offence under the section was otherwise proved, the fact that no item of stolen property could be recovered from any of the accused persons was considered to be immaterial\(^{39}:\)

Out of the eight offences mentioned above death sentence was mandatory only in case of murder committed by a person while he is already undergoing a sentence for life imprisonment.\(^{40}\) For other offences
the Penal Code did not make it obligatory for the courts to award death penalty and they were free to punish the offenders with an alternative sentence. But the decision of the supreme court delivered on 7th April 1983 disposing of writ petition filed by Mithu and other challenging the constitutional validity of section 303 on the ground that it violated Articles 14 and 21 of the constitution, the five judges constitution Bench presided over by chief justice Y. V. Chandrachurn observed that section 303 of I.P.C. was unconstitutional and there shall be no mandatory sentence of death for the offence of murder by life convict. In other words, all murder cases would fall under section 302 which deals with punishment for murder.

Delivering the judgement on behalf of JJ. Murtaza Fazal Ali, V.D. Tultzapurkar, Vardrajan and himself (Mr. Justice Chinnappa Reddy delivered a separate but concurring judgement). The chief justice ruled that section 305, I.P.C. violates the guarantee of equality contained in Article 14 as also the right confined by Article 21 of the constitution.

Indian Penal Code contained fifty one sections which prescribe life imprisonment for various offences. The basic difference between section 302 and the other sections was that whereas under these sections life imprisonment is the maximum penalty which has to be imposed.

The court, however, made it clear that the ruling in Bachan Singh case/ upholding the Constitutional validity of death sentence could not govern the death penalty prescribed in section 303-

Referring to section 235(2) of Cr.PC. in context of section 303 I.P.C., the S.C. held that if the court itself has no option to pass any sentence except the sentence of death it is an idle formality to ask the accused as to what he has to say on the question of sentence. The chief Justice further observed, "for us law cases to have respect and relevance
when it compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead”.

It must be stated that section 307 (second part) of I.P.C. provides mandatory capital punishment for an offence of attempt to murder by a life convict and deprives judicial discretion in such cases. The object of this provision is two-fold, namely, to provide protection to the prison personnel; and to deter the prisoners.

An analysis of these provisions of the Penal Code further reveals that there are valid reasons for allowing wider judicial discretion in cases offences other than those falling under section 303. To elaborate this point further it would be convenient to classify the aforesaid eight offences in to three broad categories, namely-

(a) Offences against the Government (These include offences under Sections 121 to 132, I.P.C.)
(b) Offences against lawful justice (Section 194)
(c) Offences against persons (Sections 302, 303, 305, 307 and 396 I.P.C.).

**Legislative Amendments in the Provisions related to Death Penalty**

Changes are being brought about to the criminal law in relation with the changing aspects of capital punishment. By a notable amendment in 1955 to the Code of Criminal Procedure, it is no longer obligatory for a trial judge to give reasons for imposing the lesser penalty.\(^{42}\)

Before this amendment the judge was to record the reasons in the judgment for not inflicting death penalty.

As the old sub sec. (5) of Sec. 376 of Cr.P.C. was as follows "If the accused is convicted of an offence punishable with death and the court
sentences him to any punishment other than death, the court shall, in its judgment, state reasons why sentence of death was not passed”.

Provided that in trials by jury the court need not to write a judgment but the court of sessions shall record the heads of the charge to jury.

By the amended sub-section 354 of Cr.P.C, 1973 this point was made more explicit. Section 354 (3): When the conviction is for an offence punishable with death or in the alternative, with imprisonment for life or an imprisonment for a term often years, the judgment shall state the reasons for the sentence awarded and, in the case of sentence of death the special reasons for such sentences.

By virtue of section 235(2) of the code of Criminal Procedure 1973, which provided a hearing on the question of sentence the incidences of death penalty can be minimised.

Death sentence was mandatory for murder, if committed by a person while undergoing a sentence of imprisonment for life under Sec. 303 I.P.C. This section has now been struck down by a full bench of Supreme Court in 1982 on the ground that this section violates the guarantee of equality u/A. 14 and also the right contained in Art. 21 because it does not leave any discretion to the judge to inflict any other sentence.

A glance at the relevant clauses of the Indian Penal Code (Amendment) Bill 1972, reveals the legislative trend to be in time with the new judicial attitude against death penalty.\textsuperscript{43} The significance of this Bill is that it provides life imprisonment as the punishment for murder and death penalty only as a proviso for aggravated forms of murder. Sec. 302 is proposed to be amended as follows: -

**Sec. 302(1):** Whoever commits murder shall, save as otherwise provided
in sub-section (2), be punished with imprisonment for life and shall also be liable to fine.

(2) Whoever commits murder shall,

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any armed forces of the Union or of any Police force or of any public servant whose duty is to preserve peace and order in any area or place, while such member or public servant is on duty; or

(d) if the murder has been committed by him, while under sentence of imprisonment for life and such sentence has become final, be punished with death, or imprisonment for life, and shall also be liable to fine.\(^44\)

The proposal is to delete the present section 303 of IPC.

Similarly the provision for death penalty in sec. 305 of IPC is proposed to be substituted by life - imprisonment by this amendment.\(^45\)

Likewise Sec. 307 of IPC is proposed to be amended including imprisonment for life as an alternative of death penalty.\(^46\)

With regard to the question of abolition of capital punishment it is worthwhile to point out in the erst-while princely state of Travancore, now a part of Kerala, death penalty was abolished as early as in 1944.\(^47\)

(b) IN ENGLAND

The history of crime and punishment in England during the medieval period reveals that infliction of death penalty was commonly practised for the elimination of criminals- Henry VIII who reigned in England for over fifty years\(^48\), was particularly famous for his brutality
towards the condemned prisoners. He used to bail the offenders alive. His
daughter Elizabath who succeeded him was for more stiff in punishing
the offenders. The offenders were not put to death at once but were
subjected to slow process of amputation by bits so that they suffered
maximum pain and torture. The condemned offenders were often
executed publicly. These brutal methods of condemning the offenders
were, however, abandoned by the end of eighteenth century when the
system of transporting criminals to American colonies at their opinion
was firmly established.

Prof. Fitzerland observed that the history of capital punishment in
England for the last two hundred years recorded a continuous decline in
its incidence. During the later half of the eighteenth century as many as
two hundred offences were punishable with death penalty. The obvious
reason for the frequency of execution was the concern of the ruler to
eliminate criminals in absence of adequate police force to detect and
prevent crimes. The methods of putting offenders to death were
extremely cruel, brutal and torturous.

As the time passed the severity of capital punishment was
mitigated mainly in two ways: Firstly, this sentence could be avoided by
claiming the 'benefit of clergy' which meant exemption from death
sentence to those male offenders who could read and were eligible for
holy order. Secondly, the prisoners who were awarded death sentence
could be pardoned if they agreed to be transported to the American
colonies. Thus by 1767 condemned felons could be transported for seven
years in lieu of capital sentence. In course of time death punishment for
felony was abolished and in 1853 the system of transporting criminals
also came to an end and a new punishment of penal servitude was
introduced.
Commenting the frequency of executions during the eighteenth century Donald Taft observed that during no period in the history of western civilization were more frantic legislative efforts made to stem crime by infliction of capital punishment as in that century. In this opinion the growing importance of this punishment was owing to the agrarian and industrial changes in the English society resulting into multiplicity of crimes which had to be suppressed by all means. Supporting this view Prof. Radzinowicz observed that more than 190 crimes were punishable with the death during the reign of George III in 1810.

In nineteenth century, however, the public opinion disfavoured the use of capital punishment for offences other than the heinous crimes. Bentham and Bright, the two eminent English law reformers opposed frequent use of capital punishment. Sir Samuel Romilly also advocated a view that the use of capital punishment should be confined only to the cases of wilful murder.

The irrevocable and irreversible nature of death penalty gave rise to a number of complications which invited public attention towards the need for abolition of this sentence. Consequently the British Royal Commission on capital punishment was appointed in 1949 to examine the problem. As a result of the findings of this commission death sentence was suspended in England and Wales for five years from 1965 and was finally abolished by the end of 1969.

However, the constant rise in the incidence of crime in recent years has necessitated Britain to reassess its penal policy regarding death penalty. The two latest decisions of the Privy Council emphatically stressed that the award of death sentence is not violative of human rights or fundamental rights.
Available literature on capital punishment in the United States testifies that in modern times the sentence of death is being sparingly used in that country. This however, does not mean that capital punishment is altogether abolished in U.S.A. The retention of death penalty is still considered to be morally and legally just though it may be rarely carried in to practice. The American penologist justify the retention of capital punishment for two obvious reasons. Firstly, from the point of view of protection of the community death penalty is needed as a threat or warning to deter potential murderers. Secondly, it also accomplished the retributive object of punishment in as much as a person who murders another has perhaps forfeited his claim for life. It is, however generally argued that the risk of being executed in fact serves no deterrent purpose because the murderers often plan out their crime in such a way that the chances of their detention are rare and they are almost sure of their escaping unpunished. The retention of death penalty for capital murderers is justified on the ground that if not executed, they will remain a menace and a positive danger to society.

American recent trend is to restrict capital punishment only to the offences of murder and rape. Another noticeable trend during the recent years is to make the process of execution private/ painless and quick was unlike the old method of public execution which were brutal, painful and time consuming. The common modes of inflicting death penalty in United States are electrocution, hanging, asphyxiation with lethal gas and shooting. Several states have abolished death punishment with beneficial results. Recently Mr, Justice Bernan and Mr. Justice Marshal of the U.S. Supreme Court in a famous decision of Furman v/s The State of Georgia, observed that death penalty should be outlawed on the
ground that it was an anachronism degrading to human dignity and unnecessary in modern life. But most of the judges did not agree with their view that the eight amendment of the American constitution which prohibits capital punishment for all crimes and under all circumstances is a good law. Some of the recent American decisions suggest that the courts are convinced that death penalty per se is not violation of the Constitution.

It is significant to note that with the abandonment of the torturous and barbarous methods of inflicting death penalty the meaning of the term 'capital punishment now only extends to death sentence for murder or homicides.

In the modern reformative era, the retributive principle of 'tit for tat' does not serve any useful purpose. Retribution can only do harm than good to the criminals and can never be an effective measure of suppressing crime.

Retalisation and retribution apart from being outdated are also against the accepted norms of modern criminal justice. Beccaria was perhaps the first criminologist who raised a crusade against capital the use of cruel and barbarous capital punishment in 1764. He strongly protested against the use of cruel and barbarous modes of punishing the offenders and emphasized the need of individualised treatment. He expressed a view that death as a sentence symbolises man's cruelty and insignificance of human life.

Lastly but not the least it is often argued that death penalty "brutalizes" human nature and cheapens human life.- thus it initiates the humanitarian sentiments concerning the sacredness of human life.
Chapter – 3

(4) MODES OF EXECUTION OF DEATH SENTENCE

Various modes and methods of inflicting death sentence upon the convict as practiced in different societies are examined in this chapter. This approach is not an exhaustive of all the modes of execution but covers some of the important practices followed.

Since Middle Ages death sentence was the common practice throughout the world and was inflicted in the case of conviction for large number of crimes, including petty offences involving property. In England, during the 18th century, death was the punishment for several specific offences which were about a hundred. The death penalty was executed in various ways. Several methods of execution of death sentences involved torture, burning at the stake, breaking on the wheel, slow strangulation, crushing under elephant’s feet, throwing from a cliff, boiling in the oil, stoning to death etc. with the emergence of various principles relating to fair procedure contained in the contribution of several democratic countries and with the strong, growth of human rights movement, such severe death punishments involving torture began to die out in the 18th century. The number of offences punishable by death was also reduced in all leading countries. Also, penalties involving torture disappeared with the idea that punishment by way of death sentence should be swift and humane, whether by guillotine, hanging the garotte, or the headman's axe. Some of the important practices of death penalty are as follows:-

(a) BURNING AT THE STAKE

Burning' dates back to the Christian era. Burning at the stake was a popular death sentence and means of torture, which was used mostly for heretics, witches, and suspicious women. It was in the year 643 AD, an
Edict issued by Pope declared it illegal to burn witches. However, the increased persecution of witches throughout the centuries resulted in millions of women being burned at the stake. The first major witchhunt occurred in Switzerland in the year 1427 AD. Throughout the 16th and 17th Centuries, witch trials became common throughout Germany, Austria, Switzerland, England, Scotland, and Spain during the Inquisition. Soon after, witch trials began to decline in parts of Europe, and in England and the death penalty for witches was abolished. The last legal execution by burning at the stake took place at end of the Spanish inquisition in 1834.

(b) THE WHEEL

The wheel as a method of torture and execution could be used in a number of ways. A person could be attached to the outer rim of the wheel and then rolled over sharp spikes, or down a hill, to his death. Also, the wheel could be laid on its side, like a turntable, with the person tied to it. The wheel would turn, and people would take turns beating the victim with iron bars, breaking his bones and eventually causing his death. This method was used throughout Europe, especially during the Middle Ages.

(c) GUILLOTINE

The guillotine became a popular form of execution in France in the year 1789, when Dr. Joseph Guillotine proposed that all criminals be executed by the same method and that torture should be kept to a minimum. Decapitation was thought to be the least painful and most humane method of execution at that time. Guillotine suggested that a decapitation machine be built. Subsequently, the decapitation machine came to be named after him. The machine was first tested on sheep and calves, and then on human corpses. Finally, after many improvements
and trials, the blade was perfected, and the first execution by guillotine took place in the year 1792. It was widely used during the French Revolution, where many of the executions were held publicly outside the prison of Versailles. King Charles I was also executed in the same way in England. The last public execution by guillotine was held in France, in June 1939. The last use of the guillotine came in 1977 in France, and the device has not officially been used since. Though the guillotine is less painful, it is not acceptable today as it is primitive and involves the mutilation of the condemned person. After France was admitted to the European Union, death sentences itself has since been abolished in France.

(d) HANGING AND THE GAROTTE

Hanging was a very common method adopted for execution among the various methods available. The prisoner could simply be hanged with a noose, which could lead to death by fracturing the neck. However, if torture was also intended, there could be methods other than hanging with a noose.

In medieval times, if torture was intended, a person would be drawn and quartered before being hanged. For extremely serious crimes such as high treason, hanging alone was not considered enough. Therefore, a prisoner would be carved into pieces while still alive before being hanged. The Garotte was also a popular method of torture, and was similar to hanging. A mechanical device such as a rack or a gag would be tightened around the person's neck, causing slow strangulation, stretching, and obstruction of blood vessels. A device could also be placed in a prisoner's mouth and kept in place by tying and locking a chain around his or her neck.
Hanging is one of the oldest methods of execution and today it is used in some countries as a form of execution. Delaware, New Hampshire and Washington authorize hanging as a form of execution; depending on the convict's sentencing date he or she may be allowed to choose between hanging or lethal injection. Since 1976, three prisoners have been hanged in the United States. Prior to the execution the prisoner must be weighed. The "drop" must be based on the prisoner's weight, to deliver 1260 foot-pounds of force to the neck. The prisoner's weight in pounds is divided into 1260 to arrive at the drop in feet. The noose is then placed around the convict's neck, behind his or her left ear, which will cause the neck to snap. The trap door then opens, and the convict drops, if properly done, death is caused by dislocation of the third and fourth cervical vertebrae, or by asphyxiation. This lengthy measuring process is to assure almost instant death and a minimum of bruising. If careful measuring and planning is not done, strangulation, obstructed blood flow, or beheading often result. The death by hanging however according to most of the medico-jurisprudential writers is result of asphyxia or strangulation and fracture of the neck is an exception (both in judicial as well as suicidal hanging).

(e) HEADMAN'S AXE

This form of execution was quite popular in Germany and England during the 16th and 17th centuries, where decapitation was thought to be the most humane form of capital punishment. An executioner, usually hooded, would chop off the person's head with an axe or sword. The last beheading took place in 1747 in United Kingdom. Later on, and before capital punishment was abolished recently, with a greater interest in humanitarianism, capital punishment became less gruesome than the beheadings and torture that were commonplace centuries before. Lethal
injection and electrocution have become the preferred methods of execution in many countries mostly because these methods appeared to be less offensive to the public and more humane for the prisoner.

(f) FIRING SQUAD

There is no fixed procedure when it comes to execution by firing squad. Usually the convict is tied to the pole, with hands and is blindfolded and a cloth patch is put on heart, or is tied to a chair. In most cases, a team of five executioners is used to aim at the convict's heart. In some countries few of the rifles are loaded with blank bullets and the shooters are not told about it so that the true killer is unknown. Several countries like the Russia, eastern European countries like China, Thailand use this method. It is significant to note that shooting by firing squad is also permitted in India when a death sentence is given by court marshal (This is discussed in detail subsequently). In some states in United States like Utah and Oklahoma, choice is given to the convict whether he should be shot to death by firing squad or by lethal injection. Gary Giimore in 1977, and John Taylor in 1996 were executed by firing squad in Utah,

It is significant to note that the leaders of the third Irish of Germany, who were given death punishment by hanging at the Nuremberg trials, asked for execution to death punishment by firing squad as the former was degrading and they wanted a military death. This reflects that death by hanging is not a dignified method of execution.

(g) GAS CHAMBER

In an execution using lethal gas, the prisoner is restrained and sealed in an airtight chamber. When given the signal the executioner opens a valve, allowing hydrochloric acid to flow into a pan. Upon another signal, either potassium cyanide or sodium cyanide crystals are
dropped mechanically into the acid, producing hydrocyanic gas. The hydrocyanic gas destroys the body's ability to process blood hemoglobin, and unconsciousness can occur within a few seconds if the prisoner takes a deep breath. However, if he or she holds their breath death can take much longer, and the prisoner usually goes into wild convulsions. Death usually occurs within six to 18 minutes. After the pronouncement of death the chamber is evacuated through carbon and neutralizing filters. Crews wearing gas masks decontaminate the body with bleach solution, and it is out gassed before being released. If this process was not done, the undertaker or anyone handling the body would be killed. Nevada was the first state to sanction the use of the gas chamber, and the first execution by lethal gas took place in February, 1924. Since then it has been a means of carrying out the death sentence 31 times. Five States in the U.S.A. authorize the use of the gas chamber as an alternative to lethal injection, viz. Arizona, California, Maryland, Missouri, and Wyoming. In most cases the prisoner is allowed to choose the method of execution, depending on his or her date of sentencing. Eleven people have been executed by lethal gas in the United States since 1976. This method however is expensive and cumbersome. It is also a reminder of hundreds of thousands of Jews who were killed in gas chamber by the Nazi Germany.

(h) ELECTROCUTION

In a typical execution using the electric chair, a prisoner is strapped to a specially built chair, their head and body shaved to provide better contact with the moistened copper electrodes that the executioner attaches. Usually three or more executioners push buttons, but only one is connected to the actual electrical source so the real executioner is not known. The jolt varies in power from State to State, and is also
determined by the convict's body weight. The first jolt is followed by several more in a lower voltage. In Georgia, executioners apply 2,000 volts for four seconds, 1,000 volts for the next seven seconds and then 208 volts for two minutes. Electrocution produces visibly destructive effects on the body, as the internal organs are burned. The prisoner usually leaps forward against the restraints when the switch is turned on. The body changes color, swells, and may even catch fire. The prisoner may also defecate, urinate, and vomit blood. The first electric chair designed for an execution was created by George Westinghouse at the turn of the century. Westinghouse was propositioned by the New York City Correctional Institution to design an electric chair, because many felt that the present form of execution, hanging, had become too inhumane and out-dated. Westinghouse told the correctional institution that the chair's power source was so deadly it would only take five seconds of 1,000 volts to cause death. However, the first man executed did not die after five seconds, but instead took four minutes of a steady stream of power to finally be pronounced dead. During these four minutes the convict started to smoke, both the hair on his arms and head ignited in flames, and blood spilled from every orifice in his face. After this display, the electric chair was considered a failure. Today the electric chair is modernized and is used in eleven States of U.S.A. Arkansas, Kentucky, Ohio, Oklahoma, South Carolina, Tennessee, and Virginia States of U.S.A. authorize both lethal injection and electrocution, allowing some inmates to choose the method. Alabama, Florida, Georgia, and Nebraska, however, use electrocution as their sole means of execution. Since 1976, 144 people have been executed by electric chair.
(i) LETHAL INJECTION

Death by lethal injection involves the continuous intravenous injection of a lethal quantity of three different drugs. The prisoner is secured on a gurney with lined ankle and wrist restraints. A cardiac monitor and a stethoscope are attached, and two saline intravenous lines are started, one in each arm. The inmate is then covered with a sheet. The saline intravenous lines are turned off, and Sodium Thiopental is injected, causing the inmate to fall into a deep sleep. The second chemical agent, Pancuronium Bromide, a muscle relaxer, follows. This causes the inmate to stop breathing due to paralyses of the diaphragm and lungs. Finally, Potassium Chloride is injected, stopping the heart.

Since 1976, many prisoners have been executed by lethal injection in the United States. Lethal injection is now the most common method of execution in the United States with all of the 66 executions carried out during 2001 being by this method. Of the 749 executions in America upto 2000, 586 have been carried out by lethal injection, including those of seven women. China also reported 8 executions by injection during 2000.

Lethal injection was first considered as a means of execution in 1888 when New York's J. Mount Bleyer MD put it forward in an article in the Medico-Legal Journal suggesting that the intra-venous injection of six grains of Morphine should be used for execution of death sentence. The idea did not catch on and New York introduced the electric chair instead (Based on the findings of the New York Commission of Inquiry 1888). It was again put forward in 1977 by Dr. Stanley Deutsch, who at the time chaired the Anaesthesiology Department of Oklahoma University Medical School, in response to a call by an Oklahoma State senator Bill Dawson for a cheaper alternative to repairing the State's
derelict electric chair, Deutsch described a way to administer drugs through an intravenous drip so as to cause death rapidly and without pain. Deutsch wrote to the Senator Bill Dawson "Having been anaesthetised on several occasions with ultra short-acting barbiturates and having administered these drugs for approximately 20 years, I can assure you that this is a rapid, pleasant way of producing unconsciousness". And Oklahoma thus became the first State in the U.S.A. to legislate for it in 1977. Texas introduced similar legislation later in the same year to replace its electric chair and carried out the first execution by the method of lethal injection on December 7th 1982 when Charles Brooks was put to death for the murder. It will be relevant here to mention the observation of this execution procedure. The procedure began at 12.07 a.m. He was certified dead at 12.16 a.m. There was no apparent problem and Brooks seemed to die quite easily. At first he raised his head, clenched his fist and seemed to yawn or gasp before passing into unconsciousness. 36 American States now use lethal injection either as their sole method or as an option to one of the traditional methods.


The Philippines has also decided to use lethal injection for future executions to replace the electric chair and carried out its first execution since 1976 when Leo Echegaray was put to death for child rape on February 4, 1999 and 6 more men have been executed by this method by the end of 2000. Guatemala has also switched to lethal injection after a
botched firing squad execution in 1996 and carried out three executions since then. China also has been experimenting with lethal injection although most executions continue to be by shooting. The present trend seems to be that of favoring execution by lethal injection.

States of America and has been substituted by electrocution, or lethal injection and in thirty four States the execution is carried by lethal injection. These methods being more civilized have been adopted and hanging has been abolished by most of these states in the U.S.A

There is also significant increase in the number of countries those who have adopted the method of execution by lethal injection and today thirty five States use this method.

The following table gives comparative analysis of different modes of executing death sentence:

<table>
<thead>
<tr>
<th>Hanging By Neck Till Death</th>
<th>Shooting</th>
<th>Intravenous Lethal Injection</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Simple to execute</td>
<td>1. Simple to execute</td>
<td>1. Simple to execute</td>
</tr>
<tr>
<td>2. Execution process takes more than 40 minutes to declare prisoner to be dead</td>
<td>2. Execution process takes not more than few minutes to declare prisoner to be dead</td>
<td>2. Execution process takes 5 to 9 minutes to declare prisoner to be dead</td>
</tr>
<tr>
<td>3. Less scientific equipments are required.</td>
<td>3. Less scientific equipments are required.</td>
<td>3. More scientific equipments are required, they are easily available.</td>
</tr>
<tr>
<td>4. Uncertainty as to time required for the prisoner to become unconscious</td>
<td>4. Instant death.</td>
<td>4. Unconsciousness takes place immediately after the application of anesthesia and dies in sleep.</td>
</tr>
</tbody>
</table>
5. May cause lingering death  
6. Most of the time may involve enormous pain  
7. Has been abandoned by most of the countries considering it not to be a civilized mode  
8. Mutilation involved.  
9. Not a controlled way of execution. It depends on various factors.  
10. Not generally swift  

5. Instant death  
6. Pain may hardly be involved.  
7. Most of the countries provide for the option of either lethal injection or shooting.  
8. Mutilation involved.  
9. It is always under control and does not depend on the factors like physique etc. of the convict.  
10. It is comparatively swift and painless  

5. Not a lingering death.  
6. Pain only as result of needle prick.  
7. It is being accepted now to be most civilized mode of execution of death sentence.  
8. No mutilation involved..  
9. It is the best controlled way of execution.  
10. It is the painless and swift method of execution.

(5) CRIES FOR AND AGAINST CAPITAL PUNISHMENT: A VISUALIZATION

The problem of Capital - Punishment has remained controversial in every nook and corner of the world. It has got some special significance in India today, when the two diametrically opposed schools are pleading, for and against its Abolition and Retention.

The controversies are not confined to the commentators alone, but its reflections may also be found in the judicial pronouncements of different High Courts and the Supreme Court of India.

An humble attempt has been made in the following pages to examine
the Controversy, in the light of changing Socio-Economic conditions in the country and suggest suitable measures for certain reforms.

As mentioned above, the sentence of death has been the subject of heated debate in different countries of the world for the last so many years. During this period both retentionists and abolitionists, have developed ritualistic arguments on the key issue of the controversy. But the controversy has not been settled either by events, by legislation, or by changing ideas. Abolitionists and Retentionists continue to throw statistics at each other.

Thorstein Sellin has demonstrated a scientific study of crime rates and trends which shows that the abolition or the re-establishment of capital punishment in a country has never led to an abrupt and appreciable rise in criminality. This is a strong argument for the abolitionists. The figures themselves, however, must be interpreted with particular case, because of the conditions peculiar to each country, the forms and trends of delinquency and the nature, makeup and the action of the bodies responsible for investigation, prosecution and punishment under each system. The problem of Death Penalty i.e., the controversy about its retention and abolition is to be studied in the list of new circumstances and climate of the 20th Century.

In India, no issue regarding the abolition of capital punishment was raised in the Assembly until 1931, when one of the members, Sri Gaya Prasad gave a notice of motion, for circulation of the Bill but it was defeated.

Subsequently in 1933, a motion was adopted in the Legislative Assembly of India at Shimla, granting leave to introduce a bill to abolish the capital punishment for offences under the I.P.C. It seems that the Bill was never moved, although leave was granted to introduce the bill.

The government's policy on capital punishment in British India prior
to independence was clearly stated twice in 1946 by the then Home Minister Sir John Thome, in the debates of the Legislative Assembly, "The govt. does not think it wise to abolish capital punishment for any type of crime for which that punishment is now provided"\textsuperscript{59}.

Even after India attained independence, the government's policy on capital punishment remained unchanged and the then Home Minister declared in Legislative Assembly on 29th March 1949, that the present is not considered as an appropriate time for the abolition of Capital Punishment\textsuperscript{60}.

In the year 1956, the govt of India sought the opinion of all the states in India on the issue of abolition of Capital Punishment. It is learnt that all the states, emphatically opposed abolition of capital punishment.

Capital punishment was debated in Indian Parliament for the first time on 25th April 1958, then a resolution for the abolition of capital punishment was moved. But out of 14 members of Rajya Sabha, 9 supported the retention of capital punishment.

The second time Capital punishment was debataed in Rajya Sabha on August, 25,1961, this was in the form of a resoltuion to abolish capital punishment but this time, out of nineteen members who took part in the discussion in Rajya Sabha, only six members advocated the abolition of capital punishment.

Third time capital punishment was discussed, when a resolution was moved in the Lok Sabha by a member of Parliament on 21, April, 1962, for its abolition. But this time out of fourteen members only five spoke for the abolition of capital punishment.

Thus, on all the three occasions the abolitionists did not make a deep impression. Not only were the members in favour of the retention of
capital punishment but some of them also suggested legislation for the award of capital punishment for some additional offences like, Adulteration of Food and Drugs, etc.

However, very recently under the title of "Death Penalty may be Abolished" the Times of India\textsuperscript{61} writes: The South Asian Human Rights Documentation Centre (SAHRDC) has suggested to the Constitution Review Commission that it should recommend abolition of death penalty. However, till it is abolished, the SAHRDC has asked for strict and explicit standards which comply with the emergent international consensus towards minimization of the death penalty. The commission had approached the SAHRDC for suggestion on the death penalty.

(i) Arguments for Retention

The Law Commission of India in its 35th report 1967, favoured a cautious approach and pleaded its retention as an exceptional penalty. It maintained that the problem of retention and abolition could not be discussed without going into the conditions prevailed in India. Thus the retentionists of death penalty emphasize that all their arguments have to be considered in the light of conditions prevailed in India. The arguments that may be valid in respect of other countries may not necessarily be valid for India. The position regarding law and order may vary from state to state and even within a state. India is a vast country and the large number of her population is illiterate. The extra legal factors that act as a check on murder in western countries such as education, homogeneity, prosperity, viability and awareness of fault are unfortunately absent in many parts of India. The various arguments put forth by retentionists are as follows: -

(1) The first basic argument for retention of death penalty is that it is an indispensable deterrent to murder. "Remove it", and they say,
"otherwise no one will be safe", murderers will stalk in the country undeterred. The weak and aged will lose an essential protection.

The contention of the advocates of death penalty regarding potential murderers is based upon the answer to the question, "what is that by which every man or woman fears most?"

It is the knowledge that, penalty for murder is death, that holds back the hands of countless would be murderers. The love for life and its opposite the dread of death are most firmly embedded in human beings.

"For kings and for beggars for the justly doomed and for the unjustly, says Carlyle, "It is a hard thing to die".

They argue that the majority of murders are committed in India by the poor and backward classes. Prison conditions are often better than conditions prevailing in their homes and for such persons, death is the only deterrence. Moreover, life-imprisonment is inadequate to replace death penalty, particularly because of the practice of earlier release. There are several cases in which hardened criminals even though they return after several years, commit the same crime even on that very day of their release.

Take the case of a wife, such are actual cases, when she is in love with somebody, but if she takes divorce, she finds herself illegible to get the property of her husband therefore the only way to enjoy the paramour and the property is to kill the husband. The poor man's wife is raped by a richman, even children under 6 or 7 years are ravished, such criminals should be awarded death penalty and so also adulterators of food and drugs and medicines.

A prisoner poisoned his brother to get possession of 40 Bighas of land. The brother had no wife and children. He was sentenced to three years imprisonment. Because he was to get 40 bighas land on release from
prison, he was happy to undergo three years imprisonment. Many kill their brothers, uncles, wives and other relatives, a son kills father for mere gain of a property.

Retention of death penalty creates conditions for non commission of the crime, i.e. acts as a deterrent, so death penalty has to be retained as a necessary evil.

In 1958, the then Home Minister Mr. G.B. Pant said by abolition of death penalty "we will be giving a sort of right to kill without punishment", apart from it, we shall be inviting dacoits to commit more murders by abolition of death penalty.

There are cold blooded and calculated murders that have been thought of and planned out months ahead, the abolition of death penalty in such cases would not be any use to society. Hence this is not the time opportune to abolish death penalty.

Moreover, when death penalty is going to be executed, and a person goes to be hanged, so many mercy petitions are submitted to the government. It is worth considerable, "why is it so in respect of one offence alone there are so many who come forward to ask for mercy being given to a prisoner?" This proves the deterrent effect of death penalty.

Thus, there are criminals of the deepest die who can never be deterred by anything and there are many others who may not fear imprisonment but the natural instinct for living may still inspire fear in their minds. The majority of judges, members of Parliament and Legislatures and members of the bar and police officers, are definitely of the view that deterrent object of death penalty is achieved in a fair measure in India.

Retentionists contend that death penalty is far more powerful and effective deterrent than life imprisonment and that it would discourage
criminal conduct on the part of those who are aware of its existence. Stephen says, "no punishment deters man so effectively from committing crime as punishment of Death".

The Royal Commission report on death penalty said, "Prima facie, the penalty of death is likely to have a stronger effect as a deterrent to normal human beings, than any other form of punishment and there is some evidence, that there is infact so. Therefore, if the death penalty is removed, the fear that comes the way of people committing murders will be removed".65

All sentences are awarded for security and protection of society, so that every individual, as far as it is possible, may live in peace. Taking a realistic view, so long as the society does not become more refined, death sentence will have to be retained. The security of the society as well as individual liberty of every person has to be borne in mind. Capital punishment is needed to ensure the security.66

(2) Retentionists say that Death Penalty is a social retribution and a state has a right to punish the worst criminal by death.

They say that the criminal commits a terrible crime and as a result, an imbalance creates in society. In order to equalize or to restore the balance, the criminal ought to die otherwise the friends and relatives of the victim as well as the general public who demand and expect satisfaction, may take the law in to their own hands and may even lynch the criminal. The supporters of death penalty say that, it is justified to forfeit the life of a person, who takes away another's life. David Dressier says, "a person who kills another must be eliminated from the society, therefore, fully merits his execution".

In the Debate on 25 April 1985, it was stated that for the maintenance
of law and order in the country, capital punishment is necessary. Life and property should be made secure.

At the same time one should not revert back to the old barbaric and pre-historic practice of, "an eye for an eye and a tooth for a tooth". The then Home Minister G.B. Pant said that, "We do not stand for this dictum", but according to the modern science of penology, all sentences are awarded only for the security and protection of society. He further said that there are several countries which abolished capital punishment but after some experience they had to revert back to the old system and revive the capital punishment which they had abolished. Austria and New Zealand and England are instances in point and nine states of U.S.A, where they had restored the Death Penalty.  

Thus, abolition of death penalty may do more harm to the country than we can visualise. There are certain cases, where a death penalty will not be out of proportion to the nature of the crime committed.

(3) The retentionists have held that there are certain types of crimes which are of such a serious nature, so brutal, monstrous and inhuman that the community may disown the particular individual as an human being. In such -a case death penalty might be considered the right type of punishment. In most of the cases the murders are committed with predetermination. The dacoits, in our country, enter the house and rape the woman in presence of her husband. They stab them in the stomach, and kill children. Should, such a brutal murder be pardoned?

Another type of gruesome crime is, as we read daily in news papers, that girls aged 4 to 10 years are raped brutally. They are cut into pieces and thrown into tanks after rape. After all, there is a class, which might be called professional murderers and why should, so much sympathy be shown
to them?

Where a man goes about doing heinous things, raping children, committing murders etc. should we say that he should not be put to death. Another serious nature of cases is of adulteration of medicines, death penalty should be awarded in this case and also in cases of food adulteration.

We also see so many cases of murder driven by religious fanaticism i.e., the life of a person is taken by another person because of a certain belief and that his religion demands that the non-believer or the believer in any other faith be killed and that if he commits such a crime, he would be rewarded in heaven.

There is a superstition that the Gods or Goddesses would be pleased if a certain person or even if it be child of that very person is killed. Cases are not lacking where virgin girls are sacrificed for getting a child by another lady.

As regards the miscarriages of justice, this is very rare, there may be one or two cases in hundred or a thousand where a wrong person is punished. Mens rea is very important ingredient of murder and unless mens rea is proved, no death penalty is awarded. Again, error may be corrected, in appeal, by superior courts.

In our country, we have many other safeguards too. Whenever possible, instead of death penalty, the lesser punishment is given, and in cases of difference of opinion among judges over the question of death sentence, it is not inflicted.

Another argument of retentionists is that if it would be abolished, the relatives and friends of the murdered man would take law in their own hand and wreak-vengeance from the murderer, by either killing him or other members of his family, and this would give rise to a chain of murders and
if death penalty is properly carried out, instead:; of burtalising society, it satisfies the sense of justice and provides social satisfaction and a sense of protection.

(6) The defenders of death penalty say that there are gangs and in murder cases, where witnesses have to give evidence, the moment death penalty is removed, every witness is murdered by the gangsters and it becomes very difficult to get the evidence. If these gangs are there, people will be afraid to come and give evidence. Once death penalty is removed, witnesses will not be safe even in the witness box.

(7) Experience of other countries would not be conclusive for India. There is greater danger in India of increase in violent crimes if death penalty is abolished, particularly in respect of the professional criminals.71

In this connection it may be noted that in India, Cases of dacoity and goondaism accompanied with murder or attempt to murder are frequent in certain areas. Moreover many countries had to re-introduce capital punishment after abolition as in Australia, New Zealand, England and nine states of U.S.A.72

(8) Supporters of death penalty say that it is needed as a threat or warning to potential murderers and if they were kept alive, would remain a threat and would endanger the lives of fellow citizens if they were paroled or pardoned and, thus, allowed to return to a life in freedom. There have been cases when murderers, after coming out of prison, pursued and attacked the man who got them convicted. Society must be protected from the risk of second offence by a criminal who is not executed and released or he may escape.

Life imprisonment as a substitute for death sentence would be too risky and inadequate, nor would the threat of that penalty have the same
power to inhibit murderous impulses\textsuperscript{73}.

(9) Capital punishment marks the society's detestation and abhorrence of the taking of life and its revulsion against the crimes. It is supported not because of a desire for revenge but rather as the society's reprobation of the grave crime of murder.

By emphasising the gravity of murder, capital punishment tends to foster the community's abhorrence of the crime. This decreases the incidents of murder in the long run\textsuperscript{74}.

(10) With reference to the communal riots in India, it would be unwise for us to think in terms of the immediate abolition of capital punishment\textsuperscript{75}.

(11) If we want to abolish the death penalty we have to change the entire pattern of our living and the entire structure of society. We are living in a world where people may go to any extent of crime for very simple reasons.

(12) Retentionists have argued that death penalty exerts a eugenic influence.

(13) In a seminar organised by Govt. of India, during May 8-10, 1969, at Delhi on the subject of "Criminal Law and Contemporary Social Changes", a substantial number of the members submitted that death penalty should be abolished. They felt that not only the experience of other countries but also the experience of the period when capital punishment was not in force in - Travancore state (1945-1950) and in Goa (1876-1963) showed that the existence of capital punishment as a punishment for murder did not, in any way, operate as a deterrent against commission of murder. But the study group further reported that certain members of the group strongly pressed that the capital punishment is not only to be retained but it should also be extended to cover those persons who have committed serious offences such as white collar crimes, such as cheating in the construction of buildings
and thereby endangering the lives of thousands, manufacturing drugs which are deleterious to human health, violation of foreign exchange regulations involving a loss of crores of rupees to the country's economy.

Thus, the study groups' recommendations are quite opposite in themselves. This shows that the real importance of the deterrent value of capital punishment is realised in their hearts even when they are inclined to support its abolition.

Moreover, the matter of abolition or retention of capital punishment in India was examined by the Law Commission of India. The Commission after analysing the available materials and assessing the views of the abolitionists & retentionists concluded as under:

"Having regard, however, to the conditions in India, the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country, at the present juncture, India cannot risk the experiment of the abolition of capital punishment".

Law Commission under the Chairmanship of Justice Jayachandra Reddy, also favours the retention of death penalty in India on similar grounds.

Even the countries which abolished the death penalty have either retained it for certain specific offences or reintroduced it in the wake of peculiar circumstances which caused later on. It was observed by their lordships of the Supreme Court, "in England death penalty was retained for high treason in the Sherman Bill of 1956. Even at present for that offence death penalty is a valid sanction. In the after math of assassination of Prime Minister Bhandaranayke in 1959 Ceylon hurriedly introduced capital
punishment for murder owing to similar considerations. Israel sanctioned death penalty for crimes committed against the Jewish people & prosecuted the notorious Jew 'Baiter Adolf Henman' in 1962...

The Supreme Court of America declared the death penalty as ultra vires of the constitution in Furman vs. Georgia on 29.06.1976. But this view was repelled subsequently by the chosen representatives of the people in as much as the legislatures of the 32 states reintroduced the capital punishment for murder and other various offences.

So, if guilt is clearly established beyond a reasonable doubt under circumstances that guarantee a reasonable opportunity for the defendant to confront his accusers, to cross-examine witnesses, to present his case with the assistance of professional counsel, and in general to enjoy the benefits of due process of law; if in addition he has been given the protection of laws that prevent the use of torture to extract confessions and is provided immunity against self incrimination; if those who are authorized to pass judgment find there were no excusing or mitigating circumstances; if he is found to have committed a wanton, brutal, callous murder or some other crime that is subversive of the very foundation of an ordered society; and if, finally the representatives of the people, excusing the people's sovereign authority, have prescribed death as the penalty for that crime, then the judge and jury are fully justified in imposing that penalty, and the proper authorities are justified in carrying it out.

Moreover, I am of the view that death penalty not only be maintained but be extended too in some other areas such as dowry killings, infant-rapes, gang-rapes, adulteration of food and drugs, cheating in construction of building, and thereby endangering the lives of thousands etc. These offences have emerged in a horrible shape today. Dowry cases have travelled
from voluntary giving to killing, rape has come down on 10 or 15 months baby, adulterated drugs, in themselves are distributing death. Crime rate is increasing by leaps and bounds. Less heinous crimes are also giving alarm of ensuing great danger as is the case of dowry. At this juncture, it would, as I think, be improper to eliminate death penalty. Time has not yet arrived for its abolition. Instead, we must think over its expansion.

(ii) ARGUMENTS FOR ABOLITION

“Since every saint had a past and every sinner a future, never write off the man wearing the criminal veneer attire but remove the dangerous degeneracy in him; restore his healing of his fevered; fatigued or frustrated inside and by repairing the repressive, through hidden injustice of the social order which is vicariously guilty of the criminal behaviour of many innocent convicts”

Justice Krishna Iyer

There is an International Covenant on Civil and Political Rights which encourages the abolition of death penalty and many countries have even abolished it despite the fact that today the human life, in some states, has become a cheap commodity. Death Penalty puts an end to all mortal ills and leaves no room either for sorrow or joy. In present, in our country the debate on capital punishment has assumed new dimension. The abolitionists have moved their movements with more emphatic arguments. They maintain that the society can control its criminal elements without resorting to this extreme type of punishment. The various arguments in favour of abolition are :-

(1) Death penalty is irrevocable and irrepairable and where a person is wrongly convicted and sentenced to death, the greatest injustice results
and such execution will amount to a blot on judicial conscience. The administration of justice is an human function and human beings are not infallible, an error may occur and if an error does occur in a capital case, it cannot be corrected after the sentence of the court has been carried out. It can be tolerated only when there is absolute certainty of the guilt of the accused and such certainty is not possible. Why not scrap Sec. 194 of IPC\textsuperscript{82}, if judicial error is ruled out? The fact that it remains on the statute book amounts to theoretical admission of miscarriage of justice and judicial error in imposition of death is a crime beyond punishment\textsuperscript{83}. Majority opinion in Bachan Singh's case\textsuperscript{84} also admits such possibility but proceeds to say that, "these incidents can be infinitesimally reduced by providing adequate safeguards and checks". It is respectfully submitted that this is a strange logic which in its essence means that it is alright as long only very less number of innocents are executed, and this amounts to negation of well accepted principle of administration of criminal Justice which says, \textit{let hundred guilty escape, but let not one innocent be punished}.

(2) The concept of innocence in relation to death penalty deserves to be elaborated. It has two aspects, firstly, those who did not commit the crime at all but are sentenced to death because of judicial error, secondly, the cases, where the accused committed the crime but did not deserve death penalty, because of absence of special reasons. May be the execution of the first category of innocents is minimum and rare, but undoubtedly the incidences of execution of second category of innocents are not rare, because of the subjectivism in perception of special reasons by various judges. Judicial error, also has two aspects, firstly, error with reference to a question of fact; secondly, error with reference to a question of law. Justice Bhagwati opines that error may result due to more than one reasons, such as improper investigation, perjury, police mistakes etc\textsuperscript{85}. Torture of
the accused appears the only method of investigation that the police employ. Professor Baxi observes that ".... even with the greatest possible understanding, sympathy and concern for the plight of the Indian Police, it should be possible to reach a hypothesis that custodial violence or torture is an integral part of police operations in India".

Judicial history does not lack in cases where grave errors in judgments were committed and innocent persons were hanged. Prof. Borchard, has drawn attention to 65 cases, from England & US, of persons convicted of crimes of which they were subsequently proved to be innocent.

Prof. A.L. Goodhart said, "It would be a terrible thing if a man has been hanged for a crime which he has not committed, in such a case law itself would be a murderer".

In Shankarlal Gyarasilal Dixit vs. State of Maharashtra, the sessions court and the High Court convicted the accused of the crime of rape and murder of a 5 year old girl, and both courts imposed the death sentence on the accused. The Supreme Court, reappraising the evidence, acquitted him. This seems a definite demonstration of judicial fallibility.

This possibility of error is not the concern of only those who are outside the justicing system, but it appears to have agitated judges too. Ten persons were sentenced to death for the murder of four. The High Court, in brief order acquitted them all. Chanrachud J. speaking for the court said, "if ten persons sentenced to death could be acquitted on mere assumptions, there is a fear that ten, who were not guilty, could be convicted by the same indifferent process." 

Though juries strain every nerve and spend every bit of their energy before awarding death penalty, yet the slips made by the justices cannot be ignored. Lord Shaw said, "every human judgment is mingled with human
error and in the issue of life and death, no judge should be charged with an irrevocable doom.

The possibility of an innocent person being subjected to the ultimate penalty is no longer an abstract proposition rooted in a vague premise. It has, in fact, achieved legislative confirmation.

(3) Capital punishment is looked upon as the only most effective deterrent. But the **deterrent effect of death penalty is falsified by statistics and logic**. Justice Bhagwati clearly established that it is not the severity of the sentence, it is certainty of detection and punishment that acts as deterrent\(^9^0\).

Why the deterrence of death penalty in sec. 302IPC failed to contain recurring communal murders Hyderabad (A.P.) and the murders that are committed by the fundamentalists & terrorists in Jammu & Kashmir. In fact, crimes are committed due to more than one reason.

Moreover, if deterrence is the object, then the family of the offender should also be punished, since this would increase the deterrent element.

The British & the Canadian white papers as well as the work undertaken by the European Council, the committee for the prevention of crime created by the United Nations and the European Parliament, all these studies came to the same conclusion. *Violent crime follows a curve that is a function of social and economic conditions and the evolution of the moral values of society at any given moment. It is unaffected by the existence or absence of capital punishment. In other words, the death penalty does not reduce crime, nor does its abolition increase it.\(^9^1\)

By comparing California, which had the death penalty, with its neighbouring state, Oregon, which had abolished it, or Arkansas with Missouri or New York with Pennsylvanian, these studies came up with the
surprising result that in most cases, where the death penalty had been abolished, the homicide rate was lower than it was where it had been retained. As a result, many criminologists, & sociologists have concluded that "the death penalty has no discernible effect as a deterrent to murder."\(^92\)

A survey of experts from the American Society of Criminology, the Academy of Criminal Justice Sciences, and the Law and Society Association showed that the overwhelming majority did not believe that the death penalty is a proven deterrent to homicide.\(^94\)

Moreover, the so called deterrent effect of capital punishment does not operate on all kinds of murderers. The death penalty will have no deterrent effect upon those persons, who commit murder on account of serious physical, mental, and cultural deficiencies or those who commit murder on account of intensely difficult or emotional situations.

In England in the 18th Century hangings were public, yet there was no evidence that the crime rate declined. The evidence placed before the Royal Commission of 1866 in England, indicated that of the 167 convicted of death sentence 164 had witnessed public executions previously.

Examining world wide data on homicide, Norwal Morris, who prepared a report for the United - Nations, stated, "all the available data suggested that presence or absence of death sentence does not appear to affect murder rate and both are not interdependent.\(^95\)

A study concerning six decades, 1910-1962, undertaken in the state of Ohio, in U.S.A. and California released in 1979, establish that capital punishment did not act as a deterrent to murder. Thus, if deterrent effect is not achieved then why it is retained, Justice Krishna Iyer is also of the same view.

To those who say that capital punishment has a statutory deterrent effect, it may be said that history refutes it, the experience of other countries
refutes it, and reason refutes it. Capital punishment not only offends against the fundamental ideals of the sanctity of human life, but also operates to destroy the very purpose for which it is inflicted.

The recent researches in criminology have established that murders are committed due to the operation of multifarious factors sometimes beyond the control of the murderer. Murderers may be men or women, youths, girls, they may be normal or abnormal, feeble minded, epileptic, or insane. The crime may have occurred so much in the heat of passion as to rule out the possibility of premeditation or it may have been well prepared and carried out in cold blood. The emotions springing from weakness as often from wickedness, may arise due to cupidity, lust, jealousy despair, pity, self-righteousness, rage of fits, fear, anger, revenge etc. Therefore will be monstrous to inflict death on all persons irrespective of subjective and other considerations of the offenders.96

The same is true of those who commit murders as a result of defective personality or highly unfortunate social environment. Nor can the death penalty be supposed to act as an effective deterrent in the case of the professional gunman. He realises that even if sentenced to death he may have this sentence commuted to life imprisonment and may ultimately be pardoned and restored to a life of freedom.

The jilted lover who kills his sweet-heart, the jealous paramour who murders his mistress and the disillusioned husband who fatally stabs his faithless wife are all rash, impulsive and inflamed persons beyond control. Only after the act has been committed they reflect upon the futility and enormity of their behaviour. No question of deterrence arises for these classes.

Inspite of the retention of Capital Punishment, murders did take
place. Sometimes murders are committed by insane, deterrence cannot be achieved in such a case, for, as he overcomes his insanity, he becomes a normal person.

There have been cases in India and abroad, where people out of mercy have given poison or some injection to their near and dear ones to end their agony. Should such persons be sentenced with capital punishment? You must look to the criminal and not to the crime itself only.

Punishment of death is selective and therefore, not deterrent in effect. It is not in all cases of murder that death penalty is awarded. In India out of every 110 prosecuted, only 2, were hanged or the number executed varied between 1, and 1.8%. What deterrent effect can there be in such circumstances?

The evidence shows that absence of the death penalty does not increase crime. In 22 countries that have completely abolished it, there has been no increase in the rates of homicide. In Goa and Travancore where capital punishment was not in force for many yrs., evidence shows that absence of death penalty did not increase crime.

Prof. Gillin says, "Our experience points out that death penalty is not necessary for social protection."

Thus, Sellin rightly says, "The death penalty probably can never be made a deterrent."

(4) On the question of equality, among other grounds, Justice Bhagwati based his argument that predisposition of Judges to Capital Punishment results in inequality. Justice Bhagwati, thus, sums up the whole situation in the form of a question that may be asked by the accused: Am I to live or die depends on the way in which the Benches are constituted?

Prof. Blackshield also demonstrated after a careful study that there
is inconsistency in the confirmation of death sentences by the Supreme Court, and concluded that." where life and death are at stake, inconsistencies which are understandable may not be acceptable."¹⁰¹

A law which in practice sends poor and illiterate (who can't defend the case by hiring best legal expertise) to gallows cannot be regarded as not violative of equal protection of laws. The observations of Justice Douglass in *Furman vs. Georgia*¹⁰², is worth quoting:

"In a nation committed to equal protection of the laws there is not permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is a member of a suspect or unpopular minority, and saving those who by special position may be in a more protected position. In ancient Hindu Law a Brahmin was exempted from capital punishment, & under that law generally, punishment increased in severity as social status diminished. We have, I fear, taken in practice the same position, partially as a result of the ability of the rich to purchase the service of the most respected and most resourceful legal talent in the Nation."

As far as U.S. is concerned, Richard E. Dieter, who has been Executive Director of Death Penalty Information Centre, has informed that the problem of racial disparities in the applications of the death penalty which existed before 1976 has not been eliminated. 82% of the murder victims in the case resulting in execution since 1976 have been white,¹⁰³ even though whites are victims in less than 50% of the murders committed in the U.S.¹⁰⁴ Since 1976, 84 black defendants have been executed for the murder of a white victim, but only 4 white defendants have been executed for the murder of a black victim.¹⁰⁵
In 1990, the U.S. General Accounting Office conducted a review of the best studies concerning race and the death penalty. They concluded that "Race of Victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e. those murdered whites were found to be more likely to be sentenced to death than those who murdered blacks".

**Racial disparities** in the death penalty continue in various ways:

- In Maryland, 87% of those on death row are African Americans.\(^{106}\)
- In Kentucky, 100% of those on death row are there for the murder of a white victim, despite the fact that there have been 1,000 African-Americans murdered in that state since 1976.\(^{107}\)
- In New Jersy, a recent death penalty study by the state's Supreme Court found, "strong and consistent biases "against black defendants.\(^{108}\)

Back to home, Justice Bhagwati observed that, "there can be no doubt that death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived section of the community and the rich and the affluent usually escape from its clutches."\(^{109}\)

(5) So far as the object of the punishment is concerned, it is worthwhile to quote penologist Beccaria\(^{110}\) - "The purpose of sentencing is not to torment the criminal nor undo his crime but the end of the punishment is to deter others and to reform the criminal. The punishment should be such which makes strong and lasting impression on the minds of others with least suffering to the criminals.\(^{111}\)

The aim of society should be to reform the criminal. This can be easily done because we have entered a civilized age. There was a time when man was uneducated, illiterate and savage and it required severe
punishment to set criminals on the right path. But now man should open his eyes and he must realise that those days have become part of distant memory when "an eye for an eye" and "a tooth for a tooth" fulfilled the requirement of justice. But justice no longer lies in retribution. It demands the criminal's induction into a new social environment devoid of those circumstances that incited him.

(6) When "an eye for an eye and a tooth for a tooth" is a practice, even then we don't want the rapist to be sexually assaulted, nor burn down the houses of the arsonists i.e. to pay in the same coin yet we think it natural to insist on killing the man who has killed, Why?

Those who believe in the abolition of capital punishment, cite moral and ethical grounds in support of their arguments. They feel that the giver of life is Supreme Creator and that he alone has the right to take it away. It is further argued that capital punishment leads only to the destruction of the sinner and not the sin.

(7) As Human life is complex and actuated not only by fear, but also loyalty, greed, lust, and by many other factors, dissenting with the majority view Mr. Justice Krishna Iyer pleaded for abolition of death penalty. He observed:

"Since every saint had a past and sinner a future, never wright of the man wearing the criminal veneer attire but remove the dangerous degeneracy in him, restore his retarded human potential by holistic healing of his favoured, fatigued or frustrated inside and by repairing the repressive, though hidden injustice of the social order which is vicariously guilty of the criminal behaviour of many innocent convicts."

Capital punishment should be abolished because it is a legalised,
revengeful and cruel destruction of God's most wonderful creation, the human being.\textsuperscript{113}

It will be greatest of Dharma to do away with that which takes away the life and thus give people a chance to become better, to become improved, giving a chance to people to live in amity, brotherhood, love and affection.

Among the teachings of various religions, Christianity commanded, "Thou shalt not kill". While Islam laid down that if the relatives of a victim accept compensation and pardon, the offender should not be hanged.

The principle of, "middle path", preached by Lord-Buddha was supposed to support the argument to abolish capital punishment.

(8) It may be argued, how can a second death bring satisfaction or restore the balance which was tilted by the first murder? Capital punishment, in fact, brings no sense of relief or satisfaction to the victim's family. On the contrary, by a well planed and properly executed prison labour, the murderer may be made to support the victim's family and dependants as it is being done in Sweden and other western countries. This is the right way of sympathising with the victim's family. Neither execution of murderer pleases the conscience of the community. It appears, therefore, that capital punishment cannot be supported on the theory of retribution.

(9) The argument that if capital punishment is not awarded to murderer there is a possibility of more killings by way of satisfying feelings of revenge need not be considered as an obstacle for abolition of capital punishment, particularly in the social context of this country because in India such cases are few and even in countries like U.S.A. where lynchings were once common are now on decline.

(10) The death penalty is often defended on the ground that it is less expensive than the imprisonment. But although the maintenance cost per-
prisoner may be high but the life of the prisoner cannot be taken on this ground. Life is not so cheap and cannot be weighed or measured in terms of money.

It sounds somewhat ridiculous to advance such theory of cost in a social welfare state.

Secondly, if this applies to those who are condemned to die, it may be applied to all prisoners who are being maintained at public expenses.\(^{114}\)

(11) Capital punishment is morally indefensible. Society has no right to take the life of any person. It is morally wrong for the state in the name of the law to take life deliberately.\(^{115}\) It may be conceivable that capital punishment may be viewed by the society as a means of protecting itself by eliminating its enemies. This contention is not entirely valid in as much as offenders usually sentenced to death are not necessarily habitual criminals.

John Bright has remarked that, "capital punishment, whilst pretending to support reverence for human life, does in fact tends to destroy it." So capital punishment is morally wrong because it is barbarous and out of step with modern morality and thought.\(^{116}\) By eliminating the criminal, the state does not erase the crime, but repeats it.

(12) One of the abuses of capital punishment is that it is not reformative at all. In fact, capital punishment indicates the impossibility of reformation. Death penalty certainly prevents reformation. Thus an view of the growing modern conviction that the principal object of punishment is to reform the offenders when it is possible to restore him to society, the death penalty is found to be entirely out of touch with the spirit of new penological thought.

(13) There may be some criminals so hardened and inveterate as not to give much hope of reformation. But it is possible to make a positive forecast without trial that a particular offender is irredeemable. This argument applies with
special force to crimes committed in a state of passion, which appears as quickly as it disappears leaving the criminal a victim of capital punishment. Even brutal murderers who were sentenced to imprisonment when they were reformed, proved to be very good citizens.

The recent researches in criminology have established that murders are committed due to the operation of multifarious factors, sometimes beyond the control of the murderer.

(14) Death sentences are known to have been given on political reasons i.e. to suppress political rivals. So there is danger of its misuse for this reason.

(15) Under the Indian law of murder, a person may find himself condemned to death on vicarious or constructive liability for the offence committed by someone else, though he might not be conscious of having done any killing or participating in killing. All that the court has to find is that the accused was one of the unlawful assembly, whose common objective was to commit murder, although there may not have been any common intention and participation by the accused in the actual commission of that offence. This shows, how harsh our law is and the amount of incalculable harm it does to innocent persons.

(16) Moreover, all one must notice the distinctive things about the kind of killing that capital punishment always involves –

a. When the state kills a prisoner, no one else's life, limit or liberty is therewith pressurized, saved or restored nor is any one's death or harm prevented.

b. When the state kills a prisoner, it kills an human being whose abilities, moral development and capacities for autonomous conduct are not significantly different from other prisoners & most other persons.
c. When the state kills a prisoner, an alternative is available - incarceration, isolation, temporary sedation - that would effectively reduce the risk of harm to others.

d. When the state kills a prisoner, it does not think what the prisoner prefers or what the future life of that prisoner would have been if he had not been killed.\textsuperscript{117}

(17) It is often argued that sentence of death injures the family of the offender. It leaves the family of offender in misery and poverty by taking away its source of income and breadearner. In Mahabharata there is a discussion between king Dyumatsena and his son Prince Satyawan. Prince says, "By killing the wrongdoers, the king kills a large number of innocent people as his mother, wife, father, children, all are killed. Thus, their relatives should not be punished by infliction of capital punishment.

It violates our humanitarian sentiments. Death penalty is a form of cruelty and inhumanity unworthy of a human civilisation. Society places upon a certain individual, this brutalizing task of taking life, that no one of its members wishes himself to take. Men can take life in self defence or in the heat of passion and have a relieving sense of justification, but to take life in cold-blood causes all the humanitarian sentiments developed in thousands of years to come a setback.

(18) Capital punishment is a calculated murder by the state as the date of hanging is fixed and told to the condemned person in advance.\textsuperscript{118} It is also not uncommon for men and women to sit in the death house for several years before their cases are finally settled by one way or the other.

Moreover, Capital punishment is inhuman, cruel and unjustified. Revengeful and cruel destruction of a fellow human being, even if it is legalised, does not seem to be justified. The plea that death sentence is
painless does not have any merits at all. Even the most efficient methods of execution do not result in instantaneous death. Besides, the prisoner's mental agony during the period between the pronouncement of the sentence and execution is incomparable. Life in a death cell is no life but death itself. The kith and kin of the condemned also remain mentally tortured.\(^{119}\)

If protection of society from criminals is the object of the punishment, then the state should rather devise other effective prophylactic methods of nipping the crime in bud than to do away the criminals as poisonous snakes are beaten to death.

Thus, now social conditions have completely changed since the time when capital punishment was considered almost indispensable. Human life was, then, very cheap and undignified but now with the concept of a social welfare state, this punishment is neither necessary nor desirable.

**ABOLITIONISTS FOR ALL CRIMES**

*(Countries whose laws do not provide for the death penalty for any crime)*

<table>
<thead>
<tr>
<th>Country</th>
<th>Date of Abolition</th>
<th>Date of Abolition for Ordinary Crimes</th>
<th>Date of Last Execution</th>
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<tr>
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<td>1984</td>
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<td>Costa rica</td>
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<td>Czech and Slovak</td>
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<td>Micronesia (federated states)</td>
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<td>Sao Tome and Principe</td>
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<td>Venezuela</td>
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Total 44 countries
* Date of last known execution
** No executions since independence

_Courtesy: Amnesty International_

**RETENTIONISTS**

_(Countries and territories which retain and use the death penalty for ordinary crimes)*

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*Courtesy: Amnesty International*
(6) DEATH PENALTY FOR DRUG OFFENCES AND INTERNATIONAL HUMAN RIGHTS LAW

According to Amnesty International, the death penalty has been abolished in law or practice in 133 states. This figure includes countries that are abolitionist for all crimes, abolitionist for ordinary crimes (offences committed during peacetime) and de facto abolitionist (those that have not carried out an execution in the past ten years despite the existence of capital punishment in their statutes). Of the sixty-four 'retentionist' states that continue to use capital punishment, half have legislation applying the death penalty for drug-related offences. In contrast to the international trend towards the abolition of capital punishment, the number of countries applying the death penalty to drug offenders has increased over the past twenty years. Under the International Covenant on Civil and Political Rights (ICCPR)¹²⁰, the use of capital punishment, while not prohibited, is restricted in several ways. One of the key restrictions is contained in Article 6(2), which states that the penalty of death may only be applied for the 'most serious crimes'. Over the past twenty-five years, human rights bodies have interpreted Article 6(2) in a manner that limits the number and types of offences for which a penalty of death is allowable under international human rights law. However, many retentionist states continue to argue that drug crimes fall under the umbrella of 'most serious crimes' and claim that the use of capital punishment for drug offences is justified.

Background: The use of the death penalty for drug offences

In 1985, the death penalty for drug offences was in force in twenty-two countries. Ten years later, in 1995, this number had increased to twenty-six. By the end of 2000, at least thirty-four states had enacted
legislation providing for capital punishment for drug crimes, the majority of these being in the Middle East, North America and Asia Pacific regions. In a number of these countries, certain drug offences carry a mandatory sentence of death. The number of countries actually carrying out executions, and the number of people put to death annually for drug convictions, are more difficult figures to calculate. It is clear that not all of these countries are implementing the death sentences provided for in their legislation. Nevertheless, it is equally clear that a significant number of executions for drug offences take place each year.

A review of various reports from UN agencies, non-governmental organisations and media outlets shows that in recent years executions for drug offences have been carried out in countries including China, Egypt, Indonesia, Iran, Kuwait, Malaysia, Saudi Arabia, Singapore, Thailand and Viet Nam. Even in countries that are not actively executing drug offenders, death sentences for drug-related crimes continue to be pronounced.

While in some of these countries the number of executions is small, in others drug offenders constitute a significant proportion of total executions. For example, in Malaysia, between July 2004 and July 2005, thirty-six of the fifty-two executions carried out were for drug trafficking. In April 2005, the Internal Security Ministry reported to the Malaysian parliament that 229 people had been executed for drug trafficking over the previous thirty years.

In 2004, Amnesty International reported that twenty-six of the fifty executions conducted in Saudi Arabia in the previous year were for drug-related offences. The following year, in the same country, Amnesty reported that at least thirty-three executions were carried out for drug
offences.

The government of Viet Nam admitted in a 2003 submission to the UN Human Rights Committee that, 'over the last years, the death penalty has been mostly given to persons engaged in drug trafficking.' According to a recent media report, 'Around 100 people are executed by firing squad in Vietnam each year, mostly for drug-related offences/' One UN human rights monitor commenting on the situation noted that 'Concerns have been expressed that at least one third of all publicised death sentences [in Viet Nam] are imposed for drug-related crimes'.

Since 1991, more than 400 people have been executed in Singapore, the majority for drug offences. It has been reported that between 1994 and 1999, 76 per cent of all executions were drug-related. According to media reports, Singapore executed seventeen people for drug crimes in 2000, and twenty-two in 2001. In 2004, Amnesty International suggested that Singapore has perhaps the highest per capita execution rate in the world.

In recent years, China has used the UN's International Day Against Drug Abuse and Illicit Drug Trafficking, 26 June, to conduct public executions of drug offenders. In 2001, over fifty people were convicted and publicly executed for drug crimes at mass rallies, at least one of which was broadcast on state television. In 2002, the day was marked by sixty-four public executions in rallies across the country, the largest of which took place in the south-western city of Chongqing, where twenty-four people were shot. A UN human rights monitor reported 'dozens' of people being executed to mark the day in 2004, and Amnesty International recorded fifty-five executions for drug offences over a two-week period running up to 26 June 2005.
Capital drug crimes in domestic legislation

The increase in countries legislating for the death penalty for drug offences is not the only contradiction to the international trend towards capital punishment abolition. The other is the increasing number and variety of drug-related offences for which the death penalty is being prescribed. The typical application of capital punishment in the domestic legislation of retentionist states is for drug trafficking, cultivation, manufacturing and/or importing/exporting. However, the definition of capital narcotics crimes is not limited to these offences. In fact, the types of drug crimes which carry a sentence of death are broad and diverse. While the UN Human Rights Committee and others have consistently called for restrictions in the type and number of offences for which the penalty is death, narcotics control legislation in many countries outlines a disturbing number and variety of capital drug offences.

In many countries, the death penalty may be applied to people in possession of illicit drugs. In countries such as Singapore and Malaysia, the usual burden of proof is reversed so that an individual arrested in possession of a quantity of narcotics exceeding a certain weight is presumed to be trafficking unless he or she can prove otherwise in court. This policy has been criticised by human rights monitors.

In Iran, penalties for possession may be calculated cumulatively. For example, a mandatory death sentence is imposed for possession of more than 30g of heroin or 5kg of opium. Under Iranian legislation, this quantity may be based upon the amount seized during a single arrest, or may be added together over a number of cases. Therefore a person with several convictions for possession of smaller quantities may receive a mandatory death sentence if the total amount of drugs seized from all
convictions exceeds the prescribed threshold.

Many countries allow for capital punishment for drug offences where there are aggravating features, such as the use of violence or the involvement of minors. In Sudan, proprietors of cafes or restaurants where drug use or trafficking takes place are liable for the death penalty. Proscribed activities under Article 4 of the Sudanese legislation - potentially subjecting a proprietor to the death penalty if such activities occur on his or her premises - include smoking hashish or possession of a hashish pipe. This is similar to a section of the legislation in Yemen which stipulates that a sentence of death can be imposed on 'All persons who have operated prepared or equipped premises for the consumption of narcotics'.

Some countries, such as Jordan, Egypt, Syria and Oman, impose a mandatory death sentence if the offender is a public official or government employee. Egypt also retains a mandatory death sentence for 'Anyone who, by whatever means of force or deceit, induces any other person to take any narcotic substance'. This is similar to a provision in Iranian narcotics control legislation prescribing the death penalty upon a repeat conviction for intentionally caus(ing) another person to be addicted to the drugs.¹²¹

**Moral and utilitarian rationales**

Punitive, prohibitionist policies towards drugs are typically justified on both moral, and utilitarian grounds. In many ways, the application of the death penalty for drug offences is the ultimate expression of these perspectives, as both moral and utilitarian rationales feature prominently among supporters of the use of capital punishment for drug offences.
While the use of illegal drugs may potentially have harmful effects for the user, including death, most people who ingest a dose of illegal drugs suffer no significant ill-effects at all and certainly do not die from the experience. Whether from the perspective of a low-level drug dealer or a sophisticated international criminal enterprise, killing one's customers is bad for business. It is difficult therefore to make a reasonable case that the use, sale or trafficking of narcotics is intended to have a lethal outcome. As a result, the traditional 'eye-for-an-eye' retributive rationales common among death penalty supporters do not fit neatly in the context of drug offences. Because of this, it is necessary for supporters of capital punishment to adopt a moral basis for the policy, which involves the presumption that drug use is intrinsically wrong and evidence of moral inadequacy and should therefore be harshly penalised.

Following this moral perspective, rather than attempting to prove individual intent or lethality in a particular drug case, pronouncements are made about the 'social evil caused by drug trafficking' and the 'global menace' of the drug trade.

Persons involved in the drug trade are not accused of being guilty of individual, identifiable homicides, but rather as being 'merchants of death', 'engineers of evil' or 'peddlers of death' whose crimes cause 'serious harm to the nation'. In this manner, the moral rationale paints drug offenders as threats to the life, values and health of the state, against whom extraordinary penalties are therefore justified. As described recently by Malaysian Prime Minister Datuk Seri Abdullah Ahmad Badawi, the death penalty is the 'right kind of punishment' given the menace that drugs pose to society.

Wedded to the moral rationale is the utilitarian approach, which
justifies punitive policies on the basis of efficacy. The utilitarian perspective believes that harsh punishment is most effective in deterring the 'evil' of drugs and mitigating their negative societal consequences. Under the utilitarian rationale, capital punishment is justified because of its claimed deterrent effect on drug trafficking and drug use, which it is argued is particularly crucial in countries located on major drug transshipment routes.

The government of Singapore, for example, has defended its use of capital punishment because 'tough anti-drug laws have worked well in Singapore's context to deter and punish drug traffickers' and are 'necessary legislation to help us keep our country drug-free'. Similarly, the interim government of Iraq, which reintroduced capital punishment including for drug offences, following the US-led invasion and fall of Saddam Hussein, justified this decision on the basis that "This penalty has a huge psychological impact on persons who are hesitant about committing serious crimes. Thus, the death penalty is one of the most important ways of preventing crime'.

Whether there is any truth to the utilitarian rationale is debatable. Death penalty expert Professor Roger Hood of Oxford University, for example, points out that, despite oft-repeated claims of effective deterrence made by retentionist states, there is no statistical evidence to support this contention. Even if capital punishment was proven to be an effective deterrent, the death penalty for drugs would still merit critical examination under a country's human rights obligations as it is not permissible to inflict penalties that violate international human rights law, regardless of their deterrent effects.

Malaysia concluded that 'The actual data...shows that Malaysia's
solution to the drug problem is not effective', highlighting that, despite the introduction of the death penalty for drugs in 1975, data on drug use suggest Malaysia 'has one of the world's highest per capita populations of drug addicts and users', a point 'vehemently denied by the government but supported by its own official statistics'. The research asks whether the lack of convenient international fight connections through Malaysia may actually have a greater impact than the mandatory death penalty on reducing the level of drug traffic. More recently, a member of the ruling government party in Malaysia stated during a 2005 parliamentary debate on drug policy that 'The mandatory death sentence has not been effective in curtailing drug trafficking'.

The problem that the official data pose for utilitarian rationales in Malaysia may explain why the government of Singapore ceased regular publication of crime statistics in the 1980s, thereby making its claims of the death penalty's effectiveness impossible to test. As noted by one commentator:

One might have expected that if the death penalty is being imposed on drug offences in order to deter or incapacitate, the government would be keenly interested in statistical and other studies to find out if, in fact, the increased penalties are working. But such studies, if they exist, are seldom revealed. Statistical data are not provided in any consistent or meaningful way by the government. One can only speculate why.

Singapore's dubious distinction as possibly the highest per capita executioner in the world - the vast majority of which are for drug offences - would certainly raise doubts about the success of the death penalty as a deterrent to drug crime.
The 2003 International Narcotics Control Strategy Report from the US State Department noted that 'Drug laws remain very tough in Vietnam', including provision for mandatory 'death by a seven-man firing squad' in some cases, yet concluded that 'Despite the tough laws, [the Standing Office for Drug Control] reported in its 2002 report...that "drug trafficking continues to rise"'.

**International human rights law and the interpretation of "most serious crimes"**

Under the ICCPR, the application of capital punishment, while not prohibited, is restricted in important ways. One key restriction is found in Article 6(2), which states that, 'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes'.

The UN Commission on Human Rights identified this limitation as one of the key safeguards 'guaranteeing the protection of the rights of those facing the death penalty', and the UN Human Rights Committee has called upon states to 'abolish [capital punishment] for other than the "most serious crimes"'. The definition of what does and does not constitute a 'most serious crime' is therefore central to a consideration of whether the execution of drug offenders is consistent with international human rights law under the ICCPR. The concept of 'most serious crimes' was the subject of debate during the drafting of the ICCPR, with some countries arguing the need to identify specifically the offences falling within the scope of this term. The failure of the drafters to do so has left national governments with the discretion to decide for themselves what acts constitute 'most serious crimes' and, as a result, many retentionist countries prescribe capital punishment for a variety of 'ordinary crimes', including drug offences.
Since the ICCPR entered into force in 1976, the interpretation of 'most serious crimes' has been refined and clarified by a number of UN human rights bodies in an effort to limit the number of offences for which a death sentence can be pronounced. As early as 1982, the UN Human Rights Committee - the expert body that monitors compliance with state obligations under the ICCPR and provides authoritative interpretations of its provisions - declared that 'the expression "most serious crimes" must be read restrictively to mean that the death penalty should be a quite exceptional measure'. Two years later, the Economic and Social Council of the UN adopted the resolution *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, which reaffirmed that 'capital punishment may be imposed only for the most serious crimes' and further specified that the scope of capital offences 'should not go beyond intentional crimes with lethal or other extremely grave consequences'. This resolution was later adopted by the UN General Assembly. Guidance on the scope of concepts such as 'most serious crimes' and 'intentional crimes with lethal or other extremely grave consequences' is also found in the quinquennial reports on capital punishment issued by the UN Secretary-General. The 1995 report recognised that 'the definition of the "most serious crimes" may vary in different social, cultural, religious and political contexts'. However, the reports have criticised the term 'most serious crimes', describing it as 'vague and open to a wide range of interpretations', and observed that 'the amorphous phrase "extremely grave consequences" has left itself open to wide interpretation by a number of countries'. As a result, the Secretary-General emphasised that 'the safeguard...is intended to imply that the offences should be life-threatening, in the sense that this is a very likely consequence of the action'. In reviewing the range of ordinary offences for which capital
punishment is prescribed internationally - including drug crimes - the Secretary-General concluded that the fact that the death penalty is 'imposed for crimes when the intent to kill may not be proven or where the offence may not be life-threatening' suggests that retentionist states are using 'a wide interpretation of both the letter and the spirit of the safeguard'. The Secretary-General further identified the application of the death penalty to 'a wide range of offences, far beyond the crime of murder' as a 'problem'. The finding that inflicting capital punishment for crimes beyond murder is a 'problem' suggests that a 'most serious crime' is restricted to homicide and excludes non-lethal or otherwise ordinary crimes.

The UN Human Rights Committee has indicated that the definition of 'most serious crimes' is limited to those directly resulting in death. The Committee's Concluding Observations, which periodically examine country compliance with the terms of the ICCPR, stated for Iran in 1993 that 'In light of the provision of article 6 of the Covenant...the Committee considers the imposition of that penalty for crimes of an economic nature...or for crimes that do not result in loss of life, as being contrary to the Covenant'. Death penalty expert Professor William A. Schabas of the Irish Centre for Human Rights notes that the Committee's recent case law suggests that it interprets 'most serious crimes' to apply only to homicide. Similarly, Professor Roger Hood concludes that a strong argument can be made that capital punishment should be restricted solely to 'the most serious offences of (culpable) homicide'. Further guidance on this question is found in the reports of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, which have consistently emphasised that 'the death penalty must under all circumstances be regarded as an extreme exception to the fundamental right to life, and
must as such be interpreted in the most restrictive manner possible'. Commenting on the interpretation of 'most serious crimes', the 2002 report stated:

The Special Rapporteur is strongly of the opinion that these restrictions exclude the possibility of imposing death sentences for economic and other so-called victimless offences, actions relating to prevailing moral values, or activities of a religious or political nature - including acts of treason, espionage or other vaguely defined acts usually described as "crimes against the State".

Indeed, the Special Rapporteur has stated strongly that in cases where the 'international restrictions are not respected...the carrying out of a death sentence may constitute a form of summary or arbitrary execution'. For all these reasons, 'The Special Rapporteur is deeply concerned that in a number of countries the death penalty is imposed for crimes which do not fall within the category of the "most serious crimes" as stipulated in Article 6, paragraph 2, of the International Covenant on Civil and Political Rights'.

The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment published a similar finding in a 2006 report on China, which expressed 'concern at the high number of crimes for which the death penalty can be applied' and recommended that the 'scope of the death penalty should be reduced, e.g. by abolishing it for economic and non-violent crimes'. In keeping with the interpretation that capital punishment should be used only in exceptional circumstances, the UN Commission on Human Rights consistently 'called upon all countries that still maintain the death penalty to progressively restrict the number of offences for which it could be imposed'. In 2004, the Commission again passed a resolution calling upon retentionist states that have ratified the
ICCPR 'not to impose the death penalty for any but the most serious crimes'. The resolution further called upon countries 'To ensure that the notion of "most serious crimes" does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed or non-violent acts'. Again the Commission called for the progressive restriction of the number of offences to which the death penalty may be applied.

In conclusion, therefore, from the perspective of UN human rights treaty bodies and special rapporteurs, several areas of consensus emerge in the interpretation of 'most serious crimes' as to the threshold necessary to satisfy the requirements of Article 6(2) of the ICCPR. These include:

1. 'Most serious crimes' should be interpreted in the most restrictive and exceptional manner possible.
2. The death penalty should only be considered in cases where the crime is intentional and results in lethal or extremely grave consequences.
3. Countries should repeal legislation prescribing capital punishment for economic, non-violent or victimless offences.\(^\text{122}\)

**Drug crimes as 'most serious crimes' in international human rights law:**

Although none of the above-mentioned/reports and resolutions provide a definitive statement on the meaning of 'most serious crimes', there are strong indications that UN human rights bodies do not consider drug crimes to be capital offences. Based upon the restrictive interpretation of 'most serious crimes' explored above, it is difficult to argue that drug offences satisfy the threshold of intent or lethal consequence necessary to justify the death penalty under Article 6(2) of the ICCPR.

For example, the UN Human Rights Committee, in its Concluding
Observations on reviewing national compliance with obligations under the ICCPR, has consistently been critical of countries that apply the death penalty to a large number of offences, noting the incompatibility of many of those offences with Article 6 and calling for repeal in those cases. The Committee has addressed these criticisms, to many states that apply capital punishment to drug offenders, including Egypt, India, Iran, Jordan, Libya, Philippines, Sudan, Syria and Viet Nam.

In its Concluding Observations on Sri Lanka in 1995, the Committee specifically listed 'drug-related offences' among those that 'do not appear to be the most serious offences under article 6 of the Covenant/. In 2000, in the Concluding Observations on Kuwait, it expressed 'serious concern over the large number of offences for which the death penalty can be imposed, including very vague categories of offences relating to internal and external security as well as drug-related crimes. In its 2005 Concluding Observations on Thailand, the Committee noted 'with concern that the death penalty is not restricted to the "most serious crimes"

Therefore, from the perspective of the UN human rights system, there is little to support the suggestion that drug offences meet the threshold of 'most serious crimes'. In fact, the weight of opinion would indicate that drug offences are not 'most serious crimes' as the term has been interpreted.\textsuperscript{123}

**Drug crimes as capital crimes in domestic legislation**

In addition to international human rights law, another method to assess whether drug crimes constitute 'most serious crimes' in the eyes of the international community is to examine the domestic legislation of retentionist countries. Indeed, perhaps the strongest case against the suggestion of an international consensus in this regard is the disparity
among the retentionist states themselves over the definition of capital drug offences. This disparity not only calls into question the definition of drug offences as 'most serious crimes', but also undermines one of the key utilitarian rationales (deterring drug trafficking) used by retentionist governments for prescribing capital punishment for drugs.

A review of domestic legislation reveals a remarkable lack of consistency in the application of capital punishment for drug crimes. In 1995, the UN Secretary-General's fifth quinquennial report on the death penalty noted that the threshold for a capital drug offence among retentionist countries ranged from the possession of 2g to the possession of 25kg of heroin. Identifying a credible definition of 'most serious crimes' using such a range is a difficult, if not impossible, exercise.

Even among those states with common borders that retain the death penalty for drug offences, the threshold of what constitutes a capital offence varies, in some cases drastically. As a result of this lack of consistency - and often wildly differing standards - a capital offence in one country may only be a minor offence across the border in its neighbor. Often the differences are exponential. In some cases, a sentence of death is possible - or even mandatory - for the possession of amounts of drugs so small they would not approach the threshold of a capital offence in an adjacent state. One illustration of this is found when comparing the neighboring states of India, Pakistan, Sri Lanka and Bangladesh, a region described by both a Bangladeshi Minister of Home Affairs and an Indian representative to the UN as a transit route between the two major opium-producing areas of the 'Golden Triangle' and the 'Golden Crescent'. Under Sri Lankan legislation, the death penalty may be applied for trafficking, importing/exporting or possession of only 2g of heroin. Yet a conviction for that same quantity of heroin in Bangladesh, Pakistan or India - where
the death penalty is prescribed for possession of 25g, 100g and 1kg respectively - would not nearly approach the level of a capital offence. The same legislation reveals a similar disparity in the threshold for opium: Pakistan, the most restrictive of these jurisdictions in this regard, prescribes the death penalty for possession of over 200g, a quantity far smaller than in the legislation of Sri Lanka (500g), Bangladesh (2kg) or India (10kg). Similar inconsistencies in the definition of capital drug offences are evident when comparing the neighbouring states of China, Laos and Viet Nam, countries that border, or are part of, the 'Golden Triangle'.

In China, the death penalty may be applied for possession of 50g of heroin. In Viet Nam, the quantity necessary to constitute a capital crime is double that amount (100g), while the 500g threshold in Laos is five times that of the Vietnamese legislation and ten times that under Chinese narcotics laws. Just over 1,000km away across the South China Sea, the possession of a mere 15g of heroin will bring a mandatory death sentence in both Singapore and Malaysia.

Interestingly, Singapore's narcotics legislation does not prohibit 'heroin' but specifies 'diamorphine' (the pharmaceutical name for prescription-grade heroin) instead. On this basis, the government of Singapore has claimed, in response to criticism, that its law only imposes the death penalty for persons convicted of possessing or trafficking more than 15g of pure heroin, which in its calculations is equivalent to 'a slab of approximately 750g of street heroin'. If the intention of this statement is to imply that Singapore maintains a higher threshold for death penalty crimes than countries whose laws only proscribe heroin, this claim opens up further regional inconsistencies as, for example, it legislates a threshold fifty times greater than neighbouring Malaysia, whose
legislation prohibits 15g of 'heroin' rather than of 'diamorphine'. Opium laws in this region are equally inconsistent. While 1kg of opium can bring execution in China, across the border in Laos the quantity is 5kg.

In Singapore, a quantity of 800g of opium is a capital offence, whereas in neighbouring Malaysia it is 1kg. This comparison of retentionist countries with common borders not only illustrates the arbitrary nature of defining 'most serious crimes' in the context of drugs, but also undermines the utilitarian rationale that harsh penalties are necessary and justified for countries geographically located on major drug transshipment routes. If this were indeed a legitimate factor in the decision of governments to apply the death penalty for drug offences, it would encourage neighbouring states to harmonise drug penalties so as to discourage the countries with the 'weaker' provisions being targeted by drug traffickers. The fact that the legislation in neighbouring states is at times exponentially different undermines the credibility of this justification. This inconsistent approach to the definition of capital drug offences among retentionist countries is in itself perhaps the strongest illustration that the extension of the death penalty to narcotics is at best an arbitrary exercise. The lack of a coherent threshold for a capital drug offence - as well as the wide variety of offences for which the death penalty is prescribed - demonstrates that there is not even consensus among retentionist countries about which drug crimes constitute 'most serious crimes', except for the moral rationale that all drug crimes are necessarily 'most serious'. As a result it cannot reasonably be claimed that drug offences are considered 'most serious crimes' by the international community as a whole.124
References:

7. Narada Smriti, xiv, 6-8
8. Manu Smriti, viii, 244.
9. Armshastra of Kautilya, 4.11.
10. Raghwansam, ix, 81.
16. AIR 1979 SC 916.
17. Rust, Hurt and Homicide (1958) p. 28
18. Amiruddin (1871) 7 Beng. LR 63.
22. Gourishankar, ..(1965) 68 Bom LR 236.
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31. Jai Narain, 1972 Cr LJ 469 (SC)
35. Teja (1895) 1? All 86; Umrao Singh, (18S4) 16 All 437, dissented from; Chittu (1900) PK NO. 4 of 1900.
36. Samundar Singh, AIR 1965 Cal, 598.
37. Lashkar, (1921) 2 Lah 275; Habal Sheikh V. State, 1991 Cr.LJ 1258 Cal, acquittal because who played what role not shown by evidence.
38. Shyam Behari, 1957 Cr. LJ 416 (SC Para 5); Suryamurthy V. Govindaswamy AIR 1989 SC 1410 : 1989 Cr.LJ 1451, where some of the accused were acquitted because evidence of their identity was not dependable.
40. Section 303 of the I.P.C.
42. Jan Mohd. vs. State AIR 1963 p. 504 as sec. 367 (5) of the Cr. P.C. was replaced by the act XXXVI of 1955.
43. The full text of the Bill based on the Report of Joint Parliamentary Committee on IPC (Amendment) of 1972, was published in Gazette of India., Extra Ordinary dated 29.1.1976, part II., sec. 2.
44. Ibid. (Clause 124).
45. Ibid. (Clause 128).
46. Ibid (Clause 129).
47. Travancore Penal Code (Amendment) Proclamation, 1120, sec. 2(2).
48. Henry VIII ruled over England from 1491 to 1547 A.D.
50. In subsequent years, this benefit was extended to women also. It was finally abolished on 1927.
52. Australian law also provides death penalty for the offence of murder and rape.
53. In latin American capital punishment has been abolished in Argentina, Brazil, Colombia, Cesta, nicer, the Dominion Republic, Mexico (under the federal law and in all but four of the states), Panama, Uruguay and Venezuela. It is retained in Canada.
54. (1972) 408 U.S. 238.
http://www.deathrowbook.com
64. 35, Law Commission Report, p. 131.
69. Ibid., p. 1747.
70. Ibid., p. 1765.
71. Canadian Report, p.11, para 35-54.
82. Sec. 194 IPC provides punishment for giving or fabricating false evidence with intent to procure conviction of capital offences. In case an innocent man be convicted and executed in consequence of such false evidence, such person may be sentenced to either with death or imprisonment for life or ten years and fine.
84. AIR, 1980 S.C. 918.
85. AIR 1982 S.C. 1344.
90. AIR 1982 S.C. 1369.
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95. An illustrated weekly of India, April 7-13, 1985, p.8.

96. Dr. K.S. Chhabra, "Quantum of punishment in Criminal law in India, p. 104-6.


98. An Illustrated Weekly of India, 7-13, April, 1985, p.8-9.


100. AIR 1982 pp. 1375-84, the learned judge says, that if eg. Justice Sen and Justice Kailasani had constituted the bench hearing Rajendra Prasad's Case, then, without meaning the slightest disrespect to these two eminent judges, one can hazard a guess that perhaps, the death sentence of Rajendra Prasad would have been confirmed.

101. AIR, Blackshield, op. Cit., p. 166.

102. Furman vs. Goergia, 408 US, 238.


108. C. Conway, N.J. Death Penalty study Raises Spectre of Bias Among Juris, February 20, 1996;


111. Dr. Mool Singh, Death Sentence - Rethinking in terms of its Abolition, 1989 Cr.L.J.p. 126.


113. Rajya Sabha Debates 25th April, 1968


115. Ceylon Report, p. 38, "Summary of arguments under long term affect".

119. K.S. Ajay Kumar, 1980 (Ja) 4 CUCL p. 175.