A Revealing interview

What does society gain by sentencing men to death? This was the question raised, not by a reformist jurist nor an activist judge but by two ignorant and illiterate convicts sentenced to death. The question echoed and re-echoed within the walls of the prison. The anxious and questioning eyes of the prisoners stared at the present writer from behind the bars. The writer was there for an interview as part of his Master’s degree programme in Law in the University of Cochin. The very appearance of the convicts showed that they were much moved. The

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1. The Central Prison, Trivandrum - capital of the State of Kerala. The then Inspector General of Prisons Mr. P. Gopala Menon, granted me permission to interview the prisoners sentenced to death. The present writer expresses his thanks to him.

2. At first the prisoners mistook the present writer for someone bringing them pleasant news. They seemed to decline to answer when the purpose of the visit was explained. They asked what benefit they were going to achieve out of the interview. They were told that the study might benefit future convicts; suddenly they began to respond.
horror of death was haunting them. The call itself seemed death-smelling. 3

One of the convicts was sentenced for murdering a woman after a quarrel 4 and the other for murdering his own wife and children. 5 Both of them were born poor; both had to be provided with lawyers by the State. 6 They were dissatisfied with the sentence — they felt it to be hard and excessive. One of them asked, “the law shows sympathy to the victim’s family by executing us; can it show similar sympathy to our family, when we are executed?” That prisoner who killed a woman after a quarrel asked, “if extreme penalty is given to me what would the law do with calculated cold blooded murders?” Both of them were first offenders and were sorry for what they have done 7 and anxious to go back to the world outside with malice towards none if they get a new lease of life. They raised a pertinent question why they, as first offenders, could not be awarded lesser punishment?

The Problems

Though they were illiterate and uneducated the mute and silent words they spoke, the ideas of those who do feel the

3. The thought of impending death deprived them of their sleep and appetite, they stated. The security measures were extra-ordinarily stringent. The interview was conducted in the presence of security officers.

4. The accused was sleeping. The younger brother of the deceased woman was flying a kite closely by. Infuriated by the disturbance the accused tore the kite off. This led to a wordy duel. The police did not take any action as there was a compromise. After a week the deceased spat at the convict. The accused got infuriated and in the quarrel the deceased was done away with.

5. The prosecution case was that the accused fell in love with a teen-aged girl and finding his wife and children an obstacle in the way for living with his love the accused liquidated his wife and children.

6. Both of them seemed to believe that if the advocates had sincerely conducted the cases they would not have received punishment. Due to poverty they could not engage any other advocate.

7. The first prisoner even stated that he was ready to bring up the children of the deceased.
horror of death that awaits them and the problems raised by these unfortunate victims of fate scintillate with all the questions involved in capital punishment - the woes, the ethos, the impact, the criminological gain and the pain of the victim and the pain of their kith and kin.

Penal Codes prescribe this punishment on the ground of deterrence. But empirical studies show that capital punishment is really bankrupt in deterrence. The perennial debate on the topic of abolition of capital punishment is still going on and adequate changes are being made in the sentencing policy of many countries. The judiciary has got a vital role in this respect. An attempt is made in this paper to assess the judicial attitude towards capital punishment. A discussion on punishment in general is a necessary prelude to the analysis of the question.

Punishment in general

Punishment in law differs from what the common man thinks about it. Various writers have defined punishment in different fashion. Alf Ross defines it in terms of four components and says: “Punishment is that social response which (1) occurs where there is violation of a legal rule; (2) is imposed and carried out by authorised persons on behalf of the legal order to which the violated rule belongs, (3) involves suffering or at least other consequences normally considered unpleasant; and (4) expressed disapproval of the violator.”

Punishment is looked upon as an evil when it prevents the offender from providing for his dependents. It is bad when his work in the outer-world is more valuable to society than his occupation in prison. It has a perilous impact if the prisoner leaves more hostile and embittered than he was when he en-

8. For example, see Thornston Sellin, Capital Punishment (1967)
9. Sutherland & Cressey observe: “Punishment under the law differs from that imposed by a mob in that it is applied dispassionately by representatives of the State in such a manner that it may win the approval of the cool judgement of impartial observers” — Principles of Criminology (6th ed. 1960), p. 7.
tered it. Norwood East emphasizes that it is the duty of society to prevent at least the last of these consequences.\textsuperscript{11}

In the case of an offence punishable with death the retributive mentality of the public at the time of offence towards the accused diminishes and subsequently at the time of execution the accused is viewed with sympathy. The deliberate taking away of the life of the accused by the State may itself be taken as murder. Perhaps this may be the reason for the mounting public sympathy towards the convict who is about to be executed. The provision for reprieve and commutation of the sentence of death are against the retributive theory. In India the President and the Governors of the States have the power to pardon and commute the sentence of death.\textsuperscript{12} At times the policy of commutation depends on their attitude towards death penalty. Thus, a Governor opposed to this punishment may commute every sentence; another who supports it may commute only few of them.\textsuperscript{13} As far as the modern trends in penology are concerned, offenders sentenced to death are comparatively rare. H.S. Ursekhar observes:

"It is well-known that courts do not impose the death-sentence in every case of conviction for murder. This fact alone would show that the death penalty is not a matter for retribution."\textsuperscript{14}

Thus in many cases even though the victim is dead the person who caused the death is not given death according to \textit{lex talionis} upon which the theory of retribution is based. Justice V.R. Krishna Iyer asked 'whether the horror of murder can be met with the terror of punishment.'\textsuperscript{15} In short retributivism in the strict sense of the term is lacking in the case of capital punishment.

\begin{itemize}
\item \textsuperscript{11} Society and the Criminal (1960), p. 189.
\item \textsuperscript{12} See Articles 72 and 161 of the Constitution of India.
\item \textsuperscript{13} Vedder and Kay, (ed.), \textit{Penology: A Realistic Approach} (1964) p. 247.
\item \textsuperscript{14} \textit{Law and Social Welfare} (1973), p. 84
\item \textsuperscript{15} "Rehabilitation, Real Remedy," The Hindu, May 5, 1978.
\end{itemize}
It is believed that by awarding the severest penalty general deterrence can be achieved, ie., the very desire to live is inborn in every human being, and the knowledge that his life will be taken away on his doing certain things will disuade him. The real question is whether death penalty is more effective than any other penalty. It is difficult to give a positive answer. Richard M. Gerstein supporting death penalty states:

"Further more it is obvious that satistics cannot tell us how many potential criminals have refrained from taking others’ life through fear of the death penalty. As judge Hymen Barshay of New York stated, 'the death penalty is a warning, just like a light house throwing its beams out to sea. We hear about ship wrecks but we do not hear about the ships the lighthouse guides safely on their way.'"16

Professor Sellin, after considering the data collected from some States in the U.S. arrived at the conclusion that the presence of the death penalty for murder in a State appears to have no more influence on its homicide rates.17 Doctors and medicines have been there from time immemorial, still diseases come. Likewise law can only check, and not irradiicate, crimes by providing severe punishment. Fear of death cannot deter patriotic activities nor can it deter urgent necessities which lead to crimes.

Returning of the offender as a reformed man envisaged under the reformatory theory is obviously impossible under death penalty.

Capital Punishment in India: Some Historical Aspects:

In the old system of punishment the retributive aspect held prominence.18 Retributive element is gradually placed by the reformatory aspects of punishment. Ancient India was ruled ac-

According to *Dharma*, the most comprehensive concept in the history of Indian thought. Hindu mythology contains several instances of dispensation of criminal juristic based on this concept. The rules of *dharma* were applicable not only to the ruled but to the ruler also.

In the *Vedic* age the King himself administered criminal justice. Theft, robbery, adultery, incest, abduction, the slaying of *Brahmin* (which only was the murder proper), drinking, treachery, etc. were punishable with death. Ordeals were looked upon as valid tests of innocence. During the *Maurya* period the law of treason was developed and various acts of treason were punishable with death. As a general rule *Brahmins* were exempted from death penalty, at the worst *Brahmin* offenders were to be branded. Caste of the offender was the basis of liability. Thus, a *Sudra* would receive capital punishment with confiscation of property for homicide whereas a *Brhamin* would be blinded only.

**Capital Punishment under the British Rule.**

The British when they began their reign in India followed the Muslim criminal law then prevailing. They continued to


20. The mythological stories in *Ramayana* provide some instances; *Thadaka*, the sex-maniac evil woman was killed by the King Sree Rama for common good. The King seemed to be more retributive when he abandoned his wife Sita in the midst of forest only on suspicion of her chastity raised by the public. The killing of *Shambuka* (who violated the custom by the performance of penance which was denied to backward classes of people) and the giving up of his life by Laxmana himself according to the words of the King are other notable examples of executions according to *dharma*.


follow it for a pretty long time. Muslim jurisprudence classified crimes as follows.\textsuperscript{24}

(1) Offences against God (for example, adultery), (2) Offences against State (for example rebellion) and (3) Offences against private individuals (for example, assault). In the latter two groups the injured party could compound the offences. Thus murder could be compensated by payment of an amount to the victim's family. Robbery with murder was punishable with death and the dead body was exposed to the public as a warning.\textsuperscript{25} Under the British regime no provision was there for the punishment of British European felons in the mofussil which enabled the British to oppress the native Indians with impurity.\textsuperscript{26} Homicides were classified into 'Amd' (wilful murder) and 'Shabih-amd' 'culpable homicide not amounting to murder) were not subjected to capital punishment. A man could kill his wife and her paramour when caught in the act of adultery. Similarly one could kill a man who attempted to rape one's wife or even, one's slave girl. One could also slay a person caught in the act of robbing one's house. No muslim could be convicted on the evidence of a non-muslim, but a non-muslim could be convicted on testimony by anybody.\textsuperscript{27} Until 1790, policy of the East India Company was of little interference with the administration of criminal justice. The jurisdiction of the criminal courts was amended in December, 1790, but the British subjects continued to be amenable to the jurisdiction of the Supreme Court at Calcutta and this resulted in grave injustice to natives.\textsuperscript{28} Even accidental homicide became a capital offence. Intention and not the manner of commission was made the relevant factor in deciding the culpability. The Governor-General was made more powerful. Persons convicted by courts

\textsuperscript{26} Majumdar, R.C. (ed.), \textit{History and Culture of the Indian People} (1963) Vol. IX, p. 347.
\textsuperscript{27} Misra, B.B., \textit{The Central Administration of the East India Company} (1959), p. 301.
\textsuperscript{28} \textit{Id.} at p. 329.
martial were liable to immediate punishment by death and to forfeiture of property. In 1810 the participation of religious leaders in trial was dispensed with. This resulted in impartial justice to everybody. From 1829 by prohibiting Sati, the practice of the bereaved wife burning herself to death in the pyre of the deceased husband, even an abettor was deemed to be guilty of culpable homicide and death penalty could be awarded as the punishment.

After the First War of Independence, called by British historians as 'sepoy mutiny'; waging war and other offences against the State or instigation of such offences was made punishable with death. Persons seducing or endeavouring to seduce any officer or soldier from the allegiance to British Government or the East India Company were also made liable to capital punishment. In all cases where the Court of Sessions sentenced an accused to death or imprisonment for life, it was to transmit a copy of the sentence to the Nizamat Adalat, which had to finalise the sentence for execution.

A Draft Penal Code was prepared and submitted in 1837 by the Indian Law Commissioners. Death penalty was prescribed for offences like waging war against the State, giving false evidence so as to get an innocent person convicted 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: viz. for waging or attempting to wage war, or abetting the waging of war against the Government of India, for abetment of mutiny, if mutiny

29. Id. at p. 359.
30. Id. at p. 374.
31. Id. at p. 31.
33. Section 121:- Whoever wages war against the Government of India, or 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.
is committed in consequence thereof,\textsuperscript{34} for giving or fabricating false evidence with intent to procure conviction of capital offence,\textsuperscript{35} for committing murder,\textsuperscript{36} for committing murder by a person under sentence of imprisonment for life,\textsuperscript{37} for abetment of suicide committed by child, or insane, or an idiot, or an intoxicated person\textsuperscript{38} for attempt by life-convict to murder, if hurt is caused\textsuperscript{39} and for murder in dacoity.\textsuperscript{40}

\textit{Attempt at Reforms}

Changes are being brought about to the criminal law in relation with the changing aspects of capital punishment. By a

\begin{enumerate}
\item Section 132:- Whoever abets the committing of mutiny by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of the Government of India, shall, if mutiny be committed in consequence of that abetment be punished with death or imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be available to fine.
\item Section 194:- Whoever gives or fabricate false 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... 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 herein before described.
\item Section 302:- Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.
\item Section 303:- Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death.
\item Section 305:- If any person under eighteen years of age, any insane 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.
\item Section 307:- 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,... When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death.
\item Section 396:- If any one of fine or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons 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.
\end{enumerate}
notable amendment in 1955 to the Code of Criminal Procedure “It is no longer obligatory for the trial Judge to give reasons for imposing the lesser penalty.” Before this amendment, the judge had to record his reasons in the judgment for not inflicting death penalty. By the amended sub-section (3) to Section 354 of the Code of Criminal Procedure 1973, this point was made more explicit. By virtue of section 235(2) of the Code of Criminal Procedure 1973, which provides for a hearing on the question of sentence, the incidence of death penalty can be minimised.

A glance at the relevant clauses of the Indian Penal Code (Amendment) Bill 1972, reveals the legislative trend to be in tune with the new judicial attitude against death penalty. 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. It is proposed to delete

42. Sub-section (5) of Section 367 of the Code of Criminal Procedure was repealed by Act XXVI of 1955. The old sub-section (5) of S. 367 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 reason why sentence of death was not passed. Provided that in trials by jury, the court need not write a judgment, but the Court of Sessions shall record the heads of the charge to jury.
43. Section 354(3):- 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 judgment shall state the reasons for the sentence awarded and, in the case of sentence of death, the special reasons for such sentence.
44. Section 235 (2):- If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Sec. 360, hear the accused on the question of sentence, and then pass sentence on him according to law (Section 360 provides for release on probation of good conduct or after admonition).
46. Section 302 is proposed to be amended as follows:

“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,
the present section 303 of the Indian Penal Code. The provision for death penalty in section 305 of the Indian Penal Code is proposed to be substituted by life-imprisonment by the amendment. Like-wise section 307 of the Indian Penal Code is proposed to be amended including imprisonment for life as an alternative to death penalty.

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

(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.” (See clause 124).

46a See n 37 Supra
47. Section 305 is proposed to be amended as follows:
“S. 305. If any person under eighteen years of age, any person in a state of intoxication commits suicide whoever abets the commission of such suicide shall be punished with imprisonment for life, or rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine.” (see clause 128).
48. “S. 307. Whoever attempts to murder shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused thereby to any person the offender may,
(a) if under sentence of imprisonment for life, be punished with death or imprisonment for life;
(b) in any other case, be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years.” (see clause 129).
49. See Travancore Penal Code (Amendment) Proclamation, 1120, S.2(2). For the penalty of death provided in the sections referred to in sub-section (1) the penalty of imprisonment for life with or without forfeiture of property, was substituted. But on the integration of Travancore with the Union of India capital punishment was reintroduced in 1951.
Capital Punishment in U.S. and England

The move in England for the abolition of capital punishment had much influence upon the American people. Between 1847 and 1876, four States in the U.S. prohibited capital punishment. They formed various associations and societies for giving sufficient propaganda to the problem. In 1958 eighteen States of the U.S.A. introduced Abolition Bills. A movement was organised by the lawyers and other social reformers for the abolition of capital punishment. From 1963 onwards some American lawyers planned and argued a series of cases designed to eliminate capital punishment in 'an artfully coordinated litigation campaign.' Prof. Anthony Amsterdam began to forge a strategy by circulating elaborately documented drafts of legal arguments. In 1968 the Supreme Court of America decided certain cases which significantly limited States power to inflict the death penalty. The court held that the power of the jury to impose death penalty violated 14th and 16th amendments. In Furman v. Georgia, the Supreme Court held death penalty as unconstitutional. Marshall, J. observed that the death penalty is an excessive and unnecessary punishment and hence unconstitutional. Brennan, J. observed that a punishment that does not conform with human dignity is cruel and unusual. In 1976 the Supreme Court by its decision in five cases overruled Furman. Seven judges reached at the conclusion that capital punishment does not constitute a per se violation of the Constitution.

50. Sutherland & Cressey, op.cit., p. 263.
51. Id. at p. 15.
52. See generally Michael Meltsner, "Litigating against the Death Penalty: The Strategy behind Furman," 82 Yale L. J. 1111.
54. 405 U.S. 238 (1972).
55. Id. at 358.
56. Id. at 305.
History shows that in England for the last 200 years the incidence of capital punishment is decreasing. The 18th and 19th Century England had as many as 200 offences punishable with death. In 1767 the courts were empowered to pass sentence of transportation which practice brought about a reduction in the use of capital punishment. In 1750 a committee appointed by the House of Commons recommended to replace death penalty by some other punishment. But the Bill implementing this was rejected by the House of Lords. In 1770 another committee also recommended its abolition and the House of Lords rejected the Bill. In the midst of a series of campaigns for abolition a Select Committee of the House of Commons was chosen to study the position. A number of legislations were enacted later, abolishing the capital punishment for certain offences. Report of the Royal Commission on Capital Punishment is a milestone in the history of abolition move. Later in 1965 death penalty was abolished by the Murder (Abolition of Death Penalty) Act 1965, which provided in lieu of death, imprisonment for life. Thus, it is seen that ten years from 1963 are notable for legislative activity in the sentencing process.

Judicial attitude in India

The attitude of the Supreme Court of India towards death penalty has been considerably changed to one of observing more leniency to the offender when his life is at peril. The court has to overcome many fetters imposed by statutes. Thus, in Joseph Peter v. State of Goa, Daman, Justice V. R. Krishna

60. Fitzgerald, op.cit., p. 217.
63. Cmnd. 8932.
64. See section 1(1).
Iyer stated that judges are bound by the statutes by the oath of their office. This helplessness is implicit in many decisions; in some cases the Supreme Court has gone to the extent of mentioning it. In spite of the limitations Supreme Court has evolved a new trend of reducing death penalty to lesser punishments. For ascertaining this trend an assessment of all cases involving death sentence decided by the Supreme Court is necessary. The enthusiasm of the Supreme Court to make the law more in tune with the progress of civilization is evident in all these cases.

Mitigating Grounds

A perusal of the variety of cases decided by the Supreme Court, involving death penalty, brings to light an array of mitigating grounds under which the death penalty could be altered to a lesser punishment. If in some cases the absence of brutality, dastardliness and premeditation in crime was an influencing factor for reduction of punishment, in some others the fact that the judges of the High Court below has disagreed on the award of death penalty would be a mitigating circumstance. Among the group of criminals for the same offence if one goes to the gallows and the others escape it may not look to be a

67. "... judges must enforce the laws whatever they be, and decide according to the best of their lights, but the laws are not always just and the lights are not always luminous. Nor again, are judicial methods always adequate to secure justice. We are, bound by the Penal Code and the Criminal Procedure Code, by the very oath of our office." Id. at 1813.


69. See the cases noted below under each ground.


fair and equal treatment of the criminals. Such an unequal position of an accused will be a ground for mitigation. Young people will have a long period of life before them in which they will get an opportunity to mend and repair the damage caused to their character. The Supreme Court inspired by an expert study reduced the sentence of death inflicted on a 16 year old boy to that of life. In many cases the Supreme Court of India had insisted that the High Court below should state special reasons for awarding death sentence. Failure of the High Court to state special reasons would certainly be a circumstance for reduction of punishment. Thus in Bishnu Das Shaw v. State of West Bengal, the Supreme Court held, “The changes which the law has undergone in the last 25 years clearly indicate that Parliament is taking note of contemporary criminological thought and movement…. S. 354(3) has narrowed the discretion, Death Sentence is ordinarily ruled out and can only be imposed for ‘Special Reasons.’”

Perhaps the social, economic and psychic condition of the accused is one of the most conspicuous elements that persuade the Supreme Court for taking a lenient view of the criminals condemned to death. Ediga Anamma v. State of A.P. is a striking example. An women...and her

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73. Law Commission of India 35th and 42nd Reports.


76. A.I.R. 1979 S.C. 964 at p. 70.

child were murdered. The tragedy happened out of the jealousy of the appellant, a woman beaten away by her husband and in laws, but finding solace in a middle-aged shepherd who had amorous clandestine relationship with both the deceased and the appellant. Reducing the death penalty on the appellant the Supreme Court took account of the physical and psychic breakdown of the hopless appellant in the following words:

"Here, the criminal's social and personal factors are less harsh, her femininity and youth, her unbalanced sex and expulsion from the conjugal home and being the mother of a young boy—these individually inconclusive and cumulatively marginal facts and circumstances—tend towards award of life imprisonment. We realise the speculative nature of the correlation between crime and punishment in this case, as in many others, and conscious of fallibility, dilute the death penalty."78

One may say that some judgements went for personalising the punishment taking into consideration of the particular circumstances, both physical and mental, of the accused in reducing the extreme penalty.79 The peculiar facts and circumstances in which the commission of an offence took place will be an important factor working in the mind of the Supreme Court in deciding the penalty.80


Sometimes the victims play an active role in bringing about the commission of the offence. If this ground was treated by the Supreme Court for reducing the death penalty to less severe punishments in some other cases it was the long delay in bringing about the execution thus subjecting the condemned to feel severe mental agony, the ground for mitigation Justice R. S. Sarkaria observed:

“The dread of impending execution has been brooding over the head of these accused condemned prisoners for an excruciatingly long period.”

The policy of the Supreme Court as evidenced from the above discussion is one of eliminating the extreme penalty in as much cases as possible. There are a number of cases in which the Supreme Court has acquitted the appellants on merits against death penalty endorsed or sentenced to death by the courts below.

Grounds for confirmation

Even though it 'halted the hangman's halter' on extenuating circumstances the Supreme Court had to concur with the opinion of the High Court in certain cases. They can be grouped


as follows: (1) brutal, inhuman, cruel, dastardly or callous murders, (2) cases where the offender was prepared to commit murder if necessary, (3) cases of pre-planned pre-meditated, cold-blooded murders, and (4) cases of murder by offenders undergoing imprisonment for life.

In the first group of cases the Supreme Court found it just and proper to inflict death penalty. A person is murdered in a cruel fashion. The dead body is taken in a procession on a mare by the accused persons for a distance of one mile. At the end of this horrid procession they chop away the head of the deceased. The Supreme Court deprecated such a dastardly act in *Jaghir Singh v. State of Punjab* \(^{85}\) and observed:

"The murder was ruthless and cold-blooded. There are no extenuating circumstances." \(^{86}\)

Similar cases come under this group. \(^{87}\)

In the second group of cases, the intention for the offence develops only at the spot though sufficient preparations were already made. \(^{88}\) In *Hukam Singh v. State of U.P.* \(^{89}\) when the

86. Id. at 46, *per* Bachawat, J.
appellant was forcibly taking his cart through the crops he was causing a struggle out of which the deceased lost his life. On appeal the Supreme Court held:

“When several persons are armed with lathis and one of them is armed with hatchets and are agreed to use these weapons in case they are thwarted in the achievement of their object, it is by no means incorrect to conclude that they were prepared to use violence in prosecution of their common object and that they knew that in the prosecution of such common object it was likely that someone may be so injured as to die as a result of these injuries.”

The third group of cases are more or less similar to the first group of cases. In this group, the *mens rea* is the important element. In *Maghar Singh v. State of Punjab* the deceased was murdered by his 2nd wife, his son and his wife’s paramour. On appeal the Supreme Court held:

“It was a preplanned, cold-blooded and dastardly murder in which as many as seventeen injuries were caused on the deceased most of which were on vital parts of his body. There are no extenuating circumstances to justify the giving of any lesser sentence by this court.”

A number of cases were subjected to study which would come under this group.

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90. *Id.* at 1543, *per* Raghunath Dayal, J.


92. *Id.* at 1324, *per* Murtaza Fazal Ali, J.

The last group of cases is those murders committed by a prisoner undergoing life imprisonment. Such cases cover not only instances where one commits murder but also which one is held guilty of murder constructively viz., under section 302 read with section 34 or under section 302 read with section 149 of the Indian Penal Code. In *Mahavir Gope v. State of Bihar* the Supreme Court held:

“The section would apply even in cases where a person undergoing sentence of imprisonment for life is convicted either under sec. 302|149 or under sec. 302|34.”

In certain clear cases where the offence is proved by circumstantial evidence, when the nature of the case does not fall within any of the above categories, the Supreme Court had inflicted death penalty.

The *hot debate* on the abolition of “this uncivilised form of deliberate killing of another in cold-blood” is going on. The Supreme Court of India is now favouring the view that death penalty is to be imposed only in exceptional cases, which is evident from the study made above. “History hopefully reflects


95. Id. at 120, per Gajendragadkhar, J.


the march of civilization from terrorism to humanism and the geography of death penalty depicts retreat from country after country."  

**The question of constitutionality**

The Supreme Court had discussed the question of constitutional validity of capital punishment and had arrived at conclusion that this punishment is constitutional.  

**Capital Punishment: Is it justifiable?**

Law interacts with human behaviour in every walks of life. The legal machinery being an instrument of social change, it becomes necessary to impose new patterns of social behaviour upon society. Imposition of punishment may be justified by the theory of social contract. The question whether the imposition of capital punishment can be justified on the basis of the theory of social contract was subjected to a threadbare examination by Beccaria. He argued:

"It seems to be absurd that the laws which are an expression of the public will, which detect and punish homicide, should themselves commit it and that to deter citizens from murder, they order a public one."

The idea of capital punishment is not suited to the modern welfare state ideals. The State is the protector of all alike. But with regard to capital punishment it is doubtful whether this statement is true. Can the State take the life of a man in the name of protecting the other members of society? R. v. Dudley

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101. People by subjecting themselves to the authority of the government, impliedly concede to be punished for wrongs done.

& Stephens\textsuperscript{103} is a conspicuous example. In this case the accused persons, when they were left in the open sea to escape only with an open boat, were constrained to kill and live upon the flesh and blood of a boy, who was their co-sailer. After a shipwreck the accused persons and the deceased boy were compelled to live for a considerable number of days without any food or drink. At last out of the necessity to sustain their lives they killed the boy. Whether or not one could kill another out of necessity is a crucial question in the case. The decision shows that however grave the necessity may be taking another's life could not be allowed.\textsuperscript{104} The protection of society from criminal is the justification with which the State executive criminals. It is also said that protection of society is a necessity which validates execution. If the killing out of necessity to live is not permissible, as per decision in \textit{R. v. Dudley and Stephens},\textsuperscript{105} then the killing out of necessity to merely protect others is also not justifiable.

The Indian Law Commission in its 35th Report sees six objects of capital punishment. They are (1) deterrence,\textsuperscript{106} (2) retribution, (3) disabling,\textsuperscript{107} (4) avoidance of lynching and private vengeance,\textsuperscript{108} (5) disapprobation by the public\textsuperscript{109} and

\textsuperscript{103} (1884) 14 Q.B.D. 273.
\textsuperscript{104} Lord Coleridge, C.J. held:
"But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law absolute defence of it."
\textit{Id.} at 287.
\textsuperscript{105} \textit{Supra}, n. 103.
\textsuperscript{106} The unique deterrence of capital punishment acts on professional criminals even.
\textsuperscript{107} When certain forms of crimes endanger the peace of the society the remedy is death penalty.
\textsuperscript{108} There have been cases when murderers after they come out of the prison, pursue the man who helped the prosecution.
\textsuperscript{109} Capital punishment tends to foster the general abhorrence of the crime. The common man thinks that the capital punishment is very effective.
atonement by the offender. The arguments go on alleging that the imprisoning of the convicts for a long time will make additional administrative problems and also that it is not proper to keep there overburdening the taxpayer.

A case for abolition

Revengeful and cruel destruction of a fellow human being, even if it is legalised, does not seem to be justified. The question is one of values, the values we put on human life. Inevitably, capital punishment is morally indefensible. The deliberate taking of the life of an individual by the State in the name of administration of justice is highly immoral. The State does in the name of law what the offender did. Revengeful and cruel destruction of a fellow human being, even if it is legalised, does not seem to be justified. The question is one of values, the values we put on human life. Inevitably, capital punishment is morally indefensible. The deliberate taking of the life of an individual by the State in the name of administration of justice is highly immoral. The State does in the name of law what the offender did. In ancient India the great sages and philosophers were alive to the problem that the killing of an offender meant killing of not that particular offender only but indirectly it meant killing his parents, wife and children. Deterrent effect of capital punishment if any it has, is hardly of any application to abnormal or subnormal persons. Thus it is said that, of all murders judicial murder is the most revolting.

Capital punishment is inhuman, cruel and uncivilized. 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 prisoners mental agony during the period between the pronouncement of the sentence and execution is incomparable. Life in the death-cell is no life but death itself. The kith and kin of the condemned also are mentally tortured. The capital punishment causes irreparable grief to the family of the executed and makes many persons parentless, sonless or husbandless as the case may be.

110. See the first portion of this paper where a report of an interview with death-convicts is provided.

111. Lehar Mehta, "Is Capital Sentence Justified?" A.I.R. 1949 (Jour.) 103 at 105.

Wrong imprisonment can be compensated but execution of the innocent is beyond compensation. Another aspect is that capital punishment is repugnant to the principle of non-violence (‘ahimsa’) and is scorned by Gandhiji the father of the nation. Death penalty is usually applied unequally. Accused persons who are financially sound to defend themselves well at the trial usually escape from conviction. The experience of the poor who cannot ‘purchase’ legal aid will be different. When an important person is convicted there would always be a large section of society trying to get it reduced. The condemned commoners get less public support.

It is not yet established beyond doubt that death penalty has more deterrent effects than any other punishment. If capital punishment had such deterrent effects murders would have become less. This is not so in many countries. Even though death penalty is there crimes are not in the decrease. We cannot eradicate it, but can only prevent it. If protection of society from criminals is the object of punishment the State should rather devise other effective prophylactic methods of nipping the crime in the bud than do away with the criminals as poisonous snakes are beaten to death. Glanville Williams observed that if punishment were abolished for murder, rape, arson and such other grave offences only a very small number of persons would thereby become more disposed to commit these crimes, but on the other hand if motoring offences could be committed with impunity the relevant laws would soon become a dead letter.

113. See, Agarwal, M.L., “Capital Punishment: Abolition Move in India.” A.I.R. 1958 (Jour.) 69; in which a few cases are provided where innocent persons being convicted. There have been instances of the real culprit appearing years after an innocent is hanged.


115. The persons whom the present writer interviewed, are of this opinion.

116. When the late Z.A. Bhutto was convicted almost all the world requested the Pakistani authorities to dispense with his execution.

The Royal Commission on Capital Punishment did not totally rule out the deterrent effect but emphasised its limitations. The Law Commission of India also observed in a similar way. The comparative figures for the yearly rate of murders in the States of America (with and without capital punishment) show that the abolition States have consistently lower rates in most cases than retention States. William O. Hochkammer, Jr. points out:

"To the extent it is true that a criminal does out expect to be the recipient of the maximum sentence; it is also true that the criminal will not be deterred by the most severe sentence the law may impose on him."

In short it is impossible to arrive at a definite conclusion on the deterrent effect of death penalty.

N. C. Pal observed that the cause of murder is not the presence or absence of death penalty but the social relationship conducive to the mental balance before the commission of the crime or strong desire to do away with somebody.

Conclusion

When the system of punishment is examined from the historical perspective it is seen that though capital punishment was extensively applied in olden days, it has lost its importance by the flux of time. Only a few rulers of India like Asoka and Akber have taken the pain to modify the systems of punishments. The Britishers initiated the trend of avoidance of death penalty in India.

Many countries have abolished death penalty. For abolishing death penalty great movements, like the one that took place in America, were made and being made and being made all over the world.

118. See paras 62, 65, 59, 60 and 68 of Cmnd. 8932.
Deterrent theory is the only one that seems to support capital punishment. But a closer study with the aid of the statistical data show that capital punishment does not have more deterrent value than the life imprisonment.

A study on the approach of the Supreme Court of India to capital punishment reveals that the impact of abolition movement in India and other countries are clearly reflected through its decisions. The Supreme Court has developed a new trend of reducing the incidence of death penalty in as many cases as is possible. For this many new grounds justifying reduction of death penalty have been developed by the Supreme Court. The Supreme Court has used its judicial skills and modern penological knowledge brilliantly well in reducing the death penalty.

The same effect is reflected in the legislative field in India as evidenced by the amendments brought about in the substantive and procedural laws of the country. The Supreme Court has taken the initiative in reforming the law.

More research and empirical study can herald a legal system without risk to human lives. To end, it may be noted:

"Law is for life, let us declare from this humanist platform and look beyond death penalty, lying buried on the debris of civilization towards a Human Tomorrow."  