The present-day social situation in India is described by an expert on Indian affairs, Rothermund, like this: “The spectrum of contemporaneous human experience in India today ranges from tribesmen, still hunting with bow and arrow, to nuclear physicists helping India to detonate her own atomic explosion. In having to cope with this spectrum on a political level, the State indeed has a difficult task to accomplish”.¹ There are conflicts arising out of the living together of different ethnic groups.² A great number of religions influence social life: Hindus (82.7%), Moslems (11%), Christians (2.6%), Sikhs (1.8%) and Buddhists (0.7%) are the largest groups in addition to a lot of sub-groups and sects.³ The Hindu caste system is still influencing social and economic life, although Article 15 of the Constitution of India positively declared that there would be no discrimination on the basis of caste.

Problems also arise from the truly babylonic number of languages. The Constitution mentions Hindi and English as the official languages, and 15 other regional languages. Some 24 more languages and over some 720 dialects also exist in addition. India, with a population of about 680 million, is one of the most densely populated countries; in the years from 1970 to 1979 the yearly increase in population was 2.1% in comparison to West Germany’s increase of only 0.1%. Compulsory education cannot be enforced. A four-fifth of the children, who actually

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³ All figures are taken out of the Fischer Weltalmanach 1982.

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attend school in practice, already leave at the age of ten because they have to support their families with their labour. Poverty must be regarded as one of the greatest problems. Of the 80% of inhabitants working as peasants in the countryside over 40% are living under the subsistence level. In major cities, like Calcutta, Delhi and Bombay, every second person does not have sufficient means to support life.

**Religions on Capital Punishment**

The Indian Constitution guarantees the protection of each religious belief; no religion is recognized as the State Religion. The doctrines of the two main religions, Hinduism and Islam, are interpreted in such different ways, that both retentionists and abolitionists of capital punishment are in a position to appeal to their religious doctrines. So, similar to Christianity, a clear and definite statement cannot be expected.

The Hinduism is characterized by the doctrine of rebirth. Every being is reborn in an eternal wheel of becoming, depending on one's bad or good deeds, one is reborn as a God, human being, animal or in hell. So it should be the aim of each Hindu to ensure a good position on rebirth by good deeds, this leads to one of the main ethical commandments, the *ahimsa*. It says, that every creature, whether animal, plant or human being is not allowed to be killed or injured, otherwise one endangers one's own position on rebirth. The opponents of capital punishment refer to this doctrine which prohibits killing. As a second religious argument they mention *dharma*, in consequence of which capital punishment has to be abolished. Mahatma Gandhi, the father of the Indian nation, had declared himself an opponent of the death sentence. But, this theoretical basis, itself derived from Hinduism, conflicts with the practice during the so called Hindu period (2250 B. C. - 1200 A. D.), in which death sentence was imposed even for a theft.

The second religion of an enormous influence is Islam. Since the foundation of Pakistan in 1950 its share has diminished

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to 11.2% but for centuries Islam has been exerting a decisive influence in the country. Islam is not only a religion in the theological-dogmatic sense, but it also implies the foundation of a specific Islamic State, it contains inseparable religious and political components. On this basis of unity of polity and religion the State is regarded as a representative of God in this world. Because of this function, it is allowed to dispose of human life. The character of punishment is attributed to Mohammed who taught: “An eye for an eye, a tooth for a tooth”. In the cause of Islam’s development the individual gave this right of sanction to the State. A murder, must be punished with death, because killing is regarded as the gravest offence against the Koran, but this does not include the legitimate defence of the State to protect the life of its citizens. In Islamic law a person sentenced to death had only one chance. If the relatives of the victim were opposed to the idea of revenge and only demanded compensation in money the offender and his family had to pay the “blood-price”, thereafter the person convicted was set free.

A change towards a gradual abolition of capital punishment in Islamic law could, perhaps, be seen in the development that families who favoured compensation were promised a reward. In conclusion, it cannot be said that the Islam unequivocally advocates capital punishment. The fact, that in Pakistan, in recent years, four times the number of death sentences have been enforced than in India is not too much helpful in this context, because there may be many different reasons for this.

CONCEPTION OF THE STATE

The attitude towards capital punishment depends on one’s conception of the State, too. A theocratic State like Pakistan

8. N. Boubakeur, L’Islam et la Peine de Mort, in (1978), No. 16, pp. 119, 120.
9. Id., p. 121.
is considered to be a proponent of the death sentence. India likes to regard itself as a secular State and consequently it is likely to be more libertarian in imposing deterrent punishment.

Nehru, the former Prime Minister of India, considered secularism and tolerance as of prime importance. Indeed, the preamble to the Constitution as well as Articles 25 and 26 guarantee religious liberty in belief and practice. But, that Hinduism did not become a State Religion is said to be more a question of a lack of organization for Hindus and of the British heritage of a neutral attitude towards religion.10

THE STATUTORY REGULATION OF CAPITAL PUNISHMENT

History

The national epic poem of the Indian people, *Mahabharata*, held to have been composed in the fourth century B.C., describes vividly a quarrel between King *Dyumatsene* and his son, Prince *Satyavan*. A few men were brought to the King to be executed. But the Prince tried to change his father's mind by explaining: "It is not possible for the destruction of an individual ever to be just". He also referred his father to the possible tragedy of killing innocent persons. It would be much better to deprive them of their possessions and imprison them. Another, more recent source is said to emanate from the Zenith of the Hindu period (540 - 325 B.C.).11 Generally it was the King's task to protect property, to return it to the old owner and to punish the thief. The offender had to go immediately to the King, who had to beat him irrespective of whether the accused might die or not. It can be said that during the Hindu period (2250 B. C. - 1200 A.D.) capital punishment was a much used sanction.12 The Moslems introduced while they were in control over India their

own principles of punishment. At that time, death sentence used to be enforced by stoning or whipping.

The English were the first who succeeded in setting up centralized government over the whole country. Their law, being at first only applicable to the English, prescribed capital punishment for altogether twelve offences. When, in 1862, the Indian Penal Code, obviously influenced by the English, came into force the long English tradition of capital punishment was continued in a codified form.13

Present Law

Capital punishment is prescribed in sections 121, 132, 194 para (2), 302, 303, 305, 307 para (2) of Indian Penal Code. Besides these sections there are 3 other categories of cases of constructive liability to death penalty, viz., section 34, sections 109 to 119 and section 396 of Indian Penal Code. Only section 303, which makes provision for a case in which a person sentenced to life imprisonment commits murder prescribes the death sentence as a mandatory punishment without leaving the judge any discretionary power. All other sections just mentioned also provides, apart from capital punishment, imprisonment for life. Deportation to the Andaman islands, a punishment which had frequently been imposed since 1858 as a result of the overcrowded prisons, was abrogated in 1949. Death sentence can be imposed by a Sessions Judge sitting on his own and by a High Court. The death sentence passed by a Sessions Judge has to be confirmed by the High Court.

Articles 132, 134 and 136 of the Constitution guarantee a right to appeal to the Supreme Court. The President of the Republic and the Governors of the Union States have the power to grant a pardon under Articles 72 and 161 respectively under the Constitution of India. If the death sentence is not subject to further appeal, it has to be enforced by hanging. There is a considerable body of opinion which favours the replacement of hanging with something more human and less painful. The

gas-chamber, electric chair and injections have been suggested. But no change has been recommended because one thinks that hanging is the most certain, human, quick and decent method.

The time-limit between confirming the sentence and execution should not be longer than 28 days. But in practice this often is much longer, especially in cases of appeal or pardon. Amnesty International report cases in which the time between sentence and execution has been prolonged for up to ten years. 14

Women may also be executed, but the enforcement of a death sentence must be postponed in the case of pregnancy.

In 1967 Law Commission of India recommended the imposition of capital punishment for young persons only if, at the time of the offence, they have reached the age of eighteen. 15 But this change was not adopted in the amendment of the Indian Penal Code.

A mental disease of the required degree of the accused excludes conviction and thereby capital punishment. 16 In such cases, Indian law, as is the case of German law, applies the institution of protective detention.

TRENDS TOWARDS RESTRAINT OF CAPITAL PUNISHMENT

Since the independence of India in 1947, the number of death sentences has diminished. Where they were imposed, however, judges increasingly tended to commute the sentence. This trend towards restraint of capital punishment becomes quite clear from the amendments of the Criminal Procedure Code in 1973. The original section 367 of the 1898 Code required the court to state the reasons why death sentence was not passed. This was deleted with effect from January 1956 and the court was given the option of passing either the death sentence or a sentence of life imprisonment, depending on the facts and circumstances of each particular case. Since the amendment of 1973,

section 354 sub-section 3 reads as follows: “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 in the case of death special reasons for such sentence”.

This means, that life imprisonment is now the rule in cases of murder and that capital punishment is only an exception to be resorted to for special reasons that must be given. These special reasons have neither been described nor defined in the Code, no guideline has been furnished either by Parliament or by the highest Court of the land.

Death sentence has to be “sparingly used”, it should be passed only in the rarest of rare cases, keeping in view the criminals and not the crime. The courts are required to look into the character, family history, antecedents, social background, economic environment and other motivating forces. But, according to Amnesty International, this theoretical change has not considerably diminished the number of death sentences in practice. Between 1971 and 1975, 200 death sentences are said to be enforced.

Now, what about the imposition of the death sentence for murders claimed to have been committed for political reasons? Since the increased activities of the ‘Naxalites’ this question has been subject to discussion again. India always prides itself on not having hanged political murderers since Godse, the man who assassinated Gandhi in 1948. But, contrary to this attitude, in 1975, four years after their conviction two ‘Naxalites’ were hanged. In the morning of the same day, which was the 25th

20. A group of extremist Marxist revolutionaries who are inspired by Maoist ideology are commonly called Naxalites or Naxalbaris named after the place Naxalbari in the State of West Bengal where the movement originated first in India.
anniversary of the Indian Constitution the Government had promised the commutation of all death sentences imposed upto that day. 21

MOVEMENT FOR ABOLITION OF CAPITAL PUNISHMENT

There has been mounting pressure in the country to abolish capital punishment altogether. In 1931, an abolition bill was introduced in the legislative assembly, but a motion for circulation of the bill was defeated, as well as another bill in 1956. In 1958 the question of abolishing capital punishment was discussed again in the Upper House of Parliament (Rajya Sabha): “The ripples are created and they are in the air”. In 1961, another similar resolution was rejected after a long debate in the Lokh Saba, the Lower House of Parliament. Another resolution moved in 1962, though received more serious attention, was withdrawn when the Government gave the assurance that the proceedings of the debate would be sent to the Law Commission for consideration with regard to its review of the Indian Penal Code and Criminal Procedure Code. The result was a separate Law Commission Report on capital punishment submitted to the Government in September 1967. Questionnaires were sent to all those concerned; almost all State Governments, Judges of High Courts, bar associations throughout the country, and distinguished lawyers. Many were in favour of retention of death sentence. In its Report, the Commission came to the following conclusion:

“Having regard, however, to the conditions in India, to 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 abolition of capital punishment”. 22

In this thesis which seems to be irrevocable, the abolitionists face the end of their efforts to attain their aim by introducing a bill. There had been several actions to have capital punishment declared unconstitutional, but they failed, too. In 1973, the Supreme Court said that Article 21 of the Constitution contains nothing against the constitutionality of capital punishment. This decision was followed in 1979 and again in 1980.

ARGUMENTS ON BOTH SIDES

The retentionists of capital punishment emphasize that all their arguments have to be considered in the light of conditions in India. Arguments that may be valid in respect of other countries may not necessarily be valid for India. India is a vast country and the large mass of the population is illiterate. The majority of the people live in villages, scattered far and wide and are looked after by a police force which is not uniformly adequate. There are, in some parts of the country, sectional feuds marred by fanaticism.

The extra-legal factors that act as a check on murder in Western countries, education, prosperity, homogeneity and awareness of fault, are unfortunately absent in many parts of India, or are overpowered by other and more violent factors.

There had been a detailed discussion, concerning the deterrent effect of capital punishment. This deterrent effect is one of the basic arguments of the retentionists, nevertheless they know the problems. Human being is complex and actuated not only by fear, but also by love, loyalty, greed, lust, and by many other factors.

27. Id., p. 53, para. 124.
In spite of these arguments, the retentionists are convinced of the deterrent effect of capital punishment; they say that this deterrent effect cannot be seen directly, but it acts on the community in the form of moral consciousness.29

Further, they argue that the majority of murders in India are committed by poorer and backward classes. Prison conditions are often better than conditions prevailing in their homes, and for such persons death is the only deterrence.30 Moreover, life imprisonment is inadequate to replace capital punishment, particularly because of the practice of earlier release. The retentionists also refer to the fact that public opinion is in favour to capital punishment. As in Germany, Kant is quoted who explained that the proper theory of punishment is the theory of retribution. It is also said that capital punishment in a painless and human form is less cruel than imprisonment for life. 31 Further the retentionists do not see a problem in miscarriage of justice, because the accused has the chance of appeal and pardon. But, if however, one considers the criticism, that is often expressed concerning the apparent susceptibility of the Indian justice system to corruption, one may conclude that this argument would rather tend to lend support to the abolitionists' cause.

Another argument of the retentionists is that a poor land like India is not able to imprison all murderers and feed them for decades, not to mention that the taxpayers should not be called upon to pay for the maintenance of anti social criminals for an indefinite or very long period.32 Further more there will be an increased risk to police officers, if murderers are not sentenced to death. Very often, there have been cases when murderers, after they came out of prison, pursue the man who got them convicted.33

29. *Id.*, p. 112.
30. *Id.*, p. 58.
31. *Id.*, p. 57, para 145.
32. *Id.*, p. 56, para. 140.
33 *Id.*, p. 55, para. 131.
Capital punishment also has the function of avoiding popular reactions, if the people think that justice has not been done, they take the law into their own hands. But, the main argument of the retentionists is that even if the principle of abolition is accepted, the time is not yet ripe in India. Present-day society is not yet ripe for this reform and the community has not yet reached such stage.

Above all the abolitionists mention that Indian ideology is based on non-violence. This is the great ideal, which the fathers of the Indian nation kept before them and if they have any regard and respect for them, the death sentence must be immediately removed. Further they say that difficulties of prison administration are no argument for retention. Taking away of life by the State for economic reasons is contrary to the universally accepted religious and moral principles. Capital punishment is irrevocable. In case of an erroneous conviction no compensation can be awarded.

Capital punishment is unjust as well, because persons who cannot afford to engage a good lawyer are unable to fight a case to the last; so the poor Indian has smaller chance of not being executed. The opponents of capital punishment think that at least the experiment of abolition is worth making. India, with its great traditions is more fitted to make this experiment than any other countries. For them, the argument of public opinion is an irrelevant one. On the one hand public opinion is largely divided on the issue, on the other hand the leaders who are Members of Parliament are responsible for creating public opinion and for reforming society.

34. Id., p. 57, para. 143.
35. Id., p. 58, para. 150.
36. "If a country physically and morally in shambles, as was Germany in 1948, could abolish the death penalty without any ill effects, this country of ours, the land of Lord Mahabir and Buddha - and of Mahatma Gandhi; the apostles of peace and of Ahimsa . . . . should need the continued protection of the hangman?" id., p. 60, para 160.
37. Id., p. 69, para. 204.
Opinions Outside Parliament

The questionnaires which were despatched by the Law Commission show that the proponents of capital punishment are in the majority. In favour of retention were almost all High Courts, Bar Associations, all State Governments and most of the directors of prisons and police force. But, abolitionists were in the majority as regards the private persons questioned. This leads to the conclusion, that public opinion in India does not totally support the retention of capital punishment.

By comparing this discussion in India with the one in West Germany, it can be said that there are no totally new arguments. The difference only arises because of the difference in weight of certain arguments, e.g., the economic argument or miscarriage of justice. Also the argument of general deterrence might be weighed differently, or perhaps, viewed from a different angle.

For the man in the street the State was, and still is, the ruler over life and death. A State that voluntarily gives up this position, might be regarded as a weak one, no longer requiring loyalty. But, are these mere speculations? The weight of various criminological arguments like gang warfare and a murder rate amounting to six-times that of England and France are yet to be evaluated. There remain a lot of questions, but nevertheless, one should try an evaluation. Because of the weight of the specific Indian arguments capital punishment should be retained for the moment. But there rests a hope, that there will be a further restraint and that abolition will follow in the end.

38. See, Id., pp. 70-76.