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LOOSE THE NOOSE: BID ADIEU TO CAPITAL PUNISHMENT *

ABSTRACT

This research paper basically aims at providing various pro-abolishment rationales for death penalty. This paper commences with the various punishment theories propounded till date and moves forward with a total humanist approach. This paper shows the flow of Indian laws from a totalitarian and orthodox approach to a modernistic and welfare approach. It lays down several rationale on the basis of precedents and law reports to provide a much humanistic approach in the Penal system of India by the way of abolishment of the Capital Punishment barring a few exceptional cases. The basic aim of the paper is to provide certain reasons which ensures humanity. All the rationale behind Capital Punishment frustrates the basic purpose of law that is to provide social justice and individual security. The shabby concept of Capital Punishment abridges or takes away the live concept of *living law.*

1. INTRODUCTION

"*Law is a rule whereby invisible border line is fixed within which the being and the activity of each being obtain a secure and free space.*"

- Fredrick Karl Von Savigny

Law favors reason and abandons all the unreasonable acts. It must favor the notion of order and must reject notion of force. It is an agreement between state and citizen of state and thus it must protect the interest of each and every individual. Capital punishment should be abolished to make law a voice of harmony. The harmonizing approach in a new term can be quoted as a reformative approach. The theories of punishments have flown down a vast valley beginning right from the theory of retribution to the theory of reformation. Law must adhere the nature and must not act beyond the transcendental phenomenon.

Inflicting pain is a general human tendency. It has become a part of human behavior, followed ever since the evolution of human being and passed through generations to us. Unlike the Utopian society depicted five hundred years back by Thomas Moore, we are living in a society in which now and then, conflicts among individuals take place, people are ready to inflict any kind of pain to another. And, when these vices conflict with the established laws, pain is again inflicted upon those who encroach upon the legal mechanism by the means of sanctions or any other kind of penalties. These kind of sanctions stem from the theory of punishment.

1.1 Theory of Punishment

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There are five different theories of punishment existing in this civilization differing from each other in the quantum of punishment. But these can never exist unaccompanied by any other in any judicial system. These can be portrayed as:

1.1.1 Deterrent Theory

Salmond sparkled the deterrent theory in the society by declaring that *"The chief end of the law of crime is to make the evildoer an example and a warning to all that are likeminded with him".*[1]

In the words of Bentham, *"Example is the most important end of all, in proportion as the number of the persons under temptation to offend is to one."*[2] He says that greater evil can be exterminated by the example only.

For Beccaria punishment is an evil- *"The degree of the punishment, and the consequence of a crime, ought to be so contrived as to have the greatest possible effect on others, with the least possible pain to the delinquent - for mankind, by their union, originally intended to subject themselves to the least evils possible."*[3]

1.1.2 Retributive Theory

The perception of revenge empowers the retributive theory. The followers of this theory has faded away from generations. Mahatma Gandhi, one of the biggest sceptics of this theory believed that- *"An eye for an eye will turn the whole world blind".*

The reasoning provided by the admirers of this theory rests on that a man has done wrong, therefore for that reason and for no other, he shall be punished. But, contrary to what has been said, punishment as we are told, is an end in itself, not a means to any end beyond itself. Punishment looks to the past, not to the future.[4]

1.1.3 Preventive Theory

Punishment is not an absolute end … Punishment is a means for achieving the state's end, which is public security; and its only purpose is to prevent offences by threatening to punish them.[5] Justice Holmes also writes, *"Prevention would accordingly seem to be the chief and only universal purpose of punishment. The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pain in order that it threats may continue to be believed."*[6]

So, by giving a threat, it prohibits the commission of crime for securing the public security in the state for the greater good.

1.1.4 Reformative Theory

This approach is now the most obeyed and respected all across the globe. The motive behind the establishment of this kind of penal system is to turn the evil inside the human body into something good, trustworthy and reliable asset for the nation. Hon'ble Justice Krishna Iyer had

[1] SIR JOHN WILLIAM SALMOND, JURISPRUDENCE: OR THE THEORY OF THE LAW, 75, (1907).
[2] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, Chap. XIII, Sec. 2, (1948), (Oct. 23, 2016, 04:50 p.m.) http://publishing.cdlib.org/ucpressebooks/view?docId=ft4q2nb3dn&chunk.id=d0e2447&toc.id=&brand=ucpress.
[3] CESARE BONESANA BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS, Chapter 19, (1809), (Oct. 23, 2016, 06:50 p.m.), http://publishing.cdlib.org/ucpressebooks/view?docId=ft4q2nb3dn&chunk.id=d0e2778&toc.depth=100&brand=ucpress.
[4] Hastings Rashdall, *The Theory of Punishment*, 2 International Journal of Ethics, 20 (1891) (Oct. 23, 2016, 07:12 p.m.), http://www.jstor.org/stable/2375806.
[5] THOM BROOKS, PUNISHMENT, 45, (2012).
[6] V.D. MAHAJAN, JURISPRUDENCE & LEGAL THEORY, 124, (5th ed., 2016).

once told that, *"Every Saint has a past but every sinner has a future".* So, as the majesty has said it is a way to look into the future for the creation of a better individual.

In 1975, Robert Martinson, a sociologist, published the results of a study he had made in New York regarding the rehabilitation of prisoners. Among the conclusions he drew: *"The prison which makes every effort at rehabilitation succeeds no better than the prison which leaves its inmates to rot...The certainty of punishment rather than the severity, is the most effective crime deterrent. We should make plain that prisons exist to punish people for crimes committed."*[7]

1.1.5 Expiatory Theory

The theory of expiation go beyond the limits of law. It is not suggested that the criminal law should be entirely divorced form the moral view of any community but ethics must have some subjective viewpoint. State often condemns act which are free of ethical guilt. It is not the task of state to punish sin, but only adopt measures against certain social dangers.[8]

The moral of any entity can be used as a tool for the procreation of something noble from a culprit. One very eminent instance from the Indian history can be taken as Valmiki, who reformed from a dacoit to a saint and wrote the epic Mahabharata.

Researchers in this paper has confined their research area to the jurisprudence of death penalty and its imposition in the Indian Legal System. The researcher has further relied on various arguments in support of abolishment of death penalty and has also suggested certain reforms for the same.

2. JURISPRUDENCE FOR ABOLISHMENT OF CAPITAL PUNISHMENT

Seizing a soul form a body as a part of sanction is centuries old practice of this world, being performed in one way or the other. The harshest among them all dates back to the 7th Century when Draconian Code got established in Greece and death penalty was prescribed even for trivial offences. Fourteenth Century England saw the execution even for the offences as minor as disturbing peace.[9] But, this method has been portrayed as a guardian of humanity since time immemorial and also, changing throughout the course of evolution of our civilization.

A number of references can be inferred from the work of Plato in *The Laws* on capital punishment. He justifies the imposition of death penalty for a wide variety of offences as a measure of deterrence. His various defenses in favor of death penalty in his work shows his willingness to endorse the use of execution.[10] However, the early times also found some rivals against the said proposition of Plato. Thucydides reports a debate between Cleon and Diodotus regarding implementation of death penalty: 'We must not, therefore, commit ourselves to a false policy through a belief in the efficacy of punishment of death, or excludes rebel from the hope of repentance and an early atonement of their error'.[11] This argument of Thucydides shows the contradiction on the very implementation of death penalty in that era.

Capital Punishment in the middle ages has been indorsed by various political thinkers of the age. Grotius justified it with reference to the Bible and accepted the capital punishment to justify the legality of warfare.[12] Thomas Hobbes proposed this penal provision by stating that, '*a subject may be put to death by the command of sovereign*', John Locke has also shown his inclination by enriching the power of sovereign to make laws with penalties of death.[13] Jean-

[7] Bachan Singh v. State Of Punjab, 1983 SCR (1) 145, ¶ 94.
[8] A TEXTBOOK OF JURISPRUDENCE, 358, (G.W. PAWTON & DAVID P. DERHAM EDS.) (4th ed., 2007).
[9] RON FRIDELL, CAPITAL PUNISHMENT, 13 (2004).
[10] JUSTICE V. LAW IN GREEK POLITICAL THOUGHT, 244, (Leslie G. Rubin ed.) (1997).
[11] WILLIAM SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW, 4, (2002).
[12] Id.
[13] AGAINST THE DEATH PENALTY: INTERNATIONAL INITIATIVES AND IMPLICATIONS, 43, (Jon Yorke ed.)(2008).

Jacques Rousseau shares the modern rejection of the death penalty and says that *blood of a single man is of greater price than the freedom of the whole human race*, but he also agrees to capital punishment for certain murderers.[14] Montesquieu narrowed the scope for death penalty to a category of offences which were treason, murder, attempted murder, certain types of manslaughter and certain crimes against property.[15]

Jermy Bentham in the ordinary age of twenty-seven related his general utilitarian principles to the extensive discussion of capital punishment in two chapters of Book II of his *Rationale of Punishment*. Bentham argues the case of death penalty on utilitarian grounds.[16] Bentham revealed four characteristics against the death penalty relative to imprisonment which were:[17]

i) *It is "not convertible to profit":* He substantiated his argument on an evident fact that a dead person cannot provide 'compensation'.
ii) *It lacks "frugality":* He contemplates that this penal provision fails to acquire a desirable amount of pleasure as compared to the pain produced for the person who is being punished, but imprisonment can do this effectively.
iii) *It lacks "equability":* He says that prospective of death varies from one offender to another, for one it may be a very heavy punishment and for another it may mean nothing and thus death penalty cannot serve as an effective deterrent method.
iv) *It is "not remissible":* Bentham says that there is no remedy or any way to compensate the wrongfully executed person. He bases his contention by saying that Judges may get fallible, or, witnesses may depose their testimony in falsehood, or, circumstantial evidence may be effect of chance.

However, in his 1775 essay, a few paragraphs from the end, Bentham approves the death penalty for the offences which in highest degree shocks the public feelings such as aggravated murder which may result in destruction of numbers.[18]

Although in last years of his life, his work entitled "*On Death Punishment*" in the form of an essay- *Jeremy Bentham to His Fellow Citizens of France,* he raised an inquiry and responded as well:

"*The punishment of death-shall it be abolished? I answer-Yes. Shall there be any exception to this rule? I answer, so far as regards sub sequential offenses, No . . . "*[19]

H.L.A. Hart had its own reforming methods which included the state of repentance, or recognition of moral guilt, or greater awareness of the character and demands of the society. He attacked capital punishment by asserting that reform should predominate in a system of Criminal Law, as if the main purpose of providing punishment for murder was to reform the murderer not to terminate the murderer.[20]

Hart while explaining abolition of death penalty in England, referred to words of House of Commons on Debate of the Death Penalty (Abolition) Bill:[21]

[14] JEAN-JACQUES ROUSSEAU: POLITICAL PRINCIPLES AND INSTITUTIONS, 351-354, (John T. Scott ed.) (2006).
[15] CHARLES DE SECONDAT BARON DE MONTESQUIEU ET. AL., MONTESQUIEU'S SCIENCE OF POLITICS: ESSAYS ON THE SPIRIT OF LAWS, 315, (David W. Carrithers et. al. eds. 2001) (1689-1755).
[16] Bedau Hugo Adam, *Bentham's Utilitarian Critique of the Death Penalty*, 74 *J. Crim. L. & Criminology,* 1033 (1983), (Oct. 10, 2016, 11:30 p.m.) http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6388&context=jclc.
[17] HUGO ADAM BEDAU, DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT, 76-80, (1987).
[18] 3 JEREMY BENTHAM: CRITICAL ASSESSMENTS 987 (Bhiku C. Parekh ed.), (1993).
[19] JEREMY BENTHAM TO HIS FELLOW-CITIZENS OF FRANCE, ON DEATH PUNISHMENT, London, (1831).
[20] HART H.L.A., PUNISHMENT AND RESPONSIBILITY ESSAYS IN THE PHILOSOPHY OF LAW, 26-27, (2008).
[21] Id. at 55-56.

"*That this house believes that death penalty for murder no longer accords with the needs or the true interests of a civilized society and calls upon Her Majesty's government to introduce forthwith legislation for its abolition or for its suspension for an experimental period.*"[22]

Blackstone also condemned this very established set of penal provision. Furthermore, he says that theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery and like….. Nor is death always equivalent for death. Whiling indicating at death penalty, he expressed that the execution of a needy decrepit assassin is a poor satisfaction for the murder of a noble man in the bloom of his youth, and full enjoyment of his friends, his honors, at his fortune.[23]

Apart from these eminent jurists there are many who has their own propositions regarding for or against the death penalty. And, as the time is inching towards an era of modern and harmonious society and due to the changing nature of jurisprudence on the subject matter, inflicting this kind of pain on any individual is deteriorating. It can be very well seen in the laws of various countries who has abolished this inhumane practice. This can also be substantiated with the evolution of new international jurisprudence regarding eradication of such practice.[24]

These theories by different jurists from different era is suggestive of the fact that the researchers are not the first one to go ahead in favor of the subject matter. Being a part of progressive society and to achieve the status of a civilized state and citizen, it has been quite necessary to abolish these kind of barbarous practices from the genesis of this country.

3. Juridical Approach

The Constitution of India is the law of the land and the Indian Judiciary has got the power of its interpretation ab initio, since our Constitution came into effect in 1950. The Apex Court in its various judgment, in the journey of this 69 year of independent country, has interpreted Article 21 and Article 14 of the Constitution of India reading with Section 302 of IPC or any other parallel law which prescribes death penalty as its punishment. Many of the prominent judgments has been delivered in this epoch by eminent judges of the nation. The status quo with visitation towards the death penalty rests as *"Death penalty is a law and rarest of rare is the policy"*.[25]

3.1 Death penalty for the offence of Murder

This voyage has taken few turns and bounces and is sure to make few in the upcoming future. Therefore, the history can be divided into few fragments:

1. Pre-1955 Version
2. Amendment in the old Code.
3. Enactment of Criminal Procedure Code, 1973.
4. Inception of Doctrine of Rarest of Rare.

3.1.1 Pre-1955 Version

Section 367(5) of the 1898 Code ruled this period according to which-

"*If the accused, is convicted of an offenses of punishable with death and the court sentences him to any punishment other than death the court shall in judgment state the reason why sentences of death of was not passed.".*

[22] 548 H.C. Deb. 2652, 2655 (1956).
[23] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 13, (1979).
[24] The Second Optional Protocol to the International Covenant on Civil and Political Rights, Protocol No. 6 to the European Convention on Human Rights,
[25] P.K. DAS, SUPREME COURT ON RAREST OF RARE CASES, 1, (2011).

The language of the enactment clearly supports the verdict to be given in favor of death penalty. This era was supportive of the principle that "death sentence was the rule and life imprisonment was the exception".[26]

3.1.2 Amendment in the old Code

Year of 1955 saw a major penal reform with the amendment in Section 367 of 1898 Code omitting the Clause 5 of Section 367. Afterwards, we witnessed a landmark judgment delivered by the Hon'ble Supreme Court in the case of *Jagmohan Singh v. The State of U.P.*,[27] in which the constitutional validity of the death penalty was raised. Court also said that it is left to the judicial discretion of the court whether the death sentence or the lesser sentence has to be imposed. On the question of constitutional validity of Capital Punishment, it was further decided that death penalty is not violative of Article 14, 19 and 21 of the Constitution of India. The apex Court substantiated its argument by concluding that there has to be balance in all the aggravating and mitigating circumstances of the crime facts and circumstances of one case can hardly be the same as the facts and circumstances of another.[28]

3.1.3 Enactment of Criminal Procedure Code, 1973.

In 1973, new Code took the place of Old Code and now Section 354(3) came into picture as against Section 367(5) of the Old Code. Now the new rule states 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 judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.*"

So, now coin seems to have turned downwards and now the principle to be followed gets itself established as, life imprisonment for murder is the rule and capital sentence the exception to be resorted to for reasons to be stated.[29]

Hon'be Justice V.R. Krishna Iyer, he believed that in contemporary India, social mood and realities govern the direction of penal laws wherein legal deprivation of life is the exception and long deprivation of liberty is the favorable choice.[30] Subsequently, he believed that there is a shift in the penal strategy and thus all of the offenders has not to be kept in the hanging basket rather we have to mix the humane approach in it.[31] He further put emphasis to establish a better world, without legal knifing of life, given propitious social changes and also proposed extermination of death penalty from the Indian law.[32]

In an another case, *Rajendra Prasad v. State of Uttar Pradesh*,[33] Justice Krishna Iyer highlighted the dilemma of a judge where he feels trapped due to the choices given by Penal Law which is either physical liquidation or life-long incarceration to the offender.[34] He raises a question that whether it is correct to wipe out a human being from its existence because of the after-shock of the crime committed by him.[35] He further goes on to come to a point that, *"the right to life and to fundamental freedoms is deprived when he is hanged to death, his dignity is defiled when his neck is noosed and strangled"*.[36] He also says that degrading punishment cannot be awarded as it will violate "dignity of the individual", which is itself mentioned in the

[26] Yakub Abdul Razak Memon v. State of Maharashtra through CBI, Bombay, (2013) 13 SCC 1, ¶ 479.
[27] AIR 1973 SC 947, ¶ 4.
[28] Id. at ¶ 28
[29] Ediga Anamma v. State of Andhra Pradesh, AIR 1974 SC 799, ¶ 20.
[30] Id. at ¶ 23
[31] Id. at, ¶ 24.
[32] Id. at ¶ 25.
[33] AIR 1979 SC 916.
[34] Id. at ¶ 1.
[35] Id. at ¶ 2.
[36] Id. at ¶ 57.

Preamble.[37] Putting an end to the dilemma, it was said that death penalty must be the last step in the extreme situations as there is a divinity in every human being and no one is beyond redemption.[38]

*3.1.4 Inception of Doctrine of Rarest of Rare***.**

After a comprehensive discussion on the discretion of the judge to impose punishment on the offender, Supreme Court came up with the solution by outlining a doctrine in the year 1980, which we know as 'Doctrine of rarest of rare' in the case of *Bachan Singh v. State of Punjab*[39] which was later fortified by giving it a precise meaning in the case of *Machhi Singh v. State of Punjab*.[40]

In *Bachan Singh's* case, the Court said that the judges should never be blood thirsty and thus decision in favour of death penalty must be left for the rarest of rare cases when alternative option is available to them.[41] Basically, this doctrine contented that the imposition of death penalty under Section 302 of the Indian Penal Code read with Section 354(3) of the Cr.P.C. was arbitrary as the discretion conferred on the Court to award death penalty was not guided by any policy or principle laid down by the legislature but was wholly arbitrary, and thus the doctrine gave it a proper shape.[42]

In *Machhi Singh's case*, Supreme Court exhaustively narrated the criteria for rarest of rare cases and also said that the community does not sanction the death penalty in each and every case, it will do so only when it's collective conscience is shocked by the act of offender, which in other words may be called- Rarest of Rare case.[43]

This doctrine though provides some relief by making the enforcement of death penalty as an exception, yet takes the life of the individual when it falls in its exception. Doctrine punishes those who commit the crime of heinous nature but this intelligible differentia of deciding whether a case within the criteria of being heinous or of brutal nature is completely discretionary.

In an another case, *Mithu v. State of Punjab*[44], Supreme Court held Section 303 of I.P.C. unconstitutional, violative of Article 14 and 21 of the Constitution of India on the ground that no mandatory sentence of death for the offence of murder can be awarded as it gives no discretionary power to the Court and thus section is Draconian in severity, relentless and inexorable in operation.

3.2 Death penalty in other offences

In *State of Punjab v. Dalbir Singh*[45], the Hon'ble Supreme Court declared that Section 27(3) of Arms Act, 1959 is ultra vires of the Constitution as it provides imposition of mandatory death penalty which violates Article 21 of the Constitution and also seizes the discretionary power of the Court violating the decision given in Mithu's case.

Section 31-A of the NDPS Act has also been held violative of Article 21 of the Constitution of India by the Hon'ble Bombay High Court as it provides for mandatory death penalty and also discretion in the matter of sentence must be left to the judge liable to be corrected by the

[37] Id. at ¶ 68.
[38] Id. at ¶ 99.
[39] AIR 1980 SC 898.
[40] AIR 1983 SC 957.
[41] AIR 1980 SC 898, ¶ 207.
[42] Bachan Singh v. State of Punjab, (1982) 3 SCC 24, ¶ 258.
[43] *Supra* note 40, ¶ 32.
[44] AIR 1983 SC 473.
[45] AIR 2012 SC 1040.

superior court.[46] Appeal has also been made against this verdict in the Supreme Court, but has not been adjudicated yet.

Whenever there is going to be a debate over the death penalty, these landmark judgments will get its place in that debate and all these landmarks judgment suggests one and only one thing, if not explicitly then some way down the road it suggests to switch over the method of punishment from death penalty to life imprisonment, a reformative approach while delineating punishment. It gives us a hint of a key to the reformative approach towards any offender who has been proved guilty of an offence punishable with death.

It can be foreseen from the above established arguments that liberal approach has been established in the recent years while delivering judgments. Now, it is out in the open that no one judge is keen to shed blood in the name of punishing culprits and so is the time to move a step further from what has been established already in these years. So, the researcher would propose a 5th phase which should come across the country by making death punishment unconstitutional or removed by the legislature itself.

4. Capital Punishment: An Aboriginal Practice

4.1 Practice across the globe

Death Penalty can be expounded as the gravest and ruthless punishment one may be awarded by the court of law. Though many of the countries have abolished this terrorizing provision of death penalty on the very foundation that if state cannot give birth then how it can take life of a human being.[47] This includes half of the world along with Britain, certain states of U.S.A., Israel and many more. But as far as the status of Indian law regarding death penalty is concerned, India is still following the path of awarding death penalty as a punishment against certain specific offences.

In the United States of America itself, if we will take a note over the murder rate in states where death penalty is permissible and if compared against the state where death penalty is not permissible, the statistics show a clear picture- states with no rule of death penalty has low murder rate than that of the states where death penalty is being awarded till now. And, the difference is not very subtle but a vast one.[48]

According to a Retired federal judge, H. Lee Sarokin deterrence plays no part when it comes to reducing the crime rate. He convincingly says that, *"Persons contemplating murder do not sit around the kitchen table and say I won't commit this murder if I face the death penalty, but I will do it if the penalty is life without parole. I do not believe persons contemplating or committing murder plan to get caught or weigh the consequences. Fear of the death penalty*

[46] Indian Harm Reduction Network, a Society registered under Societies Registration Act, 1860, Registration No. S/58430/2007 v. The Union of India (UOI), through Secretary, Director General, Narcotics Control Bureau, Zonal Director, Narcotics Control Bureau, Mumbai Zonal Unit and State of Maharashtra AND Gulam Mohammed Malik v. Vipin Nair, Intelligence Officer, Narcotics Control Bureau, The State of Maharashtra and Union of India (UOI) through (a) Secretary, Ministry of Law and Justice and (b) Secretary, Department of Revenue, 2012 Bom CR (Cri) 121, ¶ 57.

[47] *Death Penalty*, AMNESTY INTERNATIONAL CHARITY LIMITED, (Nov. 05, 2016, 09:15 p.m.), https://www.amnesty.org/en/what-we-do/death-penalty/. A total of 102 countries has completely abolished the death penalty.

[48] *Deterrence: States Without the Death Penalty Have Had Consistently Lower Murder Rates*, DEATH PENALTY INFORMATION CENTER, (Nov. 06, 2016, 09:50 p.m.), http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates.

may cause a few to hesitate, but certainly not enough to keep it in force, and the truth is that there is no way of ever knowing whether or not the death penalty deters."[49]

Apart from the laws of the different nations, certain International laws also explicitly puts a bar on the practice of death penalty and these are:[50]

- The Second Optional Protocol to the International Covenant on Civil and Political Rights
- Protocol No. 6 to the European Convention on Human Rights
- The Protocol to the American Convention on Human Rights to Abolish the Death Penalty.

4.2 Overview: Indian Perspective

The murder rate in India has remained approximately constant for the past 10 years (around 2.8 per 1, 00, 000 of population) with a declination at a very minute rate in past two years depending on the rate of murder in various states.[51] Crime under Narcotic Drugs & Psychotropic Substances Act, 1985, Explosives and Explosive Substances Act, has also increased by a significant rate across the country.[52] It is apparent from the figures that punishment of death penalty is not contributing the cause of lessening the crimes which is the purpose of enforcing any kind of punishment in the penal system.

It is also well established that the difference in the execution and pronouncement of death penalty is huge.[53] If we look at the recent figures, around 1,455 convicts from 2001-11 has been awarded death penalty but number of execution during the period till 2016 has only been three.[54] This inefficiency of the penal system has led to sufferance for the prisoners on death row. The anticipation of death by each passing day creates fear in their mind and can be considered as the violation of human rights and to right to live with human dignity. This terror over the mind of inmates must be culminated.

There are few states which have not even executed death sentence till date[55] and the crime rate in those state is also less than the average crime rate of over all India[56] and so is the rate of violent crime in those states.[57] It indicates that even where death penalty is being constantly awarded and executed, crime rate is not lessening in those states. So, the whole purpose of retaining death penalty is getting compromised and this is one of the many rationale proposed by the researchers for abolishment of this aboriginal practice.

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[49] H. Lee Sarokin, *Is It Time to Execute the Death Penalty?*, Jan. 16, 2011, http://www.huffingtonpost.in/entry/is-it-time-to-execute-the_b_809553.

[50] *Supra* note 47.

[51] *Crime in India 2015*, National Crime Records Bureau, Ministry of Home Affairs, Government of India 4, Table 1.3 (Dec. 18, 2016), http://ncrb.nic.in/StatPublications/CII/CII2015/FILES/Compendium-15.11.16.pdf.

[52] Id. at 36, Table 1.12. Crime under Narcotic Drugs & Psychotropic Substances Act, 1985 has increased by 3.8 % in 2014 as against increase of 2.8 % in the year of 2013, and, Crime under Explosives and Explosive Substances Act has increased by 0.3% in the year of 2014.

[53] Prakash Satya, *Death penalty: 'Rarest of rare' cases are not so rare in India now*, Feb 05, 2016, http://www.hindustantimes.com/india/rarest-of-rare-cases-are-not-so-rare-in-india-now/story-JxnTLyJ4tPlDBnHhatCcIL.html.

[54] *Death Penalty Database*, CORNELL LAW SCHOOL, (Dec. 16, 2016, 03:50 p.m.), https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=India.

[55] *State-wise list of Prisoner Execution in India since 1947*, Death Penalty Research Project, NLU, Delhi 36 (Dec. 16, 2016), http://www.deathpenaltyindia.com/wp-content/uploads/2014/12/PrisonersExecutedinIndiasince-1947.pdf. These states are Andaman & Nicobar Islands, Arunachal Pradesh, Chandigarh, Chhattisgarh, Dadra & Nagar Haveli, Daman & Diu, Gujarat, Himachal Pradesh, Jharkhand, Lakshadweep, Manipur Meghalaya, Nagaland, Mizoram Puducherry, Sikkim, Tripura, Uttarakhand.

[56] *Supra* note 51 at 59, Figure 3.1.

[57] *Supra* note 51 at 60, Figure 3.2.

4.3 LCI Report on Death Penalty 2015

In the 35th Report of Law Commission of India, 1967, it was expressly suggested that risk of abolishment of death penalty should not be taken and it is the need of the hour to check the crime rate and maintenance of law.[58] This was based on the popular conviction persisting among the people of the nation which has changed in recent years towards the subject matter. It can be very well reflected from the suggestions forwarded by recent LCI report in 2015.

The report has marched in favor of life imprisonment instead of imposition of death penalty for all crimes other than terrorism related offences and waging war.[59] This was the first step taken for the establishment of new jurisprudence in the country towards reformative approach of the penal system and retreating from retributive approach. But, they have also hinted that there is no valid penological justification for treating terrorism differently from other crimes, yet they retained death penalty in the name of national security.[60]

The researchers here also propose for the same which has been already recommended by the LCI in 2015 but the distinction which has been reserved for the terrorism should also be swept away and they shall be equated on the similar pedestal. The reasoning for the same is that the terrorist who gets into our country, they already enter in our country by knowing the fact that they can be executed by armed forces, if caught. So, giving death penalty to those who are willing to die on the out front is no punishment at all. If the approach gets upside down and the practice of imposing life imprisonment is established, then only by making them realize the magnitude of the crime committed and making them repent for the same can be a possible way to punish those culprits for the crimes committed by them against mankind.

Once, Gandhiji has also said that *"God Alone Can Take Life Because He Alone Gives it"*. The same approach should be taken by our legislators and the judiciary.

5. Conclusion

"In the great majority of human beings merciless retribution does not cure but merely hardens and embitters. If corporal punishment could be proved to have a remedial effect on the object of it, it would in my opinion be justified, but the overwhelming bulk of evidence is that in most instances it has the reverse effect".

- Justice Krishna Iyer

Though about capital punishment much juristic ink has flowed in an endeavor to provide a universally accepted procedure but there has been a little sign of attaining that objective as there has never been unanimity of opinion regarding this. Evidences have witnessed that we are still trapped in police state because of legality of such punishments. The foundation stone of welfare state is in humanity and the capital punishment is inconsistent with such humane concepts. The aim of the law is to set a standard of behavior which makes the society *appraise* the law not *abide* the law. State must strive to abolish the Austinian notion of law being a command of the sovereign backed by sanction. The favorable concept of law is the Moulton's theory- *"law as a crystallized common sense of community"* and this common sense refuses to inherit the theory of capital punishment. The murder that is depicted as a horrible crime is repeated in cold blood, remorselessly by way of this procedure of capital punishment. Moreover, this punishment also shows that there is *monopoly of state* in use of force as state is striving to stop an act by way of same. Social pressure must be a tool of psychological advancement and not deterrence and the policy of law makers must oscillate between individual and social interest. Law must not be against phenomenon of nature.

[58] Report No. 262, *Death Penalty*, Law Commission of India, 2015, p. 3.
[59] Id. at 217.
[60] Id.

Law should be stringent for the actions not for the actors. Law must be flexible enough to ensure the needs of the society without compromising with the interests of the individual. The only catalyst for such flexible approach is reformative theory of penalizing the culprits. State is a custodian of both, individual as well as social interests. Law must make the society prudent enough to accept the guilty actors and reject the notion of retribution and deterrence. The research paper aimed to uncover the basic rationality for abolition of capital punishment and provide a foundation stone for such an act. The abolishment of such punishment will ensure non-violence in Gandhi's India.