CHAPTER-III

CAPITAL PUNISHMENT : HUMAN RIGHTS JURISPRUDENCE DEVELOPED BY THE INTERNATIONAL, REGIONAL AND NATIONAL BODIES

If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries.
- George Bernard Shaw

3.1 INTRODUCTION

Life is so dear to everyone that no one desires his soul to leave for the celestial world. Love towards life leads human mind to live in eternity. Evolution of Human Rights jurisprudence is an outcome of reverence for life. Today’s crusade for protection of basic human rights via human rights instruments of the international, regional and national bodies and the codified laws is an outcome of man’s instinct to respect the other living beings. Rule of law has been the crux of a peaceful society, which on failure always gave birth to the retributory or preventive instinct in human beings. In ancient era, people usually followed the concept of Dharma which infused and imbibed human minds to embrace every type of righteous conduct for welfare of an individual and the society. Such a divinity in human beings excluded the evils from everyone. Avowedly, such inculcation in human minds was outcome of faith in Dharma as also the fear of divine displeasure for disobeying Dharma. Such a divine command in absence of State ensured progress and upliftment of living beings.

Rare indeed is this human birth. The human body is like a boat, the first and foremost use of which is to carry us across the ocean of life and death to the shore of immortality. The web of our life is of a mingled yarn, good and ill together. Affliction does not come from the dust nor does sprout from the ground but man is born to trouble as the sparks fly upward. A person sins when he succumbs to the inclination to contravene the divine will by pursuing inordinate desires. A situation arose when some members of the society contravened the

---

1 Srimad Bhagavatam XI. XIII
2 William Shakespeare ‘All’s well that Ends well’.
3 Bible Job 5: 6-7
4 Sekai Kyusei Kyo. Mokichi Okada, Johrei
divine set up by flouting *Dharma*. The joy and moral stimulation of work came to be forgotten in the mad chase of evanescent profits. The inclination aggression constituted impediment to the rule of *Dharma* being ruled by the society itself on mutual cooperation. Failure of such a divine set up gave existence and established the institution of Kingship/State.

The following is the brief survey of the changing society.

3.1.1 **REVERENCE FOR LIFE:**

On birth of a child in the family, all of us pray for the health, happiness and wellbeing of the new born in the following words:

May you live for one hundred years  
May you see one hundred autumns  
in their resplendent glory,  
May you listen to the whispers of the falling leaves  
of one hundred autumns  
May you minstrel to humanity  
in the language of one hundred autumns.  

Everyone desires to achieve immortality. What a man thinks has been truly described by Shri Rabindranath Tagore in his poetry as follows:

I do not want to die  
In this beautiful planet  
I want to live  
Amidst the army of human beings  
I want to live  
In the midst of the rays of the rising sun  
Amidst the flowers and foliage of gardens  
of beauty and fragrance  
How I wish I could get a little place  
Amidst the hearts of living beings.

Before dealing with the concept of human rights jurisprudence of today’s world, it would be worthwhile to have a glimpse of ancient era to see the rule of law in absence of a State and after origin of the State.

---

5 Shukla Yajur Veda
3.1.2 **RULE OF DHARMA IN ABSENCE OF A ‘STATE’:**

Law is the highest reason, implanted in nature, which commands those things which ought to be done and prohibits the reverse. The highest law was born in all the ages before any law was written or State was formed. We are by nature inclined to love mankind which is the foundation of law.⁶

In ancient era, there was no State⁷ and people were following Dharma⁸ to protect each other. ‘Stateless society’ finds mentioned in Mahabharata Shantiparva as under:

```
नैव राज्यं न राजा सीत्य दण्डो न च दाण्डिकः |
धर्मेणैव प्रजा: सर्वा रक्ष्यति स्म परस्परम् ॥ ॥⁹
```

Neither there was kingdom nor king, neither punishment nor the guilty for being punished. Dharma was being followed by people to protect each other.

The supremacy of Dharma prevailed in ancient Indian Rajadharma which reads thus:

```
तदेतत्तु — क्षत्रियः क्षर्म: यद्यमः: ॥ तस्माद्भार्तेपरमः नासितः।
अथो अबत्तियां बलियांसमाशनस्ते धर्मेण: ॥ यथा राजा एवम् ॥ ॥¹⁰
```

Law is the king of kings; nothing is superior to law; the law aided by the power of the king enables the weak to prevail over the strong.

---

⁶ Cicero
⁷ The ‘State’ is an association of human beings which is brought into existence by a morally self-possessed society to serve as its impartial agent for making its sense of justice prevail in the justiciable sphere of the social life, and with that end in view endowed with supreme legal authority (including the monopoly of legal force) on condition of exercising it in strict conformity with the moral standards of the society. [See: K.P. Mukherji, The State p.42]
⁸ The Sanskrit word ‘Dharma’ is a word of the widest import. There is no corresponding word in any other language. Mahabharatha Shantiparva (109: 9-11) contains a discussion of this topic. On being questioned by Yudhistira about the meaning and scope of Dharma, Bhisma states:

```
तावृद्धिदलगुणमण्यते यदम् सुदुःस्तरम् ।
 तुकात्र प्रतिसंभाव्यतुता कथं यथसत्तति ॥ ॥ (109.9)
```

वधाणम् विधियानन्दुनिपृत्तमण्यता प्रकटम् ।
 ये सदैव वधानसुयुक्तं सर्वं इति विशेषम् ॥ ॥ (109.11)

"It is most difficult to define Dharma. Dharma has been explained to be that which helps the upliftment of living beings. Therefore that which ensures welfare (of living beings) is surely Dharma" [See: Shantiparva, 109-9-11]

Madhavacharya, the Minister of Hakka and Bukka, founder Kings of Vijayanagar Empire, in his commentary on Parashara Smriti, has briefly and precisely explained the meaning of Dharma thus:-

```
अपूर्वतः — निषेध्यतेश्च समाधितत्वाधारयति — इति धर्मः।
 स च वधानं — वामनाद्यां चोदनासुष्टवशस्त्रशिधितम् ॥
```

“Dharma is that which sustains and ensures progress and welfare of all in this world and eternal bliss in the other world. The Dharma is promulgated in the form of commands (positive and negative i.e. Vidhi and Nishedha). [See: Parashara Dharma Samhita, edited by Vamanasharma” (1893) p.63]

Dharma embraces every type of righteous conduct covering every aspect of life essential for the sustenance and welfare of the individual and the society. The Smritis classified such of the rules of Dharma which were purely personal in nature as ‘Achara’ (Conduct) and those which were to be enforced and observed by the State as civil and criminal law (Vyavahara Dharma) and Constitutional Law (Raja Dharma) respectively.

⁹ Mahabharata Shantiparva 59 : 14
¹⁰ Brihadaryaka Upanishad 1-4-14.
This verse not only declares the supremacy of law but also the principle of rule of law. The Dharma was the ultimate authority and the authority of the king was only penultimate.

The basic philosophy that for the good of the greater number, interest of individuals or smaller groups should be subordinated and sacrificed to the extent necessary was deeply embedded in and formed the foundation of Dharma. This aspect is evident from the following verse:

ćeśvāvān kulaśārāṁ gāmasārāṁ kulaṁ tucchet
grāmāṁ janaśārāṁ aatmāṁ pūrthīṁ tucchet ||

Sacrifice the interest of individual for the sake of the family, sacrifice the interest of the family for the sake of the village, sacrifice, the interest of the village for the sake of the country and lastly for the sake of securing Moksha (eternal bliss) of the Atma reject the World.

The above verses give a clear picture of an ideal stateless society, which appears to have been in existence in the hoary past. Such a society was the most ideal for the reason that every individual scrupulously acted according to the rules of right conduct by the force of his own culture and habit and not out of any fear of being punished by a powerful superior authority like the State. Consequently there was mutual co-operation and protection. The society was free from the evils arising from selfishness and exploitation by individuals. The sanction which enforced such implicit obedience to Dharma was the faith of the people in it as also the fear of incurring divine displeasure if Dharma was disobeyed.

The source of all evil actions of human beings was traced to the desire for material pleasure which in turn gave rise to conflict of interests among individuals. While man has the inherent capacity to control his desires and not to harm other human beings, when his desires go uncontrolled, he has also the mischievous propensity to cause injury and misery to his fellow men and women.

3.1.3 ORIGIN OF KINGSHIP/STATE IN ANCIENT INDIA:

The ideal society so beautifully described above did not last long. While the faith in the efficacy and utility of Dharma, belief in God and the God fearing attitude of people continued to dominate the society, the actual state of affairs gradually deteriorated. A

---

11 Udyoga Parva (Vidura Niti – Ch.37-17)
12 JOIS, RAMA, SEEDS OF MODERN PUBLIC LAW IN ANCIENT INDIAN JURISPRUDENCE, 5 (LUCKNOW EASTERN BOOK COMPANY 1990)
13 Id., p.7
situation arose when some persons, out of selfish worldly desires began to flout Dharma, and became immune to the fear of divine displeasure. They were infatuated by their desire for pleasure and, prompted by their own muscle power, began to exploit and torment the weaker sections of society for their selfish ends. Tyranny of the strong over the weak reigned unabated. The danger to peaceful co-existence and consequent uncertainty and anxiety about the safety of life and property of individuals, was brought about by such individuals. It was as though the rule of ‘Matsyanyaya’ (big fish devouring the small fish) governed the society. This situation forced the law abiding people to search for a remedy. This resulted in the discovery of the institution of king and establishment of his authority (kingship or the State).  

3.1.4 RAJDHARMA : DUTIES OF KING (STATE) : OBJECT OF INFLICTING PUNISHMENT:

The discovery of the institution of king and establishment of the Kingship/State started a new era. A King is expected to protect the society. It is stated in Manusmriti and I quote:

ब्राह्मण प्राप्तेन संस्कारं क्षत्रियेण यथाविधि |
सर्वस्यास्य यथान्त्यायं कर्तव्यं परिक्षणम् ।।

The King, Kshatriya by birth, consecrated with the sacred-thread, has the duty to protect his subjects on paradigms of justice.

The provisions of Rajadharma incorporate innumerable functions to be discharged by the King. All these have been summed up in five fundamental duties:

दुष्टस्य दण्डः सुज्ञस्य पूजा न्यायेन कोषस्य च संप्रस्विकः ।
अपक्षारोर्षिष्यु राज्यरक्षा पन्चेव यज्ञः: कांमिता नूपाणाम् ।।

To punish the wicked, to honour (protect) the good, to enrich the treasury (Kosha) by just methods, to be impartial towards the litigants and protection of the country - These are the five yajnas (selfless duties) to be performed by a King.

The object of inflicting the punishment under the Ancient Indian Penal law was both reformative and deterrent. Rajadharmā gave great importance to the administration of justice and declared that it was the personal responsibility of the King himself. He was required to preside over the highest court and render justice to the litigants as well as punish the offenders in an impartial manner:

पिताज्ञायः सुहृत्वा भार्याः पुत्र: पुरोहितः ।
नादयति नाम राज्यभ्रस्तिः य: स्वघर्में न तिष्ठति।।

---

14 Id., p.21
15 PATHAK, GANESH DUTT, 7 : 2 MANU SMRITI, 208 (VARANASI, SHRI THAKUR PRASAD PUSTAK BHANDAR, 2002)
16 Atri Smriti-28
The King should not leave an offender unpunished, whatever may be his relationship with him. Neither father, nor a teacher, nor a friend, nor mother, nor wife, nor a son, nor a domestic priest should go unpunished for the offence committed.

It is evident from the above that ensuring the welfare of the people was the quintessence of the Rajadharma.

The powers vested in the King (State) to punish a person found guilty of an offence has been praised by the Dharmashastra as a great gift to mankind. The reason given in this behalf is that without the creation of kingship and without the conferment of power on the King to punish the criminals, there would have been chaos and human beings would have always been tormented by fear, insecurity to life and property and consequential misery.

Whether an individual behaves properly only on account of fear of punishment is defined in the following verse:

\[
\text{सर्वो दण्डजितो लोको दुर्लभो हि शुचिर्वर्जः।}
\text{दण्डस्य हि भयाद्भितो भोगार्याव प्रवर्तते।}^{18}
\]

It is difficult to find a man in this world who is always pure in all respects. It is only on account of the fear of punishment that an individual behaves properly and is kept within bounds.

One of the duties of King to punish wrongdoer has been explained by Mahabharata Shantiparva\textsuperscript{19} as follows:

\[
\text{स्मयदण्डदशरे नित्यं राजा धर्मनवानुषयत्।}
\text{नृपस्य सततं दण्डं सम्यगं धर्मं प्रशस्तते॥}^{18}
\]

The King, who always judiciously holds the rod of punishment, acquires great merit. The proper regulation of punishment is the great duty of kings and deserves great praise.\textsuperscript{20}
Manusmriti defines the importance of punishment as follows:

दण्डः शास्त्री प्रजा: सर्व दण्ड एवामक्षतिः।
दण्डः सुपोषु जागरी दण्डधर्म विदुबुधः॥

Danda is identified by the learned men with Dharma because it is the Danda which rules and protects all subjects and is awake even when other sleep.

Mahabharata Shantiparva defines the importance of punishment as follows:

दण्ड: संरक्षते धर्म्य तथेवार्थ जलाधिप।
कामं संरक्षते दण्डस्त्रिवर्गो दण्ड उच्चते।

Punishment protects Dharma, Artha and Kama (the law, the lawful wealth and lawful desires of human beings) and hence it is called ‘Trivargarupa’ (symbol of Dharma, Artha and Kama).  

It is significant to note that Manu seeks just punishment against persons who act unjustly. It is stated in Manusmriti:

कथे नापि विष्णुचन्द्र गुर्गीदुः न शकुनयत।
तदेवै सर्वमयेत तथूर्जीत चचुष्यतम्॥

If one sentence does not suffice to the gravity of the offence, the Judge can combine any or all the punishments to run concurrently.

By inflicting the punishment, it was thought that the world was functioning properly only because of punishment:

अथं पितामहेनौकर्को राजधर्मः सनातनः।
ईश्वरच महादण्डः दण्डे सर्व प्रतिष्ठतम्॥

O’ Grandfather, you have now finished your discourse upon the duties of Kings. From what you have said it appears that punishment occupies a high position and is the master of everything, for everything depends upon punishment.  

---

21 Pathak, Ganesh Dutt, Manu Smriti, 7:18 (Varanasi, Shri Thakur Prasad Pustak Bhandar, 2002)
22 Mahabharata Shantiparva 15-3
23 Manusmriti 8:130
24 Mahabharata Shantiparva CXXI 1
25 Mahabharata Shantiparva CXXI 1, A Prose English Translation of The Mahabharata (Translated Literally from the Original Sanskrit Text), Shanti Parva, Edited & Published by Manmatha Nath Dutt, (Delhi, Parimal Publications 1988)
The punishment, in ancient India, became a form of deterrence for the offenders as follows:

न स्वाद यदीह दण्डो च प्रमक्षेयः परस्परम् ।
भयाद्व दण्डसय नान्योध्यावत्ति चैव गुष्ठिष्ठर ।

26

If punishment had not existed, all creatures would have struck one another. Through fear of punishment, O’ Yudhishthira, living creatures do not kill one another.27

Kautilya supported the deterrent punishment and observed that in absence of punishment, mätsyanayana will be common scenario and mighty will devour the weak:

दण्डः अप्रशीता हि मात्सपपन्यमुदभावयति ।
वल्लीयानबल हि प्रस्ते दण्डावामावे ।।

According to Kautilya, if punishment is too severe alarms a man, if too mild frustrates him, but if properly determined makes man conform to Dharma or righteous conduct.

Yajnavalkya recommended infliction of death penalty against criminals:

विगुणदण्डस्तः वामाद्दो धनदण्डो वधस्तः ।
योज्या व्यस्ता च समस्तः वा झपराध वानिदेः ।।

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

3.1.5 FEASIBILITY OF DEATH SENTENCE:

There is an interesting dialogue relating to the question of desirability of inflicting death sentence between King Dhyumatsena and his son, Prince Satyavan. The Prince seems to be pleading for lighter punishment even for grave offences and the King replies that some people are not deterred even by the fear of death sentence. The relevant discussion is as follows:28

Prince Satyavan said that killing of any human being cannot be rationalized by law:

26 Mahabharata Shantiparva CXXI 34
27 Mahabharata Shantiparva CXXI 34, A Prose English Translation of The Mahabharata (Translated Literally from the Original Sanskrit Text), Shanti Parva, Edited & Published by Manmatha Nath Dutt, (Delhi, Parimal Publications 1988)
28 श्रीमहाभारते शान्तिपार्वी नामसंज्ञानम् [प्रथम खण्ड] शारिरपर्वं, [तेर्जयेन् पुनञ्जुम्रा, गीताप्रेस सं• 2070] अध्याय 267 श्लोक 15
Sometimes virtue assumes the form of sin, and sin assumes the form of virtue. It can never be possible that destruction of individuals can never be a virtuous act.

King Dhyumatsena justifying the human killing replied thus:

अथ चेदव्यः धर्मं अर्थ: को जातु चिदद्भवेत्।
दस्यवशेषन हन्येषु सत्यवन् संकोचे भवेत्॥

If the sparing of those who should be killed, be virtue, if robbers be spared, O Satyavat, then all distinctions (between virtue and vice) would disappear.

In the following verses, Prince Satyavan seems to be convincing the King to abolish death penalty as follows:

असाधुश्रवः पुरुषो लभते शीलमेकद।
साधुश्रवः हस्तानि शोभना जायते प्रजा।।
न मूलधात: कर्तव्योऽैष धर्मं सनातन।।
अष्ट स्वयंवर्णेन्द्र प्रायप्रिच्छति विशिष्टे॥

Sometimes a wicked man is seen to imbibe good conduct from a pious person. It is seen that good children spring from wicked persons. The wicked, therefore, should not be uprooted. The extermination of the wicked is not quite of a piece with eternal practice. By punishing them gently, by depriving them of all their riches, by chains and imprisonment, by disfiguring them, they may be made to expiate their offences.

29 Mahabharata Shantiparva 267 : 4

30 Mahabharata Shantiparva (CCLXVII): 267 : 4, A Prose English Translation of The Mahabharata (Translated Literally from the Original Sanskrit Text), Shanti Parva, Edited & Published by Manmatha Nath Dutt, (Delhi, Parimal Publications 1988)

31 Mahabharata Shantiparva 267 : 5

32 Mahabharata Shantiparva (CCLXVII): 267 : 5, A Prose English Translation of The Mahabharata (Translated Literally from the Original Sanskrit Text), Shanti Parva, Edited & Published by Manmatha Nath Dutt, (Delhi, Parimal Publications 1988)

33 Mahabharata Shantiparva 267 : 11 & 12

34 Mahabharata Shantiparva (CCLXVII): 267 : 11 & 12, A Prose English Translation of The Mahabharata (Translated Literally from the Original Sanskrit Text), Shanti Parva, Edited & Published by Manmatha Nath Dutt, (Delhi, Parimal Publications 1988)
If in the presence of the priest and others, they give themselves up to him from desire of protection, and swear, saying, - O’ Brahmana, we shall never again commit any sin – they would then be discharged without any punishment. This is the command of the creator himself. Even the Brahmana who puts on a deer-skin and the wand and has his head shaved, should be punished.

If you cannot make honest men of those rogues and in saving them by means other than destruction, do you then root them out by celebrating some sacrifice.

Subjects can be made honest by being only terrorized. Good Kings never kill the wicked from motives of retribution, Good Kings succeed in ruling their subjects properly with the help of good conduct.
King Dhyumatsena stated thus:

अहन्यमानेषु पुनः सर्वेण परापवेत् ।
पूर्वे पृष्ठते चे वै चुरास्या धामवन् जनान।।
गुडः सत्यमूहिष्ययं अत्यद्वहावत्तमयय।।
पुराधिगुद्धध्व एवासीद्व वागद्वत्तदन्तन्तरभै।।
आसोवादनद्वोररे वधद्वोररे वर्तते।
व्यभिचारिणि न शक्यते नियऽयुमवेत् जनान।।

If they who transgressed those limits were not punished with death, those barristers would soon be destroyed. Men of more ancient times were capable of being governed easily. They were very truthful. They were little bent upon quarrelling. They seldom gave way to anger, or, if they did, their anger never became ungovernable. In those days mere disapproval of offence was sufficient punishment. After this came the punishment represented by harsh words or censures. Then came the punishment of fines and forfeitures. In this age, however, the punishment of death is in vogue, wickedness has increased to such an extent that by killing one others cannot be controlled.  

It shows that even in the hoary past the feasibility of the imposition of heavy penalties agitated the minds of the rulers and thinkers; while the young Prince argued forcefully against sentence of death, the king furnished a cogent reply and supported the necessity of heavy penalties on the ground that people were becoming more and more insensitive to lighter penalties. While the question raised by Prince Satyavan continues to appeal to a few, the society still holds on to Dhyumatsena view.  

3.1.6 CRIME AND SOCIETY:  

From the foregoing discussion it is crystal clear that crime existed in all societies and continued to emerge as a challenge for all the rulers and the society. Every crime, in its ultimate analysis, is a challenge to the social order. Crime increase is deeply related to the fall in ethical and moral values of a society. Legislation in respect of criminal matters reflects sociological reality. It is the fundamental obligation of the State to make adequate laws and organise an efficient legal and judicial system, worthy of respect, embodying the cherished

---

41 Mahabharata Shantiparva 267 : 18, 19 & 20

42 Mahabharata Shantiparva (CCLXVII): 267 : 18, 19 & 20. A Prose English Translation of The Mahabharata (Translated Literally from the Original Sanskrit Text), Shanti Parva, Edited & Published by Manmatha Nath Dutt, (Delhi, Parimal Publications 1988)

43 JOIS, RAMA, SEEDS OF MODERN PUBLIC LAW IN ANCIENT INDIAN JURISPRUDENCE, 93-94 (Lucknow Eastern Book Company 1990)
values of the society. Law enforcement agencies of the State play an important role in promoting peace and stability in the society.\textsuperscript{44} To strike a balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law enforcement machinery on the other is perennial problem of the statecraft.\textsuperscript{45} Welfare State shuns absolutism and arbitrariness, rejects subordination of societal interests to any other interest, recognises happiness of people as a whole and respects rule of law for the sake of both the individual and the society. Supremacy of the law was the basis on which the edifice of ancient administration was built up.\textsuperscript{46} In the modern society, societal interest has become a top priority for the State. The world seems to have become a global village to pursue the human rights issues. Right to life has achieved utmost attention worldwide.

As discussed above, by advent of the State, a challenge came to regulate the man’s desire and mischievous propensity causing misery to his fellow men. It gave birth to different laws which later came to be codified. By passage of time, the desires of man went uncontrolled leading towards division of the world into different regions and countries which led into historical wars to show one’s power and desire to rule the world from one window. The holocaust of the wars on different occasions ultimately became once again responsible for the inclusion of promotion and encouragement of respect for human rights throughout the world which brought the nations worldwide together to respect human values. The right to life has achieved utmost attention worldwide. Modern society whose foundation is based on bloodstains is now been trying to wipe out even a single drop of the blood on humanity. Harsher punishments have been made lighter ones. Some of the countries still believe in redemption of crime from society by awarding harsh punishment in most serious crimes. However, most of the nations view capital punishment being violative of right to life and an affront to human dignity. This love and affection towards human lives from different angles, is responsible for creation of human rights jurisprudence. Even though there remains challenge to achieve ultimate goal of abolition of capital punishment throughout the world depending upon a variety of reasons but to create embargo upon the crusaders seems irresistible.

\textsuperscript{44} BHARDWAI, H.R., {	extsc{crime criminal justice & human rights}}, 1-3 (Delhi, Konark Publishers Pvt. Ltd. 2001)
\textsuperscript{45} Lewis Mayers
\textsuperscript{46} JOIS, RAMA, {	extsc{seeds of modern public law in ancient indian jurisprudence}}, III (Lucknow Eastern Book Company 1990)
3.1.7 **HUMAN RIGHTS JURISPRUDENCE**

Freedom means the supremacy of human rights everywhere. Our support goes to those who struggle to gain these rights or keep them. - Franklin Roosevelt -

Evolution of dynamic concept of human rights depends on evolution of mankind. The law is a magic mirror in which we see reflected not only our own lives but of those who went before us.\(^{47}\) For realising the beauty and harmony of human unity, the struggle, as Einstein says, is eternal and final victory may not be won “but to tire in that struggle would mean the ruin of society”.

A recognized principle of human rights jurisprudence imposes duty on the State to protect and to promote the human right of everyone within its jurisdiction.\(^{48}\) The extent to which human rights are respected and protected in the criminal justice system of a society demonstrates its civilization. A society has to harmonise the interest of an accused and the fundamental interests of the society.\(^{49}\)

Human rights are no new principles of morality for Indian people. They have been an integral part of Indian culture and heritage. India occupies the summit position in the comity of nations that preaches and practices human rights.\(^{50}\)

The crusade to preserve and protect human dignity against any kind of discrimination has brought the nations together. The concept of United Nations itself is based on the principle that entire humanity is one family. The member nations, big or small, are equal and are entitled to fair and just treatment in the pursuit of happiness and shaping the destiny of their people.\(^{51}\)

It is needless to mention over here that though the human rights came into vogue sometime around the Second World War era, the issue of protection of basic human rights has been in existence a long ago. While we look around United Nations to complete our study on human rights, in order to comprehend the full scope and ambit of the concept of human rights, we must try to trace the historical background of the evolution of this concept. Former Chief


\(^{48}\) VERMA, J.S., Former CJII & Former Chairman NHRC in his Foreword to the book, MURTHY, YSR, HUMAN RIGHTS HANDBOOK, i (Delhi Lexis Nexis Butterworths 2007)

\(^{49}\) BHARDWAI, H.R., CRIME CRIMINAL JUSTICE & HUMAN RIGHTS, 206 (Delhi, Konark Publishers Pvt. Ltd. 2001)

\(^{50}\) Id. p.173

\(^{51}\) Id. p.174
Justice of India, Hon’ble Dr. Justice P.N. Bhagwati has discussed the issue precisely in one of his write-up. Dr. Justice Bhagwati observed that “though the roots of this concern of the United Nations for human rights and fundamental freedoms may be traced to humanitarian traditions and the struggle for freedom and equality in all continents, it was the holocaust of the Second World War which was immediately responsible for the inclusion of promotion and encouragement of respect for human rights and fundamental freedoms for all in the purposes and principles of the United Nations.”

The following study on the international, regional and national documents leads the whole world to a new dimension of international law. It demonstrates the dynamic force of the human rights concept in contemporary history leading towards exploring the new horizons in the study of capital punishment.

3.2. CAPITAL PUNISHMENT AND ROLE OF UNITED NATIONS

Since foundation of the United Nations in 1945, the United Nations has expressed its concern over question relating to death sentence. The main objective to be pursued in this area has been to restrict the offences for imposing death penalty, with desirability of its abolition worldwide.

The United Nations’ position on death penalty was expected to be stated more specifically in the International Covenant on Civil and Political Rights (ICCPR), the drafting of which had been under way since 1947. From that time also, one approach stressed the need for abolition of death penalty, and the second approach sought restriction on its application to certain cases. The proponents of the second approach gave importance to right to life and emphasizing the need for the restriction of the application of death penalty won greater support than the first one. Many of the proposals advancing international standards for safeguards for the protection of capital offenders received much attention and resulted in extensive coverage in the Covenant. Finally, in 1957, the work on this provision was completed and approved for inclusion in the ICCPR, which was adopted by the General Assembly in its resolution 2200-A (XXI) of 16 December 1966. It is needless to mention here that on the same date and by the same resolution, the General Assembly also adopted the International Covenant on Economic, Social and Cultural Rights (hereinafter for short referred to as “the ICESCR”), which seeks to protect the most basic human rights for all people.

52 BHAGWATI, DR. JUSTICE P.N., SCOPE AND AMBIT OF HUMAN RIGHTS, DEATH PENALTY AN AFFRONT TO HUMAN RIGHTS, 10, (1ST ED., SOCIETY FOR COMMUNITY AGAINST TRUST, 2011)
The United Nations for the first time indicated its goal of abolition of capital punishment in ICCPR. Article 6 is one of the core provisions for the protection of the life, liberty and physical security of the individual. Article 6(1) provides that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. It also stipulates the narrow confines for inflicting death sentence in States parties where that penalty has not been abolished. Article 7 of the ICCPR corresponding to Article 5 of the UDHR reaffirms that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

It is needless to mention here that being deeply concerned with the issue of death penalty the United Nations General Assembly\(^{53}\) invited the Economic and Social Council to undertake a study on death sentence.

The General Assembly having considered the report on Capital Punishment and comments thereon adopted Resolution No.2393 (XXIII) dated 26 November 1968 inviting the Member States:

“(a) To ensure the most careful legal procedures and the greatest possible safeguards for the accused in capital cases in countries where the death penalty obtains, inter alia, by providing that

(i) A person condemned to death shall not be deprived of the right to appeal to a higher judicial authority or, as the case may be, to petition for pardon or reprieve;

(ii) A death sentence shall not be carried out until the procedures of appeal or, as the case may be, of petition for pardon or reprieve have been terminated;

(iii) Special attention be given in the case of indigent persons by the provision of adequate legal assistance at all stages of the proceedings;

(b) To consider whether the careful legal procedures and safeguards referred to in sub-paragraph (a) above may not be further strengthened by the fixing of a time-limit or time-limits before the expiry of which no death sentence shall be carried out, as has already been recognized in certain international conventions dealing with specific situations.”

The General Assembly by adopting Resolutions No.2857 (XXVI) of 20 December 1971 and 32/61 of 8 December 1977 reaffirmed its objective to restrict the offences for imposing death penalty, with desirability of its abolition worldwide.

\(^{53}\) By Resolution No. 1396 (XIV) dated 20 November 1959
The Economic and Social Council by adopting the Resolution No.1984/50 of 25 May 1984 laid down certain safeguards for death-row convicts covering basic guarantees in criminal proceedings. The Council recommended the States to take the following steps:

1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.

2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.

4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

5. Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.

9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.”

The United Nations General Assembly by adopting Resolution No.44/128 of 15 December 1989 which came into force on 11 July 1991 titled “Second Optional Protocol to the ICCPR aiming at the abolition of death penalty reiterated its position that the death penalty” is incompatible with human rights. Article 1 of the resolution requires from the
Member parties not to execute anyone within their jurisdiction and to take all measures to abolish death sentence.

Over the years, the United Nations General Assembly guided by the purposes and principles contained in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child considered that the use of the death penalty undermines human dignity and that a moratorium on the use of the death penalty contributes to the enhancement and progressive development of human rights. The General Assembly has always expressed its deep concern about the continued application of the death penalty and called upon the States that still maintain the death penalty to:

“(a) to respect international standards that provide safeguards guaranteeing protection of the rights of those facing the death penalty, in particular the minimum standards, as set out in the annex to Economic and Social Council resolution 1984/50 of 25 May 1984;

(b) to make available relevant information with regard to their use of the death penalty, inter alia, the number of persons sentenced to death, the number of persons on death row and the number of executions carried out, which can contribute to possible informed and transparent national and international debates, including on the obligations of States pertaining to the use of the death penalty;

(c) to progressively restrict the use of the death penalty and not to impose capital punishment for offences committed by persons below 18 years of age and on pregnant women; and

(d) to establish a moratorium on executions with a view to abolishing the death penalty; and the States which have abolished the death penalty not to reintroduce it, and encourages them to share their experience in this regard.”

By way of Resolution No.71/187 dated 19 December 2016, the General Assembly reaffirmed Resolutions No.62/149 dated 18 December 2007, 63/168 dated 18 December 2008, 65/206 of 21 December 2010, 67/176 dated 20 December 2012 and 69/186 dated 18 December 2014 called upon the States to mainly respect international standards as set out in the annex to Economic and Social Council resolution 1984/50 of 25 May 1984; and to reduce the number of offences for which the death penalty may be imposed.


---

on Capital Punishment and Implementation of the Safeguards guaranteeing protection to the rights of those facing the death penalty confirms a very marked trend towards abolition and restriction of the use of capital punishment in most countries.

The Commission on Human Rights adopted Resolution No.1997/12 of 3 April 1997 by recalling Article 3 of the UDHR, Article 6 of the ICCPR and Articles 6 and 37(a) of the Convention on the Rights of the Child, various resolutions of the General Assembly and Economic and Social Council and noting that several countries impose the death penalty in disregard of the limitations provided for in the ICCPR and without taking into account the Safeguards guaranteeing protection of the rights of death row convicts, called upon the States that have not yet done so to consider acceding to or ratifying the Second Optional Protocol to the ICCPRs aiming at the abolition of the death penalty; and to observe the Safeguards set out in Economic and Social Council’s resolution 1984/50.

The Commission on Human Rights adopted Resolution No.1998/8 of 3 April 1998 and called upon all States that still maintain death penalty:

“(a) Progressively to restrict the number of offences for which the death penalty may be imposed;

(b) To establish a moratorium on executions, with a view to completely abolishing the death penalty; and

(c) To make available to the public information with regard to the imposition of the death penalty.”

The Commission on Human Rights adopted another Resolution No.2003/67 of 24 April 2003 called upon Member States to the ICCPR to consider acceding to or ratifying the Second Optional Protocol to the Covenant and to follow certain other safeguards.

3.2.1 YEARLY REPORTS OF THE HUMAN RIGHTS COUNCIL:

Pursuant to the decision (No.18/117 of 28 September 2011) of the Human Rights Council, the Secretary General prepares yearly reports mainly under title “Promotion and Protection of Human Rights”. In Annual Report for the period April 2015 to June 2016, it is stated that initiatives in several countries represent important steps towards universal abolition of the death penalty. It is now beyond question that there is widespread agreement that

---

56 A/HRC/33/20 dated 12 July 2016
ratification of the Second Optional Protocol to the ICCPR contributes to the enhancement of human dignity and the progressive development of human rights. States that have not yet ratified the Second Optional Protocol should therefore do so without delay.

### 3.3 REGIONAL CONVENTIONS

In this part, the Researcher has made an attempt to study the human rights jurisprudence of Europe, U.S.A., Africa and Asian Region.

#### 3.3.1 EUROPEAN UNION:

European Union is one of the most prominent international player having strong and principled policy against the death penalty worldwide. The European Union regards abolition as essential for the protection of human dignity, as well as for the progressive development of human rights.

#### 3.3.2 EUROPEAN UNION GUIDELINES 1998

On 29 June 1998 the European Union adopted Guidelines towards third countries on the death penalty. These guidelines present the objectives and elements of European Union policy on the universal abolition of the capital punishment. European Union countries decided to strengthen their activities in opposition to capital punishment. To this end, they adopted the first version of these guidelines. At that time, capital punishment had been abolished in most European Union countries and those that had not yet abolished it were no longer applying it. Since then, all countries of the Union have ratified Protocol No 6 to the ECHR concerning the Abolition of the Death Penalty. It should also be noted that abolition forms one of the conditions of EU membership.

The United Nations has established conditions under which death penalty may be used. Second Optional Protocol to the ICCPR seeks from Member States to provide permanent abolition of death penalty. European Union now espouses abolition of death penalty for itself and others.

The following guidelines present the objectives and elements of European Union policy on the universal abolition of the death penalty.

- Encourage states to ratify and comply with international human rights instruments, especially those relating to the use of the death penalty, including the ICCPR;
- Raise the issue in multilateral fora and work towards moratoria on the use of the death penalty and, in due course, abolition;
- Encourage relevant international organisations to take appropriate steps to encourage states to ratify and comply with international standards relating to the death penalty;

- Encourage and offer bilateral and multilateral cooperation, inter alia in collaboration with civil society, including in the legal field with the aim of establishing a fair and impartial judicial process for criminal cases.”

Where States insist on maintaining the death penalty, the EU considers it important that the following minimum standards should be met:

“(i) Capital punishment may be imposed only for the most serious crimes;

(ii) Capital punishment may be imposed only for a crime for which the death penalty was prescribed at the time of its commission;

(iii) Capital punishment may not be imposed on persons below 18 years of age at the time of the commission of their crime; pregnant women or new mothers; and persons who have become insane.

(iv) Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for alternative explanation of the facts.

(v) Capital punishment must only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, and where appropriate, the right to contact a consular representative.

(vi) Anyone sentenced to death shall have an effective right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals become mandatory.

(vii) Where applicable, anyone sentenced to death shall have the right to submit an individual complaint under international procedures; the death sentence will not be carried out while the complaint remains under consideration under those procedures.

(viii) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases of capital punishment.

(ix) Capital punishment may not be carried out in contravention of a state's international commitments.

(x) The length of time spent after having been sentenced to death may also be a factor.
(xi) Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering. It may not be carried out in public or in any other degrading manner.

(xii) The death penalty should not be imposed as an act of political revenge in contravention of the minimum standards, eg against coup plotters.”

3.3.3 REVISED GUIDELINES ON DEATH PENALTY

On 12 April 2013 the European Union revised the Guidelines towards the death penalty. In these guidelines, recalling the earlier developments relating to capital punishment, the EU considered to continue its long-standing campaign against the death penalty. In addition, where the European Union becomes aware of individual death penalty cases, in particular those which violate the minimum standards, the EU will consider making specific demarches.

While continuing to state its strong opposition to the death penalty and advocate for its full abolition, the EU shall insist that those countries that still maintain executions respect the following minimum standards:

“i) The death penalty must not be imposed for non-violent acts such as financial or economic crimes, or because of political offences or rivalries. It shall also not be imposed for drug-related crimes, religious practices or expression of conscience, or for sexual relations between consenting adults, it also being understood that scope should never go beyond the most serious intentional crimes.

ii) Capital punishment must never be provided for in law as a mandatory sentence.

iii) Capital punishment shall not be imposed for a crime for which the death penalty was not prescribed at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

iv) Capital punishment shall not be imposed on:

Persons below 18 years of age at the time of the commission of their crime;

Pregnant women, new mothers and nursing women;

Persons suffering from any mental illness or having an intellectual disability/the elderly.

57 Resolution No.8416/13 of 12 April 2013
v) Capital punishment shall not be imposed if the guilt of the person charged is not based upon clear and convincing evidence, leaving room for alternative explanation of the facts. In this respect, the use of torture to extract guilty pleas shall be strictly prohibited.

vi) A final judgement rendered by an independent and impartial competent court after legal proceedings, including those before special tribunals or jurisdictions, which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings shall be necessary.

vii) When considering whether legal proceedings provide all possible safeguards to ensure a fair trial, due attention shall be given to whether anyone suspected of or charged with a crime for which capital punishment may be imposed has been informed of the right to contact a consular representative.

viii) Military tribunals may not impose death sentences on civilians under any circumstances.

ix) Anyone sentenced to death shall have an effective right to appeal to a court of higher jurisdiction.

x) Where applicable, anyone sentenced to death shall have the right to submit an Individual complaint under international or regional procedures; the death sentence will not be carried out while the complaint remains under consideration under those procedures; the death penalty will not be carried out as long as any related legal or formal procedure, at the international, regional or national level, is pending.

xi) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases of capital punishment; the death sentence will not be carried out while such applications remain under consideration under relevant procedures in a state.

xii) Capital punishment may not be carried out in contravention of a state's international commitments.

xiii) Consideration shall be given to the length of time spent on death row and the conditions of imprisonment after having been sentenced to death, bearing in mind that the conditions of imprisonment of persons on death row should not be inferior to that of other inmates. These elements may constitute forms of torture or inhumane or degrading treatment or punishment.

xiv) Where capital punishment occurs notwithstanding the EU's best efforts to prevent it, it shall only be carried out so as to inflict the minimum
possible suffering. It may not be carried out in public or in any other manner intended to further degrade the person facing execution. Equally, it must not be practised in secrecy. The family and lawyers of prisoners on death row must be notified of details of their execution.

xv) The death penalty must not be applied or used in a discriminatory manner on any ground including political affiliation, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

3.3.4 **CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION**

The Charter of Fundamental Rights recognizes a range of personal, civil, political, economic and social rights of EU citizens and residents enshrining them into EU law. The Charter of Fundamental Rights contains a preamble and 54 Articles, grouped in seven chapters namely, Dignity, Freedoms, Equality, Solidarity, Citizens’ Rights, Justice and General provisions.

Article 1 of the Charter proclaims that human dignity is inviolable and it must be respected and protected. Article 2 provides that everyone has the right to life and no one shall be condemned to the death penalty or executed. Article 19(2) provides that no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

3.3.5 **EUROPEAN CONVENTION ON HUMAN RIGHTS**

The European Convention on Human Rights, which was adopted in 1950 and came into force three years later, is a unique reflection of the values of civilisation and democracy. It provides a list of guaranteed rights such as the “right to life, the prohibition of torture, slavery and forced labour, the right to liberty and security, the right to a fair trial, respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, the right to marry, the right to an effective remedy and the prohibition of discrimination”.

The European Convention like the ICCPR allows capital punishment as an exception to the right to life. Article 2 of the Convention provides that everyone’s right to life shall be

---


protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Article 3 provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

3.3.6 **PROTOCOL NO.6**

On 28 April 1983, the Member States of the Council of Europe adopted Protocol No.6 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Article 1 of the Protocol provides that no one shall be condemned to such penalty or executed. Article 2 further provides for death penalty in time of war. It states that a State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions.

3.3.7 **PROTOCOL NO.13**

The Member States of the Council of Europe convinced that everyone’s right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right. By adopting Protocol no.13 to the Convention provided for abolition of death sentence. Article provides that no one shall be condemned to such penalty or executed.

3.3.8 **AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN**

The American people have acknowledged the dignity of the individual, and their Constitutions recognize that juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness.

Article 1 of the Declaration provides that every human being has the right to life, liberty and the security of his person. Article II provides that all persons are equal before the law. Article XXV provides that no person may be deprived of his liberty except in the cases and

---

60 Protocol To the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of Death Penalty in all Circumstances (VILNIUS, 3 MAY 2002)
according to the procedure established by pre-existing law. Article XXVI provides that every accused person is presumed to be innocent until proved guilty.

3.3.9 AMERICAN CONVENTION ON HUMAN RIGHTS 1969

The American States recognized that the essential rights of man are not derived from one's being a national of a certain State, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States. Article 3 provides that every person has the right to recognition as a person before the law. Article 4 provides that no one shall be arbitrarily deprived of his life; in countries that have not abolished the death penalty, it may be imposed only for the most serious crimes.

3.3.10 PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS TO ABOLISH THE DEATH PENALTY

Article 1 of this Protocol provides that the State parties shall not apply death penalty in their territory to any person subject to their jurisdiction. Article 2 provides that no reservations may be made to this Protocol. However, at the time of ratification or accession, the States Parties to this instrument may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.

3.3.11 THE AFRICAN CHARTER OF HUMAN AND PEOPLE’S RIGHTS 1981

Article 4 of the Charter provides that no one may be arbitrarily deprived of this right. Article 7 includes a right of an individual to be presumed innocent until proved guilty by a competent Court. Even though the Charter does not specifically speak about death sentence yet Articles 4 and 7 make it clear that there is no scope for death sentence.

---

62 It is also known as Pact of San Jose, Costa Rica. Adopted at San Jose on 22 November 1969 and entered into force on 18 July 1978, providing protection of human rights on a regional basis in North and South America.

63 Adopted by the General Assembly of the Organization of American States at its 20th Regular Session on 8 June 1990 in Asuncion, Paraguay


Oversight and interpretation of the Charter is the task of the African Commission on Human and Peoples’ Rights, which was set up in 1987 and is now headquartered in Banjul, Gambia. A protocol to the Charter was subsequently adopted in 1998 whereby an African Court on Human and Peoples’ Rights was to be created. The protocol came into effect on 25 January 2005.
3.3.12 **ASIAN REGION:**

Prof. S.R. Bhansali in his celebrated book “Law Relating to Human Rights in International and National Laws and Constitutions”\(^65\) has discussed with Regional Instruments on Human Rights. It is stated by him that after the adoption of UDHR, the idea of regional arrangements for the promotion and protection of human rights was gaining ground on the basis of two reasons, *firstly*, the regional implementation of human rights would contribute to regional peace by advancing the respect for human rights within the various countries of the area; and, *secondly*, the regional implementation of human rights would contribute to universal peace by raising the average standard of observance of human rights within their region.

Prof. Bhansali has further noted that in Asia, attempts have been made to create sub-regional conventions for the promotion and protection of human rights:

1. Arab League Council
2. Association of South East Asian Nations (ASEAN)
3. South Asian Association for Regional Co-operation (SAARC)

Article 3 Arab Charter on Human Rights, 1994 provides that death penalty may be imposed only for the most serious crimes and not on persons committing political crime, persons under 18 years pregnant woman and nursing mother within two years of date on which she gave birth.

Prof. Bhansali has further discussed that the ASEAN comprising five South East States have been taking interest in achieving cooperation in political, economic and cultural fields. Although cooperation in the field of human rights has not been the subject of discussion in the past, the possibility for the cooperation towards it cannot be completely ruled out in view of it being related to many economic, social and cultural problems of the region.

It is further stated by Prof. Bhansali that SAARC is to contribute to mutual trust, understanding and appreciation of each other’s problems. Commonwealth comprising of Asian and South Pacific countries, being one of the most important International

---

Associations of the Asian, South Pacific and African States, is rendering a significant service to the cause of human rights.

It transpires from the discussion carried out by Prof. Bhansali that though some efforts have been made at Asian region but the result is not fruitful like other regions. There may be certain geographical, economical and other internal political issues which are not allowing the Asian countries to come together for protection of human rights.

3.4 NATIONAL BODIES

3.4.1 NATIONAL HUMAN RIGHTS COMMISSION

National Human Rights Commission (NHRC) was established on October 12, 1993. Its statute is contained in the Protection of Human Rights Act, 1993 and is in conformity with the Paris Principles adopted at the first international workshop on National Institutions for promotion and protection of Human Rights held in Paris in October 1991 and endorsed by the UN General Assembly in Resolution No.48/134 of December 20, 1993. The NHRC is an embodiment of India’s concern for protection of human rights. The 1993 Act provides for the creation of State Human Rights Commission.

3.5 CONCLUSION

From the foregoing International, Regional and National Treaties/Conventions and Resolutions, human rights jurisprudence is very much clear. The crusade for reverence to life initially led to restrictive use of death penalty with a final aim of complete abolition. There is in fact no international law which prohibits death sentence and it is a matter of domestic jurisdiction of State. The International Treaties are ruling the area desiring a State, if it so desires, to fill the gap in its existing laws concerning death sentence. The obligation to protect requires States to protect individuals and groups against human rights abuses. Many parts of the world seem to be following abolition of death penalty. Europe with an exception of Belarus seems to be the crusader for abolition of death penalty.

The International Human Rights Treaty System has continued to grow with the adoption of new instruments and the creation of new treaty bodies from time to time. The internationally-agreed standards set out in the treaties require effective national-level implementation in order to ensure that they are enjoyed by all men, women and children in each country. To fully understand a State’s obligations under these treaties, it is necessary to read all the human rights treaties to which a State has become party together as a whole.
Rather than being separate, free-standing treaties, the treaties complement each other, with a number of principles binding them together. Each includes explicitly or implicitly the basic principles of non-discrimination and equality, effective protection against violations of rights, special protection for the particularly vulnerable and an understanding of the human being as being an active and informed participant in public life of the State in which he or she is located and in decisions affecting him or her, rather than a passive object of authorities’ decisions. All the treaties, based on these common principles, are interdependent, inter-related and mutually re-enforcing, with the result that no rights can be fully enjoyed in isolation, but depend on the enjoyment of all other rights. This interdependence is one reason for crafting a more coordinated approach by the human rights treaty bodies to their activities, in particular by encouraging States to see implementation of the provisions of all of the treaties as part of a single objective. Many States, beyond their participation in the UN human rights treaty system, are also parties to regional human rights instruments, which may further expand the protection offered to persons within the State’s jurisdiction. All of these international legal obligations should be considered together when evaluating a State’s responsibility to protect human rights.66

Human rights are uniformly recognized throughout the universe. The UDHR, the ICCPRs and other international covenants recognize the observance of certain universal rights, articulated therein, to be human rights, and these are acknowledged and accepted as equal and inalienable and necessary for the inherent dignity and development of an individual.

Article 10 of the UDHR states that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”. Article 11(1) provides that “everyone charged with penal offences has a right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”.

Article 6(1) of the ICCPR states that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. Article 6(4) states that “anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may

be granted in all cases”. Article 14 guarantees to the citizens of nations signatory to that covenant various rights in the determination of any criminal charge and confers on them the minimum guarantees. Article 14(2) states that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”. Article 14(3)(d) entitles the person facing the criminal charge either to defend himself in person or through the assistance of a counsel of his choice and if he does not have legal assistance, to be informed of his right and provide him the legal assistance without payment in case he does not have sufficient means to pay for it. UN Economic and Social Council vide Resolution 1984/50 dated 25th May 1984 adopted certain safeguards providing basic guarantees to be respected in criminal justice proceedings to ensure the rights of the offenders charged with a capital offence.67

The salutary features mentioned above which came to be introduced in international covenants from time to time already formed part of the Constitution of India and other legislations. Article 20 of the Constitution of India provides that “no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence”. Article 21 commands in emphatic terms that “no person shall be deprived of his life or personal liberty except according to the procedure established by law”. Article 22(1) states that “no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice”. Article 39-A casts a duty on the State to ensure that justice is not denied by reason of economic or other disabilities in the legal system and to provide free legal aid to every citizen with economic or other disabilities. Articles 72 and 161 provides for grant of pardon.

If a person has been guaranteed certain rights either under the Constitution or under an International Covenant or under a law, and he is denied access to such a right, then it amounts to a clear violation of his human rights. However, India’s commitment does not go beyond what is prohibited in the Constitution and the Indian Penal Code and the Criminal

Procedure Code. The spirit of the international convention has to be kept in view in considering the validity of the impugned provisions and their applications.⁶⁸

All the aforementioned human rights documents call upon the States to take all necessary steps to minimise the sufferings of the death-row convicts and to abolish death penalty. What is required to be explored is the legality of capital punishment *vis-a-vis* international and regional human rights; And, Whether the interrelationship of capital punishment and human rights should be reviewed against the contemporary transnational developments such as terrorism? These aspects will be answered in subsequent chapters.

* * * * *

⁶⁸ *P.N. Krishna Lal v. Govt. of Kerala*, 1995 Supp. (2) SCC 187