CHAPTER - IV
4.1 DEATH SENTENCE – ABOLISHMENT OR RETENTION

The death sentence invites the sharp debate, the word death sentence has several meanings shades issues but is never finally decided. Some think capital punishment must be held as a threat to habitual, untractable, and incorrigible, etc. Beccaria wrote, man is the creator of his own life, individually or collectively, and have the right to destroy.

The social equilibrium of society is maintained through the machinery of criminal justice (imprisonment and fire). The object of criminal sentence is wrong. The main purpose of punishment is physical pain to the wrong - doer.

The argument against the capital punishment in certain countries like United State of America where the death penalty has been abolished in other countries capital punishment is still retained. It is to be noted that the state itself has committed the greatest crime, of ending many lives of people. The capital punishment whose advantage can be obtained and other means whose disadvantage cannot be prevented is in any to be other way abolished it. If capital punishment is avoided and the person is executed under decision, it cannot be revoked. It is better to save nine murderers from capital punishment than inflict it on one who may be in fact innocent. The capital punishment is neither effective not just, it is to be abolished.

If a person who has committed a murder, it is quite possible that the victim’s relative might murder the person and the chain of murders will go on for ever.

Capital punishment is applied for the special reasons and brutal murder and the gravest offences against the state. Society wants peaceful clean of the crime and the criminals. Offenders are parts of the society and it has to be correct and then made a good citizen. Benthams theory define that ‘the pain of offender should be higher than pleasure’. Death sentence must fulfill the condition of protection of criminal justice administration and human rights.

India retains death penalty as punishment for Murder, Terrorism, Kidnapping, Desertion, Inducement to suicide of a minor, mentally retired person, offence of rape and, drug trafficking offences.
Indian penology is guided by punitive justice deterrent and revenge. This is settled by the Retribution, Rehabilitation it means ‘hate the sin not the sinner’.

4.2 CRIMINAL LIABILITY

The perfect law is that evil is maximum in favor of the good in. Every crime there are three elements

1) The offenders character

2) The commission of the offence motives

3) The magnitude of the offence.

Criminal liability applied in means rea and actus reus.

1) The offenders character:

The character or disposition of the offender is reason for his punishment the dark side of the character be thought with the sympathetic instincts, their religion, beliefs, natural affection, their love of the approbation of others, their pride and self respect threatening the law Man has good character in the society. The evil character in the society must supplement the artificial offenders with kindness.

2) The commission of the offence motives:

The object of the crime is establishment, artificial natural motive, which leads to a crime.

3) The magnitude of the offence:

The Punishment may be a thought a measure to solve by the profit derived by the offender. It seems that criminal liability when the criminals committed the crime shows that their character and motive and magnitude are in the offence. All are the part of doctrine of the means rea and actus reus.

4.3 IN FAVOUR OF DEATH PENALTY
One of the arguments in favour of the death penalty is that it is a very effective deterrent (though it cannot be reformative), because death is most dreaded by the intending murderer. But the question is: Does death penalty really deter? What do the facts and figures show? Facts and figures show that death penalty does not deter. But it is believed that, homicides will not increase.

In this Reports for the years, 1905-24, the Chief of the Norwegian Prisons declared that the number of homicides had declined considerably, in spite of the fact that the Chief of Prison Administration in Sweden reported a notable decrease in crime, with reduction in the number of death sentences and the final abolition of death penalty. Such a report was made by the Representative of the Danish government. Can one expect similar results in India.

These only method are used for of eliminating the hopeless enemy of society. Why should society support a prisoner, undergoing life imprisonment, with the constant menace of his release and subsequent depredations? Capital sentence has got a deterrent value of its own (F.N. Garofalo Criminology, 522-529). It is further argued by some eminent jurists that if capital punishment is properly carried out, it will affect the brutalizing society. Again, the protagonists of capital sentences argue that to maintain irreformable criminals, who prey upon society. It entails heavy financial burden upon tax payers. It is positive and selective agency to wipe out the stock ir-reformable criminals. Again, capital punishment, according to some Jurists also explains the low rate of serious crimes.

Those who support the retention of the sentence on account of the protection of the community say that death penalty is needed as a threat or warning to deter potential murderers and the murderers are too dangerous. Once they have committed the crime, to be kept alive, since they may kill fellow prisoners or prison personnel and may escape or be ultimately released on parole or pardon, in which case they would again become a menace to the community. Hence it would be too risky to substitute life imprisonment, for the death penalty. It is further argued in favour of death penalty that with permissible remissions, sentence of life imprisonment often works out to ten or twelve years. The personal grudge a person in prison may have can be nurtured for twelve or ten years and on his release, he may be tempted to take his revenge on the person who had been
instrumental in sending him to prison. It is this factor which restrains a Judge from giving a life sentence.

In the system of the criminal administration, a new proposal has been made in the Indian Penal Code (Amendment) Bill that the maximum term for a life sentence should be twenty years and the minimum fourteen years. If this proposal is accepted by the Parliament the above mentioned argument may be remedied.

The supporters of capital penalty further argue that some murders are diabolical in conception and cruel in execution and it would be a travesty of justice not to award the ultimate sentence in such cases. They say that ultimate sin must invite the ultimate sentence.

a) To Deter People

Capital Punishment serves as an example for others not to involve in any of the criminal act. In 18th century, the Judge rightly pointed out the deterrent effect of the capital punishment saying that "Your (the person against whom death sentence is passed) are hanged not because you have stolen a sheep but in order that others may not steal sheep."

b) Social demand

It is the need of the society that the offenders should be punished according to the crime which he has committed in order to stop antisocial elements.

c) Economic Saving

Instead of capital punishment if imprisonment for life is imposed, there is a burden on Indian economy. Huge amount is being spent on the accommodation, food, medicines etc.

d) Humanitarian

Now-a-days, the imposition of capital punishment is painless. Compared to the early times. The capital punishment is humanitarian e.g. A kills B with 25-30 knife brutal
B die on spot. In this example, A brutally Killed B, still execution of death sentence is not brutal should the killers like Raman Raghav be forgiven? Of course to it will definitely, result in serious miscarriage to justice. Unfortunately he was found to be insane it was certified that he used to drink blood. What is right and good remains a mystery.

e) Darwin's Theory

Darwin's theory postulates one of most important principle i.e. survival of the fittest and the struggle for existence. NatWest will select only those persons who are fit. That means offenders must be removed by way of capital punishment.

f) Moral war

The offenders particularly recidivists enjoy in harassing the people. They never think of old age, people, women, child, while committing atrocities.

In Kothewadi's Case in Ahmednagar District dacoit with murder, offenders raped women of old age after mercilessly beating them. Is such criminals are entitled to live in society when they have no of human sentiments the capital punishment is the proper thing for such persons.

g) The rarest of the rare case

Out of 11 sections of IPC only 10 sec. impose capital punishment the cases which are proved beyond the reasonable doubt only in such case capital punishment is imposed. The Supreme Court in number of case, explained the Doctrine of "the rarest of the rare case" Bachan Singh case – showed that capital punishment in not violated of Art. 21 Due to this doctrine only few accused have to suffer death penalty.

h) Recidivists

The capital punishment is imposed on the offenders who commit repeated crime, i.e. recidivists like Raman Raghav. Therefore, there should be one voice to impose death penalty to such criminal, in the interest of justice.

i) Definiteness
Capital punishment is the definite solution to the problem of increasing crime rates.

j) Miscarriage of Justice

There is no question of miscarriage of justice why should there be sympathy for criminal who committed heinous crimes.

k) Victimology

Nowadays, new concept of victimology has emerged victimology means to compensate the victim or relatives of victim. Can murder be compensated? What is the value of life? It is very easy for rich people to commit crimes and compensate the victim. Such concept is dangerous to society and such concepts definitely empowers compensation in money?

i) Retention of Capital Punishment

Number of countries in the world abolished capital punishment. In U.K. by the bill of 1964 capital punishment was abolished. The result of which is that crime rate has increased. So these countries again reverted back to capital punishment.

4.4 ARGUMENT AGAINST THE CAPITAL PUNISHMENT

Scientific, statistical and even moral arguments against capital punishment have been in plenty. Many reasons against this type of punishment have been advanced by the United States Governors in the Pageant survey. There has, however, been a remarkable nine point indictment of capital punishment presented to and approved by the Delaware Legislature in 1958. This indictment is:

i) Evidence clearly shows that the death penalty does not serve as the capital of crime prevention.

ii) Except in the rare cases of serious crimes they suffered mental disturbances, sure; They are impulsive in nature; And there are the actions of the criminal class. Fifty percent of those executed in Delaware for offences.
iii) When the death penalty is possible punishment is removed, fewer delays and possible punishment.

iv) the death of the poor unfortunate ignorance and lack of resources.

v) Innocent of the death penalty is an irrevocable justice. Human judgment can not be wrong.

vi) It takes a life when the state sets a bad example; Imitative crimes and killings triggered execution.

vii) generally moral legal taking life is useless. Rehabilitated individuals who are dangerous to the public authorities, is demoralizing. Imagine the effect on fellow prisoners.

viii) May have a role in life, there is a test of the most sensational, and it affects the poor and the community is critical to the administration of justice.

ix) Life imprisonment is protected by community.

An important fact to be remembered is that only 26.28 percent of the homicides are premeditated, even assuming that the fear of death deters a prospective murderer, such deterrence would be limited to cases of deliberate murder. In other cases, however, murder not having been premeditated, the assaulter could not be said to have had the time to think of the consequences of this act. He may have even repented later for the horrible act; but, at the time he did it, the thought of punishment could hardly have entered his mind. So many of the homicides are caused in the course of quarrel, as the result of anger deteriorating into harsh words and blows. Very often, then, in the heat of the moment the knife is whipped out, or a blow given, which causes the death. Out of 507 cases of homicides investigated by the author (by personal observation at the Criminal Session of the Bombay High Court, and by going through facts mentioned in various briefs and records), it is found that the percentage of case of premeditated murder was 26.28 and that of unpremeditated cases was 73.72

Homicide, in India, has been found to be due mainly to rage degenerating into the vengeful emotion. Most of the homicides are without premeditation. Horrible malice
asserts itself in a homicidal act. "Murder committed because of rage, says Dr. Anita Mughal may be due to rage associated with (1) Merely an uncontrolled temper (2) the epileptic furore; (3) the manic excitement in manic depressive psychosis (4) the catatonic excitement in schizophrenia (5) the outbursts of the low grade moron, as well as to other causes associated with organic disease. Where is the question of deterrence then? Whether Capital Punishment existed or not, the offender would have committed the act. Both deduction and induction show that it has no deterrent value. If that argument is in favour of capital punishment, it is eliminated and nullified, there is no further argument in this favour.

a)  **Deterrent result**

The capital punishment reduces crime as it deters people not to commit any crime. But the increasing crime rate shows that capital punishment has no deterrent effect.

b)  **It is not a social demand**

As we know noone is a born criminal i.e. criminals are ‘not born, they are made’. There are the germs of the criminality existing in the society. Criminals are the product of society itself. How can society claim for the removal of the same?

c)  **No economic saving**

It is not true that by imposing death penalty, there will be economic saving. If a person who is suffering death penalty is of extraordinary talent, he will definitely help for the growth of economy.

d)  **Not Humanitarian**

If one cannot give life then one has no right to take life Humanitarian approach is based on the principle "hate the sin, not the sinner". That is why, our aim should be to remove crime but not the criminals, Gandhiji also supported this view.

e)  **No moral war**
Moral values are not hereditary, they are to be taught so if any offender does not have morality that means he was not taught by his / her parents, teachers, friends, society etc. there are number of causes of crimes.

f) The rarest of the rare case

Though it is in ‘the rarest of the rare’ case still a life is lost. And that cannot be remedied later.

g) No reformation

By imposing capital punishment there will be no space or scope for reformation, which is the most powerful theory of modern times. The system of punishment should be changed in order to reform and rehabilitate the offenders.

h) Definiteness

Capital punishment for murder means the law of jungle i.e. an eye for an eye.

i) Miscarriage of Justice

Death sentence results into services miscarriage of justices if it is imposed wrongly.

j) Victimology

By way of capital punishment the accused is punished what is the benefit to the relative of the victim? It is more serious when there are dependents on victim. Is challenge to victimology has been introduced. It mainly concerns with the compensation to such person from the accused.

4.5 POLITICS OF CAPITAL PUNISHMENT:

If we accept, however, the synthesis emerging out of judicial dialectics along with the present legislative framework, the sphere of death penalty would be reasonably restricted and it would be resorted to in the rarest of rare situations. The lack convincing empirical studies regarding the penological significance of capital punishment which
could suggest either its abolition or retention. Even if one has it, the empiricism and legalistic along cannot decide the issue and it has to be considered in the perspective of basic characteristically inherent in a particular social and political order.

While discussing the politics of capital punishment, it is never intended to brand either abolitionists to be radical democrats or retentionists to be fascists. The debate—to hang or not—reduces to be a political problem with reference to the National Priorities in sight. It becomes a political issue if it is made as structural analysis, in terms of existing social and legal institutions vis-a-vis the avowed cultural goals. In the state structure, death penalty has become, though ignorantly introduced, a persistent and integral part of the social contract and while considering its abolition or retention to effect on the people's faith in the existing political order also becomes relevant.

The popular spirit, let few intellectuals alone, believe in the responsibility of the State in executing the murderer. Criminology of the West has failed to explain the hysteric carnages during the yester months in the west of Uttar Pradesh. Amidst religious fanaticism, caste prejudices and the growing unique political norms hitherto unknown, people in general still applaud the statesman who takes a vow in public to annihilate. In such a social climate where the social reaction does not behave in a logical fashion. The body of politic would not like to meet the fate of Socrates or Gallelio. In the colonial police organization which has hitherto been not scientifically oriented and which rests on the classical belief that the violators should be treated in the equally criminal way, if the capital punishment is withdrawn totally, there would be a race for killing in the cloak of encounters which is a new dimension in the administration of criminal justice, particularly in India.

Incarceration as an alternative of death sentence in third world countries and particularly in India where more than half of the people live in conditions even worse than worst prison atmosphere, may also be considered as it may affect the crime rate. Another significant point in this regard is that most of the studies are with reference. In the present context a new class of criminals is coming up and in terms of social danger their activities concern all more than the traditional violates.

These public welfare criminals are, beyond the therapeutic treatment and their crimogenesis is entirely different from that of the traditional violations. Such deviants are
in need of life long isolation or elimination. In all types of existing social orders with varying political and economic structures, including the socialist political communities, death penalty exists for some offence or the other:

“8 and for specific offenses committed in time of war, while retaining it in spite of slavery movement, the abolition of the death penalty for all crimes in 18 States in the world.”

A year later, the Supreme Court was once again called upon to settle the controversy over choice between death penalty and imprisonment for life but this time by a larger Bench of five Judges Overruling its earlier decision in Rajendra Prasad, the Court by a majority of 4 to 1 majority view taken by Mr. Justice Y.V. Chandrachud, J. Sarkaria, Gupta and Untavalia, JJ. While Bhagwati, J. dissenting expressed that capital punishment alternative for unreasonable and hence not violative of Art. 14, 19, 21 Indian constitution, Justifying retention of death punishment in reference to u/s 354 (3) of the Cr. P. C., 1973, the Court observed inter alternative.

“The question is whether or not the death penalty, no penological purpose which sociology, including the judges, on the contrary, people have a very large section, around the world, to the removal of vision despite the strong differing opinions provoked a difficult complex and complicated issue helps, judges and administrators still firmly in the protection of society is worth and the death penalty confidence necessary”.

The Court further observed the Supreme Court tramples Assembly so wearily in an area not venture to develop rigorous standards; Legislature is cited only in accordance with the principles laid down with detailed guidelines.

The majority however, expressed the need for liberal construction of mitigating factors in the area of death penalty and held that Mindful of the need to make savings in the rarest of the rare cases.

Negatively the abolitionist’s contention that vengeance rehabilitation, and finally that it is inhuman and degrading, the Supreme Court ruled that though life imprisonment is the rule, death sentence must be retained as an exception for the offence of murder under Section 302, I.P.C. but it is to be used sparingly.
But soon after in Sher singh case [ F.N. A.I.R. 1983 SC 465] the Supreme Court overruled its earlier ruling in ‘Vetheeswaran’s case. Delivering the judgment in this case Chief Justice Mr. Y.V. Chandrachud observed that death penalty should only be imposed in rare and exceptional cases but any death sentence upheld by the Supreme Court should not be allowed to be defeated by applying any rule of thumb.

The learned Court further observed that no hard and fast rule can be laid down as far as the question of delay was concerned. If a person was allowed to resort to frivolous proceedings in order to ‘delay the execution of death sentence’, the law laid down by Court a death sentence would become an object of ridicule. Thus, dismissing the writ petition the Supreme Court in this case directed the Punjab Government to explain the delay in execution.

The Supreme Court reiterated its approval for death sentence once again in its decision in Chopra Children murder case.[F.N. A.I.R.1981 SC1572] In this case the accused Kuljeet Singh alias Ranga alongwith one Jashbir Singh alias Billa committed gruesome murder of two teenage children Gita Chopra and her brother Sanjay in a professional manner and was sentenced to death by Additional District Judge, Delhi. The High Court confirmed the conviction and death sentence whereupon appellant moved in appeal to Supreme Court. Dismissing the appeal, the Supreme Court upheld the conviction and sentence of the accused on the ground that the murder was preplanned, cold – blooded and committed in most brutal manner; hence there were no extenuating circumstances warranting mitigation of sentence.

In yet another case, namely, Japed Ahmad Abdulhamid Paivala v. State of Maharashtra, the Supreme Court upheld the sentence of death for a gruesome and brutal murder.[ F.N. A.I.R. 1983 SC594] In the instant case the appellant was convicted for multiple murders. He killed his sister-in-law aged 23 years, his little niece aged 3 years, his baby nephew aged about one and half year and the minor servant aged about 8 years. The motive of murders was the golden ear rings and bangles of the deceased. The sister-in-law sustained 20 stab injuries, niece 13 stab wounds, servant 8 incised wounds and baby niece 3 injuries the accused was convicted for murder, and sentenced to death. His conviction was upheld by the High Court. He thereupon moved an appeal to the Supreme
Court only on the question of sentence. Dismissing his appeal the Supreme Court, inter
alias observed:

“The appellant acted like a demon showing no mercy to his helpless victims three
of whom were helpless little children and one, a woman. The murders were perpetrated in
a cruel, callous and fiendish fashion. Although the appellant was 22 years of age, and the
case rested upon circumstantial evidence, the Court was unable to, refuse to pass the
sentence of death as it would be stultifying the course of law and justice. It was truly the
‘rarest of rare cases’ the Court had no option but to confirm the sentence of death.”

In conclusions there are certain factors that need review and re-consideration.
Whether it is retention or abolition the cultural background and the proportions of
civilized sections in society have to be thought over the confusion also arises regarding
the terms ‘The rarest of the rare’ and ‘special reasons’ for it is not exactly and completely
defined and as the result it is in the discretionary powers of the related judge and his
temperamental situations, or at times confusions that once again create the element of
subjectivity.

One wonders how Dist judges High court judges and Supreme court justice look at
the same fact from different point of view same cases have been earlier referred to the
fact that the gravity and seriousness of the crime once again depends upon the tendency
of the related authorities creating a lot hindrance in the process years and decades are
wasted not only the criminal but also the victim are kept on the enter look for an
unbearable long time. The need of fast track is accepted in language but it avoided in
practice due to the influential capacity of the criminal, the intentional delay by the
lawyers and the detailed formal procedures of the judiciary at times the situations arise
when law is followed in language but is lost in spirit.

In such peculiar circumstance one needs to review and reexamine reevaluate and
re-consider the problems regarding the period the subjectivity and the other mentionable
as well as termed as a denial and in the rare cases the death of the person who demands
justice.

In the end there are certain facts that are the results of the police lawyers judiciary
politicians nexus that farmers end their lives and their relatives beg for the compensations
there are a number of rape cases and sexual crimes the result that very recently Indian tourism is going to suffer as the western countries raise the problem of security of honors of women in India.

There are crimes everywhere but in the developing countries the problems are different from developed countries. There it is essential to reconsider death penalty and life imprisonment from a completely new point of view the present research is just a step in the just direction of just research is just a step in the just cause of justice.

4.6 MODE OF EXECUTION IN DEATH

The common methods of criminal; death penalty, boiling, burning, beheading, skinning off disgraceful collusions or alive, CRUCIFICATION, offender thrown from the rock, submerged in water, stoned, of strangled, amputated, thrown before the wild beasts, gun shooting or starving him to death.

The ancient law of crimes in India provided death sentence for quite a good number of offences. During the medieval period of the Moguls rule in India, the sentence of death invigorated in its crudest form. At times the offender was made to dress in the tight robe prepared out of freshly slain buffalo skin and thrown in the scorching sun. The shrinking of the skin hide eventually caused death of the offender in agony, and pain. Suffering death penalty was by hailing the body of the offender on walls. These modes of putting an offender to death were abolished under the British system of criminal justice administration during early decades of nineteenth century stopped all types but death by hanging remained the only lawful mode to inflict death sentence.

In India, the capital punishment is in execution, it is carried out in two different states. One, i.e. is shot to death by hanging until death. Manuals in various states in India discuss the execution times of the prison. The execution is made in accordance with section 354 of the death penalty awarded and, after exhausting all remedies to ensure the system (5) Cr. PC of 1973, i.e. hanging by the neck until death. It is an act of force, provided under the 1950, 1950 and Navy active military law execution by hanging by the neck until death or was shot to death in 1952, or either of both.
HANGING METHOD

India adopted the method stating that involves the hanging by neck until death is a method adopted by u/s 354(5) of CR.P.C.1973

“He died when he was sentenced to the death penalty for any person to be hanged by the neck for death”.

In this method the execution is carried according to section and jail manuals. The hanging means “specifically to put to death by suspension by the neck”. India carried out by hanging in 1949, after Independent India the first person to be hanged was Nathuram Godse, Mahatma Gandhi’s assassin.
AJMAL KASAB

26/11
Then IN 2010 two persons were also hanged Ajmal Kasab the terrorist of 2008 Mumbai attack was executed on 21 Nov.2012 in Yerwada Central Jail, Pune at 07:32 am and the second was Afzal Guru for the terrorist activities conspiracy Dec.2001 attack on the Indian parliament and he was executed in Tihar Jail Delhi on 9 Feb. 2013.

There are four main forms of hanging

1) Suspended hanging

2) Short or no drop hanging

3) Measure or long drop – when the trap doors open for calculated weight physique

4) Standard drop hanging – where the prisoner drops to predetermined depth

Execution by hanging is done in early in the morning between 4-5 am. The trial is taken dummy of drop duration of suspension before the execution as a rule bag of sand weighting 1 ½ times the weight of the convict are to be hanged distance between 1.83-2.44 meter. The measurement of the convicts neck, height from the drop shutter is also considered at the time by executive magistrate deputed by the district magistrate and deputy superintendent senior jailor, medical officer present in the execution the prisoners body that is suspended for 30 min. to 1 hr and the medical officer certified that the life is extinct.
SHOOTING METHOD

This method is applicable in the Navy act 1957, The Army act 1950, and Air force act 1950 in the execution of capital punishment.
All these acts u/s 34 (a) to (o) of the Air force act 1950 define the court martial providing of capital punishment.

“The grant of the death penalty, he was convicted in a military court at its discretion may die or suffer fatal shot to death and hanged by the neck until death directly affected”.

This provides either execution for death sentence hanging or Shot to death by a military court at the discretion of court.

The death penalty and the execution of the things and their difference paper.

The crime, arrest of the criminal, the collection of evidence, the determination of the guilt or innocence of the person and imposition of suitable punishment on the guilty person decided after a long process are Crime action or behavior is punishable by criminal crime that is opposed to the moral wrong, public wrong. Many crimes are immoral but not all actions considered illegal or immoral. Capital punishment is primarily a method of protecting society from criminal behaviors that to the society’s cry for justice against the criminals.

In death penalty given it violates the constitutional guarantee of equal protection. All murders are same but some few offenders are not given capital punishment, the view of judge is influencial.

The common mode of carrying out of capital punishment it is a different part of the world where the ways are of shooting, gas chamber, hanging, lethal injection.

**LETHAL INJECTION**
Combination with a chemical paralytic agent parpicuret lethal doses are injected in a short-acting intravenous injections of drugs following the method of sodium pentothal and potassium bromide pancurium to stop heart.
The inside one methad chair with mesh bottom consists of a tall steel and glass vault slightly 8 feet about 6 1/2 feet diameter with five sides of the grey steel hexagon including heavy windows after pronouncement of death, the method is used to the chamber evacassted through carbon and neutralizing filters.

ELECTRIC CHAIR METHOD
The 2000 volts of electricity at average of nine amps is applied to the prisoner’s head approximately 35 to 40 seconds each.

4.7 TABLE OF DIFFERENT METHODS
<table>
<thead>
<tr>
<th><strong>Hanging</strong></th>
<th><strong>Shooting</strong></th>
<th><strong>Lethal Injection</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Simple to carry out</td>
<td>1. Simple to complete</td>
<td>1. Simple to carry out</td>
</tr>
<tr>
<td>2. about 40 minutes to announce the death of prisoner</td>
<td>2. not more than few minutes to declare prisoner to be dead</td>
<td>2. first 9 minutes of the process takes 5 to announce the death of prisoner</td>
</tr>
<tr>
<td>3. Less scientific equipments are required.</td>
<td>3. Less scientific equipments are required.</td>
<td>3. Require more scientific devices, they are easy to get.</td>
</tr>
<tr>
<td>4. unconscious.</td>
<td>4. Instant death.</td>
<td>4. Any use immediately held an emotional.</td>
</tr>
<tr>
<td>5. Considering it has been abandoned in most countries will not be in a civilized manner.</td>
<td>5. In most states offer the option of either lethal injection or shooting.</td>
<td>5. Now it must be executed in a more civilized manner acceptable.</td>
</tr>
</tbody>
</table>
4.8 **PUNE BAKERY BLAST HIMAYAT BAIG IS INNOCENT**

Himayat Baig has been accused of involved Pune's German Bakery blast. The court passed recently, the sentence to death Himayat Baig is innocent that he was not involved in any conspiracy Himayat Baig was not in Pune on the day of the blast and in this case exact role was not aware of Baig the cell phone shows that Baig was in Aurangabad.

India retains death sentence for a number of offences like murder, kidnapping, terrorism desertion, mentally retarded person and inducement to suicide of a minor or offence of rape second convictions for drug trafficking offences.

4.9 **DELHI GANG RAPE CASE**

In the fast track court all four convicts were awarded death sentence Nirbhaya was Gang raped and murdered the court considered that it cannot turn a blind eye on the increasing cases of sexual physical attack against women, the collective conscience of it is the rarest of the rare category.

**Machi Singh case (1983)**

The apex code lay three situation

1) When it’s ‘the rarest of rare’ case.

2) When it is enough with life imprisonment and the death penalty rendering something uncommon about the crime to call.

3) In the situation of the crime, even if there is no option but to impose the highest punishment of death there weight age has been given to circumstances in favor of the offender.
4.10 DEATH PENALTY AND INDIAN LAWS

The basic principle of Indian criminal law and jurisprudence is the presumption of innocence of the accused in every criminal prosecution, casting the burden of proof to prosecution beyond reasonable doubt.

The approach of Indian Courts and laws must be seen in such perspective that they have decided Death Penalty to be retained in Indian Penal system. Nevertheless Indian Penal system has not scalped death penalty so awarded for rare crimes in rare cases for rare Criminal. As the exactness of Indian Laws and procedures strive to reach Justice. It strives for punishment for guilty and it strives for innocent to be not sentenced even unintentionally. However there are procedural hazards which are tried to be minimized. The position of Death penalty, its positive ends and negative ends in Indian laws is discussed in this Chapter.

Death penalty in India is awarded as punishment for various crimes under various acts. The acts and the provisions for death penalty are discussed below.

4.11 CRIMINAL PROCEDURE CODE 1973 (Cr. P.C.)

Criminal Procedure, 1973 (Cr. PC) sets out the rules of procedure of the administration of criminal justice is a comprehensive law. Code 1898 of the Code, the Code of 1973 the result of a major overall procedures, powers, duties and responsibilities of the rules of procedure as well as the various authorities involved in the investigation of an offense bailed out the registration form covers. Code(1973) at the end of a criminal trial, a judge handing down the rules governing the behavior culminating tests, resources, and related issues elaborates on admission policies and procedures governing it. The right of convicted persons filed an amendment to the Code, also contains provisions for appeals to higher courts of law.

The code of criminal procedure, 1973, contains a provision regarding Sentenced to a term of years or life imprisonment for the offense of conviction "when the reasons for the punishment to be awarded the verdict, and sentence case - section 354 (3) code provides the death penalty for special purposes such as.” complex cases. The court
must record “Special reasons” justifying the sentence and state as to why an alternative sentence would not meet the ends of justice in that particular case.

Legislative development in India in this regard has been slow but steady which is discernible through section 302, *Indian Penal Code* S. 354(3) and S. 325(2) of the CR.P.C. Successive amendments have shifted punitive focus from death to life generally, where special reasons compel to eliminate the deviant.

The legislative vacuum between conviction and death sentence, presumably, invites individualization of punishment crystallized in the form of 'Special reasons'. In absence of legislative postulates and any-procedure of pre-sentence inquiry the judicial discretion may hit, inter alia, the equal protection guaranteed under Art. 14 INDIAN CONSTITUTION. Death penalty, resultanty, eroding seven basic freedoms infringes Article 19, and also attracts Article 21 which guarantees life and liberty.

There is a long list of cases to discern the judicial dynamics directed towards the centre, left and right but it would be sufficient, here to take three representatives Jogmohan, Bachan, and Rajendra. In view, of the same points discussed in detail in Bachan, it would be sufficient to deal Jagmohan very precisely. In Jagmohan, the constitutionality of S. 302, Indian Penal Code was challenged that it infringed Arts.14,19,21of Indian constitution.

In Bachan Singh case the constitutionality of Sec. 302 , was the subject matter of a detailed discussion in view of Arts. 14, 19 and 21 of the Constitution. The plurality of decision makers, took the help of prevailing penological dilemma and to rationalize the predisposition it was observed :

Crime in India with the perspective of the parliamentary representatives of the people through the formalities of contemporary public opinion, the death penalty and limit the area, particularly the eradication or a recent, including the effort to reject the past three decades, again and again, the death penalty, the Constitution of India frames Indian Penal Code under the murder sentenced to death If convicted of murder in the 35 th and the subsequent reports of the Law Commission suggested the amendment of criminal procedure and insertion of new sections 235, suggesting that if (2) and 354 (3) pre-sentence investigation and punishment for murder and other capital crimes, sentenced
to Code that provide the process and in front of parliament 1972-73, lost in 1973, it took the 1898 Code revision line that considered to be indirectly replaced it. It can not hold a replacement for the murder of S. 302 providing punishment, criminal procedure law is unfair but it is in the public interest.

Reasons for sentence and special reasons for death sentence-the sub –section casts a duty on the court to give special reasons for awarding, Whether the lower court has exercised its discretion judicially and also to provide material to the authority concerned at the time of considering the mercy petition by condemning the accused. Under the present court, the reasons for the change were of unequivocal importance to the legislature or the government resorted to murder and capital punishment is imprisonment and immunity. It has been held at death sentence is not violative of article 21 of the constitution if it is given in ‘the rarest of the rare’ cases. Death sentence was held to be properly imposed where the accused was hired assassin who committed murder only to earn. When the accused was of sixteen years of age the death sentence held to be improper.

The Allahabad high court has held that the accused being the ‘jeth’ of the deceased, (elder brother of the deceased’s husband) was an any important holy place for a Hindu women, is not a sufficient reason to make the case rarest of rare case in which death sentence should be imposed. Where domestic servant kill his aged master his wife and their granddaughter aged 3 years, he was sentenced to death, confirmed by the High Court, the Supreme Court confirming the death sentence held in his case came within the category of rarest of rare cases. It was observed that he had committed the ghastly murder only with a view to commit robbery.

The motive was heinous and the crime was committed in cold – blooded, cruel and diabolical manner and there were absolutely no mitigating circumstances, for awarding him lesser sentences. There the accused had committed brutal murder, but since he was neither a member of a mafia gang nor was a habitual offender and had not committed any crime against the society and he was belonged to a poor family of a labour class, aged 20 years, the Rajasthan high court converted death sentence to imprisonment for life, giving him an opportunity to be a reformed member of society.
When the accused, while riding a tractor, shot dead, a person from his gun and crushed him by his tractor, it was held that it was rarest of rare case so as to warrant death sentence in a triple murder case, murders were committed by a young son at the instigation of his life, holding that the murder were committed under great emotional disturbance and in great frenzy. Where the two accused burnt the bus deliberately killing twenty three passengers and robbed them, the A.P. High Court, confirming their death sentence, said that their case is full within the ambit of ‘rarest of rare’ cases where the accused having illicit relationship with a married lady, killed her husband with a handy red stone, the supreme court held that his act could not be said to be so cruel, which would warrant death penalty and commuted the sentence to life imprisonment.

Short-terms sentence give reasons for (Sub Section (4)). It requires the court to give reasons for a short-terms sentence. This enables the high court to judge whether the lower court has exercised its discretion properly. Direction when sentence of death (sub section (45)) capital sentence are passed the session judges subject to confirmation by the High Court. As to submitting a sentence of death for confirmation by the high court. As to submitting a sentence of death for confirmation chapter XXVII and as to execution of such sentence., the words “that he be hanged by the neck till he is dead” should be inserted in the sentence. It was held that execution of death sentence by public hanging was violative of article 21 of the constitution. The validity of clause (5) of this section was challenged on the ground that it was violative of art 21 of the constitution as being prescriptive of a cruel punishment. The Supreme Court however held that the section was valid.

The lower court in recording an order of sentence stated that the accused was sentenced to death by hanging till he is dead. The Error was technical in nature. However it was expected that in a case of ----- Judgment as envisaged by section 354, Cr.P.C. in awarding the death sentence, discretion lies with the court; hence norms can be laid down. It was held that execution of death sentence by hanging by the neck as provided in clause (5) of sec. 354 was not violative of article 21 of the constitution.

4.12 DIFFERENCE BETWEEN CRIMINAL LAW IN GENERAL AND SPECIAL LAWS THAT PROVIDING DEATH PENALTY
The Special rules to the above-mentioned laws, Cr.PC procedures set out offences under the laws of the continuing investigation and prosecution. Most importantly, this legislation includes a number of changes to the rules relating to appreciation of evidence at the trial stage. For example, "terrorism" is a source of a number of laws relating to the alleged actions by a police officer is allows to use a confession by the accused. Under ordinary criminal law, allowing such confessions, mostly because of concerns about the use of police torture to extract confessions reveal will be worth. Similarly, another co-accused of the admission of a crime, such as TADA, POTA, MISA, MACOCA,¹ are not as special as some of the laws adopted under the ordinary criminal law. The law must be taken in relation to some of the many pre-permitted and other crimes. Many dangerous provisions of the constitution and the Indian Supreme Court have confirmed the challenge, but in practice many of these laws is clear evidence that the process are characterized by misuse and abuse; Under these laws, the death penalty, only increases the anxiety.

4.13 PROCEDURE IN CRIMINAL LAW FOR DEATH PENALTY CASES

Cr.P.C. Justice of the platform - offers the possibility of three death penalty cases of murder or similar serious offences feel also, the ordinary criminal law, under all the initial tests. It's a death sentence for awarding court event, a particular state of the District and Sessions Judge, held at the respective High Court convicted (section 366 Cr.PC) confirmed imperative. The High Court directs further inquiries to be made or additional source of energy in this state (Section 367 Cr.PC) the age the accused and guilt of the bearing should be taken on any point. Based on its assessment of the evidence on record, the High Court in May: (i) confirm or passed to any other penalty, or (ii) the offense or the punishment and the Sessions Court for a new trial on the basis of the revised payment order, or been convicted of any offense other than that (iii) the release of the accused person. The first court to death if he appellate court. The third level (the Supreme Court). Change Court sentences to death the High Court releases the society manages the circumstances of the death penalty except in cases of appeal from the order of the Supreme Court, the High Court has no right.

¹ [F.N. http://www.hinduonnet.com/fline/f12515/stories/20080801251508200.htm]
When an appeal is filed to the Supreme Court, "a special holiday" to give it permission to appeal before the High Court or the Supreme Court decides what they feel proper. Such is the case with some special law about Terrorist and Disruptive Activities (Prevention) Act, 1987, an appeal of the trial court's judgment to the Supreme Court provides that the decisions are first High and Supreme Court are different. (Though this Act lapsed in 1995, trials under the Act continue to this day).

The procedure of appeal:

Cr.P.C. Under the court handed down a death sentence to the Supreme Court as part of the mandatory confirmation, a minimum of two judges of a High Court Bench, understand the facts, the crime and its own decision to award a sentence it considered circumstances of the case. As noted above, the Supreme Court confirmed the death penalty if he appeals to the Supreme Court. The Court for a death or other offenses punishable crime in a case involving release in the event that, alone, the state Supreme Court before the release of an appeal against may file (Section 378 Cr.P.C) The High Court may confirm the release or release set aside and the alleged crimes, convict and sentence. Section 379 Cr.PC has not been released, aside from a death sentence if. Provides an automatic appeal to the Supreme Court. Imposed punishment enough (Section 377 Cr.P.C) appeals the trial court or the High Court if they feel that the sentence imposed by the file extension of.

Normally, the High Court or the Supreme Court, relatives of crime victims revision petitions seek enhancement of punishment (but not appeals) may be filed. The release of a High Court and the Supreme Court awards an automatic right of removal in the event of death penalty, especially when the event is such a right, the court ruled that the death of a high court proves. As noted above, if granted special leave to the Supreme Court, the High Court for special leave to appeal to the Supreme Court only grants access. Even the Supreme Court agreed to consider the appeal of a death penalty threshold level limned itself, ie, in the case should be dismissed.

It is not certain whether High Court or Supreme Court may convict the criminal.

The right to appeal – no automatic appeal to the Supreme Court
There is no automatic right of an accused to appeal to the Supreme Court in capital cases. This is so even where the trial court may have awarded life imprisonment but the High Court has enhanced the sentence to death. The sole exception in law is made for cases where the High Court overturns an acquittal and awards the death penalty, where Section 379 Cr.P.C. provides for mandatory appeal to the Supreme Court.

4.14 CRIMINAL PROCEDURE CODE. S. 367

The amendments to various laws regarding the death penalty in the context of a comprehensive insight into the history of the death penalty, strange. It is consider that the history of American criminal procedure code. S.367 (5) of Criminal Procedure, 1898, 1955, prior to its amendment, gives the reasons why the death of a person other than to say the death penalty as a punishment for a crime, confirmed the sentence of a court. The amendment deleted this provision, but a life sentence would be known in the alternative cases Cr.PC or the Indian Penal Code, 1860 (IPC) or there is the indication - the death penalty.
Section 34 provides for the act of any person who commits any of the following offenses enemy and death penalty crimes in connection with the subject, is that:

a) Shamefully abandoned or committed to his charge any fortress, castle, then, space or security, offers up, or it's his duty to protect the law and make or force or induce any commanding officer or other person using any means, or

b) Intentionally uses any means to compel or induce any person subject to military, naval or air force law abstain from hostile acts against the enemy acts against or discourage such person or

c) In the presence of the enemy, shy to show cowardice in his arms ammunition, tools or equipment, or the like misbehavior casts away or

d) Paperwork keeps a weapon against the enemy deception or union or any person involved in intelligence or

e) Directly or indirectly, money, weapons, ammunition, stores or products supported enemy or

f) Enemy by treachery or cowardice sends a flag of truce, or

g) In time of war or during any military operation, with a calculated creation at arm in action, camp, garrison or quarters, or spreads reports calculated to create alarm or distress, or

h) The time for action is not regularly relieved or without leave from his commanding officer or his post, security, pikvet, patrol or leave the party, or

i) Voluntarily helps with or aids the enemy, having been a prisoner of war, or

j) Knowingly harbors or protects an enemy not being a prisoner, or

k) War or a warning when a sentry being, on his post retirement or in a trance, or Indian air forces, or any forces co - it's implementation or such forces in the area,
martial court sentenced to death or suffer will be responsible for the lower sentence, noting the action is.²

In the case of section 37 of this act, any person who commits any of the following offences provides the means to match them guilty and sentenced to death, it is as

a) Begins induces, causes, or any other person makes any muting military, naval or air forces or any of the Indian forces conspiring co-operation it, or

b) Joins in any such muting, or

c) Being present, such as muting, as well as to suppress the use of his high-end, or

d) Knowing or believing that any muting without cause, or muting any purpose, or a conspiracy, without delay, his commanding or other superior officer that he can not give the information, or

e) Or loyalty to the union of the Indian army, navy or air force to seduce any person, kidnapping martial court, mentioned that the death of this act or to be less liable to face punishment.

Section 163 deals with alteration of finding or sentence in certain cases

a) Confirmation is not necessary to make sure, or it comes with a military court, the guilt of an invention, part 179 under the authority given the buying power there is no reason or evidence, where does the main alternative finding is valid, if there was a new discovery, have been awarded the penalty to cancel the said offense establishing the facts of the particular offense send penalty.

b) This was confirmed in a military court, or a sentence passed in sub-section (1) the substitution of a new innovation to advance the cross is not a punishment, not necessarily confirmation, it is found to be invalid for any reason, the authority referred to Subsection (1) and valid sentence is passed.

² [F.N. Sec.34 of the Army Act 1950, pp.683,684,685]
c) In a sentence, the punishment, or substitute a new penalty were convicted under this section, the penalty should not be much greater than the punishment of sub-section (1) or sub-section (2) has given under them.

4.16 INDIAN PENAL CODE 1986 (I.P.C.)

The first draft of the Indian Penal Law Commission of India, Lord Macaulay jurist well identified, directly in the hands of Sir Barnes Peacock went further revision was completed in 1860 under the Indian Penal Code was passed by the then chief of the draft on October 6, 1860 and passed legislature.

Section 53 of the Indian Penal Code for the first part of this one of the criminals convicted U / s 53 IPC section refers to the death penalty under the provisions are in charge again. Code authors, the death penalty and says, "We believe that the feet should be very little punishment, not only to murder or crimes against the state planned to use it in cases where there have been confirmed." Accordingly, under the code, death, which (he may be sentenced to an alternative punishment for offenders living (303) under the penalty of imprisonment for a person convicted of murder to be granted, except for the penal code, "death" is recommended.  

India has retained the capital punishment in Indian Penal Code 1860, it defines to retain capital punishment as

Awarding death penalty arises from the original IPC section 53; the penalty is a general rule. I.P.C. Offers the following crimes punishable for death.

(Section 120 - B):

1. Treason, waging war against the Indian state (Section 121);
2. In fact, to ensure complicity in rebellion (Section 132);
3. As a result of the death of an innocent man convicted of perjury.(Section 194);

4. Threatening or inducting any person as a result of the death of an innocent man convicted and give false evidence (Section 195 A):

5. Murder (section 302) and a career criminal (section 303) killing other. Although the Supreme Court struck down the latter, it is still in IPC.

6. A small, crazy person or an intoxicated person abetting suicide (Section 307).\(^4\)

### 4.17 SATI

Previously Sati had been a very common part in the society. It was an inhuman practice burning of any widow with the dead body of her husband Rajaram Mohan Rayfight for this purpose (The Commission of Sati Prevention Act 1887. In that act u/s 4(i) defines person as guilty. Even in modern times in spite of the harsh rules, there are frequent event of burning hanging killing women for money or out of suspensions. Atrocities against women are still going on, in spite of civilized and educated people.

\(^4\) [F.N. Indian penal code, 1986]

This act enacted for prevention of offences of atrocities against the murder of s.c.&s.t. This act u/s 3(2)(i) defines that a member of a scheduled caste or tribe resulting that person conviction and execution carries the death penalty.


This act was enacted for “large scale narcotics trafficking” in mandatory for death penalty. The Bombay High Court ruled that section 31A of N.D.P.S act which impose mandatory death sentence violation of article 21 (right of life) of the Indian constitution 1950the judge giving sentence directed in to deciding about awarding capital punishment.5

4.20 Indian Navy Act

When the death penalty is given it says."He was sentenced to be hanged by the neck to direct."6

In Army Act, and Air Force Act, of execution, however executing procedure is perspective of the relevant provisions. Under various provisions of these laws, as described here under Army Act, 1950, the Navy Act, 1957 and the terms of the offer, such as the Air Force Act, Army Act, 1950 and Rules of 1950, the Navy Act, 1957, in nature, was shot to death in 1950 is similar to the Air Force Act will provide for the execution of the death penalty.7

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5 [F.N. Bombay high court second NDPS conviction need not mean death Mumbai DNA dna.india.com refined 2013-04-03]
6 [F.N. Indian Navy Act,1957]
7 [F.N. “Army Act 1950, the provisions of Chapter VI of the death penalty provision in section Riot 34 (a) (1) opponent of the death penalty to crimes, sec.37 deals and offers to pass the case to match them to the crime, convicted and sentenced to death. Pertains to the court martial sentences were awardable Chapter VII, Chapter XII is revision confirmation and, in the form of (Chapter XIII 1997) provides the Navy with a penalty in the form of punitive action death.(sec.147, sec.166) they all related in death penalty the execution contracts.”]
After the laws of the relevant provisions of this Act under the assumption that the execution of the death penalty instructions is given to the implementation of a shooting system with available weapons and equipment that are intended to make it simple and easy these forces, the painted. A condemned man's shooting from a distance is necessary in order to determine the length of specific conditions, etc. drop height, measured as the value of which is a comprehensive process less painful compared to that in the case of the death involves etc. appears in some kind of killing.

During the Nuremberg trials after the Second World War, the death penalty, by members of the German High Command to executed pointed out here that the choice of death should be by gunshot. Instead of shooting them to death by hanging sneaking players wanted death. This object of shot to death by hanging by the neck until death sentence is sufficient to ensure it as simple and less painful. This method is simple, easy and less painful to run, because many developing and developed countries, adopt in the practice of this method.

4.21 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

The ICCPR the Human Rights Committee, the permanent status (in 2006 under the Charter of, a separate body) monitored, periodic reports are submitted by member states to review their compliance with the agreement.

Article 6 (2) of the International Covenant on Civil and Political Rights death penalty is very rare action must be read restrictively to mean that. the death penalty has been provided to protect the it, adopted by the death penalty, the most serious crimes. It is lethal or other extremely grave consequences of their scope should not go beyond the crimes that have been deliberately(imposition 1984 necessary UN economic and Social Council).

In recent years, the expansion of the use of the death penalty in this regard, Article 6 (2) seems to be violated. Kidnapping for ransom cases in India in 1993, the death penalty (Section 364A IPC) was introduced. UN Human Rights Committee under section 6 of kidnapping resulting in the death of the "most serious crimes" that can not be characterized as reported.
The death penalty for drug delivery of drugs and psychotropic substances (Prevention) Act, 1995, is similarly error. Illegal UN Special correspondent, summary executions, arbitrary death penalty for crimes such as economic crimes and drug-related crimes should be eliminated.

UN Special correspondent controls "imposing the death penalty for economic and other so-called Victimless crimes, or to exclude the possibility of the UN Safeguards Guaranteeing Protection of the Rights of the death penalty for those who set out to defend the claims of a religious or political nature - treason, espionage and usually either 'faith "crimes against the state" and other vaguely described as actions."

A large number of special laws that provide for the death penalty to one (abuse of Scheduled Castes and Scheduled Tribes (Prevention) Act, 1989) passed or were amended (NDPS Act, Arms Act, etc.) and then accept the International Covenant on Civil and particularly in India, the UN General Assembly, "...... 8 December 1977 with the main objective to be pursued in the field of capital punishment in 1979, passed a resolution 32/61 Political Rights (ICCPR) that preventing the gradual abolition of the death penalty, the penalty may be imposed .......

In India all attempts for statutory abolition of death sentence have proved abortive due to the persistent opposition by the Government. Behaviorally, dwindling penological significance of Death Sentence and global dimension of abolitionist movement, however, have been successful during the yester years. If it continues, it is due to the lack of scientific orientation of the people in an inhuman, egoistic and discriminative social and political order superstructure by dehumanized jural postulates. It may also be required for the continuity of a state-structure based on the idea of fear, domination and annihilation of dissent—present or potential. To conclude, scientific wisdom must suggest its total abolition, aboriginal superstition may prompt to retain it and between the lines, capital punishment is a political compromise.

The chapter discusses various types of punishments and analyses various sides of death sentences from the ancient past to the present period the defects in the execution,

8 [F.N. UN Doc.E/cn.4/1999/39,6th January 1999,para.63 ] India awards the death penalty for ‘waging war against the state’ (Section 121 I.P.C.).
the proportion if pain and sufferings the threat to be created among others had been thought over the picture given show various types of executions.

The purpose and the effects are significant in the problem of capital punishment in addition the views of religious caste prejudices political motives and delaying or speaking of the punishment with some or other ulterior motives creates more problems. What is proper as far as the executions are related and as far as the types of executions are related the problem becomes confusions more compounded the basic factor is crime effect of crime and the aftermath of the crime on social mind are some of the great challenges before the court while deciding the punishment. The chapter also discusses the alternatives for the cruel and most suffering based ways of execution.

4.22 ABSENCE OF CONSENT: ITS MEANING AND IMPORTANCE IN RAPE OFFENCE IN INDIA

Almost every morning the newspaper flashes incidents of rape against women specially those in custody. It appears that like inflation, the offence of rape is increasing by leaps and bounds. It is an irony of fate that when we are making tall talks of promoting women's liberty in all spheres their honour is thus being violated. No doubt it is not a new offence. It is as old as Adam. However, that is no reason why this heinous offence should increase. Rise in crime rate is sometimes considered as indicator of culture and civilisation of a country. Wave of this crime is more violent in Western countries than in India and it is high time, that we examine the relevant law to see that any loopholes in the definition of the offence or for that matter law for bringing the offenders to book, are properly plugged in order that increase in the crime on account of laxity in law is checkmated. Mathura's case of Maharashtra, Rameeza Bee's case of Andhra Pradesh, large number of police raping of adivasi women of Madhya Pradesh etc. have rocked the nation out of slumber and thinking on the subject is being devoted by lawyers, jurists, legislators and commissions appointed by the Government for preventing the evil, more particularly on legal plane.

The latin word ‘rapare’ to snatch gives an indication of the conception of the offence. It is something against the will and without the consent of the victim. The words "against the will" is of wider import so as to exclude through it also the consent. The Indian Penal Code adds two more attributes which also would constitute the offence even
though no snatching, in terms is involved; when the girl is a minor i.e., below the age of sixteen years or when the girl gives her consent believing the man to be her husband which the man knows he is not. In both these cases in ultimate analysis, it can be realized that mental frame is not working on account of the presumption of the statute either about non-development of mental faculty, or on account of its clouding by misconception of fact. In either of the situation, we will have in a way to say that the body of the victim is snatched presumptively or consciously. Since snatching implies that one is not consenting, the question whether in an incident rape has taken place or not depends upon absence or presence of consent. As such, discussion on consent has great importance for this offence. Unfortunately, however, the word consent has not been denned in the Indian Penal Code. Whether we see Sec. 375 or Sec. 90 of this Code we do not find it defined in positive terms so as to tell us what is. Thirdly and fourthly of Sec. 375 tell us when the said consent in particular situations is not consent and Sec. 90 also likewise delineates mere situations of apparent consent which are not to be treated as consent for the purposes of the Code. The Section reads as under:

90. A consent is not such a consent as is intended to any section of this code, if the consent is given by a person under fear of injury or under misconception of fact and if the person doing the act knows or has reason to believe, that the consent was given in consequence of such fear or misconception; or if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequences of that to which he gives his consent; or unless the contrary appears from the content if consent is given by a person who is under twelve years of age.

For arriving at the conclusion as to what constitutes consent by a woman an important defence next to denial of sexual intercourse with the woman—one has to look up for it in case law or writings of jurists. Consent is an act of reason accompanied with deliberation after the mind has weighed, as in a balance, the good and evil on each side. Consent denotes an active will in the mind of a person to permit the doing of the act complained of. Consent on the part of a woman as a defence to an allegation of rape, requires voluntary participation, nor only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent.
A woman is said to consent only when she agrees to submit herself while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammeled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.

Courts have gone even to the extent that consent after the first act of rape does not absolve the accused as it might purely be the result of sexual urge and would not affect the first act of coitus which has already taken place against her will. Dr. Kenny has pointed out that although the offence of rape is usually effected by violence, it has been held that rape can be committed without the use of any violence, the essential point being that the women's free conscious permission has not been obtained in the case of adults and in the case of girls below the age prescribed in the Sexual Offences Act, 1956 it cannot be given.

Last there is miscarriage of justice consent must not be confused with passive submission. There is a big difference between the two. Every consent involves a submission, but it by no means follows that a mere submission involves consent. Raking which has taken place and is still continuing in India in the wake of Supreme Court decision in Mathura's case has arisen on account of passive submission of Mathura having been considered as amounting to consent. One feels dissident, technicalities of evidence apart, to accept that the woman in the case could of her free will have surrendered herself to the strange drunken constables on the floor of a latrine within the four walls of a police station, as were the conditions given out in the case. A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistence or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be consent as understood by law. Nevertheless, to make the things mere explicit, it is desirable to substitute the expression "free and voluntary consent" for the word "consent" in the second clause of section 375 I.P.C. to make it clear that the consent should be active consent, as distinguished from that consent which is said to be implied by silence. This will no more leave it open to the court to draw an inference of consent on the part of the woman from her silence due to timidity or meekness or from such circumstances without any more as that the girl meekly followed
the offender when he pulled her catching hold of her hand, or that the woman kept silent and did not shout or protest to cry out for help.

Consent is vitiated when a woman is put in fear of death or hurt as also fear of injury being caused to any person (including herself) in body, mind, reputation or property. It is also vitiated when her consent is obtained by criminal intimidation i.e. by any words or acts intended or calculated to put her in fear of any injury or danger to herself or to any person in whom she is injury to her reputation or property or to the reputation of anyone in whom she is interested. Thus, if the consent is obtained after giving the woman a threat of spreading false and scandalous rumors about her character or destruction of her property or injury to her children or parents or by holding out other threats of injury to her person, reputation or property, that consent will also not be valid consent.

A woman is not to be taken as giving her consent merely because she offers no resistance; there is no consent where the woman's will is ever borne by force or threat of force or where a woman is asleep or rendered insensible by drink or drug or by use of stupefying substances. Consent is the act of a man, in his character of a rational and intelligent being not in that of an animal. It must proceed from will, not when such will is acting without control or reason as in idiocy or drunkenness but from the will sufficiently enlightened by the intellect to make such consent the act of a reasoning being.

Consent being anti-thesis of rape, it is common defence put forward by the accused. Whether in a particular situation, there is consent of the woman or not is quite an intriguing matter. For one thing, women are seldom proved to translate their thoughts in those matters into words. They usually leave the matter of consent to tacit understanding. In such cases, consent becomes a matter of inference to be drawn from evidence of previous or contemporaneous acts and conduct and other surrounding circumstances. Non-resistance, if not otherwise accounted for should be real and not unreal for there is such a thing as maiden modesty and some resistance is simulated even by women who are most anxious for the connection.

Also, before arriving at any decision regarding the consent of the woman, the subsequent conduct and demeanor of the complainant should also be taken into consideration. Where in a case of rape, people are attracted by the cries of ravished
woman and she shortly afterwards jumps into well out of shame, and her demeanor in the court is truthful, and no moral intimacy is suggested, her cries followed by her falling into the well show strongly her unwillingness.\(^8\) Again, in the case of rape, the fact, that the girl was virgo intact up to the date of occurrence is very proof against the intercourse having taken place with the consent of the girl;\(^9\) on the other hand, a grown up woman carried about by the accused and subjected to sexual intercourse and now and then left by herself and there being no evidence of protest on her part must be presumed to have been a consenting party in the elopement and the accused cannot be convicted for rape. Thus in rape case, the court has to look at all the circumstances and decide as to their conduct and intention apart from their own explanation and is never and should not consider itself bound by the explanation because the woman may well be too ashamed to confess to their lust and even if not too ashamed to do so the court must realise that the woman probably thinks that such a grave admission would be fatal to the case and therefore refuse to telling the actual truth. Sir Travers Humphreys\(^{10}\) has made an observation lasting value in the connection. It is too dangerous to accept as satisfactory evidence upon which to convict in any sexual case the statement of the woman concerned unless there is other evidence tending in the same direction. Further that this rule should never be relied merely because the prosecutrix in the witness box behaves like an angel and looks like a madonna.

At the same time, it too is a reality that almost all rape cases take place in dark secluded corners whether inside a building or in the open where no person other than the victim and the accused is within hearing distance or looking limits. Accordingly woman is probably the only person who can give testimony about violence done to her. It is in this context that one has to examine the applicability of the principle of criminal law that an accused is to be treated innocent till the offence is proved against him beyond reasonable doubt. Under the circumstances burden on the complainant and for that matter on the prosecution becomes very onerous. It is mainly for this reason that rape cases quite often do not succeed, in the courts. The position is more precarious specially in the custodial rape i.e. rapes of women in police custody, in jails, in hospitals as patients, in remand homes etc. In such situations it is almost impossible for women to prove that the rape was without her consent. Law Commission of India in its 84th report recommended the insertion of following new section in the Indian Evidence Act, 1872.
"111A—In a prosecution for rape or attempt to commit rape, where sexual intercourse is proved and the question is whether it was without the consent of the women and the woman with whom rape is alleged to have been committed or attempted states in her evidence before the court that she did not consent, the court shall presume that she did not consent."

The Criminal Law (Amendment) Bill, 1980 seeks to adopt the above recommendation but proposes to restrict it to the cases of custodial rapes.

It is good that the bill means to restrict the presumption of absence of consent to custodial rape when the woman affirms rape without her consent, in her statement given in evidence before the court. Thereby it keeps rape cases by other offenders -beyond purview of this proposed provision and the same to be? governed by usual requirement of cases being proved reasonable doubt before the accused can be convicted. Nevertheless raiding (if presumption against the accused in custodial case just on the basis of the statement of the victim is fraught with danger of blackmailing innocent honest and unyielding public officials. It would be more fair if the presumption in question is raised by the court after the victim has, besides her statement of her rape without consent, makes out a prima facie case on the basis of medical evidence etc.

Medical examination as also physical examination of the woman and the accused soon after the rape incident can be indicative both of the factum of sexual intercourse between the two and also about its being without consent of the woman. Indications about latter aspect are gathered from observations of the Medical Officer in regard to signs of violence by way of torn clothes scratches on and other injuries on body specially private parts, mental upsetting reflected in the talk of the victim or story given by her much nearer in time to the incident. In this connection, it need not however, be understood that absence of injuries on the person of the victim would necessarily show her consent.\textsuperscript{11,12} Her utterances immediately after the incident while appearing for medical examination, if faithfully summarised in the report, can give an indication of his agitated or disturbed mind under the impact of violence done to her person. The difficulty however arises in case of such custodial rapes where presumption of lack of consent is sought to be raised that the hand which is raised for rape is naturally inclined not to allow evidence against it to come in whether by delaying medical examination or by influencing the medical
officer directly or indirectly. Shri Vasudhe Dhamamwar who went into details of Patna rape case of March 1980 brings out how Dr. Hazari of Saddar Hospital gave a report that as per her knowledge, examination of a menstruating woman would show no sign of semen i.e., the blood would wash away semen out of the vagina. No sample of pubic hair which could show such signs was taken. All this, even though, as per the victim, she was not menstruating at the time of the incident and the doctor had not inquired anything about it from her. Apart from the reasons of influence, lady doctors who alone generally are expected to conduct such examinations put in negative reports (i.e., deny rape) in order to escape giving evidence, not only does this mean frequent attendance at courts and disruption of ones' routine, it also means being asked a lot of questions in un-parliamentary language designed to shame and insult them.

In order that such evidence becomes available it should be rendered specifically mandatory on pain of specially, provided for punishment for the police to arrange medical examination of both the accused and the victim before they wash themselves or change their clothes. It may be still better if cases of custodial rapes are inquired into by the magistrates so that the natural reluctance of the custodians or their influence do not operate to avoid proper medical evidence getting collected. Furthermore form in which the medical officer should be expected to give in standardised form comprehensive and prompt report both to the police as also the concerned village magistrate such comprehensive and untampered report given on physical and medical examination will be a good piece of evidence for making out prima facie case for raising presumption of lack of consent of the woman when she denies such consent to the rape, in her statement before the judge.

Whereas the prosecutor in a rape case tries to establish that the act was without consent of the woman, the accused can make out argument for presence of consent by adducing evidence past intercourse of the woman with him under section 11 of the Evidence Act as a fact relevant which renders existence of another fact in issue or relevant fact highly probable, or under section 14 showing passion (a state of mind), or under sections 8 and 9 to render past acts of sexual intercourse with him as showing conduct influence by a fact in issue or relevant fact. However, under sections 155(4) and 146 of the Evidence Act, not only acts of sexual intercourse with the accused but also with others can be highlighted in one case to display general immoral character of the
prosecutrix and in the other case to injuring her character or impeach her credit. If general immoral character is regarded as shaking the character of a male witness. But there is no corresponding provision for males in Sec. 155. It is wrong to assume that a female witness is less likely to tell the truth when she has a general immoral character. This discriminatory treatment has no moral or legal basis; it causes serious hardship to the victim. She very often feels humiliated, particularly at home or amongst neighbours or at work or at school self-consciousness and shame resulting from queries and adverse comments, might even result in a permanent scar on her peace of mind and psychic well being. Since there can hardly be any doubt that an unrestrained questioning on matters of sexual life can amount to a destruction of reputation and self respect of the woman, there need must be struck a balance between the demands of fair trial and the dignity of the woman. The law should reflect an approach which protects her interests, without compromising those of fair trial i.e., by restricting the examination under section 155(4) of the Evidence Act past sexual intercourse with the accused in an endeavor to show her consent in the alleged present rape, where consent is in issue. Consent is not in issue in case of rape of minor girls and they should be saved from examination under section 155(4).

Cross-examination under section 146 at present is open in all cases including those of rape. In the rape cases testing veracity and impeaching the credit, means directing of the cross-examination on the victim's statement about absence of her consent, that being the main issue. Once the cross-examination is meant to focus itself on consent, questions of past sexual intercourses with persons other than the accused have no meaning except unnecessary humiliation and degradation for the woman. Accordingly in order to direct all proceedings in rape cases to the determination of presence or otherwise of the consent of the woman, section 146 should be suitably amended so as to restrict questions to her past sexual intercourse and that too with the present accused. Evidence of acts of intercourse with persons other than the accused indicates a remote or faint likelihood of the woman having consented to intercourse in the instant case. Even when a prostitute is raped, her consent at the time of commission of the crime must be proved by evidence alone.

The Indian Law Commission in its 82nd report recommended changes in law of Evidence on above lines but the same are not incorporated in the Criminal Law
(Amendment) Bill, 1980, much to the chagrin of persons raising voice in different forums for fair deal to the fair sex. Logic and also interests of the women victims of rape demand that they should not be discriminated against and put to wolve in the man, for being treated as thing for his pleasure without any dignity or will of her own. If in certain situations, judge considers that past sexual dealings of the woman with persons other than the accused can have bearing on the question of her consent, discretion can be left with him by a proper provision being made in the Indian Evidence Act on the lines of Sexual Offences (Amendment) Act of 1976 as in England. Section of the said Act lays down:

(i) If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the Judge no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant.

(ii) The judge shall not give leave in pursuance of the preceding sub-section for any evidence or question except on application made to him in the absence of jury by or on behalf of a defendant, and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked.

Exceptional situation as contemplated in the English Act can arise also in India and the Judge may allow question on sexual experience of the rape victim with persons other than the accused. For example, where a woman went to a club every Saturday night and pick up a different man and took him back to her home to have sex act with him as she did at the time of the alleged rape. Her consent to rape with the present accused becomes probable in the context of this evidence and such evidence can accordingly be allowed to be brought on record by the accused.