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AN ANALYTICAL STUDY ON CAPITAL PUNISHMENT IN INDIA AND ITS CONSTITUTIONALITY”

AUTHORED BY - NAZNEEN¹

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Place :

1. Research Scholar, Ph.D in Law at K.R.Mangalam Un

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ABBREVIATIONS



ACHR	:	American Convention on Human Rights
Admn	:	Administration
AIR	:	All India Reporter
Art.	:	Article
Annex	:	Annexure
ATR	:	Amnesty International Report
C.J.	:	Chief Justice
Cl.	:	Clause
CRPC	:	Code of Criminal Procedure
DLT	:	Delhi Law Judgments
ETC	:	Etcet'ra, and the rest and so on
GA	:	General Assembly
HC	:	High Court
ICCPR	:	International Covenant on Civil and Political Rights
IED	:	Improvised Explosive Devices
IPC	:	Indian Penal Code
i.e.	:	Id-est, (That is).
JJ	:	Judges or Justice
JT	:	Judgment Today (SC).
NCRB	:	National Crimes Record Bureau
NDPS	:	Narcotic Drugs and Psychotropic Substances
Para	:	Paragraph
P.no	:	Page number
POTA	:	The Prevention of Terrorism Act, 2002
POTO	:	Prevention of Terrorism Ordinance, 2001
TADA	:	Terrorist and Disruptive Activities (Prevention) Act.
SC	:	Supreme Court
SCC	:	Supreme Court Case
SCR	:	Supreme Court Reports
s.	:	Section
sch.	:	Schedule
SITA	:	Suppression of Immoral Trafficking Act

UOI : Union of India

UN : United Nation

USSR : Soviet Union

V. : Versus, against

VIZ : Videlicet, namely



**“AN ANALYTICAL STUDY ON CAPITAL PUNISHMENT INDIA AND ITS
CONSTITUTIONALITY”**

ABSTRACT

Capital punishment is the most controversial and debated subjected among the modern penologists. There are arguments for and against the utility of this mode of sentence. The controversy is gradually being resolved with a series of judicial pronouncements containing elaborate discussion on this complex penological issue.

Death Sentence has been inflicted on the offenders for various crimes in different countries depending upon the social set-up. The infliction of death sentence for heinous crimes like murder, has been in vogue since time immemorial and perhaps shall continue for all times to come because criminals ought to be banished.

The question of the constitutionality of death penalty has acquired new heights because of liberal judicial interpretation of fundamental rights guaranteed by article 14,19 and 21 of the constitution. As a result of this a number of human rights have been recognized. The doctrine of just, fair and reasonable procedure propounded in Maneka Gandhi’s case AIR 1978 SC 597 become a new ground for attacking the constitutionality of death penalty.

Keywords : *Capital punishment, judicial pronouncements, heinous crimes, fundamental rights.*

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CHAPTER- 1

INTRODUCTION

1.1. Introduction: Capital punishment is perhaps the most controversial and debated subject among the modern penologists. There are arguments for and against the utility of this mode of sentence. The controversy is gradually being resolved with a series of judicial pronouncements containing elaborate discussion on this complex penological issue. However, looking to the variety of considerations involved in the problem. Death sentence has been inflicted on the offenders for various crimes in different countries depending upon the social set-up. The infliction of death sentence for heinous crimes like murder, has been in vogue since time immemorial and perhaps shall continue for all times to come because criminals disturb the peace and tranquility of the society and such criminals ought to be banished. *Garofalo*, a well-known criminologist, favoured death penalty as the most efficient means of eliminating criminals.

As a rule, punishability, by and large, depends on the degree of culpability of criminal act and the danger posed by it to society as also the depravity of the offender. The risk of penalty is the cost of crime which the offender has to pay. When this cost is high as compared with the benefit which the crime is expected to yield, it will deter a considerable number of people. This is true with crime punishable with death sentence as well. A dispassionate analysis of criminological jurisprudence would reveal that capital punishment is justified only in extreme cases in which a high degree of culpability is involved causing grave danger of society. It must, however, be added that a mere objective consideration of dangerousness of act to society by itself would not be enough to assess perpetrator's culpability but his personal attributes and circumstance and gravity of the offence have also to be taken into consideration to decide whether or not he deserves capital punishment. Thus, punishment should be commensurate among other things, with the gravity of offender's act and societal reaction to it.² Experience has shown that despite consciousness about the desirability of reformatory justice, at times unequivocal stand is unavoidable in extreme cases where offender has been fully aware of the fatal consequences of his gruesome and brutal crime and there were no mitigating circumstances. In such aggravating situation, though unwantonly, law must take a

2.

2 Pranjape, *Criminology, Penology and Victimology*, Central Law Publications, p-327, sixteenth Edition-2014.

firm stand and not hesitate even to award the extreme sentence of death to the offender. These situations have found expression in the penal law of India and other countries of the world.³

1.1.1. Definition of Capital Punishment:-

According to *David Dressler*—“a person who kills another must be eliminated from the society and therefore fully merits his Execution”.⁴

Irwin Isenberg (1997) said that when you kill a man with premeditation you do something then stealing from him. I favour the death penalty as a matter of justice and human dignity ever apart from deterrence. The penalty must be appropriate to the crime.⁵

Marquis Beccaria in 1764; put up defence in favour of “the passionate sentimentality against a human being against capital punishment”.⁶

According to *Beccaria* – if the society is based on the original civil contract, it is impossible to expect people to agree the suffered such a penalty so this impossibility capital punishment stands invalidated. He developed in his treatise a number of innovative and innovative and influential principles: punishment had a preventive (deterrent), not a retributive, function; punishment should be proportionate to the crime committed; the probability of punishment, not its severity, would achieve the preventive effect; procedure of criminal convictions should be public; and finally, in order to be effective, punishment should be prompt.⁷

1.1.2. Meaning of Capital Punishment:-

The term “death penalty” and capital punishment are frequently used to mean the same thing. However some people believe that a difference exist because “death penalty” refers to penalty received and not necessary its implementation while capital punishment refers to execution itself .Other people believe that penalty means punishment and capital refers to death. Etymologically the terms capital literally means “of the head” has been derived from the Latin word capital from “capitalis from the caput “head” in this context alluded to execution by beheading.⁸ So the Latin use the word capitalis from caput, head to describe that which related to life that by which life is endangered. They used the neuter from this adjective i.e. capital substantively to denominate death, actual or civil banishment imposed by public

³ N.V. Paranjape, *Criminology, Penology and Victimology*, Central Law Publications, p-327, sixteenth Edition-2014.

⁴ David Dressler (2nd Edition, 1999) *Reading Criminology And Penology*, Columbia Univ.Pr.Page-501

⁵ Death Penalty Argument, 209.198.129.195> OrnellasPaprer. (Visited on January.21,2020)

⁶ Beccaria Marquis Cesav 1764 (January.21,2020) *Crime On Punishment*, Create Space Pr.

⁷ Beccaria, Cesare. “Of Crimes and Punishment.” (<https://en.m.wikipedia.org.>wiki> .Visited on January.21,2020)

⁸ Kronenwetter 2001, P.202 (<https://en.m.wikipedia.org.>wiki> . Visited on January.21,2020)

authority in consequence of crime. The idea of capital punishment is a great antiquity and formed of part of the primal concept of the human race.

According to *encyclopedia Britannica*- capital punishment also call that penalty. Execution of the offender sentenced to death after conviction by a court of law of a criminal offences. Capital punishment should be distinguish from the extra judicial execution carried out without due process of law. The term death penalty sometime used interchangeably with capital though imposition of the penalty is not always followed by execution because of the commutation to life imprisonment.⁹ According to Columbia encyclopaedia (sixth edition) (2008) capital punishment is imposition of a penalty of death by the state capital punishment was widely applied ancient tribes. It was founded (1750 B.C) in code of Hammurabi¹⁰. According to Catholic encyclopedia-capital punishment stated “the infliction by due process of the penalty of death as a punishment for crime¹¹”. Death sentence has been inflicted on the offenders for various crimes in different countries depending upon the social set-up. The infliction of the death sentence for heinous crimes like murder, has been in vogue since time in immemorial and perhaps shall continue for all times to come because criminals disturb the peace and tranquillity of the society and such criminals ought to be banished. Garofalo, a well-known criminologist, favoured death penalty as the most efficient means of eliminating criminals.¹²

So capital punishment also known as the death penalty is a government sanctioned practice whereby a person is put to death by the state as a punishment for a crime. The sentence that someone be punished in such a manner is referred to as death sentence whereas the act of carrying out the sentence is known as Execution crimes that are punishable by death are known as capital offences. Commonly included offences are- murder, treason, espionage, war crimes, genocide, crime against humanity.

1.1.3. ORIGIN AND HISTORICAL, BACK GROUND

In primitive tribal society, their practices indicates that death penalty was a part of their judicial system. In this society communal punishment for wrong doing generally includes compensation by wrongdoer, corporal punishment i.e. to cause physical pain includes flogging, branding, mutilation, spanking or padding, shunning i.e. the act of social rejection here individuals are deliberately excluded from social relationship or social interaction. Banishment

⁹ www.Britannica.com. (Visited on 21st January, 2020).

¹⁰ www.Death penalty procon.org. (Visited on 21st January, 2020).

¹¹ www.Britannica.com. (Visited on 21st January,2020)

¹² Neeraj Kumar Gupta, Singhal's Criminology 136 (Singhal Law Publications) Delhi-84, Fourth Edition-2015,Reprint: 2019-20

i.e. to be in exile means to be away from one's home and execution. On crime committed by neighbouring tribes or communities' punishment in the form of formal apology, compensation on by blood feuds was prevalent. "Acts of retaliation underscore the ability of the social collective to defend itself and demonstrate to enemies that injury to property, right or the person will not go unpunishment". The earliest code which provides punishment for death penalty was the code of Hammurabi "which was written on stone tablets around 1754 B.C. it contained 282 laws that were collected by the Babylonian king Hammurabi with scaled punishment adjustment "an eye for an eye" a tooth for a tooth (lex talionis) as graded depending on social states of slave versus free man or women.

The TORAH (Jewish Law) "also known as the Pentateuch (first five books of the Christian old testament) also lays down the death penalty for Murder, kidnapping, Magic, violation of the Sabbath, blasphemy and wide range of sexual crime"¹³. Further in ancient Greece and Athens, also the homicide statutes are provided under the writing of Draco in about 621 BC for Murder, Treason, arson or rape etc. In Roman law of twelve tables, Death sentence was carried out by means as crucifixion, drowning, beating to death, buried alive and impalement. In Tang dynasty- Emperor Xuanzong of Tang abolished death penalty after only 12 years it restored death penalty as the response to a Lushan rebellion. The most common form of Execution were strangulation and decapitation and other forms are scourging to death with a thick rod, truncation (cut into two pieces at the waist) Ling Chi (slow slicing) or death by thousand cut, Minister of fifty grade if received death sentence Emperor may grant him to commit suicide in lieu of Execution.

In Medieval and early Modern Europe the death penalty was used as generalized form of punishment. During reign of *Henry VII of England* – 72,000 people are estimated to have been executed.¹⁴

In this period there was a massive moral panic regarding witchcraft in Europe & in European colonies in North America. It was widespreadly claim that satanic witches were operating as an organized threat to Christendom as a result ten thousands of women were prosecuted and executed through witch trial in early modern period, so death penalty was given for witchcraft and sexual offences such as sodomy. In England – under Buggery Act 1533 it stipulated hanging as punishment for buggery. James Pratt and John Smith were the last two

¹³ Schabas, William (2002). *The Abolition of the Death Penalty in International Law*. Cambridge University Press. ISBN 978-0-521-81491-1. (<https://en.m.wikipedia.org.>wiki>, Visited on January 21, 2020).

¹⁴ History of the Death Penalty. Public Broadcasting Service. Archived from the original on 13 November 2012. Retrieved 12 December 2012 (<https://en.m.wikipedia.org.>wiki>, Visited on January 21, 2020)

Englishmen to be executed for sodomy in 1835.¹⁵ Islam on whole accepts capital punishment crimes for death penalty are for hudud crimes such Zina (consensual extramarital sex or homosexual sex) and Apostasy, (leaving Islam and converting to another religion) and for Murder and manslaughter under Sharia requires capital punishment in public. Victim family can seek execution (Qisas) or Exchange for blood money restitution (Diyya).

In the emergence of Modern nation states, justice came to be increasingly associated with the concept of natural and legal right, Cesare Beccaria demand “abolition of death penalty on his treaties on crimes and punishment 1764. Jeremy Bentham founder Modern utilitarianism also called for abolition of death penalty.¹⁶ As violent criminality increases, execution are carried out inside prison away from public view. In English in 18th centuries capital offences are mainly on property offences. In contemporary era there were three types of capital punishment i.e. by hanging, decapitation & death by Shooting. The fascist and communist government employed death penalty as a potent means of political oppression. During Stalin, “the Great terror of 1937- 38 executed more than 1 million social citizens. Mao Zedong publicly stated that 80000 people had been executed after communist parties’ victory in 1949”. Now in most of the countries the practice of capital punishment is reserved for Murder, Terrorism, war crimes, espionage, treason or as part of Military justice and Drug trafficking are all capital offences. Some countries provides death penalty on sexual crimes such as rape, adultery, incest, sodomy. Religious crime in Islamic states provides death penalty are hudud crime against God and Apostasy (conversion to another religion) blasphemy, monareben, witchcraft attract death penalty. In China human trafficking and corruption also attract death penalty and court martial imposed death sentence on cowardice, desertion (abandon duty or post without permission), and Mutiny.

1.1.4. Concept of Punishment:

Punishment is a design social reaction to crime it is a human act and involves deliberate infliction of suffering on wrong doer, the infliction of suffering on the criminal provide a sense of relief or gratification to the members of the society. Before dealing with the theories of punishment, it would be pertinent to explain the concept of punishment.¹⁷ Sir Walter Moberly, while accepting the definition of punishment as given by Grotious, suggests that punishment

¹⁵Cook, Matt; Mills, Robert; Trumbach, Randolph; Cocks, Harry (2007). A Gay History of Britain: Love and Sex between Men since the middle Ages. Greenwood world publishing. P-109(<https://en.m.wikipedia.org.>wiki>, Visited on January 21, 2020)

¹⁶ Bedau, Hugo Adam (Autumn 1983). “Bentham’s Utilitarian Critique of the Death Penalty. The journal of Criminal Law and Criminology.74 (3): 1033-65. (<https://en.m.wikipedia.org.>wiki>, Visited on January 21, 2020).

¹⁷ Ponnaian. M. Criminology and Penology, Publisher- Pioneer Book, P-208, 3rd Edition, 1992.

presupposes that:-

1. What is infliction is an ill, that something unpleasant;
2. It is sequel to some act which is disapproved by authority;
3. There is some correspondence between the punishment and the act which has evoked it;
4. Punishment is inflicted, that it is imposed by someone's voluntary act;
5. Punishment is inflicted upon the criminal, or upon someone who is supposed to be answerable for him and for his wrong doings.¹⁸

1.1.5. Types of Punishment:

The punishment can be categorised as:

1.1.5.1. Corporal Punishment

Corporal punishments which are known in the history ranges from physical torture to death besides confinement and transportation. The corporal punishment is of following kinds-

i. Flogging:

Flogging was a popular method to punish the criminals almost everywhere but it was a cruel punishment. The punishment was given at the whipping posts. Flogging could be given for breaking and entering, for assaulting and beating the wife. Various forms of flogging were in operation and for criminals it was a severe and cruel method of punishment. In England whipping was abolished in 1948. Flogging has been abandoned in the U.S.A also. The flogging by Russian Knout was very dangerous and fiendish. Whipping was a form of punishment in Iran, ancient and medieval India .Mughals and Marathas punished with whipping due to its severity and punishment. Flogging is still operative in Saudi Arabia.

ii. Mutilation:

Mutilation was based on '*lex talions*' [law of retaliation]. The punishment was to be duplicate to the injury inflicted. Mutilation as a punishment was more in practice because the crimes of mayhem and mutilation were generally committed. Its aim was preventive also since the criminal by amputation could not repeat the same conduct in future. The thieves if their hands were cut off could not, commit theft in future and so was for the counterfeiters. Tongues were torn out of the liars and perjurers, eyes were gouged out of spies and the sex criminals were castrated. Mutilation also served a deterrent effect on others for committing crimes. The plucking out of eyes, slitting of the nose, ears and upper lips, the tearing away of scalps and death in a horrendous manner were the punishments.

¹⁸ Neeraj Kumar Gupta, Singhal's Criminology, P-130 (Singhal Law Publications), Delhi-84, Fourth Edition, 2015, Reprint: 2019-20.

iii. Branding:

Branding of criminals was also a form of punishment. In Rome, the appropriate mark was branded on the forehead of the criminal. Till 1929, Branding was a common mode of punishment in England. Branding was also prevalent in America. T was branded on the hand of the first burglar and 'R' on the forehead of the offender for the second burglar in East Jersey. 'B' was branded on the forehead of the offender for blasphemy in Maryland. The adulterers in New England were compelled to wear 'scarlet' letter.¹⁹

iv. Stocks and Pillories:

In stocks, the prisoners were made to sit down with their hands and feet fastened in a locked frame. In pillory, the prisoners were made to stand with fastened feet and hands in the locked frame. Pillory continued in England till 1873 and in Delaware till 1905. The idea in pillory and stocks was to subject the prisoner to public ridicule. If he committed a serious crime, pelting and stoning was also resorted to punish him. The prisoner could be even whipped or branded in such a condition. Sometimes, his ears were nailed to the pillory and beams to tear the ear lobes or the ears were cut away carelessly by the officer in charge of the pillory.²⁰

v. Other Punishments:

Confinements in irons was also a punishment. The confinement in cell with hands and feet fastened by heavy chains with sides, ceiling or floor, the prisoners chained in reclining position on iron bars, chaining in cage wagons at night, handcuffing to the cell-doors were the cruel punishments. The scolders and gossipers in the villages were strapped to a chair and then fastened to a long lever operated by a man sitting on the bank of a stream or a pond for dipping him in the water with the jeering by the crowd which was known as 'ducking stool'.²¹

1.1.5.2. Transportation

Transportation of criminals is a form of punishment, the antecedent of which was banishment. The undesired person was sent to exile after observing some religious ceremonies and rituals as it was tantamount to death. Slowly, the religious ceremonies and rituals disappeared with political motive and exile turned into outlawry. The criminals sentenced to death were pressed to work on galleys or mines. As a galley slaves they were chained with their seats and compelled to work the severe floggings in case they failed to work. They had to live

¹⁹ Neeraj Kumar Gupta, Singhal's Criminology 137 (Singhal Law Publications), Delhi-84, Fourth Edition, 2015, Reprint: 2019-20

²⁰ Neeraj Kumar Gupta, Singhal's Criminology p- 137 (Singhal Law Publications), Delhi-84, Fourth Edition, 2015, Reprint: 2019-20

²¹ Neeraj Kumar Gupta, Singhal's Criminology, p- 137 (Singhal Law Publications), Delhi-84, Fourth Edition, 2015, Reprint: 2019-20

worse than the beasts. Death punishment was widely prescribed but in many cases instead of executing the offenders, they were deported overseas with the motive to get rid of criminals. The people staking their claims on the land often resorted to forced labour by these deported criminals. Australia was discovered in 1770 by Captain Cook and from 1787, the criminals were deported to Australia with an idea to raise a new colony. The criminal as well as free settlers raised the colony. The transportation of criminals to some Islands in French Guinea from France was more brutal as the policy was to kill the criminals by starving and taking more work from them mercilessly. Almost equal number of prisoners as transported died every year. The escape of the criminals was almost impossible from these islands. The transportation of criminals were prevalent in Russia also and it was more brutal and degrading in Siberia.

In India, the transportation of criminals for life was by confining the criminals at Port Blair and Andaman Islands. The place is well known for the dangerous snakes. Due to Japanese occupation of the island in the early forties, the punishment could not become operative. In 1955, the 'transportation for life' was substituted by the 'imprisonment for life'. The banishment did not find favour of the Law Commission also.²²

1.1.5.3. Imprisonment

Imprisonment is of following:

(i). Simple Imprisonment:

Simple imprisonment is awarded for minor offences which are not very serious. The prisoner has to live in prison normally without any further requirement. He gets his normal meal, whatever is served in the prison, may mingle with others and meet those who want to meet him in the prison subject to such condition as may be prescribed.

(ii). Rigorous Imprisonment:

Rigorous imprisonment differs from simple imprisonment in the sense that the prisoner has to put his labour while serving the prison term. These days due to reformative attitude various training programmes are organised for the prisoners so that they may live a normal and responsible life after returning to the society.

(iii). Solitary Confinement:-

Solitary confinement is again a very brute form of punishment. The prisoners are put in the solitary cell and they are not allowed to meet the other prisoners. They have no idea as to what is going on in the world. This harsh punishment is awarded to criminals on the philosophy

²² Neeraj Kumar Gupta, Singhal's Criminology, p- 138(Singhal Law Publications), Delhi-84,Fourth Edition, 2015, Reprint: 2019-20

that that it will reform the criminals so as to bring the change in the course of their action when they return to the society. However, the experience has been otherwise. Instead of bringing any reform, it may cause mental depression leading to psyche problems. Mental and physical ailments may arise due to unhygienic condition within the cell and sometimes and even the prisoners may die due to these conditions. The prisoners may turn to be more violent and hard core criminals.

(iv). Imprisonment for Life:-

Imprisonment for life i.e., for the whole of life. Generally, in cases of death sentence, it is proved as an alternative punishment and the court under section 302, I.P.C. has discretion to award death or life –imprisonment depending upon the circumstances of the case and gravity of the act. Death sentence has been inflicted on the offenders for various crimes in different countries depending upon the social set-up. The infliction of the death sentence for heinous crimes like murder, has been in vogue since time in immemorial and perhaps shall continue for all times to come because criminals disturb the peace and tranquillity of the society and such criminals ought to be banished. Garofalo, a well-known criminologist, favoured death penalty as the most efficient means of eliminating criminals.²³

1.1.6. Various Theories of Punishment:-

The punishment etymologically derives its origin from Greek word “*Pu*” meaning to “*cleanse*”. The punishment in the Sanskrit term “*dam*” means to ‘*check or to restrain*’ and the term “*Danda*” means a stick, staff or rod, a symbol of authority and punishment which is believes that the punishment cleans the guilty of the wrong doer. The object of criminal justice is to protect the society against criminals by punishing them under the existing penal law. Thus, behaviour either by deterring the potential offenders or by incapacitating and preventing them from repeating the offence or by reforming them into law-abiding citizens. It is this principle which underlies the doctrines concerning the desirability and objectives of punishment. Theories of punishment, therefore, contain generally policies regarding handling of crime and criminals. There are four generally accepted theories of punishment, namely, deterrent, retributive, preventive and reformative. It must, however, be noted that these are not exclusive and each of them plays an important role in dealing with potential offenders.

1.1.6.1. Theories of Punishment:-

²³ Neeraj Kumar Gupta, Singhal’s Criminology 139 (Singhal Law Publications), Delhi-84, Fourth Edition, 2015, Reprint: 2019-20.

To punish criminals is a recognized function of all civilized states for centuries. But with the changing, patterns of modern societies, the approach of penologists towards punishment have also undergo a radical change. The penologists today are concerned with crucial problem as to the end of punishment and its place penal policy. Though opinions have differed as regards punishment of offenders varying from age-old traditionalism to recent modernism, broadly speaking four types of views can be distinctly found to prevail. Modern penologists prefer to call them 'theories of punishment, which are as follows:-

(i). Deterrent Theory:-

Deterrent theory justify punishment as a deterrent to the offenders punished and also to others in the community. It improves social behaviour designed to deter future crime. It terrorise others and punishment has value in economic terms it means "pay the price of a crime".²⁴ Deterrence, as a measure of punishment particularly fails in its practical application. Deterrence, as a measure of punishment particularly fails in case of hardened criminals because the severity of punishment hardly has any effect on them. It also fails to deter ordinary criminals. Suffice it to say that the doctrine concerning deterrent punishment has been closely associated with the primitive theories of crime responsibility. In earlier time, crime was attributed to the influence of 'evil spirit' or 'free-will' of the offender for act of voluntary perversity which was believed to be a challenge to God or religion.

(ii). Retributive Theory:-

Retributive is a very important features of the administration of criminal justice basis of this theory is that offender must receive as much pain and suffering as inflicted by him on his victim and thereby restore the social balance disturbed by the acts of the criminals.²⁵ As rightly observed by Sir Walter Moberly, "The doing and its retribution has been an unending fascination for the human mind." The theory of retribution is based on the view the punishment is a particular application of the general principle of justice, that men should be given their due. Punishment serves to express and to satisfy the righteous indignation which a health minded community regards transgression. As such, it is sometimes and end in itself. Retributive theory is closely associated with the notion of expiation which means blotting out the guilt by suffering an appropriate punishment. It is this consideration which underlies the mathematical equation of crime, namely, guilt plus punishment is equal to innocence. Although most penologists refuse to subscribe to the contention that criminals should be punished with a view

²⁴ Ponnaian. M. Criminology and Penology, Publisher- Pioneer Book, P-212, 3rd Edition, 1992.

²⁵ Ponnaian. M. Criminology and Penology, Publisher- Pioneer Book, P-210, 3rd Edition, 1992.

to making them pay their dues, yet the practical utility of expiatory theory cannot be wholly discarded. No sooner and inmate completes his term of sentence, his guilt is deemed to have been washed off and he is relegated a position as if he had committed no wrong. Standard of punishment under retributive theory are – (i). that the offender has performed certain culpability. (ii). The penalty to be imposed on the offender will give satisfaction equivalent to the grievance caused by him. (iii). Similar one have been awarded and will be awarded similar punishment. (iv). The is responsible for his action and has performed its knowledge or probable consequences according to the criminal code of the state.

Criticism:

The Utilitarian's have criticized the Retributive approach on the ground that it has no social utility. Any justification for punishment must state what effect such punishment is likely to have on criminals and on society in future. Another argument put forward is that if individuals have no right to exact retribution, how can the state, acquire such a right. Punishment must serve as an instrument for reducing crimes by deterring the offender and others from doing similar acts in future or it must prevent the commission of offences by incapacitating the offenders.

(iii). Preventive Theory

Preventive philosophy of punishment is based on the proposition 'not to avenge crime but to prevent it'. It presupposes that need for punishment of crime arises simply out of social necessities. In punishing a criminal, the community protects itself against anti-social acts which endanger social order in general or person or property of its members. In order to present preventive theory in its accurate form, it would be worthwhile to quote Fichte who observed, "The end of all penal laws is that they are not to be applied". The real object of the penal law, therefore, is to make the threat generally known rather than putting it occasionally into execution. This indeed makes the preventive theory realistic and humane. It is effective for discouraging anti-social conduct and a better alternative deterrence or retribution which now stand rejected as method of dealing with crime and criminals. According to the supporters of this theory, murders are hanged not merely to deter others from meeting similar end, but eliminate such dreadful offenders from society.²⁶

(iv). Reformatory Theory²⁷

²⁶ Ponnaian. M. Criminology and Penology, Publisher-Pioneer Book, P-211, 3rd Edition, 1992.

²⁷ Neeraj Kumar Gupta, Singhal's Criminology 133, (Singhal Law Publications), Delhi-84, Fourth Edition, 2015, Reprint: 2019-20.

With the passage of time, “development in the field of criminal science brought about a radical change in criminological thinking. There was a fresh approach to the problem of crime and criminals. Individualized treatment became the cardinal principal for reformation of offenders .This view found expression the reformatory theory of punishment. As against deterrent, retributive and preventive justice, the reformatory approach to punishment seeks to bring about a change in the attitude of offender so as to rehabilitate him as a law abiding member of society. Thus punishment is used as a measure to reclaim the offender and not to torture or harass him. Reformatory theory condemns all kinds of corporal punishments. The major emphasis of the reformist movement is rehabilitation of inmates in peno-correctional institution so that they are transformed into good citizens. These correctional institution have either maximum or minimum security arrangements. The reformists advocate humane treatments of inmates inside the prison institutions. They also suggest that the prisoners should be properly trained to adjust themselves to free life in society after their release. Agencies such as parole and probation recommended as the best measures to reclaim offenders to society as reformed person.

The reformatory view of penology suggests that punishment is only justiciable if it looks to the future and not to the past. “It should not be regarded as settling an old account but rather as opening a new ones.” Thus the supporters of this view justify prisonisation not solely for the purpose of isolating criminals and eliminating them from society but to bring about a change in their mental outlook through effective measures of reformation during the term of their sentence. Undoubtedly modern penologists reaffirm their faith in reformatory justice but they strongly feel that it should not be stretched too far. The reformatory methods have proved useful in cases of juvenile delinquents and the first offenders. Sex psychopaths also seem to respond favourably to the individualised treatment model of punishment. Recidivists and hardened criminals, however, do not respond favourably to the reformist ideology. It is for this reason that Salmond observed that through general substitution of reformation for deterrence may seem disastrous, it is necessary in certain cases especially for abnormal, and degenerates who have diminished responsibility. It, therefore, follows that punishment should not be regarded as an end in itself but only as a means, the end being the social security and rehabilitation of the offender in society. Many penologists have denounced ‘rehabilitative ideal’ or the ‘reformist ideology’ underlying individualised treatment model because in practice they are more punitive, unjust and inhumane than retribution or deterrence. Writing about the condition of prisons in Russia and France, Peter Kropotkin observed, “Prisons are seen as symbols of our refusal to deal with the root causes of crime such as poverty, discrimination, unemployment,

ignorance, over-crowding and so on.”

Yet another argument which is often advanced against reformatory treatment is that there is no punishment involved in it in the sense of some sort of pain and, therefore, it cannot be regarded as punishment in true sense of the term. But it must be pointed out that though reformatory treatment involves benevolent justice, yet the detention of the offender in prison or any other reformatory institution for this reformation or readjustment is in itself a punishment because of the mental pain which he suffers from the deprivation of his liberty during the period he is institutionalised. Therefore, it is erroneous to think that institutional detention for reformation is not a form of punishment. In fact, surveillance and close supervision is itself punitive though it involves no physical pain or suffering. The authors of an American study also criticized reformist ideology stating that, “it never commended more than lip service from most of its more powerful adherents. Prison administrators who embraced the rehabilitative ideal, have done so because it increased their power over inmates”.

It is a known fact that punishment always carries with it a stigma inasmuch as it fitters the normal liberty of individual. It has become an integral part of law enforcement for securing social control. Punishment is inevitable for recidivists who are habitual law- breakers. The tendency among recidivist to repeat crime due to their inability to conform to the accepted norms to society. Investigative researches reveal that it is the mental depravity of the offenders which makes them delinquent and, therefore, a system of such offenders. However, there is a need for compartmentalisation of offenders for this purpose on the basis of age, sex, gravity of offence and mental condition. This object is achieved by scientific classification of criminals into different categories such as the first time offenders, recidivists, juvenile delinquents, insane criminals and sex offenders. Thus, punishment should be sort of social surgery since criminal is essentially a product of conflict between the interests of society.²⁸

1.2. Statement of Problem

Under certain condition of Indian penal Code provide imprisonment for life or death penalty as alternative punishment. Section – 303 of Indian Penal Code does not provide any guidelines as when should the guardians of constitutional courts impose capital punishment or award life imprisonment or lesser than that. The judicature is allowed to exercise its discretionary power and reasoning but by following the guidelines of rarest of rare case provided in Macchi Singh V. state of Punjab AIR 1983 SC 957, the court laid down: “In order to apply the guidelines

²⁸ Neeraj Kumar Gupta, Singhal’s Criminology, p-135 (Singhal Law Publications), Delhi-84, Fourth Edition, 2015, Reprint: 2020.

inter alia the following questions may be asked and answered:

- (i) Is there something uncommon about the crime which renders the sentence of imprisonment for life inadequate and calls for a death sentence?
- (ii) Are there circumstances in the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offenders?"

The researcher is trying to analyse the cases regarding important issue on capital punishment is it justifiable with law and instead of death penalty can jury penalize accuse with another form of punishment which is as severe as death penalty, Who all accused should be judiciary giving such a tough punishment ?

1.3. Literature Review

There are lots and lots of books and write ups on capital punishment. The review has been aimed to analyse what has been done by other scholars and to know who has been undone so that being researcher I may contribute my ideas and findings.

1. In (ICCPR, 1979),²⁹The concept of most serious crime rose during drafting of Article – 6 of ICCPR which provide right to life it has vast interpretation and says that capital punishment should be provided only on most serious crimes but only minority of states abolished capital punishment till 1954.
2. According to safeguard guaranteeing protection of right of these facing execution of death penalty of 1984 the death penalty should not go beyond international crimes with lethal or another extreme consequences. United Nation Secretary General in 6th report says that offence should be life endangering in the sense that it is likely consequence of action, 46 countries abolish death penalty in 1986 for ordinary crime (Amnesty International Report, 1987). After 16 year the rate almost double.
3. Roscoe pound gave the theory of social engineering based on doctrine of rarest of rare cases. The aim of this theory is to want of maximum satisfaction toward society as possible also proving justice to build as efficient structure of society. It says to balance the interest of society as well as individual and public at large.
4. (International Commission against death penalty, 2010)³⁰ Capital Punishment in US was

²⁹ (1979). Article-6. Comment 6 of ICCPR (International Covenant on Civil and Political Rights) states India has steadfastly refuse to alter its sentencing policy. Retrieved December 30, 2013 from <http://www.ohchr.org> (visited on 08-01-2020).

³⁰ International Commission against death penalty. (2010). How state abolish death penalty, United States Publication. (<http://www.ohchr.org> (visited on 08-01-2020)).

suspended between 1972 to 1976 after the SC decision in number of cases of death penalty and declared capital punishment as unconstitutional. In April 2013, 18 states repealed death penalty.

5. In *Rooper V. Simmons* Court held that cruel and unusual punishment were prohibited by the US government.³¹ The United State Supreme court rule 5-4 that it is unconstitutional to impose the death penalty for a crime committed by a child under the age of 18. The court imposed on a minor violates the Eighth and Fourteenth Amendments. Significantly, the court also noted that the imposition of the death penalty on a child violated international human rights of the child and the International Covenant on civil and political Rights.³²

6. When we talk about the Capital punishment there exist two types of opinion one group argue to support capital punishment while another argues to abolish capital punishment. In Abolitionist Argument, States abolish the death penalty for a variety of reasons. However, human rights disclosure regularly plays a role and Retentionist Argument, it should be noted that the number of retentionist countries imply a greater resistance to abolition than may actually be the case. Retentionist states often argue that the death penalty deters crime and prevents re-offences.

7. (International Commission against Death Penalty, 2010) says that Argentina execution of abolishing death penalty was started in 1916 and under mitre government in 1970. It abolishes capital punishment for law and ordinary crime in 2008. In 1994 death penalty prohibited for political crimes also. On the other hand Cambodia along with Philippines, this is one of two associations of South Asia abolishes Capital Punishment. It had the longest period of abolitions. Death Penalty in these countries prohibited in 1989 through amendment for all crimes. In France, death penalty for all crimes abolish in 1981 thus joining hand with the thirteen other European countries that already abolished death penalty. With 2006 amendment to constitution Kyrgyzstan abolish death penalty for all crimes. Mexico abolishes capital punishment in 2005 for all crime in law. Capital punishment in US on April, 2013 eighteen states repealed death punishment.³³

8. (Maharashtra Prisons Rule, 1971) there are different methods of execution of death penalty. India hanging is the most practiced method for capital punishment. 'Convict' means a person awarded death penalty. On admission of convict in prison regarding date of his execution and

³¹ *Rooper v. Simmons*, 543 US 551, 2005. Retrieved December 31, 2013 from <http://www.supremecourt.gov> (visited on 08-01-2020).

³² <https://www.fairsentencingofyouth.org> (visited on 08-01-2020)

³³ Sapre, DP. And Karmarkar, MD (2012), Capital Punishment. Journal of Sapre forensic, Medica Karmarkar, Science and Law. Volume 2, Number 2.pp-28-36. (Visited on 08-01-2020).

entry in prison he will inform to state government and will take solicitor order from state government for execution convict person should be kept in especially trial after the mercy petition has been rejected state government will choose the date of execution of death penalty and will inform to his family member.³⁴

1.4. Hypothesis

This research work is being undertaken to know the legality of capital punishment is a legal punishment in India. By examining various statutes provisions and Indian Penal Code where death sentence has been provided as one of the mode of punishment and to know that from where did the validity of capital punishment is derived, its guidelines in awarding death sentence evolve in various cases. Whether there is arbitrariness in awarding death sentence by the judge and analysing the retention of capital punishment in India as it is required to maintain law and order and peaceful co-existence of society. The Hypothesis of the Research is as follow-

1. The principle on which Supreme Court of India award Capital Punishment i.e. Rarest of rare case does not violate the Constitutionality of Article-21 of the constitution of India.
2. Though Capital Punishment to accused violates Human Rights in India but it is beneficial to the society.
3. Judiciary in India while awarding death penalty use their discretionary power keeping in mind the welfare of public at large.

1.5. Scope and Object of the Study

Scope

The various cases studies or mentioned for the research are mostly landmark cases of India and foreign countries which establishes history in the title of just and fairness of rarest of rare cases. Many old and latest judgement were also included in this project. Analysis of topic based mostly on comparison of death penalty laws in different countries.

Objects

Many debates and research has been done by different jurist, researchers, administration and legislation but no one properly conclude to favour capital punishment or abolish it. According to the Indian Law capital punishment use to be given on rarest of rare case but this logic creating a matrix for today's generation as today many people advocates the human rights. The objects

³⁴ Sapre, DP. And Karmarkar, MD (2012), Capital Punishment. Journal of Sapre forensic, Medica Karmarkar, Science and Law. Volume 2, Number 2.pp-28-36. (Visited on 08-01-2020).

of the study are:

1. To study the meaning, extent and principle of rarest of rare crimes in India.
2. To identify that capital punishment is the only reason to create fear in mind of public, so that they stop doing heinous crimes.
3. To find that does death penalty should be abolished in India also according to Human Rights.
4. To discuss theories of punishment and their relevance and also analyse the argument of Retentionist and Abolitionist of Capital Punishment.
5. To examine in details the statutory and Constitutional frame work relating to Capital Punishment.

The researcher started this project to find out through analysis that weather the capital punishment which uses to lay down on rarest of rare case basis is it just, fair, and reasonable for public at large and to humanity.

1.6. Research Methodology

Research methodology is a way to systematically solve the research problem. It may be understood as a science of studying how research is done scientifically. The concept of the research methodology is much wider. The method a researcher follows in pursuing a research is research methodology. The research methodology adopted in the preparations of the present dissertation “AN ANALYTICAL STUDY ON CAPITAL PUNISHMENT IN INDIA AND ITS CONSTITUTIONALITY”. Doctrinal method has been adopted while doing the study by making references to leading articles of legal luminaries, newspaper magazines, internet journals, all India report and Supreme Court cases and most of the reference is taken from different books.

1.7. Significance of Study

As Capital Punishment is one of the burning topic across the world for its abolition for all crimes and for its retention for various heinous crimes which is against humanity so in Indian also the issue for abolition of capital punishment is debated by various eminent jurists, legislators, lawyers, public etc. as in India capital punishment is legal punishment as it is provided under the Indian penal code and various statutes enacted by the parliament of India.

The significance of this research is to ascertain and analyse the legality of capital punishment in India provided under Indian penal code and various statutes with reference to article 21 of the Indian constitution and to analyse the guided principles evolve in Bachan Singh Case i.e. principle of rarest of rare case and various guidelines evolve in Machhi Singh Case for awarding death sentences and various cases which fall under the category of rarest of rare

case and its justification in execution of death sentence. So it analyse the retention of capital punishment and execution of death sentence in India as it is justified in India, to protect the sanctity of ethical values, dignity of individuals and for maintaining law and order and peaceful co-existence.

1.8. Frame work of study

The first chapter of the study deal with 'INTRODUCTION' it contains Origin, Historical Background and Evolution of Punishment, Types of Punishment and Various theories of Punishment.

This second chapter of the study deal with "HISTORICAL PERSPECTIVE OF CAPITAL PUNISHMENT OF INDIA" it contains the Hindu Period, Muslim Period, British Period, various cases of death penalty, offences under Cr.P.C and IPC and Method of Execution in India.

This third chapter of the study deal with "RETENTIONIST AND ABOLITIONIST OF CAPITAL PUNISHMENT" it contains retentionist and abolitionist views of Capital Punishment and Arguments for and Against of Capital Punishment.

This fourth chapter of the study deal with "INTERNATIONAL PERSPECTIVE OF CAPITAL PUNISHMENT" it contains International Perspective of various Countries such as America, Britain, Canada, Sweden, Japan, China, North Korea, Islamic Republic of Afghanistan, Syrian Arab Republic.

This fifth chapter of the study deal with "PRESENT SCENARIO OF CAPITAL PUNISHMENT IN INDIA" it contains Constitutional validity of Capital Punishment in India, Article 21 of the India Constitution, Evolution of the principle of Rarest of the rare case and various leading Landmark cases of capital punishment.

This sixth chapter of the study deal with "SUGGESTION AND CONCLUSION" it contains analysing the Capital Punishment and its constitutionality in Indian context.

CHAPTER-2

HISTORICAL PERSPECTIVE OF CAPITAL PUNISHMENT IN INDIA

2. General: Capital Punishment has been prevalent in India from times immemorial. It is as old as the Hindu Society. There were references about the death penalty in our ancient scriptures and law books. Kane points out “It will be seen from the early sutras like that of Gautama and from Manusmriti that the ancient criminal law in India was very severe and drastic. But from the times of Yajnavalkya, Narada and Brihaspati the rigour of punishment was lessened and softened.³⁵The fundamental basis of ‘Dandaniti’ was deterrence. The concept of reformation was not known to the Smriti writers. One more salient feature of ancient Hindu law was that the punishment depended upon the caste of the offender as well as the victim. There was little uniformity between the various scriptures and sastras. The law depended upon the nature and whim of the King, if not in theory, at least in practice. Nevertheless, murder was considered to be the worst of all crimes and hence the punishment was also severe.

2.1.1. The Hindu Period

Death sentence in India, it is as old as the Hindu society. It has been prevalent in India from times immemorial. We find references to the penalty of death in our ancient scriptures and law books. Hindu law gives did not find anything abhorrent in it, they justified it in the cases of certain serious offences against the individuals and the state. Generally, the death penalty was accompanied with the infliction of torture and was applied indiscriminately.

Various forms of punishment were mainly traced from the Rig Veda and Atharva Veda.³⁶ There

³⁵ Kane, P.V, History Dharmasastras: 390b (1978) <https://www.shodhganga.infiibet.ac.in>handle> (visited on 10th January, 2020).

³⁶ Priyavrata Veda Vachaspati: Vedon ki Rajanitik Siddhanta: A Study in Vedic Polity: 555-585(1983). <https://www.shodhganga.infiibet.ac.in>handle> (visited on 10th January, 2020).

is a mention in both Rig Veda and Atharva Veda about the death penalty by hanging, by shooting, by thunderbolt, by electrocution, or by combination of any of the three punishments out of the above. The infliction of penalties, including the penalty of death, is a process operating against certain classes in general: and even if a single individual is subjected to any penalty, including the penalty of death, it is because of that individual belonging to the enumerated class of the social degenerates. The hundred and fourth hymn of the seventh part of the Rig Veda and fourth hymn of Eighth part of Atharva Veda have been addressed in common to the deities Indra and Soma. Infliction of punishment on culprits appears to be the common jurisdiction of these two deities. The hymns reflect the instrumentality of Indra in inflicting penalties in consultation with Soma, making thereby the infliction of punishment as a matter of common deliberation of the deities Indra and Soma, as if the two are respectively the executive and the judicial organs, acting in unison, in the cosmic government.³⁷

Till the end of the Epic period killing was justified either in war or combat. The eighteen prominent epics, the Puranas, are impregnated with the classical theme of the incarceration of godhead on the mission of killing non-Aryan sovereigns. All this depicts the cult of killing as a cultural crusade. Killing of a demon or evil spirit was supposed to be a very religious act performed with a view to propitiating the deities for safeguarding the welfare of the group. With that object in view, such punishments were usually carried out in the public gatherings, since they had a religious outlook. Such a mode of Capital Punishment seemed to have been in vogue.

The administration of criminal justice as an integral part of the sovereign function of the State did not seem to have emerged in India till the smriti period. The credit goes first to smriti, mainly Manu and secondly to the Artha Sastra of Kautilya, who have eliminated the influx of metaphysical subtleties into the innate conditions of the society' governed by positive law administered by the Royal Courts. The administration of criminal justice in accordance with the tenets of positive law deduced from the principles laid down in the smritis, very often alloyed with Royal edicts or ordinances, emerged in the smriti period and continued till the Mughal regime in India until it was replaced by codified penal law in the British regime. The Manu Smriti has recognised a juristic distinction between the sentences of death '*de jure*' and '*de facto*'. It is stated that a death sentence passed on a Brahmin culprit is not to be executed '*de facto*', but only '*de jure*' by the tonsure of his head. The tonsure to such a Brahmin was as

³⁷ Chaturvedi and Chaturvedi: Theory and Law of Capital Punishment: 30 (1989).<https://www.shodhganga.infiibet.ac.in/handle> (visited on 10th January, 2020).

good as his death. The death sentence of a Brahmin culprit may be executed '*de jure*' by his exile also.

The later smriti writers also concurred with the opinion of Manu. Kautilya's Artha Sastra, Gautama's Dharma Sutras and Yajnavalkya's smriti prescribe that as a general rule 'a Brahmin offender was not to be sentenced to death or corporal punishment for any offence deserving a death sentence, but in such cases other punishments should be substituted.'³⁸ Kautilya who exempted a Brahmin from death sentence, as a general rule prescribed certain extraordinary circumstances where death penalty can be given to a Brahmin also. A Brahmin who aims at the kingdom or who forces entrance into the king's harem or who instigates alien enemies or tribes against the king or who instigates disaffection or rebellion in forts or in the country or in the army should be sentenced to death. Katyayana was against exempting Brahmins from death penalty and stated that even a Brahmin deserved to be killed if he be guilty of causing abortion, or if he be a thief of gold or if he kills a Brahmin woman with a sharp weapon or if he kills a chaste woman. Death Penalty on culprits belonging to a class other than that of the Brahmins has to be executed '*de facto*' without any exceptions. Manu Smriti not only prescribed varied types of punishments depending upon the cast and social status of the offender and victim, but also prescribed various modes of carrying out the execution depending upon the offence committed. The thief of unclaimed property is liable to be crushed to death by an elephant. The punishment for institution of a malicious proceeding may range from fine, corporal pain and death, commensurate with the charge levelled against the accused. A Sudra bringing false accusation of theft against a Brahmin is liable to be awarded death penalty.

The punishment on a thief of gold, silver or other metal of the weight of a hundred grams or valuable apparel of another might range from corporal pain, amputation, or death in accordance with the gravity of the offence and with due regard to time and place of offence and the class of offence to which the owner of such property would belong to. A person of noble birth, convicted of theft of gems or precious stones, or of kidnapping a woman, is liable to penalty of death. A culprit guilty of arson, of poisoning, of causing hurt on an unarmed victim, or robbery, and of stealing crops or women, even if he be a preceptor, an old man or child, is liable to be killed instantly. An adulteress proud of money or beauty, bringing indignity to her husband by lying with her paramour is liable to be bitten to death by dogs in a public place and the paramour is to be burnt to death by being placed on a red-hot iron cot.

³⁸ Kulshreshtha, V.D: Landmarks in Indian Legal and Constitutional History: 11 (1989).
<https://www.shodhganga.infiibet.ac.in/handle> (visited on 10th January, 2020).

2.1.1.1. Offences against State:-

After Manu, the total scenario was changed. Offences against God, morality and upper class people took a back seat, and offences against the State were considered to be the gravest. Kautilya's Artha Sastra reflects this change of attitude, which is still prevalent and embedded in all the penal laws of the world till date. Kautilya considered offences against the State as gravest, and prescribed death penalty for such offences even on the least pretext. There are four broad classes of offences, traceable in Artha Sastra as would entail death penalty, namely, (a) spying against the State, (b) misappropriation from the State exchequer or from personal property of the king, or from the resources of the State, (c) conspiracy by officers of the State, including ministers, and (d) other heinous offences committed by citizens. Death penalty for offences against security of State were awarded, not strictly as a mark of justice but rather as a measure of policy or expediency where no chances could be taken. A liberal view in these matters could jeopardise the security of the State.

The offence of breach of secrecy, which is, in other words, the same thing as spying against the State is punishable with death. The offence of embezzlement from the State treasury, if committed by the treasurer entails death penalty. The other offences which carried death penalty are misappropriation or conversion of the personal belongings of the sovereign and involvement of officers of State in the offence of disposing of any jewel extracted from mines or sandal wood forests. Artha Sastra contained provisions for death penalty on officers of State, when suspected to be conspirators or otherwise guilty of breach of loyalty to the sovereign. Death to such suspects had to be brought about only by diplomatic manoeuvring and rather in a clandestine way. It also prescribed death penalty for clandestine deaths, which resemble our modern day fake encounters by police.

The thugs and cheats in places of pilgrimage would reap death penalty on their fourth offence. Persons guilty of rape, abduction or of keeping others in wrongful confinement, or those who cause grievous hurt to others by the offence of deprivation of members of the body, like nose or ear and those who kill the horses or elephants of the king or steal such chattels or chariots or those who have trespassed on places of public resort, would also meet death penalty. Causing the death of a virgin below the age of menstruation is offence entailing death penalty. Letting out a prisoner from the prison would entail penalty, of confiscation of the property and death also. Assault on a woman by a prisoner and cohabitation committed by a Sudra man with a Brahmin lady also carried the death penalty. Death caused in a scuffle called for death penalty with torture, but if death of the victim did not take place immediately and he died within seven

days then the penalty would be death without torture. The Artha Sastra prescribed death penalty for murder even if it occurred in a quarrel or duel. Hanging was the penalty for spreading false rumours, house-breaking and stealing the king's horses and elephants. For offences against the State, for murdering one's father and mother or committing serious arson Capital Punishment was given in varied forms, namely roasting alive, drowning, trampling by elephants, devouring by dogs, cutting into pieces, implement etc.,³⁹

For rape, threat to kill, abduction and wrongful confinement, death was given by crucifixion. The other offences which carried death penalty by crucifixion were trespass on places of public resort, causing grievous hurt, stealing king's chattels and chariots etc., for committing arson death penalty was executed by burning. The person guilty of damaging a bridge or obstruction of a water course would be drowned. Causing death by poison was also punished by drowning. Women were not exempted from death penalty. But, if a woman was found to be pregnant, her execution would be postponed till one month after her delivery. This provision was clearer than the provision of Criminal Procedure Code.⁴⁰ The woman guilty of killing her husband, or her off springs, or committing arson, or causing the death of any person by poisoning would be crushed to death by cows. It is notable that the Artha Sastra is not a penal code and naturally lacks a coherent schematisation of offences and their penalties of death mentioned therein are not to be taken as exhaustive but only illustrative. They are meant to set guidelines for the sovereign having most of the things to be determined by discretion of the sovereign: and the penalty of death attached to so many offences do not at all seem to be imperative.⁴¹ In Buddhist texts also references to death penalty were found. Even a compassionate king like Emperor Ashoka postulated death penalty for a number of heinous crimes, though General Amnesty existed. Idu Battuta, in his writings painted the picture of India, as it was in the 14th century, pointed out that Capital Punishment was in vogue for the offences of moral turpitude. Even members of the Royal family were dealt with like ordinary men.

2.1.2 The Muslim Period:

Muslim period marks the beginning of a new era in the legal history of India. The social system of Muslims was based on their religion, Islam, which may be described as a reformist version of seventh century Arabian practice. Muslims after conquering India imposed their

³⁹ Kane, P. V: History of Dharmasastras: 391-410(1989) <https://www.shodhganga.infiibet.ac.in>handle> (visited on 10th January, 2020).

⁴⁰ Section 415 of Criminal Procedure Code is silent about the of the pregnant woman's execution. It simply says the execution shall be postponed. <https://www.shodhganga.infiibet.ac.in>handle> (visited on 10th January, 2020).

⁴¹ Chaturvedi and Chaturvedi: Theory and Law of Capital Punishment: 42 (1989) <https://www.shodhganga.infiibet.ac.in>handle> (visited on 10th January, 2020).

criminal law on Hindus, whom they conquered. Consequently, before the advent of the British, the Mohammedan Criminal Law was prevailing in India. The concept of crime and punishment is ancient and goes back to unwritten history, though much of it has reached us through the revealed sacred books and the written laws over a period of 35 centuries or more. According to Islamic law, the punishment should be deterrent. An accused, once found guilty should be punished at a public place in order to open the eyes of a potential criminal. Islam has prescribed death sentence for a premeditated murder. This point is illustrated through verse 179 Sura II from the Holy Quran. "On wise person (here is safety for your lives in death penalty and we hope that you would never violate and would always abide by this law of tranquillity."

2.1.2.1. The Origin and Nature of Mohammedan Criminal Law:

The primary basis of Mohammedan criminal law was believed to be of divine origin. But, the laws of Quran were found inadequate to administer justice. When Quran was found inadequate, so to fulfil the want of large and civilised community there was introduced the "Sunna" or rules of conduct. Deduced from the oral precepts, actions and decisions of the Prophet. These authentic traditions were taken to be the second authority of Mohammedan law and were regarded as conclusive in cases which were not expressly provided by the Quran. The third source of legal authority received by the "Sunnis" was the concurrence of the companions of Muhammad and failing this they took the aid of analogy as the fourth source. "Analogy" is a vast scattered mass of material codified after the death of the Prophet, according to the ideas and opinions of four great Muslim Jurists. The traditional Muslim Criminal Law broadly classified crimes under three heads: (i) Crimes against God, (ii) Crimes against sovereign and (iii) Crimes against private individuals. The first category includes such crimes as apostasy, drinking intoxicating liquors, adultery etc. The second category consists of crimes such as theft, highway robbery and robbery with murder and the like. The third category includes such offences as murder, maiming etc., i.e., offences against human body. Accordingly, the Muslim Criminal Law arranged punishments for various offences into four categories, namely Qisas retaliation, Diya or blood money, Hadd or fixed penalties and Tazir or discretionary punishments. Before proceeding into the details, it would be convenient to have a clear idea about the conception and classification of Homicide under Muslim Law. Homicide under Muslim Law was classified under the following heads:

- (i) Homicide in prosecution of war against hostile Muslims for the advancement of Islam. (ii) Homicide in support of Musalman community. (iii) Homicide of an apostate Muslim. (iv) Homicide of an insurgent against the rightful Imam. (v) Homicide of a person who resists the

established government openly. (vi) Homicide of a condemned criminal and (vii) Homicide of a murderer by a person who was legally entitled to retaliate are lawful and justifiable.

Leaving these instances, the Muhammedan Criminal Law recognised the general legality of putting another person to death, if necessary, for the prevention of evil, and safety of the community. Capital Punishment could be imposed on persons who violently disturb the public peace, highway robberies, person committing arson, persons who commit extortions under the pretext of collecting public taxes, false informers and generally on all habitual ill-doers who made practice of committing offences injurious to society. But, this infliction of death upon a criminal by a private individual was only justified if the criminal was in the act of committing the crime: after the completion of the offence, only a competent official was authorised to 'punish the offender.

Besides these there were five kinds of homicides under Mohammedan Law.

- i. Qatl-i-Amd: It literally means wilful homicide and implies intention to kill followed by a voluntary act. It entitles the aggrieved person to demand Qisa. The right of retaliation being considered as a private right, the possessors of the right were at liberty to remit their claim, and forgive the offender: or to compound, with the consent of the murderer for compensation.
- ii. Diya or Blood-money: Diya meant blood money. In cases of homicide Qisa could be exchanged for money. The murderer paid some money to the legal heir of the victim, so that the avenger would not retaliate. So, practically, the punishment of Diya was a corollary to the punishment of Qisa. The blood-money was fixed by law, for man it was 3333-5-4 Dinars and for causing the death of a woman it was half the amount. Curiously, there was no difference between the compensation for the death of a Muslim and a non-Muslim.
- iii. Hadd: In the case of Hadd, the law prescribed and fixed the penalties for certain offences. In other words it meant boundary or fixed limit of punishment with reference to the right of God or to Public Justice. In such offences the Judge was not free to use either Qisa or Diya or his discretion but he was required to pass a sentence according to the provisions of law.
- iv. Tazir: Tazir means discretionary punishment. Offences for which no punishment was prescribed were left to the discretion of the Judges to give any sort of punishment from imprisonment and banishment to public exposure. The circumstances of each case determined the Tazir. In these cases the king had the right called "*Right of Siyosat*" to punish the guilty in the interest of public justice.

Akbar's ideas of justice may be gathered from his instructions to the Governor of Gujarat that he should not take away life till after the most mature deliberations. In his times the death sentence was awarded but it was not accompanied with mutilation or other cruelty except in

cases of grave sedition. This sentence was to be confirmed by the Emperor, the exemplary justice by the Moghul Emperor Jahangir in India who ruled from 1605 to 1627 was an illustration of the law of “life for life” as an institutional punishment in the 17th Century. The Emperor applied this principle in his own case, by offering himself to be killed in the hands of a lady who was bereaved of her husband by an arrow at the hands of empress Noorjehan. This incident is quoted with historical veracity. A codified system of penal law never appeared even in Mughal period: and death penalty for heinous offences continued to be part of criminal justice, though history from times of Manu to the Mughal has failed to provide any known instance of regularly staged criminal trial. Aurangzeb the last of the five great Mughal rulers is known to have executed death penalty on Tej Bahadur Singh, the ninth preceptor of the Sikh religion. Two of the sons of tenth preceptor of the Sikh religion, namely Guru Gobind Singh, were put to death, by plastering them inside a wall, but all the three instances of death penalty were founded on religious and political motives and fail to provide any clue to any settled system of law and procedure providing for trial of offences calling for penalty of death. Otherwise, under the dictates of anger and passion Aurangzeb never issued orders of death.

2.1.3. British Period:-

Warren Hastings adopted the principle of non-interference with Mohammedan Penal Law as long as it would not affect the authority of the Government and the interests of the society. It soon appeared, however, that some of the provisions of the Mohammedan Penal Law were of such a nature that the East India Company could not allow their continuance on grounds of humanity and justice. Mohammedan Criminal Law prescribed death penalty and also other cruel punishments.” The Mohammedan Criminal Law was open to every kind of objection. It was occasionally cruel. It was frequently technical, and it often mitigated the extravagant harshness of its provisions by rules of evidence which practically excluded the possibility of carrying them into effect.” Nevertheless, in some respects, undoubtedly, the Mohammedan Law was superior to the English Criminal Law of that period which was still rude and crude, and far from perfect. English law would hang a man for stealing trivial things, but in Bengal a thief could never be capitally punished. In prescribing the severest punishment for crimes against person, it was far in advance of the English Criminal Law of the eighteenth century which punished offences against property with much greater severity. It is noteworthy to observe that Hastings who boasted that he intended to preserve the native law and commented upon Mohammedan Penal Law as barbarous and inhuman was the instrument behind the execution of Raja Nand Kumar, who was falsely implicated in a bribery charge for the sin of

bringing corruption and bribery charges against Hastings. The English Act of forgery under which Nand Kumar was convicted had never been formally promulgated in Calcutta and the people could not be expected to know anything about it. The Hindu or the Muslim law never regarded forgery as a capital offence. To sentence an Indian to death under these circumstances by applying literally an obscure English law, was nothing short of miscarriage of justice. However, it is Cornwallis who brought substantial changes in the Criminal Law by making the following amendments:

- (a) Intention of homicide was to be determined from general circumstances and proper evidence, and not from the nature of the instrument employed.
- (b) The discretion left to the next of the kin of a murdered person to remit the penalty of death on the murderer was taken away, and the law was to take its course upon all persons convicted thereof without any reference to the will of the relatives of the deceased:

The famous Cornwallis Code provided that in cases of murder the following circumstances were not to bar the trial or condemnation of the prisoner.

- (i) Refusal of the heir to prosecute,
- (ii) Non-appearance of the heir within a reasonable time and
- (iii) Legal incompetency, e.g., minority of the heir to prosecute.

In any of these circumstances, the case was to be conducted and sentence was to be passed on the supposition that the deceased had no heir or that the heir had been present at the trial and did prosecute. In 1797 further changes were brought in the law of homicide. The law officers were directed to give their "*fatwas*" in all cases of wilful murder on the assumption that Qisa was claimed, even when it was not, and the sentence might extend up to death. In other kinds of homicide, if the Mohammedan Law prescribed the payment of the fine of blood, the judges were directed to commute the punishment to imprisonment which could extend to life imprisonment. In 1799 the political awareness in Indians caused the making of another Regulation which was the first measure on the offence of treason and which penalised this offence. In the same year justifiable homicides under Mohammedan Law were also regarded as opposed to public justice, and all such cases were declared liable to Capital Punishment. The capital sentence was also prescribed in cases of homicide which were previously exempted from retaliation on some flimsy and superstitious grounds like the prisoner being one of the ancestors of the slain, or being the master of the slave if the deceased was a slave, or on the plea that the deceased desired to be put to death.

The next reform came in 1802 when infanticide - the practice of destroying children by throwing them into water which was practised partly from economic reasons but also from a

belief in its efficacy as a stimulant to the fertility of the mother - and which was not sanctioned by the Hindu Law, nor countenanced by the religious orders or by. The people at large, nor was it at any time authorised by the Hindu or Mohammedan Governments of India - was declared to be wilful murder and on conviction to be liable to the punishment of death, and same punishment was to be inflicted on all the abettors and accomplices, notwithstanding any contrary fatwa of the law officers. Regulation VI of 1832 marked the end of the Mohammedan Penal Law as a general system of law applicable to all persons in the country, excepting "British subjects". The period of horror of the Mutiny of 1857, being over Act XXVI of 1858 was enacted with a view to discouraging a recurrence. Under this Act, collecting men, arms, ammunition, or otherwise preparing to levy war against the State or instigating, or aiding in the commission of that offence was made liable to the punishment of death, or to the punishment of transportation of life, or of imprisonment with hard labour for a term not exceeding fourteen years. Ultimately, the Indian Penal Code was passed in 1860. The provision regarding Capital Punishment under this code are discussed separately.

2.1.4. Move to Abolish Death Penalty in India:

After the Indian Penal Code came into force attempts were made both before and after independence for abolition of death penalty. In 1931 Gaya Prasad Singh introduced a Bill and a motion for its circulation was negative after the reply by the then Prime Minister Sir James Crerar. The mover in support of his motion, cited the examples of other countries which had abolished the death sentence, pointing out that the abrogation of death penalty had not landed human society into chaos, and argued that Capital Punishment had a demoralising effect on the human mind. The dangers of conviction of innocent persons and misery caused to the wife and children of the condemned man were also dealt upon. The Home Minister, however, in his reply supported death penalty on the ground that in many countries death sentence had been restored after abolition: Secondly, he pointed out that in the abolition countries, the enactments abolishing death sentences were made after a very long period of experiment: Thirdly, he argued that in his experience as Home Minister and from the familiarity he had gained with homicides throughout the length and breadth of India, he could recite to the House "Crimes of so dreadful character that one is presented with the very pressing question whether in cases of that kind any punishment other than Capital punishment could on any theory of crime be regarded as the proper punishment." Fourthly he also stated that the Indian law was more elastic than English law, as for it empowered the Courts to pass an alternative sentence. In this connection, he stated "it is my experience, both as an official in Local Government and as an

official and a Member of the Government of India, that discretion is very frequently, and I think on the whole, very wisely and judiciously exercised.” In Independent India in 1952 Sri A. Kazmi moved a Bill to amend Section 302 of Indian Penal Code in such a way to abolish death penalty. But, later the Bill was withdrawn without much discussion. Subsequently, Bills and resolutions were introduced in Parliament in 1956⁴² in 1958⁴³ and in 1961.⁴⁴ For abolition of death penalty. All these attempts failed, but, provided a ground for discussion over death penalty. Sri Raghunath Singh’s resolution for the abolition of Capital Punishment was discussed in the Lok Sabha, in 1962⁴⁵ and later it was withdrawn after discussion. However, a decision was taken to refer the matter to the Law Commission. The Government gave an assurance that a copy of the discussion that took place in the House would be forwarded to the Law Commission, which was seized of the question of examining the Code of Criminal Procedure and the Indian Penal Code, with a view to considering as to whether any changes are necessary therein.

Thereafter, in 1963, a question, was put in the Rajya Sabha on the subject. In the answers to the supplementary on the question Government gave an assurance that a copy of the debates that had taken place in the Rajya Sabha in 1961 on the resolution of Smt. Savitri Devi Nigam would be forwarded to the Law Commission.⁴⁶ Government kept its promise by sending copies of Debates in the Lok Sabha as well as in Rajya Sabha to the Law Commission. As to the resolution of Sri Raghunath Singh, Dr. L.M. Singhvi, had moved an amendment to the effect that the original resolution be substituted by one that the Government should take immediate steps to set up a commission consisting of eminent lawyers, judges and Members of the House of Parliament to consider the desirability of enacting legislation for the abolition of Capital Punishment in India. Sri. H. C. Mathur moved amendment to the effect that the question regarding the abolition of Capital Punishment be referred to the Law Commission. Sri Bede also moved an amendment to the effect that a committee of eleven members consisting of legal experts and members of Parliament be appointed to investigate and report under what circumstances the Capital Punishment could be abolished.⁴⁷ The Legislative move having, thus, ended with the resolution, of Sri Raghunath Singh, the matter was taken up during Gandhi

⁴² Lok Sabha Debates, 1956, V. II, Part II, Cols. 3538 Dated 23-3-1956: V. VII. Part II, Cols. 4345-4348, Dated 24-8-1956: V. IX, Part II, Cols. 916-986, Dated 23-11-1956

⁴³ Rajya Sabha Debates: 25th April, 1958: 431-442 and 444-528.

⁴⁴ Rajya Sabha Debates: 25th August 1961, Cols. 1681- 1784 and 8th September, 1961, Cols. 307-365.

⁴⁵ Lok Sabha Debates, April 21, 1962, Cols. 307-365.

⁴⁶ Government kept its promise by sending copies of Debates in the Lok Sabha as well as in Rajya Sabha to the Law commission.

⁴⁷ Chaturvedi and Chaturvedi: Theory and Law of Capital Punishment:149(1989)

Centenary year, when the Government decided to commute the death sentence of condemned prisoners into sentence of life imprisonment. In reply to a question raised, in the Rajya Sabha, on March 12, 1969 by Ganesh Lai Chaudhary, whether Government had ordered to commute the death sentence during the Gandhi Centenary year, the Home Minister, Y.B. Chavan, stated on floor of the House that in connection with the Gandhi Centenary year, it had been decided that in respect of death sentences awarded by Court, the President would exercise his prerogative of mercy in the case of all prisoners against whom the death sentence had been awarded on or before the 12th November, 1968, and commute the death sentence in each case to one of imprisonment for life.

Capital Punishment existed in England since 450 B.C. In tenth century Britain mutilation also appeared on the scene. Canute's rule was blessed with peace without any executions. But, Rufus reintroduced Capital Punishment. By the end of fifteenth century ecclesiastical courts started punishing people spiritually. Every literate claimed the benefit of clergy. In spite of this, the number of capital offences in England rose to 220 but in the course of time they were reduced to thirty two in all. The starting point for abolition of Capital Punishment in England was the year 1764, with Cesare Beccaria essay on Crimes and Punishment. With the efforts of Bentham and Romily the ideas of Beccaria seeped into the English thought. Mackintosh, Ewart and John Russell were instrumental for the abolition move. Criminal Law was not uniform throughout America. Every Colony had its own law though the variation is slight. Though technically thirty-one crimes carry death penalty only seven crimes have actually been punished with death. Benjamin Rush, influenced by Becerra's essay started the movement towards the abolition of Capital Punishment. Livingston further carried the movement of abolition. Nine States in America abolished Capital Punishment completely. In other states it still exists.

In India, the Hindu Era and Mughal Regime saw Capital Punishment being imposed quite liberally. After the British stepped in the number of capital offences reduced substantially. In 1860, the Indian Penal Code was enacted. It prescribed death penalty only for eight categories of offences. Prior to Independence and after Independence also several motions were moved in both the houses for the abolition of Capital Punishment, 35th Law Commission was appointed to study the matter in detail. Neither the Legislature not the Law Commission felt that the time is ripened for the abolition.

2.2. Capital Punishment in India

Capital punishment is a legal penalty in India. In Dec 2007 India voted against a united

nation General Assembly resolution calling for a moratorium on the death penalty. Again in November 2012 India again upheld its punishment by voting against the UN General Assembly resolution seeking to end the institution of capital punishment globally. A total of twenty six executions have taken place in India since 1991. The number of people executed have taken place in India since the nation achieved independence is a matter of dispute. Government official statistics claim that fifty-two people had been executed since independence. National law university Delhi confirmed 755 execution in India since 1947 people union for civil liberties indicates that actual number of execution is in fact much higher as they located records of 1,422 execution in the decade from 1953 to 1963 alone. According to report of cases in which the death sentence was awarded in India from 1953-63 was 1410. Act 21 of India constitution provide that person life can be deprived by just fair and reasonable procedure establishment by law. The Supreme Court in *Mithu V. State Of Punjab* struck down section 303 of the Indian penal code which provided for a mandatory death sentence for offenders serving a life sentence. *In Bachan Singh State of Punjab*

The constitutional Bench of Supreme Court of India held capital punishment in India can be given only in “rarest cases”. Various categories of the fact and circumstances of case which will fall under principle of rarest of rare was laid down *In Macchi Singh V. State Of Punjab*⁴⁸ the categories provided under this case was not an exhaustive guidelines, every case will depend upon the fact and circumstances of each case. The supreme court of India ruled that the death penalty should be imposed only in the rarest of rare cases while stating that honour killing fall within the rarest of rare category. Court has recommended the death penalty to those found of committing honour killing which deserves to be a capital crime and also recommended death sentence to be imposed on the police officials who commits police brutality in the form of encounter killing. India is one of the 57th Retentionist countries of death penalty and it was carried out execution since India’s independence.

2.3. Various Cases of Death Penalty in India:-

Nirbaya Case popularly known as Delhi gang rape case but Capital Punishment is a legal penalty in India. The authorities alleged that the four adult convicts were “intentionally delaying” and “frustrating” the legal process in the case by filing their pleas in stages, so that their execution could be postponed. On 17 January 2020, after the convicts exhausted their mercy pleas, a Delhi court issued a second death warrant for the convicts to be hanged on 1 February 2020 at 6:00 am. The four adult convicts were hanged on 20 march 2020 at 5:30 am

⁴⁸AIR 1983, 957,983 SCR(3413),SCC(3470)1983 Scale(2) 1

IST at Tihar Jail, and were declared dead after thirty minutes.

*In Kuljeet Singh Alias Ranga v. Union of India*⁴⁹ the Supreme Court dismissed the writ petition for reconsideration of the sentence of death imposed upon the accused. Kuljeet Singh alias Ranga and Jasbir Singh alias Billa, were convicted of the abduction and murder of two children Geeta Chopra and Sanjay Chopra in Delhi. The trial Court imposed the death sentence upon the two accused that was confirmed by the Delhi High Court. Their Special Leave Petition were also dismissed by the Supreme Court. The present writ petition was also dismissed with the observation that “the murder of Chopra children was caused after a savage planning which bears professional stamp. So deep-laid was strategy to which they adhered to the last without contrition of any kind. Their inhumanity defies all belief and description.”

*Dhananjay Chatterjee V. State of West Bengal*⁵⁰ In this case Dhananjay was convicted for committing rape and murdering a 14 year old girl name Hetal Parek at her apartment residence in Bhowanipur on 5th of March 1990. The Supreme Court-convicted Dhananjay for raping and murdering Hetal Parek who was only 14 years of old. And sentence him to death as he was to give security to the dwellers of the apartment as he was the guard of the apartment. His act was contravened to his duty.

*Rajiv Alias Ram Chandra V. State of Rajasthan*⁵¹ In this case the Supreme Court observe the brutality and atrocity of the manner of commission of the crime. The accused, in a cool and calculated manner, killed five persons including his wife and three minor sons, though the motive could not be established. The Supreme Court confirmed the imposition of capital punishment upon the accused by applying in the theory of retribution and deterrence and held that “the punishment to be awarded for a crime must not be relevant but it should confirm to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and should “respond to the society’s cry for justice’ against the criminal.

*In Deena V. State of Uttar Pradesh*⁵² In this case Deena was convicted for murdering a witness in a firing incident while they were sleep. The motive was to teach a lesson to the deceased for appearing as a witness against him. The High Court confirmed the extreme penalty of law imposed by the Session Court. The Supreme Court, in imposing the death sentence, held that: “the appellant is a desperate character and that while he was on bail in Ram Chandra

⁴⁹ AIR 1981 SC 1572,1981(3)SCC324

⁵⁰1994 SCR (1)37,1994 SCC(2)220

⁵¹1996 AIR 787

⁵² 1978 AIR 1605

murder of Nainsukh, one of the prosecution witness in Ram Chandra murder case. The offence was committed after deliberate planning in the night when the victim was sleeping. It was for the purpose of teaching a lesson to a witness who gave evidence against the accused. We do not see any extenuating circumstance. We confirm the sentence of death and dismiss this appeal.

*In Sushil Murmu V. State of Jharkhand*⁵³ A young child of 9 years was sacrificed before Goddess Kali by the appellant for this own prosperity. The death sentence is ordinarily ruled out and can only be imposed for “special reason,” which is the duty of the court of State. The Judge has to balance the personality of the offender with the circumstances, situations and reaction, and choose the appropriate sentence to be imposed. The normal penalty is imprisonment for life and it can be awarded in the offence/sentence. The matter of imposing sentence is left to the discretion of the court but the court must take into account all the circumstances, and state its reasons for whichever of the two sentences it imposed in its discretion. Therefore the former rule that the normal punishment for murder is death is no longer operative and it is now within the discretion of the court to pass either of the two sentences prescribed. A balance sheet of aggravating and mitigating circumstances has to be drawn up and is so doing: the mitigating circumstances have to be accorded full account, and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. The appellant was found not to be possessed of basic humanness and completely lacking in the psyche or mind set which can be amenable for any reformation. The tendency in the accused cannot be placed on a par with even an intention to kill some but rather borders on a crime against humanity, of the greatest depravity, shocking the conscience of the courts of Law, as well as that of the public. Superstition cannot and does not provide justification for any killing, much less a planned and deliberate one, and no amount of superstition belief can be allowed to wash away the sin and offence of an unprovoked killing, more so in the case of an innocent and defenceless child. This case was to be treated as the “rarest of rare cases” in which it was held that the death sentence is and should be the rule with no exception whatsoever.

*Kamta Tiwari V. State Of Madhya Pradesh*⁵⁴ the deceased was an innocent helpless girl of 7 years of age, was kidnapped by the appellant, to whom she called her uncle. She was raped, strangulated to death and the body was thrown into a well, holding the facts circumstances of the case, rarest of rare Supreme Court held that death sentence is essentially desirable not only

⁵³ AIR2004 SC 394, JT 2003(10)SC 340

⁵⁴ AIR 1996(6)SCC 250

to deter others from committing such crime but also to give emphatic expression to society; abhorrence of such crime.

*Yakub Abdul Razak Memon V. State Of Maharashtra*⁵⁵Yakub Memon was convicted over his involvement in the 1993 Bombay bombing by special terrorist and disruptive activities court on 27 July 2007. He was the brother of one prime suspects in the bombing, tiger Memon. Supreme Court of India confirmed Memon convictions of death sentence for conspiracy through financing the attacks. The Judges called him the master and driving force behind the bombing. His review petition was rejected by the Supreme Court of India. His mercy petition was also rejected by the President of India.

*Md. Ajmal Md. Amir Kasab @ Abu...V. State Of Maharashtra*⁵⁶On 3rd of May 2010, Mumbai special court convicted Ajmal Kasab of murder, waging war on India, possession of explosive and other changes. Kasab was sentenced to death for attacking Mumbai and killing 166 people on 26 November, 2008 along with nine other Pakistan terrorist. He was found guilty of 80 offences, including waging war against India which is punishable with Death. The Bombay High Court upheld Kasab's death sentence on 21st Feb 2011 and Supreme Court also upheld the death sentence on 29th August 2012. His mercy petition was rejected by president on 5 Nov. 2012.

*In Joseph Peter V. State of Goa Daman and Diu*⁵⁷The Supreme Court refused to commute the death sentence upon the accused Justice Krishna Iyer, held that 'we have to be guided by the rulings of this Court which have not gone to the extent of holding that passed on this circumstances alone without other supplementing factors or in the face of surrounding beastly circumstance of crime, judicial clemency can attenuate the sentence. On deliberating the award of a death sentence: "with all its dreadful scenario of swinging desperately out of the last breach of moral life is an excruciating hour for the judges called upon to lend signature to this acerb stroke of the executioner's rope. Even so judge just enforce the law, whatever they be, and the lights are not always luminous. Nor, again are judicial methods always adequate to secure justice. We are bound by the Penal Code and the Criminal Procedure Code, by the oath of our office."

*In Rau Chima Chougule V. State of Maharashtra*⁵⁸Rau Chima Chougule was convicted for murdering his daughter and his son-in-law. The session Judge sentenced him to death. His

⁵⁵ Cr APPL NO. 1728 of 2007,Cr.APPL NO.609 of 200

⁵⁶ SR APPL NO.1961 of 2011(9) SCC

⁵⁷ AIR 1977(3) SCC 280

⁵⁸ AIR 1996,787

conviction was upheld and sentence of death was confirmed by the High Court. Upholding of the Court below, the Supreme Court held that “murders were therefore not only preplanned and cold blooded, but were acts of treachery of the “worst kind” as stated by the High Court. The appellant was not an immature person as he was 60 years old at the time of the commission of the murders, and we are unable to think that the High Court erred in taking the view that there were special which it has recorded, for imposing the extreme penalty of death.”

*Dayanidhi Bisoi V. State Of Orissa*⁵⁹the accuse murder a women and a minor daughter without any provocation in order to get their jewellery. The High Court confirmed the death sentence awarded by trial court. The Supreme Court held that “as the murder were committed in deliberate and diabolic manner, the cold blooded and premeditated approach of the accused to put to death innocent life including a child of three years just to gain monetary benefit, the extenuating circumstances put forth by the accused in regard to his age, surviving relative and possibility of rehabilitation would not justify the court to impose a sentence of life imprisonment. It falls under rarest of rare case.

*In Krishna Mochi V. State of Bihar*⁶⁰ In this case the death sentence was imposed upon four persons accused of a group massacre relating to caste conflict. The accused approached the Supreme Court. While the senior most judge-in his minority view-acquitted one of the accused and commuted the sentence upon all the accused. The court deliberated at length as to what are the circumstances, which brings a particular case within the category of “rarest of rare case” confirmed death sentence.

*Md.Afzal and Others V. State*⁶¹Afzal Guru was convicted of conspiracy in connection with 2007 India parliament attack and was sentence to death. The Supreme Court upheld the death sentence and rule that the attack “shocked the conscience of the society at large.” He was hanged at Tihar Central Jail Delhi on 9th Feb.2013.After his mercy petition was rejected by the Parliament of India.

*State Of Maharastra V. Sukhdev Singh*⁶²this is a case of the assassination of former Army Chief of India, General A.S.Vaidya. The accused were charged under the TADA Act. They confessed their involvement in the killing. “The Supreme Court upheld the decision of the trial court and confirmed the death sentence upon the two accused.

*Surja Ram V. State Of Rajasthan*⁶³Supreme Court upheld the death sentence against the

⁵⁹JT 2003(5)SCC 24

⁶⁰AIR 1981SC 1572,1981(3)SCC24

⁶¹2003VIIAD Delhi(1) 107 (2003) DLT 385

⁶²1992(3) SCC 700

⁶³AIR 1997 18

accused for murdering four persons including two children. The accused was held of killing his own brothers, two minor sons, his aunt also attempting to kill his brother's wife and daughter with the intention of wiping out his brother's the entire family in a land dispute.

*In Jai Kumar V. State Of Madhya Pradesh*⁶⁴The Supreme Court confirmed the sentence of death awarded by trial court and confirmed by the High Court to the accused who was found guilty of murder of lady and small child, is in conformity with the brutality and the cruelty shown by accused in committing the murders. It upheld the death sentence upon the accused.

*Suresh Chand Bahri V. State of Bihar*⁶⁵Conspiracy hatched by husband with two association to kill his wife and two children simply to gain control over property, murder of wife committed in an extremely brutal, gruesome, diabolical, revolting and dastardly manner as victims body truncated into two parts in a most devilish style. Supreme Court justify the High Court is confirming death sentence and confirmed the death sentence.

Panchi V. State Of U.P Accused person armed with sharp edge weapons entering house of deceased person and butchering four persons to death including a five year old child and an old lady mercilessly. Section held-appellant deserve nothing less than death sentence.

Shankar @Gauri Shankar and Ors. V. State Of Tamil Nadu This case is popularly known as Auto Shankar is the nick name of Indian Serial Killer, Gauri Shankar and his gang were found guilty for 6 murders committed over a period of two years in 1988-89. They were tried for murders of Lalita, Sudalai, Sampath, Mohan, Govindaraj and Ravi. The bodies of the victims were either burnt or buried inside residential houses. The court-convicted Shankar along with his two associates for committing 6 murders and sentence them to death.

*Chabil Prasad Agarwal (Appellant) V. Sunil Chandra Biswas*⁶⁶ The accused had been attempting to extract money from the unfortunate boy's father even after the boy had been murdered by making the father to believe that the boy was alive and would be returned to him if he paid the money, which extreme penalty of death is called for. The Supreme Court confirmed the death sentence.

*Kehar Singh & Ors V. State (Delhi Admn)*⁶⁷ (Indira Gandhi murder case) - The accused killed, the then Prime Minister, Mrs. Indira Gandhi while standing on guard duty by firing from carbine, releasing about 25 bullets, Convicting the accused the court said that it was the most foul and senseless assassination as persons duty bound to protect the life of the Prime Minister

⁶⁴1985(3) SCC 291

⁶⁵AIR 1995 SCC 2420

⁶⁶1991 AIR 345,1991(1)SCC 752

⁶⁷1988 AIR 1883,198 SCR suppl(2) 24

have themselves become the assassins. It was one of the rarest of rare cases where extreme penalty of death was called for.

*Nathuram Godse V. Crown*⁶⁸In this case father of nation Mohandas Karamchand Gandhi was assassinated by Nathuram Godse in a prayer meeting in the evening at Birla Mandir in Delhi. The Court convicted Nathuram Godse and Narayan Apte and sentenced them to death. This case was the first case in which the death sentence was awarded by the Court after India got her Independence.

2.4. Offences Punishment By Death Was Penalty Under Indian Penal Code.

In Colonial rule in India by the British government death was prescribed as one of the punishments in the Indian Penal Code 1860 (IPC) which listed a number of capital crimes and the same penal code was retained by India Government after independence.

Sl.No.	Sections Under Indian Penal Code	Nature Of Crime
1.	120 B IPC	Being a party of a criminal conspiracy commit a capital offence.
2.	121 of IPC	Waging or attempting of wage war or abetting waging of war, against the Government of India.
3.	132 of IPC	Abetting a mutiny in the armed forces.
4.	194 of IPC	Giving or fabricating false evidence with intent to procure a conviction of a capital offence.
5.	302,303 of IPC	Murder
6.	305 of IPC	Abetting the suicide of a minor, insane person etc.
7.	364A of IPC	Kidnapping for ransom
8.	396A of IPC	Dacoity with murder
9.	376A of IPC and Criminal Law(Amendment Act 2013)	Rape if the perpetrator inflicts injuries that result in the victim's death or incapacitation in a persistent vegetative state or is a repeater offender.
10.	376AB of IPC; 42 of Protection of Children from	Rape and gang rape of a girl under 12 years of age.

⁶⁸AIR 1949 East Punjab 321 Cr.APPL NO.66

	Sexual Offences Act, 2012(POCSO) and Criminal Law (Amendment) Act, 2013	
11.	Part II Section 4 of The Commission of Sati (Prevention) Act, 1987	Aiding or abetting an act of a minor
12.	Bombay Prohibition (Gujarat Amendment) Act,2009	In Gujarat only- Manufacture and sale of poisoned alcohol which results in death.

2.5. Offence under Criminal Procedure Code, 1973

The new Criminal Procedure Code, 1973 provides a new provision in Section 235(2) ⁶⁹at the stage of sentencing. The object of this provision is to give a fresh opportunity to the convicted person to bring to the notice of the court in awarding appropriate sentence having regard to the personal, social and other circumstances of the case. The accused may have some grounds to urge for giving him consideration in regard to the sentence such as that he is bread winner of the family of which the court may not be made aware of during the trial.” ⁷⁰The social compulsion, the pressure of poverty, the retributive instinct to seek an extra legal remedy to a sense of being wronged, the lack of means to be educated in the difficult art of an honest living, the parentage, the heredity - all these and similar other considerations can, hopefully and legitimately, tilt the scales on the propriety of sentence. The mandate of Section 235(2) must therefore be obeyed in its letter and spirit.”⁷¹

Under the Code of Criminal Procedure, 1898, whatever the accused wished to submit in regard to the sentence had to be stated by him before the arguments concluded and the judgment was delivered. There was no separate stage for being heard in regard to sentence. The accused had to produce material and make his submission in regard to sentence on the assumption that he was ultimately going to be convicted. This provision was most unsatisfactory. The Legislature therefore, decided that it is only when the accused is convicted that the question of sentence should come up for consideration and at that stage, an opportunity should be given to the accused to be heard in regard to the sentence.⁷² The requirement of hearing the accused is intended to satisfy the rules of natural justice. The Judge must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence. This

⁶⁹ Ram Nath Iyer, P; Code of Criminal Procedure,1865 (1994)

⁷⁰ Subhash C. Gupta, Capital Punishment in India, Deep and Deep Publication, p- 119 (1986)

⁷¹ Dagdu v. State of Maharastra, AIR 1977 SC 1579

⁷² Santa Singh v. State of Punjab AIR 1976 S.C 2386

is indeed one of the reasons in Mithu's case⁷³ for the Supreme Court to strike down Section 303 of Indian Penal Code as unconstitutional. "Is a law which provides for the sentence of death for the offence of murder, without affording to the accused an opportunity to show because why that sentence should not be imposed, just and fair?" Section 235(2) becomes a meaningless ritual in cases arising under Section 303 of Indian Penal Code.

Prior to 1955, Section 367(5) of the Code of Criminal Procedure, 1898 insisted upon the court stating its reasons if the sentence of death was not imposed in a case of murder. The result was that it was thought that in the absence of extenuating circumstances, which were to be stated by the court, the ordinary penalty for murder was death. In 1955, sub-section (5) of Section 367 was deleted and the deletion was interpreted, at any rate by some Courts, to mean that the sentence of life imprisonment was the normal sentence for murder and sentence of death could be imposed only if there were aggravating circumstances. In the Code of Criminal Procedure of 1973, there is a further swing towards life imprisonment. The discretion to impose the sentence of death or life imprisonment is not as wide now as it was before 1973 Code. Section 354 (3) of the new Criminal Procedure Code has narrowed down the discretion. Now death sentence is ordinarily ruled out and can only be imposed for special reasons.⁷⁴

The ultimate shift in legislative emphasis is that, under the New Criminal Procedure Code, 1973, life imprisonment for murder is the rule and Capital Punishment the exception - to be resorted to for reasons to be stated as per Section 354(3) of Criminal Procedure Code. "Now only special reasons, that is to say, special facts and circumstances in a given case, will warrant the passing of death sentence."⁷⁵ But, it is unnecessary, nor is it possible to make a catalogue of special reasons which may justify the passing of death sentence in a case.

In keeping with the current penological thought imprisonment for life is a rule and death sentence is an exception....if a death sentence is to be awarded, the court has to justify it by giving special reasons. Thus Judges are left with the task of discovering "special reasons", observed Krishna Iyer. He further held that "special reasons" necessary for imposing death penalty must relate not to the crime as such but to the criminal. However, in Rajendra Prasad's case, Kailasam J. did not accept this view of Krishna Iyer J.⁷⁶ and observed that such a principle was not warranted by the law as it stands today. "Extreme penalty could be invoked in extreme situations", he opined. In Rajendra Prasad's⁷⁷ case the majority further held "Such

⁷³ 1983 AIR SC 473 at 478.

⁷⁴ Subhash C. Gupta, Capital Punishment in India. Deep and Deep Publication, p- 120 (1986)

⁷⁵ Balwant Singh v. State AIR 1976 SC 2169.

⁷⁶ Bishnu Deo v. State of West Bengal AIR 1979 SC 964

⁷⁷ AIR 1979SC, 916

extraordinary grounds alone constitutionally qualify as special reasons as to leave no option to the Court but to execute the offender if State and society are to survive. One stroke of murder hardly qualifies for this drastic requirement, however gruesome the killing or pathetic the situation be, unless the inherent testimony oozing from that act is irresistible that the murderous appetite of the convict is too chronic and deadly that ordered life in a given locality or society or in prison itself would be gone if this man were now or later to be at large. If he is an irredeemable murderer, like a blood-thirsty tiger, he has to quit this terrestrial tenancy. This concept of special reasons are further explained by the Apex Court through Bhagwati, J. in the case of Bachan Singh. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. It is only when the culpability assumes the proportion of extreme depravity that special reasons” can legitimately be said to exist. The “special reasons “mentioned in Section 354(3) of Criminal Procedure Code should be taken as equivalent and synonymous to “compelling reasons”.

Murder is terrific (bhayankaram) is not a reason to impose death penalty. All murders are terrific and if the fact of murder being terrific is an adequate reason for imposing death sentence, then every murder shall have to be visited with that sentence and death sentence will become the rule, not an exception and Section 354(3) Criminal Procedure Code will become a dead letter.⁷⁸

Section 354(5) of Criminal Procedure Code deals with the execution of death penalty. It provides that “when any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead. “Even if it is not mentioned so also, there is no difficulty. Because, anyway the High Court has to confirm the death sentence imposed by the Sessions Court. The form of the warrant that is issued when the sentence is confirmed by the High Court direct the convict to be hanged by the neck till he is dead and where the sentence is imposed by the High Court either in appeal under Section 378 Criminal Procedure Code or in exercise of the power of revision, the formal order that flows from the High Court contains a similar direction. The state must establish that the procedure prescribed by Section 354 (5), Criminal Procedure Code for executing the death sentence is just, fair and reasonable and that the said procedure is not harsh, cruel or degrading. The method prescribed by Section 354(5) Criminal Procedure Code for executing the death sentence does not violate the provisions of Article 21 of Indian Constitution.⁷⁹ The system is consistent with the obligation of the State, to ensure

⁷⁸ Muniappan v. State of Tamil Nadu, AIR 1981 SC 1220

⁷⁹ Attorney General of India v. Lichhma Devi AIR 1986 SC 467

that the process of execution is conducted with decency and decorum without involving degradation or brutality of any kind. The direction for execution of death sentence by public hanging is unconstitutional and if any Jail Manual were to provide public hanging the Supreme Court would declare it to be violative of Article 21 of the Constitution. Section 366 of Code Criminal Procedure insists upon the confirmation of death penalty by the High Court. The first provision of this particular section states, “When the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and sentence shall not be executed unless it is confirmed by the High Court. “ The second provision insists that the Court passing the sentence shall commit the convicted person to jail custody under a warrant. The first provision of the said section corresponds to Section 374 of the Old Code, without any change and Sub section (2) has been newly added. It is the practice of the High Court to be satisfied on the facts as well as the law of the case, that the conviction is right, before it proceeds to confirm the sentence.⁸⁰

The High Court has to come to its own individual conclusions as to the guilt or innocence of the accused, independent of the opinion of the Sessions Judge. The High Court is duty bound to independently consider the matter carefully and examine all relevant and material evidence.⁸¹ The High Court is under an obligation to consider what sentence should be imposed and not to be content with trial court’s decision on the point.⁸² When an accused is convicted and sentenced to death, he is only a convict prisoner and not to be treated as condemned prisoner. The death sentence is not executable without confirmation of the High Court. Such a prisoner will be governed by Chapter XVH of the Jail Manual and will be given facilities under that chapter.... atleast till he is declared as condemned prisoner in the eye of law.⁸³ Neither is he serving rigorous imprisonment nor simple imprisonment. He is in jail so that he is kept safe and protected with the purpose that he may be available for the execution of death sentence. Section 367 of Criminal Procedure Code deals with the power of High Court to direct further enquiry to be made or additional evidence to be taken. Sub-section (i) of this section provides “If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.” Where an application by an accused person to call

⁸⁰ Masti v. State AIR 1965 SC 202.

⁸¹ Ifikhar Khan v. State, AIR 1973 SC 863.

⁸² Neti Sri Ramulu v. State of Andhra Pradesh, AIR 1973SC 255

⁸³ Kehar Singh v. State 1987 cri l.J 291 (Del)

material evidence bearing on his line of defence was refused by the lower court but was renewed in the High Court, it was held that the accused should be permitted under this section to produce further evidence. As pointed out by the Supreme Court, when the reference is made for the confirmation of the death sentence, the High Court is to see not only the correctness of order passed by the Sessions Judge but must examine the entire evidence by itself.⁸⁴

The High Court may even direct a further inquiry or the taking of additional evidence for determining the guilt or innocence of the accused and then come to its own conclusion on the entire material on record whether the death sentence should be confirmed or not. Section 368 of Criminal Procedure Code empowers the High Court to confirm sentence or annul conviction. It envisages “In any case submitted under Section 366, the High Court (a) may confirm the sentence, or pass any other sentence warranted by law, or (b) annul the conviction, and convict the accused of any offence of which the court of session might have convicted him, or order a new trial on the same or on amended charge, or (c) may acquit the accused person; Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.” Section 369 of the Code prescribes that either confirmation of the sentence or new sentence is to be signed by two judges of High Court. It runs thus: “In every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall when such Court consists of two or more Judges, be made, passed and signed by at least two of them. ‘Where the Court consists of two or more Judges and the order of confirmation of sentence of death is made, passed and signed by one of them, the sentence of death is not validly confirmed but remains submitted to the court which has so dispose of the same under Sections 367(3).

The Code mandates that when the High Court concerned consists of two or more Judges, the confirmation of the death sentence or other sentences shall be signed by at least two of them and this applied only where the court, at the time of confirmation of the death sentence, consists of two or more Judges. But, when a single judicial commissioner alone is functioning, Section 369 of the Code is not attracted and the confirmation of the death sentence may be signed by him alone and there will be no illegality. Section 370 of the Code deals with the procedure in cases of difference of opinion. “Where any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case shall be decided in the manner provided by Section 392 of the same Code.”

When a sentence of death is referred to the High Court for confirmation and the Judges differ, the matter should be referred to a third Judge, under section 370, who should not decide it according to the opinion of the Judge for acquittal or conviction, but shall deliver his opinion.

⁸⁴Subhash v. State of Uttar Pradesh, 1976 Cri.L.J152 SC.

The third Judge's duty is to examine the whole evidence and come to a final judgment. No fetters can be placed on the third Judge. He is at liberty to express and act upon the opinion which he himself arrives at. If the third Judge chooses he can pass a sentence of death, even though one Judge favours an acquittal and the other gives a lesser sentence when convicting the accused. But, the golden rule to be followed by the third Judge is to give the benefit of doubt to the accused. The observation of such a rule does not amount to abdication of his functions as a Judge under Sections 370 and 392 of the Code.⁸⁵ However, when there is difference of opinion in the High Court not only on the question of guilt but also on that of sentence, the sentence should be reduced to imprisonment for life.⁸⁶ In the same case as a precautionary method the Supreme Court further maintained that when appellate Judges who agree on the question of guilt differ on that of sentence, it is usual not to impose death penalty unless there are compelling reasons.

Section 371 of the Code deals with the procedure in cases submitted to High Court for confirmation. It provides "In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the Order, under the seal of High Court and attested with his official signature, to the Court of Session." Section 385 of Criminal Procedure Code dealing with the procedure for hearing appeal ordinarily not to dismiss such appeals summarily. (1) If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given

- (i) To the appellant or his pleader:
 - (ii) To such officer as the State Government may appoint on his behalf:
 - (iii) If the appeal is from a judgment of conviction in a case instituted upon complaint, to the complainant:
 - (iv) If the appeal is under section 377 or section 378, to the accused, and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal.
- (2) The Appellate Court shall then send for the record of the case, if such record is not already available in that Court, and near the parties:

Provided that if the appeal is only as to the extent or the legality of the sentence, the court may dispose of the appeal without sending for the record.

⁸⁵ In re Narasiah, AIR1959 A.P. 313 at 317-318

⁸⁶ Pandurang v. State of Hyderabad, AIR 1955 SC 216 at 223

(3) Where the only ground for appeal from a conviction is the alleged severity of the sentence, the appellant shall not, except with the leave of the Court, urge or be heard in support of any other ground.”

This section corresponds to section 422 of the Old Code with some changes and additions. This section embodies the principles of natural justice by providing that the appellate court shall cause notice of the time and place at which such appeal shall be heard to be given to the appellant or his pleader and this is mandatory. Section 389 deals with the suspension of sentence pending the appeal and release of appellant on bail. It runs thus:” (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if is in-confinement, that he be released on bail, or on his own bond.’ This section corresponds to the provisions of Section 426 of the Old Code. Section 413 deals with the execution of order passed under Section 388: It reads “When in a case submitted to the High Court for the confirmation of a sentence of death, if the Court of Session receives the order of confirmation or other order of the High Court thereon, it shall cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary. This section corresponds to section 381 of the Old Code without any change in the substance. No fixed period of delay can be held to make the sentence of death in executable.

A warrant does not mean only one warrant, even when interpreted in isolation and out of context. A warrant once issued can go unexecuted and is liable to be rendered ineffective in a number of situations. But, by no logic can it be said that since warrant has become infructuous and that death sentence should automatically stand vacated. No provision of the Code bars return of the first warrant without the execution having been carried out. Nor does it do so in case of issuance of a second warrant. Section 414 of Criminal Procedure Code deals with the execution of sentence of death passed by High Court. When a sentence of death is passed by the High Court in appeal or in revision, the Court of Session shall, on receiving the order of the High Court, cause the sentence to be carried into effect by issuing a warrant. Section 415 Code of Criminal Procedure deals with the postponement of execution of sentence of death in case of appeal to Supreme Court.”(1) Where a person is sentenced to death by the High Court and an appeal from its judgment lies to Supreme Court under sub-clause (a) or sub-clause (b) of clause (1) of Article 134 of the Constitution, the High Court shall order the execution of the sentence to be postponed until the period allowed for preferring such appeal has expired, or if an appeal is preferred within that period, until such appeal is disposed of.” The sub-clause (2) of the same section provides “Where a sentence of death is passed or confirmed by the High

Court, and the person sentenced makes an application to the High Court for the grant of certificate under Article 132, or under sub-clause (c) of clause (1) of Article 134 of the Constitution, the High Court shall order the execution of the sentence to be postponed until such application is disposed of by the High Court, or if a certificate is granted on such application, until the period allowed for preferring an appeal to the Supreme Court.” The sub-clause (3) of the section provides “Where a sentence of death is passed or confirmed by the High Court, and the High Court is satisfied that the person sentenced intends to present a petition to the Supreme Court for the grant of special leave to appeal under Article 136 of the Constitution, the High Court shall order the execution of the sentence to be postponed for such period as it considers sufficient to enable him to present such petition.”

Section 416 of Code of Criminal Procedure is an important provision because it deals with the postponement of Capital Punishment on pregnant woman. It envisages: “If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and May if it thinks fit commute the sentence to imprisonment for life.” This provision does not specify the time for which the execution has to be postponed. There is no clue, whatsoever, in the provision whether such postponement is for good or till the woman delivers. Moreover, the High Court is the only forum in which the law vests the power of postponing the execution of a sentence of death passed and confirmed on a woman proved to be pregnant. The Sessions Judge, may, of course, direct the postponement of the execution of the sentence, until appropriate orders to that effect are passed by the High Court. The High Court, under such circumstances, is empowered even to commute the sentence to one of life imprisonment, if it thinks fit and this is one instance making a departure from the mandate of Section 362 of the Code of Criminal Procedure, 1973 that no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.

The provision of Section 416 of the Code of Criminal Procedure, is an instance of “Reprieve” or “Respite”. It is stated that when a woman is convicted and sentenced to death, clerk of the Crown, after - sentence, is to ask whether the woman has anything to say in the stay of the execution of the sentence. If she then claims or the Court, then or later on, has reason to suppose that she is pregnant, a jury of twelve matrons are empanelled and sworn to try whether or not she is quick with child. If the Jury requires the assistance, of a medical man, a medical man is requested by the Court to retire and examine the prisoner and is then examined as a witness. If the Jury finds that the prisoner is quick with child, the Court stays the execution of the Capital sentence until the prisoner delivers a child or it is no longer possible that she

should deliver a child. It is however, for the prisoner to plead pregnancy, because the right to a Jury of matrons accrues to her only when she pleads but not otherwise. In India, too, it is implied, under the provisions of Section 416 of Criminal Procedure Code, that the convict herself, or her counsel should reveal the state of her pregnancy, though, for the postponement of execution, it is not at all necessarily that she should be quick with child. What is necessary is that she must be pregnant, and the time factor as to the duration of the pregnancy at the time of conviction is immaterial.

In France, United Kingdom (position prior to abolition) USSR, Czechoslovakia, Yugoslavia, Australia, Netherlands, New Guinea, Laos, China, Cambodia, and The Central African Republic of Morocco, pregnant women are exempted from being executed. The law provides only for the postponement of the execution for a period which varies depending upon the fact whether the women sentenced to death breast-feed the child or not.⁸⁷ The aspect of breast-feeding is not considered in India. It is quite interesting to note whether by depriving a child from being fed by mother is violative of his fundamental right or not. However, in actual practice, the postponement of the execution in such circumstances generally leads to subsequent commutation of the death sentence.

432 of the Code deals with suspension, remission and commutation of sentences runs in the following terms: "Power to suspend or remit sentences:

(1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever the application is made to the appropriate Government for the suspension or remission of a sentence the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been

⁸⁷ Bhattacharya, S.K. "Issues in Abolition of Capital Punishment". Employment News Weekly-1, 21-27, December, 1994

suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with: Provided that in the case of any sentence (other than a sentence of fine) passed on a male person. Section above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and

(a) Where such a petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) Where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provision of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in Section 433, the expression “appropriate Government” means,

(a) In cases where the sentence is for an offence against or the order referred to in sub-section.

(6) Is passed under any law relating to a matter to which the executive power of the Union extends, the Central Government:

(b) In other cases, the Government of the State within which the offender is sentenced or the said order is passed.”

Section 432 incorporates the provisions of section 401 and 402(3) of the Old code. There is no change in substance of the old law. This section does not give any power to the Government to reverse the judgment of the Court, but provides the power of remitting the sentence. The minimum sentence awardable under section 302 of Indian Penal Code, being life imprisonment no reduction is” possible. This power is executive in nature. While Article 161 of the Constitution speaks of grant of reprieves, pardons and remissions etc., it does not speak of imposition of conditions for the grant, whereas section 432 of Criminal Procedure Code speaks of remission or suspension with any condition. Section 432(3) specifically provides for consequences of the conditions which are contemplated by Section 432(1) of Criminal Procedure Code not being fulfilled. Section 432 (3) contemplates remanding the person so

subjected to remission to jail once again. Section 432 of Criminal Procedure Code is not manifestation of Articles 72 and 161 of the Constitution but a separate, though similar provision. In cases of murder, the Judge may report any extenuating circumstances calling for a mitigation of punishment to the Government and the Government may there upon take such action under this section as it thinks fit.

The word remit as used in Section 432 is not a term of art. Some of the meanings of the word “remit” are to pardon, to refrain from inflicting, and to give up. There is therefore, no obstacle in the way of the Governor in remitting a sentence of death.⁸⁸ When the concerned Court feels sympathetic towards the accused, owing to some reasons such as the wife of the accused is a cancer patient with six children.⁸⁹ Or the accused is a boy of tender years⁹⁰ or accused is a young lady who committed murder under the influence of others but legally constrained to show mercy, then it recommends such cases to the Government, because the power of granting mercy is vest with the executive but not with the judiciary.

An order passed under Section 432 Cr.P.C. is justiciable on any of the following grounds:

- (1) That the authority exercising the power had no jurisdiction.
- (2) That the impugned Order goes beyond the extent of power conferred by law.
- (3) That the order has been obtained on the ground of fraud or that it has been passed taking into account the extraneous considerations not germane to the exercise of the power or in other words, is a result of malafide exercise of power.⁹¹ The brother of the murdered person is considered to one of the most aggrieved parties and has the Locus standi to challenge the order of remission of punishment. While the State Government is not legally obliged to give reasons for remitting sentence, it is duty bound to reply to allegations made in petition challenging the remission. The State Government is not bound to produce the records under writ of certiorari. The initial onus is on the petitioner to give prima facie evidence to show that the power has been exercised malafide. Reference under sub-section (2) of section 432 Criminal Procedure Code is not mandatory and therefore non-compliance of the said provision does not make the impugned order without jurisdiction.⁹² Even though the Sentence Revising Board is not required to give detailed reasons, nevertheless the administrative orders are subject to judicial review. Section 433 of Criminal Procedure Code deals with the power of commuting the sentence. The appropriate Government may, without the consent of the person sentenced,

⁸⁸ The Deputy Inspector General of Police, North Ranges, Waltair and another v. Raja Ram

⁸⁹ Sadhu Singh v. State of Punjab, 1968 Cri L.J. 1183 (P&H)

⁹⁰ Nawab v. Emperor, AIR 1932 Lah.308

⁹¹ Ram Nath Iyer, Code Criminal Procedure 3233 (1994)

⁹² Hukam Singh v. State of Punjab, 1975 Cri L.J. 902 (P&H)

commute (a) sentence of death, for any other punishment provided by the Indian Penal Code, (b) Section 433 corresponds to the provisions of Section 402(1) of the Old Code.

A combined reading of the provisions of the Articles 72, 73, 161, 162 and 246 of the Constitution of India and those of Section 433(a) Criminal Procedure Code indicates that the State Government continues to enjoy the power of commuting a sentence of death; since the expression “State Government” means the Governor under the General Clauses Act and under Section 433 Cr.P.C, the Governor can commute sentence of death under Section 433 Cr.P.C.⁹³ Albeit the Court initially felt that reasons need not be given in the case of reduction of sentence of death under prerogative of mercy of State. Later observations of the Supreme Court insist that if there are any mitigating circumstances, not brought on record for reducing the sentence of death to imprisonment for life, the proper course is to bring them to the notice of the appropriate Government. It is true that in proper cases an inordinate delay in the execution of the death sentence may be regarded as a ground for commuting it. But, this is no rule of law and is a matter primarily for consideration of the State Government.⁹⁴ Accordingly no rule can be laid down that delay exceeding two years in the execution of death sentence can be used to demand its conversion into life imprisonment.⁹⁵ Section 434 of Criminal Procedure Code envisages that the power conferred by Sections 432 and 433 upon the State Government may, in the case of sentence of death, also be exercised by the Central Government This section corresponds to Section 402 (2) of Old Code. However, this section is applicable only to a sentence of death and to no other sentence. The Supreme Court retains and must retain an inherent power and jurisdiction for dealing with any extraordinary situation in the larger interests of administration of justice and for preventing manifest injustice being done.

2.6. Various Statutes in India in which Death Penalty can be Awarded.

In addition to the Indian penal code, there are various legislation enacted by the parliament of India which provides for awarding death penalty.

2.6.1. The Commission of Sati (Prevention) Act 1987⁹⁶

According to Part II section 4(1) if any person commits sati, whoever abets the commission of such sati either directly or indirectly shall be punishable with death. Sati is the burning or burying alive of any widow or women along with the body of her deceased husband or any other relative or with any article, object or thing associated with the husband on such

⁹³ Parkasho v. State of Uttar Pradesh, AIR 1962, AII.151

⁹⁴ AIR 1964 SC, 276

⁹⁵ Sher Singh v. State of Punjab, AIR 1983 SC. 465

⁹⁶ The Commission of SATI (Prevention) Act 1987

relative.

*Roop Kuvarba Kanwar Case*⁹⁷: Roop Kanwar was a Rajput women who was immolated at Deorala village in Rajasthan, India along with her deceased husband, sing Shekhawat on the funeral pyre. She was regarded as Sati Mother or pure mother. 45 people was being charged with murder all this people was acquitted. But later due to much publicized, 11 people was again arrested including a state politicians were charge with glorification of Sati Special court of Jaipur-on 31st Jan 2004 acquitted all the accused in the cased. Though in above mentioned case the abettor for the commission of Sati was not proved beyond reasonable doubt. All the accuse charge for abetting Sati were acquittal from their respective charges. It sends a strong message to the public that the custom which they are treating as “Holy” is a crime under Sati (Prevention) Act and the abettor for the commission of Sati and causing death according to the abetment then the abettor can be sentence to death. So, to great extent this case provides a strong deterrence that not to abet for commission of Sati. One can forfeit his life is convicted for the commissions of abetting Sati and death is caused according to its abetment. So, presently there are no cases heard for committing Sati. As it is strictly prohibited by Sati (Prevention) Act, which is a special law. So, abetting for commission of Sati is strictly prohibited in India under Sati (Prevention) Act, and the act is punishable with death sentence as provided under the provision of the Act.

2.6.2. Narcotic Drugs and Psychotropic Substances Act, 1985:-

The NDPS Act provides legality of death penalty in India apart from other statutes of India. According to its provision death penalty can be awarded on repeater offender on Drug Trafficking.

(i). Death Penalty for Certain Offences after Previous Conviction:-

Section 31A Death Penalty for certain offences after previous conviction⁹⁸- (1) Notwithstanding anything contained in Sec- 31, any person who has been convicted of the commission of or attempt to commit or abetment of on criminal conspiracy to commit any of the offences punishable under ⁹⁹[Section 19, Section 24, Section 27A and for offences involving commercial quantity of any narcotic drug or psychotropic substance], is subsequently convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence relating to-

⁹⁷ www.en.m.Wikipedia>wiki>Roop Kanwar (Visited on 21 January, 2020).

⁹⁸Narcotic Drugs and Psychotropic Substances Act,1985, Ins by Act 2 of 1989, s.9 (w.e.f. 29-5-1989) p-20

⁹⁹Subs. By Act 9 of 2001, s.13, for “section 15 to 25 (both inclusive) or section 27A” (w.e.f. 2-10-2001) p-20 <http://indiacode.nic.in>bitstream>.(Visited on 21 January, 2020)

(a) Engaging in the production, manufacture, possession transportation, import into India, Export from India or transshipment, of the narcotic drugs or psychotropic substances specified under column (1) of the table below and involving the quantity against each such drugs or substances as specified in column (2) of the sound table:

SL. NO	Particulars of Narcotic Drugs And Psychotropic Substance (Column-1)	Quantity (Column-2)
1.	Opium	10 kg
2.	Morphine	1 kg
3.	Heroin	1 kg
4.	Cadeine	1 kg
5.	Thebeine	1 kg
6.	Cocaine	500 grams
7.	Hashish	20 kg
8.	Any Mixture with or without any neutral material of any of the above drugs	1500grams
9.	LSD, LDS-25(+)-(-)-Deithyllgaxidesdlysergic acid diethymide in	500 grams
10	THC (Tetrahydrocannabinols, the following in omers:6-a(10a), 6-a(7),8,9,(11) and their stero chemical variants	500 grams
11.	Methamphetamine(+)-2-Methylamine- a phenyl propane	1500 grams
12.	Methaqualone(2-Methyl-30-0-toly 4-(3-M)- Quinanzolinone	1500 grams

13.	Amphetamine(+)-2 amino-I-Phenyl propane	1500 grams
14.	Salts and Preparation of the Psychotropic substance mentioned is (9) to (12)	1500 grams

(b). Financing directly or indirectly any of the activities specified in clause (a) shall be punishable with death.¹⁰⁰

According to 2014 Amendment on NDPS Act the words “shall be punishable with death” under section- 31A (b). The words and figure “shall be punished with punishment which shall not be less than the punishment specified in section 31 of with death” shall be substituted. Section- 31A of NDPS Act, is attracted only in cases when a person who has been convicted of either embezzlement of opium by a licenced cultivator (Sec-19) unauthorized trade and external dealing in Narcotic Drugs and Psychotropic Substances (Sec-24) and financing illicit trafficking and harbouring offender Section 27A and for offence involving commercial quantity of Narcotic drugs or psychotropic substances. Supreme Court says that Narcotic crimes are more heinous than Murder. So death sentence can be awarded to a drug trafficker who has been convicted once under NDPS Act for engaging in production, manufacture, possession, transportation, import into India, export from India or transshipment of Narcotic Drugs or Psychotropic substance in addition death penalty is gives only when certain quantities of specified Narcotic Drugs and Psychotropic substance are seized from the offenders.

In February 2012, Chandigarh district court sentence Paramjit Singh caught with 10kg of heroin in 2007 to death , as in 1998 he had nabbed with 1.02 kg of heroin and after the completion of parole he started drug trafficking again. In February 2008, Ahmedabad session court sentence Omkarnath Kak caught with 28 kg of chairs in 2003 to death as in 1998 Kak has been arrested for possession of 40 kg of Charas. In December 2007, Special Court in Mumbai award death sentence to Gulam Malik, caught with 142 kg of hasish in 2004 in earlier Occasion he has been arrested for possession of 1.8 kg of hasish. So, in India for financial the activities which is prohibited under NDPS Act and for the habitual offender on the crime under NDPS Act, the court can award a sentence of death as provided under the provisions of section 31A of NDPS Act, as mentioned above. So, various Act punishable with death are provided under section 31A of the NDSP Act also.

2.6.3. The Prevention of Terrorism Act 2002:-

¹⁰⁰ Subs by Act 16 of 2014, s.15, for “shall be punishable with death” (w.e.f.1-5-2014) p-21 <http://indiacode.nic.in>bitstream>. (Visited on 21 January, 2020).

Prevention of terrorism Act 2002 was passed by the joint session of both the houses of Parliament with an objective to strengthening anti-terrorism operation. The Act replaced the prevention of Terrorism Ordinance (POTO) of 2001 and Terrorist and Disruptive Activities (prevention) Act (TADA). The Act provides a terrorist act punishable with death which provides legality of death penalty under this Act. Section 3(1) of POTA defines Terrorist Act as: - (1) Whoever- (a) with the intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or fire arms or other lethal weapons or poison or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means. Whatsoever, in such manner as to cause or likely to cause of death or injuries to any person or person or loss of a damage or destruction of any property or equipment used or intended to be used for the defence of India or in connections with any other purpose of the government of India, any state government or any of their agencies or detains any person and threaten to kill or injure such person in order to compel the government or any other person to do or abstain from doing any act.

(b) Is or continuous to be member of an association declared unlawful under unlawful activities (Prevention) Act, 1967 or voluntarily does an act aiding or promoting in any manner the objects of such association and is either case is in possession of any unlicensed fire arms, ammunition, explosive, or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property, commits terrorist act. Explanation- for the purposes of this sub-section “a terrorist act” shall include the act of raising funds intended for the purpose of Terrorism.

(2) Whoever commits a terrorist act, shall- (a) if such act has resulted in death of any person, be punishable with death or imprisonment for life and shall also be liable for fine.¹⁰¹ Yakub Abdul Razar Memon V. State of Maharastra was convicted over his involvement in the 1993 Bombay bombing by special Terrorist and Disruptive activities court on 27 July 2007.

TADA Court found guilty of the following offences on 27 July 2007-

Crime	Sentence
Criminal conspiracy to carry out terrorist act and disruptive activities and murder,	Death

¹⁰¹Odishapolicedcb.gov.in>files. Visited on 17 feb,2020

Aiding and abetting and facilitating in a terrorist act	Life imprisonment
Illegal possession and transportation of arms and ammunition.	Rigorous imprisonment
Possessing explosive with the intent to endanger lives,	Rigorous imprisonment for 10 years

Supreme Court rejected his review petition on death sentence. President of India rejected his mercy petition. Memon was executed by hanging in Nagpur Central Jail on 30 July 2015. *Mohammad Ajmal Amir Kasab@ Abu...V. State Of Maharashtra-* Who took part in 2008 Mumbai terrorist attack in Maharashtra India was convicted under Murder, waging war against India, possession of explosive substance on 12 Aug 2012 Supreme Court found guilty for waging war and sentence to death.

2.6.4. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989:-

It provides provision for death penalty-under Section-3 of the schedule caste and schedule tribes (Prevention) of Atrocities Act. - Whoever, not being a member of a scheduled caste or a scheduled tribes- (i) gives or fabricates false evidence intending thereby so cause, or knowing it to be likely that he will thereby cause any member of a scheduled caste or a scheduled tribe to be convicted of an offence which is capital by the law for the time being in force shall be punished with imprisonment for life and with fine and if an innocent member of a scheduled caste or a scheduled tribes be convicted an executed in consequences of such false or fabricated evidence, the person who gives or fabricates such false evidence shall be punished with death. So, under Section 3 of Scheduled caste and Scheduled tribes (Prevention) of Atrocities Act, 1989 provided that when a death of a person belonging to Schedule Caste and Schedule Tribes is caused by giving false fabricated evidence by any other member of the society, and judge basing on the false fabricated evidence convicted a member of Schedule Tribes and Schedule Caste of death sentence and the death penalty has been carried out and later on court came to know that evidence given was false fabricated evidence then the person who has given the false fabricated evidence can be punished with death as provided under Scheduled Castes and Schedule Tribes (Prevention) of Atrocities Act, 1989.

2.6.5. Air Force Act, 1950¹⁰²:-

Under Indian Air Force Act, 1950 there are three provisions where death penalty can

¹⁰²<https://mod.gov.in>AFAct>, visited on 14th march, 2020.

be awarded by the court material on commission of any of the offences provided under various provision of the Indian Air Forces Act, they are:

Sec 34. Offence in relation to the enemy and punishable with death- Any person subjects to this Act who commits any of the following offences, that is to say-

- (a) Shamefully abandons or delivers up any garrison, fortress, post, place or guard, committed to his charge, or which it is his duty to defend, or uses any means to compel or induce any commanding officer or other person to commit the said act; or
- (b) Intentionally uses means to compel or induce any person subject to military, naval or air force law to abstain from acting against the enemy, or to discourage such person from acting against the enemy; or
- (c) In the presence of enemy, shamefully cast away his arms, ammunition, tools or equipment or misbehaves in such manner as to show cowardice; or
- (d) Treacherously holds correspondence with, or communication intelligence to, the enemy or any person in arms against the Union;
- (e) Directly or indirectly assists the enemy with money, arms, ammunition, stores or supplies; or
- (f) Treacherously or through cowardice sends a flag of truce to the enemy; or
- (g) In time of war or during any air force operation, intentionally occasions a false alarm in action, camp or quarters or spreads reports calculated to create alarm or despondency; or
- (h) In time of action leave his commanding officer or his post, guard, piquet, patrol or party without being regularly relieved or without leave; or
- (i) Having been made a prisoner of war, voluntarily serves with or aids the enemy; or
- (j) Knowingly harbours or protects an enemy not being a prisoner; or
- (k) Being a sentry in time of war or alarm, sleeps upon his post or is intoxicated; or
- (l) Knowingly does any act calculated to imperil the success of the military, naval or air forces of India or any forces co-operating there with or any part of such forces; or
- (m) Treacherously or shamefully causes the capture or destruction by the enemy of any aircraft belonging to the forces; or
- (n) Treacherously uses any false air signal or alters or interferes with any air signal; or
- (o) When ordered by his superior officer or otherwise under orders to carry out any air forces operation, treacherously or shamefully fails to use his utmost exertions to carry such orders into effect. Shall on conviction by contractual be liable to suffer death or such less punishment as is in this Act mentioned.

Under Section 37-Air Force Act, Mutiny- any person subjected to this Act who commits any

of the following offences that is to say- (a) Begins incites, causes or conspires with any other person to cause, any Mutiny in the military, Naval or Air Forces of India or any forces co-operating there with;

(b) Joins in any such mutiny does

(c) being present at any such mutiny does not use his utmost endeavours to suppress the same.

(d) Knowing or having reason to believe in existence of any such Mutiny or of any intention to commit such mutiny or such conspiracy does not without delay, give information thereof to his commanding or other superior officer.¹⁰³

(e) Endeavour to seduce any person in the Military, Naval or Air Forces of India from his duty or allegiance to the union.

Shall on conviction by court martial be liable to suffer death or such less punishment as in this mentioned.

2.6.6. Desertion and Aiding Desertion:-

Section 38 (1) any person subject to this Act who desert or attempt to desert the service shall on convict by court martial, if he commits the offence or active service or when under order for active service be liable to death.¹⁰⁴ So, Under Indian Army Act, under any of the offence provided under the provision of sec 34, sec 37 and sec 38(1) of the Indian Army Act, if the Court Martial found guilty of any of the offences mentioned in the said provision can award death sentence. If court Martial things appropriate to award death sentence in the case so, above are the various provision under which court Martial can award death sentence under Indian Army Act, 1950.

2.7. Method of Execution:-

An appraisal of the administration of criminal justice of ancient times reveals that death penalty was commonly used in cases of heinous crimes. However, there was great divergence as to the mode of its execution. The common modes of inflicting death sentence on the offender were crucifixion, drowning, burning, boiling, beheading, throwing before wild beasts, flaying or skinning of alive, hurling the offender from rock, stoning, strangling, impelling, amputating, shooting by gun or starving m to death. Hanging the offender by neck till death in public places has been a common method of putting an end to the life of an offender. These draconian and barbarous methods of punishing criminals to death were justified on the ground that they were the quickest and easiest mode of punishment and at the same time carried with them an element

¹⁰³ Indian Army Act, 1950, (<https://mod.gov.in/default>handle, visited on 14th march, 2020>)

¹⁰⁴ Indian Army Act,1950, (<https://mod.gov.in/default>handle, visited on 14th march, 2020>)

of deterrence and retribution. They have, however, fallen into disuse with the advance of time and modern humanitarian approach to penology.

Deterrence has been defined by Dr. Johnson as discouraging the offender by terror or naked fear from repeating his crime and at the same time and preventing others from following his path. It must, however, be remembered that deterrence is a relative term, its seriousness depending on the category of the offender. The stigma attached to arrest, trial, conviction and sentence may have little effect on habitual offenders or hardened criminals but may act as a powerful deterrent to an average law-abiding citizen. Undoubtedly, of all the punishments, death penalty appears to be the strongest deterrent for there can be nothing for which a man would be willing to give away his life. At present, the common mode of execution of death sentence which are in vogue in different parts of the world are asphyxiation [strangulation] electrocution, guillotine, shooting, gas chamber, hanging, lethal injection etc. The method of execution by electrocution consists in subjecting the condemned prisoner to heavy charge of electric current. This method was first used in Auburn State Prison, New York on August 6, 1890 and is now being extensively used in USA, UK, USSR, Japan, and other European countries. The use of Guillotine for execution of criminals was introduced in France in 1792. It was a kind of machine erected for execution of criminals in western countries, particularly in France Scotland and England. Shooting as a mode of execution of a condemned person was used for offences tried in military courts. In Russia, China and some eastern European countries, death by firing squad is the customary mode of execution. More recently, gas chambers are being used in the western world for the execution of death sentence. The condemned prisoners are put to death by being stripped in a chair in a sealed gas chamber into which poisonous fumes by cyanide are injected. The method prevailed in USA and was extensively used by Nazi Germany in killing Jews and other unwanted racial minorities.

The method of hanging the condemned prisoner till death has been commonly in use in almost all the countries since ages. In India public hanging is now held to be unconstitutional. Death sentence by means of lethal injection is relatively a later development. It was first adopted in Okhalahoma [USA] in 1977. The injection is administered intravenously with delicate skilled operation. It is preferred because it ensures instantaneous death without any suffering. It is in use in USA, UK, Canada and other developed countries. In Iran, the offences of murder, rape and sexual assault are punishable with death penalty. The offenders found guilty of these offences are publically hanged to crane used for lifting heavy loads and put to death. The unmarried girls are, however, exempt from death penalty even though the offence committed by them is punishable with death sentence.

As per the Amnesty International annual report [2004] on judicial execution, nine out of ten executions took place in people's Republic of China which carried out at least 3400 executions to crackdown hard core criminality, particularly those involving in drug trafficking and corruption cases. As a measure of policy against the use death sentence, the European Union and Council of Europe require abolition of death penalty by the state wishing to join them, but are willing to accept a moratorium as an intern measure. Thus, Russia became member of the Council of Europe although it practices death penalty in law but has never used it since it became a member of the council. So also is the case of latavia which is a member of European Council.

2.8. Method of Execution of Death Sentence in India

There are two types of methods of execution of death sentence in India.

(i).Hanging: - The code of criminal procedure 1898 provide the method of execution by hanging. The same method was adopted in the code of criminal procedure 1973. Under section-354(5) Cr.P.C. 1973 states that "when any person is sentence to death, the sentence to death, the sentence shall be direct that he be hanged neck till he is death"¹⁰⁵. *In Deena and Ors. Union Of India*,¹⁰⁶ petition challenged the constitutionally of section-354(5) Cr.P.C on the ground that hanging a convict is a cruel method of executing the death sentence and is violate of Art.21 of the Constitution of India. Supreme Court held that the method prescribed under Section-354(5) Cr.P.C for executing the death sentence did not violate the provision contained in Article-21 of the Constitution.

(ii).Shooting:-

There are various statutes which provides execution death sentence by shooting, under section-163 of the Air Force Act, section-166 of the Army Act, section-147 of the Navy Act, section-119 of the Border Security Force Act, Section-96 of the Indian Coastal Guard Act, Section-133 of the Indo-Tibetan Border Police Force Act, Section-141 of the Assam Rifles Act, Section-133 of the Sashastra Seema Bal Act provide that in executing a death sentence, the offender may be either hanged by neck till death or be shot to death.

¹⁰⁵ The code of criminal procedure, 1973 (Act no.2 of 1974)

¹⁰⁶ 1983(4) SCC 645

CHAPTER- 3

ABOLITIONIST AND RETENTIONIST OF CAPITAL PUNISHMENT

The chapter discussed the grave concerns that former judges expressed about the criminal justice system, while the second chapter presented the confused state of death penalty sentencing in India. Given the views that emerged from those chapters, it is important to consider judicial attitudes towards the death penalty, and the underlying basis of those attitudes. The effort in this chapter has been to understand the judicial perception of death penalty in terms of its purpose, administration, and its future in our society. The social conversation on death penalty is an evolving one, and therefore our interest was in capturing the perspective of judges on different aspects of the death penalty, rather than only recording their personal positions. The dominant perspectives that emerged from these interviews help us understand the state of the death penalty conversation in courts that goes beyond the text of judicial pronouncements. The background considerations discussed throughout this chapter, will perhaps also begin to explain the confused state of death penalty sentencing in India. It is evident that the approach of the law on death penalty sentencing, and the dominant perspectives amongst the former judges, are significantly at odds with one another. The formal requirements of death penalty sentencing make it very difficult to impose the punishment, yet these requirements have been consistently chipped away at by courts that have not applied them with full rigour. These conversations with former judges reveal a significant dissonance between the attitudes of former judges to the death penalty, and the demands of the law on death penalty sentencing.¹⁰⁷

¹⁰⁷ Matters of Judgement, P-104, centre on the Death Penalty, National Law University, Delhi Press, Edition- November, 2017.

This chapter in the first half tracks the abolitionist and Retentionist justifications provided by former judges [irrespective of their position on death penalty]. It was important to adopt this approach when exploring abolitionist justifications with Retentionist judges, and vice versa, as it enabled us to fully grasp, and make sense of the movement between these two positions. The second half of this chapter documents the views of the judges on recent developments that take small steps in moving away from the death penalty. In these parts, the reactions of the former judges to the 262nd Report of the Law commissions of India 2015¹⁰⁸, and the new sentencing powers crafted in *Union of India v. Sriharan* [December 2015] are discussed¹⁰⁹.

3.1. Abolitionist View on Death Penalty:-

Though capital punishment is a legal penalty in India which has been evolved by the supreme court of India in various cases according to the provision of the constitution of India and various penal provision and statutes which provides capital punishment if a prohibited act is committed by an individual and death of a human being is caused. The debate on the issue for the abolition of death penalty is not ending. The legality of capital punishment must be subjected to review from time to time in order to tune with the evolving standards of decency in a mature society. The contemporary criminologist also support for the abolition of death penalty worldwide.

There are various section under penal code under which death sentence can be awarded to the accused such as section 121 IPC- waging war against the government, section- 132 abetting mutiny actually committed, section- 194 giving fabricating false evidence upon which an innocent person suffer death, section-302 murder, section-305 abetment of suicide of a minor or insane or intoxicated person, section -396 Dacoity accompanied for murder, section- 307 attempt to murder by a person under sentence of imprisonment for life if hurt is caused. Along with Indian Penal Code there are various statutes which provides capital punishment are Narcotic Drugs and Psychotropic substance Act, Prevention of Terrorist Act, Explosive Substance Act, Army Act, Air Force Act, Navy Act etc.

Court repeatedly held that though the Acts provides capital punishment. The death penalty must be awarded only in rarest of rare case in awarding punishment life imprisonment must be the rule and death penalty must be the Exception. As the purpose of punishment may be either to serve as deterrent, retributions, reformation or giving an opportunity to offender to rehabilitate so as not to commit a crime in future so according to India law the quantum of

¹⁰⁸ Matters of Judgement, P-104, centre on the Death Penalty, National Law University, Delhi Press, Edition- November, 2017.

¹⁰⁹ AIR 2014, 4SCC 242

judiciously and is proportion to the gravity of the offence. Since the death penalty is an extreme punishment that ends a human life the condition have been imposed under the law to give special reasons for awarding this type of sentence. The special reason must relate not to the crime as such but to the criminal. The crime may be shocking and yet the criminal may not deserved death penalty. Justice Krishna Iyer commented in *Rajendra Prasad V. State of U.P* that capital punishment would not be justified unless in was shown that criminal was dangerous to the society. In *Rajiv v. State of Rajasthan*, Dr. A.S Anand CJ. Further observed that “it is the nature and gravity of the crime but not the criminal which are germane for consideration of appropriate punishment in a criminal trail”.

The first task that the state should engage itself is to abolish the capital punishment as with the advancement of civilization the imposition of death sentence has been inappropriate. It is a common experience that murder in most of the cases are not premeditated Murders are committed in a moment of excitement, grave provocation and anger which makes his makes his unable to use his sense of reasons and blind him to each consequences for the time being. As soon as the temporary insanity is over he becomes a normal human being and repents for his reprehensible conduct. It is a disease and needs to be reformed.

There are various circumstances which provide to prefer the abolition of capital punishment. They are:-

3.1.1. Death Penalty is Arbitrary:-

The arbitrariness of judge is possible when the review, Appeal petitions is heard by two different benches is awarding death sentence. This possibility was shown by justice P.N Bhagwati again in his dissenting judgment in *Bachan Singh* case, cited a case where a different view was taken by a bench resulted in a loss a loss of human life. Para no. 17 of the judgment reads as follows: - “The most striking example of freakiness in imposition of death penalty is provided by recent case (*Harbans Singh V. State of Uttar Pradesh*). ‘The most striking example of freakishness in imposition of death penalty’ is provided by a recent case *Harbans Singh V. State of Uttar Pradesh* which involved three accused, namely, Jeeta Singh, Kashmira Singh and Harbans Singh. The Allahabad High Court sentenced these three persons to death by a judgment and order dated October 20, 1975 for playing an equal part in jointly murdering a family of persons. Each of these three persons preferred a separate petition in the Supreme Court for separate petition in the Supreme Court for special leave to appeal against the common judgment sentencing them all to death penalty. The Special Leave Petition of Jeeta Singh came up for hearing before a Bench consisting of Chandrachud, J and it was dismissed on April 15,

1976. Then came the special leave petition preferred by Kashmira Singh from jail and this petition was placed for hearing before another Bench consisting of Fazal Ali, J and myself we granted leave to Kashmira Singh limited to the question of sentence and by an order dated April 10, 1977 we allow his appeal and commuted his sentence of death into one of imprisonment for life. The result was that while Kashmira Singh's death sentence was commuted to life imprisonment by one bench, and he was executed on October 6, 1981, though both had played equal part in the murder of the family and there was nothing of distinguish the case of one from that of the other. The special leave petition of Harbans Singh then came up for hearing and this time, it was still another bench which heard his special leave petition. The bench consisted of Sarkaria and Shinghal, JJ. And they rejected the special leave petition of Harbans Singh on October 16, 1978. Harbans Singh applied for review of this decision, but Sarkaria, J and A.P. SEN, J. dismissed the review petition on May 9, 1980. It appears that though the registry of this court had mentioned in its office report that Kashmira Singh and his review petition were dismissed by this court, Harbans Singh would have been executed on October 6, 1981 along with Jeeta Singh, but fortunately for him he field a writ petition came up for hearing before a still another bench consisting of Chandrachud, C.J. Desai and A.N. Sen, JJ, it was pointed out to the court that the death sentence imposed on Kashmira Singh had been commuted by a bench consisting of Fazal Ali, J. And myself and when this fact was pointed out, the Bench of the clemency petition filed by Harbans Singh. This is a classic case which illustrates the judicial vagaries in the imposition of death penalty and demonstrates vividly, in all its cruel and stark reality, how the death penalty is influenced by the composition of the Bench, even in case governed by section 354, sub-section(3) of the Code of the Criminal Procedure, 1973. The question may well be asked by the accused. Am I to live or die depending upon the way in which the Benches are constituted from time to time? Is that not clearly violation of the fundamental guarantees enshrined in Article 14 and 21?" So as the sentence of death penalty is arbitrary according to cited case above, life imprisonment should be the punishment and death penalty should be abolished.

3.1.2. Death Penalty Is Not Deterrent

The law commission of India in its thirty fifth report held that capital punishment does not act as a deterrent. The supporter for the retention of death penalty states death penalty act as a deterrent because "every human beings dreads death" suggesting that the death penalty has a greater deterrent effect than any other punishment. This statement may not influence a potential murder. The penalty for murder is death as well as life imprisonment were both the

penalties are so severed as to destroy the future of anyone subjected to them, a national man would not commit the crime unless he thinks that there is little chance of detection, what would weigh heavily with him in such a case are the uncertainty of detection and consequent punishment rather than the nature of punishment. Therefore it is not the harshness or severity of death penalty which acts as a deterrent.

A life sentence would act as an equally strong deterrent against crime as death penalty, provided the killer feels that the crime would not go unpunished. More than the severity of the sentence it is certainty of detection and punishment that as a deterrent. *In Furman Georgia Case* (408 Us 238) Brennan J. And White J. have expressed that “when in frequently and arbitrarily imposed death penalty is not a greater deterrent to murder than life imprisonment”¹¹⁰.

3.1.3. Execution by Hanging in Cruel, Painful and Inhuman Treatment:-

In India method of execution is by hanging it is undoubtedly a cruel and degrading method, which livings inhuman pain and suffering to the victim. Duffy, warden of San Quentines, high security prison of USA described the hanging process in details- “The day before an execution the prisoner goes through a harrowing experience of being weighed, measured for length of drop to assure breaking of the neck, the size of neck, body measurement etc. Who trap springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth his neck may be broken and the rope many times takes large position of skin and flesh. He urinates, he defecates, and dropping fall to the floor while witness look on and at almost all execution one or more faint or have to be helped out of the witness room. The prisoner remains dangling from the end of the rope for about 15-20 minutes before the doctor, who has to climbed upon a small ladder and listen to his heart beat with a stethoscope and pronounce dead. A prison guard stands and hold the body the doctor steady because during the first few minutes there is usually considerable struggling in an effort to breathe if it is drop from too short. There will be a slow and agonising death by strangulation on the other hand if it is drop is too high the head will tear off.

3.1.4. Violation of Fundamental Right with Delay of Execution

International covenant on civil and political right provides for the abolition of death penalty of death to the member state and convention against torture and under article 2 of the charter of fundamental rights of European- prohibits the use of capital punishment and the

¹¹⁰ 408 U.S 238(1972)

council of Europe- prohibits the use of death penalty by its member and united nation general assembly passed a resolution for a global moratorium on execution of death penalty with a view to eventual abolition. Death penalty violates fundamental rights of every individual in the society as every individual has right to life, liberty, and equality. Right to life means a life of dignity that every person has and does not mean an animal existence, so as life comes naturally it should be allowed to perish naturally death penalty is against law of nature, unnatural death taken by state is untenable. The Supreme Court *In Francis Corale V. Administrator Union*¹¹¹, held that- the expression “life” in Article of the Indian Constitution does not connote merely physical animal existence but embraces something more.

3.2. Retentionist View of Death Penalty

The history of human civilization reveals that during no period of time death penalty has been discarded as a code of punishment. The ancient Indian civilization does not abolition of death sentence although it disuse at some of time in history were the people were most truthful, soft-hearted and benevolent but corporal punishment were invoked to protect the society from violent criminals. The retentionist support capital punishment on the ground that it has a deterrent value and it commands obedience of law to all people in the society and also believe that death of victim must be balance by the death of the guilty party otherwise the anguish and passions aroused by the crime in society will not be calm down. Statistics on homicide in various countries shows that by abolishing death penalty crimes rate went higher and the public opinion most is the urban areas suggest that death penalty should be retain in various specific crime which is against the nation and the society as a whole. The desirability of the punishment depends on the nature of the crimes and the circumstances associated there with.

Following are some generalisation factors which provide desirability of capital punishment:-

- (i). Retention of death penalty seems desirable in the cases of harden criminals who are incorrigible and commit cold blooded murder in a calculated.
- (ii) Most of the dispute arises of the possession of agricultural land or for ownership over the property. So if the death penalty is abolished than the weaker section with fall prey under the dominant class in the society as they can easily hire criminal for assassinating the other party. It will provide benefit for selfish motive and personal gain, so to check this menace death penalty should be retain.
- (iii) To safeguard minorities in the society death penalty should be retained as in India there are diversity of cultures, ethical, races, religious etc. The majority community easily commits

¹¹¹ 1981 AIR 746, 1981 SC (2) 512

homicide without thinking about its gravity and consequences. So to deter this kind of act, death penalty should be retained.

(iv). In India sex taboo is too strict, so individuals who violated the sanctity of the culture, practice, prestige's of the family, are killed in the name of honour of the family so to check this menace, retention of death penalty is required in India.

(v). Death penalty should be retained to protect the society from any anti-social element and to maintain law and order in the society death penalty should be retained to curb out the habitual offenders and sex psychopaths as they are abnormal person who commit crime without bothering about its gravity and evil effects.

(vi). There are criminals who take pleasure in killing human life without any apparent reason, they commit murder one after another only for the sake of fun. When interrogated, these men-killers boldly confessed they commit homicides because they desire some kind of pleasure in watching their victim dying in pain and torture. To such criminals death sentence is perhaps the only appropriate punishment for such beastly offenders.

(vii). the death penalty guarantees that those executed will not commit any further crimes.

3.3. Abolitionist and Retentionist Justifications

Irrespective of their personal positions, all former judges were asked justifications for both abolishing, and retaining the death penalty in India. Cumulatively, 29 former judges identified possible abolitionist justifications in the Indian context, and 39 identified Retentionist justifications. Whilst 17 former judges highlighted justifications in both categories, 14 explicitly stated that they saw no reasons whatsoever for abolishing the death penalty in India. Three judges explicitly stated the reverse, and said they saw no reason for retaining it. Whilst we did not explicitly enquire the judges' positions on the death penalty, the conversations did reveal their standings, and from that we emerged that we had 44 Retentionist, and 11 abolitionists within our sample. The 11 abolitionists heard 61 death penalty cases between them in Supreme Court, and confirmed 19 death sentences, whilst the 44 Retentionist judges confirmed 86 death sentences in 163 death sentences appeals.¹¹²

3.4. Argument 'For' death Penalty (Retentionist View):-

1. Elimination of murderers by execution is fair retribution and serves the ends of justice.
2. Punishment must match the gravity of offence and worst crimes should be severely dealt with for the sake of deterrence and security of the society.

¹¹² Matters of Judgement, P-105, centre on the Death Penalty, National Law University, Delhi Press, Edition- November, 2017.

3. Death penalty shows society's reaction to heinous crimes.
4. One who ends somebody's life, forfeits his right to life.
5. Death should be looked as a form of retributive justice insofar as it provides satisfaction and peace of mind for many victims of and their families or relatives.
6. It is the most effective way to protect society against condemned offenders. This is the reason why death penalty has been held to be constitutionally valid.
7. Some authorities believe that death penalty is less cruel than a prolonged life imprisonment.
8. Considered from the economic point of view also it is for less expensive to execute a convict than to house him/her in a prison institution for life.
9. It prevents over-crowding in prisons and helps in elimination of offenders who are potential danger to the institution thereby making maintenance of discipline in prisons easy.
10. It upholds rule of law because it discourages vigilantism or self-help on the part of victim's family.¹¹³

3.5. Arguments 'Against' Death Sentence (Abolitionist's View):

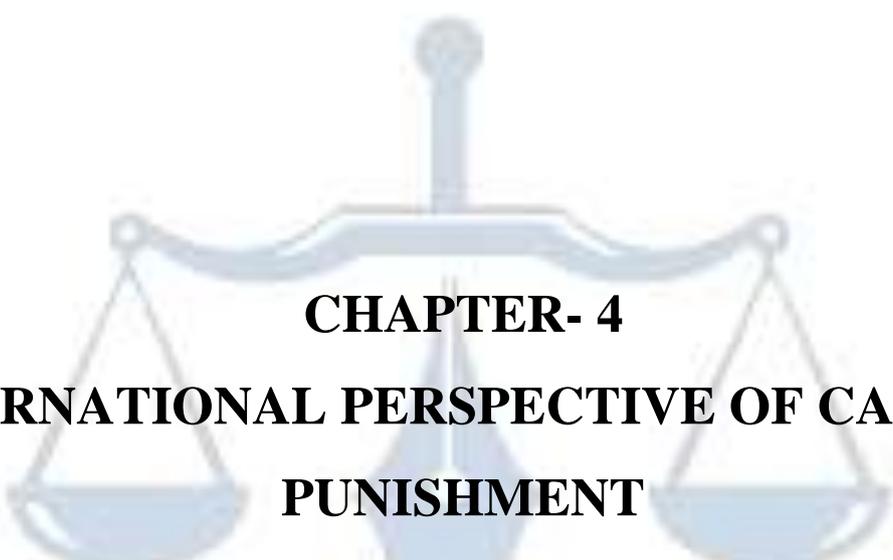
- i. Death penalty is killing and all killings were wrong and therefore, death sentence is also wrong.
- ii. An execution arising out of miscarriage of justice is irreversible and therefore, it may result in great injustice to the person wrongly sentenced to death.
- iii. It is a lethal vengeance which brutalises the society.
- iv. Death penalty is unjust and often discriminatory against poor who cannot afford to defend themselves properly against a homicide charge.
- v. It is a misconception to think that death penalty has a deterrent effect because hired murderers do take chance with the criminal justice system whatever may be the consequences.
- vi. Death penalty is violate of human rights. Particularly Articles 3 and 5 of the UN Declaration of Human Rights.
- vii. Quite a large number of murders are crimes of emotion or impulsiveness.
- viii. It denies the possibility of reformation and rehabilitation of the offenders.

A perusal of arguments for and against the retention of capital punishment in a penal makes it abundantly clear that atleast its retention in a statute book would better serve the ends of justice, though in practice it may be used sparingly. The approach to capital punishment is well reflected in the judicial pronouncements handed down by the Supreme Court ever since the

¹¹³ N.V. Paranjape: Criminology, Penology and Victimology, Central Law Publications, p-335, sixteenth Edition-2014.

historic Bachan Singh's case, where the court laid down the 'Rarest of Rare Case' principle.

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CHAPTER- 4

INTERNATIONAL PERSPECTIVE OF CAPITAL PUNISHMENT

Capital punishment is a matter of active controversy in several countries and states, and positions can vary within a single political ideology or cultural region. In the European Union, Article 2 of the charter of fundamental rights of the European Union prohibits the use of capital punishment.¹¹⁵ The council of Europe, which has 47 members' states, has sought to abolish the use of the death penalty by its member absolutely, through protocol 13 of the European convention on human rights. However, this only affects those member states which have signed and ratified it, and they do not include Armenia, Russia, and Azerbaijan. The United Nations general assembly has adopted, in 2007, 2008, 2010, 2012 and 2014¹¹⁶, non-binding resolutions calling for a global moratorium on executions, with a view to eventual abolition. Although most nations have abolished capital punishment, over 60% of the world's population live in countries where the death penalty is retained , such as China, India, the United States, Indonesia, Pakistan, Bangladesh, Nigeria, Ethiopia, Egypt, Saudi Arabia, Iran and among almost all Islamic countries, as well as being maintained in Japan, South Korea, Taiwan, and

¹¹⁴ N.V. Paranjape: Criminology, Penology and Victimology, Central Law Publications, p-336, sixteenth Edition-2014.

¹¹⁵ "Charter of fundamental Rights of the European Union". European Union Archived. From the original on 29th may 2010. Retrieved 23 August 2010. . <https://en.m.wikipedia.org/wiki>. Visited on 15th April, 2020.

¹¹⁶ "117 countries vote for a global moratorium on executions". World coalition against the death penalty. From the original on 2 April 2015. . <https://en.m.wikipedia.org/wiki>. Visited on 15th April, 2020.

Sri Lanka. China is believed to execute more people than all other countries combined.

An international survey carried out in 1962 by the United Nations, however, confirmed that neither suspension nor abolition of death penalty had any immediate effect in increasing the incidence of crimes punishable with sentence of death. The countries which had abolished capital punishment, notably, Germany, Austria, Scandinavia, Netherlands, Denmark and some Latin American states reported no ill-effects of abolition. It is significant to note that with the abandonment of the torturous and barbarous methods of inflicting death penalty, the meaning of term 'capital punishment' now extends only to death sentence for murder or homicides. Particularly, in western countries rape is no longer serious crime for two main reasons. Firstly, with general laxity in morality, the gravity of this offence is fast declining. In the second place, scientists have declined rape as a mere passive surrender by the victim because in their opinion it is practically impossible to commit rape unless the victim is made unconscious. Likewise, treason being exclusively a war-time offence, it is futile to enlist as a peace-time offence and to provide death penalty for it.

In the modern reformatory era, the retributive principle of 'tit for tat' does not serve any useful purpose. Retribution can only do more harm than good to the criminals and can never be an effective measure of suppressing crime. Retaliation and retribution, apart from being outdated are also against the accepted norms of modern criminal justice. Beccaria was perhaps the first criminologist who raised a crusade against capital punishment in 1764. He strongly protested against the use of cruel and barbarous modes of punishing the offenders and emphasised the need of individualised treatment. He expressed a view that death as a sentence symbolises man's cruelty and insignificance of human life. In course of time, mens rea became the guiding principle for determining the guilt and punishment of the offender though it is true that in certain cases it is difficult to determine mens rea of the offender.¹¹⁷

Yet another reason for discarding retribution as a principle of criminal justice is to be found in the fact that putting a person to death virtually amounts to killing him deliberately. That apart, experience has shown that more than eighty per cent of the persons committing murder are not really murderers but are persons who have fallen a prey to this heinous crime due to circumstances such as passion, provocation, jealousy, sexual impulsiveness, poverty or intoxication. Obviously, death sentence is hardly an appropriate punishment for such offenders. Prof. Scot has expressed doubts about the adequacy of capital punishment as it involves the

¹¹⁷ N.V. Paranjape: Criminology, Penology and Victimology, Central Law Publications, p-333, sixteenth Edition-2014.

risk of innocent person being sent to guillotine. In a number of cases bona fide errors of judgement as to guilt of the accused are known to have occurred. If an innocent person is hanged due to due to miscarriage of justice, his life is lost forever and the loss is obviously irredeemable. Perhaps it is for this reason that slightest doubt about the guilt of the accused entitles him for an acquittal on the plea of 'benefit of doubt' under the criminal law of most countries.

4.2. In America:

Subsequently, a majority of states passed new death penalty statutes, and the court affirmed the legality of capital punishment in 1976 case *Gregg v. Georgia*. Since then, more than 7800 defendants have been sentenced to death¹¹⁸; of these, more than 1500 have been executed. A total of 165 who were sentenced to death in the modern era were exonerated before their scheduled execution. As of December 17, 2019, 2,656 are still on death row. The death penalty for federal crimes was reinstated in July 2019 after a 16-year hiatus. The last federal execution was that of Louis Jones, JR. IN 2003. There are currently 62 prisoners on federal death row, five of whom the justice department had scheduled for execution. In December, the United States Supreme Court put the executions on hold. The United States is distinct among advanced industrial democracies in its extensive use of capital punishment.¹¹⁹

The U.S. Supreme Court has vacillated on the application of capital punishment, ruling in the *Furman* decision [1972] that capital punishment was a violation of the Eighth Amendment prohibition against "cruel and unusual punishment" in certain cases, and then reinstated it in 1976. New York, which once laid the nation in executions, has abolished capital punishment. There is no capital punishment in Alaska, Hawaii, Iowa, Kansas, Massachusetts, Maine, Minnesota, Michigan, North Dakota, Rhode Island, Vermont, West Virginia, and the District of Columbia. There have been no federal executions in more than 30 years. Texas, Florida, Louisiana, Georgia, Virginia, Alabama, and Arkansas have held the most executions in recent years. Means of capital punishment used in the United States includes lethal injections, electrocution, gas chamber, hanging, and firing squad. All capital offenses require automatic appeals which means that approximately 2,500 men and women are presently on "death rows" awaiting their appeals or death.

¹¹⁸ "Death Sentences in the United States from 1977 by State and By Year". Death Penalty Information Center. Retrieved April 24, 2017. https://en.m.wikipedia.org/wiki/Death_penalty_in_the_United_States. Visited on 15th April, 2020.

¹¹⁹ Steiker, Carol S.; Steiker, Jordan M. (January 13, 2020). "The Rise, fall, and Afterlife of the Death penalty in the United States". *Annual Review of Criminology*. 3(1): 299-315. Doi: 10.1146/annurev-criminol-011518-024721. ISSN 2572-4568. https://en.m.wikipedia.org/wiki/Death_penalty_in_the_United_States. Visited on 15th April, 2020.

The first known infliction of the death penalty in the American colonies occurred in Jamestown colony in 1608. During the period of the Revolutionary War, capital punishment apparently was widely accepted –162 documented executions took place in the eighteenth century, at the end of the war, 11 colonies wrote new constitutions, and, although nine of them did not allow cruel and unusual punishment, all authorised capital punishment. In 1790, the First Congress enacted legislation that implemented capital punishment for the crimes of Robbery, murder, rape and forgery of public securities. The nineteenth century saw dramatic increase in the use of capital punishment with 1,391 documented executions. The death penalty continued as an acceptable practise in the United States for some time. In 1994, *in Collins v. Collins, Blackmun* wrote a dissenting opinion in which he condemned the practice of capital punishment in the United States. He argued that “no combination of procedural rules or substantive regulations ever [could] save the death penalty from its inherent constitutional deficiencies”—“arbitrariness, discrimination, caprice, and mistake.” Justice Antonin Scalia criticized Blackmun’s position, writing that Blackmun had based his dissent on intellectual, moral, and personal reasons, rather than on the authority of the constitution. The Fifth Amendment seems to supply a clearer basis for assuming the constitutionality of the death penalty. The amendment states that no one shall be “*deprived of life, liberty, or property, without due process of the law.*” From this language, one can conclude that with due process of law, capital punishment may be imposed.

Chief justice Warren E. Burger, who filed a dissenting opinion, relied heavily upon the language of the Fifth Amendment to support his argument that the deathly penalty was constitutional. In *Furman*, the justices who found the death penalty to be unconstitutional pointed to the language of the Eighth Amendment as the basis of their decision. The Eighth Amendment of the U.S. Constitution prohibits the government from inflicting “cruel and unusual punishments.” The controversy over the constitutionality of the death penalty lies in the Ambiguity of the phrase “cruel and unusual.” The first meeting of the congress addressed the phrase for only a few minutes. Congressman William Smith of South Carolina foreshadowed the controversy to come when he stated that the wordings of the Eighth Amendment was “too indefinite.”

Whereas some argue that the phrase “cruel and unusual” refers to the type of punishment inflicted [such punishments as the severing of limbs, for example, would almost certainly be considered cruel and unusual] others feel that the phrase refers to the degree and duration of the punishment. The U.S, Supreme Court has rejected both interpretations, leaving the death penalty a legal means of punishing certain criminals.

4.3. In Britain:

In Britain, death by hanging was the principle form of execution from Anglo-Saxon times until capital punishment was abolished in 1964. Up to May 1868 all hangings were carried out in public and large crowds who were at least supposed to be deterred by the spectacle, but who probably went for morbid excitement and the carnival atmosphere that usually surrounded such events. The modern expression Gala Day is derived from the Anglo-Saxon gallows day. After hangings retreated inside prisons, large crowd would still often gather outside the gates to see the posting of the death notice or to protect the execution.

On the 26th of May 1868, Michael Barren, a Fenian, [what would now be called an I.R.A. terrorist] became the last man to be publically hanged in England, before a huge crowd outside New gate prison, for causing an explosion at Clerkenwell in London which killed Sarah Ann Hodgkin son and six other innocent people. Three days later on the 29th may 1868. Parliament passed the Capital Punishment [amendment] Act, ending public hanging. Strangely the last fully public hanging in the British Isles did not take place until the 11th of august 1875, when Joseph Phillip Le Brun was executed for murder on the island of Jersey.

The provision of the Capital Punishment Amendment Act of 1868 did not apply there. Ruth Ellis was the last woman to suffer the death penalty in Britain on the 13th of July 1955. The last hanging in northern island was that of Robert McGladdery on the 20th December 1961 at Belfast for the murder of Pearl Gamble. 21 old Henry Burnett was the last person hanged in Scotland in the newly refurbished Condemned Suite at Craig inches Prison in Aberdenon the 15th of august 1963 for the murder of Thomas Guyan. The last hangings of all in Britain were two carried out simultaneously at 8.00 a.m. on august 13th, 1964 at Walton prison, Liverpool and strange ways prison in Manchester, when Peter Anthony Allen and Gwynne Owen Evans were executed for the murders of John West. On the 16th of December 1969, the House of common reaffirmed its decision that capital punishment for murder should be permanently abolished. On a free vote, the House voted by 343 to 185, a majority of 158, that the Murder [Abolition of Death Penalty] Act 1965, should not expire. Thus, the death penalty for murder was formally abolished.

4.4. In Canada:

Canada's earliest history, including its period as a French colony and, after 1763, its time as a Britishlony. From 1867 to the elimination of the death penalty for murder on July 14, 1976, 1,481 people had been sentenced to death, and 710 had been executed, 697 were men and 13 were women. The only method used in Canada for capital punishment of civilians after the end

of the French regime was hanging. The last execution in Canada was the double hanging of Arthur Lucas and Ronald Turpin on December 11, 1962, at Toronto's Don Jail.

The death penalty was de facto abolished in Canada in 1972, and Bill C-84 was enacted in 1976 resulting in the de jure abolition of the death penalty, except for certain military offences committed by members of the Canadian Armed Forces (cowardice, desertion, unlawful surrender and spying for the enemy) which are prosecuted under the National Defence Act. In 1998, Canada eliminated death penalty for these military offence as well.¹²⁰

4.5. In Sweden:

Capital punishment in Sweden [Swedish: Dödsstraff-literally "Death punishment"] was practised up until 1910. It is now outlawed by the Swedish- constitution which clearly states that capital punishment, corporal punishment, and torture is strictly prohibited. *Johan Alfred Ander* was the last person executed in Sweden. He was sentenced to death for a murder during the course of the robbery that was committed in January 1910. His sentence was not commuted and he was executed November 23 at Langholmen in Stockholm using a guillotine [the only time a guillotine was used in Sweden]. The executioner was Albert Gustaf Dahlman, who died in 1920. At his death at average high age, he was the last of all executioners in Sweden. It has been suggested that the difficulties in finding the person to carry out this kind of work might have been one of the reasons for the abolishment of capital punishment one year later.

4.6. In Japan:

Capital punishment is legal in Japan. The only crimes for which capital punishment is statutory are homicide and treason. Between 1946 and 1993, Japanese courts sentenced 766 people to death [including a small number from People's Republic of China, South Korea and Indonesia], 608 of whom were executed. The death penalty is ordinarily imposed in cases of multiple murders involving aggravating factors.

Although the public has generally supported the death penalty, capital punishment is a contentious issue in Japan nonetheless. A 1999 government survey found that 79.3 percent of public supported it. In 34 polls taken between 1953 and 1999, support for the death penalty has varied, although never having dropped below 50 percent. At a 2003 trial, a Tokyo prosecutor presented the court a petition with 76,000 signatures as part of his case for a death sentence. During the late 1980s, four high profile cases acquittals of death-row inmates after retrials "shook public confidence in the system and profoundly embarrassed the Ministry of Justice,

¹²⁰ Capital Punishment, Canadian Encyclopedia, Historical Canada, from the original on 16 November 2016. Retrieved 12 December 2016, Visited on 29 January, 2020.

which until had believed that the execution of an innocent person was all but impossible.”¹²¹ Between 1989 and 1993, four successive ministers of justice refused to authorize executions, which amounted to an informal moratorium. Until then, the group campaigning to end capital punishment were marginal but they coalesced into a single umbrella organization called Forum 90. Unlike in the U.S., where a state’s governor can issue a pardon for any state crime and the president can pardon a federal crime, in Japan, the Justice Minister has to sign death warrants. It is not uncommon for a Justice Minister not to sign death warrants, some for political or religious convictions, and others for personal dislike for signing of death warrants.

This has caused some debate in Japan, some accusing those justice ministers of neglecting their public duty. For example, Seiken Sugiura, Minister of Justice between October 2005 and September 2006, and a follower of Pureland Buddhism, publically stated on October 31, 2005 that he would not sign execution warrants. He said that “From the standpoint of the theory of civilizations, I believe that the general trend from a long-term perspective will be to move toward abolition.” The Times claimed that the death penalty was effectively suspended on September 17, 2009 with the appointment of Keiko Chiba as Minister of Justice.¹²² However, no official policy statement was made in this regard. Chiba only stated that “I will cautiously handle (the cases) based on the duties of the justice minister.” The Times speculation was conclusively disproved when Chiba signed two death warrants and personally witnessed the execution.

4.7. In China:

Capital punishment in the People’s Republic of China is currently administered for a variety of crimes, but the vast majority of executions are for cases of either aggravated murder or large scale drug trafficking. The People’s Republic of China executes the higher number of people annually, although other countries [such as Iran or Singapore] have higher execution rates per capita.¹²³ Article 49 in the Chinese criminal code explicitly forbids the death penalty for offenders who are under the age of 18 at the crime.¹²⁴

Capital punishment is applied flexibility to a wide range of crimes, some of which are punishable by death in no other judicial system in the world. Economic crimes such as tax fraud have appeared routinely among the dockets of those receiving the death sentence, as have drug

¹²¹ Charles Lane – Lane, Charles (January 16, 2005). “Why Japan still has the death penalty.” Washington

¹²² Parry, Richard Lloyd (19 September 2009). “Japan’s death penalty effectively scrapped with arrival of Keiko Chiba”. The Times (London).

¹²³ Fan, Maureen; Cha, Ariana Eunjung (2008-12-24). “China’s Capital Cases Still Secret, Arbitrary”. The Washington post.

¹²⁴ “Selected Legal provisions of the People’s Republic of China Affecting Criminal Justice.” Congressional-Executive Commission on China .1997-03-14.

offences. Capital punishment in china can be imposed on crimes against national symbols and treasures, such as theft of cultural relics and [before 1997] the killing of pandas.¹²⁵ Corruption, property crimes such as theft, and smuggling gold, silver or other precious metals are also amongst the 68 crimes that are eligible for the death penalty in china. Capital punishment is also imposed on inchoate offenses, that is, attempted crimes which are not actually fully carried out, including repeat offences such as attempted fraud. The recidivistic nature of the offences, not their seriousness per se, is what is adjudicated to merit the capital sentences.

4.8. North Korea

Capital punishment is form of punishment in North Korea, allegedly for many offences, such as grand theft, murder, rape, drug smuggling, treason, espionage, political dissidence, defection, piracy, consumption of media not approved by the government and proselytizing religious beliefs that contradict practiced Juche ideology¹²⁶. Current working knowledge of the topic depends heavily on unverified accounts of defectors (both relatives of victims, and former members of the government). Executions are supposedly mostly carried out by firing squad, hanging or decapitation in public, which, if true, make north Korea one of the last four countries to still perform public executions, the other three being Iran, Saudi Arabia and Somalia.

Public Executions

North Korea was alleged to have resumed public executions in October 2007 after they had declined in the years following 2000 amidst international criticism. Prominent supposedly executed criminals include officials convicted of drug trafficking and embezzlement. Common criminals convicted of crimes such as murder, robbery, rape, drug dealing, smuggling, piracy, vandalism etc. Have also been reported to be executed, mostly by firing squad. The country does not publicly release national crime statistics or reports on the levels of crimes. As of 2012, North Korea is allegedly one of four countries carrying out execution in public, the other three being Iran, Saudi Arabia and Somalia. In October 2007, a South Pyongan Province factory chief convicted of making international phone calls from 13 phones he installed in his factory basement was supposedly executed by firing squad in front of a crowd of 150,000 people in a stadium, according to an unverified report from a South Korean aid agency called good friends¹²⁷. Good friends also reported that six were killed in the rush as spectators left. In

¹²⁵ "Threats". Panda Central .World Wide Fund for Nature.

¹²⁶ Kirby, Michael Donald ; Biserko, Sonja; Darusman, Marzuki (February 7, 2014)

¹²⁷ "150,000 Witness North Korea is Another Execution of Factory Boss whose Crimes was making International Phone Calls. May 27, 2013, at the Way back Machine, Fox News, and November 27, 2007. (www.en.m.Wikipedia.org. Visited on 13th April, 2020).

another unverified instance, 15 people were allegedly publicly executed for crossing the border into china.

A U.N. General Assembly committee has adopted a draft resolution, co-sponsored by more than 50 countries, expressing “very serious concern” at reports widespread human rights violations in North Korea, including public executions. North Korea has condemned the draft, saying it is inaccurate and biased. The report was sent to the then 192-member general assembly for a final vote.¹²⁸In June 2019, a south Korean NGO the transitional justice working group released an unverified report “mapping the fate of the dead” that suggested 318 sites in north Korea supposedly used by the government for public executions have taken place near rivers, fields, markets, school, and sports grounds. The report alleges that family members and children of those sentenced to death were forced to watch their executions. So, North Korea is one of the 57th retentionist countries of death penalty where death penalty is used as a common punishment and it is a legal punishment to make a deterrent effect so public execution is still carried out.

There are even such crimes which is not a crime in other countries such as watching South Korean movies, watching pornography, making international phone calls, stealing food etc. So, North Korea criminal law is a unique law as compared with other countries penal law.

4.9. Islamic Republic of Iran

Capital punishment is a legal penalty in Iran is believed to execute the most people per capita, Iran carried out atleast 567 execution in 2016 fewer than 2015 where execution was carried out atleast 977 people. Despite Iran has signed convention on the right of the child and which forbids executing child offender under 18 years of age, Iran executes minors as alleged by the western media.

Method for Executing Death Penalty:-

In Iran is hanging, firing squad, stoning and falling from heights or thrown from heights. Crime, punishable by death includes –murder, rape, sodomy, child molestation, drug-trafficking, armed robbery, kidnapping, terrorism, burglary, homo sexuality, incestuous relation, fornication, paedophilia prostitution, plotting to over thrown the Islamic regime political dissidence, sabotage, arson, rebellion apostasy, adultery, blasphemy, counterfeiting,

¹²⁸ “North Korea resumes public executions. A non-profit organisation work towards realization of Human rights and protects crime against humanity. English-language version of Pravda. November 26, 2007. Retrieved December 19, 2007. (www.en.m.Wikipedia.org. Visited on 13th April, 2020).

smuggling producing and publishing pornography. Certain military offences attract death penalty are cowardice, assisting the enemy, enmity against god espionage and treason etc. So Iran is one of the 57th Retentionist countries of death penalty under their criminal law.

4.10. Saudi Arabia:

Capital punishment is a legal penalty in Saudi Arabia in 2016 it performed at least 154 execution¹²⁹ while in 2015 about 158, at least 146 in 2017¹³⁰, and at least 149 in 2018, people were executed by Saudi authorities. Saudi Arabia ends death penalty for minors. Saudi Arabia will no longer impose the death penalty on minors who committed crimes. The UN Conventions on the Rights of the Child-which Riyadh has signed- says capital punishment should not be used for offences carried out by minors. A record 184 people were executed in the kingdom in 2019, according to human rights group Amnesty International.

On 2nd Jan 2016, Saudi Arabia authority has carried out a mass execution of forty seven (47) imprisoned civilians convicted for terrorism in twelve (12) different provinces in the country, forty three (43) people are beheaded four (4) people were executed by firing squads, among people killed was Shia Sheikh Nimral Nirm. Capital offences under which death sentence can be awarded in Saudi Arabia are- on the commission of crimes such as treason, espionage, murder, rape, terrorism, drug smuggling, apostasy, armed robbery blasphemy, adultery, burglary in aggravated circumstances, sexual misconduct, homo-sexuality, sodomy, witchcraft waging war with god etc. Murder is punishment by death but execution can be avoided by paying blood money to victim family if they agree. The sharia law there are three categories of criminal offence where Saudi judiciary can impose death penalty- in Hudud punishment are fixed for specific crimes- under this law crimes which attract death penalty are crimes of apostasy, adultery, sodomy. In Qisas- rule of eye for an eye is adopted, retaliatory punishment is allowed it includes murder in Tazir- general crimes defined by national regulation. Drug trafficking also attracts death penalty under this law.

Method of Execution:

In Saudi Arabia execution of death sentence is usually carried out publicly by beheading with a sword. In some cases crucifixion on the beheaded body is ordered for certain period or days and also death sentence is carried out by shooting or by stoning. So, Saudi Arabia is one of the 57th Retentionist countries of capital punishment in their legal system.

¹²⁹ "Death Sentences and executions in 2016". Amnesty .org. Retrieved August 21, 2017. .
(www.en.m.Wikipedia.org. Visited on 13th April, 2020).

¹³⁰ The Death penalty in 2017: Facts and Figures. Amnesty International. 2018-04-12. Retrieved 2018-07-16. .
(www.en.m.Wikipedia.org. Visited on 13th April, 2020).

4.11. Islamic Republic of Afghanistan

Afghanistan is one of the 57th Retentionist of capital punishment in the world. Capital punishment is legal penalty in Afghanistan. Various offences punishable for death in Afghanistan are- aggravating murder, treason, kidnapping, terrorism related offences resulting in death, offences of rape and adultery etc. In the reign of Taliban government offences punishable by death are- adultery, homosexual acts, apostasy and blasphemy etc, are punishable with death.

Methods of execution of death sentence

1. Hanging and
2. Shooting squad.

Various execution of death sentence by hanging and shooting are- on April 2014 Abdulla khan was executed by a gun shot in head. He was an afghan serial killer, found guilty in killing more than 20 people including his wife. It was the first execution since the fall of the Taliban government in late 2001. In Oct.2007, fifteen prisoner were executed by shooting including Reza Khan. He was charged of murder, rape and robbery involving four journalist on November 19, 2001. He was convicted and executed on Oct 8, 2007. On June 2011, two mass killer was executed by hanging. One of the killer was Zar Ajam, who had randomly shot dead 40 people inside a branch of Kabul bank in Jalalabad Afghanistan.

On Nov. 2012 fourteen prisoners were executed by hanging and in 2014 five men were executed by hanging.¹³¹ They were convicted for robbery and gang rape.¹³² On 8th may, 2016 six convicts whom had been sentence to death were executed by hanging. They are –MHD usam, who planted improvised explosive device (IED) which kill 7 police officer. He was convicted by the court and sentence to death. Khan agha-was convicted for his involvement in the attack on Abdullah Laghman deputy head of NDS in 2009 were 14 civilians were killed, he was sentence to death. Hamidulla- was convicted for his involvement in assassination of Burhanuddin Rabbami in Kabul in Sept 2011, he was sentence to death. MHD. Ismail- was convicted for his involvement in planning suicide attack on finest supermarket in 2011 where 9 afghan people were killed and 5 foreigner in which MS Hamida barmaki, commissioner of human rights commission of Afghanistan was also killed along with her husband. So, he was sentence to death. Hujatullah- was convicted for planting improvised explosive device (IED)

¹³¹ Afghanistan executes eight prisoners: officials”. English.ahram.org.eg.2012-11-20. Retrieved 2014-02-23 (www.en.m.Wikipedia.org. Visited on 13th April, 2020)

¹³² Afghanistan hangs “terrorists” News.iafrica.com.2012-11-21. Retrieved 2014-02-23. (www.en.m.Wikipedia.org. Visited on 13th April, 2020)

in Paghman province on vehicle which killed 9 civilians. So, he was sentence to death. Akmal- was convicted for planting attack on Mhd-Daud khan military hospital in 2011, killed 6 peoples for Afghan National Security. So, he was sentence to death. So, Afghanistan is one of the strong Retentionist countries of capital punishment in the world. Where public execution still prevails.

4.12. Syrian Arab Republic

In Syria capital punishment is a punishment there are various crimes where on the commission of such crimes there are mandatory death sentence also under the penal law. Various crimes where punishment is a death sentence also under the penal law are – premeditated murder, murder to further felony, murder of a state employee charged with the implementation of the narcotic drugs law during the performance of his functions, arson resulting in death, gang robbery resulting in death.

Terrorist acts and financing of terrorism resulting in death, terrorist act and financing of terrorism not resulting in death, drug possession, treason and it include political dissidence, espionage by military personal, desertion, in-subordinations, rebellion, gang robbery, attempting a death eligible crimes. Belonging to Moslem brethren group (Muslim Brotherhood Organisation) falsifications of material evidence resulting in a third party being convicted for a drug offences and sentence to death etc. Mandatory death sentence imposed on the commission of the following offences they are- drug trafficking aggravated by recidivism status as a state employee, use of minor membership in Moslem brethren group (Muslim Brotherhood Organisation).

Modes of Execution of Death Sentence:-

Death sentence are carried out usually by hanging in cases of ordinary persons and by shooting for military personnel's. So, Syrian government has various crimes which is punishable with death and also has mandatory death penalty for various crimes as provided under there penal law. The executions of offenders cannot be ascertained in the cases of Syrian government due to civil strife prevailing in Syria.

4.13. International Perspective of Retentionist and Abolitionist of Capital Punishment:

There are 104 countries in the world whose penal does not have death penalty they abolished death penalty for all crimes and there are 30 countries whose penal laws does not have provision for awarding death penalty. Abu they for many years did not implement any death penalty in exceptional cases only and there are about 57 countries who retain death penalty and implement execution till date. The diagram below shows the countries who has

practically did not implemented death penalty though they have punishment of death penalty for various crimes they are as given below :-

4.13.1. Countries which Abolished Capital Punishment for All Crimes¹³³

There are 104 countries whose law does not provide for death penalty for any crime or offence are -

ALBANIA	CANADA
ANDORRA	COLOMBIA
ANGOLA	COOK ISLANDS
ARGENTINA	CONGO REPUBLIC
ARMENIA	COSTARICA
AUSTRALIA	COTE DIVOIRE
AUSTRIA	CROATIA
AZERBAIJAN	CYPRUS
BELGUIM	CZECH REPUBLIC
BENIN	DENMARK
BHUTAN	DJ' BOUTI
BOLIVIA	DOMINICAN REPUBLIC
BOSNIA & HERZEGOVING	ECUADOR
BULGARIA	ESTONIA
BURUNDI	FINLAND

CAMBODIA	FIJI
CABO VERDE	FRANCE
GABON	MONACO
GEORGIA	MONTENEGRO
GERMANY	MOZAMBIQUE
HAITI	NAMIBIA
HLOY SEE	NAURU
HONDURAS	NETHERLANDS
HUGARY	NEW ZEALAND

¹³³ www.deathpenaltyinfo.org. (Visited on 29th march, 2020).

ICELAND	NICARAGUS
IRELAND	NIUE
ITALY	NORWAY
LIECHTENSTEIN	PALAU
LUXEMBOURG	PHILIPPINES
MACEDONIA	POLAND
MADAGASCAR	PROTUGAL

MAURITIUS	ROMANIA
MALTA	RWANDA
MARSHALL ISLAND	SAMOA
MEXICO	SAN MARINO
MICRONESIA	SAOTOME & PRINCIPLE
MOLDOVA	SENEGAL
SERBIA	SWEDEN
SLOVAKIA	SWITZERLAND
SLOVENIA	TIMOR-LESTE
SOLOMON ISLAND	TOGO
SOUTH AFRICA	TURKEY
SPAIN	TURKMENISTAN
SURINAME	TUVALU

4.13.2. Countries Which Abolished Capital Punishment for Only Ordinary Crimes:-

There are 7 countries where death penalty is given on exceptional case such as crimes under military law or crimes committed in exceptional circumstances only are –

BRAZIL	CHILE
EL SAL VADOR	GUINEA
ISRAEL	KAZAKHSTAN
PERU	

4.14. Capital Punishment in International Human Rights Treaties

- The International Covenant on Civil and Political Rights ('ICCPR') is one of the key documents discussing the imposition of death penalty in international human rights law. The ICCPR does not abolish the use of the death penalty, but Article 6 contains guarantees regarding the right to life, and contains important safeguards to be followed by signatories who retain the death penalty.¹³⁴
- The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty is the only treaty directly concerned with abolishing the death penalty, which is open to signatures from all countries in the world. It came into force in 1991, and has 81 states parties and 3 signatories.¹³⁵
- Similar to the ICCPR, Article 37(a) of the Convention on the Rights of the Child ('CRC') explicitly prohibits the use of the death penalty against persons under the age of 18. As of July 2015, 195 countries had ratified the CRC.¹³⁶
- The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment ('the Torture Convention') and the UN Committee against Torture have been sources of jurisprudence for limitations on the death penalty as well as necessary safeguards. The Torture Convention does not regard the imposition of death penalty per se as a form of torture or cruel, inhuman or degrading treatment or punishment ('CIDT'). However, some methods of execution and the phenomenon of death row have been seen as forms of CIDT by UN bodies.¹³⁷
- In the evolution of international criminal law, the death penalty was a permissible punishment in the Nuremberg and Tokyo tribunals, both of which were established following World War II. Since then, however, international criminal courts exclude the death penalty as a permissible punishment.

Of the treaties mentioned above, India has ratified the ICCPR and the CRC, and is signatory to the Torture Convention but has not ratified it. Under international law, treaty obligations are binding on states once they have ratified the treaty. Even where a treaty has been signed but not ratified, the state is bound to "refrain from acts which would defeat the

¹³⁴ India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp.40-41. (www.en.m.Wikipedia.org. Visited on 29th march, 2020).

¹³⁵ India. Law Commission of India, Report No.262 on Death Penalty, August 2015, p.43, (www.en.m.Wikipedia.org. Visited on 29th march, 2020).

¹³⁶ India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp. 43-44, (www.en.m.Wikipedia.org. Visited on 29th march, 2020).

¹³⁷ India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp. 44-45, (www.en.m.Wikipedia.org. Visited on 29th march, 2020).

object and purpose of a treaty”.¹³⁸

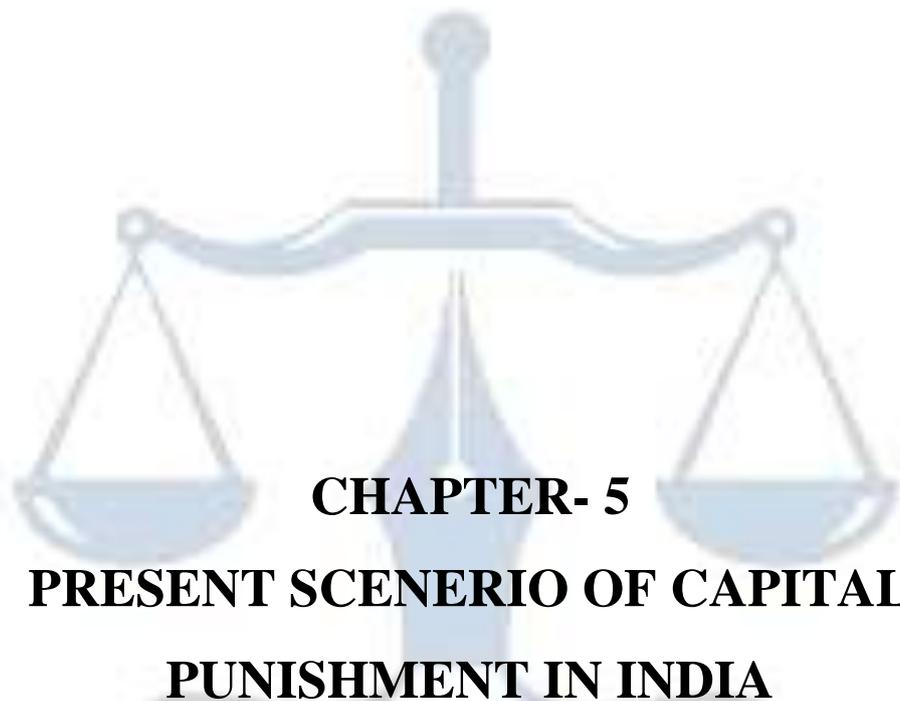
4.15. Political Commitments Regarding Capital Punishment Globally

- Several resolutions of the UN General Assembly (UNGA) have called for a moratorium on the use of the death penalty. In 2007, the UNGA called on states to “progressively restrict the use of the death penalty, reduce the number of offences for which it may be imposed” and “establish a moratorium on executions with a view to abolishing the death penalty.” In 2008, the GA reaffirmed this resolution, which was reinforced in subsequent resolutions in 2010, 2012, and 2014. Many of these resolutions noted that, “a moratorium on the use of the death penalty contributes to respect for human dignity and to the enhancement and progressive development of human rights.” In 2014, 117 States had voted in favour of the most recent resolution. India has not voted in favour of these resolutions.¹³⁹
- In a 2013 resolution, the UN Human Rights Council acknowledged “the negative impact of a parent’s death sentence and his or her execution on his or her children, and urged “States to provide those children with the protection and assistance they may require,” Human Rights Council resolution, 2014 noted that “States with different legal systems, traditions, cultures and religious backgrounds have abolished the death penalty or are applying a moratorium on its use” and deplored the fact that “the use of the death penalty leads to violations of the human rights of those facing the death penalty and of other affected persons.” The Human Rights Council urged states to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights.
- The law of extradition has been another tool for countries pushing for the abolition of the death penalty. Several abolitionist countries either require assurances that retentionist-extraditing countries not impose the death penalty, or have included such a clause in bilateral extradition treaties.¹⁴⁰

¹³⁸ India. Law Commission of India, Report No.262 on Death Penalty, August 2015, p. 46, (www.en.m.Wikipedia.org. Visited on 29th march, 2020).

¹³⁹ India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp. 51-52. (www.en.m.Wikipedia.org. Visited on 29th march, 2020).

¹⁴⁰ India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp. 52-53. (www.en.m.Wikipedia.org. Visited on 29th march, 2020).



CHAPTER- 5

PRESENT SCENERIO OF CAPITAL PUNISHMENT IN INDIA

5.1.General:-Capital Punishment is a legal penalty in India.¹⁴¹ It has carried out in nine instances since 1995¹⁴², while a total of thirty executions have taken place in India since 1991, the most recent of which were carried out in 2020. The apex court had confirmed seven death penalties in 2017 whereas in 2016 it had confirmed capital punishment in one case and commuted seven. However, the trial courts in India sentenced 162 persons to the gallows in 2018, which was the highest in nearly two decades, since 2000. Of these, 45 included cases of murder, and 58 murder and sexual offences.

The Supreme Court in *Mithu vs. State of Punjab* struck down section 303 of the Indian Penal Code, which provided for a mandatory death sentence for offenders who committed murder whilst serving a life sentence. The number of people executed in India since the nation

¹⁴¹ Majumder, Sanjoy. "Indian and death penalty. BBC News 4 August 2005. (www.en.m.Wikipedia.org. Visited on 20 march, 2020).

¹⁴² "Yakub Memon case: Death Penalty in India, by the numbers". 27 July 2015. . (www.en.m.Wikipedia.org. Visited on 20 march, 2020).

achieved Independence in 1947 is a matter of dispute; official government statistics claim that fifty-two people had been executed since Independence. However, research by the people's union for civil liberties indicates that the actual number of execution is in fact much higher, as they located records of 1,422 executions in the decade from 1953 to 1963 alone. Research published by national law university, Delhi on death row convicts since 2000 had found that of the 1,617 prisoners sentenced to death by trial courts in India, capital punishment was confirmed in only seventy-one cases. NLU Delhi confirmed 755 executions in India since 1947. National Law University, Delhi examined 1,414 prisoners who were executed, in the available list of convicts hanged in post-independence since 1947.

According to a report of the Law Commission of India (1967), the total number of cases in which the death sentence was handed down in India from 1953-63 was 1410. In December 2007, India voted against a United Nations General Assembly Resolution calling for a Moratorium on the death penalty. In November 2012, India again upheld its stance on capital punishment by voting against UN General Assembly Draft Resolution seeking to end the institution of Capital Punishment globally.¹⁴³ On 31 August 2015, the Law Commission of India submitted a report to the Government which recommended the abolition of Capital Punishment for all crimes in India, excepting the crime of waging war against the nation or for terrorism related offences. The report cited several factors to justify abolishing the death penalty, including its abolition by 140 other nations, its arbitrary and flawed application and its lack of any proven deterring effect on criminals.¹⁴⁴

5.2. Constitutional Validity of Capital Punishment in India

The validity of the death penalty came before a Constitution Bench of the Supreme Court in *Jag Mohan Singh v. State of U.P.* AIR 1973, SC 997. It was argued that the sentence of death deprived a citizen of all the freedoms under Article 19(1) and, therefore, the death penalty was constitutionally impermissible. Palekar J. observed that the court would assume for the purpose of the present argument that the right to live was basic to the freedoms mentioned in Article 19 and that no law could deprive a citizen of his life unless J. came to the conclusion that the law was reasonable and in public interest.

5.2.1. Article 21 of Indian Constitution

¹⁴³ General Assembly GA/11331, Sixty-Seventh GENERAL ASSEMBLY PLENARY 60TH MEETING". 20 DECEMBER, 2012. ANNEX XIII. Retrieved 30 July 2013. . (www.en.m.Wikipedia.org. Visited on 20 March, 2020).

¹⁴⁴ "End death penalty, keep it only for terror: Law panel tells government". 1 September 2015. Retrieved 9 September 2015. . (www.en.m.Wikipedia.org. Visited on 20 March, 2020)

The greatest heritage of democracy is the right to personal liberty and dignity. Most of Fundamental Rights would be insignificant if an individual is denied the right to life and personal liberty. All democratic countries recognize the Fundamental Right to life and Personal Liberty. In modern constitution like other freedoms it is also not recognised in absolute terms so it is now an established constitutional norm that an individual can be deprived of life and personal liberty under a valid law and under a valid procedure. Article- 21- of the Indian Constitution guarantees the fundamental right to life and personal liberty by laying down “*No person shall be deprived of his life or personal liberty except according to procedure established by law.*”¹⁴⁵This Article lays down that an individual can be deprived of his life or personal liberty only under a law passed by a competent legislature conferring authority for the deprivation of either or both and by laying down a procedure for such deprivation.

5.2.1.1. Right to Life

The expression “*Life*” in Art 21 is given an expressive interpretation by the Supreme Court of India. Right to life does not mean an animal existence but to live with human dignity. In *Munn V. State of Illinois, Field*¹⁴⁶, J observed that-“by the terms life as here used, something more meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits, the mutilation of the body by the amputation of an arm or leg or the putting of an eye or the destruction of any other organ of the body through which the soul communicates with the other world.”

In *Francis Coralie V. Administrator Union*,¹⁴⁷The Supreme Court has held that the expression “life” in Art 21 does not connote merely physical or animal existence. but embraces something more Bhagwati, J held “we think that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life, such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing of oneself in diverse forms, freely moving about and mixing commingling with fellow human beings.

5.2.1.2. Right to Personal Liberty

In *A.K. Gopalan V. State of Madras Case*¹⁴⁸- Supreme Court held that the “Personal liberty” in Article 21 means nothing more than the liberty of the physical body i.e. freedom

¹⁴⁵ The Constitution of India

¹⁴⁶ 94 U.S 113 (1876)

¹⁴⁷ AIR 1981 746, 1981 SCR(2) 516

¹⁴⁸ AIR 27,1950 SCR 88

from arrest and detention without authority of law, and further stated that as by qualifying the word “Liberty” with personal, the import of the word personal liberty is narrowed down to the meaning given in English law the Expression “Liberty of Person” was defined by Prof. Dicey that “Personal Liberty means freedom from physical restraints and coercion which is not authorised by law. And further majority said that Art-19 and 21 deal with different aspects of liberty Art-21 is a guarantee against deprivation of personal liberty while Art 21 is a guarantee against unreasonable restriction on the right of movement.

*In Maneka Gandhi V. Union 1978*¹⁴⁹ Supreme Court has overruled Gopalan’s case and gave wide and liberal interpretation to the scope “personal Liberty”. Bhagwati J. observed: The expression “Personal Liberty in Art 21 of widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of district Fundamental rights and given additional protection under Art 19”.

Another dimension of right to personal liberty is that a person is not wholly denied his Fundamental right even when confined to a prison. A person is entitled to all his Fundamental Rights unless his liberty has been constitutionally curtailed. Violation of the right to personal liberty by a private person is not within the preview of Article 21. Therefore a person whose right to personal liberty is infringed by a private individual must seek his remedy under the ordinary law not under Article 21 of the Indian Constitution.

5.2.1.3. Procedure Established By Law

The United State of America constitution provides that a person cannot be deprived of his liberty “without due process of law” the American Supreme Court interpreting that court would examine the law to ascertain if it is a just law, both as the procedure and to the substantive provision contained therein. The expression “procedure established by law” means procedure laid down by statute or procedure prescribed by the law of the state. According-

- (i) There must be a law justifying interference with the person’s life or personal liberty,
- (ii) The law should be a valid law,
- (iii) The procedure laid down by law should have been strictly followed. The executive in the absence of any procedure prescribed by law, sustaining the deprivation of personal liberty shall act in violation of Art-21 if it interferes with the personal liberty of the individual.

*In A.K. Gopalan V. State Of Madras*¹⁵⁰, Supreme Court held that the expression “procedure established by law” means procedure enacted by law made by the state and the

¹⁴⁹ AIR 597, 1987 SCR(2) 621

¹⁵⁰ AIR 27, 1950 SCR 88

word “law” in Art 21 does not mean natural law based on principle of natural justice that in effect means that Art 21 gives protection only against the executive and not against the legislature.

The interpretation was taken to its logical conclusion in *A.D.M, Jabalpur v. Shivakant Shukla*¹⁵¹ where the Supreme Court held that Art.21 was the sole repository of the right to life and personal liberty against its illegal deprivation by the executive and in case enforcement of Art.21 was suspended by a president order under Art.359 of the constitution of India, the court could not enquire whether the executive action depriving a person of his life or personal liberty was authorized by law. And also Court held that various Fundamental rights are exclusive of each other i.e. the principle of exclusiveness of Fundamental right was propounded which emphasized that each Fundamental right was independent of another. And also held that Art 19 has no application to law depriving a person of his life and personal liberty enacted under Art.21 of the Indian Constitution and held that Article 21 and Article 19 dealt with different subjects. The exclusiveness of Fundamental right expounded was rejected in *R.C.Cooper V. Union of India*.¹⁵²

5.2.1.4. Procedure Established by Law and Due Process of Law

In *Gopalan's Case*, the Supreme Court rejected the contention of the petitioner that “procedure established by law” in Art.21, meant the same thing as “due process of law” in the American constitution and held that there is no justification for adopting the meaning of the word “law” as interpreted by the supreme court of America in the expression due process of law merely because the word “law” is used in Art 21. The court supported its decision by looking into the report of the Drafting committee of the constituent assembly in respect Art 21 the report of committee show, that constituent assembly had formerly use the American expression “due process of law” but they deliberately dropped it in favour of the expression “procedure established by law”. So the expression “procedure established by law” means there should be a procedure passed by a valid law, made by state and only the protection of procedure law is guaranteed under Article 21 whereas “due process of law” includes both substantive and procedure law and requires it to be “due” which means just, fair and reasonable upholding the principle of Natural justice.

5.3. Constitutional of Capital Punishment in India

Punishment for wrong doer exist from the time society come into being. Death penalty has

¹⁵¹ AIR1976 SC 1207,1976 SCR 172

¹⁵² AIR1970 SC 546

been one of the mode of punishment from the time immemorial of the society. For the commission of heinous crime by a person, as the act has societal abhorrence, need to be punished and Death penalty has been use as the punishment for serious crimes and to eliminates criminal from the society. India jurisprudence is based on the combination of deterrent and reformative theories of punishment while the punishment are to be imposed to create deter amongst the offenders or the offender are given opportunity for reformation. India is one of the 57 Retentionist countries which have retained death penalty on the ground that, Death sentence would be awarded only in the “rarest of rare cases” or “special reason” it depend upon facts and circumstance of the case. Further Article 14 of constitution declares “equality before law and equal protection of the law which means that no person shall be discriminate against unless the discrimination is required to achieve equality.¹⁵³Capital sentence seems to be an anti-thesis of one’s right to life. However it is an indisputable fact that there is nothing in the constitution of India which expressly holds capital punishment as unconstitutional. The constitutional validity of death penalty has been challenged from time to time, various cases on Capital Punishment.

*In Jagmohan Singh V. State of Punjab*¹⁵⁴In this case the legality of imposing death sentence was challenged as it is violative of Art.19 and 21 of the constitution and it did not provided any procedure for awarding death sentence to the judge bulk discretion is given to the judge the procedure provided by criminal procedure code was confined only to finding of guilt and not for awarding Death sentence. Supreme Court- Five judge Bench held that- if the entire procedure for criminal trial under the Cr.P.C for arriving at sentence of death is valid than imposition of death sentence in accordance with the procedure established by law cannot be said to be unconstitutional therefore the capital punishment was not violative of Art. 21 and 19 and was constitutionally valid.

But in *Rajendra Prasad V. State of U.P*¹⁵⁵, *Krishna Iyer J* held that capital punishment would not be justified unless it was shown that criminal was dangerous to the society. He held that giving discretion to the judge to make choice between death sentence and life imprisonment on “special reason” under section 354(3) of Cr.P.C. would be violative of Article 14 of the constitution.

Two things required for imposed death penalty-

(i) The special reason should be recorded for imposed death penalty in a case.

¹⁵³ Art.17 of the Constitution of India

¹⁵⁴ AIR 1978 SC 947

¹⁵⁵ AIR 1979 SC 916

(ii) The death penalty must be imposed only in extra ordinary circumstances.

The question of reasonable of death penalty was again raised before constitutional Bench of Supreme Court in *Bachan Singh V. State Of Punjab*¹⁵⁶, the supreme court by 4:1 majority over ruled Rajendra Prasad's decision and held that the provision of death penalty under section-302 IPC as an alternative punishment for murder is not violative of Article 21.

5.4. Limitation on Capital Punishment

5.4.1. Legislative Limitation

Section 354(3) of Cr.P.C, 1973, mandates the court convicting a person for an offence punishable with death, or in the alternative, with imprisonment for life or imprisonment for a term of years, not to impose a sentence of death on that person unless there are "special reason" to be recorded for such sentence. The expression 'special reason' in the context of this provision, means 'exceptional reasons' founded on the exceptionally grave circumstances of the particular case relating to the crime as well as criminal. Thus, the legislative policy is clear on the face of section 354(3) that on conviction for murder and other capital offences punishable in the alternative with death under the Penal Code, the extreme penalty should be imposed only in extreme cases. Now the Code of Criminal Procedure has provided for the hearing of the accused on the question of sentence. This provision occurs in sections 235 and 248. According to section 235(2) of Cr.P.C, 1973, the accused has the right to address the court, after the finding of the guilt by the court and can bring on record mitigating circumstances bearing on the point of sentence.

5.4.2. Judicial Limitation

The majority decision in *Bachan Singh v. State AIR 1980 SC 898*, upheld the constitutionality of death penalty but held that it should be imposed on only in 'rarest of rare' cases. This means Death penalty is a punishment that is to be awarded only in special cases.

In T.V. Vatheeswaran V. State of Tamil Nadu (1983)2 SCC 68, it was held that any delay exceeding 2 years in the execution of a death sentence would justify its modification to life imprisonment. *In Sher Singh v. State of Punjab (1983)2 SCC 344*, a larger bench of the Supreme Court held that the delay in the execution of a death sentence, irrespective of the circumstances under which it was caused, will not by itself constitute an adequate grant of modification of the sentence. The court reaffirmed the principle in *Triveniben V. State of Gujarat (19of89)ISCC 678* holding that only material delay which would be material for consideration will be the delay in disposal of the mercy petition or delay occurring at the

¹⁵⁶ AIR 1980 SC 898

instance of the executive.

5.4.3. Death Penalty –An Alternative Punishment

The provision of death penalty as an alternative punishment for murder in section-302, Indian Penal Code is not unreasonable and it is in the public interest. There are several offences under the Penal Code, such as theft, cheating, ordinary assault, which do not violate or affect ‘public order’, but only ‘law and order’. These offences injure only specific individuals as distinguished from the public at large. It is by now settled that ‘public order’ means ‘even tempo of the life of the community’. That being so, even all murders do not disturb or affect ‘public order’. Some murders may be of purely specific individuals, and consequently, such murders may not be covered by ‘public order’ within contemplation of (1), (2), (3) and (4) of Article 19. Such murders do not lead to public disorder but to *disorder simpliciter*. Yet, no national being can say that punishment of such murderers is not in the general public interest. The real distinction between the areas of ‘law and order’ and ‘public order’ lies not merely in the nature or quality of the act, but in the degree and extent.¹⁵⁷

5.4.4. Death Penalty Is Penological or Not?

The question whether or not death penalty serves any penological purpose, is a difficult, complex and intractable issue. It has evoked strong and divergent views. The reference has arisen in these circumstances. Bachan Singh, appellant in Criminal Appeal No. 273 of 1979, was tried and convicted and sentenced to death under section 302, Indian Penal Code for the murders of Desa Singh and Durga Bai by the Sessions Judge. The High Court confirmed his death sentence and dismissed his appeal. *In re Rajendra Prasad*, the majority has held that: “such extraordinary grounds alone constitutionally qualify as special reasons which leave no option to the court but to execute the offender if state and society are to survive.” If imprisonment were to be regarded as a ‘restriction’ of the right mentioned in Article 19(1) (d), it would equally be a restriction on the rights mentioned by the other sub-clauses of Clause (1), with the result that all penal laws providing for imprisonment as a mode of punishment would have to run the gauntlet of class (2) to (6) before their validity could be accepted. Article 20, 21 and 22 are primarily concerned with penal enactments of other laws under which personal safety or liberty of persons could be taken away in the interests of the society and they set down the limits within which the State control should be exercised.

In re Jagmohan also, this court took due note of the fact that for certain types of murders,

¹⁵⁷ Neeraj Kumar Gupta, Singhal’s Criminology P-144-145, (Singhal Law Publications), Delhi-84, Fourth Edition-2015, Reprint: 2019-20

death penalty alone is considered an adequate deterrent: “A large number of murders is undoubtedly of the common type. But some at least are diabolical in conception and cruel in execution. One cannot ignore the fact that life imprisonment works out in most cases to a dozen years of punishment, and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty. *In Ediga Anamma v. State of Andhra Pradesh*, V.R. Krishna Iyer, J., observed that “deterrence through threat of death may still be a promising strategy in some frightful area of murderous crime”.¹⁵⁸

5.5. Evolution of the Doctrine of Rarest of the Cases

It may do so (in rarest of the rare cases) when its collective conscience is so shocked that it will except the judicial authority to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the antisocial or abhorrent nature of the crime.

- i. Manner of Commission of Murder: When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.
- ii. Motive for Commission of Murder: When the murder is committed for a motive which evinces total depravity and meanness.¹⁵⁹
- iii. Anti-social or Socially Abhorrent Nature of the Crime: When murder of a member of a scheduled caste, tribe or minority community is committed not for personal reasons but under such circumstances which arouse social wrath.¹⁶⁰
- iv. Magnitude of Crime: When the crime is enormous in proportion.
- v. Personality of Victim of Murder: When the victim of murder is (a) an innocent child, (b) a helpless women or a person rendered helpless by old age or infirmity, (c) when the victim is a person vis-à-vis when the victim is a public figure generally lived and respected by the community.

The following propositions emerged from Bachan Singh’s case:

¹⁵⁸ Neeraj Kumar Gupta, Singhal’s Criminology 145 (Singhal Law Publications), Delhi-84,Fourth Edition-2015, Reprint: 2019-20

¹⁵⁹ Neeraj Kumar Gupta, Singhal’s Criminology 149 (Singhal Law Publications), Delhi-84,Fourth Edition-2015, Reprint: 2019-20

¹⁶⁰ Neeraj Kumar Gupta, Singhal’s Criminology 149 (Singhal Law Publications), Delhi-84,Fourth Edition-2015, Reprint: 2019-20

- i. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
- ii. Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
- iii. Life Imprisonment is the rule and death sentence is an exception.
- iv. A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstance has to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before the option is exercised.

In order to apply these guidelines *inter alia* the following questions may be asked and answered:

- (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
- (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

The crime committed carried features which could be utterly horrendous especially when we know the weapons and the manner of their use. The victims could offer no resistance to the accused appellants. The law clamours for a sterner sentence; the crime being heinous, atrocious and cruel. These two defenceless and helpless men were put to death while asleep. The crime was gruesome and cold-blooded revealing the propensity of the accused appellants to commit murder. "A young man named Mohinder Singh, a bread-earner of the family, was put to death by Macchi Singh while asleep in his blissful abode. The crime was pre-mediated and hair-raising to the society at large in the sequence of which it came to be creating a great risk of serious bodily harm and death too many persons." Not only were the crimes cold-blooded, calculated and gruesome in features, but also these had been committed while spreading horror of a killing spree. They put to death a widow. The helpless state of the victims and the circumstances of the case lead us to confirm the death sentence.

Decision:

We are of the opinion that in so far as these three appellants are concerned the '*rarest of rare*' cases rule prescribed in *Bachan Singh's case* is clearly attracted and sentence of death is called for. We are unable to persuade ourselves that a sentence of imprisonment for life be adequate in the circumstances of the crime. We, therefore, fully uphold the view concurrently

taken by the Sessions Court and the High Court that extreme penalty of death required to be imposed on appellants (1) Macchi Singh, (2) Kashmir Singh, son of Arjan Singh, and (3) Jagir Singh. We accordingly confirm the death sentence imposed on them and dismiss their appeals.¹⁶¹

Appeals preferred by appellants Mohinder Singh is allowed. The death sentence imposed on the appellants named hereafter, viz. (1) Macchi Singh, (2) Kashmir Singh, son of Arjan Singh, and (3) Jagir Singh., having been confirmed, the sentence shall be executed in accordance with law. Appellants (1) Phuman Singh, (2) Jagtar Singh, and (3) Kashmir Singh, S/O Wadhawa Singh, who are on bail pursuant to the order passed by this Court on September 15, 1982 shall surrender their bail bonds in order to undergo the sentence imposed by the lower courts and confirmed by this Court.¹⁶²

5.6. Various Cases which falls under “Rarest of Rare Cases”, Judgment Given by our Honourable Supreme Court and High Court are given below:

*In Dhanajoy Chatterjee V. Union of India*¹⁶³In this case Dhanajoy was convicted for committing rape and murdering 14 years old girl name Hetal Parek at her apartment residence in Bhowanipur on 5th of March 1990. The Supreme court- convicted Dhanajoy for raping and murdering Hatel Parek who was only 14 years of old. And sentence him to death as he was to death as he was to give security to the dwellers of the apartment. His act was contravened to his duty.

Gentela Vijaya Vardhan Rao V. State Of Andhra Pradesh ¹⁶⁴The accused set the bus on fire with the sole motive of committing robbery. Twenty three persons were burst alive in a bus. The Court upheld the death sentence awarded to the accused after balancing the aggravating and mitigating circumstances.

Dayanidhi Bisoi V. State Of Orissa The accused murder a women and a minor daughter without any provocation in order to get their jewellery. The High Court confirmed the death sentence awarded by trial court. The Supreme Court held that “as the murder were committed in deliberate and diabolic manner, the cold blooded and premeditated approach of the accused death innocent life including a child of three years just to gain monetary benefit, the extenuating circumstances put forth by the accused in regard to his age, surviving relative and possibility

¹⁶¹ Neeraj Kumar Gupta, Singhal’s Criminology P-151 (Singhal Law Publications), Delhi-84, Fourth Edition-2015, Reprint: 2019-20

¹⁶² Neeraj Kumar Gupta, Singhal’s Criminology P-151 (Singhal Law Publications), Delhi-84, Fourth Edition-2015, Reprint: 2019-20.

¹⁶³ AIR 1936 Cal 43,1994(2)SCC 220

¹⁶⁴ 1996(6) SCC 241

of rehabilitation would not justify the court to impose a sentence of life imprisonment. It falls under rarest of rare case.

*Devendra Prasad Tiwari V. State Of Uttar Pradesh*¹⁶⁵ the accused intentionally cause death of his own son age 30 years. The Supreme Court keeping in view, the motive and manner with which the crime was committed ghastly was of the opinion that the death penalty awarded to the appellant in appropriate.

*Dagdu and Others V. State of Maharastra*¹⁶⁶The accused murdered five small girls, a one year old infant and four woman cold-bloodedly. The Supreme Court while confirming the death sentence upon four of the accused, acquitted two persons. Held that it is a case of rarest of rare case.

*Kehar Singh & Ors V. State (Delhi Admn)*¹⁶⁷ Delhi Court panel said that- No excuse or circumstances can mitigate such a treacherous and cowardly out where a defences women was cruelly slaughter by the guardian of her safety.” The judgment condemned the most inhuman mode of killing and said. Two persons crowing in before an orderly woman and mercilessly pumping into her not one or two but as many as 30 bullets is the ghastly scene to be conjured in the mind eye and confirms the death sentence.

In Deena V. State of Uttar Pradesh,¹⁶⁸ in this case Deena was convicted for murdering a witness in a firing incident while they were sleep. The motive was to teach a lesson to the deceased for appearing as a witness against him. The High Court confirmed the extreme penalty of law imposed by the Session Court, in imposing the death sentence, held that; “the appellant is a desperate character and that while he was on bail in Ram Chandra murder case he committed the murder of Nainsukh, one of the prosecution witness in Ram Chandra murder case. The offence was committed after deliberate planning in the night when the victim was sleeping. It was for the purpose of teaching a lesson to a witness who gave evidence against the accused. We do not see any extenuating circumstance. We confirm the sentence of death and dismiss this appeal.”

Govindasswami V. State of Tamil Naidu,¹⁶⁹ This case related to five murders committed while the deceased were sleeping at home. The Court held that it is a “rarest of rare case” and confirmed the sentence of death to the accused.

¹⁶⁵ JT200(5) SC 590

¹⁶⁶ 1978(4)SCC 474

¹⁶⁷1988 AIR 1883,198 Scr supl(2) 24

¹⁶⁸ 1978 AIR 1605

¹⁶⁹ 1977(3) SCC 68

Yakub Abdul Razar Memon V. State Of Maharastra,¹⁷⁰ Yakub Memon was convicted over his involvement in the 1993 Bombay bombing by special terrorist and disruptive activities court on 27 July 2007. He was the brother of one prime suspects in the bombing, tiger Memon. Supreme Court of India confirmed Memons convictions of death sentence for conspiracy through financing the attacks. The Judges called him the master and driving force behind the bombing. His review petition was rejected by the supreme court of India. His mercy petition was also rejected by the president of India. Memons death sentence was confirmed by the Court.

*Gurudev Singh V. State of Punjab*¹⁷¹ In this case Supreme Court Upholds the imposition of the death penalty upon two accused who were found guilty of killing fifteen persons. The High Court affirmed the death sentence upon two of the accused, whilst reducing the sentence to life imprisonment for the other three accused. The Supreme Court found it to be a fit case for awarding the death penalty.

*In Henry Westmuller Roberts V. State of Assam*¹⁷² In this case one minor boy was allegedly murdered by the two accused for ransom. The Court held that the offence committed by the accused who was the originator of the idea of kidnapping the children of rich people for the purpose of extracting a ransom were heinous and pre-planned. It held the case to be a “rarest of rare case” and confirmed the death sentence upon the accused.

Shabnam and Samir V. State of Uttar Pradesh,¹⁷³ The Supreme Court imposed death sentence under section 302 IPC on a women and her lover/Samir who wiped out her entire family- parents, two brothers, sister-in-law and two minors, after heavily sedating them to remove opposition to their love affair and also to grab the family property. The apex court, which is generally reluctant in awarding death sentence to women convicts and of late has been increasingly reluctant to impose Capital Punishment, was shocked by the brutality of the crime. The bench of Chief Justice H L Dattu and Justice S A Bobde and Arun Mishra dismissed the appeals of Shabnam and her lover Saleem and upheld the death penalty imposed on them by a UP trial court which was confirmed by the Allahabad HC, Writing the judgement for the bench, Justice Dattu said:- Here is a case where the daughter Shabnam, who has been brought in an educated and independent environment by her family and was respectfully employed as a teacher, influenced by the love and lust of her paramour has committed this brutal parricide,

¹⁷⁰ Cr APPL NO.1728 of 2007, Cr.APPL NO. 609 of 200

¹⁷¹ AIR 1998 SC 1933

¹⁷² JT 200(6) SC 36

¹⁷³ The Times of India, dated 16 May 2015, p.13 (Pune Edn.)

exterminating seven lives including that of a 10 months old innocent child. So the court confirmed the death sentence.

In Jai Kumar V. State of Madhya Pradesh,¹⁷⁴ The Supreme Court confirmed the sentence of death awarded by trial court and confirmed by the High Court to the accused who was found guilty of murder of lady and small child, is in conformity with the brutality and the cruelty shown by accused in committing the murders. It upheld the death sentence upon the accused.

*Surendra Koli V. State of Uttar Pradesh*¹⁷⁵ Surendra Koli's voluntary confession before a magistrate of killing Rimpa Haldar, age 14 years proved to be the unimpeachable evidence corroborated by two girls against him, graphically describing how he lured minor girls inside his employer Mohinder Singh's Noida house, strangled them sexually abused even the bodies of the girls, dismembered them and sometimes cooked a few parts and ate them. The confessional statement was corroborated by the circumstantial evidence as the body parts of the victims were also recovered. DNA tests confirmed the identities of the victims. Dismissing the appeal, the apex court said that there is no reasons to interfere with the finding of the trial court and High Court that and the accused is guilty of murdering Rimpa Haldar who was the first victim in the Nithari serial cum rape killing episode. The killing by Koli are horrifying and barbaric. He used a definite method in committing the crimes. It fitted the classification of the rare category of murder cases marked by violence, brutality and heinousness warranting imposition of death penalty.

In Kuljeet Singh Alias Ranga V. Union of India,¹⁷⁶ The Supreme Court dismissed the writ petition for reconsideration of the sentence of death imposed upon the accused. Kuljeet Singh alias Ranga and Jasbir Singh alias Billa, were convicted of the abduction and murder to two children Geeta Chopra and Sanjay Chopra in Delhi. The trial Court imposed the death sentence upon the two accused that was confirmed by the Supreme Court. Their Special Leave Petitions were also dismissed by the Supreme Court. The present writ petition was also dismissed with the observations that "the murder of Chopra children was caused after a savage planning which bears professional stamp. So deep-laid was strategy to which they adhered to the last without contrition of any kind. Their inhumanity defies all belief and description."

In Lok Pal Singh V. State of Madhya Pradesh,¹⁷⁷ In this case the accused was convicted of the murder of seven persons. According to the prosecution, the accused inspired by unholy

¹⁷⁴ 1985(3)SCC 291

¹⁷⁵ AIR 2011 SC 970,(2011) 4SCC 80

¹⁷⁶ 1999(5) SCC 1

¹⁷⁷ AIR 1995 SC 1387

spirit of revenge and retaliation entered the house of the deceased persons and killed as many as six. The plea of leniency, held that “there does not seem to be any reason why any leniency should be shown to the appellant. This is a most cruel, heinous and dastardly murder and there is no extenuating circumstance for reducing the sentence of death to imprisonment of one.

In Mahendra Nath Das V. State of Assam,¹⁷⁸ The Supreme Court discussed the mitigating and aggravating circumstances and found that the murder was committed in a gruesome, heinous, cold-blooded and cruel manner. The court, whilst confirming the decision of lower courts, described it a rarest of rare case and confirmed the death sentence on the accused.

Malai and Another V. State of Madhya Pradesh,¹⁷⁹ in this case there was a raped and murder of a young girl by a guard in the jail premises. The Court held it to be a “rarest of rare case” and confirmed the death sentence upon the accused.

Md. Afzal and Others V. State,¹⁸⁰ Afzal Guru was convicted of conspiracy in connection with 2007 India parliament attack and was sentenced to death. The Supreme Court upheld the death sentence and ruled that the attack “shocked the conscience of the society at large.” He was hanged at Tihar Central Jail Delhi on 9th Feb, 2013. After his mercy petition was rejected by the parliament of India.

In Narayan Chetanram Chaudhary and Another V. State Of Maharashtra,¹⁸¹ The Supreme Court held that the murder of six persons including a pregnant woman, by a teenager, to be a beast-like mental attitude and termed it as “rarest of rare case”, confirming the death sentence upon the accused.

Rajiv Alias Ram Chandra V. State of Rajasthan,¹⁸² in this case the Supreme Court observed the brutality and atrocity of the manner of commission of the crime. The accused, in a cool and calculated manner, killed five persons including his wife and three minor sons, though the motive could not be established. The Supreme Court confirmed the imposition of capital punishment upon the accused by applying in the theory of retribution and deterrence and held that

“The punishment to be awarded for a crime must not be relevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and should respond to the society’s cry for justice against the criminal.”

¹⁷⁸ 1985 (Sup) SCC 102

¹⁷⁹ AIR 1986,1999(5) SCC 102

¹⁸⁰ 2003 VIIAD Delhi(1)107 (2003) DLT 385

¹⁸¹ AIR 2000(8) SC 177

¹⁸² 2000(8) SCC 457

In Shobhit Chamar V. State of Bihar,¹⁸³ In this case six murders, including those of two children, were committed a view to taking revenge on a family. While the death sentence was confirmed upon Shobhit Chamar, his co-accused was sentence to life imprisonment. The case was held to be “rarest of rare case” deserving of the maximum punishment.

State of Maharastra V. Sukhdev Singh,¹⁸⁴ This is a case of the assassination of former Army Chief of India, General A.S. Vaidya. The accused were charged under the TADA Act. They confessed their involvement in the killing. “The Supreme Court upheld the decision of the trial court and confirmed the death sentence upon the two accused.

Surja Ram V. State of Rajasthan,¹⁸⁵ Supreme Court upheld the death sentence against the accused for murdering four persons including two children. The accused was held of killing his own brothers, two minor sons, his aunt also attempting to kill his brother’s wife and daughter with the intention of wiping out his brother’s the entire family in a land dispute.

5.7. Emergence of Alternative Punishment to Capital Punishment

In the last few years, Supreme Court has entrenched the punishment of “full life” or life sentence of determinate number of years as a response to challenges presented in death cases. The Supreme Court speaking through a three-judge bench decision in *Swamy Shraddhanand [2]* case laid the foundation of this emerging penal option in following terms:

“The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that

¹⁸³AIR 2001 SCC 2231, 1999(2) SCC 343

¹⁸⁴1992(3) SCC 700

¹⁸⁵AIR 1997 18

the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases

The observations in Swamy Shraddhanand [2] case have been followed by the Court in a multitude of cases such as Haru Ghosh v. State of West Bengal, State of Uttar Pradesh v. Sanjay Kumar, Sebastian v. State of Kerala, Gurvail Singh v. State of Punjab where full life or sentence of determinate number of years has been awarded as opposed to death penalty.¹⁸⁶

Clemency Powers

If the Supreme Court turns down the appeal against capital punishment, a condemned prisoner can submit a mercy petition to the President of India and the Governor of the State. Under Articles 72 and 161 of the Constitution, the President and Governors, respectively have the power “to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence”¹⁸⁷ Neither of these powers are personal to the holders of the Office, but are to be exercised (under Articles 74 and 163, respectively) on the aid and advice of the Council of Ministers. Clemency powers, while exercisable for a wide range of considerations and on protean occasions, also function as the final safeguard against possibility of judicial error or miscarriage of justice. This casts a heavy responsibility on those wielding this power and necessitates a full application of mind, scrutiny of judicial records, and wide ranging inquiries in adjudicating a clemency petition, especially one from a prisoner under a judicially confirmed death sentence who is on the very verge of execution. The Ministry of Home Affairs, Government of India, has drafted the “Procedure Regarding Petitions for Mercy in Death Sentence Cases” to guide State Governments and the prison authorities in dealing with mercy petitions submitted by death sentence prisoners¹⁸⁸.

5.8. Aggravating Circumstances for Death Penalty

Various aggravating circumstances has been evolved by our honourable Supreme Court/ High Court in various cases from Jag Mohan Singh case, Bachan Singh case and Macchi Singh case etc, which is to be examined by the judge before awarding death penalty and in

¹⁸⁶ India. Law Commission of India. Consultation Paper on Capital Punishment, May 2014, pp.26-27. (www.en.m.Wikipedia.org. Visited on 29 march, 2020)

¹⁸⁷ Indian Express, New Delhi, dated 27.5.2015. (www.en.m.Wikipedia.org. Visited on 29 march, 2020)

¹⁸⁸ India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp.176, 179. (www.en.m.Wikipedia.org. Visited on 29 march, 2020).

addition two question must be consider before awarding death sentence, they are-

- (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for death sentence?
- (b) Are the circumstances of the crime such that there is no alternative but to imposed death sentence even after according maximum weightage to military circumstances which speak in favour of the offender?

In addition to the question as stated above various aggravating factors should be exercise by the judge they are-

- (i) Firstly have to see to manner of the commission of the crime that whether such act is brutal, cruel, diabolical, dastardly, cold-blooded or Treacherous manner commission of crime.
- (ii) Heinous motive-murder committed for gaining control over property or murder committed for reward, money or for betrayal of motherland.
- (iii) Murder committed to helpless person, innocent child, women etc.
- (iv) Murder committed for personal gain.
- (v) Murder committed to public figure person.
- (vi) Without grave sudden probation cause the death of innocent person.
- (vii) When the Crime is anti-social murder to the members of socially backward classes.
- (viii) Murder committed betrayal for material again.
- (ix) Murder committed to various members of one class society Genocide.
- (x) Nature of crime has societal abhorrence.

Above are some of the some of the aggravating factor evolved by the Supreme Court and High Court, it is not an exhaustive rule, the aggravating factors depends on the fact to circumstances of each case.

5.9. Mitigating Factors for Death Penalty¹⁸⁹

Various mitigating factors which provides commutation of death sentence evolved by the judgement of Supreme Court are:

- (i) Accused acted upon grave and sudden provocation.
- (ii) Where conviction is based on circumstantial evidence, it would not be safe to award death, penalty.
- (iii) Accused was psychologically disturbed.
- (iv) No previous enmity between accuse and victim.
- (v) No previous enmity between accuse and victim delay in disposing of appeal without any

¹⁸⁹Gaur K.D.C Criminal Law, Lexis nexus p.462,8th edition 2015

justification cause.

- (vi) Where degree of individual participates in not proved by beyond reasonable doubt.
- (vii) Rehabilitation and reformation should be gives preference if the accuse is a first offender.
- (viii) Delay in disposing mercy petition.
- (ix) Murder committed on order and command of superior.
- (x) On sole testimony of child not safe to award death sentence is exception.
- (xi) Life imprisonment is the rule and death sentence is the exception this rule should be apply.
- (xii) Exceed right to private defence.

So, when a person causes a death of another human being is trail able under the court of law for the act of causing death. As killing of human beings is illegal in India even if the consent is given by the deceased. Only in extreme cases passive euthanasia is permissible with certain guidelines and it is needed to be confirmed by the High Court. So, if the person who causes a death of another person able to prove some mitigating factors as stated above. Then court will be lenient is awarding the sentence. Above stated Mitigating factors totally depends upon the facts and circumstances of each case a society grows the mitigating factor also will grow. So, Mitigating factor doesn't make one immune from punishment if death is caused to a person and the accuse proves some mitigating factors then the punishment will not be of death sentence but will be for life imprisonment as death of a person is caused. He is only immune from death sentence but not from other punishment. So, above are some of the mitigating factors as evolve from various cases it doesn't give immune from punishment only it is immune from death sentence.¹⁹⁰

5.10. Law Commission of India in its 262nd Report on Death Penalty

The Law Commission of India in its 262nd Report (August 2015) recommended that death penalty be abolished for all crimes other than terrorism related offences and waging war. Complete recommendations of the Report are as follows:

- (i) The Commission recommended that measures suggested that police reforms, witness protection scheme and victim compensation scheme should be taken up expeditiously by the government.
- (ii) The march of our own jurisprudence- from removing the requirement of giving special reasons for imposing life imprisonment instead of death in 1955; to requiring special reasons

¹⁹⁰Gaur K.D.C Criminal Law, Lexis nexus p.463,8th edition 2015

for imposing the death penalty in 1973 to 1980 when the death penalty was restricted by the Supreme Court to the rarest of rare cases- shows the direction in which we have to head. Informed also by the expanded and deepened contents and horizons of the Rights to life and strengthened due process requirements in the interactions between the State and the individual, prevailing standards of constitutional morality and human dignity, the Commission felt that time has come for India to move towards abolition of the death penalty.

(iii) Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism-related offences and waging war, will affect national security. However, given the concerns raised by the law makers, the Commission did not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.

(iv) The Commission accordingly recommended that the death penalty be abolished for all crimes other than terrorism related offences and waging war.

(v) Further, the Commission sincerely hopes that the movement towards absolute abolition will be swift and irreversible.¹⁹¹

5.11. National Crime Records Bureau (NCRB) and ACHR Statistics

Year	Sentences given	Sentences commuted to life	Executed	Convict	President	Ruling Party/Alliance
2001 ¹⁹²	106	303	0		K.R. Narayanan	National
2002	126	301	0		A.P.J. Abdul Kalam	Democratic Alliance
2003	142	142	0			
2004	125	179	1	Dhananjay Chatterjee		
2005	164	1241	0			

¹⁹¹ India Law Commission of India, Report no.262 on Death Penalty, August 2015, pp. 217-218. (www.en.m.Wikipedia.org. Visited on 20 April, 2020).

¹⁹² "Details of capital Punishment and life imprisonment 2001-2012". Open Government Data Platform India. Retrieved 9 January 2020. (www.en.m.Wikipedia.org. Visited on 20 April, 2020)

2006	129	1020	0			
2007	186	881	0		Pratibha Patil	United Progressive Alliance
2008	126	46	0			
2009	137	104	0			
2010	97	62	0			
2011	117	42	0			
2012	97	61	1	Ajmal Kasab	Pranab Mukherjee	National Democratic Alliance
2013	125	115	1	Afzal Guru		
2014	95	112	0			
2015 ¹⁹³	101	49	1	Yakub Memon		
2016	148	82	0			
2017	121	83	0		Ram Nath Kovind	
2018	186	65	0			
2019			0			
2020			4	Akshay Thakur, Mukesh Singh, Pawan Gupta and Vinay Sharma		

¹⁹³ “Details of Death Sentence during 2015”. Prison Statistics India- 2014. National Crime Record Bureau. 26 September 2016. Retrieved 21 February 2020. (www.en.m.Wikipedia.org. Visited on 20 April, 2020)

CHAPTER-6

CONCLUSION AND SUGGESTION

CONCLUSION

The capital punishment is one of the issue across the world for its abolition and for its retention, international covenants on civil and political rights to life and its requires it to be protected by the law it promotes mass campaign for the abolition of death penalty even for serious crimes though it does not directly prohibits death penalty its puts certain restrictions to the member states not to execute death sentence and on the other hand various member states retain capital punishment for heinous crimes according to their respective culture, penal laws, ethical value of the member states which strongly oppose total abolition of death penalty upon heinous crimes which is against the society at large.

Capital Punishment is accepted in India from times immemorial. It is as old as the Hindu Society. The administration of criminal justice as an integral part of the sovereign function of the State did not seem to have emerged in India till the smriti period. The credit goes to smritis, mainly Manu, secondly to the Artha Sastra of Kautilya in making administration of criminal justice as part of the sovereign function of the State. However, Artha Sastra was not a Penal Code. So, it lacks a coherent schematisation. In the Buddhist texts also, references to death penalty were found. Capital Punishment was in vogue for the offences of moral turpitude. Muslim period marks the beginning of a new era in the legal history of India. The social system of the Muslims was based on their religion. Muslims after conquering India imposed their criminal law on Hindus whom they conquered. The sources of Muslim Law were Quran, Sunna and Sunnis. The traditional Muslim Criminal Law broadly classified crimes under three heads: (i) Crimes against God (ii) Crimes against the sovereign and (iii) crimes against private individuals and prescribed Capital Punishment for certain offences.

The policy of the British being to interfere as little as possible with the Muslim Penal Law, only such modifications were made as were required to remove glaring defects. Motive for the commission of the offences played vital role in the capital offences than the manner of committing the offence. The trial of Nand Kumar was considered as a glaring example for the miscarriage of justice in the British India. For the first time in 1846, the Law Commission under the Chairmanship of Lord Macaulay prepared the Indian Penal Code and it was adopted on 6th October, 1860. The Indian Penal Code, 1860 defines the substantive offences and prescribes punishments. Even after, Independence, the same Indian Penal Code has been in

operational.

As my research work is upon “an Analytical study on Capital Punishment in India and its Constitutionality” after analysing various provision of capital punishment provided under Indian Penal Code and various statutes enacted by the parliament of India such as sati NDPS Act, Indian Naval, Air Force, Army Act, The Commission Of Sati Prevention Act, The Scheduled Caste And Scheduled Tribes (Prevention) Atrocities Act etc. And by analysing various penal law of the countries of the world who has retent the capital punishment as one of the mode of punishment for heinous crimes which is against the society except in North Korea where the crimes in other countries penal laws is not a crime it is punishable with death in North Korea such crimes are making international phone calls, stealing food, watching South Korean movies, watching pornography etc. Which is not acceptable but as compare to all the penal laws in the world where capital punishment is retain it is for the heinous crimes which is against the society at large which is to great extent acceptable according to my observations. According to my analytical study on capital punishment in India. India has the safest penal laws awarding death sentence as compare with other democratic government of the world according to my observation to this research work.

First of all, in India capital punishment derives its validity from Article 21 of the Constitution which provides that every person’s right to life and provided the law and procedure established by law provided under *Maneka Gandhi’s case*. It permits states to deprive person’s life and liberty according to just fair and reasonable procedure established by law and the provision which provides death penalty in India is only for the offences of heinous crimes to which the Indian society and the nation totally condemned as it is against the peaceful co-existence of the Indian society. In India it gives the accuse a fair hearing according to the principle of natural justice i.e. hearing according to professional legal practitioner and to the poor accuse it gives right to free legal aid under Article 21 of the Indian constitution and under provisions of Cr.P.C. There are various rights provided to the accused according to the code Criminal Procedure of India under its various provision. After the trial if the accuse is convicted for any sentence or death sentence then the accuse has a right to file a review petition of the sentence under special leave petition directly to the supreme court of India to get quashed the sentence of death sentence or any sentence.

Under Indian law if death sentence is given by the lower court that is by the session court it need to be confirmed by the high court upon the sentence of death by giving special reasons in writing as life imprisonment is the rule and death sentence is the exception in other words we can say “life imprisonment is the genus and death sentence is the specie.” If the

accuse could not get his death sentence quashed under review, appeal, curative petitions under judiciary than the accuse has the last remedy to get quashed the death sentence i.e. to file a mercy petition to the president of India or to the governor of states only after the last remedy is dismissed the execution of the death sentence given under India penal code and various statutes enacted by the parliament of India. And in India in awarding death sentence also it is guided by a safest guidelines as provided by various provisions under the code of criminal procedure that is when lower court that is Court of Session award death sentence to accuse its needs to be confirm by the high court by giving a special reason in writing for awarding death sentence. While awarding death sentence it is guided by the principles of rarest of rare cases as evolve under a landmark judgement in *Bachan Singh Case*, its provides that only if the case falls under rarest of rare cases death penalty can be awarded otherwise not as the general rule is life imprisonment and death penalty is the exception. And its evolve some guidelines in *Machhi Singh Case* where it provides that mostly the cases which falls under the guidelines will usually falls under the principle of rarest of rare cases. The guidelines had been already discuss in chapter 5 of this research work.

So, in order to apply the guidelines following questions may be asked and answered-

- (i). Is there something uncommon about the crimes which renders sentence of imprisonment for life inadequate and calls for death sentences?
- (ii). Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour the offender?

After examining all the circumstances and answering the question if death sentence is warranted than court would proceed to do so and in addition for awarding death sentence judge should record special reason while awarding death sentence. And to know the nature, gravity of the crime it need to answer five question i.e. (i) why the crime is committed? (ii) Who has committed the crimes? (iii) To whom the crime is committed? (iv). When was the crime committed? (v) By what means the crime was committed?

The principle of rarest of rare cases has been already discussed in chapter 5 of this research work. And in addition there is various general exceptions provided under Indian Penal Code under section 76-106 IPC which provides that even if the death is caused, the person will not be liable for the death cause if the act falls under the various general execptions provided under Indian Penal Code as it gives complete immune from any sentence. In addition also there are five exceptions provided under section 300 of IPC where the general rule principle is provided to great extent. If the death was cause within five exceptions of section 300 IPC then

the accused will not be awarded to the sentence of death rather life imprisonment will be awarded so life imprisonment is a genus and death penalty is the specie.

So, in the case to fall under rarest of rare case it is provided a very thin line only if the act falls under this ambit of this thin line that is rarest of rare case the death sentence is awarded. So, to falls under rarest of rare cases it is the act which is extremely inexcusable from every angle according to the penal laws and the consciousness of the society as it is only the cases of heinous crimes which falls under the rarest of rare case so if the case falls under rarest of rare case then death sentence is warranted and its execution is justified under a penal law. So, according to my observation by analysing various provisions of IPC and various statutes enacted by the parliament of India and the guided guidelines for awarding death sentence under the principle of rarest of rare case and the validity of the death penalty as provided under Article 21 of the Indian Constitution. India has the safest guidelines for awarding death sentence as compare with other penal laws of the democratic countries of the world.

In India, there are various cases of murder, rape of child accompanied with murder, kidnapping child for ransom accompanied with murder, pre-planned murder, cold blooded murder only for acquiring property for selfish gain, rape of child by guardian/step father, murder for non-fulfilment of the demand of dowry, rape only to fulfil the sex desire of the accuse in result victims death etc. As crimes which shocks the consciousness of the society is committed in various parts of India and for the above mentioned various cases under the cases which falls under rarest of rare cases as in chapter 5 as discussed only the punishment warranted is the death penalty and the execution of this criminals is justified. I am shocked and wonder about all the human rights organisation of the world and India that they supported abolition of death penalty for all heinous crimes. In cases like *Nirbhaya Gang Rape Case* popularly known as Delhi Gang Rape Case (State through reference v. Ram Singh and ors.). Where the manner of the rape committed shock the consciousness of the nation and the world. In *Seema Mohan Gravit Case*. In this case two sisters Seema Gravit and Renuka Shinde has been charged for kidnapping 14 children and for murdering 9 children. Supreme Court- confirmed that sentence for murdering of 6 children. Mercy petition is rejected by the president of India. In *Jumman Khan V. State of U.P.* In this case accuse rape a 7 years old child and murder the child. Supreme Court confirmed the death sentence.

In Khamta Tiwari V. State Of Madhya Pradesh, In this case an innocent helpless girl of 7 years age was kidnapped by appellant to whom she called her uncle. She was rape and strangulated to death and the body was thrown into a well. In India there are lots of cases where children below 14 years of age are rape and murder, pre-planned murder, multiple murders etc.

It occurs in our Indian society. It is a shameful upon such offenders who committed such heinous crimes which is against the ethical value of the society. So can we expect our law to be lenient on such heinous crimes and say that death penalty is against human dignity, it is inhuman punishment, the punishment degraded the dignity of the accuse. And Juvenile Delinquency are rising day by day in India in various cases recently one of the accuse in *Nirbaya Case* popularly known as Delhi gang rape case but Capital Punishment is a legal penalty in India. The authorities alleged that the four adult convicts were “intentionally delaying” and “frustrating” the legal process in the case by filing their pleas in stages, so that their execution could be postponed. On 17 January 2020, after the convicts exhausted their mercy pleas, a Delhi court issued a second death warrant for the convicts to be hanged on 1 February 2020 at 6:00 am. The four adult convicts were hanged on 20 march 2020 at 5:30 am IST at Tihar Jail, and were declared dead after thirty minutes. And *Ryan International School Murder Case* etc. So in my observation Juvenile Delinquency to some extent should also be punishable with capital punishment by looking into the maturity of the juvenile conflicting with laws. So, India has the safest provision for awarding death sentence as it is guided by the principle of rarest of rare cases and death sentence awarded only after accuse is given a fair hearing and the accuse has defended his accusation by a professional legal practitioner and all the rights and safeguards has been availed by the accuse provided under constitution of India and under various statutes enacted by the parliament of India Constitution has its unique features as compare to other democratic countries of the world it is unique in itself, as law are made after harmonizing the diversity of culture, religion, race, etc. In the Indian society so penal law of India also has its uniqueness as it is guided by the principle of rarest of rare cases. In India, there are various cases of murder, rape of child accompanied with murder, kidnapping child for ransom accompanied with murder, pre-planned murder, cold blooded murder only for acquiring property for selfish gain, rape of child by guardian/step father, murder for non-fulfilment of the demand of dowry, rape only to fulfil the sex desire of the accuse in result victims death etc.

The human rights organisation I think they forgot that this heinous crimes are committed against the victims right to life and personal liberty so can a reasonable person say that death sentence awarded to accuse who has committed such a heinous crimes which shocks the consciousness of the society. That death sentence awarded to the accuse violates the dignity of accuse, violates accuse right to life and personal liberty and can we say that execution to accuse by hanging, shooting degrade the dignity of the accused and the punishment is inhuman, torturous in nature. I don't think so a reasonable man would be against the execution of the

accused who has committed by the accused is so grave that it is absolutely condemned by the society. The accused who has rape a child below 10 years of age and murder a child can our law be so lenient that the accused should be rehabilitatee and his conduct should be reformed. No, the only appropriate punishment for such heinous crime is capital punishment.

So according to my observation upon various provision of IPC and various statutes and the cases its legality of the capital punishment is justified because it deals only with heinous crimes which is degraded the consciousness of the society and it's condemned by the Indian society as a whole.

SUGGESTIONS

- i. Death Penalty is often imposed on the poor, uneducated, underprivileged and minorities. They seldom win: a legal battle in a Court of Law. Legal aid now provided in India is for the poor advocates who cannot have earnings on par with senior advocates. While arguing a case where one's life is at stake the advocate who is engaged by the state for the accused should be an advocate with atleast seven years legal standing.
- ii. The Government shall pay the fees of an advocate thus engaged substantially according to his regular charges but not a statutory fee. This would create an interest in the case to the advocate who is arguing on behalf of the accused.
- iii. Instead of inventing a sophisticated method of execution which is quick, painless and decent, it is better to switch over from death penalty to an alternative punishment which will not put an end to "right to life" itself.
- iv. Life imprisonment is a very good alternative to death penalty. As such it is submitted to the policy makers that open prisons which are a twentieth century invention in the jurisprudence of Criminology and Penology, where life convicts are expected to serve the remaining period of their sentence are not only reformative in nature but, a very good income to the government. Now, retentionist need not complain that keeping the murderers behind the bars would cost more for the public exchequer.
- v. Causing death to an individual may become inevitable at times in certain circumstances such as when a country is locked in either international warfare or civil warfare. Even at times, police personnel may have to cause death to protect their lives or the lives of other individuals. In such cases strict legal safeguards must be prescribed to avoid abuse of such powers by enforcement officials.
- vii. Instead of spending crore of rupees in constructing gas chambers or gallows, the expenditure may be diverted to train efficient law enforcement authorities and to correct errors

in the judicial system.

vii. All measures of abolition for the death penalty should be considered as progress in the enjoyment of the right to life.

viii. Dangerous offenders can be kept away from the public without resorting to executions. Many abolitionist countries are practising this method of seclusion. It is as good or as bad as keeping the mentally insane in an asylum without causing inconvenience to the healthy.

ix. Till Capital Punishment is abolished the offenders may be provided atleast with B class facilities, labour may be avoided for them, they be provided with conjugal visits and visits with the family.

x. The offender's legal battle and the mercy and pardon petitions should be moved quickly so as to avoid delay and thus prolonging his misery. Secretaries to the Governor and President be trained in this regard to move the condemned prisoners' file quickly.

xi. Condemned prisoners should be provided with library and some other recreation facilities. Arrangements for their prayers should also be arranged.

xii. The prime object of any State should be towards prevention of crime and reformation of its citizens but not to put an end to the life of the offender.

xiii. It is submitted that the Supreme Court of India should extend its recent order of releasing the under trials in case of delay in trial to the condemned prisoners in case of delay in their executions as was done by the Supreme Court of Zimbabwe.

The suggestion for the implementation of death penalty is that for the heinous crimes the trial should be held by the fast track court. Offender should not be written in prison for many years. Because detaining their offender in prison our government spent huge amount of tax money paid by the honest citizens in giving security to this criminals as there are lots of welfare activities to be done by the government the revenue collected by the government should be used for the upliftment of the Indian society in every fields such as in science and technology, medicals, educations etc. And the review, appeal, curative petitions and mercy petition should be disposed of quickly to meet the ends of justice and to save the money of the government so trial should be speed for offender in heinous crimes and review appeal and mercy petition should be disposed of quickly without unreasonable delay as offenders of heinous crimes against the humanity of the world society.

So, by analysing the Capital Punishment and its constitutionality in Indian context, it is justified in executing to heinous crimes offenders as all convicted and execution till date has been offender of heinous crimes offender of heinous crimes only which is against the society and enter humanity of the world. So, capital punishment in India is justified and

appreciable as our government protect us from these heinous crimes of offenders. Death penalty should not be substituted by life imprisonment in cases which falls under rarest of rare cases as its shocks the consciousness of the society, to gain trust of the people and to maintain law and order in the society government of Indian should retent capital punishment as provided under various law of the land as the validity of death penalty is provided under Constitution of India. As Indian has unique penal laws guided by the principle of rarest of rare cases in awarding death sentence as its constitutions of democratic states of the world.



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