CHAPTER-I
INTRODUCTORY REMARKS
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1.1 General

"Punishment itself was an evil, but a necessary evil" - Putting the offender to death to teach other minds a lesson.

-Bentham

Everyone is aware of the fundamental feature of human behaviour i.e. love for life. It is the foremost valuable wealth for a human being and not only a human being, but also for an animal, even an animal does not want to lose the life. Everybody desire to get pleasure from it up to the fullest extent mirthfully. For a human being nothing can be beloved than life and death penalty is that sort of punishment that takes this loved one property.

Capital punishment means a sentence of death. It is the severest i.e. an extreme point of sentence. The punishment is extreme as a result of it turnoff the existence of human life. The capital punishment is to be awarded just for very gruesome, horrifying, anti-social, grievous and disgusting crimes against humanity. Although the definition and extent of such crimes vary from state to state and phase to phase; there is in all probability no any country in the world where death penalty has never existed. It has been in observed from the past.

The terribly object of penalty has continuously been to require care of the society against the criminal and unsocial elements. A penalty awarded to a specific person becomes a supply of security to all and helps in instilling some kind of fear or apprehension in like-minded person. Punishment, thus, cannot be regarded as an act of revenge against a guilty or unlucky individual who has given way to mischievous inclinations but as an indispensable sacrifice to common safety.
Capital punishment was in practical as an effective measure to warfare crime and for hundreds of years its legitimacy was not questioned. The ancient kings believed that if the offenders were with mercy excuse, crimes were multiplied so large. It absolutely was thought that the simplest way of protecting society from dangerous criminals was to sentence them to death. Its acceptance, in ancient societies, appears to possess relied on three principles:

*Firstly,* insignificant price connected to human life, or at least to the life of any particular individual.

*Secondly,* death of the criminal was considered to be just and fair because for deviation he must pay.

*Thirdly,* the executing was to search out natural support by the arrival or gradual institution of an omnipotent state.

These three reasons created the recourse to executing necessary. However with the change of society the voices against the executing began to arise and since last century capital punishment has become a very hot and debatable subject in legal world.

The degree of punishment in a given case must depend upon the brutality of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Burden of appropriate punishment is that the manner during which the court responds to the society's need for justice against the criminals. The courts ought to impose penalization appropriate the crime in order that the courts reflect public disgust of the crime. The court must not only keep in view the rights of the criminal, but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

India stands dignified among the world trend to finish the penalty and those nations that continue to execute, like several of the decreasing range of countries
that also apply the penalty of death, over the last twenty years, India has reduced
the number of executions carried out.

The Indian judiciary has dominated that the death penalty for murder must be
restricted to the rarest of rare cases; however this instruction has been contradicted
by the legislative assembly increasing the quantity of offences punishable by death.
There are serious concerns about arbitrariness and discrimination in the processes
that lead to people being sentenced to death penalty. Such type of factors would
render India's use of the death penalty. Amnesty International is influence the
Government of India to announce an instant suspension on executions with a view
to abolishing the death penalty. As an developing global and regional power and a
party to the International Covenant on Civil and Political Rights and other
international human rights treaties, India has an chance to exercise regional
leadership and to strong signal of its determination to fully support human rights
by abolishing the death penalty.

In the past three decades, nice paces are created towards a world free from
executions. In 1980, only twenty five countries had abolished the execution for all
crimes. That number currently stands at 91, with an extra 11 countries having
abolished the penalty of death for 'ordinary' crimes. 33 countries are considered to
be abolitionist in practice in that they retain the death penalty for ordinary crimes
such as murder but have not executed anyone during the last 10 years and are
supposed to have a strategy or established practice of not carrying out executions,
meaning that a total of 135 of the world's nations have turned their back on death
penalty in law or practice.

At the time of independence, India reserved the 1860 Penal Code that provided
for the capital punishment for murder. In 1973, the Apex court of India upheld the
constitutionality of the capital punishment for the very first time in the case of
Jagmohan Singh v. State of UP\textsuperscript{1}. Within the similar year, a new Code of Criminal Procedure was approved. In 1980, the Supreme Court once more upheld the constitutionality of the death penalty in the case of Bachan Singh v. State of Punjab\textsuperscript{2}, and emphasized that the penalty of death should be used only in the Rarest of Rare cases.

The Indian judiciary is following the worldwide trend of moving away from the choice of capital punishment and turn towards 'whole-life-in-prison' sentences. Recently, the lesser sentences obligatory on the killers of the law student Priyadarshini Mattoo, Bangalore call-centre employee Pratibha Srikanthamurthy and Punjab Chief Minister Beant Singh shows that Indian judiciary is moving away from the choice of death penalty.

It might appear so from the frustration expressed by family members of each of those victims, who declared that nothing less than capital Punishment would have happy their look for justice. As reflected in the media, this sentiment was shared by an enormous section of public opinion. It was indeed an act of courage on the part of judges to defy such a clamour of death. Yet, their verdicts have given abundant cause for concern to liberal as similarly.

It seems that judges within the lower courts are also obtaining increasing averse to use the executing in many high profile cases. Cases involving premeditated cold blooded murder, rape and murders of minors during rioting, terrorist bombings etc. have not attracted the capital punishment. But activists reveal a flaw, that due to the absence of sentencing guidelines in what constitutes "rarest of rare", in some less gruesome murders, the lower courts have awarded death sentences possibly due to poor defense presented by the lawyers of the economically backward.

Although there was widespread disappointment that the executing was not proclaimed in the heart-wrenching cases of Priyadarshini Mattoo and Pratibha

\textsuperscript{1} AIR 1973(1) SCC 20
\textsuperscript{2} AIR 1982 SC 1325
Srikanthamurthy, however certain area unit we have a tendency to that the corporal punishment is that the best punishment for the worst of our criminals? Recently some social activists and social reformers are demanding the imposition of death penalty for corruption, graft, bribe, scam and money reserve cases.

The death sentence of former law student Santosh Singh for the rape and murder of 23 years old Delhi law student Priyadarshini Mattoo was commuted to the imprisonment for life by the Supreme Court. In the case of the 22 years old newly married Business Process Outsourcing (BPO) employee from Bangalore, Pratibha Sri kanthamurthy, the cab driver who raped and murdered her, was sentenced to the life imprisonment till death.

The general agreement was that the two cold-blooded criminals deserved nothing less than the execution. The courts, in their knowledge, however, did not see the crimes as the "rarest of the rare" which might have invited such a penalty.

There is decisiveness regarding the death sentence that appears to satisfy the popular perceptions of justice in matters of crime and punishment. This conjointly explains the democrat stance of some political parties who demanded that the 26/11 terrorist Mohammed Ajmal Kasab be "publicly hanged from the Gateway of India without a trial."

According to the report of the Amnesty International in U.S.A. as on May 1, 1970 executions are obligatory for aggravated murder in 35 states. Drawing upon the penal statutes of the States in U.S.A. framed after Furman v. Georgia, in general and clause 2(a), (b), (c) and (d) of the Indian Penal Code (Amendment Bill) passed in 1978 by Rajya Sabha, specifically. Dr. Chitle has prompt the aggravating circumstances, where, execution can be awarded:

\[3 \text{ 408 U.S. 238}\]
(a) If the murder has been committed after previous planning and involves extreme brutality; or

(b) If the murder involves exceptional depravity; or

(c) if the murder is of member of any of the armed forces of the union or of a member of any police force or of any public servant and was committed while such member or public servant was on duty; or in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under section 43 of the Code of Criminal Procedure, 1973 or who had rendered assistance to a Magistrate or a Police Officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

After the perusal of the same study, the research scholar’s view that keeping in view the structure of the Indian society; death penalty should be retained. Protection of society and deterrent effect on the criminals that the declared object of law and that is needed to be achieved by imposing an acceptable sentence. A duty is cast upon the Court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment as a measure of social necessity and as a means of deterring other potential offenders.

The author is of the view that imprisonment should be the rule and the penalty of death should be given in “rarest of rare cases”. Whenever Court imposes the capital punishment, it should record special reasons for the same. The capital punishment should be given only, when the act of accused is of extremely brutal, inhuman, barbaric, exceptional depravity and when the crime has been committed in a very cruel manner, such as rape followed by murder of a girl of very tender
age," dacoity followed by vehemently killing of innocent persons, extremist persons killing innocent persons, murder of politicians, killing of person in a very barbaric manner and socio-economic offences etc. The Supreme Court has very pertinently observed in *Jai Kumar v. State of M.P*[^4]. That civilization and the due process of law along with social order ought not to permit the Courts to be hasty in awarding capital punishment but act as a speed breaker in the use of this type of punishment.

The study explain that in agricultural based countries like India, the problem of death penalty arises in case of murders committed during agrarian riots and disputes relating to possession or ownership of land-property, in such cases, the offenders are well aware of the consequences of their act but they fall a prey to criminality due to passion, excitement or anger for the victim whom they want to put out of their way once for all. Thus, these persons though aware of the consequences, in fact do not intend those consequences to follow, hence they cannot be categorized as professional killers and death penalty can hardly serve any useful purpose in such cases, especially where act was not pre-mediated. Likewise, when the death has been committed by the accused in sudden provocation or on account of heat exchange of talks and if he does not have any criminal antecedents death penalty should be imposed in such type of cases.

Arguments in favour of the capital punishment rest on the call for permanently eliminating the worst criminals from society, not wasting public exchequer on their imprisonment and providing a strong deterrence against serious crimes.

The global trend, however, favours the abolition of capital punishment, considering it as inhuman on the part of the State, irrespective of the crimes committed. The European Parliament has been in the forefront for the abolition of the penalty of death and has observed that barely 43 countries retain this punishment. According to it, the highest number of executions in 2009 took place

[^4]: AIR 1999 SC1860
in China (500) followed by Iran (402), Iraq (77) and Saudi Arabia (69). India has not had only four executions in the last 10 years, and in that sense has been moving away from capital punishment, although more than 50 people were sentenced to death in 2015. In the Asian subcontinent, Nepal and Bhutan have abolished the death penalty.

The large numbers of nations which have abolished capital punishment believe that the principle of *lax talionis* is no longer appropriate in modern society; innumerable voices have questioned this practice. In July this year, former president APJ Abdul Kalam added his voice to the call for a national debate on the need to continue with the death penalty.

Life Imprisonment till death is not a soft sentence as it seems but is often considered a harsher punishment than the death sentence. In 2007, 311 Italian prisoners who were sentenced to life imprisonment till death petitioned the government for the right to be executed. They described life without parole a "living death".

As the world moves away from the retention of the penalty of death, the time has come for the authorities of India to abolish this form of punishment. One fears that the leader of India may lack the political courage to abolish the capital punishment. The opinion of public often supports retention of the punishment of death, based on the inaccurate view that it deters violent crime. It is up to the nation's leadership to explain the futility of retaining executions on this basis and to convey the unacceptability of such a grave human rights violation committed in the name of people via the country's judicial system.

The penalty of death is awarded only for the "rarest of rare cases", a formula that works very well. This restraint shows the maturity of our judiciary. Some of the documents in the case of restricted and banned the death penalty, at least in its

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5 An eye for an eye, *Available at* [www.en.m.wikipedia.org](http://www.en.m.wikipedia.org) (*visited on 12/12/15 at 11:09 AM*)
use of the death penalty is much debate over the appropriate punishment for a heinous crime, politics, the international law, the not yet. The issue of capital punishment also dubbed as death penalty always draws fierce debate amongst the supporters and the protests as the death penalty. The death penalty is the ultimate human right, arguing against forgiveness. Community life is sacred and that the capital punishment, that the state's right to act in self-defence to protect the innocent, but not the obligation to and one way to protect the life of the innocent is to have exemplary punishment for those who indulge in heinous crimes.

In recent years, the debate and the fact that large numbers of innocent people sentenced to death have shown that the use of new technologies inflamed. Recently the Supreme Court has while taken a serious note of the spate or kidnapping for ransom across the country, by asking the Law that allows judges to say, hard to punish traffickers in the country, to award Even though they are not involved in murder, kidnapping for ransom, in exceptional cases, the death penalty. A bench comprising Justice H.S. Bedi and J.M. Panchal observed that “Statistics kidnapped for ransom has become a lucrative and well in tough times, according to the court a duty to the other dealt with.”

Both national and international level from the time of this long, there was a controversial question. That capital punishment discuss as legal philosophers, Justice, judges and other intellectuals as social scientist commented on the forum. In many countries, the death sentence it is an essential measurement of the criminal righteousness system. It is a form of geography, culture and the reasons may be different, although the passing of time is not acceptable form of justice through the ages.

When penalties are imposed to deter the offender should be given a chance to reform the Indian jurisprudence that the offender is part of the Indian criminal jurisprudence, expression and the combination of different theories. Bearing in mind these basic principles, the Registrar legislature draft Criminal Procedure
Code based on the individual purpose of this sub-capital offenses and lays down the death penalty that the court may have to register. Therefore, Criminal Procedure Code and legal status very special cases when the death penalty was imposed in 1973, the general rule was that a life sentence.

Now a days in India Rape is become the most hienous crime in the country. Due to this reason even the Indian Judiciary in great confusion. Some of the famous jurists and the social organization working for the benefit of women have a view that the crime be punishable with severe punishment the legislature must make the amendment in the punishment of rape and provide capital punishment in the cases of rape. Judiciary has supported severe punishment in cases of rape. The problem is that how to decide the rarest of rare in certain cases. Now researcher would analyse the all relevant aspect related to making capital punishment in cases of rape.

Punishment in some form or other exists in most civilized societies. Capital punishment is one by which an offender is sentenced to death for committing the hienous crime of murder. Capital Punishment as a form of punishment and its deterrent value especially for the crime of murder has been a subject of intense though inconclusive debate both at national and global levels.

Death penalty is the practice of executing someone as punishment for a specific crime after a proper legal trial. It can only be used by a state, so when non-state organizations speak of having 'executed' a person they have actually committed a murder. It is generally used as a punishment for mainly grave types of murder, but in some countries treason, types of fraud, adultery and rape are capital crimes.

The common modes of punishment prevalent in different parts of the world including corporal punishments such as flogging, mutilation, branding, pillories, chaining persons together, stoning, banishment, transportation and death penalty or capital punishment.
Most of written history across the world has references to capital punishment indicating that it is as old as civilization itself. The first known codification of the death penalty was in the 18th century BCE, in the code of Babylonian king Hammurabi. The 14th century BCE Hittite code, the 7th century BCEs Draconian code of Athens and the 5th century BCE Roman Law all had a provision of death sentence.

Kautilya's "Arthasastra" also imposes death penalty for crimes like rape of a minor and theft in the government treasury. History gives instances of death sentence carried out by crucifixion, drowning, beating to death, stoning, burning alive, impalement, hanging, firing squads, electrocution, lethal injection, and so on.

Capital punishment is a legal but rarely carried out sentence in India. For Indians capital punishment is almost synonymous with hanging. Imposition of the penalty is not always followed by execution (even when it is upheld on appeal), because of the possibility of commutation to life imprisonment. In recent times there has been numerous gaps; between the hanging of on Auto Shanker and Dhananjay Chaterjee, and thereafter until the execution of Ajmal Kasab and Afzal Guru and Yakub Menon.

The 35th report of the Law Commission of India has vouched for the deterrent effect of capital punishment. However, whether or not capital punishment acts as a deterrent may not be statistically proved either way because statistics as to how many potentially murderers were deterred from committing murder but for existence of capital punishment for murder are difficult, if not altogether impossible, to conclude.
The Supreme Court of India ruled in 1983 that the death penalty should be imposed only in the Rarest of rare cases. Capital crimes are murder, gang robbery with murder, abetting the suicide of a child or insane person, waging war against the government, and abetting mutiny by a member of the armed forces. In current years the penalty of death has been imposed under new anti-terrorism legislation for people convicted of terrorist activities. Recently, the Indian Supreme Court in *Swamy Sharadananda v. State of Karnataka*\(^\text{11}\) made imposing the death penalty even harder. The judgment holds that the "rarest of the rare" test prescribed in case of *Bachan Singh*\(^\text{12}\) was diluted in the *Machi Singh case*\(^\text{13}\). The judgment then goes on to say that the "rarest of the rare" must be measured not only in qualitative but also in quantitative terms. Thus, given that the general crime levels have been worsening since *Machi Singh’s case* was decided, the categories of “rarest of the rare” should also change. Therefore, all the categories specified in *Machi Singh* need not fit in with “rarest of the rare”. Today a lot of the categories are no longer as rare.

The Supreme Court justified the practice of capital punishment in India, particularly in view of growing terrorist activity that has cost the lives of hundreds of innocent civilians and uniformed personnel. If the atrociousness of the crime is such that a large number of innocent people are killed without any reason, then, too, award of the extreme penalty of death will be justified. All these factors have to be taken into consideration by the President or the governor while deciding mercy pleas. India is one of the worst victims of internal and external terrorism. In the last three decades, innocent lives have been lost on account of the activities of terrorists, who have killed people using bullets, bombs and other weapons.

If the murder is committed in an extremely brutal or dastardly manner which gives rise to intense and extreme indignation in the community, the court may be

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\(^{11}\) (2008) 13 SCC 767  
\(^{12}\) 1980 AIR 276  
\(^{13}\) 1983 AIR 1957, 1983 SCR (3) 413
fully justified in awarding the death penalty. If the murder is committed, by
burning a bride, for the sake of money or satisfaction of other kinds of greed, there
will be ample justification for awarding the death penalty. While there is no
abatement in crimes committed due to personal animosity and property disputes,
people across the world have suffered on account of new forms of crimes. The
monster of terrorism has spread its tentacles in most countries.

The question of the constitutionality of death penalty has acquired new
significance because of liberal judicial interpretation of fundamental rights
guaranteed by article 14, 19 & 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 becomes a new ground for
attacking the constitutionality of death penalty. Further the nature of the problem is
such that it needs to take place in the society. The impact of legal changes and
international obligations also becomes important in this connection.

1.2 Scope of the study

The abolition of death penalty has received strong backing in international arena
however India is still retaining capital punishment as an allowed and lawful form
of punishment. Retention of death penalty in India has strong background because
of many factors which approve and hail death penalty as an indispensable part of
Indian jurisprudence.

Due to increase in crime rate in India, particularly heinous crimes like murder
for ransom and the terrorist’s activities the retentionists have an upper hand than
those who are in favour of abolishing death penalty. Therefore through this study
certain pertinent questions on both sides of retention and abolition of the death
penalty are to be explored and analysed. This study also contains the causes and
effects of delayed execution. Whether delayed execution becomes the part of
system or it is creating by petitioners to enjoy more to his or her life. Delayed
execution in real sense hurt the family of victim as well as society. No doubt delayed execution also effect the sound administration of justice, which is the integral part of a democracy.

1.3 Aims and Objective of the study

The purpose of research work is to analyse the relevance of Capital Punishment in Present scenario and causes of delay in execution in India. Object of this study is to make out and analyse the statutory provisions provided in India. Another object of this study is also to figure out the following spheres:-

a) To know the relevancy of death penalty in heinous cases.

b) Death penalty leads to remove from society someone who would cause more harm and who is incapable of rehabilitation.

c) Death penalty helps to deter other from committing crimes, attracting capital punishment.

d) The relevancy of principle of the rarest of the rare is good in the criminology in India.

e) To know the Constitutional validity of death penalty.

f) To examine the President's power to commute death penalty is often politicized or not.

g) Applicability of the reasoning of rarest of rare in case of death penalty.

h) Role of Human right Organization, whether it is for victim or accused.

i) In the pursuit of consistent application of the death penalty, is the solution then to completely remove judicial discretion?

j) Develop a list of very specific crimes where the death penalty is automatically awarded?

k) Delay in execution after covering period of life imprisonment, whether the accused deserved for death penalty?

l) Statutory limit of time in passing the order in mercy petition, whether time limit is available after pronouncement of judicial order.
m) To analyze the living standard of criminals in jail, whether they are really getting pain in jail.

n) To examine the condition of victims of heinous crime whether Capital Punishment gave them satisfaction or not.

o) Does capital punishment put in danger our sense of the "dignity of life"?

p) Is capital punishment more expensive than life imprisonment?

q) Is it wrong to consider the penalty of death as cruel and unusual?

r) Can death penalty appropriate in modern society?

s) Does capital punishment help protect the public and deter crime?

t) Can capital punishment implemented consistently and fairly?

u) Is capital punishment economically justifiable and cost-effective?

1.4 Research Hypothesis

The aim of the present research work is to explore and analyse the relevance of Capital Punishment in India and reasons & effects of delayed execution. It also examines the provisions under the Indian law regarding death penalty. This study is based on the hypothesis that present laws are capable of curbing the relevance of Capital Punishment. The problem is relating to implementation of these laws in letter and spirit.

1.5 Research Methodology

There are two types of methodologies,

1) Doctrinal / Non Empirical Legal Research.

2) Non Doctrinal / Empirical Legal Research.

The study undertaken is doctrinal research. The evolution and research are based on the roots of utility of capital punishment and its delayed execution in
Indian scenario. The study has endeavoured to find out various incidents provision and cases where in the background of retention lies.

The study has different points on capital punishment. Apprehensive arguments between the position of retentionist and the abolitionist are by and large analytical. Therefore all the data collection will have its base for research. Hence, as far as collusion of different points on capital punishment is disturbed, it is more expressive.

This study and preservation of the capital punishment is just as possible to set right the problem. It seeks death penalty that encompasses international and national level. Abolition of death penalty has received strong backing in international arena. However India is still retaining the penalty of death as a permissible and legal type of punishment the retention of death penalty. The study has adopted the ‘doctrinal research’ method in this work on the following grounds:

Question arises as to what course the law should follow the doctrinal research may provide appropriate guidance and therefore the doctrinal research is found appropriate to determine the real strength of study and major concepts which can be improved only this doctrinal research as it is more flexible in character and extends more workable.

There are accepted truth and theories in all the fields of knowledge. The theories with differing levels of generality and degree of conformation existing at a given point of time are known to all. The intellectuals of the society are always inclined to probe the facts of the empirical world and confirm the proved truth of his investigations by accepting or correcting the existing theories. Such probing is called research thus; research is a systematic attempt to conclude realities.

Law may be termed as a behavioural science as it regulates human behaviour. It cannot provide remedy for all the situations and for all the time to come. Changes in society demand that law should move with the time if it has to remain alive and
active and it can remain alive, active and useful, if it is aware of its lacunae and
takes step to overcome it with the passage of time. But if there is a law on specific
area but due to one reason or the other, it does not work; its aim would be to
suggest reform in the existing law so as to make it workable.

The legal research means to provide originality in law. However, this should not
be the end or the sole objective of legal research. When research in undertaken as a
part of the process of law reform, it is undertaken for making suggestion for
improvements in the law and easily identifiable matters and the formulation of
those proposals in precise terms. This is very significant and governing factor in
the area of legal research.

A doctrinal research means a research that has been carried out on a legal
proposition by way of analysing the existing statutory provisions and cases by
applying the reasoning power. Ordering and systemizing lawful propositions, study
of legal institutions through lawful reasoning or rational decision. Ascertaining a
legal rule for the purpose of solving problems is one of the purposes of the
traditional legal research. This has been achieved by the original sources of law.
The Acts of Parliament and the Acts passed by the legislature fall under this
category. The case laws decided by the Supreme Court and High Courts, which are
binding on lower courts, fall under the category of precedents\footnote{Article 141, Indian Constitution Act, 1950}. The doctrinal legal
research attempts to verify the hypothesis by the first hand study of authoritative
sources. A doctrinal researcher should know how to use a law library, for the major
portion of this research methodology concerns with the identification of
authoritative sources.

**Doctrinal research looks at the following issues:**

1. The aim of preferred values;
2. The problems posed by the gap between the policy goal and the present state of achievement;

3. Availability of alternative choice for the implementation of goals;

4. The consequences that was made.

In a dynamic society, the laws on social welfare have placed great burden on courts of law. Generally, there will be gaps in statues and the courts have to evolve doctrinal principles, standards and norms. Further, there will be ambiguity in the statutory language.

In the present study, doctrinal methodology is adopted, which is based on primary and secondary sources of information which have been studied and examined in a perfect manner.

- Secondary data viz. Books, Articles, journals, newspapers and the other official data mainly available from libraries and the internet.

1.6 Review of Literature

Research work can be possible with the consultation of literature available on the topic under study. Review of related literature aims to acquire clear understanding of the basic body of knowledge consisting of issues, facts, principles, theories, etc., in the problem area. First of all, before starting up the work on the problem the present study aims to review the existing literature on the subject. It is pertinent to mention that no socio-legal research work can be written without consulting latest books, articles, bare provisions, and internet sources for related studies. The review of the existing literature is necessary to avoid repetition and to provide clarity of concept and better understanding of different aspects of
the subject and would help in identifying problem areas and formulating research methodology.

The study has reviewed the works of prominent foreign and Indian writers on the subject of criminal justice and chalked out her program for studying the system of punishments and set the goals of dealing with the issues. Mention may be made of the following treatises, journals and judicial dicta which have been reviewed by the researcher:

1.6.1 Books

1. Dr. N.V. Pranjape in his book *Studies in Jurisprudence and legal theory* (2007) explain the purpose of convenient study the book has been divided into three parts. Part 1 relates to the province of jurisprudence, legal theory and administration of justice. Theories of punishments are also explained under this part i.e. retributive, reformative, deterrent and retributive theory. The attempt has been made to examine the various jurisprudential topics in the Indian perspective. The different juristic concepts have been explained with the help of administration and relevant judicial pronouncements wherever necessary. The author has drawn extensively from the works of Salmond, Austin, Pound, Maine, Holmes and others. Various jurists gave different views about the concept of punishment.

2. Surender Malik and Sudeep Malik in his book *Supreme Court on Death Sentence in Murder cases* (2012) explain all rulings of the Supreme Court on Death Sentence from 1950 till the present has been arranged in terms of the well-established doctrine of aggravating and mitigating conditions relevant to award the sentence of death. The most striking feature that emerges from a study of this minencyclopaedia on the death penalty is that there is not a single situation wherein it

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16 Surender Malik and Sudeep Malik, *Supreme Court on Death Sentence in Murder cases* (Eastern Book Company 2012)
can be said in advance as to whether death sentence will be imposed/confirmed or not. Every case that awards or confirms death sentence has an opposite ruling in almost identical circumstances which commutes death sentence to life imprisonment. The great saviour in this unhappy and inhumane state of the law is the truly landmark and pragmatic, even humane judgment of the Supreme Court by a Bench of three-Judges in *Swamy Shraddananda v State of Karnataka*. The entire text of this judgment has been reproduced from SCC while retaining the SCC pagination and paragraphing for easy citability in court. It is felt that this judgment stands out in the pragmatism and delicate balancing of competing considerations on the death sentence. It lays down the practical via media of the court prescribing a definite term of imprisonment, commensurate to the nature of the murder committed. The Supreme Court in a number of its very recent judgments has started following Swamy Shraddananda, since it provides a solution which so satisfies the conscience. The Digest will be immensely useful to the entire criminal justice system in the administering of the death sentence in a more coherent, consistent and fair way.

3. *J.W. Cecil Turner* in *Kenny’s outlines of Criminal Law*\(^\text{17}\) (2013) in his book there is brief reference regarding the development of punishment system in England. Reports of various Law Commissions and committees contain abundant literature regarding the development and changes in Criminal Justice System since several years. The 18th Law Commission of India under the Chairmanship of Justice A. R. Lakshmanan worked with one of the objective that to review and repeal of absolute laws. The Ministry of Home Affairs, Govt. of India constituted the committee on the reforms of Criminal Justice System to make a comprehensive examination of all the functionaries of the Criminal Justice System, the fundamental principles and the relevant laws. This committee popularly called as Malimath Committee.

4. **M.P. Jain** in his book *Outlines of Indian Legal and Constitutional history (2014)*\(^{18}\) gives the growth, evolution and development legal system in India. In which he gave brief information about the development of criminal justice system during the Hindu, Muslim and British periods. It contains short, coordinated, integrated and coherent account of the important phases of the development of legal institutions in India. It also contains various chapters on modern judicial system, from Privy Council to Supreme Court, high courts, development of law, personal laws, codification, law reform, law reporting and legal profession, legal education, development of constitutional law, criminal law, development of civil law, etc. with reference to case law and exhaustive commentary. The present edition has been thoroughly updated and revised with recent amendments and case law. In his book he gave some information about the origin of Indian Penal Code which makes the beginning of the period of codification of substantive law.

5. **H.L.A Hart** in his book *Punishment and responsibility criminal punishment and justice system*\(^{19}\) (1968) the punitive measures of the punishment in the society by deterrence, by incapacitation, by rehabilitation. The guilt and innocence can figure principles for the criminal punishment. The punishment of nature involves guilt as well as suffering. The punishments are made for the wrong that vows committed. The punishment is awarded by vicarious and collative punishment the punishments as represented punishment and responsibility. The punishment carries heavy burden to justice it is a considered and intended response to wrong doers. The punishment that seeks restitution, reparation or apology from the wrong doers is the rule of law distinction between intended effects and the side effects of the actions. It is foreseen as certain, foreseen as probable and foreseen as possible. The Latin maxim actus non facit reum nisi means sit area (retroactive, secret and vague laws).

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\(^{18}\) M.P. Jain, *Outlines of Indian Legal and Constitutional History* (Lexis Nexis, 7\(^{th}\) edn. 2014)

6. **Avtar Singh Sohal** in his book *Capital Punishment: An extreme Penalty* (2008) debate on the vexed question “DEATH BE OR NOT TO BE” engaged acceptable answer and also discuss the trends prevailing the world over in regards to the capital punishment have been catalogued for the benefit of the discernable intellectuals, social scientist, political analysts and anthropologists. The historical perspective on the extreme corporal punishment is included. In his book he enlightens the readers about the socio-political, economic and legislative aspects of the issue.

7. **S.N. Misra** in his book *Indian penal code* (2014) explains section wise comment on the code. First of all, there is introductory part has been prefaced with a view to give the readers an idea about the meaning and elements of crime, mental element in crime, causes of crime, strict liability, vicarious liability and various landmark decisions. Various theories punishment and the history, constitutionality and justification of Capital Punishment have also been dealt with in detail. Till criminal law (amendment), 2013 all the amendments have been substituted in this book.

8. **C.K. Thakkar Takwani and MC Thakker** in his book *Criminal Procedure* (2014) explain that the Court procedure is a critical aspect in the administration of criminal justice. This classic work lays bare the fundamental principles of procedural law and examines the subject topic-wise, explaining important and complicated issues with the help of illustrations and case laws. The authors discuss with clarity and precision, the principles of criminal jurisprudence which are the core of criminal procedure. This book examines in detail the amendments introduced by the Criminal Law (Amendment) Act, 2013. Landmark cases of the Supreme Court, Privy Council and High Courts have been critically analyzed. Several new topics have been added in this edition and existing ones further

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examined. The present book will prove to be useful to law students, professors, prosecuting agencies, the Bench and the Bar.

9. Roger Hood and Carolyn Hoyle in his book *The Death Penalty: A Worldwide Perspective*\(^2\) (2008) is the Fourth Edition of a text that highlights the latest developments in the death penalty around the world. Roger Hood utilizes his experience as a consultant to the United Nations' annual survey of capital punishment in compiling a wide range of information from non-governmental organizations and academic literature. The book explores both the advances in legal challenges to the death penalty and the reduction in executions, while noting the continued existence of human rights abuses. Problems include unfair trials, police abuse, painful forms of execution, and excessive periods of time spent in inhumane conditions on death row. The authors explore the latest issues related to capital punishment such as deterrence, arbitrariness, and what influence victims' families should have in sentencing.

10. Michael Tonry had written in his book *Punishment and Politics*\(^2\) (2004) the evidence emulation in the making of English crime control policy he had written the offender, fairness consistency applicability and new penalties the government does not care about the fairness of offenders the government and judiciary have discretion over the sentence in the political and constitutional matter; the government’s role is different from judiciary that imposes the sentence of lose offenders sentencing policy of the system is fair and with clear guidelines it is enacted as have been written in criminal justice act 2003 in this act the judge under the judiciary plays an administrative role and what guidelines drafted in the status it is the need of the government and judiciary to make fair and clear guidelines to pronounce punishments especially when the decisions of the two are in contrast or opposition.

11. Roger Hood and Surya Deva in his book Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion24 (2013) deals with the strengthening focus on human rights; there has been a rapid increase in recent years in the number of countries that have completely abolished the death penalty. This is in recognition that it is a violation of the right to life and the right to be free from cruel, inhuman and undignified punishment. There has, simultaneously, been pressure on countries that still retain capital punishment to ensure that they at least apply the United Nations minimum human rights safeguards established to protect the rights of those facing the death penalty. This book shows that the majority of Asian countries have been particularly resistant to the abolitionist movement and tardy in accepting their responsibility to uphold the safeguards. The essays contained in this volume provide an in-depth analysis of changes in the scope and application of the penalty of death in Asia with a focus on China, India, Japan, and Singapore. They explain the extent to which these nations still fail to accept capital punishment as a human rights issue, identify impediments to reform, and explore the prospects that Asian countries will eventually embrace the goal of worldwide abolition of capital punishment.


13. **K. Balagopal** in his book *On Capital and Other Punishments*\(^{26}\) (2012) contains the collection of articles, petitions and crusade statements on the sentence of death in India. These writings contain convincing arguments for the abolition of death penalty. They do so through influential reasoning about the inherently inhuman nature of the penalty of death and through an interrogation of specific cases: those of two Dalit youth sentenced to death in the Chilakaluripeta bus burning case in Andhra Pradesh and the Rajiv Gandhi assassination case. They not only powerfully set out the philosophical and civilization basis for the abolition of sentence of death but take every argument advanced in favour of capital punishment and show the hypothetical and factual fallacies in its reasoning. Balagopal does not ask us to think about the concept of capital punishment and those on death row in the abstract or on purely sympathetic terms. He gives us clear and cogent reasons, both legal and sociological, why the imposition of Death Penalty simply does not make sense.

For instance, he clarifies that in the context of a flawed investigative system and a not always unprejudiced judicial system, giving individuals the ultimate and irreversible punishment of death can have brutal consequences. He also asks us to question our inner urge for collective revenge, which is what Death Penalty amounts to. In Balagopal’s words: “There are ample evidences to show that Death Penalty does not act as a deterrent to capital crime, because evidence shows no difference in the frequency of such offences before and after abolition. The real reason why people argue for retaining Death Penalty is a desire for retribution, which may be understandable in individuals, but not defensible when pleaded by a civilized society.” Human Rights Forum feels this collection would provide a valuable guide to thinking and action and help further the abolitionist cause in the country. This compilation is particularly relevant in these times when there is a growing glamour for the execution of Afzal Guru and Ajmal Kasab. We believe they would go some way in helping ongoing campaigns against the Death Penalty given to Santhan, Murugan and Perarivalan in the Rajiv Gandhi case, and those

\(^{26}\) K. Balagopal, *On Capital and Other Punishments* (S. Jeevan Kumar, Hyderabad 2012)
others whose mercy petitions are still pending. It will also immensely interest those engaged with penology and the sociology of crime.”

14. **Anthony Santoro** has written a new book about religious perspectives on the death penalty, *Exile and Embrace: Contemporary Religious Discourse on the Death Penalty* 27 (2013). In describing the book, John D. Bessler, a law professor at the University of Baltimore, said, “Santoro tells the stories of everyone from death row chaplains to bloggers and Bible study participants. In discussing transgression, retribution, and ‘the other,’ he skilfully demonstrates how executions say more about us than about the offenders.” Santoro is a postdoctoral fellow at Heidelberg University in Germany.

15. **Johnson, David T. and Zimringin** his book *The Next Frontier: National Development, political change and death penalty in Asia* 28 (2009) gives an overview of death penalty in Asia with reference to retentionist countries, the political conditions of these countries and trends in death penalty. There is no particular chapter dedicated to India however, there is an appendix which has information about death penalty in terms of jurisprudence and the patterns that are evident in the execution in India. It further discusses the role of courts and executive clemency in terms of judicial execution in India.

16. **Professor Upendra Baxi’s** most debated and reviewed book *The Crisis of Indian Legal system* 29 (1982) is reviewed by this researcher for the purpose of this thesis. Prof. Baxi is very critical of the judicial system and the legal system though the title suggests the criticism of only legal system. No legal system of any country can work without judiciary adjudicating and police enforcing attendance of the accused, witnesses and other relevant parties. Out of these three, the police are

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the most corrupt. Number of criminal cases have been abandoned or kept pending for 30 years and more because the warrants are not served. The accused person stands for election wins the post and becomes public representative, inaugurates bridges, clinics, schools etc. but the accused evades warrants and does not attend the court. If he is elected on ruling party ticket then the judge also takes soft view on his non-attendance of the court being bound by his limitations. Prof. Baxi laments that district magistrate’s office and the police officers in every district enforce laws selectively. No case is filed against rich and powerful unless media becomes very active in the matter. For other ordinary people police becomes predator.

17. Subba Rao G.C.V In his book *Jurisprudence and Legal Theory* (2008) explained the difference between sanction and punishment in Chapter 28 and in Chapter 30 he explained the object of criminal proceedings in very narrow manner. He stated that according to different theories of punishments its main purpose is the prevention of crime and they can be achieved in three ways 1) Punishments act on the body of the offender so as to incapacitate him for a repetition of the crime. 2) By the punishment of criminal the others are deterred by fear from infringing penal law. 3) Punishment minimizes crime by reforming the character of the criminal.

1.6.2 Articles

1. Arun Beriwal in his article *Capital Punishment: A Matter of Prudence, Not of Law* explains various facts about the death penalty. Theories of punishment and arguments in favour or against the death penalty explain in this article.

2. D.P. Das in his article *Discretion in the Sentencing Process: Case studies under the Indian Criminal Justice System* explain various methods of

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executions and various cases regarding it. Relevant provisions under Criminal Procedure Code, Indian Penal Code and Indian Constitution and other law also. This article is really helpful in research regarding this topic.

3. I.G. Ahmed in his article *Death sentence and criminal justice in human rights perspective* explain about the retention or abolition of capital punishment, debates are raging the world over amongst social activists, legal reformers, judges, jurists, lawyers and administrators. Criminologists and penologists are engaged in intensive study and research to know the answer to some perennially perplexing questions on Capital Punishment. A. Whether capital punishment serves the objectives of Punishment? B. Whether complete elimination of criminals through capital punishment will eliminate crime from the society? C. Whether complete elimination of crime from society is at all possible or imaginable?

4. Dr. A. Krishna Kumari in his article *Capital punishment: the never ending debate* deals with different theories of punishments. The retentionists interpret the retributive and deterrent theories on such a way to suit their arguments. They advocate the retention of Capital Punishment on moral, ethical and religious grounds. Abolitionists argue on the other hand in favor of abolition on the same ground as that of retentionists.

5. Arnim Aggrawal in his article *Abolition or retention of death penalty in India: A critical Reappraisal* deals with on one hand there is demand for abolition of death penalty and on the other hand there is an increased rhetoric for Capital punishment for rape, heinous crime against women, trade and trafficking of women and narcotics. The court may make use of death penalty sparingly but its

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33 Banaras Law Journal Vol. 35&36 Jan. 2006 Available at: www.bhu.ac.in/lawfaculty/blj2006-072008-09/BLJ_2006/2_Prof%20G.Ahmad.doc (visited on 15/12/15) at 01:14 PM
34 Available at SSRN-www.ssm.com/abstract=95629 (visited on 09/11/15) at 02:00 PM
retention on the statute book seems necessary as a penological expediency. Therefore, it can be safely concluded that death penalty should not be subjected to ultimately death penalty.

6. **Dr. D.P. Sapre and Dr. M.D. Karmarkar** in his article **Capital Punishment**\(^{36}\) deals with different aspects of Capital Punishment offences where capital punishment is awardable, world and Indian Scenario, procedure of execution of capital Punishment and pro and anti-views about legality of Capital Punishment.

7. **Dr. Faizan Mustafas** in his article **Doctrine of “Rarest of Rare” & Increase in Imposition of Death Penalty**\(^{37}\) explains the concept of Rarest of Rare cases its applicability and relevancy. Various cases also covered under this article which is very useful for lawyers, researchers and students.

8. **Dr. Mool Singh** in his article **Death Sentence: Rethinking in terms of its abolition**\(^{38}\), explains various arguments in favour or against the death penalty and also describe the provisions under which death penalty given to the accused.

9. **Imke Degering**, in his article **Capital Punishment in India and Problem of its prospective abolition**\(^{39}\) deals with the constitutional validity of death penalty and other relevant provision. It is a fabulous work on the relevant topic with the relevant case law.

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\(^{36}\) Dr. D.P. Sapre and Dr. M.D. Karmarkar, Capital Punishment, *Journal of forensic Medicine, Science and law*, Vol. 21, No. 2(2001)

\(^{37}\) Dr. Faizan Mustafas, Doctrine of Rarest of Rare and Increase in imposition of death Penalty, *C& MLJ* vol. 28, P. 244 (1992)

\(^{38}\) Dr. Mool Singh, Death Sentence: Rethinking in terms of its abolition, (1989) *Cr.L.J.* p. 126

\(^{39}\) Imke Degering, Capital Punishment in India and Problem of its prospective abolition (1980)10 *ISIJ* p. 76
1.6.3 Miscellaneous:

a. Websites

A number of standard websites such as Death penalty projects, Law Commission of India, etc. were visited and consulted for latest information on various issues; a detailed list of all these websites is given in the internet reference section of the bibliography.

b. Newspapers

Some national dailies like The Hindu, The Indian Express, The Times of India, and The Hindustan Times etc. were also overviewed on day to day basis for latest news regarding Capital Punishment. A list of these dailies is also given in the newspaper section of the bibliography.

c. Magazines

The legal magazines like Judicial Times, Criminal law journal, Criminal Judgments were consulted for updated information on Capital Punishment. A list of such magazines is provided in the magazine section of the Bibliography.

1.7 Research scheme

Chapter 1 - Introductory Remarks

In this chapter I have discussed the introduction of my research, its aim and objective and need to review the law regarding Capital punishment in the light of current changing scenario. Further, it gives an overview of literature and describes the methodology employed.
Chapter 2 – Evolution & Historical Background of Capital Punishment

This Chapter deals with the meaning, definition and historical evolution and phase wise changes in the laws regarding Capital Punishment and it also deals with the theory of crime, objective of the death penalty, religious views and historical methods of execution.

Chapter 3-Implications of different Laws in Capital Punishment

This chapter deals with Penal provisions regarding Capital Punishment under the Indian penal code and procedural law under criminal procedure code and Other special or local laws and also the Constitutional validity of death penalty, clemency in Indian constitution and pardoning power of governor and President.

Chapter 4- Worldwide Perspective of Capital Punishment

This Chapter deals with the worldwide perspective of death penalty and tries to compare and contrast Capital punishment on international global trends, movements in favour and against the Capital Punishment.

Chapter 5-Doctrine of Rarest of Rare Cases: A Myth or Reality

This Chapter deals with the doctrine of rarest of rare cases meaning, concept, significance and extent. This chapter also throws light on the allocation of this doctrine and various factors which make the case Rarest of rare. Role of judges and their discretionary power regarding this also explained under this chapter.

Chapter 6- Causes and Remedies of Delayed execution

This Chapter deals with the various reasons like legal, administrative and others reasons of the delayed execution in modern era and also explains the remedies for it. It also deals with the effects of delay on society, accused, victim and law and order.
Chapter 7 - Conclusion and suggestion.

Some conclusion and suggestions shall be drawn on the basis of this research study and will be incorporated in this chapter. Certain suggestions shall also be made at the end of the study for effective regulation.